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AFRICA REGIONAL RULE OF LAW STATUS REVIEW



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AFRICA REGIONAL RULE OF LAW STATUS REVIEW



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Africa Regional Rule of Law Status Review

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ACRONYMS

ACHPR	African Commission on Human and Peoples' Rights
ADB	African Development Bank
ADR	Alternative Dispute Resolution
AOC	Administrative Office of the Courts
CALEA	Commission on Accreditation of Law Enforcement Agencies
CBE	Community-based educator
CDIE	Center for Development Information and Evaluation
CIDA	Canadian International Development Agency
CJSP	Criminal Justice Strengthening Program
CSO	Civil Society Organization
DCHA	Bureau for Democracy, Conflict, and Humanitarian Assistance
Danida	Danish International Development Agency
DEA	Drug Enforcement Agency
DEC	Development Experience Clearinghouse
DFID	Department for International Development (UK)
DG	Democracy and Governance
DOC	Department of Commerce
DOJ	Department of Justice
DOS	Department of State
DPP	Department of the Public Prosecutor/Prosecutions
DRC	Democratic Republic of Congo
EC	European Commission
ESAAMLG	Eastern and Southern Africa Anti-Money Laundering Group
EU	European Union
EWLA	Ethiopian Women Lawyers Association
FIDA	<i>Federación Internacional de Abogadas</i> / International Federation of Women Lawyers
FinCEN	Financial Crimes Enforcement Network
FOIA	Freedom of Information Act
FSN	Foreign Service National
GJLOS	Governance, Justice, Law and Order Sector
GOK	Government of Kenya
GOM	Government of Malawi
GTZ	<i>Deutsche Gesellschaft für Technische Zusammenarbeit</i> (German Technical Cooperation)
HIV/AIDS	Human Immunodeficiency Virus/Acquired Immunodeficiency Syndrome
ICITAP	International Criminal Investigative Training Assistance Program
ICJ	International Commission of Jurists
ICTR	International Criminal Tribunal for Rwanda
INL	Bureau of International Narcotics and Law Enforcement Affairs
ILEA	International Law Enforcement Academy
IRS-CID	International Revenue Service Criminal Investigative Division
MCC	Millennium Challenge Corporation
MOJ	Ministry of Justice
MoPol	Mobile Police
MSI	Management Systems International
NBA	Nigerian Bar Association
NCSC	National Center for State Courts
NEPAD	New Partnership for Africa's Development
NGO	Non-governmental organization
NSPD	National Security Presidential Directive

OHADA	Organization for the Harmonization of Business Law in Africa
OPDAT	Office of Overseas Prosecutorial Development, Assistance, and Training
OTA	Office of Technical Assistance (of Treasury Department)
PEPFAR	President's Emergency Plan for AIDS Relief
RLA	Resident Legal Advisor
ROL	Rule of Law
PSCs	Personal Service Contractors
SADC	Southern African Development Community
SAJC	Southern African Judges Commission
SSR	Security Sector Reform
State/AF	Department of State Bureau for African Affairs
SWAp	Sector Wide Approach
TCC	Thuthuzela Care Centres
UN	United Nations
UNDP	United Nations Development Program
USAID	United States Agency for International Development
UNODC	United Nations Office on Drugs and Crime
USG	United States Government
USIP	United States Institute for Peace
WB	World Bank
WID	Women in Development
WJEI	Women's Justice Empowerment Initiative
WLR	Women's Legal Rights Initiative

EXECUTIVE SUMMARY

A fair and efficient justice sector is critical to the protection of human rights and the resolution of disputes between citizens. It is also essential for ensuring the proper functioning of public institutions and encouraging national and foreign investment. Measured against The World Bank's rule of law (ROL) governance indicator, all 48 countries in sub-Saharan Africa scored poorly, with 41 countries ranked below the 50th percentile. These results are a clear reflection of the significant hurdles faced by countries and donors alike in their efforts to improve rule of law in the region. Widespread violence and war, political instability, increasing crime, corruption, and poverty plague both resource-rich and resource-poor countries in the region. In this already difficult and strained environment, the pandemic of HIV/AIDS has hit Africa hard, its impacts resounding beyond the health sector.

Given the continuance of significant ROL challenges, USAID's Africa Bureau commissioned a study of the context for and status of ROL programming in the region. This study examines the ROL structures and norms that prevail in sub-Saharan Africa and the difficulties in and prospects for achieving sustainable results. Based on a review of USAID, other USG and other donor ROL assistance programs over the past 15 years, this study assesses program results and effectiveness and examines successful and unsuccessful approaches to guide USAID ROL programming in the region.

In accordance with the Statement of Work, this study began with a desk review of available and relevant literature focused on ROL issues in sub-Saharan Africa. Interviews were conducted of staff working for USAID, other USG agencies, and international donors actively engaged in justice sector programming in the region. Country studies were prepared based on field work conducted in Kenya, Malawi, and Nigeria. In addition, a desk study on Rwanda was written.

This study was not designed to be exhaustive. Field work was limited and documentation, while plentiful, rarely reported program impact or results. The team found much descriptive material about what particular projects were *doing*, but little about *achievements*. Very few evaluations were conducted in the period under review or were available. Information about the success of particular approaches and analysis comparing approaches was scant. Absent program evaluations and solid cross-country research, it was difficult for the team to derive robust findings for this study. Findings must therefore be viewed as tentative and in need of further validation.

Report Organization and Presentation

Pursuant to the scope of work, this study is organized into five chapters. Individual country reports, a matrix of USAID ROL programs, and other useful materials are included as annexes to the main report.

Chapter I provides a general introduction to the institutional context for USAID's ROL interventions in Africa, as well as the broader historical and political context within which such programming has taken place.

Chapter II reviews the scope of work provided by the USAID Africa Bureau, which commissioned the study. It also briefly describes the methodology that MSI, Inc., used to conduct, organize, and refine the analysis, as well as constraints faced by the team of researchers as they conducted the status review.

Chapter III discusses sub-Saharan African constitutions, legal frameworks, and justice institutions. It describes legal education and the role of legal associations and regional organizations, and concludes with discussion of six cross-cutting themes that affect all countries in the region. While

there is diversity and complexity in the continent's legal regimes, there are also marked similarities, especially with respect to their trajectory from former colony to democratically governed state.

In each of the 48 countries of sub-Saharan Africa, the Constitution has been re-drafted at least twice since independence; in some countries, work now proceeds on version three. Although each constitutional reform wave strove for greater levels of social inclusion, an increased balance of power between the three branches, and enhanced guarantees of citizen and human rights, disappointingly few of the resulting constitutions have led to tangible improvements in the lives of ordinary citizens.

The region's legal frameworks are a combination of laws emplaced by colonists nearly 150 years ago, long-standing customary and traditional practices, and, in those countries with a Muslim population, Islamic law and growing use of *Shari'a* courts. Although new laws have been enacted to focus on specific issues, such as new categories of criminal activity or the expansion of individual rights, the body of colonial-era laws and codes has evolved little since independence. Access to formal sector justice institutions is limited for those living in rural areas and who cannot afford legal assistance. Disputes over access to land and water have erupted repeatedly into violence and conflict. These issues are all the more problematic as legal records of property ownership are inadequate or inexistent.

With geographic distances, cost, and generally poor legal systems and institutions throughout the continent, it is unsurprising that the most frequent sources of dispute resolution in Africa today continue to be customary and traditional systems or religious authorities. Constitutional and legal guarantees introduced throughout the region are often unknown or not followed by traditional or formal authorities. Thus, throughout the region, vulnerable populations are still at risk, and those most needing help are also least likely to receive state-sponsored ROL services. Their reliance on customary practices and systems continues to be the most viable method for resolving many disputes.

Formal institutions face significant challenges, principally insufficient funds, inadequate personnel, and a lack of technical skills. In addition, inefficiency and corruption remain more the norm than the exception, and justice institutions generally are ill-equipped to meet the needs of the populations they serve. Legal education institutions are in many countries insufficient to meet expanding needs and have been slow to adopt educational models that stress practical as well as theoretical methods of instruction. In some countries, law schools have begun to support community outreach through street law programs and legal clinics designed to assist those unable to afford legal representation. Bar associations and other professional legal associations exist in a number of countries and are emerging throughout the region, but as yet do not generally exert strong influence or presence. The number of NGOs involved in legal rights and awareness programs, legal aid, and advocacy is also increasing. Strong and effective regional organizations, capable of addressing the range of social issues and challenges inherent in Africa, are still in very short supply.

To a greater or lesser extent, each country of the region shares problems arising from lack of political will for genuine reform and executive branch domination of government. Corruption and impunity for those in power are endemic and continue to impede developmental and democratic progress. Associated problems of inequitable distribution of wealth and access to resources remain at the heart of the violence and conflicts that have characterized the region during the past 60 years. Geographic isolation, poverty, and lack of education have combined to weaken citizen demand for change and social improvement. Women remain disproportionately vulnerable and marginalized, with few opportunities to improve their lot. Rights of women to own and inherit property have been both highlighted and made worse by the pandemic of HIV/AIDS across Africa. Women left ostracized and/or penniless by the death of a spouse, and orphaned children, have little recourse. But from their selfless desire to improve the future for their children – particularly their daughters – they also represent one of the strongest potential agents for change in Africa.

Chapter IV reviews the efforts of US agencies and international donors to strengthen the rule of law in Africa. Over the past half century, donors have supported programs to address the issues and challenges described above. Technical and monetary support from donor nations and organizations has increased steadily since independence of most sub-Saharan nations. While Western nations and the multilaterals continue to provide the larger share of assistance, other countries, such as China, are investing heavily in the region. To varying degrees, donor motivations have for many years originated in humanitarian concerns about poverty, disease and human rights, as well as economic or political interests. More and more, major government donors and international organizations have supported assistance to strengthen democratic governance, including legal and judicial system reform and access to justice programming. As conflicts have erupted across the continent, donors have responded with human rights assistance efforts and extensive support for rebuilding governmental and social structures. Such programs often involve multilateral and multi-donor efforts, from which shared funding mechanisms have emerged.

Violent Islamist extremism and concerns over rising rates of criminality in the areas of financial fraud and drug trafficking have drawn the attention of law enforcement authorities from countries targeted by criminals. To the already crowded donor arena are now added military and police assistance programs designed to protect donor nations while enabling African countries to confront these crimes.

Increasingly, donors are recognizing the need to identify alternate mechanisms to provide justice to less advantaged and particularly rural citizens. This means moving beyond support for formal institutions to finding ways to reconcile customary and traditional dispute resolution norms and practices with formal legal frameworks. Few Western donors have engaged in assistance programs in support of Islamic law or Shari'a courts, but this is becoming a topic of increasing interest in some parts of the region.

Over the last half century, as donor knowledge and understanding of the region have grown, development assistance approaches have evolved. Although responses to emergency situations continue to garner the lion's share of funding and attention, donor expenditures for governance and ROL are increasing. The donor community also realizes the need to establish a balance between supply- and demand-side programming, strengthening formal government institutions, and working at the grassroots level and with intermediary organizations to build citizen knowledge and skills.

In recognition of the broad scope of challenges in Africa, donors have begun to understand the need for patience and perseverance. Change comes slowly, backsliding is commonplace, and sustainability is unlikely to result from short-duration programs that provide cosmetic relief and quick fixes. Awareness among donors is growing that longer-term approaches, designed to build capacity incrementally and at a pace that matches local absorption abilities, are needed in order to achieve tangible and sustainable results. Not only are more gradual approaches likely to achieve greater results over the long term, but they do so with more modest investments than the "start and stop in disappointment" and "quick fix" approaches that have too often been the pattern.

USG ROL programs in Africa have been broad and disparate. A surprisingly diverse array of US government agencies implements ROL activities. There is a clear need for better coordination of efforts that extends beyond discussions of scheduling of events to deliberations over primary USG objectives, how these translate into what needs to be done and why, and which agencies are best placed to implement specific programs. It has proved difficult to find effective ways in which USG agencies can combine their differing types of technical expertise into integrated strategic approaches designed to achieve the objectives of each.

USAID ROL programs in Africa have addressed – to varying extents, depending on the country – each of the thematic areas covered in Chapter III of this paper, including reforming constitutional and legal

frameworks, institutional assistance to courts and other justice organizations, and access to justice programming with local organizations, citizens, and customary authorities. The greatest share of ROL funding has flowed to countries coming out of conflict, where support for efforts to bring perpetrators of violence to justice has absorbed significant resources. As a decentralized agency, both in Washington and the field, USAID offices have difficulty coordinating with and building on each other's programs. The "stove-piping" problem is well known and the lack of a solution to date means that opportunities to achieve synergistic impact are lost. Knowledge management within the Agency also remains problematic; it is sometimes difficult to discover what colleagues have learned about successful and unsuccessful approaches in other regions, or in other countries in the same region. Because Africa has a more diverse array of legal regimes than other regions (e.g., Latin America), lessons learned in one setting may be more difficult to uncover and may also be less transferable.

Though the documentation is weak, this study attempts to identify USAID ROL program accomplishments, along with areas where progress is greatly needed. According to reports – which often do not present compelling evidence – many USAID programs appear to have achieved at least some short-term (and often lower-level) objectives, but results have sometimes eroded over time. USAID ROL programs seem most successful when they derive from the clearly articulated objectives and priorities of the host country, engage directly with local counterparts to promote local input and ownership while also strengthening host capacity, integrate top-down and bottom-up approaches, incorporate multi-sectoral and holistic perspectives, and adopt a longer-term time horizon to achieve change. The dearth of project and program evaluations and research that analyze impact has hampered USAID's ability to develop and use lessons emerging from program experience as a guide for future initiatives. Mission staff think twice before embarking on a ROL program given the serious disadvantages of shrinking democracy and governance budgets, the inherent complexity of ROL systems with their diverse array of institutions, stakeholders and processes, and the difficulty of producing any attention-grabbing (or budget-justifying) results in the short term.

ROL programs supported by other USG departments and agencies, principally the Departments of Justice, State, and Treasury, are also examined, as are recent relevant initiatives of the Millennium Challenge Corporation. Primarily funded through US Department of State's INL and Bureau for African Affairs, implementing partners include US Department of Justice's ICITAP and OPDAT programs, as well as a considerable list of other Justice and Treasury Department agencies engaged in law enforcement activities in the region. With even less information than is available on USAID ROL programs, it was yet more challenging to draw conclusions about impact. The team did conclude that the lack of clearly articulated objectives and strategies to guide overall US policy hinders consolidated agency approaches that draw upon the unique strengths of each.

Other international donor programs are also reviewed. Where program examples and approaches could serve to inform future USAID initiatives, brief descriptions have been included. Such examples include GTZ's customary and traditional dispute resolution projects in Ethiopia and Ghana, and similar programming by The World Bank in Kenya; the UK's Department for International Development (DFID) multi-sectoral focus on pilot projects in rural areas; and the Scandinavian nations' longer-term project timelines.

Lessons and needs emerging from programming in post-conflict environments are presented from the perspective of noting differing opinions over three approaches supported by the international community to deal with perpetrators of violence: the *gacaca* approach of customary tribunals to try *genocidiers* in Rwanda, use of the Truth Commission in South Africa to bring about societal reconciliation, and creation of international tribunals to prosecute war crimes, as in Sierra Leone.

The enormous presence and financial investment of donors has not been without impact, though it has not been nearly as rapid or profound as hoped. There are signs that donor opinion is important to host

countries and that public knowledge and interest in governance is growing. Executive leadership in Africa is beginning to show a gradual movement toward greater respect for formal rules and laws. A recently published UCLA report¹ shows a clear increase in peaceful leadership transitions as a result of elections.

Chapter V sets out the team’s conclusions, lessons learned, and recommendations, which are condensed and summarized below.

USAID’s Comparative Strengths and Advantages

- USAID is the only USG agency with the specific mission of supporting foreign assistance from a broad developmental perspective, as opposed to the foreign policy or operational mandates of other USG agencies. The development approach combines training or technical assistance with institutional capacity building to incorporate new skills into routine usage.
- USAID’s broad-based mandates and programs provide close and frequent contact with citizens in both rural and urban settings. Sub-Saharan Africa programs typically incorporate one or more components addressing government decentralization and strengthening public administration, access to justice, women’s rights and the rights of youth, public education, and civil society, providing frequent interaction with citizens in target countries. This provides potential to leverage existing USAID programs to expand legal knowledge and awareness of rights and responsibilities.
- USAID has a track record of strong gender programs and broad-based focus on integrating gender issues into program design and implementation. USAID has a number of available mechanisms and existing initiatives that could be used as a springboard to develop further ROL activities and identify counterparts.
- Both USAID/Washington and field Missions have in-depth knowledge of the political histories and systems of the countries in which they work, representing a cross-section of disciplines. Mission staff incorporates technical support and skills of Foreign Service Nationals, many of whom later assume leadership positions in the local government or private sector.
- USAID is well known to other major donors and is a frequent participant at donor coordination fora. Its programs are perceived by other donors as more politically and operationally neutral than those of other USG entities.
- Requirements for assessments, formal work plans, and performance indicators are integral parts of USAID projects and offer mechanisms for strengthening performance. USAID also has a framework and infrastructure to research, compile, and disseminate substantial documents and studies from ROL programming, including the Center for Development Information and Evaluation (CDIE), the Knowledge Management Program, the Development Experience Clearinghouse (DEC), the Library’s Knowledge Services Center, and the Bureau of Democracy, Conflict, and Humanitarian Assistance’s (DCHA) Technical Publication Series. These planning and research capacities could provide significant research and information to field Missions contemplating ROL programming, but need to be systematically shared and applied.

¹ Daniel Posner and Daniel Young. “Institutionalization of Political Power in Africa.” (Los Angeles: UCLA, 2007).

USAID's Institutional Weaknesses

- As a non-cabinet level agency, USAID does not have a direct voice in decision-making or setting policy. It is not routinely represented in legislative briefings or meetings with congressional appropriators to respond directly to questions. Insufficient knowledge of USAID's institutional strengths and perspectives sometimes results in programs by other USG agencies that duplicate or compete with those supported by USAID.
- In response to emergency conditions or special requests from Washington, USAID's ROL programs are at times perceived as ad hoc and short-term initiatives that fall short of achieving long-term systemic results. Budgetary restrictions and limited funding make planning difficult.
- Lack of coordination and information-sharing within and between USAID Bureaus is a recognized problem that can result in duplication of effort and overlapping programs in the field, as well as lost opportunities to learn from other programs.
- Lack of easily accessible documents, products, and studies complicates internal coordination. Knowledge accumulated through previous projects and documents holds the potential to inform new program designs and plans, but is not routinely made available or applied to new projects undertaken in similar disciplines. The dearth of mid-course or post-implementation evaluations of ROL programs in Africa was a weakness identified as a major finding in this report. The many best practices and lessons learned workshops and studies completed are not centralized or easily available to staff (or researchers) to avoid repetition of the same mistakes, or to build on the foundation of prior efforts.
- After the spate of retirements of USAID officers in the early 2000s, funding restrictions on hiring new officers inhibited development of USAID's internal technical capacities. Most technical work is outsourced or carried out by personal service contractors on limited assignments. Field and implementation expertise is not institutionalized within the agency, but is accrued to the external assistance providers. USAID Missions in Africa have few officers who are lawyers or experienced in the field of ROL. Given the complexities of ROL programming, this has tended to inhibit Mission willingness and ability to undertake new justice sector programs. Lack of in-house expertise also hampers USAID's ability to contribute technical perspective to Country Team or other donor meetings.

Donor Coordination and Considerations

- Compliance with multiple and differing donor reporting and other requirements consumes significant amounts of project and local counterpart time and seriously taxes local justice systems.
- Existing donor coordination mechanisms are inadequate to maximize use of resources, impact, and sustainability.
- Fragmentation of rule of law development assistance across a range of USG agencies impedes coordination, complicates the strategic use of human and financial resources, confuses host-country and donor partners, leads to gaps and duplication, and undermines the effectiveness of ROL interventions. Because so many bureaucratic stakeholders are involved, solving these problems will require high-level policy decisions that mandate and enforce systematic, government-wide, interagency coordination in the ROL sector.

- Despite general consensus on the strength of donor leverage and the proven impact of donors on public opinion and political decision making, donors are often reluctant to exert their power. Application of unified donor pressure on severe and intractable problems, such as corruption and impunity, may be the only effective means of generating progress, particularly in countries highly reliant on donor resources. The value of imposing conditions is, however, often compromised by the failure to enforce those conditions.

Pre-implementation Analysis

- USAID Missions interested in working in ROL should conduct a pre-design assessment that includes in-depth analyses of justice system design, political actors and incentives, local capacity, and specific problems and challenges facing implementers. Although good assessment work does not ensure success, the odds are much greater that a project will not be successful absent solid preliminary assessments.

Project Planning and Design

- Project plans should be linked to national strategies and priorities. National strategies should tie to program activities required to meet objectives. Proliferation of donor and local counterpart plans introduces complexity and bureaucracy. Duplication and overlap of donor programs should be avoided through prioritized interventions and appropriate sequencing. For example, building a forensic laboratory prior to development of a chain-of-custody guiding collection, preservation, and use of physical evidence will result in an unused facility and wasted funds.
- Many donors fail to clearly link ROL interventions with the promotion of higher level objectives, such as human rights protections. Numbers of judges trained or courtrooms rehabilitated are unlikely to reflect any real difference in the provision of justice.
- Justice systems need to be analyzed and approached holistically. Concentrating on one segment of the justice chain to the detriment of others can lead to imbalances and distorted incentives between the various institutional components.
- Simplicity in project design, building local capacity while fostering local ownership, is essential.
- Projects should be broadly designed and sufficiently flexible to allow for accommodations and adjustments, especially in high-risk, unstable, or conflict-prone conditions.
- Pilot projects are useful, but should incorporate practical means for replication.

Implementation and Training Models and Needs

- Donor support for capacity building and technical assistance to implement plans is critically needed. The lack of technical knowledge and experience in implementing plans is a major stumbling block to both the pace of reform and achievement of results. Rule of law objectives are more likely to be achieved and sustained if donors provide higher levels of mentoring and technical assistance.
- USG operational training programs, as well as those of other donors, have been criticized for importing home country models that are inadequately suited or adapted to the host country. Legislative drafting should avoid direct importation of foreign laws, foster inclusionary

processes that define the problem, research existing models, harmonize with existing laws/provisions, and link to local context, regulations, and standard operating procedures. Training should connect directly with institutional development assistance to assure integration and use of new skills.

Technical Approaches

- Legal education curricula and teaching methods should stress practice in addition to theory, and support should be provided for legal clinics within law schools to bolster practical experience and expand access to legal assistance.
- Programs supporting bar associations and other legal professional associations should stress strengthening advocacy roles, regulatory and oversight capacities, and programs providing pro bono legal aid to the marginalized.
- Institutional development assistance should be harmonized across justice institutions to ensure consistency and, to the extent possible, applications should be shared to enhance uniformity and reduce costs. Assistance should focus on streamlining and improving case processing techniques and recordkeeping practices. Support for automation systems should take into account practical aspects of implementation (electricity, connectivity, technical support, training, troubleshooting, maintenance, etc.).
- Pre-trial detention and alternative sentencing programs should consider improved recordkeeping and classification systems to identify and reduce pre-trial detainee populations. Assistance should encourage alternative forms of sentencing for minor offences and should focus support towards at-risk youth.
- In rural areas in particular, consider the Justice Center or “*Casa de Justicia*” model, used in southern Africa and Latin America, which co-locates legal and social services, thereby increasing citizens’ access to justice and promoting stronger coordination between offices or entities providing services at the community level.
- USAID should explore carefully whether and how to engage with customary and traditional systems and authorities. The Agency should conduct country-specific analyses of customary systems to understand how they work and who they disadvantage before embarking on programs with traditional authorities or users of customary systems. When determining the feasibility or approach of a potential program, existing relevant analytical work should be referenced (e.g., the significant volume of work on gender justice). Human rights and equity concerns – such as the marginalization of specific populations – should remain priorities. Assistance to citizens using customary systems could take the form of education on constitutional guarantees and legal rights for citizens. Likewise, training on these issues could be offered to traditional leaders interested in reform. In either case, such assistance would inevitably need to focus on improving the norms that are being applied by these systems.

Post-conflict Country Programs

- Results from post-conflict donor interventions in Africa tend to dissipate as donors scale back or re-orient their assistance programs following a successful transition.
- When designing programs in post-conflict societies, the need to provide justice for past atrocities must be balanced with current and future justice sector needs and rebuilding efforts in the country.

- International tribunals, while effective in prosecuting perpetrators of mass atrocities, are costly and tend not to build local expertise or bring about justice sector reform. They also often employ the best local legal minds, depriving the regular formal system of critically needed talent.

Project Time Frames

- This study overwhelmingly confirmed that short-term and limited-focus ROL interventions generally fail to achieve significant and sustained impact in Africa. Programs designed to overcome problems with political will, lack of consensus, or corruption will be particularly challenging and will require patience and longer-term engagement. Donor programs emphasizing more gradual, less immediately ambitious, and longer-term programming approaches are more likely to be successful and sustainable.
- A longer time frame and slower pace can help donors and their local partners manage host country absorptive capacity problems.

Project Evaluation

- The paucity of evaluations makes it nearly impossible to draw systematic conclusions about what has worked and what has not worked.
- Regular evaluations in the course of project implementation and at the conclusion of projects would provide valuable information for the design and management of current and future activities. Comparisons of particular facets of ROL programs across similar countries (e.g., legal aid services or legal education) would also be useful. Lessons that are not systematically identified and shared across Missions are lost and cannot be used in the design of future programs.

I. INTRODUCTION

A fair and efficient justice sector is critical to ensuring the proper functioning of public institutions, enforcing basic human rights, permitting citizens to resolve disputes, and creating confidence among national and foreign investors. In sub-Saharan Africa today, many formal legal systems do not provide justice; widespread impunity for government actors and elites prevails, and the majority of the population looks to customary practices and traditional authorities to settle disputes. Violence and war, political instability, increasing crime, pervasive corruption, disease, and poverty plague both resource-rich and resource-poor countries in the region. In this already difficult and strained environment, the pandemic of HIV/AIDS has hit Africa hard, with impacts extending well beyond the health sector.

In comparison with other regions of the world, donors have focused heavily and perhaps disproportionately on health programs and humanitarian assistance in sub-Saharan Africa. Generally, such programs have responded to emergencies arising from famines, poor governance, civil war, and genocide. By their very nature, these programs have been of relatively short duration, with short-term goals. They have focused on the delivery of immediate relief, and have not sought to build institutions in recipient nations. In addition, USAID's own performance reporting and accountability systems have placed an emphasis on obtaining tangible (and significant) results annually. While in very recent years, the F process has concentrated more heavily on output reporting, USAID Missions have also tried to protect resource levels by capturing progress at outcome levels.

The emphasis on short-term gains creates serious issues for rule of law (ROL) programming, regardless of whether it derives from a long history of humanitarian assistance to the region or incentives created by internal management systems. ROL programs are complex and multifaceted, involving a large number of institutions and processes. It is difficult to understand the behavior incentives and formal/informal rules of so many institutions and actors, as well as to comprehend their interaction. ROL programs are inherently difficult to plan and USAID resources are often slight, leading to difficult choices about which institutions to fund, which geographic areas to emphasize, and whether particular problems ought to be highlighted over general institution and system performance. ROL programs also tend not to produce significant tangible results over short periods. Progress is difficult to measure, and some easier to measure quantitative "results," such as numbers of training courses or trainees, may be largely irrelevant to gauging real impact. The multiplicity of donor programs and differing approaches in ROL complicate implementation and create difficulties for institutions that are chronically weak and cannot easily manage disparate donor requirements.

Sub-Saharan Africa includes 48 countries. Data are available for all 48 for The World Bank's ROL indicator, one of its five governance indices (see the attached graphs in Annex 1 for comparative rankings and scores). Of the 48:

- Forty-one ranked below the 50th percentile in the comparative country rankings in 2007, while 22 fell below the 25th percentile.
- A comparison of scores between 1996 and 2007 revealed very poor scores (on the negative side of the scale) for all included countries, except South Africa and Namibia, which were only slightly into positive range.
 - Five (Central African Republic, Ivory Coast, Democratic Republic of Congo [DRC], Somalia, and Zimbabwe) showed no improvement in ROL over the 11-year period, while four (Angola, Chad, Guinea, and Sudan) made very modest gains.

- Six (Uganda, Rwanda, Burundi, Congo, Sierra Leone, and Liberia) showed stronger improvement, though for the last five it was from a very weak base.
- Nine showed a decline in scores, ranging from very minor (Ghana, which was one of the better scorers) to worrisome (Zimbabwe, Eritrea, Lesotho, and Senegal).

This information suggests that donor efforts in ROL confront significant hurdles and that progress will at best be halting and very slow.

Against this backdrop of a “rapid response/quick results” approach to programming in Africa, together with the exceedingly slow pace and significant challenges of ROL reforms, it has become difficult to advocate successfully for longer-term institutional development programs. This problem has likely afflicted USAID’s own ROL programming in Africa, where investment levels have been low given the scale of the problem and where programs have tended to be both of shorter duration and less comprehensive than in other regions.

Colonial Legacy

An overview of the region’s collective history provides some help in understanding the current political and socio-economic situation of sub-Saharan Africa. It sets the scene for examining the status of justice sector reform and the role that international donors have played in supporting reform. A more detailed narrative history and matrix tracing the region from its colonial roots, and illustrating the remarkably similar paths of governance followed by most countries of the countries in sub-Saharan Africa, are provided in Annexes 2 and 3.

The colonial legacy of Africa has had a profound impact on its path to democratic development. At the time of independence, neither the average citizen nor the new national leadership had ever lived under a democracy.² Governance systems installed by colonizers were not based on democratic principles, but were systems of hierarchical control that permitted a small number of rulers to dominate a large subordinate population. They were in many respects antithetical to participatory democracy. Not surprisingly, post-independence forms of government in virtually every sub-Saharan African country tended to follow similar and, more often than not, catastrophic tracks. Single-party rule devolved into brutal dictatorships, strongman rule, or military regimes. Governance practices were characterized by greed, corruption and impunity for those in power, and repression, human rights abuses, and abject poverty for those who were not.

Ethnic groups were often artificially swept within national boundaries as a consequence of colonial cartography and European territorial agreements and not through any desire on their part to coexist collectively in a newly formed country. As a result, citizens of many of these countries have had difficulty developing a collective national identity; groups have tended to maintain their own traditions and separate identities and those not in the majority group have often been ignored, discriminated against, or repressed by those in power. The need for political leaders to obtain a reliable support base has led to the development of patrimonial networks heavily reliant on ethnic identities and ties. Tragically, many sub-Saharan countries have at times descended into near or total chaos, characterized by famines in some countries and widespread violence and civil wars in others. International interventions, when they have occurred, have taken place long after the development of full-blown crisis to mitigate the resultant human rights catastrophes.

² This problem is richly documented in the literature of the region, particularly in the many Afrobarometer citizen surveys about citizen knowledge and support for democracy.

As some nations emerged from this chaotic period of governance in the late 1980s, they developed new constitutions to distribute power more equitably. Multi-party pluralistic principles were introduced, and new elections were held. However, despite these efforts, most countries continued along a halting and much interrupted path to reform for the next two decades. During the 1990s and continuing to the present, it is possible to find examples of fair and free elections (under international observation), but also an abundance of complaints about voter fraud or rigged results. Typically, the losing party challenged the results, sometimes with a violent outcome. To this day, most African nations and populations remain without a strong, positive example of a well-functioning democratic form of government, and there is a broad spectrum of failed and failing states throughout Africa.

In 2008, a regional Democracy and Governance (DG) assessment covering 10 countries in southern Africa noted the continuing inability of nations of the region to reach consensus on how to define democracy in an African context, despite the toppling of authoritarian regimes and the initiation of constitutional reforms and multi-party elections.³ This continued lack of consensus renders it difficult for the countries themselves to set meaningful policy directions for reform, and also has a profound impact on the ability of donors to develop consistent and successful approaches to supporting reform. The degree of diversity in legal regimes across Africa is profound, making it difficult for donors and indigenous reformers to find lessons in one environment that might apply to another. Locally initiated reforms, which prompted a region-wide ROL reform effort in Latin America, do not cross state boundaries as easily in Africa. The degree to which justice systems in the region are dysfunctional may also be greater than in many other regions.

Against this complicated and sometimes tragic historical backdrop, judicial and legal sector institutions of sub-Saharan African nations today face significant challenges. The legal system of most countries in the region is a diverse mix of common or civil law mingled with customary and traditional practices. Financial support for an effective and efficient formal justice system is insufficient and trained personnel are scarce. There are often too few courts, judges, and lawyers. Many physical facilities are in disrepair and equipment is rudimentary or outdated. The role of the judiciary as a “check” or counterweight to excessive executive power, and the capacity of justice institutions to confront corruption, control crime, and protect human rights are goals yet to be achieved in many nations of the region.

Despite the slow pace of reform, some progress has been made. Beginning in the late 1980s, the wave of constitutional reforms that swept across Africa incorporated essential principles of judicial independence. Increased recognition by both national leaders and local populations of the importance of ROL continues to emerge as an issue around which consensus is building, but achieving a critical mass of support to effect reform and ensure sustainability is still lacking. Much remains to be done to establish and improve the ROL in Africa. Continued donor support will be critical to maintain momentum and essential to counteract the devastating effects of its failure.

II. PURPOSE, METHODOLOGY AND CONSTRAINTS

Purpose – This study originated in USAID Africa Bureau concerns about the perceived difficulty in developing programs that would make a positive impact on ROL reform in Africa. USAID’s Africa Bureau requested that the study team assess ROL assistance in sub-Saharan Africa over the past 15 years as a means to gauge the degree of effectiveness of programs and whether efforts had produced change in the sector. The objective was to identify the impact of ROL interventions, distinguish successful and

³ MSI, “Democracy and Governance Assessment- USAID Southern Africa,” (Washington, DC: USAID, 2008), 11.

unsuccessful approaches and results, and formulate recommendations to guide future USAID ROL programming in the region.

The World Bank shares USAID's concerns and, in January 2009, commissioned a comprehensive study of its Africa ROL programs for the purpose of developing an African ROL strategy. Initial findings will be presented in the summer of 2009 and the final report and strategy is anticipated in autumn 2010. This study involves extensive field work, including stakeholder workshops and the creation of a regional ROL network. As part of the field work, DFID is funding surveys of successful interventions in a number of countries, including Ethiopia, Nigeria, Kenya, Uganda, Malawi, and Tanzania. The World Bank report should be a useful complement to this much more limited study and should also provide valuable strategy recommendations.

Methodology – In accordance with the Scope of Work, this study began with a desk review of available and relevant literature focused on ROL issues in sub-Saharan Africa. The study team did broad Web searches of ROL issues in Africa and particularly checked for relevant USAID and other United States Government (USG) documents, as well as other donors' documents (e.g., the World Bank [WB], European Union [EU], United Nations Development Program [UNDP], African regional institutions [such as the African Union and the African Development Bank], Canadian International Development Agency [CIDA], the Scandinavians, and the German Technical Cooperation [GTZ], among others). The results of the desk review were compiled into an annotated bibliography, organized by country, and submitted as a separate document.

The desk review for this study covered ROL assistance programs and legal or judicial assistance programs.⁴ Although ROL programs frequently intersect with anti-corruption, human rights, and citizen awareness of rights programming, a decision was made during early consultations with USAID to concentrate on those programs with a clear nexus to ROL topics.

The research team also completed interviews in Washington, DC with representatives of The World Bank, USAID, US Bureau of International Narcotics and Law Enforcement Affairs (INL), Office of Overseas Prosecutorial Development, Assistance, and Training (OPDAT), International Criminal Investigative Training Assistance Program (ICITAP), Millennium Challenge Corporation (MCC), and the Bureau of African Affairs at the State Department. Staff at the Departments of Commerce and the Treasury did not respond to requests for interviews.

Limited field work of one week's duration per country was conducted in three African countries, Kenya, Malawi, and Nigeria, which were selected in concert with USAID's Africa Bureau staff. Individual country reports synthesizing the field work, and providing brief assessments with findings and recommendations, are included at the end of this report in Annexes 4-6. Although not the subject of a field study, a fourth country report (Annex 7) analyzing ROL interventions in post-conflict Rwanda was prepared by a team member who has worked extensively in that country.

The study team consisted of four ROL experts, including three lawyers, and one social scientist with access to justice experience. The lead researcher and author was Jan Stromsem (MSI). She was supported by Louis Aucoin (Tufts University's Fletcher School), Lynn Carter (MSI), Michele Guttman (MSI), and Christie Warren (William and Mary Law School). Research support was provided at different points by Erin Portillo (MSI), Jessica Bonney (William and Mary Law School), Yasaman Sadeghipour (MSI), and Tara Thwing (MSI).

A workshop to discuss preliminary findings was held with USAID staff in mid-February. This led to helpful feedback, advice on conducting additional research on specific themes and on further developing

⁴ USAID Statement of Work, 4.

the report's conclusions and recommendations. The research team would particularly like to acknowledge the steady support of Ryan McCannell, the COTR, and Achieng Akumu of the DCHA/DG ROL team.

Organization and Structure of the Report – This study is organized into three sections: overarching ROL issues and themes, donor programs and approaches, and conclusions and recommendations (including lessons learned, emerging issues, and USAID comparative strengths and weaknesses). To provide a deeper review of shared histories of the countries comprising sub-Saharan Africa, we have also included a brief historical overview of the colonial legacy (Annex 2), as well as a chart detailing key dates and political information (Annex 3). A summary chart of USAID ROL assistance programs for the region is also included (Annex 8).

Constraints – This study was not designed to be exhaustive. Field work was limited. Although providing distinct perspectives and experiences in ROL reform, the three countries visited are not fully representative of all 48 nations of sub-Saharan Africa. Some of the interviews in Washington, D.C. were very useful, while others were of limited utility. In some cases, younger, less experienced staff was assigned by their organizations to take the interviews. Available documentation, particularly about program impact, was disconcertingly limited. While a wide variety of scholars, legal experts, and donors have written about ROL issues in Africa, much of that writing is generic and/or descriptive. Publications of direct relevance to this study were either unavailable (at least to this team and to the public), or did not exist. Many donor assessments and implementation reports were of limited value, as they did not address program approaches and program results. The team found much descriptive material about what particular projects were *doing*, but not about what they were achieving or about which approaches were critical to impact. Midterm or post-implementation evaluations conducted of USAID ROL programs in the region and period under review were few in number, and even then they were formative, mid-course evaluations that did not and could not address issues of longer-term impact and sustainability. Detailed program documentation from other USG departments and agencies was, for the most part, unavailable.

With few exceptions (notably, The World Bank), relevant literature describing other donor programs was equally difficult or impossible to locate. For example, many programs have been developed and implemented in African countries with EU support, but documents are largely unavailable. The few useful post-implementation evaluations the team found reflected disappointingly minor results and little sustainable impact. Even The World Bank does not make evaluations publicly available, in contrast with, for example, its judicial sector assessments and loan descriptions. There is reason to think that The World Bank does more (and possibly stronger) evaluation work than many donors, but even interviews with staff did not lead to the sharing of such documents with the team. The opportunities for cross-donor learning seem very limited; there appears to be very little joint analysis by donors of what works and what does not in ROL programs in Africa.

The evidence base is too thin and impressionistic to allow for ready determinations about the success or failure of projects and specific approaches.⁵ Many of the lessons learned in project documents have by now become hackneyed truisms, *e.g.*, the need for local ownership, the importance of exit strategies, and the need to simplify project designs in conflict environments. The lack of strong evaluative work makes it difficult to determine why particular approaches might have been more or less successful – was it the country context, the presence of a willing reformer at the top, activity sequencing, donor pressure, or some other factor or combination of factors that accounted for impact? Because there is so little real

⁵ The E&E Bureau experienced a similar problem when it tried to develop a ROL programming guide incorporating best practices and lessons learned in the region. Because documentation was so scarce, so impressionistic and so partial, the guide (produced in 2008) relied heavily in the end on the combined experience of DG officers who had managed rule of law programs in the region.

evidence (and what does exist tends to be highly anecdotal and lacks a longer time perspective), findings and conclusions in this report must be treated as tentative.

III. THE STATUS OF RULE OF LAW IN SUB-SAHARAN AFRICA: KEY ISSUES, INSTITUTIONS AND ACTORS, AND CROSS-CUTTING THEMES

A review of the status of rule of law in African countries reveals common patterns and challenges. Indeed, while acknowledging national differences, formal governing systems in virtually every country in the region are based on one of two legal systems imposed by colonists, either British common law or European civil law. Sub-Saharan African countries also share long-standing traditions in the use of informal customary and religious dispute resolution practices. These formal and traditional systems remain little changed today.

In this section, we examine common issues and themes that arise from efforts to establish rule of law in the various countries across the continent. Here, we identify the over-arching themes that emerged during the course of the study. Specific country examples are used to highlight particular points or patterns, but the principal focus is on commonality as we consider legal frameworks (the constitution and body of laws); the informal system (customary, traditional and religious systems of justice); the institutions of justice (the judiciary, prosecution, public defenders, police, and prisons); legal education institutions and professional associations; and the work of regional organizations. Finally, we present a series of shared issues that profoundly impact the ability – or inability – of a country to operate according to the ROL.

A. Legal Frameworks

I. Constitutional Framework

Throughout sub-Saharan African, at least two, and in some cases three, discrete rounds of constitution drafting have occurred over the last 50 to 60 years. The first coincided with national independence, which, as seen in the chart in Annex 3, took place mainly between the early 1950s and extended into the early 1980s, with most countries gaining their independence in the 1960s. These early constitutions were drafted with substantial input from the departing colonial leaders. Basic principles of democracy were incorporated into these early constitutional documents, (e.g., participatory elections, three branches of government) but, for the most part, the resulting governments soon became single-party systems and many experienced dictatorship and authoritarian rule, as has been the case in Chad, Sudan, Uganda, and Zimbabwe. In some cases, the ruling governments were overthrown by military coups, and a significant number of countries of the region remained under military rule for extended periods of time, as in Ghana and Nigeria.

Beginning in the late 1980s and extending through the mid-1990s, almost every country of sub-Saharan Africa went through a constitutional reform process resulting in the enactment of new national constitutions.⁶ As explained in Annex 2, this continent-wide wave of constitutional reform coincided with the end of the Cold War and is attributed – at least in part – to the contemporary abandonment of communist and authoritarian rule in favor of democratic forms of government in Eastern Europe and former Soviet Union Republics. While incorporating considerably more local input into this reform

⁶ Daniel Posner and Daniel Young. “Institutionalization of Political Power in Africa.” (Los Angeles: UCLA, 2007), 130. During this period, 36 sub-Saharan African nations approved new constitutions.

process, constitutional redrafting nevertheless had substantial external donor support and technical advice. The constitutional reforms of the early 1990s focused largely on shoring up constitutional guarantees of judicial independence and establishment of a more equitable balance of power between the three branches of government.⁷ As a recent USAID regional DG Assessment in Southern Africa noted:

In the first half of the 1990s, southern Africans shook off authoritarian regimes and headed down a path toward liberal constitutions, multiparty elections, and government accountability. But the countries set out in the direction of democracy without first having reached a meaningful consensus on what democracy is and on what rules, values, and principles would guide the way toward achieving it. This lack of consensus has hobbled every country in the region – some more than others.⁸

The goals may have been to strengthen constitutional guarantees of democratic governance, thereby disrupting the skewed power of the executive vis-à-vis other branches of government, but in most countries, these goals have yet to be achieved. Despite the introduction of term limits,⁹ in country after country, elected leaders continued to pursue self-serving agendas for personal enrichment and power – even after elections judged to have been fair and open by international observers. In part, these results flow from the underlying failure to achieve consensus on a commonly accepted set of democratic values, shared broadly with and understood by the citizenry. Several related factors should also be considered. First, in the prevailing conditions and political situations of most countries of the region (i.e., most populations are poor, ill-educated, and living in rural areas), citizens are physically disconnected from national level politics. Second, the uninterrupted cycles of autocratic leadership by an elite group with ethnic ties to the president effectively shuts out other ethnic groups from political processes. Third, many of the constitutions were overly idealistic and perhaps even utopian in their aspirations, and were incapable of implementation due to financial constraints, weak institutions, and inadequate incentives for changing political and bureaucratic elite performance. Fourth, as a likely result of the first three factors, there has been inadequate attention to reforming colonial-based legal systems and to consolidating them with customary practices in order to create new governance models that better meet the needs of citizens.

Constitutional provisions designed to introduce checks on the powers of governmental branches have often been ignored or amended. In Malawi, for example, a constitutional provision allowing citizen recall of elected members of Parliament was removed by unanimous vote of Parliament. Likewise in Malawi, a constitutional provision prohibiting members of Parliament from changing party affiliation while in office has been widely ignored, despite a Supreme Court ruling confirming the constitutionality of the prohibition. In addition, despite constitutional guarantees of individual rights, in areas such as due process, gender equality, and human rights, enforcement of these guarantees has been more the exception than the rule; with respect both to formal and informal systems.

In the absence of a democratic consensus, incumbents and elites find ways to hold onto power. This is certainly the situation in Kenya, where anticipated constitutional reforms were blocked prior to the elections and the incumbent president declared himself the victor in December 2007 elections despite credible evidence of fraud so severe that the true winner of the elections may never be known. Widespread violence erupted throughout the nation, resulting in the death of more than 1,000 citizens. Former United Nations Secretary General Kofi Annan negotiated a settlement that effectively brought the immediate crisis to an end, but the veneer of resolution is very thin. As noted by an interviewee, “...we’re really just waiting for the next election” – now some four years away – and with no real promise that it will bring the type of change needed.

⁷ USAID. “Democracy and Governance Assessment – USAID/Southern Africa,” (Washington, DC: USAID, June 2008), 2, 10-15.

⁸ *Ibid.*, 11.

⁹ Daniel Posner and Daniel Young. “Institutionalization of Political Power in Africa”. (Los Angeles: UCLA, 2007), 132. Only six countries do not now have such limits: Ivory Coast, Equatorial Guinea, The Gambia, Guinea-Bissau, Mauritania, and Zimbabwe.

In Kenya and Malawi, as well as other countries, moves are underway for further constitutional rewrites. The UNDP program in Kenya recognizes that constitutional reforms may be needed to tackle some of the governance problems in Kenya, and has supported development of a new constitutional framework (based largely on input from the local academic community) in preparation for a national referendum. However, the process has stalled, remains politicized, and is currently unresolved. Several other countries are also considering initiating a third round of constitution drafting to address problems resulting from the those constitutions drafted in the 1990s.

Both the literature review and the team's interviews indicate a trend towards more lengthy and detailed constitutions (a trend that mirrors recent constitutional reforms in Latin America) that tend to be highly prescriptive within the constitution itself rather than retaining flexibility and relegating details to the body of laws. The fundamental problem, however, is that political consensus is not possible unless it is rooted in a common set of democratic values; until citizens have a reasonable understanding of what democracy is and the roles that should be played by various governing institutions,¹⁰ such consensus is not likely to materialize. Absent this understanding and common set of values, no amount of constitutional reform can correct the lack of political will for change, dysfunctions in governance and leadership, and poor implementation of the law – all of which are serious problems for African countries.

With respect to constitutional reforms, the situation of post-conflict countries differs little from those that have managed to avoid full-scale conflict or war. In Rwanda, the government spearheaded a very participatory process of constitutional reform in 2002 in which citizen input was actively sought. As a result, the Constitution (adopted in 2003) contained some important reforms, including a strong bill of rights and increased participation in government for women, expressly reserving one-third of the seats in the Parliament for women. Nevertheless, the guarantee of freedom of expression contains a significant limitation that has proven to be the Constitution's most serious flaw. The guarantee allows expression to be limited whenever it can be considered "divisionist." In practice, this has meant growing intolerance for any criticism of the regime itself. What began as an attempt to prevent hate speech exacerbating intolerance between ethnic groups has now served to strengthen the executive and consolidate the power of the current regime.

Against this backdrop of frequent challenges to constitutional provisions to curb executive power, there is a slow, but discernable, erosion from the "big-man" model of executive leadership often seen throughout the region since independence. Powerful executives seeking terms beyond constitutional mandates have recently seen their efforts fail, such as the case of former presidents Obasanjo of Nigeria, Chiluba of Zambia, and Muluzi of Malawi¹¹. Formal "rules of the game" are beginning to matter, with the change attributed principally to evolving public opinion, concerns by those in power about possible prosecution, and the strong emphasis that Western donors have placed on the ROL since the end of the Cold War.¹²

2. Body of Laws and Codes

Because of their ethnic and cultural differences as much as their shared colonial legacies, the countries of sub-Saharan Africa operate simultaneously under multiple and often overlapping legal systems or frameworks, including post-colonial codified law, traditional or customary laws and practices and, in those countries with a Muslim population, Shari'a law. In addition, it is not unusual for the executive to rule by decree, or for new laws to be drafted, passed, and enacted that overlap or conflict with existing

¹⁰ *Ibid.*, 12.

¹¹ *Ibid.*, 127.

¹² *Ibid.*, 136-137. Although documented in only a single article reviewed (the Institutionalization article), the findings and data presented in the Institutionalization article show an interesting and encouraging trend towards increased public interest in issues of governance – in part attributable to donor efforts - that is beginning to be reflected in leadership in sub-Saharan Africa.

legislation, further complicating a system of laws already difficult to negotiate. For the most part, colonial laws remain largely unchanged since independence (as is still the case in South Asia),¹³ and new substantive laws tend to target specific issues that may be of particular concerns to donors and trading partners, as detailed further below. Formal laws are often outdated and may address situations that no longer exist. They are also often repressive and focus “more on the needs and interests of the colonial power than on protecting the citizens of the colony.”¹⁴

Additional factors complicating ROL work in Africa are the very different traditions and perspectives of Western nations and their African counterparts. A good illustration is the difference in how the average citizen of the West views crime compared with how it is addressed in Africa, particularly in rural settings. The emphasis in many African traditions is not on punishment and deterrence, as it is in the Western, liberal tradition. Such African traditions emphasize reconciliation and community healing involving both the transgressor and the transgressed. Given this disjunction between the Western donor traditions and the more community oriented African legal traditions, it is not clear that donors' emphasis on the support of institutional means will automatically produce the desired end of justice in many African settings. Critics argue that privileging institutions based on Western legal models amounts to the uncritical imposition of a model “unsuited to political and cultural landscapes” of the societies assisted.¹⁵ Others take a more negative view of traditional justice mechanisms, which typically disadvantage women and those of lower social status. The disjuncture, however, at minimum suggests that much of the population may not understand or share the values that underlie the formal legal system.

○ *Substantive and Procedural Laws*

Although the basic legal framework in most sub-Saharan African nations remains colonial-based, a substantial number of new laws have been drafted and enacted, mostly with donor urging and support. The majority of these fall into three categories. The first category is commercial codes and laws, much of which is borrowed in part or *in toto* from donor nations, primarily the UK or France.¹⁶ The second category includes new laws that relate to new or evolving forms of criminality, notably narcotics trafficking, trafficking in persons, terrorism, and financial crimes (money laundering, counterfeiting, intellectual property violations, fraud and embezzlement). In both of these categories, all too frequently, the new laws are simply transferred from the originating country, with little or no tailoring to the local context, with the result that new laws are difficult to implement, interpret and apply, and are inconsistent with the existing body of laws; thus, they end up poorly enforced.¹⁷ The third category includes principally legal guarantees regarding the status and rights of citizens, particularly women's legal rights, such as owning or inheriting property, their marital status, and legal protections from sexual violence and abuse. Some provisions of laws conflict with deeply entrenched cultural and even religious traditions, rendering them all the more difficult to enforce, especially in rural areas where the majority of women

¹³ Marcel Wetsh'okonda Koso, “Congo and the ICC,” *Open Society Justice Initiatives, Human Rights and Justice Sector Reform in Africa: Contemporary Issues and Responses*, (February 2005), 59. Numerous Congolese laws in force, inherited from colonial authoritarian regimes, actually contradict the international instruments signed by the DRC. The 1886 criminal code was last revised in 1940. It no longer bears any resemblance to the original French laws on which it was based.

¹⁴ Danish Ministry of Foreign Affairs. “Programme Support to the Justice Sector in Mozambique (Pro-Justicia) 2002-2005,” (Copenhagen: Danida, October 2002), 30. (Hereafter “Mozambique I”).

¹⁵ Syracuse University, Department of Political Science, “New Rules for the Rule of Law – External Actors and Rule of Law Development in Post-Conflict African Societies,” (Syracuse: Syracuse University), 13-15.

¹⁶ The Organisation for Harmonization of Commercial Laws in Africa (*L'Organisation pour l'Harmonisation en Afrique du Droit des Affaires* [OHADA]) was created by treaty in 1993. Today, the organization comprises 16 countries in the region.

¹⁷ For example, bankruptcy laws enacted in former French colonies are based on a French model that presupposes that bankruptcy judges are drawn from the business community and are thus well-experienced in complex business-related issues. In the former colonies, however, bankruptcy judges are appointed from within ranks of sitting judges with little specialized training or experience. As a result, specialized cases often languish for lengthy periods of time.

have few options to exercise their rights and must follow traditional and customary methods of settling disputes or conflicts.¹⁸ Despite legal reforms, poor knowledge, lack of adherence to and enforcement of new provisions perpetuates long-engrained customs in which women in reality have few rights and little effective recourse.

Procedurally, both common law and civil law traditions have presented difficulties. Procedures in both systems are cumbersome, redundant, and time consuming.¹⁹ Both systems often require assistance and intervention of an attorney, either as a legal requirement or as a practical necessity.²⁰

Different government departments provide or apply varying interpretations and versions of the same law. Few citizens know the law, or even have access to laws, and those who do often distort the law to their personal advantage. For many civil servants, the law is a trivial formality and there are few functioning institutional mechanisms to ensure that bureaucrats know and apply the law correctly.²¹ Poor dissemination of existing codes and regulations complicates application and enforcement of the law, and contributes to citizen ignorance of legal rights and obligations.²² Harmonization of laws is lacking, and new laws often conflict with existing legislation. Donor assistance in drafting or revising codes is often deemed successful because it creates or strengthens the framework itself,²³ at least on paper, but reports have largely been silent on whether implementation of these new laws has been achieved. The problem of beautifully written laws that are ignored or cannot be implemented is not unique to Africa, but extends to many Latin American countries, as well as other regions with legal systems in flux.²⁴ In several countries, particularly in post-conflict settings, such as Rwanda, where there has been a large-scale influx of donor programs, codes and laws have been updated to incorporate international standards of human rights, but may still conflict with traditional norms. The majority of countries, however, still lag behind in bringing their internal body of laws into compliance with international human rights standards.

o *Common law versus civil law systems*

Whether common law or civil law institutions contribute to a more effective ROL in sub-Saharan Africa cannot be stated with certainty. Common law lawyers and judges tend to believe that the common law system is superior, basing their opinion on the idea that the common law system inherited from the British is more able to protect the rights of the individual than civil law judicial systems. Quite the opposite point of view can be found in lawyers from civil law countries, who may view the common law system as

¹⁸ *Mozambique I*. The following problems were noted specifically in Kenya, but similar such problems arise in countries throughout the region: (1) mandatory sentencing requirements contained in the law effectively remove the principal breadwinner from his family for an extended period; and (2) traditional conflict resolution practices under which, most frequently, the accused must marry the victim.

¹⁹ In the Malawi in-country review, a high court assistant registrar enumerated the procedural steps in the life of an average civil case. Acknowledging that there were “a lot of steps,” he listed 14 different steps required, spanning a minimum of 118 days before the case could even be docketed (placed on the judge’s hearing schedule). Negotiating this process successfully requires substantial assistance from an attorney. USAID’s *Assessment of the Judicial Sector in Rwanda, 2002*, on page 61, likewise noted “the complexity of procedural rules” as a problem.

²⁰ While either legal system may permit *pro se* representation under certain circumstances, and require attorney representation in others, practice often dictates the need for legal counsel because of legal and procedural complexity and delays. In Malawi, if an attorney does not request a hearing, the plaintiff must physically come to the courthouse and wait in the hope for an opening on the docket. Principally for this reason, we observed hundreds of people milling around outside the courthouses visited.

²¹ Syracuse University, Department of Political Science, “New Rules for the Rule of Law – External Actors and Rule of Law Development in Post-Conflict African Societies,” (Syracuse: Syracuse University), 23.

²² In Malawi, two local counterparts questioned even the magistrates’ awareness of amended or new laws.

²³ United Nations Development Project. “Building Capacity in the Justice Sector.” Project ID 00035786. <http://www.er.undp.org/governance/CDMOJ1.html?id=115> (2009).

²⁴ In the period after the fall of communism, new laws were written almost wholesale and very quickly by outside experts in Eastern Europe and the former Soviet Union. There was little harmonization across the new laws and the new laws themselves were not well understood by those charged with enforcing the law.

capricious and disorganized. Data from Freedom House and Political Risk Services compare the effectiveness of the ROL in common law and civil law countries in Africa through cross-national statistical comparisons. The results reveal that common law countries in Africa are generally ranked higher at providing “rule of law” than are civil law countries.²⁵ But these differences are more shades of grey than stark systemic contrasts.

One of the main distinctions between civil code and common law systems is the degree of judicial control of proceedings, as opposed to control by lawyers. In common law systems, lawyers tend to frame the terms of litigation, decide which witnesses to call, and investigate their own cases; judges are relegated to what is often called a “referee position.” In civil code systems, especially in criminal cases, most of the proceedings from investigation through trial are controlled by judges. In the development context, judicial control of proceedings is often considered to be a more useful model when trained lawyers are scarce. However, this model is often criticized as being more susceptible to corruption.

Key differences between the two systems also surface with respect to prosecution. The civil law system is inquisitorial, while the common law system (followed in the US) is adversarial. The civil law system is based on written submissions that are not generally accessible to the public, while the common law system relies to a large extent on oral proceedings where evidence is presented and arguments are made in open court. The judge in a civil law system actively conducts investigation into the facts of each case, while the judge in a common law system plays no role in case investigation, and acts instead as a neutral and impartial observer and decision maker. The prosecutor in a civil law system contributes little substantively to case development other than to process documents; the prosecutor in a common law system controls and directs the police and the investigation of the facts.

Administrative Law – In both common and civil law systems, administrative law provides accountability mechanisms and some possibility for checking executive authority. It is an area that has been largely ignored by donor programs in Africa despite a general interest in limiting executive power.

Civil Law Systems – Administrative law is the body of law that governs the activities of administrative agencies of government, including adjudication or enforcement of regulations. Administrative law is considered a branch of public law, dealing specifically with decision-making by government agencies and special boards or commissions that are part of a national regulatory system (e.g., police laws or regulations governing international trade, manufacturing, the environment, taxation, broadcasting, immigration, and transport). Many civil law countries have established specialized administrative courts to review decisions made by government entities. Administrative jurisdiction focuses on abuses of power and authority of government institutions and, as enforced by the administrative courts, can strengthen the power of the judiciary to serve as a viable check over executive power.

Common Law Systems – The role of administrative law and procedures is similar in countries with a common law tradition, although implementation varies. As in civil law countries, administrative law governs the legal relations between government and its citizens in contexts that directly affect their everyday lives and concerns, (e.g., small business licensing, health and pension benefits, education, social programs, transportation, workplace safety, unemployment benefits, environmental regulations, etc.). In common law countries, the fundamental purpose of administrative law is to ensure that government officials and agencies exercise their powers and authorities lawfully and in accordance with defined rules and procedures. Administrative law is not a discrete substantive area of law, but applies to a gamut of substantive areas, many of which are the subject of distinct reform efforts not labeled or considered as “administrative.” Likewise, in common law countries, administrative laws allow individual citizens, as well as private entities or groups, to contest government decisions or actions. Although some specific

²⁵ Political Risk Group. www.prsgroup.com

administrative courts exist, many such disputes are argued and resolved at the agency or administrative board level. Courts are often accessible only as an appellate venue, and after all administrative remedies have been exhausted.

Of particular relevance under both systems have been recent efforts undertaken to draft and enact Freedom of Information laws that enable citizens to access heretofore unavailable information pertaining to government activities and operations. South Africa, Uganda and Angola have adopted a Freedom of Information Act (FOIA) while a FOIA bill was pending in the Liberian legislatures in 2008. Coalitions in Ghana, Tanzania, and Sierra Leone have pushed FOIA legislation. Such a law was recently enacted in Malawi, and with the assistance of the International Commission of Jurists, one has now been drafted in Kenya, though its passage is delayed in the National Assembly. In addition, the Open Society Institute has undertaken similar initiatives to support freedom of expression and information campaigns in Ghana and Nigeria, where a coalition has been supporting such legislation since 1999.²⁶ In some countries, there has been substantial civil society advocacy for FOIA laws.

- *Hybrid systems*

Basically, all legal regimes in sub-Saharan Africa are hybrids of formal Western and African customary systems. Two principal forms of hybrid systems are found in sub-Saharan Africa: the common law/customary model, or the civil law/customary model (although some countries show features of both common and civil law, as well). In countries of the northern tier of sub-Saharan Africa, however, Islamic law is added to the already diverse mixtures of legal systems. In Sudan and Nigeria, this mixture of European, customary, and Islamic law is referred to as a “hybrid” legal system. For example, in Sudan, following independence, the northern part of the country began a move towards Islamization. By the end of the 1990s, with the Islamist tendencies spreading across North Africa, northern Sudan adopted Shari’a law. From the perspective of the southern Sudanese, who were either Christians or animists, this move was deeply threatening and antithetical to the customary law they followed. The issue sharply aggravated north-south tensions. The fact that customary law was considered inferior to Shari’a law by northern Sudanese further entrenched growing animosities, ultimately leading to violent outbreaks between the two factions.²⁷

The second form of hybridization of legal systems is increasingly seen in countries updating their antiquated codes and laws. No longer necessarily tied to the common law or civil law traditions of former colonial leaders, countries throughout the region are adapting models, laws, and language from a diverse mix of legal traditions – selecting those elements most relevant to the specific issues leading to new or modified laws. Tracking similar trends seen in Latin America and Eastern Europe, where countries transitioning to democracy have incorporated elements from varied legal traditions into a new legal framework, the resulting hybrid systems can be better suited to individual country needs, if harmonized with existing laws and regulations.

- *Traditional and customary systems*

The term “customary law” applies to the body of traditions, mores, social conventions, and rules that through usage over a period of years have become the mainstay of governing traditional African societies. It is as much social convention as legal protocol.²⁸ Organized along ethnic and geographic lines, customary authorities most frequently deal with resolving everyday disputes and conflicts

²⁶ J. Kayode Fayemi. “Human Rights and Justice Sector Reforms in Africa,” *Open Society Justice Initiatives, Human Rights and Justice Sector Reform in Africa: Contemporary Issues and Responses*, (February 2005), 3.

²⁷ USAID, “Interagency Police/Criminal Justice Assessment, Southern Sudan,” (Washington, DC: USAID, 2005), 14.

²⁸ *Ibid.*, 11.

arising over issues such as inheritance, ownership of movable or immovable property, status of individuals, rules of behavior and even morality. There are various different conflict resolution mechanisms at local levels, ranging from traditional healers, to local chiefs and clan elders, to the more formalized community court system, with elected judges and defined jurisdictions. Customary practices may also incorporate traditional approaches to policing.

Numerous types of traditional authority structures were already in existence and operation throughout pre-colonial Africa, and have continued to function since independence in a variety of forms and adaptations. Some structures underwent change during the colonial period, such as *gacaca* in Rwanda, *bashingantaha* in Burundi, and clan elders in Somalia. Customary courts in former British colonies were created to control native populations and settle frequently erupting disputes over livestock, land and water rights. In some cases, after independence, traditional authority structures were altered to reflect national policies of independent governments. They were abolished by statute but later recognized constitutionally, as in Ethiopia,²⁹ reorganized into local or community courts (Kenya, Malawi, and Sierra Leone), or integrated into state law (Uganda). Indeed, traditional leaders continue to reign supreme in the Kingdoms of Lesotho and Swaziland, albeit with elements of quasi-modern institutional and constitutional structures. Yet in most countries, law and development projects during the 1960s and 1970s tended to limit jurisdiction of traditional authorities to matters pertaining to family, property, and succession law.

In today's Africa, the majority of the population is poor and still resides in rural areas, formal courts are difficult to access geographically, and the practice of doing so violates long-standing customary community practices and norms. Local conflict resolution mechanisms are often more easily accessible, quick and inexpensive.³⁰ The most common matters decided in informal or customary dispute resolution contexts relate to land, water and livestock issues,³¹ and family or domestic conflicts, including those involving women (inheritance, ownership of property, child custody, and violence against women). Since approximately 60-85% of the populations throughout Africa resort to customary forms of justice, and since courts and legal personnel are in short supply in many countries, this situation is unlikely to change in the near future. In rural areas, this percentage would be even higher.³²

Despite the obvious advantages of customary systems, such informal practices are frequently inconsistent with constitutions and international practices, and an ill-informed, largely rural population remains unaware of its rights under any systems. Other problems with traditional systems that are frequently cited relate to undocumented and unclear authorities, lack of uniformity and consistency in settlements or decisions,³³ conflicts between the formal and informal systems, duplicative and overlapping authorities, and a host of human rights issues, most of which stem from how informal systems deal with women and marginalized groups.

Some countries have recognized the duality of their systems. For example, Lesotho has a dual legal system of Sesotho customary law and common law (Roman Dutch law). Customary law applies to those

²⁹ Constitution of the Democratic Republic of Ethiopia, Art. 78 (1995). Customary and traditional courts were initially recognized, although not created by law, in the Ethiopian Constitution.

³⁰ *Mozambique I*, 22.

³¹ Kenyan Ministry of Justice. "Justice, Governance, Law and Order Sector (GJLOS) Reform Programme, National Integrated Household Baseline Survey," (Nairobi: MOJ, September 2006), 31. (Hereafter, "GJLOS survey"). This same report indicates that in rural areas, only about 10% of criminal incidents are reported to police.

³² For example, the *Mozambique I* study cites the figure of 85%, as did interviewees in Malawi. The *New Rules* included figures ranging from 70-85%.

³³ According to a World Bank interviewee in Kenya, there is a move amongst informal sector leaders to "codify" dispute resolution in Kenya.

who lead a traditional way of life, while common law applies to those who have abandoned Sesotho customs and embraced a Western way of life. Until recently, women have had the legal status of minors in both systems. Countries such as Senegal have attempted to introduce new codes to replace and upgrade customary forms of dispute resolution, but with mixed results.³⁴ Strengthening alternative dispute resolution (ADR) systems at the expense of state institutions may not serve the interests of all groups. In particular, some women's groups prefer to have their cases resolved in the formal court system rather than before patriarchal local leaders who tend to enforce long-standing discriminatory practices and customs.

○ *Shari'a law and court systems*

In recent years, Shari'a courts have been established in a number of African countries with significant Muslim populations, including Ethiopia, Gambia, Ghana, Kenya, Libya, Mali, Nigeria, Senegal, Somalia, Sudan, and Tanzania.³⁵ Shari'a courts are often constitutionally created or recognized, such as in Ethiopia, Kenya, and Sudan. In other countries, such as Ghana, Shari'a law is applied in customary courts under the broader category of customary law. Jurisdiction under Shari'a law and courts applies only when both parties are Muslim or if a non-Muslim seeks or consents to such jurisdiction.

Shari'a law can be implemented both formally in courts by a *qadi* (judge), as well as informally in local communities by emirs (community leaders). Emirs are selected based on their respect within the community, levels of education, and success in business. Their advice is not legally binding but is almost always followed, and in the absence of functioning, effective court systems, dispute resolution provided by emirs fills a clear need.

Often, Shari'a criminal law has been introduced to address concerns about security and escalating crime rates and the perception that customary and state-sponsored courts are corrupt and/or unable to effectively confront criminal behavior in local communities. Interpretations of Shari'a criminal law can include harsh punishments, such as amputation and stoning that are meant to deter crime; however, strict evidentiary requirements, when correctly applied, are supposed to make convictions difficult to obtain and the harshest of sentences rare. Although traditional Shari'a law, which emanates from the Qur'an, Sunnah, and opinions of Islamic scholars, is meant to be applied in Shari'a courts, often the rules that are applied are unwritten and arguably have no basis at all in Islamic law.³⁶ Increased reliance on Shari'a courts, coinciding with more radical and severe interpretations of Islamic law, has grown sharply over the past two decades within Muslim populations in northern countries of sub-Saharan Africa.

Some of the most controversial Shari'a verdicts have emerged from northern Nigeria, where 12 states added criminal law to the jurisdiction of Shari'a courts beginning in 2000. International human rights observers, concerned that the introduction of Islamic criminal law would result in human rights abuses, have closely monitored cases in which sentences of stoning, flogging and amputation have been handed down.³⁷ Although initial fears regarding the introduction of Shari'a criminal law in the northern states led

³⁴ USDOS, "Background Notes: Senegal," (2008). In Senegal, a Family Code was enacted in 1973, regulating marriage, divorce, succession and custody with a separate section for Muslim Succession Law. But local populations continue to adhere to local customs. For instance, the Family Code bans marriage for girls under the age of sixteen, but in many rural areas girls marry younger.

³⁵ See <http://www.law.emory.edu/ifl/legal> for a table of countries in which Islamic personal law had been implemented as of 2002. Links provide data on implementing legislation, court systems and limits to the jurisdiction of Shari'a law in each country.

³⁶ For example, an interview with a Nigerian lawyer discussed application of Maliki doctrine in Shari'a courts. When showed a volume of Ibn Malik's *Muwatta*, the foundational text for the Maliki school of jurisprudence, the attorney had never seen it, indicating that the "Shari'a" law that was applied in the northern states was a collection of Xeroxed rules without any citations to authority and which were, in fact, very different from the law set forth in the *Muwatta*.

³⁷ Human Rights Watch, "Political Shari'a? Human Rights and Islamic Law in Northern Nigeria," (Washington, DC: HRW, 2004); and Human Rights Watch, "Nigeria: First Execution under Sharia Condemned," (Washington, DC: HRW, January 8, 2002), <http://www.hrw.org/en/news/2002/01/08/nigeria-first-execution-under-sharia-condemned>. Refer for examples.

to hundreds of deaths due to clashes between Muslims and Christians, its application has been less incendiary.³⁸

A number of non-governmental organizations (NGOs), including the Federación Internacional de Abogadas (International Federation of Lawyers, or FIDA) and BAOBAB³⁹ for Women's Human Rights, work in African Shari'a courts to protect women's rights in cases involving marriage, divorce, custody, domestic violence, and inheritance – areas in which women are often subjected to discriminatory applications of the law. The fear of discriminatory judgments and unwillingness of women to take their cases to Shari'a courts has given rise to an interesting phenomenon in northern Nigeria, where ADR bodies have been created to divert women's cases away from Shari'a courts and toward secular mediation techniques.

B. Actors and Institutions

For the purposes of this study, justice sector institutions are defined as the formal (i.e., non-customary) judiciary, prosecution, public defenders, police, and prisons. Depending on the system and structures in individual countries, the Ministry of Justice (MOJ) oversees prosecution or public defense functions, while in others, the MOJ also retains control over the judiciary. In general, authority over police and prisons is centralized into a Ministry of the Interior (or Home Affairs). The organizational structure of justice sector institutions for most African countries is based on systems put in place by colonial leaders. Most of these systems have undergone little, if any, structural change since independence. Rather than presenting a comparison of organizational structures here, we concentrate on issues and problems identified with these structures in the literature as well as our field studies and interviews. We also highlight examples of recent changes and reforms that have occurred in individual countries.

Justice sector institutions in Africa are not well regarded by the populations they claim to serve. Indeed, the public perception of African justice sector institutions ranges from a general lack of confidence to outright fear of police brutality and repression. In many countries, justice institutions are considered corrupt, ineffective, and subject to executive influence. Most are under-funded, inadequately staffed, and ill-equipped. Salaries are generally low, and benefits are minimal or nonexistent. In the vast majority of African countries, training of justice sector personnel is inadequate to meet needs, and almost all in-service training and continuing legal education programs are donor-supported. In these environments, facilities and working conditions are poor, as is morale. Problems of attrition abound and are complicated by inadequate availability of trained lawyers in several countries of the region.

An evaluation of the Mozambique justice system notes the challenges stemming from inadequate financial and human resources.⁴⁰ Even in countries rich in natural resources, such as Angola and Guinea, budgetary allocations to justice institutions are insufficient to meet societal need. In countries such as Ethiopia, Liberia, and Malawi, there are extreme shortages of qualified people to staff the justice sector due to unattractive salaries and low esprit de corps, deficient management of justice sector institutions, lack of legal education and training, and a sector that is far from being able to deliver adequate services to the public. Case backlogs are almost insurmountable, are not being resolved, and continue to grow unchecked. Courts do not have the necessary instruments for adequate case management.⁴¹ Justice systems are old fashioned and inaccessible due to excessive bureaucratic procedures, antiquated

³⁸ USAID. "USAID Democracy and Governance Assessment of Nigeria," (Washington, DC: USAID, December 2006), 13.

³⁹ BAOBAB for Women's Rights. <http://www.baobabwomen.org>. FIDA is Portuguese acronym for Federation of Women Lawyers. They are active all over the world and have offices all over Africa. For example: <http://www.fidakenya.org/> (Kenya); <http://www.wougnet.org/Profiles/fidau.html> (Uganda); <http://www.fidanigeria.org/aboutus.html> (Nigeria).

⁴⁰ *Mozambique I*, 13.

⁴¹ *Ibid.*, 19-20.

legislation and rigid formalism, causing severe delays in processing of cases. The investigation and preparation of cases in the criminal field is weak and takes too long.

Lack of harmonization and coordination in criminal prosecution, especially with respect to internal procedures of key institutions (courts, prosecutors, and police), is a major problem. Often, this lack of coordination in both procedure and practice leads to failure to collect or present admissible evidence necessary to support prosecution.

I. Judiciary

In virtually every country studied, the judiciary is the most neglected and the most under-funded of the three governmental branches. Despite years of donor programs focused on strengthening internal capacities of judiciaries across Africa, comparatively few sustainable improvements have resulted. Few judiciaries are capable of serving as an effective counterbalance to other branches, and some have proven incapable of confronting controversial executive actions. A clear case was the refusal – and inability – of the Kenyan judiciary to address issues arising from the disputed election of December 2007. Even worse, allegations of arbitrary and corrupt judicial decisions are common in many countries in the region. Another common problem is inadequate and delayed enforcement of decisions.

Many judicial systems continue to be plagued by staff shortages,⁴² delays and backlogs,⁴³ poor recordkeeping, alarmingly high numbers of pre-trial detainees, and cumbersome and inefficient processes and procedures. Access is difficult, both physically and procedurally. Hours of operation tend to be restricted and judges are not always present during operating hours. In general, judges and magistrates the world over are very conservative and can be deeply resistant to change; they are no different in Africa. Although there is an increased tendency to recognize the importance of improving the efficiency of judicial systems through training and modern techniques of court and case management, in very few instances have the courts adopted modern methods of court administration or case management beyond a few demonstration or pilot sites established with donor support. While procedures followed by judges and court staff derive from applicable codes, their interpretations sometimes differ, resulting in procedural differences from court to court. Lack of documented internal regulations and standard procedures were apparent in the countries visited in the field studies and in the literature.⁴⁴ These gaps not only present opportunities for corrupt practices and manipulation of case files (e.g., files and documents disappearing), but also complicate oversight, training, and transparency.

Some countries show a marked difference in performance, and perceptions of corruption, between judges assigned to upper and lower courts. For example, the upper echelons of the High Court and the Court of Appeal in Tanzania have a reputation for professionalism and impartiality, enjoy substantial respect and credibility from the public, and are widely regarded as relatively free from corruption. In contrast, the lower courts (regional magistrates courts and below) enjoy little public credibility, are starved of

⁴² Zainab Bangura. “Sierra Leone’s Courts and the Special Court” *Open Society Justice Initiatives, Human Rights and Justice Sector Reform in Africa: Contemporary Issues and Responses*. (February 2005), 55. The author reports that by 2002, Sierra Leone – a country of five million people – had only 15 magistrates and 18 judges. A magistrate court in Freetown, the capital city, faced 100 cases a day but could only hear about 20 and adjourned the rest.

⁴³ According to a UN Web site, in the Central African Republic, a civilian criminal trial has not taken place since 2005.

⁴⁴ US Department of Justice. “Diagnostic Assessment and Proposed Implementation Strategy: The Liberian Justice System,” (Washington, DC: USDOJ, 2005), 99, 106. For example, OPDAT’s 2005 assessment of Liberia cites the issue of cumbersome processes and the fact that while standard procedures have been developed, “most fail to follow them, resulting in incomplete case information systems” (106).

resources and perceived to be corrupt. Public opinion surveys in several regions underscore the public's distrust of lower-level judicial institutions, such as the magistracy.⁴⁵

More recently, several countries have set up separate Juvenile Courts and Family Courts or specialized sections within existing courts.⁴⁶

As a result of the spate of constitutional reforms in the 1980s to 1990s, most judiciaries across the region enjoy some degree of independence – at least on paper. While some are declared to be fully independent branches of government, others remain under the organizational hierarchy of the Ministry of Justice in the executive branch. In some countries, the judiciary is an independent branch, but control of its budget remains with the executive branch (as in Malawi). In most cases, judges play a role in the appointment and career processes (most frequently by nominating candidates to the executive for appointment or, at times, for parliamentary approval), but under some systems, judicial appointments are the preserve of the Minister of Justice or the President. Many countries with civil law-based systems have also established a Judicial Council (sometimes called a High Council of the Judiciary) to nominate judges, regulate discipline, manage court processes and, in theory, guarantee judicial impartiality. In Mali, however, the President chairs the Council, effectively obviating this latter guarantee.

2. Public Prosecutors

Public prosecutor offices, called *le Parquet Général* in French-based systems, form part of the Ministry of Justice. They are responsible for prosecuting crimes and directing criminal investigations carried out by police. The literature is largely silent on the subject of prosecutorial programs.⁴⁷ For this reason, findings and comments in this section are necessarily limited to discussion of issues raised during interviews conducted during field visits, and two documents authored by the US Department of Justice's (DOJ) OPDAT office during its 2005 assessment missions to Liberia.

In general, public prosecutors face similar problems as their judiciary counterparts, such as inadequate human and material resources, poor working conditions, high caseloads, and low salaries.⁴⁸

In Malawi, the Department of the Public Prosecutor (DPP) is under the jurisdiction of the Ministry of Justice. It oversees criminal prosecutions, as well as cases related to corruption, immigration, revenue, and police- prosecutors. A major problem in Malawi's justice sector is the lack of trained lawyers; as a result, the DPP has trouble attracting and retaining lawyers. The DPP should maintain a staff of 20 lawyers, but many leave the job after only a few months. In part, this is due to the conditions of service and relatively low salaries. For this reason, the DPP has maintained the practice of using police-prosecutors to investigate and prosecute minor offenses. Although interviews suggested a need for capacity building support, as well as in conducting self assessments,⁴⁹ the brief tenure of staff within the DPP complicates building institutional capacity. Rising criminality, as well as the increasingly

⁴⁵ ARD. *Democracy and Governance Assessment of Tanzania: Transitions from the Single-Party State*. (Washington, DC: November 2003). Referenced in CDIE Rule of Law Web site.

⁴⁶ South Africa and Malawi are examples of countries establishing such specialized courts or sections. South Africa has also created Sexual Offense Courts.

⁴⁷ The EU and UNDP have posted advisors within the Ministry of Justice in Malawi – the entity housing the prosecutors. Representatives of the governments of Denmark and Great Britain both indicated that their programs provide capacity-building and training assistance for prosecutors, as well.

⁴⁸ US Department of Justice. "Diagnostic Assessment and Proposed Implementation Strategy: The Liberian Justice System," (Washington, DC: USDOJ, 2005). According to OPDAT's 2005 assessment of Liberia, the average monthly salary for a prosecutor is US \$20.

⁴⁹ The donor community provides significant training and technical assistance to the MOJ and DPP in Malawi and in preparation to meet Compact status requirements (which were achieved during 2008), an OPDAT RLA focused on areas of anti-corruption, plea bargaining, and an assets declaration law.

complicated laws that address fraud and money laundering, render the problem of staff turnover more problematic. Often, the State loses cases because the judges or prosecutors are not well prepared or trained.

In Liberia, the prosecution services fall under the control of the Solicitor General, under the MOJ. All are appointed by the President. Called County Attorneys, one is assigned to each county, and four to the circuit courts. City Attorneys are assigned to Magistrate courts and Justice of the Peace courts.⁵⁰ A serious problem faced by prosecutors in Liberia is how cases are moved from police services to prosecution, resulting in routine violations of legal requirements to present detainees to the court within 48 hours of their arrest.⁵¹ Other recurrent problems surfaced during the assessments pertaining to inadequate training and technical expertise, poor recordkeeping and faulty or incomplete information on which to build cases to present to the courts.

3. Police-Prosecutors

The practice of using police-prosecutors to both investigate and prosecute minor crimes is a direct holdover from colonial rule in former British colonies⁵² and still exists in most former British colonies today. A major concern arising from this practice is that police control three of the four major aspects of investigative and adjudicative processes, i.e., arrest, prosecution, and imprisonment, thus weakening possibilities for checks and balances over how police exert their authority. The use of police-prosecutors is far more prevalent in rural areas than in larger cities, for the simple reason that most prosecutors are located in larger cities. In Malawi, the Police Commissioner estimated that approximately 85% of all criminal cases are handled by police-prosecutors. In most such countries, plans call for a gradual shift away from this practice. However, due to inadequate financial and human resources, it is unlikely to disappear in the near future.

4. Public Defenders

African governments have infrequently incorporated public defender functions into their formal sector institutions. Examples include Malawi, Djibouti, and Gabon, all of which have enjoyed some level of support by the donor community. The Legal Aid Department of Malawi was visited during the field study, and the problems and issues noted by its Director mirror problems reported in the literature. It has received some support from USAID, DFID, and the EU and is endowed with modest staff and funding, but is poorly equipped. It handles heavy caseloads and is becoming quickly overwhelmed by the rapidly increasing volume of cases. Delays and backlogs have been the inevitable result. In some countries, pursuant to law, State-supported indigent defense is limited to serious crimes or only murder cases, e.g., Botswana. Some countries are exceptional, such as Gabon, which apparently provides relatively rapid indigent defense when needed.⁵³ As with prosecutors, the limited number of attorneys in some African nations (most notably in Ethiopia and Malawi) hampers efforts at providing legal assistance to those who cannot afford the services of a private attorney.

For the vast majority of African countries, public defenders are simply not available from public sector institutions and can only be found through legal aid NGOs, many of which have some degree of external donor funding. Virtually every external donor that supports ROL programming incorporates some element of legal aid or access to justice. Unfortunately, but not surprisingly, most of these legal aid

⁵⁰ US Department of Justice. "Diagnostic Assessment and Proposed Implementation Strategy: The Liberian Justice System," (Washington, DC: USDOJ, 2005), 15.

⁵¹ *Ibid.*

⁵² Although there is now an Office of the Crown Prosecutor, police-prosecutors still exist in Great Britain.

⁵³ USDOS. "Gabon" *Country Reports on Human Rights Practices*. (Washington, DC: USDOS, March 2008).

programs have difficulty surviving after donor funding ceases. For example, a paralegal program in Malawi during the early 1990s disappeared after USAID support ended. Although few remember the program today, human rights groups in Malawi attribute concentrated and sustained donor efforts to support legal assistance projects with having motivated the government's decision to create a Legal Aid Department within the Ministry of Justice.

5. Police

In general, the police are attached to the Ministry of the Interior, Justice, or even Defense. They tend to be centrally managed and controlled, and depending on the size and wealth of the individual country, will incorporate various specialized units. As with their other justice institution counterparts, police likewise experience problems of low salaries, inadequate training, degraded facilities, little equipment and mobility, weak management, and little oversight.⁵⁴ Few police services have adequate capacity to support collection, analysis, and use of physical evidence, as opposed to the far more subjective reliance on witness testimony. In the few cases where there is a forensic laboratory, they are ill-equipped, few trained technicians are available, and general evidentiary collection practices of police fail to adhere to a uniformly applied chain-of-custody protocol.

Police fall into the category of the most repressive, brutal, and corrupt elements of the government of several sub-Saharan African countries. Allegations of abuses of authority and human rights abound. A recently published United Nations (UN) report about the DRC noted that during the first six months of 2007, 86% of reported human rights violations were committed by the army and police.⁵⁵ Security forces at times arrest individuals to extort money from their families or arrest and beat the relatives of those whom they seek to arrest.⁵⁶ Use of the police as a political tool of repression occurs in several African nations (among them Chad and Kenya), where there are frequent allegations of police arresting political dissenters, journalists and NGO staff. Perhaps the worst recent examples include Zimbabwe and Sudan.

Sources cite multiple instances of inappropriate police actions, a recent example being the police response to the outbreak of violence in Kenya following the 2007 elections, following which police are alleged to have been responsible for more than one-third of approximately 1,000 violent deaths. State Department fact sheets on individual country human rights situations cite the police of Nigeria, Kenya, and Benin as especially inept at handling mob violence.⁵⁷ In public surveys,⁵⁸ police are also consistently ranked as the most corrupt government entity in many African countries. This can be partly explained because police come into contact with citizens more frequently than other government officials, so it is far more likely that citizens surveyed have had a personal encounter with police than any other government entity (such as judges, prosecutors, etc.).

As with other justice sector institutions, the police continue to live out their colonial legacies. For the most part, policing structures emplaced by colonial leaders followed a constabulary or a *gendarmierie* force model. These forces tended to provide policing in rural sections of both Britain and France. Most

⁵⁴ With respect to the latter issue, two USG programs implemented through ICITAP provided technical assistance to local police forces in establishing accountability mechanisms. Beginning in the late 1990s, ICITAP provided support to the police of South Africa in the establishment of a Citizens' Complaints Directorate to focus, among other things, on the high number of deaths of detainees while in police custody. More recently, to assist the government of Malawi attain MCC Compact status, ICITAP supported creation of the Office of Internal Affairs within the Police.

⁵⁵ United Nations Organization Mission in DR Congo, <http://monuc.unmissions.org/Default.aspx>

⁵⁶ US Department of State. www.state.gov

⁵⁷ A 2001 INL/USAID/DOJ assessment of the Nigerian police revealed that not only were police untrained in modern techniques of dispersing crowds – and ill-equipped to do so – but the rather well-trained and equipped MoPol could only be deployed on authority of the head of police, and this only after the regular police lost control of the situation on the ground.

⁵⁸ Afrobarometer, "2003 survey of Democracy in Nigeria," *Briefing Paper no.53; GJLOS Survey*, 55.

significantly, however, these police forces carry military status,⁵⁹ and there is a fundamentally different societal impact between the role of a military force (that of serving and protecting the state) and a civilian police force (that of serving and protecting the public). In post-conflict Rwanda, a new civilian model police force created with substantial donor assistance has proven to be less corrupt and repressive, and is viewed more positively by the public. This suggests that change is possible.

There is debate on the best policing models to support governmental transition to democracy. For example, we have seen the evolution in policing Latin America from military to civilian-based models, emphasizing public service and community-based approaches. In Africa, the debate has recently centered on whether to consolidate policing services within the military. While interesting from a cost-saving standpoint, the need is for the more service-oriented model that breaks down current barriers between police and the communities they serve.⁶⁰

6. Prisons

The condition of prisons in most African countries is very dire. Grievous human rights abuses take place on a daily basis in prisons throughout the region. Facilities are dilapidated and there is often severe overcrowding, to which the huge number of pretrial detainees contribute. In Malawi, the head of Prison Services admitted that maximum prison capacity was 4,000 detainees, but the current prisoner population numbered in excess of 12,000. Similarly large numbers emerge from most other African nations as well. Recordkeeping is generally poor, and follow-up procedures provided under the law are frequently ignored. For the most part, these problems emerge from insufficient numbers of judges and prosecutors, and are further complicated by lack of transport to/from prisons.⁶¹

In Mozambique, prison overcrowding results from inadequate investigation and case handling combined with inefficient sentencing processes. A staggering 73% of prisoners have not had their cases heard, and some have been awaiting trial for several years; in some countries, such as Liberia, the pretrial detainee population may constitute the vast share of prisoners; in Monrovia, over 90% are awaiting trial. In addition, many prisoners serve unreasonably long sentences for petty crimes, sharing facilities with seasoned criminals. The majority of inmates are young men: two-thirds are under the age of 26.⁶² Interviewees in other countries suggested higher percentages. These percentages are not inconsistent with the pre-trial detention rates in Latin America.

In general, the majority of prisoners are young and male, most of whom are arrested on relatively minor charges. They tend to be from poor families, poorly educated and unemployed. This issue is the most significant contributing factor to the growing issues of at-risk, disaffected youth – that is, young men disproportionately likely to become repeat offenders, and to engage in gang and criminal activity. In the Sahel and in the Horn of Africa, this same segment of the population is also viewed as the most vulnerable to growing influence of violent extremist and Islamist groups.⁶³

Very few countries have implemented alternative sentencing to incarceration, such as Ethiopia's community service programs. Some countries' laws allow for bail, but those arrested most often cannot afford to pay the price. In the words of one interviewee in Malawi, bail is "not for the common man." The possibility of plea bargaining is a relatively new concept within the region, but is under serious consideration in several countries.

⁵⁹ Karina Marczuk. *Small Wars Journal*. www.swj.com (2007).

⁶⁰ Shannon Beebe. "Solutions Not Yet Sought: A Human Security Paradigm for 21st Century Africa" 2009. Article discusses the economic and organizational merits of combining military with police forces into a national guard-like organization.

⁶¹ A requirement under the civil-law based systems is for the investigative magistrate to visit prisoners within 48 hours of arrest.

⁶² *Mozambique I*, 22.

⁶³ For additional information, see USAID/Kenya's draft report: "Inclusion and Counter-Extremism Assessment," MSI, 2008.

C. Legal Education and Professional Associations

I. Legal Education

a. Law Schools

Formal legal educational systems did not exist in Africa prior to the colonial era. European colonization introduced concepts of formal legal training and representation; however, the vast majority of lawyers in Africa during colonial times were European or Asian, with a few African lawyers educated in European venues.⁶⁴ Formal African legal educational institutions came into being largely after the independence waves of the 1950s and 1960s. Countries with British colonial systems adopted a basic two-tiered legal education system that, with some variations, persists today. Admission to practice requires an academic degree from a university law faculty, normally followed by a period of practical legal training and bar certification or equivalent licensure.⁶⁵ By 1972, 43 African universities with law faculties had been established, and there are well over one hundred law faculties and many other law schools in operation today. Their geographic distribution is highly skewed, e.g., there are 21 law faculties in South Africa, 23 in Nigeria, two in Ghana, and some African countries with none.⁶⁶ In some countries, colleges offer degrees based on Shari'a law.

Legal education processes, conditions, and needs differ between regions and countries. Nonetheless, a common strength of African legal training is a broad exposure to multiple legal traditions and systems, including common law, civil law, religious, and customary systems. A shared weakness, however, is limited legal educational resources, including poorly equipped and small libraries, severe shortages of textbooks, law books and publications, inadequate information databases, research resources and curriculum.⁶⁷ In addition, legal education in sub-Saharan Africa generally suffers overcrowding, lack of faculty and few institutions, poor facilities, outdated curricula and limited course offerings, lack of practical legal skills training and clinics, and critical shortages of financial and other necessary resources.⁶⁸ The accessibility and caliber of legal training and education is a significant concern in many countries.⁶⁹

Serious regional deficiencies in the availability, quality, and facilities that provide legal education have negative implications for access to justice. There are shockingly severe shortages of lawyers in most countries in sub-Saharan Africa. South Africa has the highest number of law schools and lawyers by far: 17,500 in a country of 45 million inhabitants.⁷⁰ At the other end of the spectrum, in Niger, there are 77 lawyers in a population of 11 million.⁷¹ Ethiopia, a country of 67 million, has between 434 and 1,500

⁶⁴ Samuel Manteaw, "Legal Education in Africa: What Type of Lawyer Does Africa Need?" *McGeorge Law Review* v. 39 (2008), 915-916.

⁶⁵ *Ibid.*, page 924, FN 161. In the US, the term "law school" refers to university law departments. In the U.K. and Africa, it is different. "Law faculty" refers to the university setting where academic degrees are earned, and "law school" refers to professional training in a non-university setting, such as internships and bar courses.

⁶⁶ *Ibid.*, 917.

⁶⁷ Vicki Lawal, "Legal Research and Legal Education in Africa: the Challenge for Information Literacy" (Presented at the Starr Foundation Workshop, which took place at Cornell Law School, October 7-11, 2007).

⁶⁸ Samuel Manteaw, "Legal Education in Africa: What Type of Lawyer Does Africa Need?" *McGeorge Law Review* v. 39 (2008), 932-933.

⁶⁹ James Thuo Gathill, "What is the Future of Legal Training and Practice?" *Business Daily Africa*, 5 September 2008.

⁷⁰ Penal Reform International, "Access to Justice in Africa and Beyond: Making the Rule of Law a Reality," (Chicago: Northwestern University, 2007), 12, Table 1.

⁷¹ *Ibid.*

practicing lawyers,⁷² although servicing even the basic requirements of the country's federal constitutional system and structures would require more than 8,000 lawyers.⁷³ Liberia and Malawi also have a dearth of lawyers; in both cases, law school annual output (10-12 lawyers) does not meet need, and most of these young lawyers do not remain in public sector jobs beyond a few months following graduation.

Quite clearly, existing law schools and facilities are entirely inadequate to meet formal system requirements. Compounding the problem is that, in most countries, lawyers tend to aggregate in capital cities or urban centers, while the vast majority of the population is rural. Under these circumstances, it is not surprising that alternative and customary systems remain the default system.

LEGAL EDUCATION IN ETHIOPIA

In Ethiopia, the first law faculty was established in 1963 in what is now Addis Ababa University (AAU). AAU offers a law degree (L.L.B.) that requires a five-year course of study post-high school and a law diploma that requires four years of part-time evening study. A higher-level degree (L.L.M.) has recently been initiated. There are no specialized curricula within any of the degree offerings. As of 2004, AAU had 17 faculty and had awarded approximately 1200 L.L.B.s and 2000 law diplomas in its 40 years of existence. It graduates approximately 100 students annually with law degrees or diplomas. The Ethiopian Civil Service College, established in 1995, also includes a law faculty offering degree status. In the early 2000s, five regional law faculties had been established outside the capital in a program directed by the Ministry of Education; however, the quality of those law faculties and programs is questionable. There are also four private law schools in the country. Law school graduates are required to pass a bar examination to become licensed to practice, unless the new graduate provides five years of public service to the government in positions such as judge, prosecutor, or professor.⁷⁴

In general, the law school curriculum emphasizes theory over application, and lawyers tend to enter the profession poorly equipped to deal with the realities of legal practice.⁷⁵ Improvements in both the academic/theoretical aspects of legal education, as well as the practical skills side, are urgently needed throughout sub-Saharan Africa. Most African law faculties lack interactive and skills-oriented teaching programs.⁷⁶

b. Legal Clinics

Clinical legal education programs “are practical skills- and values-oriented interactive courses where senior law students engage in practical legal work in a participatory manner out of a legal clinic office and under supervision by a professor and a practicing lawyer.”⁷⁷ Most African law schools do not have clinical programs or requirements built into curricula, although that is changing. University clinical programs help not only to afford real life experience to law students in preparation for practice, but also serve to expand coverage of the formal system to indigent populations and augment limited State-funded

⁷² *Ibid*; World Bank, “Ethiopia: Legal and Judicial Sector Assessment,” (Washington, DC: World Bank, 2004) 28. The number of Ethiopian lawyers cannot be verified because there is no centralized registry. The Ethiopian Bar Association has 434 members, but it is a voluntary membership organization. Estimates of practicing lawyers range from 434, to 800-900, to 1,500.

⁷³ World Bank, “Ethiopia: Legal and Judicial Sector Assessment,” (Washington, DC: World Bank, 2004) 26.

⁷⁴ *Ibid.*, 33-36, 39.

⁷⁵ Samuel Manteaw, “Legal Education in Africa: What Type of Lawyer Does Africa Need?” *McGeorge Law Review* v. 39 (2008) 936-937; World Bank, “Ethiopia: Legal and Judicial Sector Assessment,” (Washington, DC: World Bank, 2004) ix.

⁷⁶ Open Society Justice Initiative, “African Sub-Program Overview” http://www.justiceinitiative.org/activities/lcd/cle/cle_africa?preprint=1 (accessed 16 February 2009).

⁷⁷ Open Society Justice Initiative, “Legal Aid and Community Empowerment Clinics Overview and Goals,” <http://www.justiceinitiative.org/activities/lcd/cle?preprint=1> (accessed 25 February 2009).

legal aid services. “Furthermore, in countries rich in cultural diversity, where customary law is often embedded in the legal system – as in many African countries – clinics provide an occasion to examine possible or actual clashes between different traditions – and involve students in their resolution.”⁷⁸

Clinical programs first became popular in the US in the 1960s when the Council on Legal Education for Professional Responsibility was created with financing from the Ford Foundation.⁷⁹ Latin American clinical legal education began shortly thereafter with a grant from the Ford Foundation, and has multiplied in recent years with the spread of justice reforms. African law schools also benefitted from Ford Foundation grants, albeit to a much lesser extent, despite increasing recognition that creation of legal clinics could provide law students with practical training on developing and presenting a case, while also addressing problems of access to justice by the poor and other vulnerable groups.⁸⁰

South Africa has been a pioneer in clinical legal education on the African continent. Law students at the University of Cape Town began the first law school clinic in 1972, and South Africa now operates over 21 legal clinics associated with university training programs.⁸¹ The South African Association of University Legal Aid Institutions provides accreditation to the university law clinics. The First All-African Clinical Legal Education Colloquium took place in South Africa in 2003 and led to the compilation of a manual on establishing and running university legal aid and community empowerment programs in Africa.⁸²

“South Africa has done more than perhaps any other country to wrestle with the problem of developing an affordable legal aid system that is accessible to all of its citizens.”⁸³ Over the past decade, South Africa has worked to combine the legal services of university clinics, paralegals and the Legal Aid Board into *justice centres*, providing basic legal information, legal advice, and information needed to access courts in both civil and criminal matters.⁸⁴ As of 2002, 40 justice centres were operational and 20 more were planned for 2003; the goal is eventually to have a justice centre within 100 kilometers of every village or town.⁸⁵

Some other countries have likewise begun to establish clinical training programs, many with the help of international assistance, such as the Open Society Justice Initiative’s Legal Aid and Community

⁷⁸ Open Society Justice Initiative, “Combining Learning and Legal Aid: CLE in Africa,” <http://justiceinitiative.org/activities/lcd/cle/durban2003?preprint=1> (accessed 16 February 2009).

⁷⁹ Samuel Manteaw. “Legal Education in Africa: What Type of Lawyer Does Africa Need?” *McGeorge Law Review* v. 39 (2008), 111.

⁸⁰ World Bank, “Ethiopia: Legal and Judicial Sector Assessment,” (Washington, DC: World Bank, 2004), Executive Summary.

⁸¹ Samuel Manteaw. “Legal Education in Africa: What Type of Lawyer Does Africa Need?” *McGeorge Law Review* v. 39 (2008) FN 369; Penal Reform International, “Access to Justice in Africa and Beyond: Making the Rule of Law a Reality,” (Chicago: Northwestern University, 2007) 74.

⁸² Open Society Justice Initiative, “Legal Aid and Community Empowerment Clinics Overview and Goals,” <http://www.justiceinitiative.org/activities/lcd/cle?preprint=1> (accessed February 16, 2009); Open Society Justice Initiative, “Combining Learning and Legal Aid: CLE in Africa,” <http://justiceinitiative.org/activities/lcd/cle/durban2003?preprint=1> (accessed 16 February 2009).

⁸³ Penal Reform International, *Access to Justice in Africa and Beyond: Making the Rule of Law a Reality*, (Chicago: Northwestern University, 2007), 16.

⁸⁴ Samuel Manteaw. “Legal Education in Africa: What Type of Lawyer Does Africa Need?” *McGeorge Law Review* v. 39 (2008); Open Society Justice Initiative, “Combining Learning and Legal Aid: CLE in Africa,” <http://justiceinitiative.org/activities/lcd/cle/durban2003?preprint=1> (accessed 16 February 2009).

⁸⁵ “Combining Learning and Legal Aid: CLE in Africa,” <http://justiceinitiative.org/activities/lcd/cle/durban2003?preprint=1> (accessed 16 February 2009).

Empowerment Clinics program. These include Kenya, Lesotho, Tanzania, Zimbabwe, Botswana, Ghana, Ethiopia, Uganda, Malawi, Namibia, Mozambique, Kenya, Sierra Leone, and Nigeria.⁸⁶

2. Legal Professional Associations

a. Bar Associations

Bar associations began to emerge across the continent after independence and along with the establishment of formal African legal educational institutions. Bar associations now exist in most countries, and in many countries have established Web sites. Bar associations in sub-Saharan Africa tend to be umbrella bodies for lawyers admitted to practice, drawing together various branches (either by region or state). In most cases, bar associations are supposed to play a self-regulating role over the legal profession with respect to professional and ethical standards, regulation, and discipline. Although the strength and effectiveness of disciplinary oversight roles vary, many are regarded as weak and ineffectual, and bar associations may often be viewed as political and protective of the legal profession. Others, however, have taken stronger interest in the promotion of legal reforms, professionalism, and expansion of accessible legal services. Some national bar associations receive support from international donors, e.g., Ethiopia's activities in continuing legal education, law reform and advocacy, and legal aid services are supported by the Canadian and Swedish bar associations and development agencies. While four Web sites (Malawi, Nigeria, Sierra Leone, and South Africa) included information about community service and education, others described the work of bar associations only in terms of efforts on behalf of their membership. Many countries also have specialized bar associations that pursue legal reform and representation of specific groups and interests; women's bar associations are prevalent throughout the region.

South Africa has several bar associations, at least five of which have established Web sites. The South African associations recognize their potential to serve as change agents in establishing a more just and equitable society. The Nigerian Bar Association (NBA) has a membership of 55,000 lawyers and is reputed to be the largest professional association in Africa. It has members in every sphere of practice, giving it a credible platform to be a change agent, an ideal to which it has committed since inception. The association is managed by the National Executive Committee, which is made up of national officers and representatives of all branches. State branches of the NBA exist in each of the 36 states and, in states with more than one judicial division, there is more than one branch. State branches enjoy considerable autonomy, but are generally answerable to the national office. The NBA, as well as bar associations in other countries, could play an important role in legal and judicial reform, although that depends largely on the composition, political leanings, and function of the different countries' associations.

Bar associations did not exist in Rwanda prior to the 1994 genocide. Soon after, the first bar association was established for the sole purpose of creating a pool of lawyers to represent indigent criminal defendants accused of genocide. It conducted this work in conjunction with *Avocats Sans Frontières* (Lawyers Without Borders). At that time, the single bar association was comprised of only 30 lawyers. Today, there are provincial chapters of the bar association throughout Rwanda. Over 300 lawyers are members, and currently they provide legal services to indigent clients in both civil and criminal cases, not only cases associated with the genocide.

The Ethiopian Bar Association is a voluntary membership organization participating in legal aid programs, legal education, law reform and legal research. This bar association – with 434 members as of 2004 – has been characterized as relatively weak, and is seen by many as far from politically

⁸⁶ Penal Reform International, "Access to Justice in Africa and Beyond: Making the Rule of Law a Reality," (Chicago: Northwestern University, 2007), 75, 111.

independent.⁸⁷ The Ethiopian Women Lawyers Association (EWLA) is another voluntary membership organization. Despite its voluntary nature, EWLA has a record of substantial and influential activism. As of 2004, the EWLA had 80 full members who were all female lawyers, and approximately 300 associates, including both women and men from other professions. Its main office is in Addis Ababa, and it has six branch offices and more than 60 standing committees, comprised mainly of volunteers, in different states. The EWLA works to provide legal aid for women, research and advice on law reform, and public education.⁸⁸

b. Other Professional Associations

In addition to generic bar associations, a substantial number and variety of other legal professional associations exist throughout the region and covers a wide range of interests and professional affiliations. These professional associations are of varying size, strength, and influence. Likewise, a variety of civil society organizations (CSOs) and coalitions have taken on distinct roles and levels of activism in promoting and protecting specific legal issues, such as individual and collective human rights.

Professional associations are often formed to represent the common interests of a particular segment of actors in the justice sector, such as prosecutors, judges, poverty law and legal aid lawyers, public defenders or criminal defense lawyers, commercial lawyers, arbitrators/mediators, and other specialized private attorney groups. Many countries in the region have lawyers associations, which function separately from formal bar associations. These independent, national groups exist in countries including Burkina Faso, Burundi, Cameroon, Guinea, Mali, Mozambique, Niger, and Madagascar. South Africa has a wide spectrum of specialized professional organizations, including the South Africa Judicial Officers Organization, the South African Law Reform Commission, the Corporate Lawyers Association, the Maritime Law Association, the Association of Arbitrators, the Black Lawyers Association, and so on. Such professional associations are diverse and multiplying throughout the region.

In Nigeria, a Legal Aid Council has existed since 1974. However, chronic understaffing and limited resources have severely restricted the effectiveness of this body. Several organizations, including the Open Society Institute, which operates the Reform of Legal Aid and Assistance Delivery, have attempted to strengthen the Legal Aid Council with modest results to date.

In Ghana, the Ghana Judicial Service and the National House of Chiefs have initiated a project that seeks to re-empower chiefs to settle domestic disputes. The Ghana Arbitration Center, Alternative Dispute Resolution Coalition-Ghana, and other private ADR service providers also resolve disputes, educate on and publicize ADR, and confront access to justice problems. In addition to Ghana and South Africa, there are arbitration and mediation centers throughout the region offering such services.

Professional associations are also formed to represent common interests or pursuits in particular areas of legal practice and protection. These tend to concentrate more on social goals and objectives outside the parameters of the members' professional interests. Examples include Lawyers for Human Rights, the National Association of Democratic Lawyers (both in South Africa), and many other associations advocating and protecting individual or collective rights and interests. The most notable example of this type of professional association is the expanding number of groups representing women. Women Lawyers' Associations and specialized women's bar associations exist in many sub-Saharan African countries. Some of these are associated with FIDA, although many are not FIDA affiliates, e.g. Women's Lawyers Associations in Mauritania, Ghana, Zimbabwe, and Lesotho. Other women's lawyer groups are linked to the African Women Lawyers Association (AWLA) as a regional umbrella entity working to

⁸⁷ World Bank, "Ethiopia: Legal and Judicial Sector Assessment," (Washington, DC: World Bank, 2004), 39-40.

⁸⁸ *Ibid.*

enhance the status of women and children in Africa. This network of AWLA affiliates and many other organizations focuses on protecting and promoting women and children's rights in matters including property ownership and inheritance, custody and child support, divorce and separation, domestic and gender-based violence, female genital mutilation, witness protection, etc. In Ghana and elsewhere, AWLA affiliates have promoted police training to respond better to complaints of domestic violence. Numerous CSOs and NGOs likewise concentrate primarily on protecting the legal rights of women.

D. Regional Institutions and Programs

Literature and interviews include frequent references to international and regional institutions and NGOs that work in ROL and human rights programming throughout the region. A list and brief summary of regional NGOs that emerged in the literature review is included as Annex 10. In this section, we highlight examples of such organizations, beginning with those that have at times worked directly with USAID support and funding. Some of the largest organizations, such as the African Union, include law-related topics as part of their mandate, but have not yet reached the implementation stage, and therefore are not included here.

Federación Internacional de Abogadas – FIDA broadly seeks to promote networking among African women lawyers and to enhance the status of African women and children. FIDA is a nonprofit, membership-based organization formed in 1988 with the following objectives:

- Strengthen networking between African women lawyers.
- Share information and to lobby for gender equality in Africa through legislative reform, public education and advocacy.
- Promote the principles of the United Nations, the Organization of African Unity and the African Commission on Human and Peoples' Rights (ACHPR).
- Enhance the legal status of women in Africa.

To achieve these objectives, the Association organizes specific activities aimed at providing public venues for discussing all matters affecting women and children in Africa, disseminating knowledge of laws on the continent and strengthening the institutional capacity of member organizations.⁸⁹

At a minimum, FIDA has programs or activities in Cameroon, Ethiopia, Kenya, Nigeria, Ghana, Lesotho, Liberia, and Mozambique. In Lesotho, FIDA's programs include development and implementation of a legal literacy project in the rural areas of Lesotho. It is the longest surviving NGO in the country, and was instrumental in passage of the 2003 Sexual Offenses Act, as well as Lesotho's ratification of laws beneficial to women's inheritance and pension rights.⁹⁰

International Commission of Jurists (ICJ) – The independence and accountability of judges and lawyers is a dominant theme in the ICJ's Africa Program. Counterterrorism is primarily an issue in East Africa, Kenya, and Zimbabwe – all of which have been identified as priority countries. In the early 2000s, ICJ had a large program in Africa, but the scope has been restricted recently, due principally to funding limitations and reduced donor support. At present, ICJ works in Burkina Faso, Chad, the DRC, Kenya, Madagascar, Niger, Nigeria, Senegal, Togo, Zambia, and Zimbabwe.

⁸⁹ Information obtained from various FIDA country pages.

⁹⁰ Chemonics, "The Women's Legal Rights Initiative, Women in Development Program, Final Report," (Washington, DC: USAID, 2007), 63. Referring to changes in the Labor Code and passage of a new Sexual Offences Act.

The ICJ supports projects focused on judicial reforms, independence, accountability, and effective governance. Its programs have also dealt with strengthening ROL, human rights, democracy, and access to justice. ICJ is in part funded by international donors, including USAID, and by private donors, such as the Ford Foundation.

The team met with ICJ in Kenya, which has received past support from USAID. ICJ supports the Freedom of Information law, currently pending consideration by the Assembly, and has compiled 42 recommendations to overcome executive dominance and to establish the independence of the judiciary. ICJ's judiciary program researches and disseminates information and public perceptions of judicial independence, effectiveness, and corruption, and develops model codes of conduct for judges, magistrates and court reporters. The Commission also designed activities to address priority concerns of the public. It has trained media personnel to adequately report court proceedings.⁹¹ Through the media, it has succeeded in pushing judicial reforms to the front pages of the newspapers, advocating for constitutional review. As a result of its efforts, over 80% of reform proposals on the judiciary were incorporated in the draft Constitution.

The African Commission on Human and Peoples' Rights – The ACHPR is a quasi-judicial body responsible for promoting and protecting individual and collective human rights throughout the African continent, as well as interpreting the African Charter on Human and Peoples' Rights and considering individual complaints of violations of the Charter. There are 11 member countries from sub-Saharan Africa. The Commission promotes the value of regional mechanisms, especially with respect to developing and deepening norms and standards in the justice sector. The ACHPR was established in 1981. While original plans called for creation of a regional human rights court, the Commission's principal role has been that of overseeing implementation of rights in countries throughout the region. The ACHPR has served as a model for establishment of other regional and sub-regional judicial and accountability mechanisms and courts. The courts fall into three broad types, representing (1) regional economic communities in Africa; (2) the African Court on Human and Peoples' Rights; and (3) the Court of Justice of the African Union by the leaders of Africa, to decide on cases arising from the operation of the Constitutive Act of the African Union. The existence of these regional courts increases mechanisms for holding African governments accountable.⁹²

The Southern African Development Community (SADC) – is an intergovernmental institution headquartered in Gaborone, Botswana. Comprised of 21 states, SADC recently approved a Regional Indicative Strategic Development Plan to achieve long-term goals, focusing on a number of priority intervention areas. Among the selected priorities are policy and legislative frameworks and resources for HIV/AIDS, and gender equality. Specific interventions in the latter area focus on women's human and legal rights, gender mainstreaming, access to and control of resources, and access to key political and decision making positions. Strategies include accelerating the development of explicit gender policies, mainstreaming gender into SADC policies, and adopting women's empowerment policies and strategies.

The Southern African Judges Commission (SAJC) – is an association of Chief Justices of the Southern African region established to facilitate, among other things, closer cooperation and liaison among judges, Chief Justices in particular. The principal objectives are to promote:

1. contact and cooperation among the courts in the southern African region;
2. ROL, democracy, and independence of the courts;

⁹¹ Kenya International Commission of Jurists - Kenya. <http://www.icj-kenya.org>.

⁹² Laure-Hélène Piron, "Justice Sector Reform in Africa," *Open Society Justice Initiatives*, Human Rights and Justice Sector Reform in Africa: Contemporary Issues and Responses, (February 2005), 2; Chidi Anselm Odinkalu, "Regional Courts," *Open Society Justice Initiatives*, Human Rights and Justice Sector Reform in Africa: Contemporary Issues and Responses, (February 2005), 45-46.

3. welfare and dignity of judges in the member countries;
4. assistance to courts and to promote cooperation among judicial training institutions; and
5. publication and dissemination of judgments of the superior courts and use of information technology.

The Southern African Regional Police Chiefs Cooperation Organization – is a sub-regional bureau of INTERPOL established in 1997 to develop effective regional crime control strategies and share information. Principal objectives include strengthening regional law enforcement strategies, dissemination of information, improving management of criminal records, and formulating regional training policies and strategies.

E. Overarching Themes

I. Political Will

Political will is a critical element for reform and the sustainability of reform. The stark absence of political will for ROL reform in many African nations is a significant challenge to donor programs, especially to programs that focus on judicial independence and the judicial branch as a check on executive power. Even modest programs, however, may run up against institutional barriers. Positive impacts may quickly evaporate once donor assistance ceases. This dissolution can sometimes be attributed to poor program design, but is also often due to the lack of political consensus on the nature and pace of justice sector reform. Lack of political will is frequently reflected by the host government’s failure to allocate sufficient funding to perpetuate achievements resulting from donor support. However, lack of political will to engage in substantive reform (i.e., reform that leads to positive and sustainable change) does not always cause local governments to reject donor assistance. Quite the contrary, most African governments are willing to accept donor help for justice sector institutions, but highest on their list of needs are tangible forms of assistance, such as equipment, vehicles, rehabilitation of buildings, study tours and other types of programs directed more toward modernization than actual systemic reform.

The dual problems of low political will and lack of consensus are well-recognized by donors, who have engaged in various types of consensus-building approaches and projects to strengthen local buy-in. For the most part, donors have understood that building political will requires a broad programmatic focus incorporating all sectors likely to have a collective impact on effecting or preventing reform. This approach most commonly translates into programs that address formal sector justice institutions, but that also include activities to strengthen the legislature, enhance judicial independence, strengthen decentralization, build citizen awareness, promote advocacy, and improve the watchdog role of the media. In some cases, donor approaches have favored pilot or demonstration programs located at regional or district levels – outside of the capital city – to foster improved methods of interagency coordination between local criminal justice agencies.⁹³ At the same time, as noted elsewhere in this document, a continuing donor presence significantly contributes to maintaining focus on reform needs.

2. Corruption

Corruption is a crippling problem throughout Africa and it is one that has a sharp impact on the prospects for deepening democracy. Afrobarometer’s *Working Paper #86*, compiling survey results across 18 sub-Saharan countries, indicates that the poor feel so victimized by corruption that they have lost interest in

⁹³ Danish Ministry of Foreign Affairs. “Evaluation of Development Cooperation between Mozambique and Denmark, 1992 - 2006,” ([Copenhagen: Danida](#), 2008) 23. (Henceforth, Mozambique II).

politics. Resignation diminishes their already limited capacity to make their voices heard in decision making processes and contributes to the acceptance and perpetuation of corruption.⁹⁴

The attendant problem of impunity for those who engage in corrupt practices is equally widespread. Indeed, the negative effects of corruption are felt in every country of the region, in every institution, and in every sector of society. The ill effects have not escaped justice sector institutions. Several USAID reports have concluded that the key problem in the judiciary is corruption.⁹⁵ Corruption is a major impediment to economic and social progress, but is especially important in ROL programming because of the judiciary's role in combating and penalizing corruption in other sectors: "The judiciary is key in relation to combating corruption and that is why corruption in the justice sector institutions is even worse than in other state institutions..."⁹⁶

Multiple anti-corruption programs, both domestic and donor-supported, are in place, although without substantial success to date. New laws have been enacted to both detect and curb corruption, among them the Corruption Act of 1995 in Malawi, freedom of information (pending in Kenya and Malawi) and asset declarations laws. Numerous countries have established Anti-corruption Commissions that enjoy considerable donor funding and technical support, but carry the potential to create parallel institutions that could slow or detract from other justice sector efforts. In Malawi, Commission interviews revealed a broad public awareness and outreach program, and a tripling in the number of prosecutors during the past year of operation.⁹⁷ In Zambia, a similar Commission was formed to prevent administrative corruption and foster adherence to the national anti-corruption strategy.⁹⁸

In some countries, donors have decided to focus on anti-corruption interventions as a precursor (if not an articulated prerequisite) for supporting broader ROL programs. For example, the UN, the World Bank, the government of Sweden, and the US Department of State (DOS) adopted this stance with respect to Benin. In other countries, such as Zimbabwe and, previously, South Africa, anti-corruption sanctions have been applied by foreign governments.

A lack of documented and uniform standard operating procedures or training materials complicates both detection and oversight of corruption within justice sector institutions, as found in Malawi. Indeed, even if there are reasonably well-functioning oversight bodies, it is exceedingly difficult to hold individual employees accountable in the absence of documented standards. Moreover, without specific performance measures against which to measure individual performance, it is difficult to implement and apply periodic compliance reviews that might detect patterns of inappropriate behavior.

3. Role of Civil Society

Notwithstanding the explosive growth of the civil society sector in virtually all African countries, the ability of civil society to successfully advocate for strengthening ROL, improving human rights, and promoting better governance has had mixed results in sub-Saharan Africa. While the fall of Apartheid in South Africa represents a successful and positive illustration of the power of citizens uniting to force

⁹⁴ Mireille Razafindrakoto and Francois Roubaud, "Corruption, Institutional discredit, Exclusion of the Poor: a poverty trap," *Afrobarometer*, Working Paper no. 86, (May 2007), document abstract, iii.

⁹⁵ USAID, "Anti-Corruption Strategy," (Washington, DC: USAID, 2005); USAID, "Anti-Corruption Assessment," (Washington, DC: 2007); USAID, "Rapid Anti-corruption Assessment Techniques for USAID/Africa," (Washington, DC: USAID, 2007). All three documents make this point repeatedly.

⁹⁶ *Ibid.*

⁹⁷ The interview also highlighted an interesting new approach adopted by the investigative unit of the commission. Rather than assigning cases to individual investigators, they assign cases to investigative teams, thus enhancing not only internal sharing of information and knowledge, but also closing opportunities for staff to engage in corrupt practices.

⁹⁸ Many of MCC's Threshold programs in the region have incorporated assistance in the establishment and operation of such Commissions.

change with limited violence, similar efforts have failed in countries such as Ethiopia, Nigeria and, until recently, Zimbabwe. Technical, financial, and diplomatic support from the international community has facilitated, but never guaranteed, success.

Many NGOs and CSOs in sub-Saharan Africa address justice issues in the context of recurrent regional problems, such as human rights, women's rights, and general legal rights and awareness programs. For example, the Human Rights Consultative Committee in Malawi includes approximately 85 CSOs, a number of which support programs promoting women and children's rights, as well as good governance. Civil society initiatives frequently offer legal empowerment training and workshops at grassroots levels, paralegal assistance, and legal rights and general civic education. Other efforts include a prison watch program in Liberia, court monitoring programs in Nigeria, and numerous programs supporting new or amended legislation, such as family laws, domestic violence laws, and laws promoting transparency and access to public information. Media assistance programs often incorporate components to expand access to public information and strengthen the role of the media as an advocate for change.

Among the most successful efforts have been those focused on mobilizing strong existing constituencies in support of women's rights and interests, including critical issues of property ownership and inheritance, family and domestic laws, and combating gender-based violence and female genital mutilation. Some countries have demonstrated the potential for positive change in response to civil society demand. For example, women in Djibouti enjoy a higher public status than in many other Islamic countries. In 2002, following national debate, Djibouti enacted a new Family Law expanding protection of women and children, unifying legal treatment of all women, and replacing *Shari'a*. The government is leading efforts to stop abusive traditional practices, including female genital mutilation. However, women's rights and family planning continue to face difficult challenges, many stemming from acute poverty in both rural and urban areas.

Mobilized constituencies with common interests, such as women's movements, can provide a strong foundation for pressuring justice sector change and improved laws and enforcement. Many of the successful civil society efforts in other regions, such as Latin America, have built off of strong existing groups that have recognized the potential value of ROL and justice reform to advance and protect their own particular interests, e.g., women's groups, media, environmentalists, business and trade associations, unions, etc. As such, CSOs and NGOs organized around common interests not tied strictly or solely to legal reforms *per se* can become solid partners in creating demand for change and political will for reform.

There are very few examples of public-private partnerships in the region directed to justice sector issues, but one such venture is worth highlighting. Business against Crime South Africa (BACSA) was established in 1996 in response to a call from then-President Mandela for the business community to become involved in the fight against crime. Among other objectives, the group seeks to deploy appropriate business skills and processes to relevant government departments, assist in implementing programs to combat crime, and to mobilize businesses to support crime prevention efforts.⁹⁹

Despite some tangible and encouraging progress, at present, most CSO/NGO efforts remain in an embryonic stage and rely heavily on donor funding and support. Moreover, although they have achieved moderate success in creating public awareness of legal rights, they have not yet become strong or effective advocates to mobilize citizen demand for reform. To some degree, this weakness can be attributed to government attempts to stifle such efforts. Perhaps more significant, however, is the narrow focus and often limited role of many African civil society programs and actors. CSOs and NGOs concentrate substantially on local or community-level efforts and assistance, but for the most part have

⁹⁹ Business Against Crime South Africa home page: www.bac.co.za/content.asp?PageID=232

not developed strong networking and collaborative mechanisms to become national or regional advocates for improved legal protections and policy reforms. With some exceptions, they have not yet learned to band together into effective networks and leverage individual efforts into collective programs that pressure for changes in the legal system.

4. Access to Justice

Access to justice is an enormous problem with complex dimensions throughout sub-Saharan Africa. In general terms, access to justice refers broadly to the existence and availability of justice institutions, fair laws and procedures, law enforcement, legal education and awareness of rights, and effective and just remedies and resolution of conflicts and other legal matters in accordance with constitutional guarantees. However, in sub-Saharan Africa, neither “access” nor “justice” is easily defined or attainable in practice. Justice might be sought through the formal State system, with its goals of punishment, restoration, and deterrence, or through customary or traditional justice systems, which focus primarily on restorative justice and maintaining community harmony. Both systems suffer serious flaws and shortcomings; both have their relative merits. The nature of the shortcomings and merits varies, depending on the parties, context, and the matter at issue.

Formal systems are often weak and inaccessible, especially to poor and rural populations. By and large, the formal justice system does not extend into much of rural Africa and has little presence other than in sizeable municipalities. Courts are situated far from where much of the rural population lives, and a person may have to leave his or her family and fields to travel great distances to reach the closest court. “Very few courts have the resources or ability to operate on circuits, and therefore cannot effectively move closer to the populations they serve.”¹⁰⁰ Poor people may never have traveled outside their village, have little or no education, and minimal or inaccurate awareness of legal rights or systems. “[T]he poor often first learn about a legal right under stressful circumstances, such as death in the family, land expropriation, job loss, or natural disaster.”¹⁰¹ Marginalized populations thus face disadvantages and obstacles that block even basic legal awareness, empowerment, and access to justice. Other potential barriers include court costs, legal fees, long distances to tribunals and service providers, length and delay of proceedings, language differences, illiteracy, differing views of justice, lack of information or awareness of rights, perceptions of bias, lack of confidence in formal systems, few and inadequate court facilities, lack of training, insufficient court personnel, and other economic, physical, and social hardships.

As a result of these challenges, the vast majority of Africans, especially outside urban centers, seek to resolve disputes through traditional justice systems. Customary systems are undoubtedly more accessible in terms of distance, language, cost, time consumed, simplicity, and familiarity. Despite that advantage, they often demonstrate serious problems of discrimination and constitutional and human rights violations.¹⁰² The effects of such discrimination and other legal violations are suffered mainly by vulnerable and marginalized groups, such as women, children, ethnic and religious minorities, the disabled, and socially stigmatized. In these forums, such groups in particular “suffer the disadvantage of

¹⁰⁰ World Bank, “Ethiopia: Legal and Judicial Sector Assessment,” (Washington, DC: World Bank, 2004), 29.

¹⁰¹ ARD, “Legal Empowerment of the Poor: from concepts to assessment,” (Washington, DC: USAID, 2007), 17.

¹⁰² Penal Reform International, “Access to Justice in Africa and Beyond: Making the Rule of Law a Reality” (Chicago: Northwestern University, 2007), 18-19. “[T]here are serious problem with these traditional fora; they do not represent a panacea, and one should be cautious of romanticizing the picture and harking back to some pre-colonial ‘golden age’ as has been attempted in some countries.... They are susceptible to local politics, corrupt practices, and a tendency to maintain the status quo (particularly where women and young persons are concerned). In the absence of formal state justice agencies... they can, and do, become ‘judge, jury, and executioner.’ Many countries in sub-Saharan Africa commonly report incidents of mob or popular justice.”

bias caused by entrenched values that are presented as fair because they are customary.”¹⁰³ Although such discriminatory practices are increasingly outlawed in theory, the underlying attitudes, beliefs, root causes, and consequences remain largely unaltered.¹⁰⁴

Ideally, fair and accessible traditional systems should supplement, not supplant, the formal justice sector. Jurisdiction should be determined by the nature of the cause, the parties, and the interests of the State. Strengthening or expanding the jurisdiction of customary systems could potentially limit access to the formal justice sector by marginalized groups seeking an outlet from traditional authorities and discriminatory practices.¹⁰⁵ With this in mind, some donors have recently explored approaches to development work with customary systems and “windows of opportunity for those who are interested in learning how to work on legal reform with traditional authorities.”¹⁰⁶

Women – especially poor rural women – are by far the most marginalized and vulnerable citizens of African nations. Discriminatory laws and practices with respect to women are legion. Despite recent enactment of new constitutional provisions and new laws¹⁰⁷ to enhance women’s rights, extend human rights protections, and protect their rights in issues pertaining to inheritance, domestic violence, child custody, and other marriage-related issues, the situation of most African women has changed little. Considerable social pressures discourage change. While some improvements have been seen, there is considerable public apathy in addressing issues that primarily affect women, and they remain the most exposed segment of society, especially when seeking relief from domestic violence and abuse. Women tend to be wary of reporting crimes for fear of sexual harassment or abuse by the police.

A variety of mechanisms have been used to increase access to justice and provide broader legal assistance services in Africa, primarily to indigent populations. Some of the methods employed in South Africa, as well as other countries, include: encouraging donation of pro bono legal services from private lawyers and state-funded referrals to private lawyers, setting up legal aid internships for young lawyers in rural law firms, providing state-funded legal aid clinics (with universities and law schools) and public defender programs, establishing paralegal advice offices and service networks, and creating state-funded “justice centres.”¹⁰⁸

Although primarily applicable to urban areas, some of these approaches have been used successfully in rural areas as well, e.g., the paralegal service networks in Rwanda. Of particular note are the “justice centres” that have been established successfully in South Africa to provide a full range of legal and paralegal assistance to indigent clients in both civil and criminal matters. “The most effective legal aid service models for consumers are those that provide them with a ‘one-stop shop’ instead of being sent from pillar to post to obtain assistance.”¹⁰⁹ These centers are state-funded and combine lawyers, public defenders, paralegals, interns, and assistants under a single roof. A Danish International Development Agency (Danida) program introduced a similar model in Mozambique, creating “justice palaces” with

¹⁰³ Wilfried Scharf, et al., “Access to Justice for the Poor of Malawi?” (Washington, DC: World Bank, 2002), 40.

¹⁰⁴ Penal Reform International, “Access to Justice in sub-Saharan Africa: the role of traditional and informal justice systems” (London: PRI, 2002), 3.

¹⁰⁵ This issue has arisen at times in the context of indigenous tribunals in Latin America. For example, women seeking justice through formal court systems have been sent back to their communities to indigenous tribunals, where they are more likely to receive discriminatory treatment.

¹⁰⁶ Markus Weilenmann, “Legal Pluralism: A New Challenge for Development Agencies,” in *Access to Justice in Africa and Beyond* (Chicago: Northwestern University, 2007), 87-93.

¹⁰⁷ Such as the Family Code enacted in Benin in 2004.

¹⁰⁸ David McQuoid-Mason, “The Supply Side: the Role of Private Lawyers and Salaried Lawyers in the Provision of Legal Aid – Some Lessons from South Africa” (Presented at to the Lilongwe Conference on Legal Aid, November 2004).

¹⁰⁹ *Ibid.*, 7.

space for courts, prosecutors, defense, and police to consolidate services and increase capacity.¹¹⁰ These centers function well in larger cities, but are generally not as cost effective in smaller rural areas, where there is insufficient business to justify the expense. In those areas, a combination of legal assistance methods might be more feasible.

In Latin America, several countries have received USAID support in creating Justice Houses (*Casas de Justicia*) that serve local needs. These Justice Houses often operate in marginalized, conflictive neighborhoods to provide rapid peaceful solutions to everyday disputes, such as child support/custody issues, domestic violence, property disputes, misdemeanors, personal injuries, and administrative matters. They vary in design, but tend to incorporate a mix of prosecutors, public defenders, police, forensic medicine, document registration units, legal aid, social workers, psychologists, and mediation/conciliation services. Where successful, Justice Houses have helped to increase access to justice, restore public confidence in State institutions and legitimize the ROL at the community level, as well as promote conflict prevention, ADR, community outreach and education. These Justice Houses have evolved distinctly over years in various Latin American countries and could be considered, along with African models, for adaptation to the African context.

5. Land Ownership and Use

Attention to dispute resolution issues relating to land and access to water is essential in sub-Saharan Africa. Repeatedly, access to land has proven to be a central source of conflict. The history of locally owned land having been expropriated by colonists and then acquired by elites at independence fuels resentment and violence over injustice. In this regard, Africa is not dissimilar to other regions of the world where we have seen severe inequalities in land distribution and tenure lead to violent conflict, e.g., the revolutionary movement against the government in El Salvador, which ended with the 1992 Peace Accords. In Rwanda, the scarcity of land in the rural areas is cited as a factor leading to the genocide in 1994.¹¹¹ In Sierra Leone, one of the reasons that young men were drawn to the Revolutionary United Front (RUF) was the land tenure system that conferred power over land exclusively to elder men.¹¹² In the Kivu region of eastern Congo, conflict resulted from land grabbing during the Mobutu regime.¹¹³ The conflict currently raging in Darfur results at least in part from the breakdown of the symbiosis relating to land use that formerly existed between farmers and nomads.¹¹⁴ The outbreak of conflict also has a devastating influence on land, property, and housing, rendering negotiation of peace settlements highly challenging.

Tools enabling resolution through formal courts or even customary systems are few, due principally to the absence of the types of titles and cadastral records that commonly provide the basis for dispute resolution. Recent research has shown that less than one per cent of the continent has been subjected to cadastral surveys.¹¹⁵

Inadequate records prevent formal systems from resolving land disputes, and use of customary law in this context is laden with problems of its own. “[C]ustomary systems are extremely complex and varied, and analogies to Western legal traditions tend to distort their very nature.”¹¹⁶ Customary practices relating to

¹¹⁰ *Mozambique II*, 58.

¹¹¹ Agnès Hurwitz and Reyko Huang, eds., “Civil War and the Rule of Law: Security, Development and the Rule of Law,” (Boulder, CO: Lynne Rienner Publishers, 2008), 195.

¹¹² *Ibid.*

¹¹³ *Ibid.*, 196.

¹¹⁴ *Ibid.*, 195.

¹¹⁵ *Ibid.*, 197.

¹¹⁶ *Ibid.*, 198.

property, like all customary practices, are not static; property rights are determined by effective land use rather than anything akin to title or possession in the Western sense. Moreover, customary practices relating to land use and tenure tend to discriminate against vulnerable groups, such as women and children; this problem has been exacerbated by the spread of HIV/AIDS.

A myriad of strategies for dealing with these problems has been created and tried in different contexts with varying degrees of success. Use of Western style courts and land law can serve to resolve disputes where there is sufficient institutional and human capacity, but this approach is limited by low capacity and a non-existent cadastral system. Customary practices in land disputes likewise face a host of problems, as noted above. A recent approach, referred to as “communitization,” is being tried as an alternative. It involves moving from customary-based rights to “community based rights and administration.” Although it is too early to predict the outcome of this strategy, similar experiments in other contexts do not bode well for its success.¹¹⁷

Land disputes often involve human rights challenges. Forced displacements, loss of property due to conflict, deportations, secondary occupation, and the rights of returning internally displaced persons and refugees once violence ends all raise nearly intractable issues. The absence or unavailability of land registration records greatly complicates this process. In some cases, resolving land ownership disputes has entailed the use of specialized land courts such as the Land Claims Court in South Africa, and in other cases community based and customary ADR methods that rely on mediation and arbitration. In post-conflict territories administered by the UN, such as Bosnia, Kosovo, and East Timor, Property Claims Commissions have been established for this purpose.

Several discrete strategies have been tried at the micro level. For example, women’s groups in Liberia have secured the passage of a law preventing gender discrimination in customary practices. In order to avoid gender discrimination, property that was held customarily by a couple has been formalized through joint titling, giving both spouses equal rights to the property. In Angola and Mozambique, Oxfam has designed programs to demarcate and title customary common property. Land reformers in Mozambique have used an approach of capacity building and participation in the development of a land law specifically tailored to the problems in that country. The effort involved consultations with over 200 NGOs and 50,000 individuals.

6. HIV/AIDS

The growing prevalence of HIV/AIDS throughout sub-Saharan Africa has rendered it among the most serious of challenges facing the sub-continent today. Statistics tell a dire story, with this region alone reporting approximately 60% of all AIDS-related deaths worldwide. AIDS is now the leading cause of death in Africa, overtaking malaria as the continent’s main killer disease. Principally because of AIDS, life expectancy in sub-Saharan Africa will decline from 59 to 49 years of age between 2005 and 2010.

The battle against HIV/AIDS lies squarely at the intersection between “emergency response” and “development intervention,” making it one of the most difficult policy and program issues facing national and local governments and the international community.¹¹⁸ Dealing with HIV/AIDS is no longer the sole purview of the medical community, but one that now includes local governments, NGOs and international donors alike. Multi-sectoral strategies are required to address it, and considerable efforts have been centered on educating the public about the causes of infection. While throughout the 1990s, efforts focused on the impact of the epidemic and how to prevent its spread, over the past decade increasing importance has been placed on two significant governance issues: discrimination against victims, and

¹¹⁷ *Ibid.*

¹¹⁸ James Putzel, “Institutionalising an Emergency Response: HIV/AIDS and Governance in Uganda and Senegal,” (London: DFID, 2003), iii and 11.

legal rights of victims' families. Health is a guaranteed right in many constitutions of the region, and a few countries have responded with legislation,¹¹⁹ but many with HIV and AIDS cannot obtain care. Some victims experience considerable workplace and social discrimination. In some countries, most prominently South Africa, the debate continues not only over the government and legal systems' roles with respect to protecting the rights of those with the disease and those left behind. The epidemic has also shed light on the vulnerable position of women in Africa with respect to their rights to own or inherit property, their rights to support when widowed, their right to choose partners freely, and their protection in the face of male violence. While these problems are not uniquely associated with HIV/AIDS, the rising death rate of relatively young males has magnified them considerably. Widows with families may lose their property altogether, or be placed at the mercy of male relatives who, under many current legal regimes, have priority entitlements to property inheritance over the widow or children.

IV. KEY FINDINGS RELATED TO DONOR PROGRAMS AND PROGRAMMING APPROACHES

A. Operational Context

We have traced in other parts of this report the profound impact of colonial legacies on the development of patterns and modes of governance throughout the continent. Here we describe in broad terms donor support to ROL, and DG more generally, in sub-Saharan Africa, and examine the details of select programs, approaches, and impacts.

Early donor-supported justice reform programs, generally initiated during the 1960s and 1970s, focused on legal education. By the late 1980s and early 1990s, after the Cold War, donor support for ROL programs began in earnest, with many donors providing support for what we have earlier described as the second wave of constitutional reforms. Donors began to give high priority to activities strengthening the judiciary because of its critical role in balancing executive power, combating corruption, and confronting key issues (human rights, trafficking, political freedoms, property rights, etc.).¹²⁰ USAID looked at ROL programming in Africa through a “democratization” lens, inherited from its work in Latin America, and attempted to strengthen judicial independence in the face of overpowering executives and to provide assistance in drafting democratic constitutions. While constitution drafting may not have been a particularly onerous task, trying to balance the executive by strengthening other branches of government proved daunting. This was perhaps the most difficult area of ROL reform.

The 1990s saw the rise in importance of a new concept in aid – *governance* – and a concern for building effective state institutions. ROL was now seen as essential for establishing a stable, predictable environment conforming to formal rules. Structural reforms and reorganizations also characterized this period. For example, The World Bank engaged in law reform in the economic and commercial areas to foster favorable legal environments for foreign investment. By 2000, the World Bank acknowledged that legal reform had become a priority in many African countries, with development assistance focused on increasing effectiveness, including improving physical infrastructure, supporting legal and judicial training, making legal information accessible, and upgrading management systems in ministries.¹²¹

¹¹⁹ Charles Becker, “Law, Ethics and AIDS in Sub-Saharan Africa Senegal as a Case Study,” in *The HIV/AIDS Epidemic in Sub-Saharan Africa in a Historical Perspective*, eds Philippe Denis and Charles Becker, (Online Edition, October 2006), 207-218. See, e.g., Senegal, where the National Committee for the Prevention of AIDS (CNPPS) was formed to prepare the legislative and statutory measures for the prevention of AIDS, among other tasks.

¹²⁰ MSI, “Democracy and Governance Assessment- USAID Southern Africa,” (Washington, DC: USAID, 2008), 36.

¹²¹ *Ibid.*, 5-6.

The 1994 genocide in Rwanda marked a turning point in ROL programming in Africa, both in size and content. The sheer scale of assistance and the range of international and bilateral donors involved multiplied in the face of the wholesale destruction of the country's justice system and the urgent need to commence genocide trials. Pooling mechanisms were used – the UNDP set up a Trust Fund, and the European Commission and others provided assistance to international NGOs specializing in legal, judicial, and penal reform (e.g., *Avocats sans Frontières*, *Réseau des Citoyens*, Penal Reform International, and the Danish Centre for Human Rights). ROL programs in Rwanda ranged from building courthouses, improving prison conditions, and preparing genocide case files, to establishing a bar association, training a paralegal corps to work with the Ministry of Justice, and reforming the police. These new approaches incorporated support for domestic CSOs to demand better justice, monitor human rights, and provide legal assistance. Elsewhere in the region, Ford Foundation grantees in South Africa undertook public interest litigation, exploiting loopholes in the apartheid system. These groups later played a major role in creating the country's new constitutional structure and have since established networks to make legal services more accessible.¹²²

The overall political influence of donors in sub-Saharan Africa has been substantial, stemming principally from the enormous annual financial investments in the region. As seen in both the Kenya and Nigeria country reports, attached as Annexes 4 and 6, host country government leaders listen to donors. The donors can make demands that political leaders are loathe to meet; they can be insistent, but shifting priorities, economic considerations, and geopolitical concerns often make it difficult for the USG and other donors to maintain a consistently tough stance. The donor community also does not often act in unison, even when doing so might increase its already formidable influence.

The very slow pace of progress, considerable backsliding, corruption, and other endemic political and societal issues have caused several donors to review actual program benefits, reconsider design and implementation, and reevaluate continued engagement in this sector. There is little consensus on what is considered a successful donor approach and programmatic outcome. From this review, the definition of “success” falls into two categories. The first is the degree to which the implementer achieves the stated performance objectives and meets indicator targets contained in program documentation. For the most part, some successes (albeit at different levels of accomplishment) were associated with virtually every program reviewed, as long as donor assistance continued. In those cases where a determination could be made, accomplishments quickly dissipated when donor funding ceased.

The second definition measures the degree of sustainability of impact after project completion. This latter category is far more problematic than the first because of the dearth of long-term program evaluations, as well as a tendency for the benefits from donor programs to evaporate after program conclusion. Progress has been slower than either anticipated or desired, and some degree of adjustment has been necessary, either in measurements or implementation strategies. Progress clearly will not be linear in such difficult environments and may easily be offset by backsliding. Successful examples are most difficult to find in the second category – reflecting sustainability – as will be shown in this section of the report.

B. Donor Programs

In this section, we consider details of donor programs, donor approaches, and the recent evolution of those approaches. We also examine the issues and challenges that have arisen from working on the African sub-continent on ROL programs.

¹²² *Ibid.*, 5.

As noted in the introduction, the lack of publicly available documentation considerably complicated research. In many cases, documents describing some donor programs simply could not be found; in others, the documentation was incomplete.

I. US Government Agency Programs

Most of the funding for ROL programs comes through appropriations to the DOS and USAID, which in turn either arrange for interagency transfers of funds to procure services from other USG Departments (such as Justice and Treasury) to implement specialized programs, or use contracts and grants with firms or NGOs to secure needed skills for program implementation.

a. USAID

In this section we provide both general and specific information concerning USAID's ROL programming over the past 15 years, gathered from both research and interviews. A general comment that surfaced during interviews was that USAID programs tend to be ad hoc rather than systemic, and highly focused on a specific issue for a relatively short period of time (one to two years). This has limited both impact and program continuity. Even when investments were made over a somewhat longer period (three to five years), lack of a clear and consistent strategic framework reinforced tendencies to shift programmatic focus from one area to another before technical skills were institutionalized.

(I) General Overview of USAID Rule of Law Programming

USAID has supported various ROL projects in sub-Saharan Africa since the end of the Cold War. Currently, USAID operates in 23¹²³ of the 48 sub-Saharan African nations. Maps showing the location of USAID bilateral and regional missions are attached in Annex 9.

By far, the greatest area of programmatic and monetary focus of USAID programming for Africa centers on humanitarian assistance: poverty alleviation and treatment and prevention of disease (principally malaria) and HIV/AIDS has garnered \$3.18 billion, and general improvement of health, \$3.85 billion. Whether rich in natural resources (as in Angola, Guinea, Nigeria, Sierra Leone, or South Africa), or plagued by war and violent conflict (Angola, Burundi, DRC, Kenya, Liberia, Mozambique, Nigeria, Rwanda, Sierra Leone, Somalia, South Africa, Sudan, and Zimbabwe), all countries of this region have suffered egregious humanitarian consequences related to poverty and disease. Of the 23 Missions, all but Djibouti's incorporate sizeable programs devoted to HIV/AIDS and other diseases, and all support poverty alleviation programs.

For the most part, DG programs focus on governmental decentralization, parliamentary strengthening, public administration, civil society, conflict mitigation, and public education and awareness. Only four Missions currently report active ROL programs: Ethiopia (centered on regional judicial training centers and law schools), Liberia (focused on support for a new Judicial Training Center and legal aid clinics), South Africa (with the largest and most comprehensive program spanning judicial, prosecutorial, and police assistance, as well as victims' assistance and education), and Uganda (multi-agency program with justice sector institutions).

Based on data detailing the period from 2000 to 2007, USAID-supported ROL programs were implemented in 20 countries of sub-Saharan Africa at a cost of \$92.5 million. Over this same time period, regional programs amounting to an additional \$25.8 million were undertaken by the Africa Regional Bureau, the Office of Sustainable Development, and the Regional Economic Development Services

¹²³ Information obtained from USAID Web site. The page for Eritrea, however, reports closure of the USAID Mission at the end of 2005.

Office for East and Southern Africa. The total value of USAID ROL programs in Africa for 2000-2007 thus amounted to \$118.3 million. Program categories included non-specific ROL and justice system support (18 countries), human rights (12 countries), constitutional reform (three countries), strengthening judicial independence (three countries), and program design and learning (seven countries). For the regional initiatives, human rights programming represented by far the largest percentage of assistance dollars spent (over 83%), followed by non-specific ROL programming (nearly 15%), and program design and learning (nearly 2%).

With respect to individual country assistance programs, the greatest percentage (23%, or \$21.56 million) was spent in Sierra Leone, where the bulk of the funds supported the post-war special tribunal and post-conflict human rights activities. In descending order, percentages of funding for overall ROL programming in other countries are: South Africa at 19.5%, Liberia at 12%, Rwanda at 10.5%, Nigeria at 10%, DRC at 5%, Ethiopia at 3.5%, Burundi at 3%, Zimbabwe at 3%, Kenya at nearly 2%, and Zambia at 1%. In the remaining nine countries, less than \$1 million was spent over that eight-year period. A complete chart of USAID ROL programs between 2002 and 2007 is found in Annex 8.

With the exception of the Criminal Justice Strengthening Project (CJSP) in South Africa, much of USAID's current DG programming does not focus directly on formal sector justice institutions.¹²⁴ Rather, programming extends to the "demand side" and programs generally focus on strengthening civil society, government decentralization and good governance, improving community services, citizen awareness, building advocacy, increased participation, and access to justice.¹²⁵ Given the previously described difficulties of ROL work in Africa and difficulties in identifying sustainable successes, USAID's approach in this context is understandable. For example, in both Kenya and Nigeria, previous ROL projects have not been renewed and the potential for their resumption remains uncertain.

(2) Impact of Rule of Law programs

With few exceptions (notably the larger scale and/or post-conflict programs in DRC, Nigeria, Rwanda, South Africa, and Sudan), this study has confirmed some of the original premises of the task order Statement of Work, namely that ROL programming in sub-Saharan Africa has taken place largely outside of a sound analytic framework, and has insufficiently forged linkages between formal sector interventions and key local stakeholders to conceptualize, strategize and coordinate needed reforms. In addition, most of the smaller USAID programs have been tailored to particular themes (such as women's rights, anti-trafficking or anti-corruption) that react to Washington-based directives or emergency factors, rather than presenting a coherent, holistic analysis and strategy.¹²⁶

Both the field analysis and literature findings validate the above characterizations. In part, the relatively modest dimensions of ROL programs in Africa (relative to other sectors and other donors) derive from the comparatively small size of USAID's DG portfolio in the region. In addition, however, the perception of ROL programs as difficult to design and implement and expensive vis-à-vis results achieved has also played a profound role in shifting focus away from support of formal justice sector institutions towards engagement with less technically demanding DG sub-sectors, such as local governance and civil society.

With some notable exceptions, most USAID-supported ROL programs in Africa have consisted of short-term, narrowly targeted, and focused activities that have sprung up in reaction to specific problems rather than resulting from a needs assessment. Specific examples include support for public defender or

¹²⁴ The exceptions for 2007-08 were Burundi and the DRC.

¹²⁵ Information obtained from USAID Web site. In FYs 2005-2006, USAID supported human rights/rule of law programs in: Angola, Burundi, DRC, Ethiopia, Guinea, Kenya, Madagascar, Malawi, Mali, Mozambique, Sierra Leone, South Africa, and Tanzania. Total funding for programs in 2005 amounted to \$16.6 million and in 2006, \$10.2 million.

¹²⁶ USAID Statement of Work, 3.

paralegal programs, legal or constitutional drafting, judicial training, court administration and management improvements, etc. To some extent, all USAID ROL programs in Africa have incorporated an access to justice component, implemented chiefly through programs designed to increase citizen awareness of rights or improve conflict resolution in rural areas. USAID programs have also focused on specific problem areas, such as gender issues.

Progress achieved in ROL projects, catalogued more often in post-implementation assessments than actual evaluations, is relatively modest. This is not surprising given the level of investment and the magnitude of problems confronted. Successes of USAID programs in Africa over the prior decade were analyzed and catalogued in MSI's *ROL Achievements* paper in 2002,¹²⁷ which reviewed seven African nations: Ethiopia, Liberia, Malawi, Mozambique, Rwanda, South Africa, and Uganda. While programs were considered successful in achieving specific goals, with few exceptions (Rwanda's and South Africa's CSJP program), results do not seem to have been sustained following closure of the program. For example, in Malawi, USAID provided support for a broad-based paralegal program that was successful in improving access to justice in rural areas during the period of implementation. The structure of the program linked the training and deployment of paralegals to centralized and rural NGOs and CSOs as a means of expanding the coverage of the program and enhancing chances of sustainability.¹²⁸ However, once the program closed and USAID funding was no longer available to support paralegal costs, the program was discontinued. Interviews in Malawi could discern no trace of the program.¹²⁹

(3) Select Examples of Rule of Law and Related Programs

In this section, we have tried to select examples that highlight program *impact* rather than simply describing the array of project *activities*. Most of this information originates from routine USAID¹³⁰ and implementer reports and not evaluations.

(a) Constitutions, Laws, and Legal Frameworks

USAID supported improvements in legal frameworks and dissemination of new laws in Liberia, Rwanda, South Africa, and Uganda. USAID provided substantial support for drafting the new Rwanda Constitution in 2003, considered a milestone in reestablishing the State following the 1994 genocide. The new Constitution lays a solid framework for constructing a ROL by setting a clear separation of powers, updating human rights protections, and creating an independent judiciary. The USAID project (2005-2007) developed a legal analysis process to guide implementation of new laws and identify potential impediments. The program also supported the development of property laws and related regulations.

In Burundi, the USAID program also focused on land code reform and registration, and supported development of a database. The Kenya program included an e-legislation policy development initiative, supporting a new Freedom of Information law, among other efforts. In Mozambique, the Agency assisted

¹²⁷ MSI, "USAID Rule of Law Achievements in Africa," (Washington, DC: USAID, 2002).

¹²⁸ See Annotated bibliography for details of the Malawi paralegal program.

¹²⁹ The project also trained volunteer community-based educators (CBEs) who provided civic education to increase citizen awareness of their rights, provide some ADR services, and facilitate identification of victims of human rights abuses. Paralegals trained by the project were deployed to rural areas to triage cases and provide legal advice. The project evaluation cited the following problems: the over-ambitious scope of impact for paralegal program, the inadequate training of paralegals participating in program, and opposition from chiefs who felt their authority was being challenged by the CBEs. Ultimately, while useful in terms of identifying human rights victims during the course of the program, and developing some interesting ways of drawing local attention to their message (song, dance, and stories), the report concluded that the program led to no demonstrable changes and could not be sustained.

¹³⁰ USDOS, "2007 Draft Performance Report: Program Areas 2.1, Rule of Law and Human Rights," (Washington, DC: USDOS, 2007). This draft is not inclusive of all USAID and DOS programs, e.g., many INL-funded programs described in interviews were not included in the document.

with civil code reform, a bankruptcy law, and government contracting legislation. The Zambia program made an important contribution to the reform of media laws. In Madagascar, USAID financed the codification and publication of Malagasy laws.

(b) Strengthening Judicial Independence and Accountability

By the 1990s, most countries of the region had established some degree of judicial independence, but few judiciaries were capable of operating as fully independent entities. In Madagascar, USAID contributed to the country's ROL and administration of justice by helping to draft an anti-corruption law and providing assistance in developing an ethics code for judges.¹³¹ USAID programs in the DRC, Liberia, and Rwanda included components focused on judicial independence and strengthening.

USAID's Nigeria project incorporated both federal and state judiciary components. The federal-level program focused on enhancing independence and increasing budgetary autonomy. The state program incorporated development of a citizen "watchdog" capacity, under which trained CSO members attended court hearings and monitored adherence to legal procedures. The program also supported development of a judicial ethics code, a code of conduct for court employees, and a case tracking system for Lagos State.

A 2002 case study of a project in Benin determined that USAID had accomplished relatively little. The study indicates that investments were insufficient given the scale of the problems in the country. For example, USAID's role in supporting the Constitutional Court was very modest, making it difficult to identify clear examples of how USAID's support had promoted the independence and effectiveness of the Court.¹³² The report concluded that USAID's emphasis and impact had not been equal among DG sub-sectors. ROL activities had received little programmatic emphasis, so there was not much of a track record to assess.¹³³

Both the Nigeria and Rwanda projects developed new comprehensive and consultative budget formulation and execution processes. In Nigeria, by incorporating regular consultations with the legislative oversight committee, judicial officials gained the ability to justify expenditures and budget requests, thereby enabling significant increases in funding. The Rwanda project supported decentralization of judicial administration, as well as development of a financial procedures manual.

(c) Support to Formal Justice Sector Institutions

Strengthening judicial sector institutions (courts, prosecutors, and police) through institutional development and capacity building, training, and equipment was the focus of programs implemented in Rwanda, Ethiopia, Liberia, Malawi, Nigeria, Mozambique, and South Africa. Programs in Angola, Mozambique, Nigeria, and South Africa have also included aspects of improved case management and court administration. In Angola, USAID helped automate Luanda's criminal and commercial courts and provided training in case management to court personnel. USAID's program in Ethiopia incorporated a judicial training component, and provided assistance to legal education institutions to meet increased demands. Likewise, the Nigeria program provided technical assistance and training to the High Courts of Lagos, Kaduna, Rivers States, and the Federal Capital Territory. This program also supported technical assistance in court administration and management, as did the program in Malawi. USAID's ROL program in Liberia consists principally of technical assistance and training in support of establishing a new Judicial Training Center to provide continual professional development training and certification for

¹³¹ *Ibid*; ARD, "Democracy and Governance Strategic Assessment for USAID/Madagascar Integrated Country Strategic Plan (FY 2003-2008)," (Washington, DC: USAID, October 2001), http://cdie.usaid.gov/pdf_docs/PNACN142.pdf.

¹³² Ned McMahon, "The Impact of US Democracy and Governance Assistance in Africa: Benin Case Study," (Washington, DC: CDIE, September 2002); Kellie Burk, ed., "Rule of Law: Problem Statements and Recommendations for Programming," (ABIC, March 2006).

¹³³ *Ibid*.

legal personnel including judges, magistrates, prosecutors, public defenders, court clerks, and court, ministry and judiciary personnel. Working in support of a legal aid clinic established at the University of Liberia, the program also supports training for law students to provide legal aid to victims of crime (emphasis on gender based violence), resolution of civil matters, and by supporting internships of students at law firms and other legal aid centers.

As described in the 2002 Rwanda assessment, the international community, including USAID, devoted considerable resources both to reconstructing the infrastructure of the justice system and to developing human resources. As a result of both government and international donor commitment, considerable improvements in the justice sector have occurred. Despite the slow pace and continuing problems of insufficiently qualified judges and judicial personnel, trials today are generally run in a predictable manner that respects the rights of the accused. Security has also been improved. The national and communal police that replaced the old system of *gendarmes* (military police) have contributed to professionalization in law enforcement, while the role of the military has been limited to protecting the country from external security threats, which it has done quite effectively.¹³⁴

The 2007 mid-term evaluation of USAID's South Africa project cites multiple successes and the 2007 Performance Report for South Africa notes achievements including: "improved adjudication and administration of court systems by justice personnel, more efficient investigations conducted by the DOJ's internal audit unit, recommendations adopted for facilitating caseload processing in the five busiest lower courts, and increased access to community courts by citizens."¹³⁵ The report goes on to describe the multi-sectoral and multi-agency approach of USAID/South Africa's program in establishing "a nationwide network of rape crisis centers which provide health care, legal assistance and victims' support services [through the Women's Justice Empowerment Initiative – *see* section (e) 1 below]."¹³⁶ The South Africa project is in mid-implementation and continues to receive support from multiple donors.

(d) Building Civil Society Knowledge, Access to Justice, and Advocacy

Program examples include support to the implementation of an Alternate Dispute Resolution (ADR) system and mediation techniques in Liberia, Madagascar, and South Africa, as well as to the *gacaca* process in Rwanda to try matters relating to the genocide. USAID also helped institutionalize court-annexed mediation in Zambia. USAID Missions undertook programs to increase public access to the courts and legal services in Liberia, Malawi, Rwanda, South Africa, and Uganda. Programs supporting legal aid to rural areas were carried out in Burundi, the DRC, Liberia, Malawi, Rwanda, South Africa, and Zimbabwe. Legal clinic programs were funded in Burundi and Liberia, and public defender training was provided under the Liberian program.

The citizen education component of USAID's program in four Nigerian states had some notable accomplishments. In particular, the program focused on citizen rights under customary law systems. By informing the public about their constitutional rights, citizens learned that accessing locally available dispute resolution mechanisms did not obligate them to accept decisions that violated their rights. The program also included training and workshops with customary authorities about constitutional and legal rights of citizens. The programs were conducted through pilot programs in four states (Jigawa, Ekiti, Benue, and Enugu), linking formal and informal sector programming through public education programs

¹³⁴ MSI, "Rwanda Democracy and Governance Assessment," (Washington, DC: USAID, November 2002), http://cdie.usaid.gov/pdf_docs/PNACR569.pdf

¹³⁵ USDOS, "2007 Draft Performance Report: Program Areas 2.1, Rule of Law and Human Rights," (Washington, DC: USDOS, 2007). This draft is not inclusive of all USAID and DOS programs, e.g., many INL-funded programs described in interviews were not included in the document.

¹³⁶ USAID, "South Africa Rapid Assessment of the Criminal Justice Strengthening Program (CSJP)," (Washington, DC: USAID, May 2008), 4.

(including radio announcements, community meetings, and workshops), community law centers (comprising law schools, student clinics, and National Youth Center members to consult with residents needing legal assistance), and even legal representation in select cases. Among other things, the program supported co-location of legal aid agencies in Ekiti, a review of opportunities to involve law schools in the development of legal clinics in Jigawa, support for strategic plan and action plan development, support for review of current legislation and court rules, and case management workshops.¹³⁷

The state-focused element of the USAID project was linked closely with similar DFID-funded initiatives in three other states, with materials and findings from each shared between the two donors and those involved in the project. Although the Nigeria program closed in 2005, the in-country study interviews found that both DFID and local counterparts recalled the program vividly and supported the accomplishments attained in terms of linkages between communities and formal and informal systems. In particular, DFID and counterparts mentioned the very positive results from interactions with – and support for – Muslim communities, fostering moderate interpretation of Islamic law. For example, in Kano, where Shari'a courts hear the majority of cases and Islamic law can produce results that appear to discriminate against women, diverting cases away from courts and into alternative fora results in the application of secular principles of mediation to solve family disputes, as opposed to more rigid Shari'a law. The Kano Multi-Door Courthouse has been made even more female-friendly by employing women to serve as 15 of the 17 dispute resolution officers. (See the Nigeria Country Report in Annex 6.)

(e) Promoting Women's Rights

USAID's role as a development agency places Mission personnel in direct contact with citizens on a day-to-day basis. As such, USAID programs that focus on sectors other than ROL and formal sector justice institutions can play a significant role in dissemination of information, service delivery, and other forms of direct assistance to citizens. In this section, we highlight programs that provide direct support to citizens and that are increasingly recognized as potential venues for enhancing dissemination of information about laws and legal rights throughout society.

(1) The Women's Justice Empowerment Initiative (WJEI) – Targeting four countries in the region (Benin, Kenya, South Africa, and Zambia), WJEI's program objectives include:

- increasing awareness of the need for women's justice and empowerment through high-level engagement, conferences, public awareness, and education;
- rehabilitating, reintegrating, and empowering former victims in society by bolstering the capacity of shelters and counseling programs and addressing the health care needs of women; and
- strengthening the capacity of the legal system to protect women and punish violators by training police, prosecutors, and judges in sexual violence and abuse cases against women, and developing or strengthening laws that protect women and empower their role in society.

WJEI is jointly supported by USAID, DOS/INL and the DOS Bureau of African Affairs, with both ICITAP and OPDAT technical staff also supporting implementation. USAID is charged with implementing the first two objectives listed above, while the DOJ takes responsibility for the third. The program also includes a system of grants to local NGOs to provide for after-care, and is linked to the anti-trafficking programs. In South Africa, it is supported by representatives from a cross-section of local government institutions, as well as central government institutions, such as the MOJ.

¹³⁷ Heike Gramckow, "Nigeria Access to Justice Program: Report on Ekiti and Jigawa States," (2002), 4.

Funding for WJEI first became available during FY 2007 and, in some countries, not until 2008. Reporting on results is therefore relatively limited, but some insights from South Africa's programs are useful in terms of guiding future WJEI programs and possible expansion to other countries of Africa.

In South Africa, a new Sexual Offences Act enacted in 2007 served as a basic legal framework for consolidating law enforcement, prosecution, and judicial efforts to reduce the exceedingly high rates of rape and sexual assaults in the country, and bring perpetrators to justice. The project integrates within USAID-supported rape crisis centers (Thuthuzela Care Centers, or TCCs) medical and social service personnel and law enforcement officers, prosecutors, and judicial officers who have received specialized training to provide services to victims of sexual violence. USAID aims to improve the quality and geographic availability of assistance to rape victims, with the ultimate goal of addressing the full scope of victim assistance needs, while also reducing secondary victimization, reducing case processing delays, and improving conviction rates.

Staffing shortages and lack of specialized training in treating rape victims caused initial difficulties in providing around-the-clock services. Specialized training and assistance were provided, and a "blueprint" was developed to guide implementation and replication. Positive results have been reflected in statistical data. The program has been well received and appreciated by local government officials, and has helped the government meet its constitutional obligation to facilitate victims' access to needed services in an efficient and timely manner.

Both the blueprint for TCCs and the training curricula developed by the program can be transferred to other countries of the region. Law enforcement training incorporates materials related to evidence collection and crime scene management, and managing testimony of victims (including minors). The project uses train-the-trainer methodology to expand rapidly through the force and it will become a core component of police training curricula. Trained South African police have become active supporters, recognizing improvements through this inter-agency collaboration. Similar training will be provided to prosecutors and judges.

(2) Economic Governance/Women in Development, Women's Legal Rights programs (WID/WLR)¹³⁸

Many citizens of Africa are unaware of new and existing laws designed to ensure equal rights as well as special legal protections for women. The combination of continued subordination of women, poverty, globalization of the markets for commercial sex workers and cheap labor, lack of awareness of human rights, and lack of access to legal remedies altogether produce continuing exploitation and abuse, preventing women from fully exercising their rights and achieving their capabilities. Discriminatory laws, low justice sector capacity, and weak enforcement can also restrict women's legal rights.

In Africa, specific WID programs are implemented in Benin, Lesotho, Madagascar, Mozambique, Namibia, Rwanda, South Africa, and Swaziland. Examples of program accomplishments include:

- In Benin, an inclusive approach to development and implementation of sexual harassment legislation included training of hundreds of CSOs and creation of a national multi-media public awareness campaign regarding passage of the new Family Code.

¹³⁸ Facts and examples included in this section are drawn from the "Final Report, Women's Legal Rights Program," January 2007, 2-5. The organization of this particular report, and the clear emphasis on highlighting results and aspects of the program that might be replicated elsewhere, was very informative and helpful – much more so than many documents reviewed. Adopting this approach to reporting could assist USAID in identifying and disseminating best practice and lessons learned to other Missions in the region.

- In Lesotho, WLR partnered with an affiliate of FIDA to raise rural women’s awareness of their rights and basic laws. FIDA’s volunteer attorneys trained 60 community leaders in laws and paralegal skills in the rural areas of Lesotho.¹³⁹
- In Madagascar, WLR collaborated with the Justice Ministry to promote amendments to the existing Family Code that addressed domestic violence, sexual abuse, and sexual harassment. A specific program initiative identified lack of formalized marriage as one of the root causes of disinheritance of women. On learning of the benefits to be accrued by “remarrying” under a civil marriage, many couples originally married under traditional customs repeated the ceremony under a civil process to obtain a copy of a “legal” marriage certificate.
- In Mozambique, WLR partnered with an NGO network and the MOJ to develop a draft law on trafficking in persons.
- In Rwanda, where no formal courses on gender issues existed for judges, magistrates, or lawyers, WLR worked with the MOJ to develop a course on women’s rights under family law. The project sponsored a national conference on the subject and encouraged active participation by the public on practical means to achieve equality between the sexes and create harmony in families.
- A recent landmark decision in South Africa upheld the right of females to inherit (it also applies to women in polygamous relationships) and is retroactive to 1994. As a result of the decision, the USAID project is focusing increased attention on a massive public awareness campaign for rural women to become aware of this right, and to provide legal assistance in the rural areas so that this right can be actualized.¹⁴⁰

Of considerable interest to this study was that successful approaches developed in WID-implemented programs outside of Africa (e.g., those developed in Albania and Guatemala) were analyzed for possible transfer to nations of Africa. Among the approaches that were most attractive were awareness campaigns and partnerships with governmental institutions to support implementation of new laws related to women’s rights. With minor adjustments to fit the specific context of the other countries, the approaches were successfully transferred from one region to another. The many brochures, workshop agendas, and training materials are available via the WID Web sites.¹⁴¹

(3) DG Initiatives

USAID implemented a DG program in Kenya FIDA in efforts to build governmental and legislative coalitions to influence policies and laws that protect women’s rights and redress gender discrimination. The program also worked with community based observers to monitor women’s rights at the local level, strengthen capacity for monitoring the implementation of regional and international human rights instruments, and produce annual reports on the legal status of women in Kenya. Collaborating with government agencies such as the Kenya Law Reform Commission and the Kenya National Commission on Human Rights to ensure reporting on women’s rights, the program hosted regular consultations with policy makers to build capacity for understanding international human rights instruments and the impact

¹³⁹ As a mid-course evaluation of progress, it is not yet possible to gauge the longer term viability and sustainability of the paralegal program. While providing a useful service at this point, it would be of interest to compare sustainable results of Lesotho with the similar paralegal program in Malawi, which folded upon conclusion of the assistance program.

¹⁴⁰ Text cited from an e-mail from the Mission describing the court decision (dated March 2009).

¹⁴¹ To download a copy of the “Inheritance Law” brochure, see http://pdf.usaid.gov/pdf_docs/PNADI185.pdf (in English).

To download a copy of the “Last Will and Testament” brochure, see http://pdf.usaid.gov/pdf_docs/PNADI215.pdf. Brochures on other topics related to marriage laws, land rights, etc., are also available via the Web site.

of excluding women from development processes. These consultations were influential in forming an anti-rape police squad.¹⁴²

(f) USAID Law Enforcement Programs

After enactment of sections 534(b)(3) and 660 to the Foreign Assistance Act of 1961,¹⁴³ USAID discontinued direct involvement in police and law enforcement programs. However, over the last decade, this trend has begun to reverse itself, due in part to amended language in the above-mentioned sections, but also to internal agency reexamination of their policies and legal authority to engage in such programs, as well as their potential contributions to law enforcement and police programs. The two most compelling reasons for the change were that many of USAID's programs could not be implemented in countries where citizens confronted issues of basic personal security, and the growing recognition of USAID's contributions to these programs, namely their developmental and citizen-focused programming and perspectives.

Beginning in 2007, DCHA brought in a retired senior level police officer to provide technical assistance and guidance to USAID's law enforcement programs. While relatively few police programs have been implemented directly by USAID in sub-Saharan Africa, there are nevertheless some valuable examples to be drawn. Below, we cite several examples, drawing purposefully from differing types of interventions to highlight USAID's role.

Anti-trafficking in persons – From 2003 to 2007, the Africa Bureau funded an anti-trafficking program implemented by Missions in 12 countries across the region. The project report synthesized lessons learned relative to prevention and reintegration programs.¹⁴⁴ Prominent among recommendations is the importance of approaching the issue from a regional perspective, engaging through local partners, relevant messaging (through victims' personal stories), education and awareness programs targeting vulnerable populations and those living in remote locations, and presenting a holistic range of support services to victims. In view of preexisting civil society, health, and poverty alleviation programs in these countries, USAID was able to build on established mechanisms and liaisons with citizen groups and NGOs as primary vehicles to spread the message to rural and vulnerable populations concerning trafficking in persons.

Interagency coordination in community policing in Northern Uganda – The USAID Mission provided funding and overall coordination for a multi-agency program under which police, prosecutors, and local magistrates worked closely together with local communities to assure that all understand the basics of the investigative process, and how working together will both improve efficiency of the process and enhance response to community needs. For example, by working directly with police from the very beginning of the investigative process, prosecutors were able to gauge sufficiency of evidence to proceed with a case. They were also able to identify more approaches for presenting evidence (using crime scene photos rather than reliance of witness testimony). Meetings were held between citizens and authorities to explain how

¹⁴² (http://www.usaid.gov/our_work/cross-cutting_programs/wid/snapshot/africa/kenya/kenya_dg.html) and FIDA (Kenya) : <http://www.fidakenya.org>

¹⁴³ We have highlighted the original waiver authority under which ICITAP was established and operated, language that was subsequently deemed to apply equally to other USG agencies supporting foreign assistance programming. The four classic areas covered under the exemption include: (1) programs to enhance professional capabilities to carry out investigative functions conducted under judicial or prosecutorial control; (2) programs to enhance professional capacities to conduct forensic investigations; (3) programs to assist in the development of academic instruction and curricula for training law enforcement personnel; and (4) programs to improve the administrative and management capabilities of law enforcement agencies, especially their capabilities relating to career development, personnel evaluation, and internal discipline procedures. To this list, support for community policing programs has been added more recently.

¹⁴⁴ USAID, "USAID Anti-Trafficking in Persons Programs in Africa: A Review" (Washington, DC: USAID, 2007).

the criminal justice system operates. Program results demonstrate that improved coordination between criminal justice system components can enhance individual staff performance, while also creating a positive impact on citizen access to justice at the grassroots level. Key to the success was tailoring the program to meet the needs of community residents, and demonstrating to Ugandan officials that they had ownership of the implementation process.¹⁴⁵

South Africa criminal justice system program – Another significant example of USAID’s coordinative role is seen in the South Africa CJSP program, in particular the components focused on enhancing skills of police and prosecutors in gathering and using evidence in rape cases, and in improving methods of treating victims of rape and sexual violence cases. The previously mentioned TCCs enable rape victims to access needed medical and physiological services simultaneously with access to law enforcement officers knowledgeable in the field and prosecutors who handle criminal cases resulting from the assault.

Anti-corruption programs – Several MCC Threshold programs have been administered through USAID over the past three years. Examples include Malawi, Zambia, Tanzania, and Uganda. Police assistance programs have focused on strengthening, or developing new internal inspection units within the police to identify and control corruption. Programs have also supported enhancement of investigative skills, and development of community policing models tailored to local needs in the various countries involved (see Malawi country report, attached as Annex 5, for additional details about the MCC police program). Beyond MCC funded anti-corruption activities, USAID has also funded similar programs, such as that in Mozambique that focused on enhancing police and prosecutorial skills, and development of an overall strategic plan for police reform in Nigeria (to include focus on internal affairs and oversight). In Zambia, under an inter-agency agreement with the US Treasury Department, USAID supported development of an anti-corruption task force comprised of police investigators and prosecutors.

In post-conflict Rwanda, USAID’s program was designed to increase the security of citizens and their property by supporting police training and procurement of vehicles, radios, blankets, and other equipment.

Nigeria national police assessment – In response to rioting resulting in thousands of citizen deaths, the USG considered providing riot control equipment to the police of Nigeria. USAID participated in a multi-agency assessment of the situation, during which the team visited a training center in the north and met with the Director of the Police riot team, known as MoPol (Mobile Police). USAID representatives posed questions relative to police-community interactions (whether riots broke out spontaneously or if discord escalated incrementally) and who had authority to mobilize MoPol teams. Responses indicated that citizen unrest tended to grow over a period of days before an outbreak of violence, and that only the national Director of Police could authorize mobilization of MoPol – and this only after the regular police lost control of the situation. Since regular police had no training in crowd control and dispersal, the first corrective action was to introduce basic techniques of crowd control management into the police training curricula. The second was to introduce increased communication between police and community leaders to promote earlier responses to citizen complaints. Finally, by readjusting internal procedures (i.e., permitting MoPol to pre-position officers to quell unrest before outbreaks of violence), it would be possible to avoid a riot and the consequent application of deadly force. As a result of the assessment, the USG supported police training and technical assistance, rather than procurement of heavy weapons and equipment.

¹⁴⁵ USDOJ, ICITAP, one-page program Fact Sheet: "Uganda Programs," August 2008.

(g) HIV/AIDS and the Promotion of Legal Rights and Reforms

President's Emergency Plan for AIDS Relief (PEPFAR) – Announced in January 2003, PEPFAR is a multi-year, multi-billion dollar program to combat the global HIV/AIDS pandemic. The first PEPFAR plan (Public Law 108-25, May 27, 2003) pledged to provide legal assistance for orphans and vulnerable children, but most programs focused on HIV/AIDS as a health problem, rather than raising human rights and/or ROL issues. USAID was designated as the primary USG implementer of a program that takes a multi-sectoral and multi-donor approach to the problem of HIV/AIDS. The overall strategy acknowledges the need to increase women's access to employment and financial opportunities, and to education and information, but not their access to justice.

PEPFAR II authorizes funding for FYs 2009-2013. While maintaining many priorities from PEPFAR I, the new version has a more specific outline for national strategy and legal protections, to include legal services (linking programs addressing HIV/AIDS with those addressing gender-based violence in areas of significant HIV prevalence); programs to assist countries in the development and enforcement of women's health, children's health, and HIV/AIDS laws and policies that prevent and respond to violence against women and girls; promote the integration of screening and assessment for gender-based violence into HIV/AIDS programming; promote appropriate HIV/AIDS counseling, testing, and treatment into gender-based violence programs; and assist governments to develop partnerships with CSOs to create networks for psychosocial, legal, economic, or other support services. A subset of this initiative is **BizAIDS**, a three-year program with three interrelated components: 1) basic HIV/AIDS information/workplace program, 2) business planning in light of HIV/AIDS, and 3) legal rights and opportunities in light of HIV/AIDS.

In Malawi, the Mission leads international aid institutions dedicated specifically to combating the spread of HIV/AIDS in the country. Under the program, policies and processes address the “stigma and secrecy” surrounding the disease. These new policies have provided needed guidance on prevention of the disease as well as care and support of those infected, while also highlighting human rights that are critical in combating HIV/AIDS, such as a woman's right to protection against marital rape.¹⁴⁶

(h) Transitional Justice in Post-Conflict Regimes

The most immediate tasks in a post-conflict environment include not only the reestablishment of government institutions, including those that pertain to ROL, but also the critical need for community healing and bringing to justice the perpetrators of whatever atrocities that have taken place during the conflict. In sub-Saharan Africa, generally two forms of transitional justice have been supported: restorative justice and retributive justice. Restorative justice mechanisms take the form of truth commissions and/or community-based reconciliation mechanisms that assist the community to come to terms with what has occurred, while also learning from the past to avoid recurring cycles of conflict and violence. Retributive justice mechanisms are more directly punitive and usually involve creation of a special tribunal or international tribunal. It often targets high-level planners or architects of war crimes and other atrocities, but can also deal with lower-level perpetrators, depending on tribunal type. USAID programs have provided assistance for both mechanisms.

In Burundi, USAID contributed to stronger community-based reconciliation efforts by providing support to youth and women's groups to promote tolerance and support for truth and reconciliation, and volunteer training in conflict resolution.

¹⁴⁶ USAID, “Malawi Launches First National HIV-AIDS Policy,” (http://www.usaid.gov/stories/malawi/fp_malawi_aids.html).

In the post-conflict environment of Rwanda, the customary practice of *gacaca* was widely supported by donors in general – and the USG and USAID in particular – as the most efficient way of handling the thousands of perpetrators of genocide in the country. Both praised and criticized, this customary law approach to dealing with the massive numbers of accused did accomplish many of the goals that could not have been met through use of formal systems or even international tribunals.

The Special Court in Sierra Leone continues to receive substantial financial and technical support from USAID. The Agency also provided support to the Truth and Reconciliation Commission in South Africa.

b. Other US Government Rule of Law Programs

Numerous USG departments support ROL programming in sub-Saharan Africa. Primary players include DOS programs under the Bureau of African Affairs and the Bureau of International Narcotics and Law Enforcement Matters, the Department of Commerce (DOC), the DOJ, and the Department of the Treasury. Approximately one-half of countries supported through the MCC Threshold and Compact country programs are in sub-Saharan Africa.

(1) Departmental Programs

Department of State Programs –Two principal bureaus focus on ROL in Africa. The first is the Bureau of Africa Affairs (State/AF), which focuses principally on humanitarian assistance, poverty reduction, and HIV/AIDS programming. Under its Healthy Family programs, State/AF also supports the multi-agency WJEI program. The largest and most significant DOS Bureau in ROL programs is the Bureau of International Narcotics and Law Enforcement Affairs (INL), whose core mission is to help strengthen criminal justice systems and law enforcement agencies around the world to combat transnational criminal threats before they extend beyond their borders and threaten our homeland. Interviews with representatives from both State/AF and INL provided general overviews of the missions and programs of both bureaus. Specific program information, provided below, was obtained from INL’s most recent report to Congress.¹⁴⁷

Through its international programs, INL addresses a broad cross-section of law enforcement and criminal justice sector areas including: counter-narcotics and demand reduction; money laundering and financial crimes; anti-terrorism; corruption; smuggling of goods; illegal migration; trafficking in persons; domestic violence; border control and immigration; document security; cyber-crime; intellectual property rights; law enforcement; police academy development; and assistance to judiciaries and prosecutors.

INL’s anti-corruption initiatives are designed to 1) establish shared global anti-corruption standards, such as the United Nations Convention against Corruption; 2) strengthen global political will to fight corruption and to implement multilateral anti-corruption commitments; 3) increase international cooperation to prosecute corruption, identify and prevent access by kleptocrats to financial systems, deny safe haven to corrupt officials, and identify, recover, and return proceeds of corruption; and 4) provide anti-corruption assistance that strengthens legal frameworks and builds capacity of critical law enforcement and ROL institutions, such as police, investigators, prosecutors, judges, ethics offices, auditors, inspectors general, and other oversight, regulatory and law enforcement officials.¹⁴⁸

Specific to Africa regional programs, INL technical mentors provide assistance to the Secretariat of the Eastern and Southern Africa Anti-Money Laundering Group (ESAAMLG) and to the Horn of Africa countries targeted by the President’s East Africa Counterterrorism Initiative. The mentoring program also provides asset forfeiture assistance to the governments of Namibia, Botswana, and Zambia, under which

¹⁴⁷ Information obtained from the INL Web site.

¹⁴⁸ *Ibid.*

the mentor provides legal input to amend relevant legislation in each country, and initiates and monitors the Prosecutor Placement Program (PPP). The PPP is an initiative aimed at placing prosecutors from the region for a certain period within the Asset Forfeiture Unit of the National Prosecuting Authority in South Africa.

The mission of the regional International Law Enforcement Academies (ILEAs) has been to support emerging democracies, help protect US interests through international cooperation, and promote social, political and economic stability by combating crime. To achieve these goals, the ILEA program has supported institution building and enforcement capability, and fostered relationships of American law enforcement agencies with their counterparts in each region. ILEAs have also encouraged strong partnerships among regional countries to address common problems associated with criminal activity. In the Africa region, INL established an ILEA in Gaborone (Botswana) in 2001. United States and Botswana trainers provide instruction. ILEA-Gaborone has offered specialized courses on money laundering and terrorist financing. Among the main features of ILEA-Gaborone is a six-week intensive personal and professional development program, called the Law Enforcement Executive Development Program, for law enforcement mid-level managers. The program brings together 42 participants from several nations for training in topics such as combating transnational criminal activity, supporting democracy by stressing the ROL in international and domestic police operations, and by raising the professionalism of officers involved in the fight against crime.

The Department of Justice (DOJ) police and prosecutorial development and training programs are housed within DOJ, but their programs are funded principally through interagency agreements with the DOS-INL and, although currently to a considerably lesser degree than in the mid-1990s, by USAID.

DOJ's Office of Overseas Prosecutorial Development, Assistance and Training assesses, designs, and implements training and technical assistance programs. OPDAT draws upon the subject matter expertise components within the Department, such as the Asset Forfeiture and Money Laundering Section (AFMLS), the Counterterrorism Section, and the United States Attorney's Offices across the country to provide expert training and advice to enhance the capacities of foreign partners. In sub-Saharan Africa, OPDAT has supported Trafficking-in-Persons Programs in Ghana, Anti-Corruption Programs in Liberia, Malawi (as part of the MCC threshold program), Mozambique, Nigeria, and Uganda, an Anti-Racketeering and Asset Forfeiture program in South Africa, and supports the WJEI programs implemented in Benin, Kenya, South Africa, and Zambia. OPDAT has posted a Resident Legal Advisor (RLA) in Lusaka to manage WJEI programs, has part-time advisors in South Africa, and an RLA is expected to be posted in Kenya in early 2009.¹⁴⁹ In Kenya, the OPDAT RLA is engaging directly with government partners, the DPP, Kenya's Anti-Corruption Commission, the Law Society of Kenya, and others in a program that focuses on counterterrorist financing, anti-corruption, and procedural reform.

The DOJ International Criminal Investigative Training Assistance Program supports police development and training programs that in Africa have been implemented as follows: in Liberia (providing pre-election training to police and general institutional strengthening and training); with the police of Malawi as part of the MCC threshold program (in the areas of internal affairs, basic investigative skills, and forensics); in Nigeria (civil disorder management, and enhancing of investigative techniques); in South Africa (to support implementation of a Citizens Complaints Directorate, strengthening investigative capacities); in Tanzania following the 1998 terrorist bombing of the Embassy, when ICITAP provided training and technical assistance in developing basic law enforcement capacities within the Tanzanian Police Force; and in Uganda through a program focused on strengthening criminal investigations, criminal intelligence, and forensic skills, as well as support to the WJEI program.

¹⁴⁹ Single-page program overviews provided by OPDAT during interview.

The Treasury Department – The Office of Technical Assistance (OTA), located within the Office of the Assistant Secretary for International Affairs, addresses enforcement issues arising from tax reform, government debt issuance and management, budget policy and management, financial institution reform, and, more recently, financial enforcement related to money laundering, terrorist financing, and other financial crimes. The OTA receives funding from USAID country missions and direct appropriations from the US Congress. The OTA has been designated as the recipient of MCC funding to provide assistance to a number of Threshold Countries to enhance their capacity to address corruption and related financial crimes.

The Financial Crimes Enforcement Network (FinCEN) is a bureau of the US Department of the Treasury and the US Financial Intelligence Unit. With DOS-INL funding, FinCEN coordinates and provides training and technical assistance to foreign nations seeking to improve their capabilities to combat money laundering, terrorist financing, and other financial crimes. A specific focus of FinCEN is the creation and strengthening of financial intelligence units. FinCEN has supported ILEA training.

The Internal Revenue Service's Criminal Investigative Division (IRS-CID) provides international training and technical assistance efforts designed to assist international law enforcement officers in detecting tax, money laundering and terrorist financing crimes.¹⁵⁰ With funding provided by the DOS, IRS-CID delivers training through agency and multi-agency technical assistance programs to international law enforcement agencies. Training consists of both basic and advanced financial investigations.

The Office of the Comptroller of the Currency provides Bank Secrecy Act and anti-money laundering guidance to national banks and federal branches of foreign banking organizations and performs on-site compliance examinations. Their investigators have supported law enforcement training courses as a part of INL's ILEA program.

The US Immigration and Customs Enforcement supports training in the areas of money laundering/terrorist financing, bulk cash smuggling, and financial investigations to law enforcement, regulatory, banking and trade officials. Principally with DOS-INL funding, Immigration and Customs Enforcement provides bilateral and multilateral training and technical assistance on the interdiction and investigation of bulk cash smuggling in the ESAAMLG, and has supported training needs of the ILEA in Botswana.

Drug Enforcement Agency (DEA) – With the exception of the following example, no information was publicly available describing DEA's programs in Africa. The interview with the US Embassy in Malawi revealed DEA support for construction and implementation of a municipal courthouse. The program, as described, involved exchange programs between US judges/staff and their Malawian counterparts. There was no information on the impact and/or sustainability of the program.

Department of Commerce – Web site documents stated that that the DOC provides training and technical assistance in Africa, but detailed information was not available.

The Millennium Challenge Corporation – MCC programs focus on countries that have already implemented economic reforms and good governance programs. As discussed above, USAID and several other US government agencies implement portions of the MCC threshold programs in several countries in Africa. In addition, approximately one-half of all MCC compacts focus on countries on the African sub-

¹⁵⁰ According to INL's Web site, as of the end of 2008, through the Botswana ILEA, IRS-CID agents had provided training in techniques of financial investigations to representatives from Angola, Botswana, Lesotho, Malawi, Mauritius, Mozambique, Namibia, South Africa, Swaziland, Tanzania, Zambia, Djibouti, Ethiopia, Kenya, Seychelles, Uganda, Nigeria, Cameroon, Comoros, DRC, Gabon, and Madagascar.

continent, but ROL is the focus in only one country: Benin. The specific focus in Benin is on access to justice.

(2) Interagency Coordination

The need for increased and improved coordination between all USG agencies providing assistance was a basic assumption from the outset of this study, and has certainly been validated by the research. Very little documentation about USG programming other than that implemented by USAID either exists or was obtainable for this study. Program descriptions and evaluations for programs funded by DOS – and particularly INL – are markedly lacking. The difficulty in locating specific information, reports, or any details whatsoever about these agency programs was both surprising and disturbing. If pre-assessments or post-implementation evaluations have been conducted, they are not publicly available, and interviewees did not reference or produce them. Other than one-page program summaries provided by both ICITAP and OPDAT, no other documents were provided or were available via the Web or interviews. Similarly, no program documentation was provided by DOS bureaus, and those available from Web searches were of a summary nature and not reflective of program impact or evaluation. For the most part, program goals were expressed simply through numbers of persons trained and dollars expended – not through demonstrable impact and changes, or attempts to extract or determine best practices and lessons learned. The DOC site provided a generally useful set of reports to Congress (included as part of the separate Annotated Bibliography), but little specific information of an insightful nature about programmatic results.

The need for considerable improvement in coordination and cooperation between the various USG agencies involved in ROL programs in Africa was borne out by observations and interviews in the field. Indeed, the lack of cohesive strategic policy objectives that might serve to integrate USG programming was a repeated refrain from interviewees within and external to USG programs. Fundamentally differing mission mandates between the various departments in part account for these difficulties. For example, programming funded under DOS-INL derives from US operational law enforcement objectives – objectives that are shared by their implementing partner Departments of Commerce, Justice, and Treasury. USAID approaches foreign assistance from distinct humanitarian and developmental perspectives and, currently, the two approaches remain disconnected.

With respect to USG ROL programming in general, we observed a marked tendency for quick fixes and quick results. The short attention span of USG assistance providers, coupled with the desire to report good news, has combined to cause an approach to programming that is defined by short-term goals and short-term timelines. As described above, and despite existing interagency coordination mechanisms, there is inadequate knowledge and sharing of information between programs, both in Washington and in the field. This failure was emphasized through complaints in MCC interviews about lack of interagency coordination or high-level strategy that has detracted from the US's ability to reach long-term goals, and wasted considerable time and money. Far too often, the result is needlessly duplicated, overlapping, or even competing program strategies.

(3) Multi-Agency Programs

The *Security Sector Reform (SSR) Program* provides overall guidelines for coordinating, planning, and implementing security sector programs among the three entities involved. Under the guidelines, the DOS leads US interagency policy initiatives and oversees policy and programmatic support to SSR through its bureaus, offices, and overseas missions as directed by National Security Presidential Directive (NSPD)-1, and leads integrated USG reconstruction and stabilization efforts as directed by NSPD-44. The DOS's responsibilities also include oversight of other USG foreign policy and programming that may have an impact on the security sector. The Department of Defense's primary role in SSR is to support the reform, restructuring, or reestablishment of the armed forces and the defense sector across the operational

spectrum. USAID's primary SSR role is to support governance, conflict mitigation and response, reintegration and reconciliation, and ROL programs aimed at building civilian capacity to manage, oversee, and provide security and justice. Insofar as provision of public defender assistance is concerned, the Administrative Office of the US Courts Office of Defender Services sponsors regular programs of continuing legal education for public defenders and other criminal defense counsel appointed to represent indigent defendants. The program is accessible via the USAID/DCHA mechanism.

(4) Narco-trafficking and Anti-terrorism Programs

Strong and credible legal systems are critical tools to combat narcotics trafficking, trafficking in persons, organized crime, and even terrorist activities. The absence of a credible rule of law coupled with a lack of public security creates a climate in which criminal activities can flourish. Organized crime, narcotics traffickers, and human traffickers rely to a great extent on their ability to function without real fear of apprehension or serious legal consequences. Once established, organized crime provides a structure from which terrorism could take place and a framework for its development. Likewise, money laundering and smuggling of goods, arms, and people could be applied to finance and facilitate terrorism.

The known inability of a weak justice system to confront crime attracts and encourages criminal activity because of widespread opportunity and impunity, and thus becomes cyclical. Inadequate law enforcement is incapable of responding to demands. These factors compound pressure on an already strained justice system, undermine the rule of law, and aggregate and intensify the spread of lawlessness and, in some instances, violence. The tragic results of this volatile mix have become far too evident in various countries in Latin America, most notoriously along the northern border of Mexico.

In many countries of sub-Saharan Africa, the justice systems and institutions, including law enforcement authorities, are plagued by endemic corruption, archaic practices, inefficiency, ineffectiveness, and inaccessibility. Absent effective formal or informal justice systems, the public has little trust or confidence in the rule of law. These shortcomings are exacerbated by overburdened and inadequate social services, high rates of poverty and disease, intense and sometimes genocidal violence, high levels of domestic and gender-based violence, at-risk youth, unchecked criminal activities, and overriding impunity. Economic opportunities, corruption, and impunity invite and escalate crime and insecurity, thus compounding pressure on inadequate systems and increasing prospects of yet more serious crimes.

According to INL, the USG is increasingly concerned with both trafficking of narcotics in the West African coastal countries and the threat of Islamic extremist violence in the northern tier countries of sub-Saharan African nations. The threat of the latter seems more apparent than the former, where USAID is positioning development assistance in an attempt to preclude a more obvious extremist threat from emerging. Drug cartels from Venezuela and Colombia have invested heavily in establishing footholds in West Africa for transshipment of narcotics bound for Europe. The 2009 budget request for counter-narcotics programs in Africa is \$1.4 million (counter-narcotics) and \$37.3 million (international narcotics control); the counterterrorism program funding request is \$38.8 million and anti-terrorism programming is \$31.4 million.¹⁵¹

2. Other International Donors¹⁵²

Most other major donors supporting rule of law in sub-Saharan Africa have adopted broad, multi-sectoral and cross-cutting programs. The UK's Department for International Development (DFID) uses the broad

¹⁵¹ The differences between these categories are not spelled out in the document.

¹⁵² This section is not designed to provide a full overview of donor programs. Here, we summarize conclusions about general approaches to donor rule of law programs in sub-Saharan Africa by those organizations or nations for which sufficient documents were available for our review.

term “access to justice.” Many other donor agencies fold ROL programs into the general category of human rights protection. Although donor-supported ROL programs continue to favor reform of state institutions (courts, police) and the development of a legal profession, they also invest to a varying but increasing extent in customary courts and alternative justice mechanisms (e.g., chiefs’ courts in Sierra Leone, *bashingantahe* in Burundi, *gacaca* in Rwanda). This category of assistance includes such capacity building activities as training local judges, arbitrators, and conciliators in international human rights laws, domestic laws, conflict prevention, and mediation. They also support the construction of court facilities.¹⁵³ Working with prisons is normally the least appealing component of the justice system to external donors, and one of the most expensive to support due to the necessity of physically rehabilitating prison facilities. The modest donor assistance documented focuses largely on human rights training of guards (such as EU support in Malawi, and Sweden’s International Development Cooperation Agency program in Ethiopia).

In recent years, a number of donors have focused increased attention on community policing approaches to police reform. DFID and UNDP have supported such programs, as has DOS-INL (under various funding mechanisms). Critics of the programs have noted the importance of refocusing police on community issues, but also cite the necessity of developing community policing programs that fit within the local country context.

In general, international donors fall into two broad categories: international organizations and lenders, and bilateral governmental programs. In many ways, other donor programs confront the same difficulties faced by US donor programs, principal among these the need to coordinate program approaches with the country’s internal goals and objectives. From other perspectives, there are fundamental differences in how some donors approach international assistance programs generally, and ROL programming specifically. In this section, we provide a broad overview of the approaches used by key donors.

a. International Organizations

The World Bank – The WB currently has active ROL loan programs in 25 of the 48 countries of sub-Saharan Africa, making it by far the largest external donor in the region. In general, the objectives of WB ROL programs run the gamut from construction and rehabilitation of physical facilities, to institutional development within formal sector institutions, legal framework reforms, and training. A component dealing with improving access to justice is included in most WB projects.

A review of the literature pertaining to WB programs reveals several distinct elements. First, publicly available documentation about WB programs significantly surpasses that available from sources describing other donor efforts. Second, WB projects often specify a percentage of the overall value of a multi-purpose loan to be used for improving governance, including ROL. Sometimes the percentages are quite small (e.g., around \$1 million) and in other cases they are very substantial. Third, ongoing and third party evaluations are an integrated aspect of project implementation, enabling mid-project adjustments to implementation strategy or activities. Finally, as a general tendency, the timelines for WB programs are longer than those of many other donors (generally ranging from 5 to 10 years).¹⁵⁴

In a recently published series of articles about their Access for the Poor (J4P) programs in Kenya, the World Bank discusses the inability of formal sector institutions to meet the needs of rural inhabitants in resolving conflicts. They note that simply permitting local justice mechanisms to take their course is not a

¹⁵³ Syracuse University, Department of Political Science, “New Rules for the Rule of Law – External Actors and Rule of Law Development in Post-Conflict African Societies,” (Syracuse: Syracuse University), 15.

¹⁵⁴ For example, in their publication *Review of Justice Sector Projects in the Africa Region*, the description of the Benin program references a ten-year implementation period, further noting that while the pace of reform continues to be very slow, progress has been made.

solution, as conflicts occur between different ethnic groups that adhere to differing concepts regarding conflict resolution. As a result, local actors and NGOs have resorted to an innovative form of peace initiative, based on local concepts and stakeholders tackling prevalent conflicts. They have established “peace committees” at different administrative levels, consisting of elders and other influential community leaders with the capacity to reach across district or ethnic boundaries to negotiate solutions to conflicts. These peace initiatives have been supported by international NGOs and donors and have also been adopted by the Office of the President. These experiences, carried out in the arid lands, currently serve to inform the drafting of a national policy framework for peace-building and conflict resolution, which strives to integrate local concepts and stakeholders into conflict resolution. A parallel legal regime is emerging: one is the official law, which is legislated and enforced based on a separation of powers, and the other is the declarations emerging from the committees, which are supported by the national executive. Both make sense in their own sphere.¹⁵⁵

The African Development Bank (ADB) – The ADB has included legal and judicial reform components in broader institutional and capacity building projects, but has focused mainly on legal rather than judicial reform.¹⁵⁶ The ADB has provided assistance in the following areas relative to ROL programming: 1) financial and technical assistance to governance projects that include ROL in a number of countries, 2) preparation of Country Governance Profiles that assess areas calling for reform, and include detailed checklists about laws and judicial functions in member states, 3) support to the New Partnership for Africa’s Development (NEPAD) and corporate governance efforts, and 4) regional initiatives such as the Organization for the Harmonization of Business Law in Africa (OHADA) and the International Law Institute, as well as the establishment of the African Law Institute as the first African legal think tank designed to help harmonize, simplify, and clarify laws in the region.¹⁵⁷ The premise of ADB’s legal and judicial reform work is that it will not produce quick results, it must be measurable over time, and it must be sustainable.¹⁵⁸ Unfortunately, the team could find little precise information about judicial reform projects; based on the documentation available, there appear to be few of these.

The UN Development Program – The UNDP’s access to justice programs prioritizes citizens’ equal ability to use justice services regardless of their gender, ethnicity, religion, political views, age, class, disability or other differences.¹⁵⁹ UN projects in several countries illustrate both the positive attributes and challenges that have arisen during implementation of UN ROL assistance programs in the region. These examples include Eritrea, Kenya, Malawi, and Sudan. In Kenya, UNDP’s ROL portfolio extends from assistance to formal sector institutions and the legal framework (including constitutional reform) to a focus on improving legal services to the public, while also increasing demand. It places particular importance on programs addressing corruption, impunity, and violence. Support is also provided to develop a legal and policy framework, increase access, improve human rights, reduce backlogs, increase efficiency and accountability, and prevent corruption. Within the Ministry of Justice and the judiciary, the UN focuses on strengthening skills of national and senior-level managers, developing an umbrella and thematic approach to enhancing rule of law, and also working with grassroots-level NGOs to build demand and advocate for change. UN programs work to ensure that relevant laws and policies are in effect, while also supporting ADR methods, such as mediation.

The UNDP’s access to justice program in Malawi focuses on democracy, education, and human rights. A technical advisor is posted within the MOJ to provide hands-on technical assistance to the ministry and

¹⁵⁵ Tanya Chopra, “Building Informal Justice in Northern Kenya,” (Washington, DC: World Bank, December 2008), 2-4, 45-47.

¹⁵⁶ African Development Bank, “2006 Law for Development Bulletin,” (Abidjan: ADB, 2006), 13.

¹⁵⁷ *Ibid.*, 12-13.

¹⁵⁸ *Ibid.*, 11.

¹⁵⁹ Laure-Hélène Piron, “Justice Sector Reform in Africa,” *Open Society Justice Initiatives*, Human Rights and Justice Sector Reform in Africa: Contemporary Issues and Responses, (February 2005), 7.

other key stakeholders, working principally with the planning unit to help create a framework and policy basis for donor investments. Progress on both projects was described as “slow” but “moving forward.”

In Eritrea, the UNDP supports a project to formalize community dispute resolution practices and law reforms. The project is generally considered successful, resulting in marked improvements in codified law. The legal drafting project is also viewed as largely successful in building capacity for drafting laws, disseminating laws, and assuring harmonization of legal provisions across the entire framework.

Implementation of the multi-donor judicial reform program in Sudan began in mid-2006 and extends through mid-2009. The project is jointly managed between UNDP and the local judiciary. The description of the program in Sudan is drawn from a multi-donor evaluation conducted in 2008 noting poor pre-implementation program analysis, as well as weak administration, management and oversight by the UNDP project team.¹⁶⁰ The pace of reform and its sustainability have been negatively impacted by these flaws, as well as the failure to establish a partnership with local counterparts.¹⁶¹

b. Bilateral Donors

Germany – German ROL programs have been implemented principally through GTZ. The German government’s approach to project implementation in several African nations using a sector wide approach (SWAp) to funding is worth noting. SWAp or “basket funding” is a practice whereby donor monies are pooled into a single fund managed to some extent by the government of the host country. In Kenya, for example, Germany is part of the multi-nation Governance, Justice, Law and Order Sector (GJLOS) effort, which includes key ROL programs and reforms. GTZ has also, however, maintained a separate bilateral ROL program to increase its leverage with the Kenyan government. Germany has clearly recognized the necessity of long-term programmatic support. Toward that end, Germany’s ROL project in Ghana, initiated in 2003, is projected to extend through 2015.¹⁶²

A recently published article¹⁶³ highlights GTZ’s approach to bridging differences between the rural “living laws” and the formal state legal system in the countries of Ethiopia and Ghana. GTZ began experimenting in the early 1990s with a three-pronged approach to expand interaction with customary elements of overall ROL systems in the region. First, it provided new country officers with extensive in-briefings describing the traditional and customary practices. Second, officers were encouraged to support pilot programs in legal pluralism, such as improving the status of women. Third, GTZ encouraged innovative pilot initiatives targeting reconciliation of fragmented societies and competing legal systems. Two initial pilots were carried out in Ghana and Ethiopia. Those projects supported discussions between state authorities, NGOs, and rural authorities and inhabitants focused on identifying major differences, impediments, and ways in which both systems could leverage their services to enhance citizen ability to resolve conflicts.

United Kingdom – The Department for International Development (DFID) has integrated personnel from other government agencies into DFID in order to consolidate its justice sector programming assistance into a single agency. For example, DFID adopted the practice of seconding police from New Scotland Yard and other local police forces to focus on police development programs in Africa. DFID’s approach has evolved in recent years from a primary emphasis on formal institutional reforms to a focus on grassroots issues and rural problems, such as its Nigeria project that works with several pilot states. In particular, ROL programs dealing with smaller, rural courts tended to engage in development of policies,

¹⁶⁰ Julio Faundez, “Capacity Building of the Sudan Judiciary (Sudan Multi-Donor Trust Fund) Mid-Term Review,” (2008), 15.

¹⁶¹ *Ibid.*, 19.

¹⁶² GTZ. “Improvement of Governance Programme,” (accessed 2009). <http://www.gtz.de/en/weltweit/afrika/ghana/16950.htm>

¹⁶³ Penal Reform International, “Access to Justice in Africa and Beyond: Making the Rule of Law a Reality,” (Chicago: Northwestern University, 2007), 87-93.

procedures and systems, and general enhancement of recordkeeping systems and processes. For the most part, DFID's international assistance programs in Africa (those for which documentation was found) incorporate a significant element of civil society support and access to justice in rural areas. DFID has a history of support for policing activities. Lately, it has radically transformed its policy, putting the experience of insecurity and injustice at the center of its analysis, and highlighting the need for a sector-wide perspective. Two large-scale programs in Africa designed to reflect this new policy have been in place for a few years, and more are being designed. The two programs are the Malawi Safety, Security and Access to Justice Programme (MaSSAJ), which started in 2002 with £35 million (US \$67 million) for the first five years, and the Nigeria Access to Justice Programme, with £30 million (US \$57 million) approved in 2001 for an initial period of seven years (but still continuing today). These programs are attempting to move away from an institutional approach, emphasizing sector-wide policies and coordination, and paying particular attention to research and the perspective of the poor.¹⁶⁴

Scandinavian countries – Scandinavian countries support the SWAp approach where possible,¹⁶⁵ but also maintain bilateral programs of assistance, e.g., Denmark's Mozambique program (described below). Scandinavian foreign assistance programs are generally funded by specific and consistent national budget allocations. This reliable source of program funding has fostered and enabled Scandinavian countries to maintain long-term program commitments, despite admitted frustration with the very slow and often non-linear pace of reform. In Kenya, for example, the Swedish representative acknowledged that progress in implementing GJLOS programs had been significantly slower than anticipated. She commented that hands-on technical assistance is required for considerably longer periods in Africa than in other regions of the world, citing as one example the lengthy transition period needed to transfer the management of GJLOS finances and budget to local authorities.

China, Colombia and Venezuela – Finally, we note the growing role and influence of three countries. The first is China.¹⁶⁶ Especially in Western Africa, the Chinese government is playing an increasingly prominent and significant role as an international donor, both in the amount of its economic and foreign assistance investments into the region, and its growing political influence on individual country governments. A potentially disturbing trend is the increasing frequency with which the Chinese government is subsidizing African national officials to travel to China for lengthy periods of time to receive training in the Chinese system of government. Colombia and Venezuela are the other two countries playing a growing role in the nations of West Africa. A State Department interviewee reported that narco-trafficking drug lords from these two countries have "taken over" this region, leading to direct ties between criminal networks operating in Latin America and those emerging in West Africa. The threat of ties between narco-traffickers and Islamist extremists in West Africa and the Sahel greatly concerns the Departments of State and Defense.

¹⁶⁴ Laure-Hélène Piron, "Justice Sector Reform in Africa," *Open Society Justice Initiatives*, Human Rights and Justice Sector Reform in Africa: Contemporary Issues and Responses, (February 2005), 7.

¹⁶⁵ "Basket funding" approaches tend to be favored by some donors, particularly the Scandinavian countries, the UN, and the EU/EC. This funding strategy has been used in two of the countries visited: Kenya and Malawi. USAID participated with modest support in both countries, but there is no evidence that this type of joint funding mechanism produced deeper donor coordination or improved results than bilateral approaches.

¹⁶⁶ While there is very little evidence of development programs along the lines of the Western nations' philanthropic models, there are very small programs working in the justice sector, but not from a developmental or institutional strengthening perspective.

COUNTRY ANALYSIS – DANIDA’S MOZAMBIQUE PROGRAM

The case of Denmark’s assistance to Mozambique is presented in some detail in view of the comprehensive pre- and post-implementation analyses,¹⁶⁷ and its resemblance to the USAID program implemented in Mongolia in the late 1990s. *Danida*’s pre-program analysis noted the lack of an overall framework for objectives and policies and the need to forge new regulations linking the legal framework to the legal sector institutions. It further noted the critical need to establish interrelationships and to enhance understanding of the interdependence of each justice system institution.¹⁶⁸ The authors highlighted the lack of a common vision to guide justice sector reform and, as part of an overall strategic planning process, recommended support for development of a comprehensive “Vision Document” to serve as the overall managerial tool through which to define long-term objectives and guide implementation.¹⁶⁹ Essential ingredients to this process were identified as clear assessments of local counterpart needs and the importance of translating high-level goals contained in the strategic plan into specific and benchmarked annual work plans (called “Business Plans” within the document.)¹⁷⁰

The needs-based strategic planning process incorporated multiple donor programs into a clearly defined “road map” guiding implementation,¹⁷¹ and appeared to anticipate many predictable implementation challenges.

Unfortunately, implementation did not proceed as well as had been hoped. The post-implementation analysis cited lack of comprehensive follow-through that led some donors to consider the commitment to joint planning as “questionable.”¹⁷² It found the inability of the various ministries involved to reach consensus to be a major stumbling block. The report also found that lack of harmonized monitoring and evaluations systems detracted from the project’s ability to measure progress towards goals that would have enabled more timely problem diagnosis. Ultimately, the impetus for forward movement of the program waned and, when confronted with the disappointing outcomes of assistance, donor interest also diminished.

Despite recognition of the importance of strategic planning and action planning, actual implementation suffered from lack of participant consensus about priorities and roles, lack of prompt problem identification, and insufficient direct technical support for implementation.

C. Two Special Issues: Customary Practices and Post-Conflict Programming

I. Customary Practices and Rule of Law Programming

Although nearly all donor programs incorporate elements of enhanced access to justice, until recently, few ROL programs in Africa have dealt directly with local traditional and customary systems. While widely recognized as an effective means of resolving minor conflicts, these systems can also extend to matters of a serious nature, such as domestic violence, rape, and murder. Donor reticence to providing direct support to customary law systems stems principally from some practices that run contrary to human rights protections of women and children and other vulnerable groups; some practices are even abusive and life-threatening.¹⁷³ Yet since the vast majority of citizens have no other recourse for resolving

¹⁶⁷ *Mozambique I; Mozambique II.*

¹⁶⁸ *Mozambique I*, 16.

¹⁶⁹ *Ibid.*, 17.

¹⁷⁰ *Ibid.*, describing Business Plans as “institutional plans, which define core functions and strategies.”

¹⁷¹ For example, this approach has been used with considerable success in the USAID-funded rule of law program implemented in Mongolia between 1999 and 2008.

¹⁷² *Mozambique II*, 20.

¹⁷³ US Department of Justice. “Diagnostic Assessment and Proposed Implementation Strategy: The Liberian Justice System,” (Washington, DC: USDOJ, 2005), 158-159. For example, OPDAT’s Diagnostic Assessment of the Liberian Justice System from 2005, cites the highly circumspect practices of “trial by ordeal” involving searing with a machete or hot oil, or the “sassywood” practice of drinking a poisonous mixture. Those who survive the ordeals are considered to be “not guilty.”

disputes – especially those involving land, inheritance, and minor crimes, these systems cannot be ignored entirely in favor of formal institutions, especially since formal sector institutions are geographically remote, expensive, time consuming and, all too often, dysfunctional.

It is becoming increasingly understood that for sustainability, donor programs must take into account customary and religious systems prevalent in all countries of the region. Albeit still on a limited basis, the international community is beginning to reconsider its position with respect to traditional and customary systems.¹⁷⁴ As we have seen in the earlier discussion of this topic, perhaps the most startling example of this emerging trend is the support that has been offered by international donors in connection with the *gacaca* process in Rwanda, wherein some 130,000 detainees were held in Rwandan prisons in connection with the genocide. With considerable donor support, *gacaca* was adapted to provide for mass trials of those accused of the very major crime of genocide, along with some minor crimes. Some have criticized its use as inappropriate mass justice for mass atrocity, while others have extolled its practicality and potential for fostering reconciliation. In any event, it is without a doubt the most celebrated case where the international community has devoted effort and resources toward the use of local customary practices as part of ROL programming. Local customary practices have also been used in Africa as a tool of restorative justice in the aftermath of atrocities, as in Uganda, South African, Sierra Leone, and Mozambique.

By contrast, although there are at least 24,000 customary justice fora spread throughout the sub-continent,¹⁷⁵ only a very small portion has benefited from donor support. Some examples of programs that have had donor support include: DFID's MaSSAJ program in Malawi that is now piloting "primary justice" initiatives, designed to improve linkages between the formal and informal systems, and enhancing skills and accountability of non-state structures¹⁷⁶ and GTZ's aforementioned programs in Ethiopia and Ghana. The Open Society Justice Initiative, joining the Sierra Leone group, the National Forum for Human Rights, is undertaking an experimental effort to provide basic legal services in five chiefdoms in Sierra Leone. The idea is to work primarily through community-based paralegals – as they are provisionally called – rather than through lawyers. There are only 100 or so lawyers in the country, fewer than 10 of whom live outside the capital and its vicinity. Moreover, lawyers are not allowed to appear in customary courts. The paralegals come from the chiefdoms where they work and have grown up under customary law, but are given training in (mostly) formal law as well as in the workings of government. Their methods are diverse. For individual justice-related problems, the paralegals provide information on rights and procedures, mediate conflicts, and assist clients in dealing with government and chiefdom authorities. For community-level problems, paralegals advocate for change from above and assist in organizing collective action from below.¹⁷⁷

There are other signs that the international community is reconsidering a role with respect to customary law practices. The US Institute for Peace (USIP), for example, is undertaking a study of the use of local customary practices as part of ROL programming in more than 10 countries around the world, including Rwanda's use of *gacaca*.¹⁷⁸ The USIP study concludes that civic education is the *sine qua non* for any situation in which decisions are made regarding use of formal versus informal systems. Citizens need to be aware of their rights, and available alternatives to ensure protection of these rights. In this regard, the

¹⁷⁴ J. Kayode Fayemi, "Foreward," *Open Society Justice Initiatives*, Human Rights and Justice Sector Reform in Africa: Contemporary Issues and Responses (February 2005), 2.

¹⁷⁵ Laure-Hélène Piron, "Justice Sector Reform in Africa," *Open Society Justice Initiatives*, Human Rights and Justice Sector Reform in Africa: Contemporary Issues and Responses, (February 2005), 9.

¹⁷⁶ *Ibid.*

¹⁷⁷ Vivek Maru, "Legal Dualism in Sierra Leone," *Open Society Justice Initiative*, *Human Rights and Justice Sector Reform in Africa: Contemporary Issues and Responses*, (February 2005), 21.

¹⁷⁸ Here we reference principally the body of literature considered in a chapter on East Timor, authored by Carl Ranheim, for a forthcoming USIP publication.

current situation in East Timor serves as an encouraging example in the sense that where citizens have become aware of their rights and options available via customary and formal systems, they are making informed decisions about which system to use. In resolving cases of domestic violence, there is growing evidence that African women are systematically turning to the formal courts, rather than resigning themselves to the discrimination of village elders who have traditionally been tolerant of domestic violence.

2. Post-Conflict Rule of Law Programs

Programming in post-conflict environments presents somewhat different challenges and opportunities. Clearly the aftermath of violence and devastation present serious challenges to the local population and donors alike, necessitating programs to address both psychological fallout as well as to ensure that conflict does not recur. Dealing with those responsible for violence and crimes against humanity is a key element of donor ROL programming. Broadly speaking and as we have seen from *gacaca* in Rwanda, the Special Court for Sierra Leone, and Truth Commissions in South Africa, the means of addressing the sources of conflict and the objectives of bringing perpetrators to justice have garnered a significant portion of donor attention, sometimes to the detriment of building local capacity and institutions to enable a country recovering from conflict to move to self-sufficiency. These three examples bring differing perspectives and results, particularly with respect to building the longer term skills and capacity needed by local counterparts to support sustainability of national-level systems once donor assistance concludes.

The Truth and Reconciliation Commission of South Africa was largely supported by the South Africans themselves, leaving the donors to concentrate their efforts and funds on supporting institutional reforms and justice programming focused on citizen rights and access. Donor funding and attention were not diluted by support of conciliatory mechanisms needed to enable traumatized citizens to put the past behind them. At least in part, the relatively fast pace of justice sector reforms in South Africa is attributed to this division of labor and retention of donor resources to focus on systemic reforms. The case of **Rwanda** is quite different, as donors invested heavily in the *gacaca* process. However, donors generally acknowledge that their support of *gacaca* did little to build future capacity of the formal system components to meet the needs of citizens upon conclusion of donor assistance. Similarly, in **Sierra Leone, the Special Court** has consumed huge resources. While bringing the perpetrators of the conflict to justice, the Special Court leaves behind no residual benefit for the domestic system of justice. Rwandan nationals were likewise not involved in the International Criminal Tribunal for Rwanda, receiving neither training nor accrued experience from the exercise. Indeed, in both the cases of Rwanda and Sierra Leone, since donor attention was so focused on dealing with those responsible for the violence, comparatively few donor resources were devoted to reestablishing the formal system of justice or to rebuilding the capacity of local officials to assure its ongoing viability. This is an oft-repeated lesson found in the literature – one that should be taken into consideration in future post-conflict interventions.

On the more positive side, working in post-conflict environments can present opportunities for donors and local authorities alike. Where large-scale conflicts have ravaged a country's governmental institutions, those involved in the rebuilding efforts have a unique opportunity to "get it right," that is, assist in developing new structures and systems designed to meet citizen needs that match the economic realities and long-term sustainability of the country in question. As a cautionary note, despite the relative ease of effecting changes within formal justice sector institutions in post-conflict situations (principally because manpower, systems and facilities have been destroyed), donors cannot lose sight of the needs to support attitudinal changes on the part of both staff and citizens. Equally important is how the donor community handles traditional and customary laws, maintaining citizen access at local levels, while also ensuring that customary practices incrementally incorporate new constitutional principles that protect individual rights. This entails donor focus not just on rebuilding formal systems, but also on addressing how informal

customs and practices can be integrated to ultimately produce a unified system that serves needs of all citizens of the country in question.

V. CONCLUSIONS AND RECOMMENDATIONS

A. Common Problems and Lessons Learned from Rule of Law Programming in Africa

I. Pre-implementation Analysis

Pre-design assessment that includes in-depth analyses of justice system design, political actors and incentives, and specific problems and challenges facing implementers is critical to any project's potential success – Good assessment work does not ensure success, but the odds are much greater that a project will not be successful absent solid preliminary assessments.

2. Project Planning and Design

ROL interventions should be linked to the promotion of high-level objectives – In designing projects, instead of linking interventions to objectives such as fairness and effective dispute resolution, many donors assess outputs such as numbers of judges trained or courtrooms rehabilitated. As a consequence, progress is gauged based upon limited notions of change and may not reflect any real difference in the provision of justice.

Project plans should be linked to national strategies and priorities – All too often, national-level strategies do not exist or have not been translated beyond high-level, long-term goals into discrete sets of activities required to reach those objectives. Moreover, the sheer proliferation of both donor and local counterpart plans introduces needless levels of complexity and bureaucracy that do not contribute to the achievement of goals. There is substantial duplication and overlap of donor programs at virtually every level, and an urgent need to prioritize interventions and develop appropriate sequencing.

Concentrating on one segment of the justice chain to the detriment of others can lead to imbalances and distorted incentives between the various institutional components – Focusing attention on one component of an overall system has the potential to further weaken the neglected segments and even damage the performance of the overall system.

Local ownership and simplicity in project design and sequencing are essential, along with a realistic assessment of local capacity – While the lesson is trite by now, the results of this study confirm the importance of local ownership of program objectives and the reform process. Simplicity in design and realistic appraisal of local capacity are also keys to success. Critical reforms will not be simple to achieve, and local capacity may be very limited. Often, complex reforms can be broken into simpler pieces, with appropriate sequencing and vigilant measurement of benchmarks.

Projects should be broadly designed and sufficiently flexible – Anticipating the need for programmatic adjustments is critical, especially in high-risk, unstable, or conflict conditions.

Many pilot projects fail to plan adequately for replication – Pilot projects are attractive when resources are limited, but often are not replicable because donors tend to over-invest in them in order to achieve success. Even when the pilots are successful, host governments may not have the expertise, manpower, or funding needed to expand pilot initiatives to other locations.

3. Donor Coordination and Considerations

Fragmentation of ROL development assistance across a range of USG agencies hampers coordination – Negotiating between different institutional mandates, cultures, objectives, and approaches is challenging and time-consuming. To the extent that USG staff (and their implementers) must spend time coordinating within the USG, time available to coordinate with other donors is further limited.

Despite virtual universal recognition of the importance of donor coordination and varying mechanisms, the persistent failure to effectively coordinate reduces potential impact and sustainability – Donors’ failure to harmonize efforts makes it easier for the host nation to play donors off one another. The absence of effective collaboration among international actors can also raise the transaction costs for the recipient government.¹⁷⁹

The multiplicity of international players and institutions can lead to incompatible support provided by different actors in the same sector – Lack of coordination can result in duplication, gaps, or even competing strategies and approaches.¹⁸⁰ It can also waste resources and time, and may potentially alienate reform support.

The SWAp funding mechanism favored by some donors may lead to improved coordination – Although not the main purpose and experiences have been mixed (*see* discussion in Section IV), pooling donor funds may facilitate coordination and promote allocation of scarce resources to the highest priority needs in countries experiencing budget shortfalls. SWAp mechanisms are increasingly favored by some donors, although others do not wish to relinquish direct control over the use of their funds. From the perspective of the host nation, SWAp budgeting provides greater flexibility over the use of the funds, enhances national ownership, and promotes the development of domestic institutional mechanisms of budgetary control and accountability.¹⁸¹

Compliance with multiple and differing donor reporting and other requirements consumes significant project and local counterpart time and seriously taxes local systems – Donor-mandated conditionalities, milestones, and reporting requirements are indisputably necessary. Nevertheless, this creates a substantial strain on thinly-staffed institutions and pulls managers away from direct project activities.¹⁸²

The value of imposing conditions is compromised by failures to enforce those conditions – The need for consolidated and unified donor conditionality has been recognized as one of the few effective tools available to donors to achieve measurable progress. Failure to enforce conditionality requirements (such as repeatedly postponing deadlines), however, can send the wrong message to counterparts.

Despite general consensus on the strength of donor leverage and the proven impact of donors on public opinion and political decision-making, donors are often reluctant to exert this potential power – Donors unquestionably have the ability to sway local counterpart opinions, including high-level political leaders. Donor reaction to the outbreak of political violence in Kenya after the December 2007 elections and donor mediation contributed to re-establishing security and eventual political settlement. Donors exerted strong pressure and even halted some programs for several months. Clearly, considerable

¹⁷⁹ Nicole Ball, et al., “DFID Security and Justice Sector Reform Programming in Africa – Evaluation Working Paper #23,” (London: DFID, April 2007), 28.

¹⁸⁰ In Rwanda, for example, GTZ and USIP supported the development and use of rival and conflicting case management software; eventually, the judiciary gave up on both and developed its own software. *See Rwanda Case Study* annex to this report.

¹⁸¹ Workshop on budget support: *The Uganda Experience*, remarks of M.C. Muduuli, Deputy Secretary of the Treasury, June 2004.

¹⁸² USAID, “South Africa Rapid Assessment of the Criminal Justice Strengthening Program (CSJP),” (Washington, DC: USAID, May 2008), 11.

sensitivity must be used when applying leverage so as not to transgress issues of sovereignty. Bullying does not create local ownership and, even if successful at first, is likely to ensure failure in the long run. It may be most effective in crisis situations, such as the post-election situation in Kenya. Nevertheless, the application of unified donor pressure on severe and intractable problems – such as corruption and impunity – may be the only effective means of generating progress, particularly in countries highly reliant on donor resources. As a general rule, results from donor programs diminish if donors do not maintain pressure for reform. Providing for post-donor local sustainability and funding is critical.

4. Project Time Frames

Short-term interventions do not achieve significant and sustained impact in Africa – The clear consensus of international donors and local counterparts alike is that short-term interventions do not lead to systemic change. USAID staff acknowledges the need for longer-term support although management systems, resource limitations, and inconsistency in funding flows do not always permit this approach. In Nigeria, some components of USAID’s past ROL efforts were criticized as focusing on short-term strategies designed to produce “quick wins,” which almost always failed to produce sustainable results.

A longer time frame and slower pace can help donors and their local partners manage host country absorptive capacity problems, particularly when substantial resources are invested – Various Scandinavian donors recognize the limitations of short-term efforts and instead emphasize more gradual, less immediately ambitious, and longer-term programming. World Bank projects also often assume long-term and consistent commitments. DFID likewise pursues a strategy of long-term planning and patience to stay the course through early stages of implementation, when progress may be limited or seem non-existent.

5. Implementation and Training Models and Needs

USG operational training programs, and those of other donors, were widely criticized for importing home country models inadequately suited or adapted to the host country – Such practices may be regarded either as disrespectful or as undesirable forms of external intervention.¹⁸³ Training must be tailored to the requirements and laws of the recipients. Three problems were consistently found to some degree in nearly every African ROL program:

1. Inappropriately donor-based training curricula and materials, i.e., off-the-shelf materials applicable more to the donor’s context rather than to the host country;
2. Lack of harmonization between donor training and local laws and legal frameworks, e.g., training on plea bargaining or wiretapping where local laws do not permit those practices; and
3. Failure to connect training with the recipient institution’s environment, regulations, and standard operating procedures, e.g., training in evidence collection must tie into the host country’s protocols for chain of custody, or else it will not be used.

Court automation projects should be preceded by functional and user analyses and must anticipate future system interconnectivity needs – Sophisticated technologies and equipment dependent upon electricity, Internet, maintenance services, and other resources should not be provided if those services are not available and reliable. The need to train users and technicians should also be built into automation programs.

¹⁸³ Julio Faundez, “Capacity Building of the Sudan Judiciary (Sudan Multi-Donor Trust Fund) Mid-Term Review,” (2008), 30.

Capacity building and technical assistance for implementation processes are critical needs – Donors invest heavily in developing plans, but often fail to provide technical support for the actual step-by-step implementation of those plans. In the field research in Malawi and Kenya, donors and counterparts alike stressed the importance of donor support for implementation and not just for planning. The lack of technical knowledge and experience in implementing plans is a major stumbling block to both the pace of reform and achieving results.

Higher levels of mentoring and technical assistance than provided in most environments to date will likely be needed to support greater achievement of objectives – The evolving trend is towards greater counterpart participation and ownership to promote sustainability. A fine line must be drawn between donor control and assuring that counterparts are comfortable and capable of proceeding with implementation before delegating full responsibility.

Many programs lack adequate stakeholder or public outreach and communication strategies – These can be used to develop public confidence in judicial institutions as reforms are taking place, publicize successful reforms, and nurture and reinforce support for reforms. When feedback loops are built in, citizen and stakeholder opinion can create added pressure to stay the course of reform.

ELEMENTS OF SUCCESS IN A CIDA-FUNDED ROL PROGRAM IN ETHIOPIA

A project implementer in a Canadian-supported ROL project in Ethiopia summarizes major elements of success – elements that are generally shared across most ROL programs. This program was a five-year project contracted through the Canadian Commissioner for Federal Judicial Affairs. The project ultimately accomplished more than originally envisioned, such as establishing a wide-area network in Addis Ababa for federal courts that the Ethiopian government expanded throughout the country using its own budgetary resources. Key factors contributing to success included: thorough pre-design analysis; Ethiopian-articulated needs; determination of root causes for problems and design of program activities to address those causes; a project team comprised of Canadians and Ethiopians; trust gained from counterpart institutions; honest and frank reporting and discussions with counterparts; and donor flexibility and patience.

6. Project Evaluation

The paucity of evaluations makes it nearly impossible to draw systematic conclusions about what has worked and what has not worked – The scarcity of evaluations and post-program follow-up in African ROL projects is troublesome, particularly in light of the limited success and unusual challenges presented by ROL reform in the continent. Very few donors, aside from The World Bank, incorporate mid-term and post-implementation evaluations into their core approaches. Regular evaluations in the course of project implementation and at its conclusion would provide valuable information for the design and management of current and future activities. Comparisons of particular facets of ROL programs across similar countries (e.g., legal aid services or legal education) would also be useful.

Lessons that do not travel cannot be used in the design of future programs¹⁸⁴ – Even when evaluations are conducted, little attempt is made to share them among donors or between individuals in the same institution working in different countries.

¹⁸⁴ Nicole Ball, et al., “DFID Security and Justice Sector Reform Programming in Africa – Evaluation Working Paper #23,” (London: DFID, April 2007), 28.

7. Post-conflict Country Programs

International tribunals, while effective in prosecuting perpetrators of mass atrocities, are costly and do not build local expertise or justice sector reform – They may also hire and thus divert local legal talent desperately needed by the regular justice system. The need for local reforms and institutional strengthening may languish if the attention of capable reformers is directed to the international forum. Nonetheless, the need for judicial recognition and sanction for prior wrongdoing is indisputable. When designing programs in post-conflict societies that will both require and divert substantial resources, the need to provide justice and reparation for past atrocities must be carefully balanced against current and future justice sector needs in the country.

Even the most promising results from post-conflict donor interventions tend to dissipate when donors begin to leave the country – Despite the relative ease of effecting changes within formal justice sector institutions in post-conflict situations (principally because ineffective institutions and systems have been destroyed and can be replaced), donors cannot lose sight of the need to support attitudinal changes on the part of both staff and citizens.

B. USAID'S Institutional Advantages and Weaknesses

I. USAID Comparative Strengths and Advantages with Respect to Other USG Agencies

USAID is the only USG agency with the specific mission of supporting foreign assistance from a developmental perspective – USAID's focus differs markedly from the foreign policy or operational mandates of other USG agencies. Its ROL programs incorporate a sector-wide perspective that includes justice sector actors and institutions, the other two branches of government (*e.g.*, through executive and legislative branch strengthening programs), and civil society. Other USG departments that implement ROL programs do not fully understand or appreciate the need for a developmental approach to enhance both impact and sustainability of these programs. For example, USG law enforcement agencies are funded repeatedly to train foreign national counterparts in a broad variety of topics pertaining to priority issues of strategic interest to the US, such as counter-narcotics, counterterrorism, or money laundering investigations. Unfortunately, counterparts often are unable to put those skills to use because the institutional environment in which they work has not changed, and the effect of the training is lost. A developmental approach would combine individual training with institutional capacity building to permit the utilization of new skills.

USAID's broad-based mandates and programs provide more and closer contact with citizens in target countries than do other USG agencies and many other donors – All of USAID's sub-Saharan Africa programs incorporate one or more components addressing government decentralization and strengthening public administration, access to justice, women's rights and the rights of youth, public education, and civil society. Beyond the DG sector, USAID initiatives encompass a wide variety of other foreign assistance areas, such as poverty alleviation and public health programming, all of which can and do have a direct impact on improving ROL. USAID programs often work outside of large urban areas, and their efforts with civil society and human rights groups further expands the ability to spread information throughout social networks. Taken together, USAID programs interact with thousands of citizens on a daily basis, exponentially more than any other USG-supported programs. This gives USAID the greatest potential to connect with and improve the lives of ordinary citizens in the region. These approaches represent significant opportunities to work with civil society and to leverage existing USAID programs to expand legal knowledge and awareness of rights and responsibilities.

USAID has a track record of strong gender programs and broad-based focus on integrating gender issues into program design and implementation – USAID has worked successfully with women’s groups in Africa and in other regions, including Latin America, to improve legal status and treatment of women. USAID has available mechanisms, such as gender assessments, to discern differential gender treatment and impact so as to guide and inform more equitable program design and implementation. This is a particular strength and advantage in Africa ROL programming; work already undertaken through the WEJI and WID/WLR initiatives, as well as other efforts, could be used as a springboard for development of follow-on ROL activities and identification of counterparts.

USAID is better known to other donors and national counterparts than other USG agencies and so can coordinate more easily – USAID frequently represents the US Mission at donor coordination fora. It is perceived as more neutral than other USG agencies by both the donor community and national counterparts because of its lack of operational objectives. This enhances credibility and acceptance.

USAID has generally greater requirements for pre-design assessments, formal work plans and meaningful performance indicators – Although they are insufficient in and of themselves (and the F process outputs have muddied the waters with respect to performance monitoring), such documents provide some basis for evaluating performance. A greater focus on project and program evaluation could contribute substantially to project design and impact. Equivalent studies and requirements appear to be largely lacking in other USG agencies.

USAID has in place the framework and infrastructure to research, compile, and disseminate substantial documents and studies of lessons learned and best practices from ROL programming – USAID headquarters can play a significant research and evaluation role on behalf of field Missions. USAID has in place the *Center for Development Information and Evaluation*, its *Knowledge Management Program*, its library’s *Knowledge Services Center*, and the DEC database. The USAID DCHA/ROL team has supported research and publication of a series of technical papers (*Technical Publication Series*), to include the recently published *Guide to Rule of Law Country Analysis*; *The Rule of Law Strategic Framework*; *Case Tracking and Management Guide*; *Guidance for Promoting Judicial Independence and Impartiality*; and an occasional paper series that address ROL topics. These guides and handbooks can provide significant assistance to Missions evaluating and undertaking ROL programming. DCHA/DG also provides technical training in ROL programming to technical staff.

USAID headquarters and field staff have in-depth knowledge of the political histories and systems of the countries in which they work – Staff represents a broad cross-section of disciplines, ranging from economists to political and social scientists to those with specialized expertise, such as lawyers and law enforcement officers. Staff is increasingly cross-sectoral in outlook, enabling enhanced support for emerging themes, such as counter-extremism.

USAID Missions’ staffs and programs incorporate the valuable technical support and skills of Foreign Service Nationals (FSNs) – Many FSNs are in management or leadership positions. Following the conclusion of their USAID assignments, some FSN staff go on to assume important public and private sector positions and may thereby further disseminate and promote USAID development work and goals.

USAID works with many decentralized structures, and therefore has the presence and ability to reach rural as well as urban populations – Such structures provide a platform for the incorporation of rights information into sectoral programs such as education and HIV/AIDS. Although a focus on decentralization can lead to indiscriminate programming in the absence of strong analytical frameworks and analyses, this breadth is an advantage in ROL programming because of the diversity and informal nature of many African justice systems, particularly in rural areas.

USAID has assumed a central role in implementing MCC's threshold programs in the region, which has enabled Missions to engage directly with other USG departments – Although this is a recent trend, incorporating USAID into implementation of MCC programs has fostered expanding awareness of and cooperation around developmental approaches to ROL programming. The team saw a good example of this in Malawi, where those interviewed cited USAID's useful role in bringing together other implementing agencies, such as ICITAP and OPDAT, because of the MCC program.

2. USAID Comparative Strengths and Advantages with Respect to Other Donors and National Counterparts

USAID's on-the-ground knowledge of the political and social context of the countries in which it works is a clear advantage – Given the broad scope of its programs, which cross multiple sectors and disciplines, USAID's in-country presence permits it to establish and maintain closer relations with key counterparts.

USAID can invest in technical assistance to support program implementation in ways and amounts that the multilateral banks find difficult to do – USAID is also likely to prize institutional and policy reform over investment in physical infrastructure and equipment. Multilateral loans are more likely to provide funding for the latter, since those are the sorts of items governments are prepared to borrow to support. These separate emphases can be complementary.

3. USAID's Institutional Weaknesses

USAID's weak position in policy, decision-making, and multi-agency ROL reporting – As a non-cabinet level agency, USAID does not have a direct voice in setting policy with regard to overall objectives for ROL programming. It also lacks adequate communications or legislative outreach staff and does not seem to interact in substantial and continuing ways with congressional appropriators and their staffs to advocate for or explain and respond to questions relating to ROL issues. USAID is thus at a disadvantage because of its inability to highlight the advantages and importance of integrating a *developmental* perspective into all USG ROL and related programs. As an additional consequence of its subordinate position and lack of presence, other USG agencies or departments sometimes fund and implement programs that duplicate or compete with those supported by USAID.

USAID sometimes finds it difficult to adequately convey its perspective to other USG agencies promoting ROL. When USAID staff participates in multi-agency assessments and other missions related to ROL, it is important for agency perspectives to be reflected in the resulting reports. USAID staff should be aware of the gamut of knowledge and expertise available through its programs and partners and this range should be reflected in multi-agency reports, recommendations, and future programming guidance. This is not always the case. For example, although USAID was represented on the multi-agency Sudan assessment team in 2007, the assessment report makes no mention of USAID programs that could provide a focal point for pursuing ROL objectives in areas such as civil society, health, education, and women's rights.

Special needs and targeted initiatives – Programming is often conducted in an ad hoc fashion and can become distorted by special Washington-based initiatives. Such initiatives may make it more difficult to respond to local reform interests and needs and can create cynicism among local partners. Many if not most of USAID's smaller programs in particular have had to be tailored to address particular topics related to Washington-based directives or emergency considerations, rather than responding to the requirements of the specific country's ROL context.

Budgetary restrictions – Limited funding for tackling large scale institutional reforms, coupled with uncertain funding levels from one year to the next, makes planning difficult. Such unpredictability also makes it difficult to plan and to deliver on commitments, a situation that can be embarrassing for USAID Missions and discourage partners from planning joint programs when they know that USAID might not be able to meet its commitment.

Inter-USAID coordination – Lack of internal communication between bureaus is an acknowledged problem within the agency that can result in duplication of effort and overlapping programs in the field, as well as lost opportunities to learn from other programs. Documents are not routinely shared between bureaus, nor are bureaus necessarily aware of the projects being implemented in other regions of the world. Another ramification of the sectoral “stove-piping” of programs within the agency is the lost opportunity to integrate programs to maximize results, for example, to include legal rights awareness and access to legal aid in microfinance and entrepreneurship training for disadvantaged women.

Availability, accessibility and application of documents, products, and studies – This problem is multifaceted, but centers on the fact that the DEC database is neither complete (it does not contain all project-related products) nor up-to-date. Knowledge management still seems inadequate. Knowledge accumulated through previous projects and documents is not routinely made available or applied to new projects undertaken in similar disciplines. The many best practices and lessons learned workshops and studies that have been carried out are not centralized or easily available to staff (or researchers) to avoid repetition of the same mistakes, or to build on the foundation or prior efforts. The agency has repeatedly funded development of similar products (such as case management systems, training for members of the judiciary in principles of court administration and management, policy and procedural manuals, model legislation, etc.). The agency has ample resources that are not being mined adequately to inform and guide current and future initiatives.

The dearth of mid-course or post-implementation evaluations of ROL programs in Africa – This weakness was identified as a major finding in this report. Other than the two evaluations of the ongoing South Africa CSJP, the majority of documents unearthed were pre-implementation assessments. Similarly, program progress reports posted on the DEC were the exception rather than the rule and, although USAID reports are more plentiful than those available from other USG agencies, far more effort is needed to learn how to improve ROL programming.

Internal expertise – Following the spate of retirements of USAID officers in the late 1990s and early 2000s, budgetary and other restrictions on hiring new officers inhibited development of USAID’s internal technical capacities, both in headquarters and the field. Much of the technical work is outsourced; thus, implementation experience is not institutionalized within the agency, but is accrued to the external assistance providers. To an extent, USAID has been able to bridge gaps in expertise through the use of personal service contractors (PSCs) hired on limited contracts. While efficient as a stop-gap measure, this practice has a long history at this point and has a negative impact on the agency’s ability to institutionalize and apply knowledge and experience within USAID. Moreover, since most PSCs are on short-term contracts, the best often find jobs elsewhere, taking their accrued expertise with them.

USAID Missions in Africa have very few officers who are lawyers or experienced in the field of ROL. Field staff in Africa with expertise in other technical areas may understandably be uncomfortable with the complexities of ROL programming. Moreover, increasing numbers of junior technical staff, without deep field experience, need substantial training and mentoring prior to and while taking on the challenging programs inherent in a field environment. This not only hampers USAID’s ability to contribute technical perspective during Country Team meetings and other venues, but USAID staff is often not in a position to comment credibly on or contribute to ROL initiatives carried out by other USG entities or donors. Similarly, USAID contractor, grantee, and consultant communities have less experience in ROL

programming in Africa than elsewhere, particularly in regions such as Europe, Eurasia and Latin America and the Caribbean. Another complicating factor is lack of expertise and experience in dealing with the highly diverse indigenous systems of justice in Africa.

Short time frames/Quick results – In Africa and elsewhere, expectations that systemic changes can result from rapid programmatic interventions has proven unrealistic. Such expectations can discourage programmers from supporting institutional reforms in the justice sector.

C. Recommendations

I. Strategic Direction of USAID Rule of Law Programs in Africa

Balancing Demand- with Supply-side Programming – Shrinking budgets, together with high costs, complexity, and slow-paced results of Africa ROL initiatives have led to increased USAID “demand side” programs that focus on rights awareness, civil society advocacy, and legal aid/services. Ultimately, a sole focus on building demand is likely to result in limited success at best and, more likely, failure. To the extent they do not already, demand-side citizen education and awareness programs should incorporate elements of how citizens can effectively pursue their rights. There is now a body of research, much of it commissioned by USAID, on program elements that ensure greater effectiveness of civic education; that guidance should be put into practice.¹⁸⁵

Integrating Developmental and Operational Perspectives – USAID’s development experience and perspective should be applied to support efforts of other USG entities providing ROL assistance in Africa to assure maximum cost benefit and the greatest potential for positive impact and sustainability by the recipient nation. USAID’s institutional development expertise could assure that institutions can use the training provided to individuals trained by other USG agencies, thus avoiding duplication of effort while also building internal capacity of counterpart institutions.

Leveraging other USAID Mission Programs – The majority of USAID program funds in Africa support health-related prevention and treatment programs, such as those dedicated to HIV/AIDS, malaria, etc. All of these programs intersect directly with local populations and, as such, could and should serve as opportunities to acquaint persons assessing these services with general information about legal rights and how to protect those rights. USAID should try to integrate specific, usable information about the laws, rights and responsibilities into USAID programs that deal directly with citizens, e.g., health, education, local governance, etc.

Addressing Inadequate Political Will/Lack of Consensus – Low levels of political will and consensus do not necessarily mean that a ROL program cannot be undertaken or that it has no chance of success. Programs aimed at addressing problems such as limited judicial independence, overweening executive authority, government corruption, and the like threaten the status quo and require substantial political will and consensus for successful implementation. Creating support for change requires longer time horizons and patience, but program options include:

- Programs dealing with internal administrative or managerial issues (*e.g.*, standard rules and procedures, job descriptions, etc.), or even internal codes of ethics and internal oversight mechanisms (*i.e.*, assistance to the institutions themselves in establishing compliance and investigative capacity to self-regulate), are unlikely to be seen as threatening to the political leadership overall and could therefore be more successful.

¹⁸⁵ Additional research is currently underway in Kenya to evaluate the impact of civic education on citizens via a survey, and on civil society and the media via a qualitative approach. The evaluation is being funded by a multi-donor group that includes USAID.

- Support for longer-term efforts and focus on creating demand for reform, particularly among elite groups and existing constituencies that have a stake in a better functioning justice system, *e.g.*, the business community, lawyers, and women’s groups.

Strengthening Administrative Law and Tribunals – Increased focus on administrative law and remedies could be considered. Administrative law courts¹⁸⁶ or specialized chambers deal with cases that directly challenge the actions of governmental agencies can play an important potential role in curbing corrupt practices, particularly in civil law jurisdictions. Programmatic support could be provided to build capacity in administrative courts or chambers to deal more effectively with cases of corrupt practices or abuse of authority in civil law countries. Support for freedom of information laws can create pressure on an overly strong executive.

Customary and Traditional Practices and Authorities – The majority of Africans access justice through customary and traditional mechanisms. There are both pros and cons to working with these systems, and considerable thought should be given to whether and, if so, how to engage appropriately in this arena. There are no easy or uniform answers or approaches. Through careful country-specific analyses, USAID might identify mechanisms compatible with positive ROL norms, while reducing negative practices that undermine ROL and respect for human rights. Careful consideration should be given to the protection of women’s rights and other marginalized populations, as well as to relevant analytical studies already conducted through initiatives such as WID/WLR and the WJEL. Programmatic interventions may include educating both formal and traditional authorities about informal and formal systems and legal rights, setting up NGO monitoring of informal systems, harmonizing traditional practices with the national jurisprudence, creating linkages and building in rights of referral to the formal justice sector, and citizen education about rights.

Program Sequencing – Sequencing of assistance programs should be considered in program planning. In determining the sequence, consider essential linkages between each component and which should precede the other. For example, building a forensic laboratory prior to development of a chain-of-custody guiding collection, preservation, and use of physical evidence, will result in an unused facility and wasted funds.

2. Planning, Management and Evaluation

Technical Leadership and Direction – Despite its decentralization, USAID headquarters retains a leadership role in providing direction and guidance. Technical staff should provide informed input to policy and decision-making, as well as share accumulated knowledge and information to the field. Headquarters should provide strategic guidance to field Missions and the inter-agency planning processes to assure that ROL programs avoid duplicative or competitive approaches. Headquarters staff should foster greater exchange of information and internal coordination between bureaus in Washington, as well as those in field Missions. In particular, details regarding other donor ROL programs should be sought from the field prior to headquarter decisions on future ROL programming.

Analytical Tools and Frameworks – USAID should continue testing and refinement of existing assessment and evaluation tools, such as the newly published *Rule of Law Strategic Framework*. For assessments of criminal justice systems, participants should also consult DOS/INL’s Criminal Justice Sector Assessment Rating Tool (CJSART), which focuses on four sectors: laws, judicial institutions, law enforcement, and prisons.

¹⁸⁶ Not all civil law-based countries have established separate administrative courts; in some, administrative law cases are heard within general jurisdiction courts. In common law jurisdictions, administrative law matters are often heard in agencies or lower courts.

Program Evaluations – USAID should build in mid-term and post-implementation evaluations to all ROL projects in Africa. Analyses should highlight successful approaches and reasons why objectives may not have been met. USAID should periodically compile regional and global lessons learned and best practices arising from ROL programs into an easily available format, preferably online. The Africa Bureau should also make a systematic attempt to compare impacts and lessons learned for different types of ROL interventions across the region’s countries.

Country-level USG Coordination – USAID and Embassy staff working in the area of ROL, security, or law enforcement should consult on a regular basis to assure program harmonization and identification of ways in which to maximize leverage. USAID’s development experience and perspective should be applied to support efforts of other USG entities providing ROL assistance in Africa.

Strategic and Action Planning – In countries where national ROL reform strategies and action plans do not yet exist, USAID assistance should begin by supporting their preparation. Strategic plans should derive directly from citizen needs for justice-related services, and should be accompanied by annually updated implementation plans outlining specific activities.¹⁸⁷ USAID and the Embassy can also provide valuable coordination support by encouraging other USG and other donor ROL programs to target gaps in the action plans.

Support for Host Country Implementation – Support for implementation was a significant gap identified during field studies. Incorporating advisory assistance to local counterparts in how to implement changes and reforms will predictably enhance both results and sustainability. Advisors should have considerable implementation experience and comparative knowledge of different legal systems so as to provide options best suited to specific country contexts.

3. Technical Approaches and Best Practices

Realistic determinations of what can be achieved in a specific environment, within a given period of time, and with available funding levels, is important. Objectives are generally set too high, and project designs are often too ambitious given funding and realities on the ground. Program plans must take into account local capacity as well as political will and circumstances. They should anticipate the need for flexibility and mid-course adjustments; this should be the expected norm, not the unfortunate exception. Illustrative examples are provided below to guide programming decisions in areas common to many ROL projects:

Sharing products and analytical materials – Substantial materials from past and current USAID projects exist and could be used to inform future programming. For example, there are several USAID-developed and implemented Administrative Office of the Courts models around the world. USAID has also supported business mapping exercises and process reengineering to streamline procedures, increase efficiency, and compile useful information about approaches and models. The DCHA/DG ROL team should be sufficiently capable and staffed to serve as the central repository of knowledge, information, and products resulting from ROL and related programs. It might play a more proactive role, along with Africa Bureau staff, in helping field missions apply lessons and results from other regions or other countries in Africa, and in ensuring that relevant evaluation and assessment materials are made available and disseminated to Missions considering ROL programming. In-house resources, such as the library’s knowledge management system, could support this function by providing periodic updates of reporting on ROL programming in Africa and other regions.

¹⁸⁷ The strategic and action planning exercise supported by the USAID Mission in Mongolia can serve as a useful model in assisting local counterpart development of the initial plans, as well as the successful approaches in integrating all donor programs within the strategic framework.

Legislative Drafting – Importing laws directly from other countries, or external donor drafting of new codes, laws, statutes, etc., can lead to unexpected and unwelcome results that we have described previously in this report. Regardless of the level of external donor support for legislative drafting, the drafting process should always be *inclusionary*: that is, a drafting committee or working groups ideally consist of local experts and interested parties from within and external to the government. In addition, a multi-stage process outlining various *recommended steps to guide legislative drafting* includes the following:

- Clear articulation of problems to be addressed through the new or amended law;
- Identification by local counterparts of provisions/language in existing legislation that should be retained in the new or amended law;
- Research of other models addressing similar issues;
- Harmonization with other existing or planned legislation;
- Consultation with interested citizen groups and NGOs; and
- Anticipation of *practical implications of implementation of the law*, for example, requirements related to resources (enactment may need to be implemented in stages); training; equipment and recordkeeping requirements; and legal practitioner and citizen awareness.

Legal Education – The shortage of trained lawyers is severe and the current law schools and facilities are inadequate to meet both current and foreseeable needs. Improvement of law faculties and other legal training programs is urgently required but must be planned and carried out in a manner that will increase both the quality and the quantity of course offerings. Merely certifying schools and granting law degrees or certificates to poorly trained students would not address the needs, and instead would worsen the overall situation in the long run by infusing incompetent graduates into the system. In addition to supporting improvements to traditional formal legal education (infrastructure, curricula, teachers, libraries, etc.), another possible program option is to support the creation and operation of legal clinics within law schools to provide practical experience to prepare law students to actually practice law and equip them with needed skills prior to graduation.

Professional Associations – The interest and ability of professional associations to become more active in reform should be explored. In addition to generic bar associations, professional associations include a broad range of other associations, such as judicial associations, women’s bar and judicial associations, poverty law centers or legal aid centers, commercial bar associations, specialized private attorney associations, public lawyer associations, and numerous other topical or thematic groupings. These associations should be strengthened and supported to participate and actively promote and advocate improvements to legal and judicial systems and institutions, especially with regard to policies and practices concerning the selection, discipline, promotion, and other terms of employment of judges, and ethical codes and disciplinary procedures for lawyers. In addition, women’s professional associations in particular could play a significant role in promoting reforms to laws and practices pertaining to women’s rights. Associations might also be encouraged to provide pro bono legal services to the poor or marginalized.

Case Management Systems – Poor case processing techniques and recordkeeping practices are a frequent source of inefficiency and delay within institutions of justice. Not only did the team observe a lack of uniformity in case processing *between* the various justice sector institutions, but similar problems were found *within* given institutions. Case intake and management processes should follow the same procedures regardless of where the case enters the system. Support for improving case management and

recordkeeping should focus on assisting counterparts to develop uniform standards across the entire system.¹⁸⁸

Automation Systems and Equipment – In supporting automation projects, USAID should consider whether the system can and will be used successfully. Key issues include: local infrastructure (*i.e.*, facilities, electricity, technical and budget support for troubleshooting, maintenance, access to telephone lines or communications networks, etc.); definition of how equipment will be used (*i.e.*, what information will be retained in the system and who will have access); user training; future interface and interconnectivity needs; and shared, inter-institutional software configurations (*i.e.*, what can and should be shared across justice institutions to enhance efficiency and reduce costs). There is an unfortunate tendency for donors to support different software packages for case management, and programming in this arena needs to ensure that other interested donors are brought into the decision-making process.

Cross-Sector Harmonization and Coordination – Lack of harmonized codes, laws, regulations, and procedures across the institutions of justice not only complicates uniform application, but also results in inefficiency and can hamper the State’s ability to successfully prosecute or defend cases. Programs should seek to harmonize training, procedures, and other forms of support across all justice institutions. Especially where limited funding is available, coordination with other USG agencies or donor programs can help ensure inter-institutional harmonization. Resources must be made available for such coordination, which is time consuming, in both USAID missions and also in the implementing agencies, whether they are grantees, cooperating agencies, contractors, or host government institutions.

Pre-Trial Detention and Alternative Sentencing – USAID should consider support for programs to assist in reducing the pre-trial detainee population and for alternative forms of sentencing for minor offences, especially for at-risk youth populations. Programs could support improved recordkeeping systems to correctly classify prisoners, identifying prisoners who have been held longer than their likely sentence. Programs could also focus on keeping people out of prison by improving access to legal information, lawyers and services; sentencing protocols; and supporting new laws or provisions for alternatives to imprisonment. Programs of education and occupational training for young offenders, using basic education funds, could be integrated into prisons via NGO support.

Support for Residential Community Police – USAID could potentially play a role in fostering better relations between the police and the public they serve. Paramilitary traditions of police throughout the region tend to mirror military forces rather than the civilian-based model of police as public servants to protect the citizens. Police suffer from inadequate resources, salaries, and poor living conditions (in some areas, they are housed with their families in communal barracks). Refurbishing barracks is one method of showing support for police. An alternative might be to provide support for police to reside directly within the communities they serve, thus permitting police and their families to integrate fully as members of a community, rather than perpetuating the “us against them” mentality that currently exists in some areas. Such a move could also be expected to lower youth involvement in petty crime. Experimenting with programs that target vulnerable youth and community policing at the same time and in the same neighborhoods, as is currently being undertaken in Central America and the Caribbean, could be a useful model in environments where crime is exploding.

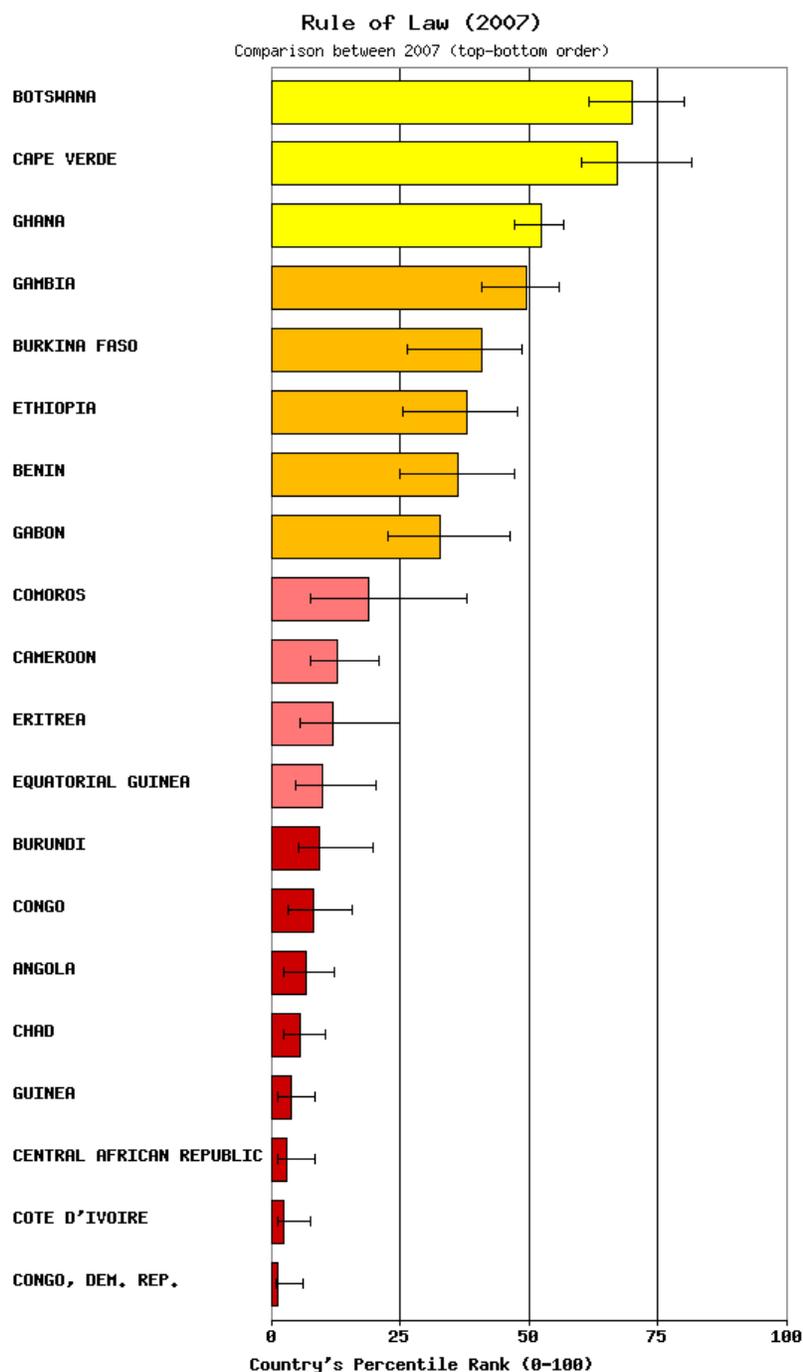
¹⁸⁸ For example, in MCC’s status report for 2007, it indicates “at first the MCC insisted that countries develop and ‘own’ a set of standard operating documents (procurement guidelines, standard bidding documents, terms of reference, contract templates, etc.), resulting in many lost months as each country reinvented the wheel on operational procedures. The MCC is now learning that a standard set of operating documents dramatically improves efficiency without undermining ownership.” From Sarah Lucas “Lessons from Seven Countries: Reflections on the Millennium Challenge Account,” Center for Global Development, *MCA Monitor*, (June 2007): 5.

One-Stop Legal Services Provision (the Justice Center or “Casa de Justicia” model) – This centralized approach combines a variety of legal and related social services into a single facility. Already used in several African countries (*e.g.*, South Africa and Mozambique), USAID should consider supporting the expansion/introduction of the practice of co-locating legal services to facilitate access to justice, particularly in rural areas, drawing from successful models in African nations, as well as Latin America, to facilitate access to justice and promote ROL at the community level.

Budget Formulation Processes – Where justice sector resources are severely deficient, project designs might focus partly on increasing exchanges over budget requirements between justice system officials and key legislative committees and executive branch agencies. The former are likely to require training in planning and budgeting and in communication strategies. As appropriate to the individual country, program designs should focus on strengthening needs-based budgeting, and on enhancing financial efficiency within the institutions receiving assistance.

Annexes

Annex I. World Bank Rule of Law Indicator: Comparative Ratings

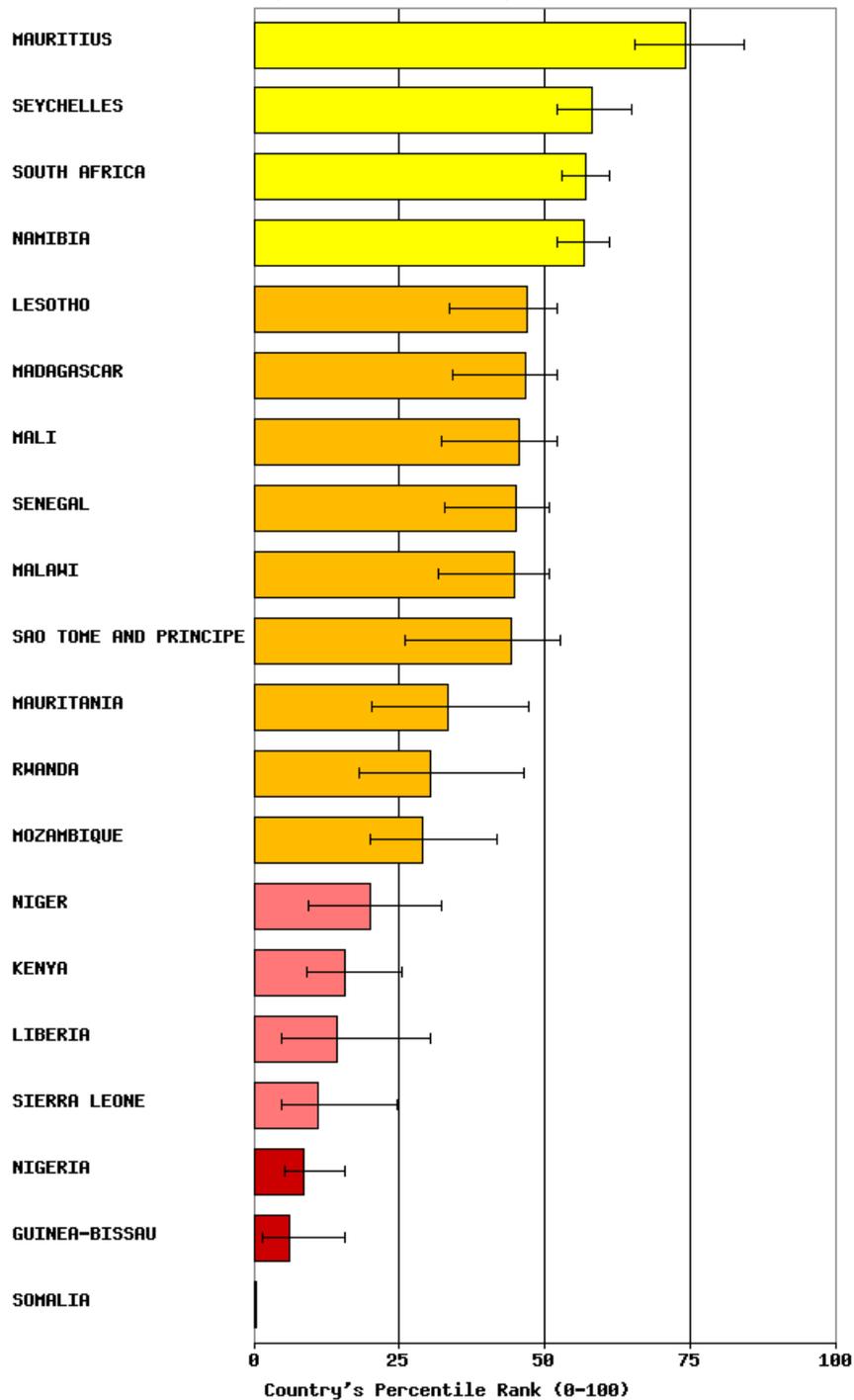


Source: Kaufmann D., A. Kraay, and M. Mastruzzi 2008: Governance Matters VII: Governance Indicators for 1996-2007

Note: The governance indicators presented here aggregate the views on the quality of governance provided by a large number of enterprise, citizen and expert survey respondents in industrial and developing countries. These data are gathered from a number of survey institutes, think tanks, non-governmental organizations, and international organizations. The aggregate indicators do not reflect the official views of the World Bank, its Executive Directors, or the countries they represent. The WGI are not used by the World Bank Group to allocate resources or for any other official purpose.

Rule of Law (2007)

Comparison between 2007 (top-bottom order)

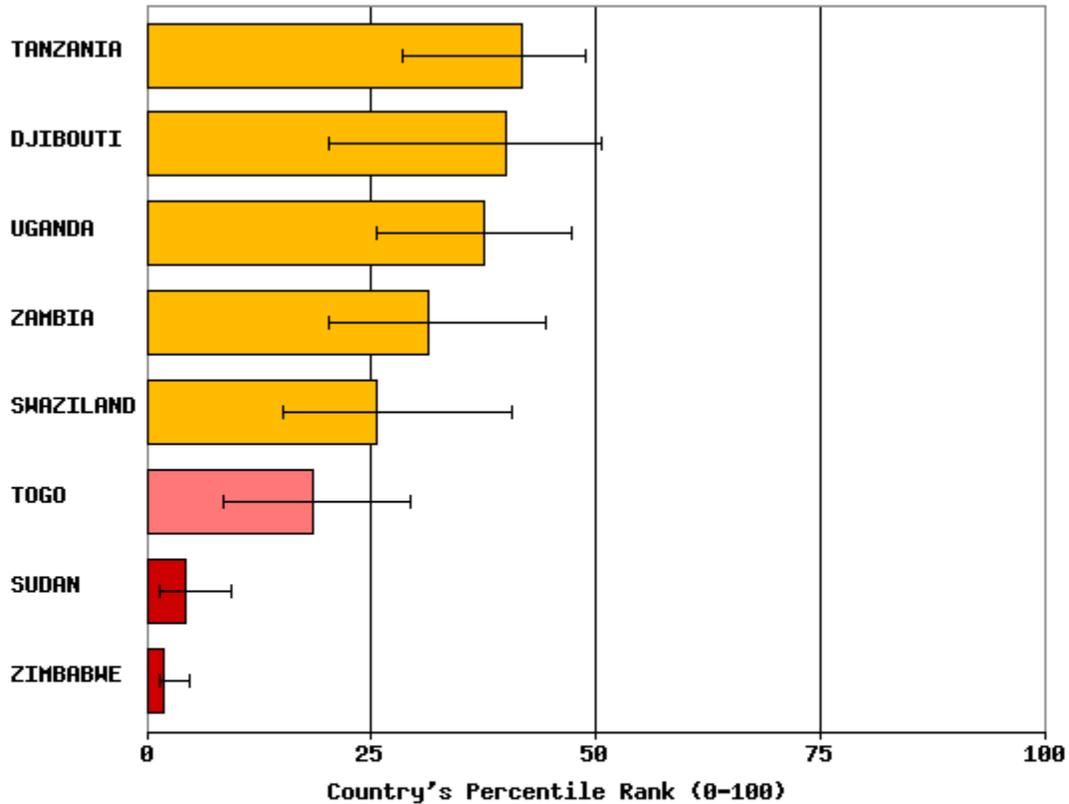


Source: Kaufmann D., A. Kraay, and M. Mastruzzi 2008: Governance Matters VII: Governance Indicators for 1996-2007

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World Bank ROL Indicator Scores for 24 Countries

Country	Sources		Year	Percentile Rank	Governance Score	Standard Error
				(0-100)	(-2.5 to +2.5)	
ANGOLA	15		2007	6.7	-1.35	0.15
BURUNDI	14		2007	9.5	-1.16	0.15
CONGO, DEM. REP.	13		2007	1.4	-1.67	0.17
ERITREA	8		2007	11.9	-1.1	0.18
ETHIOPIA	16		2007	38.1	-0.54	0.14
GAMBIA	10		2007	49.5	-0.21	0.17
GHANA	17		2007	52.4	-0.08	0.14
KENYA	19		2007	15.7	-0.98	0.13
LESOTHO	11		2007	47.1	-0.35	0.16
LIBERIA	8		2007	14.3	-1.06	0.24
MADAGASCAR	16		2007	46.7	-0.35	0.14
MALAWI	17		2007	44.8	-0.39	0.15
MALI	15		2007	45.7	-0.37	0.16
MOZAMBIQUE	19		2007	29	-0.68	0.13
NAMIBIA	13		2007	56.7	0.12	0.15
NIGERIA	19		2007	8.6	-1.2	0.13
RWANDA	11		2007	30.5	-0.65	0.18
SENEGAL	18		2007	45.2	-0.39	0.13
SIERRA LEONE	13		2007	11	-1.13	0.19
SOUTH AFRICA	19		2007	57.1	0.15	0.12
TANZANIA	17		2007	41.9	-0.45	0.14
UGANDA	19		2007	37.6	-0.54	0.13
ZAMBIA	17		2007	31.4	-0.64	0.14
ZIMBABWE	19		2007	1.9	-1.67	0.13

Annex 2. Overview of African Colonial Legacy

This attachment traces the story of African national development from its origins in European colonization to its present-day impasses. The chart in Annex 3 sets out, in graphic form, major milestones and political events in sub-Saharan Africa.

The colonization of Africa by European powers proceeded in two distinct movements, and for two distinct sets of causes. The first movement was aligned with the Age of Discovery (1450-1700), when seafaring European nations sought to create new arteries of trade with distant parts of the world. In this mode of colonization, the parent country sought only to establish sufficient foothold in the colony to secure one end of a trade route, and its formal presence in the colony only as purchaser and shipping agent. In this pattern, the interior kingdoms and empires of Africa supplied material goods, such as gold, ivory and, eventually, slaves.¹⁸⁹ This was the extent and form of Portuguese, French, and British colonization in Africa up to about 1800. With the success of abolitionist movements in England and the United States in the first half of the 19th century, slavery, the most lucrative of the African colonial trades, ended. This development suspended efforts to further colonize the African interior. It was not until the Zulu and Boer wars of the 1870s and 1880s that European interest in African colonization was re-ignited.

The causes for the second movement of African colonization are worth describing in some detail for the sake of understanding their later effects on African nationalism and independence – the results of which are still felt today, more than 130 years later.

By the 1880s, the Western powers were experiencing the birth pangs of their modernity; changes in their societies and new outlooks made wholesale colonization of Africa inevitable. These changes can be viewed broadly in two categories: economic and strategic.

By the 1870s, the European market had begun to experience a saturation of the products of its earlier industrial revolution. Combined with an American depression and generally negative trade balances, the major powers of Europe found themselves faced with slim prospects for growth at home. The possibility of a colony whose demand for goods was captive, that is, whose demand could only be met by the parent country, combined with a monopoly on the exploitation of local resources, had irresistible appeal. In addition, Britain was rapidly becoming the leading post-industrial society and its burgeoning financial services sector, which defined that status, hungered for virgin territory in which to invest its capital. From this standpoint, colonialism was inevitable, conceived entirely for and exclusively in service of the economic health of Europe.

The strategic motivations to colonize the interior of Africa arose out of related, although somewhat more complicated, origins. Briefly put, the economic pressures to colonize were visible at the foreign policy level as strategic moves. With respect to Britain, its colonization of sub-Saharan Africa was a continuation of its efforts in Egypt. After completion of the Suez Canal in 1869, Britain gradually attempted to increase its influence over the vital trade route. Although the French were still majority shareholders in the canal, British troops had occupied it by 1882, citing a duty to protect it from the Urabi Revolt.¹⁹⁰ By 1888, the occupation was legitimized by treaty. This success was followed by the emergence of a strategic plan. The British sought to connect Egypt and South Africa by rail, and from this spine develop interior African colonies.

Though Germany was experiencing the same economic squeeze as the rest of Europe, its entry into Africa can be traced to the conflict between the new German emperor, Wilhelm II, and Chancellor Otto Von Bismarck. Wilhelm, emboldened by Germany's industrial ascendancy and recent unification, sought to

¹⁸⁹ The original names for the earliest West African colonies – The Gold Coast, The Ivory Coast, and The Slave Coast – confirm this disinterest in the interior.

¹⁹⁰ The Urabi Revolt was one of the first attempts at a military coup in Africa.

make his empire a world power. The doctrine of *Weltpolitik* that descended from this desire was the key factor in Germany's enthusiasm for what became known as the Scramble for Africa. So violently did Bismarck disagree with this policy that it ended his career in government; Wilhelm famously accepted the chancellor's resignation in 1890.

France, already invested in the Suez Canal, began a colonial push by the start of the 1880s. Belgium, theretofore a minor player in both international relations and the doctrine of colonialism, suddenly came alive in the person of King Léopold II. Léopold commissioned Henry Morton Stanley to be the king's agent in the Congo, negotiating for the lands of the local tribes. Stanley's five-year effort (1875-1880) was made on behalf of Léopold's International African Association, a putatively philanthropic group whose mission was to bring civilization to the African interior. In fact, the organization was a front for Léopold's ultimate aim of personal dominion and private property in the Congo; a goal that by the century's end would cause several million deaths and the greatest scandal of the era.

In 1884, Léopold, cognizant of his country's small size and relative inability to enforce colonial claims, had spearheaded the Berlin conference (or "Congo Conference") to divide Africa. The agreement reached essentially created colonial Africa as it was until the independence movements of the 1960s. Through Léopold's influence, an article was introduced into the agreement that laid out the rules by which a country could claim a colony. The article, called the Principle of Effectivity, was designed to curb the claiming of territory where there was no presence or influence of the parent country. The Principle required that the parent country organize its colony to certain minimal standards, including an internal administration and a colony-wide police force. This method for claim formalization clearly worked in favor of a small country like Belgium, for which colonialism would have been impossible if every territorial claim had to be secured with sufficient troops to provide for its defense. The establishment of a colony-wide police force – of a paramilitary nature, whose purpose was to protect the state rather than its inhabitants – had long-ranging effects.

The agreement that emerged from the Conference of Berlin also formalized the economic relationship that was to dominate European presence in Africa. Under its terms, a parent nation could lose its claim to territory if it did not actively engage in economic activity. The dynamics of the sheltered markets that emerged are frightening. The main consumers of parent-country goods in a colony are industrial or agricultural concerns, such as gold mines or rubber plantations. For the most part, their objective was to extract valuable resources from the colony for export to the parent country. From this cycle, the true desirability of a colony becomes obvious. This cycle also brings the economic difficulties of modern Africa into perspective: for the better part of a hundred years, the African continent was subjected to the greatest act of economic sabotage in human history. Nowhere else has so much wealth been created in such meager economic circumstances.

Given the spectacular lack of investment in the local economies relative to the wealth they were producing, it is hardly surprising that this cycle of exploitation continued in stride after the shift from foreign to domestic masters. Faced with the inheritance of hypertrophied organs of the parent nation's economy, rather than functioning economies of their own, several of the worst features of post-colonial statehood become understandable. First, the symptom of a strongman taking up an incredibly luxuriant lifestyle in the face of endemic poverty is simply a continuation of this cycle with the head of state replacing the parent nation. Practices favoring corruption and impunity passed from colonial leaders to the new generation of domestic leaders. Second, an economy plays a vital role in securing the social fabric through networks of salaries, debts, finance, and so on; the absence of a functioning economy necessitates a surrogate, such as a military dictatorship, a single party, or even the nationalization of a tribal conflict to maintain cohesion. Third, there was no domestic economy on which to found the higher education required to develop native-born civil servants, and no interest from parent nations to educate what was fundamentally a nation of laborers and farmers. The colonial countries had absolutely no firsthand experience with participatory forms of government, let alone functioning democracies. The

tribal traditions that characterized the continent as a whole, particularly the ingrained animosity between many of the tribes, effectively eliminated the possibility of local populations banding together into a unified group to demand change. Under these circumstances, the newly-formed domestic governments foundered almost immediately after independence, rendering the new nations even more susceptible to the first two problems.

Over the next several decades, the veil of humanitarianism that had been the public face of colonialism slipped a number of times, but never more appallingly than during the revelations about Léopold's Congo Free State. However, these disclosures were generally believed to be aberrations of a fundamentally just plan, as opposed to the purest expression of the plan itself.

By the mid-1950s, the Second World War had radically altered the landscapes of both European and international politics. The substantially weakened condition of the colonial powers left them ill equipped to resist the wave of resentment that swept public opinion in the colonies and, to a lesser extent, at home. It is not terribly surprising how quickly the vast majority of Africa received its independence, or that it was often granted after a simple colonial referendum.¹⁹¹ Britain found itself lamely agreeing with Asquith's line about "self-government being better than good-government"¹⁹² as it helplessly watched its empire dissolve. Within two years of De Gaulle's assumption of the presidency of France and creation of the Fifth Republic, all French colonies of sub-Saharan Africa were released and made independent. With the exception of South Africa and, to an extent, Ethiopia,¹⁹³ over the last half of the 20th century, every nation of sub-Saharan Africa experienced a cycle of single-party leadership, strongman or dictatorship, military coups and regimes, and civil war that extended through the late 1980s. During this period, regardless of whether the country was rich in natural resources, virtually all wealth was concentrated in the hands of the leaders, with the vast majority of the population living in abject poverty, struggling merely to survive.

The end of the Cold War, the fall of the Soviet Union, and the move of Eastern European countries towards democracy all had a profound impact upon the nations of Africa. Beginning in this period, nation after nation began drafting new constitutions and single-party systems began a slow and difficult evolution to political plurality. These reforms were often punctuated by problematic elections, with complaints of rigged results, voter fraud, and ultimate election challenges, all too frequently with good cause. In some countries, open violence and even civil wars erupted following elections, necessitating foreign interventions either in the forms of military, police peacekeepers, or negotiated settlements. These cycles of turbulence and disruption continue through much of Africa even to this day, despite years and billions of dollars in foreign donor assistance. But one thing that has not changed, or remains little changed, since colonial times is the poor quality of life for most citizens of African nations.

An understanding of why and how African nations came to be where they are today is essential to an examination of the status of ROL in sub-Saharan Africa. This common historical background explains, at least in part, the similar characteristics and challenges justice sector institutions share across the continent, the remarkably similar problems that confront most of the 48 countries, and the exceedingly slow pace of reform despite persistent donor and burgeoning domestic efforts. Even to this day, the absence of stable, representative, participatory, and well-functioning democracies – the shared legacy of colonialism – continues to manifest itself in the vast majority of African countries by undermining the foundation necessary for the rule of law.

¹⁹¹ Algeria was the subject of the only serious decolonization conflict, mainly because of the enormous dependence of France on its oil and the vocal Pieds-Noirs minority.

¹⁹² Originally uttered with respect to Ireland in 1915.

¹⁹³ South Africa's independence came some 40 years earlier than the rest of Africa, although its transition to local leadership really only took place in the 1990s with the fall of Apartheid. Ethiopia's course was problematic, but did not track the timelines of other African nations because it was never colonized.

Annex 3. Governance in Sub-Saharan Africa: Colonization and Independence

Country	Date of Colonization	Colonizer	Date of Independence	Government Type	Cold War Proxy?	Failed State? ¹⁹⁴	Civil War?	Int. Intervention?
Ethiopia	n/a	n/a	1855, 1989, 1994 ¹⁹⁵	Multiparty (weak)	Yes	Yes	Yes	Yes
South Africa	1652	UK/Dutch ¹⁹⁶	1910 ³	Multiparty	-	-	-	-
Eritrea	1950	Ethiopia	1952, 1993 ¹⁹⁷	Single Party	-	-	Yes	Yes
Sudan	1899	UK	1956	Dictatorship	-	Yes	Yes	Yes
Ghana	1806	UK	1957	Multiparty (strong)	-	-	-	-
Cameroon	1884, 1916 ¹⁹⁸	German/UK/French	1960	Multiparty(w)	-	Yes	Yes	-
Nigeria	1885	UK	1960	Multiparty(w)	-	Yes	-	-
Somalia	1884, 1889	Italy/UK ¹⁹⁹	1960	None	-	Yes	Yes	Yes
Sierra Leone	1803	UK	1961	Multiparty(s)	-	Yes	Yes	Yes
Tanzania	1880, 1919 ²⁰⁰	German/UK	1961	Single Party	-	-	-	-
Uganda	1888	UK	1962	Single Party	-	Yes	Yes	Yes
Kenya	1888	UK	1963	Multiparty(w)	-	Yes	-	-
Zambia	1888	UK	1964	Multiparty(w)	-	-	-	-
Malawi	1891	UK	1964	Multiparty(w)	-	Yes	-	-
Gambia	1783	UK	1965	Multiparty(w)	-	-	-	-
Zimbabwe	1888	UK	1965, 1980 ²⁰¹	Dictatorship	-	Yes	-	-

¹⁹⁴ As determined by: http://www.fundforpeace.org/web/index.php?option=com_content&task=view&id=292&Itemid=452

NB: Every country in Africa is found in the top two tiers of this index.

¹⁹⁵ Ethiopia is virtually unique in African history in possessing a self-identification as a state long before the wave of independence which brought such a distinction to the rest of Africa. The modern borders were set in 1855 with the centralization of principalities under Emperor Tewodros II. The communist regime that overthrew Selassie in 1974 was itself discarded with the collapse of the Soviet Union, whose aid had been essential to its power. The present constitutional government dates to 1994.

¹⁹⁶ The formation of the modern state of South Africa is complicated, even by the standards of African independence. Briefly, a Dutch colony was founded at Cape Town in 1652, built by slaves from India, Madagascar and Indonesia; this was subsequently annexed by Britain in 1806. This British influence triggered a wave of Dutch migration that ultimately led to the two Boer Wars at the end of the 19th Century. In 1910, a union of the various British colonies was created. This gradually moved through the state of first a dominion of the British Empire, a commonwealth, and finally, in 1961, the fully independent Republic of South Africa.

¹⁹⁷ The Kingdom of Italy ruled Eritrea from 1890 to 1941 and in name only from 1936 to 1941. Eritrea was liberated from Mussolini's Italy along with the rest of Ethiopia in the 1941 Allied North African Campaign; the country itself was formed by popular vote in 1991.

¹⁹⁸ Originally the German colony of *Kamerun*, after the former's defeat in the First World War, it ceded to France and Britain. These pieces eventually reunited at independence.

¹⁹⁹ Present day Somalia is composed of two former colonies, British Somaliland, composing the top of the Horn, and Italian Somaliland, the bottom. Both gained their respective independences in 1960.

²⁰⁰ Ceded to Britain.

²⁰¹ As Rhodesia in 1965, as Zimbabwe, in 1980.

Country	Date of Colonization	Colonizer	Date of Independence	Government Type	Cold War Proxy?	Failed State? ¹⁹⁴	Civil War?	Int. Intervention?
Botswana	1885	UK	1966	Multiparty(s)	-	- ²⁰²	-	-
Lesotho	1888	UK	1966	Multiparty(s)	-	- ⁹	-	-
Swaziland	1890	UK	1968	Monarchy ²⁰³	-	- ⁹	-	-
Namibia	1883, 1915	German/UK ²⁰⁴	1989	Single party	Yes	- ⁹	-	-
Mali	1890	France	1960	Multiparty(s)	-	-	-	-
Côte d'Ivoire	1893	France	1960	Strongman	-	Yes	Yes	Yes
Burkina Faso	1898	France	1960	Multiparty(s)	-	-	-	-
Niger	1922	France	1960	Multiparty(w)	-	Yes	-	-
Togo	1884, 1914	Germany/France/UK ²⁰⁵	1960	Single party	-	-	-	-
Benin	1885	France	1960	Multiparty(w)	Yes	-	-	-
Chad	1900	France	1960	Dictatorship	-	Yes	Yes	Yes
Central African Republic	1899	France	1960	Strongman	-	Yes	Yes	Yes
Republic of the Congo	1886	France	1960	Dictatorship	Yes	Yes	Yes	-
Gabon	1910	France	1960	Strongman	-	-	-	-
Madagascar	1896	France	1960	Multiparty(w) ²⁰⁶	-	-	-	-
Djibouti	1862	France	1977	Single Party	-	-	Yes	Yes
Rwanda	1884/1916 ²⁰⁷	Germany/Belgium	1962	Single Party	-	Yes	Yes	Yes
Burundi	1899/1924 ²⁰⁸	Germany/Belgium	1962	Multiparty(w)	-	Yes	Yes	Yes
Democratic Republic of the Congo	1885	Belgium ²⁰⁹	1977	Multiparty(w)	Yes	Yes	Yes	Yes

²⁰² Note proximity to South Africa in this cluster of stability. Prior to Mugabe's land policies, Zimbabwe would have numbered among these nations.

²⁰³ The 2005 constitution was widely criticized as a legal framework for an absolute monarchy. Monarchy since 1973.

²⁰⁴ *Deutsch-Südwestafrika*, apart from a British-held port, was annexed by South Africa at the start of the First World War. It was not until 1988 that South Africa agreed to end its administration. Statehood came in 1990 and reunification of the port of Walvis Bay with the end of Apartheid in 1994.

²⁰⁵ *Togoland* was the original German colony, this was occupied by French and British troops at the start of the First World War. After Germany's surrender, it became a League of Nations protectorate and was subsequently divided into British and French Togoland. The former voted to become part of what later became Ghana while the latter, after independence, constitutes present day Togo.

²⁰⁶ After a 2002 crisis in Madagascar's presidential elections in which both contenders claimed victory, escalating violence forced the challenger and many of his supporters to flee to France.

²⁰⁷ Captured by Belgian forces during the First World War. Belgium later accepts a League of Nations mandate to govern the colony.

²⁰⁸ Ceded to Belgium as part of Germany's terms of surrender. The colonization became official in 1924.

Country	Date of Colonization	Colonizer	Date of Independence	Government Type	Cold War Proxy?	Failed State? ¹⁹⁴	Civil War?	Int. Intervention?
Guinea Bissau	1890	Portugal	1974	Multiparty(w)	-	Yes	Yes	Yes
Angola	1587	Portugal	1975	Multiparty(w)	Yes	Yes	Yes	Yes
Mozambique	1890	Portugal	1975	Multiparty(w)	Yes	-	Yes	Yes
Eritrea	1890	Italy	1941 ⁴	Single Party	-	-	Yes	-
Liberia	1822	USA	1847	Multiparty(w)	-	Yes	Yes	Yes
Equatorial Guinea	1778	Spain	1968	Strongman	-	-	-	-

²⁰⁹ The colony from which the DRC descends was the Congo Free State, unique among African possessions in being the personal property of the Belgian king, Leopold II. This status and the abuses deponent to it are important factors in subsequent regional instability.

Annex 4. Country Report: Kenya

Jan Stromsem

I. Methodology

The team leader for the Africa Regional Rule of Law Status Review traveled to Kenya from November 8-14, 2008. The information contained in this report was collected from documents reviewed during the desk study, as well as from in-country interviews conducted largely with other donor representatives and NGOs working in the justice sector. While many of the opinions expressed in the background and key findings sections derive directly from those interviews, we have deliberately not attributed specific statements to specific persons. Information from desk study documents reviewed is duly footnoted.

II. Constraints

In part due to the limited period of time spent in the country, the number of interviews was relatively limited. Also, since official USG authorization was required to gain entrée to most formal institutions, with the exception of GJLOS, interviews could only be scheduled with other donor and civil society organizations (CSOs).

III. Political Background

The Republic of Kenya gained independence from Great Britain in 1963. Although established as a democracy, the concept of plurality was not well-entrenched and despite the existence of multiple political parties, the outcome of national elections was rarely in question. Substantial revisions to Kenya's legal system in 1997 tended to strengthen the potential for multi-party national elections, but, in fact, had little impact on providing more equitable distribution of political power among the several parties.

In the December 2002 national elections, Mwai Kibaki gained the majority and was elected President. On the whole, international observers judged the elections to be free and fair, and the process seemed to mark a turning point for Kenya as a democracy. Over the next five years, however, a variety of scandals and corruption allegations marred Kibaki's administration. What began as a reform agenda disintegrated into politicized decision-making, with allegations of corruption and impunity. The December 2007 elections pitting Kibaki's Party of National Unity against the opposition Orange Democratic Movement represented the first national election in which the ruling party faced strong opposition. The results were widely criticized for rigging of voting procedures by both parties and the tallying of votes by Kibaki's Electoral Commission was called into question. The most credible and complete allegations come from EU observers who report that after Kibaki claimed to have suddenly come from behind to overtake ODM candidate Raila Odinga, he declared himself the victor and was sworn in as the new President within the hour. Nearly simultaneously, Odinga also declared himself the "People's President;" wide-spread protests and later riots broke out amid cries for Kibaki's resignation. Due to the inability of the judiciary to render a decision about the outcome of the election, together with accusations of fraud against the Electoral Commission, more than one thousand citizens were killed and another six-hundred thousand displaced – amid accusations of political murders on both sides.

During January 2008, a coalition of eminent Africans led by Kofi Annan attempted to mediate the growing political rift and unrest. An agreement was signed on February 28, 2008 wherein a coalition government was formed in which executive powers were to be shared between Kibaki as President and his challenger Odinga as Prime Minister. Appointed cabinet ministers were drawn from both the PNU and ODM. In April 2008, the so-called Grand Coalition became the final form of this compromise, establishing a shared-party government.

In many ways, the 2007 elections were seen as the first real test of democracy in Kenya – a test in which the system all but collapsed. Despite the Annan agreement, a process for continued national reconciliation has not moved forward – quite the contrary. The efforts of NGOs and the media to play a watchdog role seem to be losing ground. In the meantime, with the immediate crisis resolved, there has been a growing tendency away from citizen activism toward apathy, simply hoping for change with the next round of elections some four years away.

With the relatively high level of education of Kenyan citizens, Kenya has the potential to be a leader in Africa. But the pace of reform has been very slow and there is as much backsliding as there is forward movement. Many Kenyans are simply in denial about the present situation of their country. There is structured violence, much of it ethnically based and along tribal lines, and factionalism has taken over. Virtually everything is politicized, corrupt, and manipulated for political gain. Even reformers tend to change when they enter the government as greed and corruption quickly begin to take over. Kenya was described by at least one interviewee as a patronage system in which the patron does not allow the institutions to grow and develop because this might become a check on power.

In effect, Kenya is not currently operating as a democracy. There is little to no public dialogue, and indeed, the government is trying to place a cloak of secrecy over their work. The long standing patronage system continues unabated, perpetuated by practices under which virtually every politician, after election, concentrates on little more than accumulating personal wealth and power. At the time of the assessment, a Government of Kenya (GOK) decision was still pending on how to address the Waki report²¹⁰ findings: whether to create an internal tribunal to consider allegations contained in the report or to refer the matters to the International Tribunal in The Hague.

IV. Organization and Structure of Justice Sector Institutions

The Kenyan legal system is based upon English common law, with significant elements of customary and Islamic laws. In descending order of importance, the sources of law in Kenya include: **The Constitution** – the supreme law of the land, taking precedence over all other forms of law, written and unwritten; **Acts of Parliament, Specific Acts of Parliament of the UK, Specific Acts of the Parliament of India, English Statute Law, and African Customary Law** – applicable only to civil cases where one or more of the parties is subject to or affected by it; **African Customary law**, which differs from tribe to tribe; and **Islamic Law** – a very limited source of law in Kenya, known as applied Qadhi Courts. The Constitution of 1964 sets out the organizational structures of key rule of law institutions as follows:

The Judiciary – consists of the Courts and all officers of the Courts including the Chief Justice, the Attorney General, Judges and Magistrates. Although there is a Judicial Service Commission, judges are generally appointed directly by the President. There are four levels of courts:

1. **The Courts of Appeal** have only appellate jurisdiction in both civil and criminal cases. Decisions of the Courts of Appeal are binding on all other subordinate courts, including the High Court. It sits mainly in Nairobi, but travels on circuit to other principal towns in Kenya to hear appeals.

²¹⁰ The “Waki Report” was published on 15 October 2008, based on the work of a Commission established to investigate the facts and circumstances of the post-election violence, led by Appeals Court Justice Philip Waki. In doing so, the 500+ page document chronicles the range of problems leading to the violence, identifies alleged perpetrators, and suggests remedies for tackling the root causes of the outbreaks, namely problems of corruption, impunity, and lack of power sharing. The widespread belief that the presidency brings advantages for the president’s ethnic groups makes communities willing to exert violence to attain and keep power. The Executive Summary of this report is attached herewith as it represents insightful perspectives of what went wrong and why, as well as practical suggestions to break the cycle of impunity.

2. **The High Court** is presided over by *puisne* judges, judges of the High Court. It has unlimited original jurisdiction in civil matters, but in criminal matters it only hears cases of murder and treason. It has appellate jurisdiction in both civil and criminal matters in that appeals from the subordinate courts are referred to the High Court.
3. **Subordinate Courts** have jurisdiction that is determined on a territorial and pecuniary basis. They are presided over by magistrates [See chart]. Subordinate courts include:
 - a. **Qadhi Courts** – have jurisdiction to determine questions of Islamic law relating to personal status, marriage, divorce and inheritance in proceedings in which all the parties profess the Muslim religion.
 - b. **The Children's Court** – established in 2001 as a special court dealing with cases concerning children. It hears cases concerning parental responsibility, children's institutions, custody and maintenance, and orders for the protection of children. It also hears cases where a person has been charged with an offence under the Children's Act, but not cases where the child is charged with murder or charged jointly with adults.
 - c. **Tribunals** – quasi-judicial bodies established piecemeal to deal with specific matters. The more prominent tribunals include: (1) The **Industrial Court** – though not technically a "court," it is presided over by judges appointed by the president and eight other members appointed by the Minister of Labor. Its function is to settle trade disputes in essential services and trade disputes generally. (2) **Rent Tribunals** deal with matters concerning landlord and tenant relations.
4. Courts are further divided into four subdivisions: civil, criminal, family, and commercial. Civil divisions hear civil cases that are not of a commercial nature; cases include constitutional interpretation, civil procedure issues, civil appeals, and election petitions. Commercial divisions hear matters pertaining to debt cases, insurance claims, banking related cases, personal injury claims, and employment contracts. Family divisions cover matters of adoption, child custody, matrimonial property, property succession, separation and maintenance. Criminal divisions handle criminal cases and the criminal processes as regulated under the Criminal Procedure Code.²¹¹

Public Prosecutors – The Public Prosecutions Department has responsibility for prosecuting criminal cases on behalf of the Attorney General, representing the State in prosecutions and appeals, and advising the public sector on matters pertaining to criminal laws. The role of criminal prosecutions in the lower courts has been delegated to the police, working in close coordination with the Department of the Public Prosecutor (DPP). The total staff consists of approximately 125, of which approximately 55 serve in a supervisory role of State Counsel.

The Ministry of Justice and Constitutional Affairs was formed in 2003, with responsibilities of legal advisor in matters of justice, law reform, anti-corruption and integrity; the assurance of efficient functioning of law and justice sectors; and the coordination of justice sector reforms. The Ministry comprises the Kenyan Anti-Corruption Commission; the Kenyan School of Law; the Kenya National Commission for Human Rights and Public Complaints Standing Committee.

The Kenya Police fall under the authority of the Commissioner of Police, who reports directly to the Office of the President. The total force counts approximately 35,000 officers divided among several

²¹¹ Kenyan Section of the International Commission of Jurists publication, March 2003.

specialty formations (drug police, rail police, police training college, etc.), distributed throughout eight provincial forces: the Provincial Police Force, the Police Division, and Police Stations.

The Kenya Prison Service operates under the authority of the Ministry of Home Affairs. It includes 661 civilian and 17,943 uniformed positions. It is comprised of 89 penal institutions, two borstals and one youth corrective training center. The average inmate population ranges as high as forty thousand (0.1% national population), but a 2001 Amnesty International publication reports a population of up to fifty thousand in a system designed for only fifteen thousand. Headquarters for the Prison Service are in Nairobi, under the command of a Commissioner of Prisons, with the Provincial level institutions headed by a Commander, and smaller institutions by a Warden. The MoHA also includes a Probation Service to facilitate transition of released prisoners back into society.

V. Donor Programs

GJLOS – The largest coordinated donor project is the Government, Justice, Law and Order Sector Reform Programme, formed pursuant to agreements under the Paris Declaration, and launched in 2003 as an initial five-year program. It is now preparing project documents for a follow-on five-year period. GJLOS was preceded by efforts of the World Bank and the UK Department for International Development (DFID) that coincided with the 2002 elections and the creation of the Ministry of Justice and Constitutional Affairs (MOJ) as a new Ministry. GJLOS programs cover some 34 government institutions, to include justice sector institutions functioning under three Ministries. It is led on the government side by the MOJ and on the donor side by Finland. GJLOS is largely supported by Scandinavian countries and Germany using a SWAP funding approach. To a large degree, programs focus on strategy development and sequencing, with distinct work plans developed within each sector on an annual basis.

In the aftermath of violent outbreaks following the December 2007 elections, donor assistance more or less ground to a halt. There was considerable public outcry and tremendous disturbances erupted after election results were announced. For the past few months, even the GJLOS efforts have been somewhat dormant.

USG Programs – USAID has not worked in the rule of law area since 2001, but even then the programs that were funded were of relatively short duration, with many activities implemented on an ad hoc basis. In previous programs they have worked with the International Commission of Jurists on an access to justice program and more recently supported their efforts to develop a Freedom of Information law. Currently, the Mission does not anticipate including a rule of law program in its Democracy and Governance portfolio, principally because under the current circumstance the Kenyan Government is not particularly reform-minded. Most DG programming focuses on civil society demand and support programs, as well as decentralization issues. USG programs have also provided assistance to the Department of Public Prosecutors, particularly the units focused on corruption. Some prosecutor training was provided through the OPDAT RLA, but the program never gained the traction necessary to sustain momentum without external support. In view of the Embassy bombing in 2004, the USG law enforcement assistance programs have emphasized support for counter-terrorism programs. At present, the OPDAT advisor focuses both on counter-terrorism issues and provides support for the WJEI program through development of a work plan for an intensive six-month training and technical assistance program. An ICITAP representative is expected to be posted to the Embassy shortly to focus on the WJEI program as well as provide assistance in development of a DNA laboratory. The MCC currently supports Threshold-level programs that focus on reducing public sector corruption by overhauling the public procurement system.

The World Bank – The WB projects a significant increase in the size of its programming in Kenya, in preparation for which, it has focused on financial management and use of automation within the judiciary. It had previously supported the GJLOS program in the area of judicial performance improvements but has opted out of that program in favor of other alternatives. The WB will issue a loan directly to the judiciary for support of programming in four areas: (1) court administration and management; (2) training, to include building of a new judicial training center; (3) transparency, accountability, and public outreach; and (4) access to justice. The Bank has also supported an access to justice program aimed at poor and vulnerable segments of the population that forms part of their larger global programming. It deals with the demand side, integrating justice programs within civil society programs, and focuses on community level conflict prevention and resolution. In Kenya, the Bank has focused principally in the northern region.

GTZ – While a participant in GJLOS, the Government of Germany also has a bilateral rule of law program that addresses access to justice and anti-corruption activities. They have taken this dual-focused approach deliberately to enable increased leverage to push for improved governance, anti-corruption, and technical assistance.

UNDP – The UN's broad governance portfolio is comprised of four components, the fourth of which is empowerment. Programs related to rule of law fall under this component that focuses principally on enhancing internal capacity of core institutions to provide improved services to the public while also increasing demand. It works in support of developing the policy framework, increasing access, improving human rights, reducing backlogs, increasing efficiency and accountability, and preventing corruption. Within the MOJ and the Judiciary, the UN has focused on strengthening skills of national and senior level managers, developing an umbrella and thematic approach to enhancing rule of law, and working with grassroots-level NGOs to build demand and advocate for change. UN programs work to ensure that relevant laws and policies are in place while also supporting alternative methods, such as mediation, with a particular focus on issues of violence, impunity, and corruption. The UN also provided substantial assistance in developing a framework for a constitutional review process and for a national referendum to be held. But with the aftermath of the elections, the process became politicized and, at present, remains without constructive results.

VI. Key Findings

The chaos and violence that erupted in response to the 2007 election results served to highlight several systemic and institutional weaknesses. One of the issues brought to light is problem that the Judiciary and the Electoral Commission were incapable of carrying out their responsibilities in a fair and impartial matter and that the police were neither able nor willing to suppress the spread of violence. In fact, members of the force are alleged to have played an all too active role in perpetrating politically motivated murders. This section addresses key issues and problems arising from rule of law institutions, the constitutional and legal frameworks, and processes and constituencies that might be brought to bear to improve the current situation.

Constitutional Reform – While recognized for some years as a necessity to engender strengthening and greater autonomy of pivotal institutions of justice, reform of the existing constitutional order has now risen to a top priority in the eyes of reform-minded Kenyans and donors alike. Among the key issues to be resolved are those of decentralization of executive powers and authorities, power-sharing between political parties and the three branches of government, and increasing the capacities of key institutions to fulfill their responsibilities to serve the public needs for justice. Several interviewees indicated that a new constitution was urgently needed and that in fact, given the broad-based constitutional review that had already taken place under the auspices of the UN, much of the preparatory work had already been done. However, no concrete results have yet been achieved and the current governmental leaders seem to have relegated this issue to a back-burner. Reform of the current Constitution will require a public referendum, an unlikely occurrence under the current environment.

GJLOS – The many expectations of the GJLOS programs have not materialized. The pace of reform has been exceedingly slow; the process has been fraught with corruption scandals; the sheer size of the project has become an increasing problem, as has the lack of political will; and finally the indicators have been set at perhaps an unrealistically high level. Admittedly, the designs were highly ambitious and the issues very politically sensitive, but the continued politicization has seeped into almost all programs, resulting in significant underachievement. In what has been described as a “failure of intention” to move forward, it has not been easy to coordinate so many institutions with such differing scopes of responsibility and objectives. Each institution has its own plan and they are not linked, despite efforts to support joint planning processes. Inter-institutional coordination remains a challenge, complicated by an apparent lack of understanding of how to, or why work together constructively. This has resulted in both duplication and wastage of resources. At times, the reaction of local counterparts has been to pretend to reform, often simply to obtain the funds and equipment. However, the program has not been without positive results. For example, in the early days of the program, authorities for procurement and financial management were totally within the control of funders, and even now they continue to exert considerable oversight; however, over time, as internal systems and capacities have developed, these responsibilities have been delegated to local counterparts.

Another issue arising from the sheer size of GJLOS is the very substantial level of effort required from counterpart managers to comply with the bureaucratic requirements of the program. While an acknowledged necessity, paperwork requirements nevertheless represent the most time consuming aspects of GJLOS managers’ duties, significantly detracting from their ability to focus on implementation.

The GJLOS donors, and the funding potentially available through their programs, have a strong voice that carries a definite impact. Donors have reacted strongly, for example, freezing funds and programs support for GJLOS in response to the post-election violence. The most significant challenge is how to achieve the long-term objectives, which requires a common. A policy framework paper does exist, but it is not centered on what should be reformed; rather it focuses on modernization, most frequently through equipment procurement. While in part poor results may stem simply from not wanting to “be coordinated,” more likely, at least insofar as the perspectives of some interviewees, the problem of program coordination results from lack of a strategic approach to implementation.

The Judiciary – According to the International Commission of Jurists (ICJ), corruption in the rule of law, including the judiciary, is a serious impediment to establishment of rule of law in Kenya.²¹² The judiciary is characterized as a very conservative group that is highly hierarchical in nature. It is also considered to be a very weak institution, lacking in credibility, with a low level of public confidence. Perhaps the most telling example of this perception was seen in the fact that the judiciary was unable to take action to resolve the election dispute. Many feel that the judiciary was manipulated by the incumbent president during the elections. After the post-election violence, the judiciary hosted an “open day” in Nairobi to discuss the situation but with no concrete follow up. Approximately 70% of cases brought before the courts are criminal cases; however, pro bono public defense is available only in capital offense cases. People do not want to go to the courts and in effect, the courts have been useless in checking the power of the executive.

Appointment of judges takes place under the authority of the President, with at least 2/3 of sitting judges appointed by the current president. In fact, he has removed most of those he did not appoint. Qualifications and selection criteria are very inadequate, requiring only seven years of legal practice. According to the ICJ, problems with the judiciary are such that all judges should resign and resubmit

²¹² ICJ/Kenya, “Kenya: Judicial Independence, Corruption and Reform,” (Geneva: ICJ, December 2004), 4.

themselves as new candidates to be selected in strict compliance with professional criteria.²¹³ Few sitting judges would meet the criteria.

Due to the low capacity levels, there are serious performance and competency problems. They may have sufficient personnel but lack capacity, training, and the political will to fulfill their institutional mandate. Delays are also significant inhibiting factors and at present there is a considerable backlog of pending cases, estimated at approximately one million cases.²¹⁴ An ICJ publication characterized the judiciary as the most criticized section of Kenyan public society.²¹⁵

There are no clear procedures within the courts – no rules and regulations on which to measure performance and identify existing or potential problems. Low scores on the Transparency International Index,²¹⁶ coupled with allegations of lost or purposely misplaced files and inappropriate activities of judges and court staff²¹⁷ tend to diminish an already poor public image of the courts.

Use of Informal Systems (customary or traditional authorities) – As a general rule, citizens residing at basic rural community levels know little about laws or about functioning of the courts. In rural regions, even where courts exist, the local population tends to avoid their use due to overly complex processes and delays. Another reason, however, stems from fundamentally differing decisions emerging from traditional authorities versus those of formal courts.²¹⁸ These differences are clearly seen through a specific example that compares how traditional authorities resolve a rape case versus a decision of the formal courts. In a case of the courts, the judge has no discretion but to send the offender, if found guilty, to prison making matters worse for both families; this prevents the prisoner from earning a living and the victim is ostracized from the community and no longer considered fit for marriage. But the traditional authority will tend to mediate between family members, with the likely solution of marriage between the victim and perpetrator. Many times, the result of these fundamental differences is that crimes are not reported. Another reason for failure to consult the formal court system is simply linked to the nature of the issues that give rise to conflict in rural, versus urban, areas. In the former, 67% of grievances, most of which related to land and livestock issues, were referred to traditional authorities, compared with 35% in urban areas where matters relate principally to landlord/property disputes and domestic violence.

Counterbalancing the many problems with the judiciary, some progress has been made. For example, beginning in 1999, work began on drafting a code of ethics for the judiciary. It was widely circulated within the judiciary,²¹⁹ and in February 2005 the Judicial Service Code of Conduct and Ethics was finally adopted.

Judicial Service Commission – Under the Constitution, the Commission was designed to play a significant institutional role in the appointment and removal processes of judicial officers and to ensure full judicial independence and accountability. However, the Commission has only a limited advisory role

²¹³ ICJ/Kenya, “Strengthening Judicial Reform in Kenya, Progress Assessment from 2000-2003,” Volume III, (2003), 24: states that owing to the patronage that was a product of political interference, most judges became a major obstacle to judicial reforms that would have made the Judiciary better.

²¹⁴ Estimates of the backlog problem actually differ rather significantly from a publicly disclosed three-year backlog to the more frequently voiced number of 10 years heard during interviews.

²¹⁵ ICJ/Kenya, “The Judiciary in Review,” 23.

²¹⁶ *Ibid.*, 10.

²¹⁷ ICJ/Kenya, “Kenya: Judicial Independence, Corruption and Reform,” (Geneva: ICJ, December 2004), 17-18 contain a useful chart outlining major problems of corruption in the judiciary and various commissions that have reviewed the situation and published reports of recommended actions.

²¹⁸ The specific example cited in the above interview related to a rape case in which traditional authorities mediated between the two families involved and determined that the victim should marry the perpetrator, thus avoiding the removal of the major breadwinner from his family, while also preventing the community banishment of the defiled woman.

²¹⁹ ICJ/Kenya, “The Judiciary in Review,” 14-15.

with regard to selection of judges in the higher courts, all of whom are appointed by the president. Thus, with the majority of its members also appointed by the President, it can contribute little to actually guaranteeing independence.²²⁰ In the 2004 draft Constitution, the JSCs are substantially reformed from the perspectives of a more inclusive and representational membership, a stronger advisory role vis-à-vis the other branches in matters concerning the judiciary, and a greater voice in proposing judicial candidates to executive appointment.

Prosecutors – The ability of prosecutors to successfully prepare and present cases was raised in several interviews, with one of the primary problems being that of political interference. Lack of strong leadership is also seen as a key issue, likely stemming from the fact that the Attorney General wears two hats, that of advisor to the GoK as well as chief prosecutor. This has resulted in power increasingly shifting from the Attorney General to the Solicitor General.

The DPP faces numerous other challenges, chief among them their lack of capacity to investigate the increasingly sophisticated nature of crimes, as well as issues arising from the rise of crime due to the declining economy of Kenya, unemployment, poverty, and insecurity of neighboring countries. Internally, the Department faces issues of inadequate numbers of staff, specialized training, poor working facilities, inadequate resources, lack of access to legal research resources, and weak internal management and reporting systems.²²¹

Police – The police is divided into several forces, to include an administrative police, originally organized to supplement the Kenyan police in rural areas and, more recently, a rapid response capacity and even community policing units. Due to the many ethnic and cultural problems within the force, it is not considered to be a cohesive and fully coordinated group. Principal types of criminal activities include robbery and robbery with violence and rapes and sexual violence including against children. Murders are largely associated with robbery or land disputes. Interestingly, results from the GJLOS survey indicate that 73% of crimes committed fall into the minor offence category and that 83% of crimes committed in rural areas fall into that category. A full 62% of those reporting crimes to the police found their response “unsatisfactory” and 46% of those surveyed (36% in rural areas and 61% in cities) indicated that reporting crimes to police was a “waste of time.”²²²

Particularly as a result of the election-related violence, there is little public trust in the police; substantial reforms will be needed. For example, there are widespread allegations that the police exacerbated problems following elections and that they were responsible for as much as 35% of the deaths that took place.

Other key policing issues discussed in the literature, or raised during interviews, pertain to inappropriate use of deadly force; chain-of-command; lack of uniformity, communication, and coordination between the various forces; lack of political autonomy; and lack of oversight. There is also a serious attitude problem between the police and the public, with the former considered to be the enemy rather than protector. In the opinion of some, there should be a civilian oversight board to provide routine oversight and management of the police force and to hold it accountable for its actions.

GBV continues to be a significant problem, but even the newly established GBV unit within the police is seen as a knee-jerk reaction, not a carefully thought out and applied measure. One aspect of the problem is that they are focused on state security matters exclusively, meaning that they have lost sight of their public service role. Police are deteriorating quickly, seen as a thriving criminal enterprise resulting from state weakness and fragmentation. Discipline has broken down because they are controlled by politicians.

²²⁰ ICJ/Kenya, “Kenya: Judicial Independence, Corruption and Reform,” (Geneva: ICJ, December 2004), 33.

²²¹ GJLOS Web site.

²²² GJLOS Survey, 49.

A history of human rights abuse hangs over a poorly paid and poorly looked after police force. Substandard equipment and housing is a norm. These factors have made the police famously susceptible to corruption; most Kenyans view police extortion and bribery as par for the course.

A National Task Force on police reform was established in 2003 to undertake broad based reforms. It was later disbanded having achieved very few positive results. Similarly, a draft of a Police Oversight Bill that describes and was to have circumscribed the institution, its role, and functions was prepared; however, the Bill did not move forward and has yet to be enacted.

Public Defense – The World Bank has supported paralegal programs in rural communities and while these tend to have positive results, they last only as long as donor support continues. Some donor efforts (WB, DFID) have also extended into forging connections between district level legal aid programs and those implemented in rural areas, with a view to establishing more of a regional network approach. The MOJ has recently opened a Legal Aid Office and is in the process of developing a strategy for its operations. So far, there is no external donor support for this new office.

Prisons – Overcrowding of prisons is considered to be one of the most serious human rights problems in Kenya, with high levels of pretrial detainees held in very poor facilities. There are numerous suspicious deaths in prisons, generally ascribed to escape attempts. Medical examinations frequently are inconsistent with official statements about prisoner death, and in fact, an AG-ordered investigation found evidence of prisoners beaten to death in the course of a supposed escape attempt. Torture and the diseases stemming from overcrowding account for several hundred prisoner deaths a year.²²³ As with police, prison officers are frequently forced to compensate for menial salaries by black market dealings and other corrupt activities. Prison officers are also subject to the same poor food and contaminated water as the prisoners they guard.

Despite efforts of the Probation Service, few rehabilitation programs exist, and even donor-supplemented programs to provide after care and community services are inadequate to meet needs. The problem of insufficient access to lawyers for those held in detention is pervasive, assuaged somewhat by donor supported programs; these access programs provide additional legal resources to pre-trial detainees. For example, the Legal Research Foundation works with existing NGOs to increase the number of paralegal and legal aid clinic programs that focus on prisons. In addition, governmental reforms of prisons include a 1999 program for non-custodial sentences for 20,000 minor offenders.

Corruption – The 2006 GJLOS survey provides interesting data relative to perceived sources of corruption in Kenya. A relatively low percentage (12%) of the population reported a personal incident of corruption where, for instance, that they were asked for a bribe by a public official. Of these encounters, 33% originated with the police; many of these resulted from traffic stops. An overwhelming 80% of the population responded that corruption originated in the central government, with a mere 7% indicating involvement of local authorities. 82% of those paying a bribe avoided the original penalty and only 4% of those asked for a bribe reported the event to the authorities. When asked why, the two-fold responses indicated risk of retribution or unresponsiveness of authorities as the main reasons.²²⁴ For the most part, citizen responses were confined to personal experience with a request for a bribe, but the results of the question relative to institutional corruption indicated that 69% attributed the problem to Members of Parliament and 68% to a GoK central institution. The one institution that received a reasonably positive score of 50% for its anti-corruption efforts was the Department of Government and Ethics which no longer exists. No other GoK institution received a positive score on their efforts to thwart corrupt practices. Another survey result compares responses from poor and lesser educated Kenyans to their

²²³ Prison Reform International indicates a prisoner death rate of 90 per month (June 2000).

²²⁴ GJLOS Survey, xiv.

wealthy and highly educated counterparts, leading to a conclusion that awareness, per se, had no measurable impact on either participation in or perception of corruption.²²⁵

An Anti-corruption Commission has been established under law. While the law itself is seen as positive, there is little confidence in the Commission, principally because cases would need to be presented to a court system little able to resolve them. Mainly for this reason, its ability to implement viable programs has “stagnated.”

In the period of 2002, immediately following national elections, there was significant public support for government sponsored anti-corruption campaigns. During this period, it was not uncommon for members of the public to actually surround a police officer who tried to take a bribe and walk him into the local police station. But now this type of support has eroded, largely because the public has seen that no action will be taken with regard to the officer accused. While also attributed to the fact that security concerns have overtaken corruption as the foremost issue, the more frequent characterization of the problem is that the “laissez faire” attitude of the current Administration has permitted political corruption to extend unchecked throughout the government. One cannot help but note that when measured against the behavior of public officials shortly after taking office versus their actions once in office for a few months, a fundamental change takes place; with the pro-reform and change agendas replaced by personal interests as soon as the politician is in office long enough to learn how “to work the system.”

Youth at Risk – There is a growing problem of crimes carried out by young men who are unemployed, poorly educated, and with few hopes for a brighter future. Not only are the numbers of crimes committed by youthful offenders increasing, but the nature of the crimes themselves are more violent, frequently involving use of small arms. Described by some as an “angry young man syndrome,” the problem was also characterized as “a recipe for disaster” in the near future, especially since the government is not paying attention to the issue. Complicating this situation is the eroding level of respect for traditional leaders among youth. The problem is likely even more troublesome in the Northern and Coastal regions of the country, where undereducated youth have few practical employment skills or opportunities for employment.²²⁶ The GJLOS survey indicates that 53% of the population feels that the problem of jobless youth is among the most significant security threats to Kenya,²²⁷ particularly because with literally nothing to lose, there are few perceived risks.

Civil Society – There are a high number of NGOs and CSOs dealing with a broad variety of justice sector related issues such as increased access, legal defense, etc. However, they have yet to learn how to work together through networking, establishing common agendas and priorities. Such developments are at a nascent level, but increasingly, donors are urging consolidation of similar activities. In particular, these CSOs are seen to hold the greatest potential to organize, advocate for reforms, and hold their leaders accountable. In the words of one interviewee, “civil society is very competitive and very divided,” just at the time when strong advocacy networks are needed the most. In particular, CSOs need to focus increased attention on holding elected leaders accountable, especially by linking campaign promises with tangible service improvements, or the lack thereof.

Checks and Balances – Neither the judiciary nor the legislative branch is sufficiently strong to be able to serve as a viable check on executive power. Conversely, executive interference into the affairs of both branches is described as both problematic and commonplace. Within the judiciary itself, oversight has been generally ad hoc thus far, accomplished mainly through an Ethics Committee. They have issued three reports, containing follow up recommendations, but these have dealt mainly with debates over the

²²⁵ *Ibid.*, 47.

²²⁶ See USAID/Kenya Inclusion and Counter-extremism Assessment, March 2008, for full discussion.

²²⁷ GJLOS survey, xvii.

most effective forms of oversight such as through peer review. The Parliamentary Service Commission is fairly strong now, but still the President can control things; despite Parliament's relatively strong capacity to deal with its own issues, it can do little to impact anything external to itself.²²⁸

Laws – The colonial legacy laws currently in place do not really reflect society. While there is a legal framework in place, it does not facilitate addressing principal societal issues and problems. In many cases, the laws simply fail to reflect Kenyan society. Within the judiciary, mandatory sentencing requirements leave few discretionary powers in court judgments. Moreover, even newer laws do not necessarily reflect societal needs or mores. For example, there is a newly enacted Sexual Offenses law, a very modern law, but Kenya is not necessarily a modern society, especially outside of the larger urban areas. For a period of time, prior to the elections, a Freedom of Information law held promise as a part of a transparency campaign. It was made into a bill but since the election has not moved forward.

VIII. Recommendations

Under the current political situation of Kenya, there is a marked lack of political will among several of the key institutions of justice to engage in much needed reforms. This characterization is particularly apt with respect to the judiciary and the police, where despite the stark needs for both to engage in fundamental institutional reforms, neither appears inclined or pressured, to do so. Consequently, in this section, we summarize briefly the types of assistance from which the judiciary and police would benefit, but include this information more as a placeholder for future opportunities than a plan of action to guide immediate programming. In fact, given what we learned during the assessment, should the Mission wish to engage in a rule of law program, we recommend two narrowly defined areas, described further below, namely strengthening programmatic synergies between USAID and other USG programs and providing one or more technical advisors to support implementation of rule of law programs under GJLOS.

Strategic coordination of USG rule of law programs – As a general finding that crosses many USG foreign assistance efforts around the world, USG funded rule of law programs in Kenya could benefit significantly from more deliberate strategic linkages between USAID and other USG funded programs.²²⁹ While we are aware that both the Embassy and USAID Missions support coordination efforts through Country Team meetings, among others, nevertheless, greater results could be achieved by taking full advantage of the institutional strengths of each agency operating in the field. For example, USAID civil society programs bring implementers into close contact with local counterparts, enabling them to be aware of potential problems and flash points as they develop. As such, USAID programs designed to enhance citizen awareness, education and information, etc., can also support a process of changing public attitude as well as channeling public advocacy toward high priority issues for the US thereby expanding their impact and sustainability. Similarly, some of the technical innovations anticipated for law enforcement in Kenya, such as introducing automated fingerprint systems and DNA testing, need not be restricted to criminal cases only, but could also be used to support implementation of a nationwide citizen identification system. USAID's network of NGOs and CSOs could support expansion of the effort into rural areas.

In addition, as an MCC Threshold country, the USG is in a position to exert considerable leverage on the GoK in advancing reforms enabling Kenya to qualify for Compact status. Reforms could be focused particularly in the areas of the justice sector indicator: ruling justly and compliance with anti-corruption

²²⁸ An unfortunate example of Parliament's ability to deal with internal issues related to their refusal to pay income taxes on allowances they receive for constituent services. Presented widely in the media as a refusal to pay any income taxes at all, the decision was seen not only as self-serving, but another example of a government out of control.

²²⁹ The other principal USG Department programs include Commerce, Defense, Justice, State, and Treasury. These programs are represented in-country either through USAID or Embassy Missions.

indicators. Should Compact status be achieved, fundamental reforms to the judiciary and police should figure prominently among priority areas for programmatic emphases.

Leveraging the institutional strengths of each department participating in rule of law programming would enable USG programs to achieve individual objectives of each participant while building stronger local counterpart institutional capacities. As an example, USAID's key institutional strengths include its depth of knowledge about the country in question, the breadth of its programming, and the resulting range of its local contacts. Of equal importance to rule of law programming, it also includes a long-term institutional development approach that focuses on building capacities, within the institution, to absorb and apply incrementally higher level skills, ultimately resulting in more able and self sufficient institutional partners.

We particularly recommend this type of strategic linkage for training programs, where two principal problems arise on a recurrent basis. First, training programs should be consistent with local laws, requiring tailoring of course materials to ensure compliance; rather than simply importing a US model or off the shelf course. Secondly, while training may build skills of individual trainees, without accompanying development of internal procedures that define how the new skills can be put to use, their benefit quickly evaporates. This requires linking skills training of individuals to institutional development programs that enable the institution to use the improved skills on a daily basis. USAID's in country knowledge, coupled with its development expertise, could serve as the glue to support sustainability of the benefits of training beyond simply enhancing skills of some individuals. This approach would also obviate the need to repeat the same training courses, allowing instead for USG departments to offer a broader array of technical skills development training programs.

Collaborative and strategic leverage of donor programs – The potential impact of strategically applied donor pressure in affecting key reforms and changes should not be underestimated. It was clear from interviews and the daily newspapers that the government pays considerable attention to donor opinions and indeed, several of the Ambassadors, including the US Ambassador, have spoken out strongly and compellingly on a variety of issues. Feedback indicates that their views are taken seriously and they are widely considered to be “the voices of reason.” The voices of donors could not be ignored by those in power, if unified partnerships are formed that focus on the highest priority areas where rule of law reforms are required; specifically areas with the greatest potential for positive impact on the lives of Kenya citizens.

Judiciary – Considerable institutional strengthening is needed across the entire system to enhance operational effectiveness, increase access, and foster transparency and accountability. Developing standard internal processes and systems, such as standard operating procedures, uniform and streamlined case-processing techniques, etc., are much needed first steps. Improving court administration and management, as well as establishment of viable oversight mechanisms that enable the judiciary to conduct self-assessments (i.e., to conduct proactive compliance reviews), as well as provide for external means of review, through Parliamentary oversight, are also required. Judicial performance standards are needed, both with respect to cases (i.e., time to disposition) as well as adherence to the code of ethics for which uniform disciplinary protocols will also be required. Likewise, standard selection criteria are both required and must be followed. Delinking budgetary and administrative functions from those of the executive, enabling the judiciary to deal directly with the Ministry of Finance and the Parliament on budget issues, and self-administration are also a high priority; however, this also entails development of internal capacities to manage and administer these functions which does not currently exist.

Police – Keeping in mind that the most frequent point of contact between a citizen and his or her government is through the police, change in how the police are viewed and their ability to operate effectively in terms of protecting the population from crime can have a disproportionately positive impact on citizen perceptions of the Government as a whole. Such a change will necessitate adopting a radically

different attitude and core mission; one that moves away from police as a tool of repression toward policing as a public service institution. While this type of institutional change requires considerable time, effort, and political will, nevertheless, some relatively simple techniques can begin the process. For example, training in non confrontational crowd control techniques can prevent public demonstrations from escalating into violence. Similarly, the Human Dignity in Policing training course described in the Malawi assessment report has a proven positive track record in generating attitudinal changes. Implementation of recommendations contained in the Waki Report²³⁰ as well as using those developed as Commission on Accreditation of Law Enforcement Agencies (CALEA) criteria²³¹ should also be taken into consideration.

One specific recommendation could be pursued with the GoK immediately without necessitating programmatic interventions by the USG. Police and their families currently reside in barracks adjacent to police departments or stations. The barracks are currently crowded and in very poor, even inhumane, condition. Rather than expending funds on repairing the barracks, we recommend a radical change in approach by redirecting reprogramming funds currently used to support centralized police housing in favor of facilitating purchase of houses by individual police officers within the communities they serve. This would facilitate integration of police and their families into local communities; it would also foster improved relations between citizens and police as each would come to know the other as individuals. Such approaches have been adopted elsewhere around the world, including in the US, as an element of community policing programs. The results have tended to reduce crime in areas where police officers reside, as well as engendering greater mutual understanding and respect between the police and communities they serve.

Planning and implementation – The GoK has supported development of many reform plans whether in response to donor requirements or on their own initiative. For example, a “Vision 2030” plan has been drafted, and within GJLOS, each institution engages in active strategic planning and annual work plan exercises. However, there is a significant difference between drafting plans for donor acceptance and actually providing for their implementation. In interviews and literature, it is apparent that the principal problem from the perspective of local counterparts arises at the level of implementation, that is to say determining where to start and how to do so. In the words of one interviewee, even those inclined to support reforms do not know where to start lacking rallying points. This is perhaps the most significant challenge to reform and the area in which local counterparts need the most assistance; it is also where donor assistance could be the most valuable.

Every donor interviewed, including USAID, identified lack of technical knowledge or experience on how to implement plans as a major stumbling block to both the pace of reform and to results achieved. GJLOS also acknowledged this as a major problem, indicating that there is a need for identification of clear objectives and an overall policy framework that links directly to specific activities needed to achieve those objectives. A valuable service to the GJLOS directorship of justice institution programs could be the provision of a highly skilled advisor to work with the director; – on a daily basis – to facilitate the process of determining the steps necessary to implement plans. Such an advisor would need both a high level of experience and considerable comparative knowledge of various systems around the world that would enable him or her to provide a range of options that might best be applied to the specific situation of Kenya.

Civil Society – Development of public intolerance for the status quo will be a crucial element of effecting change in Kenya. Non-partisan civil society groups are perhaps the best hope in this regard, particularly in the sense of forging the causal link between current conditions and the politicians they elect. While the

²³⁰ See recommendations beginning on page 477 of the “Waki report.”

²³¹ See also the Malawi recommendations.

Kenyan public has tended to have a short memory, this can be overcome through concerted campaigns. But they need a practical message that will resonate; additionally, and citizen groups must learn how to work together and use power constructively so that their voices cannot be ignored. USAID and other donor programs currently focus considerable attention on civil society programming. An essential element of all donor programming should be developing citizen awareness of how the current situation impacts negatively upon them (e.g., by identifying specifically how governmental corruption impacts their daily lives) and how to apply public pressure to insist upon change.

Clearly there are numerous other areas that also require continued support for reform. Primary among those are curbing the pervasive levels of corruption and impunity, which are also the subjects of current donor programs. Progress, albeit slow, is taking place. We do not recommend new programming for USAID, but simply urge maximum leveraging of current USG and other donor resources to pressure Kenyan leadership to change.

Annex 5. Country Report: Malawi

Jan Stromsem
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Historical and Political Background

The former British protectorate of Nyasaland was granted independence in the early 1960s, and the name was changed to Malawi. Former freedom fighter and political prisoner Dr. Hastings Kamuzu Banda was elected as the first Prime Minister. He took office in 1963, and Malawi officially became a sovereign state in 1964. Under the leadership of Dr. Banda, Malawi functioned as a single-party political system for more than three decades, during which the President sought to consolidate power into the executive branch, effectively enabling him to control the other two branches of government. He declared himself “President for life” in 1971, a position he retained until he was deposed in 1993. A new provisional Constitution came into effect in 1994, establishing elections every five years and a multi-party system. The new Constitution provides for a unicameral National Assembly and an independent judiciary branch.

The current President, Bingu wa Mutharika, was elected in 2004 as a minority party President. As an economist, he has improved the macro-economic climate as well as reduced inflation, interest rates, and domestic debt. However, his minority party status has also resulted in political deadlocks. Though he has the authority to convene the Assembly, Mutharika has recently chosen not to do so, thus preventing consideration of critical pieces of legislation and considerably weakening the legislative branch’s ability to serve as a check on executive power. Despite the establishment of the Human Rights Commission and the Anticorruption Agency, corruption continues to be among the most significant issues hampering the government’s ability to address the problems confronting the Malawian people. Rapid population growth, increased movement of the population from rural to urban areas, and spread of HIV/AIDS (with estimates of 14.3% of the adult population infected) all pose significant challenges to Malawi. More than 62% of the current population of nearly 14 million is functionally illiterate, and many of them struggle to survive.

Evolution of the Judiciary

Malawi’s legal system is a combination of the original British common law system and a customary law system based on tribal practices. Although a democracy, Malawi still honors traditional leadership; an estimated 85% of the population lives in rural areas, where tribal-based justice remains a significant factor.

Until 1994, the Malawian courts were a part of the Executive Branch, organizationally placed under the Attorney General’s Office of the Ministry of Justice (MOJ). The Minister also served as Head of State, so the judiciary was essentially an appendage of the executive branch. Many laws were simply disregarded, and rule of law reforms did not move forward. During the Banda period, under the guise of preserving public security, there were numerous unexplained detentions carried out in the name of the Head of State. There were instances when the state seized private property on suspicion of activities against the state. The courts had no power to undo these detentions that became both a highly abusive practice and developed into a significant governance problem. For nearly 30 years, the courts were helpless and had authority only to deal with minor matters. Citizen protections that should have been afforded through the courts disappeared.

It was only in 1994 that the new multi-party movement really began, and with it came several changes. Executive authority was challenged; laws were amended, and many were replaced altogether. A new Constitution was drafted. With this new openness came a wave of judicial empowerment, accompanied by a sharp increase in lawsuits filed against the government by the citizens who had been victimized in

the past. They sought reparation from the government, which became quickly overwhelmed by the sheer number of legal suits and their high costs. However, under the watchful eyes of the international community, it was not an option for the government to step back from the table. Suddenly things began to open up at an even more rapid pace. Independence of the judiciary as a separate branch was guaranteed under the new Constitution, and while the details of its attributes were inadequately articulated and some residual connections to the executive remain, the principles of independence are well entrenched and judicial tenure is protected. Notably, these constitutional provisions cannot be amended without a public referendum.

Organizational Structure of Justice Sector Institutions

The current organizational structure of the judiciary includes a Constitutional Court, High Court, Supreme Court of Appeals, and Magistrate Courts that serve rural areas of the country. Although independent from a policy perspective, the judiciary's budget is still processed through the MOJ. This means that the judiciary does not have a direct voice in defending its own budget before the Cabinet or Parliament, so the executive continues to control judicial finances. The Chief Judge is appointed by the President and confirmed by the Assembly, but other judges are appointed on the advice of a Judicial Service Commission. The Commission also provides oversight of the judiciary and is responsible for career advancement and disciplinary measures, including judicial impeachment.

Two executive branch ministries have direct authority over justice related issues: the Ministry of Justice and Constitutional Affairs, which includes a Department of Public Prosecutors with authority to oversee criminal prosecutions, as well as cases related to anti-corruption cases, immigration, revenue, and police-prosecutor matters; and a newly created Legal Aid Department. The Ministry of Home Affairs and Internal Security has oversight for the Malawian Police Service, as well as immigration and prisons services.

USAID and other Donor Rule of Law Programs

USAID's DG portfolio has supported several rule of law programs during the past 15 years. One of these was a paralegal training program in the mid-1990s, renewed in the early 2000s, under which a cadre of paralegals was trained and deployed to work in rural areas to provide advice and assistance to rural populations. More recently, USAID provided management of the MCC Threshold Country development process, implemented by Casals and Associates, integrating assistance activities of the Department of Justice's ICITAP and OPDAT programs. The MCC preparatory programs focused principally on combating corruption and increasing financial stability. OPDAT placed a Regional Legal Advisor to support justice sector initiatives through the DPP, police prosecutors (see Findings section below), the Anticorruption Bureau, the Judiciary, the Law Commission, and the College of Law. ICITAP's program was designed to support basic police skills development for training instructors, more effective investigative techniques to conduct fraud investigations, establishment of an internal affairs function within the Malawi Police Service, improved case management, and development of forensic capabilities. Malawi achieved Compact status in late 2007, albeit by only a few percentage points. Other USG assistance in the rule of law area has included a program implemented by the Drug Enforcement Administration that involved construction and equipping of an entire courthouse, training – through exchange programs with the US courts – and technical support of assigned staff.

The UK Department for International Development (DFID) programs have focused predominantly on access to justice, governance, gender issues, and helping the National Assembly strengthen its internal operations. Their access program deals principally with rural level magistrate courts, addressing both demand and supply sides, as well as reducing physical and procedural barriers to access. Women are increasingly demanding access to services, but frequently remain unable to appear on their own behalf before the courts. Traditional systems tend to abuse women and there are few constitutional guarantees.

DFID has recognized that to achieve results, their programs must respond to critical local needs. As a result, now their programming tends to deemphasize training and has refocused on villages. DFID has also provided technical assistance to prisons and police in terms of forging partnerships with citizens, while also addressing victim-related issues.

The United Nations Development Programme (UNDP) Access to Justice Program focuses on democracy, education, and human rights. They have posted a technical advisor within the MOJ to provide hands on technical assistance to the Ministry and other key stakeholders, supporting the planning unit. They have created a “basket funding” approach to donor coordination, creating a framework and policy basis.

The EU’s ROL program plays the major donor role in Malawi and focuses principally on the High Courts, the MOJ, and CSOs working on justice reform issues. Their programs seek to promote rule of law and enhance access to justice by improving the quality and delivery of justice to the citizens of Malawi. They target human rights aspects of the justice system and they have provided substantial investment in vehicles, equipment, and computers. The EU focuses on four specific areas: with the MOJ on backlogs of law revisions and publication of law reports; with the Judiciary in the areas of judicial training, the development of court case management system, and publication of a handbook for magistrates; with the prison system on training, human rights, and establishing an automated database; and with the Law Commission relative to several key pieces of legislation. They have also provided assistance to the Law Faculty on moot courts and modernizing the curriculum, and to the Anticorruption Bureau. The EU has also assigned an advisor to the Ministry’s Solicitor General whose principal function is to coordinate and implement their overall ROL project. EU has supported development of a work plan for 2008 that involves a sector wide review of challenges, structures, systems, and staffing needs. The needs assessment and decisions of the types of programs needed has been completed, and they are now addressing the details of what activities are required. They employ a highly participatory process, working directly with local counterparts. The EU has also worked with the Ministry for Women and Youth on probation programs and with probation officers.

World Bank programs have supported the Anticorruption Bureau, particularly in strengthening efforts to prosecute high profile cases of corruption. Together with the Canadian International Development Agency (CIDA), another World Bank program worked with the High Court to support formation of a task force to develop a commercial division within Malawian courts. The project combined capacity building and legal training to introduce a conceptual framework on commercial and trade issues, as well as guidance on court and case law management. The Financial Management Transparency and Accountability Project also includes a capacity building aspect directed at public finance and public management with the aim of promoting transparency and accountability. The program involved a post-graduate level program of study for select High Court judges to enhance their skills in the areas of commercial law in direct support of the newly created Commercial Law Division.

Key Findings

Scarcity of human capital and material resources – Amongst the most critical problems confronting the justice system are those of inadequate human capital and material resources. The need for attorneys vastly outstrips the availability of qualified professionals. Law schools currently graduate approximately 10-12 new candidates per year, most of whom choose to join the private sector following a short tenure of eight to nine months of government service. In addition to the low salaries of public employees, reasons cited for the attrition rates were employment conditions: poor facilities, little to no benefits, and high levels of stress and frustration.

Revision of the Constitution – A new constitutional review process is currently underway, although results from the process will likely be delayed due to the upcoming elections (Presidential and National Assembly elections are scheduled for May 2009). The key areas identified for change include legal

review: revision of the body of laws (many of which are outdated); identification of inconsistencies between existing laws (for example, the right to a fair trial is not currently consistent with provisions of the Police Act); harmonization of domestic laws with provisions of international treaties; and establishing equality of the three branch system by Constitutional guarantees of separation and balance of powers.

Donor coordination – Donor coordination is currently managed through the MOJ, however, meetings are not convened on a routine basis. Informally, donors share information between themselves. Despite this, a number of problem areas were cited, to include: decision-making based on home country objectives rather than counterpart priorities and needs; short-duration, narrow focus, and ad hoc programming of some donors that are not sustainable beyond the period of assistance; the need to synchronize and harmonize donor approaches and activities to avoid duplication, overlapping and competing programs; donor shopping; too many study tours and an over emphasis on training of individuals; and too much money spent with too few results. Most significantly, donors and counterpart institutions alike recognize that the technical need for assistance has shifted from problem identification to implementing recommendations contained in assessments and strategic plans.

Balance of power between the three branches – While the current Constitution provides for shared power and oversight, many institutional mechanisms have broken down or been rendered ineffective. Presently, power is concentrated within the executive as the source of original power and ultimate decision making authority. In large part due to the President’s failure to convene National Assembly sessions, its ability to provide input to executive decision making is limited. The continued executive control of the budgets of both the Assembly and the Judiciary restricts the oversight roles of either institution. However, the other branches have managed to retain a degree of autonomy, demonstrated recently in the judiciary’s decision regarding the Section 65²³² situation. Asked to consider the case, the Supreme Court’s decision upheld the validity of the Constitutional provision, displeasing the executive which had sought to redistribute political party affiliations within the Assembly. Conversely, another example reveals that the National Assembly is not totally without decision-making powers – at least not on issues pertaining to themselves: a constitutional provision allowing citizens to recall members of Parliament was repealed by the membership – an action that clearly demonstrates that their desire to retain their seats takes precedence over the good of their constituents and removes an oversight function of the population.

To a degree, checks on political power and authority are exercised through international and domestic media, CSOs, and the international donor community, albeit with limitations. For example, in order for the media to publish information about governmental corruption, it must present hard evidence or risk arrest. Public opinion is a strong potential source for reform, but many CSOs work independently rather than band together on issues of high concern. Opinions of international donors are important, and the financial resources available through their programs have the ability to influence decision-making.

Judiciary – Public perception of the judiciary is reasonably positive, but many institutional challenges remain, mainly the human capital and resource needs of the courts, the insufficient number of courts, and difficulty of access (particularly in rural areas). While geography is the main limiting factor, costs of legal representation and court fees, cumbersome and lengthy procedures, limited hearings, poor recordkeeping, and the official language of the courts (English) also pose significant problems to accessing services from formal sector courts. Typically, when access to courts is not possible, victims tend to consult traditional authorities (magistrate court level), but frequently they are poorly trained, lack standard guidelines on handling cases or triage those cases that should be referred to higher level courts. The resulting decisions

²³² According to Section 65 of the current Constitution, elected members of Parliament are prohibited from changing from one political party to another post-election. Although several current members have changed political party allegiance (to adjust the minority-majority party balance), they have failed to resign their position within the Assembly as required under the Constitution.

are sometimes skewed; for example, decisions on gender-based violence cases may be equated to those for stealing a chicken or a goat.

Lack of enforcement of judicial decisions is commonplace, attributable to poor record keeping and lack of staff to follow up on decisions or to track pending cases. Capacity is a problem, as well as the many vacancies and continuing difficulties with staff retention. Building maintenance, equipment, and availability of basic supplies is inadequate. Most courthouses do not have public reception areas, causing those who wish to access courts to wait outside, sometimes for very lengthy periods of time. These problems are not just financial in nature: staff turnover is attributed to poor working conditions, as well as the high levels of stress and frustrations with the current system.

There are many delays, most of which are linked directly to insufficient resources and training, as well as inefficient and cumbersome internal processes. Budgetary shortfalls are exacerbated by the process of distributing monthly allocations to the courts, not simply an amortized average, but rather what the executive branch feels it can afford on a month-to-month basis. Other challenges involve the changing world, the need to change laws to adapt, and the way cases are handled. Laws may change, but the judiciary cannot keep pace due to a lack of technical skills.

Department of Public Prosecutors – Principal challenges confronting prosecution in Malawi are lack of financial resources, as well as an insufficient number of trained lawyers. The DPP currently has a staff of only 20 attorneys and the inadequate number of lawyers is directly attributable to the practice of designating police to serve as police prosecutors. Current DPP staff also lacks sufficient technical expertise to address complex cases, such as human trafficking or money laundering. In addition, many laws are outdated (including the Code of Criminal Procedure) and international standards have not been incorporated into the body of domestic laws. Lack of awareness by both prosecutors and magistrates that laws have changed, coupled with inadequate procedural harmonization across the criminal justice sector institutions in terms of how laws are interpreted and applied, complicates prosecution and judicial decision making. Frequently, the State loses cases because prosecutors and judges are unprepared.

There is a civil service program within the executive branch that provides some training, but the bulk of specialized training is on the job. Some continuing education courses are provided through donor funding, including through the MCC program; however these do not meet current needs. Even if improvements are supported externally by donors, sustainability is lacking and short-term benefits quickly collapse. For example, when there were inadequate funds for prosecutors and the courts to process homicide cases, donors provided temporary funding for the trials of the approximately 500 prisoners on remand. But when the funding stopped, so did the capacity to process the cases. Additional alternative sentencing provisions and possibilities, such as plea bargaining, are also needed, but cannot be applied without the legislation that provides guidelines for its usage (now another of the bills pending with Parliament) Until the current staffing problems can be addressed, it is not possible to phase out the use of police prosecutors.

Legal Aid Department – Functioning under the Office of the Solicitor General of the MOJ, the Legal Aid Department was created through an act of Parliament. Inadequacy of resources, both human and material, represents the most significant challenge to the public defender problem. There is a significant issue with retention of staff, particularly attorneys who tend to remain on the job for less than one year, leaving primarily due to low wages and poor working conditions. Although the Department gives priority to the most vulnerable segments of the population and currently accepts only criminal cases, with an estimated caseload of 15,000 cases per year, it is not possible to handle the volume. The LAD does receive donor support, with equipment donations from USAID, as well as through funding from the DFID and EU programs.

Police – Estimates on the size of the police force range between 9,000 and 12,000, a number that provides a ratio of police-to-population of approximately 1 to 1,400 (a relatively low ratio). Recruitment of

additional police is underway, but there are budget limitations, and they lose a significant number of officers annually to attrition and to HIV/AIDS (ranging from 120 to 250 per year). Around 90% of police receive only basic skills training, with very few officers sufficiently trained to investigate more complex criminal cases arising in urban areas, such as money laundering and financial crime. Recordkeeping takes place at both regional and district station levels, but fingerprints are periodically collected and brought to headquarters for analysis. Approximately 85% of cases are handled by the police prosecutors, under which police are cross-designated with prosecutorial authority to handle routine cases. Despite the existence of rapid response units in urban areas, there are significant delays in police responding to citizen requests for assistance in rural areas, with the result that many cases remain unreported.

Increased recruitment is needed, but current low salary levels are a significant disincentive. There have been complaints of aggressive police tactics, especially in conjunction with arrests, and public demonstrations or disturbances. Corruption is also seen as a serious problem, although the efforts of the newly created Internal Affairs Unit (established by ICITAP in conjunction with the MCC process) and the work of the Anticorruption Bureau are beginning to show results. As in the other institutions of justice, within the police there is a need to establish uniform standards and protocols for police operations, and for additional training, especially refresher courses and training to enhance investigative skills.

Prison Overcrowding – In a system designed to hold 4,000, there are currently more than 12,000 inmates in Malawi’s prisons, many of them arrested on minor charges and held in pre-trial detention. The majority of prisoners are poor and illiterate. Recidivism is a serious issue, but hard data do not exist.²³³ Another significant problem is the lack of a national registration system to correctly identify those arrested. Recordkeeping is equally problematic: there is no centralized system of prison records, and little to no sharing of records and information between institutions. Other than donor supported programs, there are no prisoner rehabilitation or support services. Buildings are old and in poor repair; there is little food for prisoners, many are in poor health, and few medical services are available. Currently, there is one guard for every 70 prisoners. A shortage of vehicles and security equipment creates difficulties in transporting prisoners to court hearings. Women are held separately from men, but otherwise the prison populations are intermingled, with youthful offenders comingled with the adult population.

With little institutional accountability²³⁴ and inadequate procedures governing follow-up of those arrested, the task of safeguarding prisoners’ rights tends to fall to private lawyers. But in a country of too few lawyers, coupled with the costs of a private attorney and the inability of the Legal Aid Department to handle all cases presented, the vast majority of prisoners remain without legal assistance. While the possibility of bail exists, the most prisoners cannot afford the costs. Under current legislation, other forms of alternative sentencing are unavailable.

Laws and Legal Drafting – The Law Commission was established as an independent body, charged with reform, review, and revision of laws, with particular focus on assuring compliance with human rights principles. While not the sole institution capable of generating legislation (executive branch institutions and other governmental branches have this authority as well), they have centralized the function and developed standard processes to guide their work. For example, the Commission provides review of draft laws to ensure that they are consistent with the principles of ROL, but also support public awareness campaigns to publicize new or amended laws. The preparation of the draft text is the responsibility of ad hoc Special Commissions, convened to focus on specific technical areas, such as on commercial laws. Once the law is drafted, it is forwarded to the Cabinet through the MOJ, then on to Parliament, with a

²³³ Statistic provided by the Director of Prison services during an interview.

²³⁴ One of the functions of the MoHA is that of oversight. However, the Deputy indicated that the Ministry did not have sufficient funds to place much emphasis on oversight at this point. There is an office of the Ombudsman, and for prisons, oversight is provided in the form of an inspectorate that functions under the direction of a high court judge. Here again, it appears that this function is “not very active and is not working as had anticipated.”

status report published in the Official Gazette. As a subscription-based publication distributed only to Government of Malawi (GOM) institutions, inadequate copies of the law are available to courts and law schools and most citizens do not even know of its existence. Many draft laws are still pending due to executive inaction either in approving the text or convening the Assembly. Although several international treaties have been signed, including those pertaining to human rights and anti-corruption issues, not all have been ratified by the Assembly, rendering it difficult for legal practitioners to remain up to date on applicable laws.

In response to a question concerning possible difficulties arising from implementing new laws, the Commission responded that as part of their standard processes, they conduct background research on new laws or modifications to assure consistency with existing laws. However, they acknowledged that they do not yet take into consideration financial implications of implementing new laws that might necessitate incremental approaches to enactment.

Anti-Corruption Bureau – Allegations of abuse of power and authority, financial irregularities, inadequate oversight mechanisms, and the absence of accountability and transparency are examples of corruption as demonstrated in the GOM. For the most part, standard rules and procedures governing internal operations of governmental institutions – within any of the three branches – either do not exist or are inadequate to support oversight and measurement of compliance.

On the positive side, however, the GOM has ratified major international anti-corruption conventions, enacted the Corrupt Practices Act in 1995, drafted new legislation to strengthen financial accountability, and created the National Audit Agenda. In addition, the Anti-Corruption Bureau was established approximately 10 years ago. The Bureau is financed by the GOM (as an executive branch Agency), and receives donor funding principally from DFID and the EU-ROL project. The Bureau has two principal functions: (1) to enforce the body of laws and (2) to prevent corruption, chiefly through public awareness and education campaigns. Its work is beginning to have an impact. Beginning with development of a national strategy, drafted in conjunction with several governmental institutions and civil society groups over the last two to three years, internal capacities and results have expanded. They have prepared internal procedures governing procurement. Its investigative unit works closely with public prosecutors, and through a newly conceived team approach to conducting investigations whereby responsibilities for investigations are assigned to a team rather than a single individual, several successful prosecutions have taken place. The Bureau also has a strong preventative role, comprised of public education and information, as well as proactive compliance reviews of both public and private institutions. It acknowledges both the importance and current lack of internal procedures, standard operating procedures within governmental and private institutions and is working to focus attention on developing these standards to guide staff while enabling oversight.

Human Rights – There are numerous donor and locally supported NGOs that work to improve human rights in Malawi. One of the largest is the Human Rights Consultative Committee, a formalized network of approximately 85 CSOs, with a subscription based membership. They were formed in 1996, and since then, the number of CSOs in Malawi has increased, particularly in response to political changes. They emphasize women's and children's rights, as well as good governance. The HRCC has supported many advocacy campaigns, bringing together their membership around critical issues. Their programs have included mediation in human rights matters. They have intervened in cases where the Executive has exceeded their legal constraints, for example, they also mounted an advocacy campaign concerning the Section 65 matter – developing a position for their network. Their position was that the Constitutional provision must be upheld and they even held a 15 day vigil on the matter.

Within the GOM, the Human Rights Commission was created under the Constitution to protect and promote human rights. It serves as an advocate, as well as in the role of investigator of instances of human rights violations reported to the Commission. One of the Commission's principal challenges

resides in the fact that there is only a single office (in Lilongwe), but regional offices are contemplated, subject to availability of funding.

Despite these efforts, there are currently serious issues of law and human rights, especially as these concern children. Much of the body of laws has not been changed since the early 1960s. New bills have been drafted (to include a new law on the rights of children), but remain tabled in Parliament. Child labor is a significant issue, as is domestic violence, and maltreatment of prisoners. Poverty and illiteracy complicate the situation, particularly for those inhabiting remote areas. Frequently information about access to services is unavailable and services themselves are limited. Donor supported programs, CSOs, and churches have provided victim support services, to include ADR and a USAID-supported paralegal program. Court processes are discouragingly complex, and both the police and the courts tend to be aggressive towards women. There have been some reasonably good examples of community policing, but many magistrates are corrupt and women's cases tend to be pushed to the bottom of calendars, especially if they are not assisted by lawyers (and most are not). All too often, in rural areas, the approach to women's issues is that they should simply endure.

Recommendations – The following recommendations represent the range of activities and programs that could be supported by future USAID rule of law projects. While support to all program areas described are needed, scarce resources dictate identifying programs most likely to result in demonstrable impact and changes that are sustainable upon conclusion of the project. With this in mind, we recommend priority focus on support for strengthening the judiciary through creation of an administrative office of the courts (AOC). Necessarily such a program will integrate recommendations contained in the Donor Coordination and Corruption sections below. Should such a program be approved, we further recommend consideration of Malawi as a regional demonstration site to highlight for neighboring countries the types of improvements and efficiencies that can result from professionalizing court administration and management, and procedural streamlining.²³⁵

Donor Coordination – The substantial leverage of donor opinions and programs should be applied strategically and in a unified fashion to the highest priority problems within each programmatic sector, e.g., corruption, balance of power between the three branches, strengthening the judiciary, etc. Approaches should balance donor objectives with those of host country counterparts. Local counterpart-prepared strategic plans are needed for each ROL institutional component (judiciary, prosecutors, police, and prisons)²³⁶ and should be accompanied by annual action plans that lay out what specific activities are required during a given year to reach long-term objectives, as well as parties responsible, and human and material resources required. Where necessary donors should support preparation of such plans and target their assistance to programmatic gaps (activities that cannot be supported by local institutions for financial or technical capacity reasons). Assistance should take into account priorities and sequencing of assistance (what must come first), and determination of needs for short-term interventions versus longer term support that are sustainable upon conclusion of the donor program.

Whenever possible, training should take the form of train-the-trainer approaches to build internal expertise and foster replication. Training should be accompanied by institutional development assistance

²³⁵ Such a program will necessarily involve supplementing the Mission's current DG staffing to enable support to and oversight for the project.

²³⁶ We acknowledge the existence of several donor-funded initiatives (DFID, the EU, and the UN principal among them, largely funded through the SWAp mechanism) to support development of strategic plans for major justice institutions. DFID has also supported a national policy framework and sector-wide plan. However, a problem were raised repetitively by local counterparts in interviews was the lack of technical knowledge on how to implement strategic plans. In discussions, counterparts indicated that it would be very helpful for high-level objectives contained in the existing plans to be translated into concrete annual activity or action plans that lay out specifically what should be done, by whom, at what cost, over what period of time, and with what specific result(s). This approach provides specific milestones to track the pace of implementation and enable all to have a clear view of the breadth, costs, and timeframes required for reforms.

(to move away from training individuals and toward assisting the institutions to use the skills); it should be practice-based, and consistent with local laws and needs. Computer equipment donations should be preceded by functional and needs analyses (e.g., how will the equipment be used and maintained, what data are to be recorded and to whom it will be accessible). Finally, to build towards long-term sustainability budgetary requirements – to be met by local counterparts – must be taken into consideration. Priority assistance should be given to making existing institutions more efficient, enhancing their ability to do more within existing budgetary limitations. (See also the recommendation on budget reprogramming).

Corruption – Secondary legislation (in the form of policies, standard operating procedures, or internal regulations) are needed to guide the day-to-day work of the institutions of justice. Such policies are also needed to set criteria for hiring and promotions, as well as for procurement, facilities maintenance and other administrative management issues. Currently these do not exist, resulting in lack of uniformity in applying and interpreting laws, but also, as acknowledged by the Anti-Corruption Bureau, complicating management and oversight. Without clearly defined and documented performance and operational standards to which employees must adhere, it is difficult to hold individuals accountable for their actions. Lack of specific standards against which to measure performance not only complicates the few compliance reviews that do take place, their absence also presents windows of opportunity to engage in corrupt practices, with little fear of discovery. As an integral element in the fight against corruption, development of secondary legislation, tied directly into all training courses and materials, should be considered an essential priority. Secondly, internal oversight mechanisms to perform routine and ad hoc compliance reviews should be supported for each institution. Scheduled protocols for discipline and sanctions are a necessary element of such mechanisms to ensure fair and equitable response to lack of compliance.

Judicial Independence – While several assistance programs are currently supported by other donors and measures recommended here must be fully integrated into those efforts, there is still considerable latitude and need to strengthen the judiciary, particularly, judicial independence. Control over the judicial budget process (i.e., formulating needs-based requirements, justifying and defending these to appropriators, and managing allocations) is the most significant current challenge to independence. However, accompanying such authority must be development of the internal capacity to handle the new responsibilities efficiently and transparently. Assuring budgetary efficiency will also require the internal capacity to meet the administrative and managerial needs of the judiciary as a whole, including oversight mechanisms, while also developing more efficient and effective processes and systems.

Whether through strengthening of the existing Justice Service Commission or supporting development of a new institution, such as a Judicial Council, the Malawian judiciary needs to develop the organizational, managerial, and administrative infrastructures that meet the needs of Malawian citizens. A foundational piece of such a reform is establishment of an institution to provide the range of services commonly associated with an AOC.²³⁷ USAID has substantial depth of experience in establishing such offices, and substantial technical and training materials exist to support the technical assistance activities needed. Primary among these are efficiency studies to streamline current processes and scheduling protocols, to determine developing criteria for delegating certain duties and authorities to clerks and administrative staff, and preparation of the above mentioned secondary legislation. Since at the functional level, the way courts handle cases, regardless of the type of case, is essentially identical, there is a substantial body of experience and best practices to guide development of revised case management processes. To support future automation, there are several generic versions of case management systems that could be easily

²³⁷ The evolution of judicial systems around the world was discussed with a Supreme Court Justice from Blantyre, particularly the increased practice of establishing Administrative Offices of the Courts to deal with administrative and managerial issues. The justice expressed considerable interest in the possibility of replicating such a practice in Malawi.

adapted to Malawian needs. However, several elements must be taken into consideration prior to embarking on any automation program: (1) completion of the process streamlining; (2) identification of user requirements and user capacities; (3) infrastructural support requirements must be in place (i.e., source of electricity, system maintenance, technical support, and user training). In addition, any automation project should consider future connectivity and inter operability needs upfront, including connections to other databases, sharing of information with other agencies, etc.

Should USAID undertake a program to support development of an AOC, we recommend consideration of the resulting institution as a demonstration site for judiciaries of other countries within the region. Not only would this approach serve to demonstrate the merits of delegating responsibilities for administrative functions away from judges and to a cadre of trained and professional administrators, it would also contribute to reducing delays and increase uniformity. In addition, the systems, processes, procedures, and training could be fairly easily adapted to neighboring countries.

Police – While changing police attitudes to a more public service orientation will require substantial time and effort, there are several concrete forms of assistance that can support incremental changes with relatively little effort. For example, training police on modern, non-confrontational techniques of arrest and crowd control, and introduction of a highly effective “Human Dignity in Policing”²³⁸ course can begin the process of improving relations between police and the communities they serve. Longer term efforts should focus on updating the current 1963 police law, expanding current community policing efforts,²³⁹ strengthening internal affairs unit, and moving away from reliance on witness testimony to increased use of objective evidence and improved forensic capacities. In addition, as mentioned in the meeting with the Ministry of Home Affairs, to guide a police reform process in terms of setting long term goals, an extensive set of accreditation standards already exists and could service as the basis for identifying where to start reforms and how to proceed with implementation (see the CALEA Web site²⁴⁰). Since the DCHA office within USAID Washington now incorporates a policing expert on its staff, the Mission might wish to consult this officer and request a field visit to provide more in depth analysis and recommendations.

Public Prosecutors – Several forms of short term assistance could be provided. For example, conducting an analysis of principal reasons why the State tends to lose criminal cases to serve as the basis for developing a program of training and technical assistance. Consideration of practical ways to use asset forfeiture funds to enhance available resources, and integration of existing expertise outside of the GOM to provide supplementary skills that are urgently needed, for example, use of banking auditors to assist in money laundering investigations. Over the longer term, a strategy must be developed to provide for evolution away from the current practice of members of the police force playing the dual roles of police and prosecutor.²⁴¹ In conjunction with the Law Commission, support analysis of current laws to determine provisions applicable to development of alternative sentencing, assist in developing guidelines and training for prosecutors and judges, for use of such alternatives, and provide technical input into the drafting of new laws or provisions addressing this issue.

²³⁸ This course was developed by ICITAP in the mid 1990s and used successfully throughout Latin America and Eastern Europe to foster improved police-citizen interaction. Development of the course was originally funded by USAID and State Department and thus should be accessible to Missions.

²³⁹ See also the recommendations regarding police barracks in the Kenya report.

²⁴⁰ CALEA is a set of standards to guide police operations across the entire spectrum of policing duties. Originally developed as a means of enhancing law enforcement effectiveness in the US and Canada, it is now used as a standard internationally and has been applied, through USG-sponsored programs, in several countries around the world. While achievement of full accreditation would likely require a number of years, and a substantial investment, to complete use of these standards as a guide for setting priorities and defining changes can be a highly useful and practical tool.

²⁴¹ Seized assets can be sold, to the profit of the GOM.

Public Defenders and Legal Aid – USAID has already provided substantial assistance to supporting citizen needs for legal services through the paralegal training program and consideration should be given to resuming such a program, integrating it with other donor programs that focus on expanding access to justice. USAID also has broad institutional experience in support of developing public defender programs in many countries around the world and analyses of lessons learned and best practices have been the subject of study, for example, in Latin American programs. However, prior to engaging in a new assistance program, USAID should explore possible longer-term funding options to ensure sustainability by the GOM. In part, budgetary increases could result from the economic reforms currently underway by the President, but at the same time, introducing improved methods of procedural and other forms of efficiency can produce substantial operating cost reductions. Such possibilities should also be explored in conjunction with the strategic and action planning processes described under the donor section above. (See paragraph on budgetary reprogramming for additional information.)

Reducing Prison Overcrowding – Avoiding recurrence of the current prison overcrowding problem will require a range of reforms described in several of the above sections. However, immediate relief can be achieved through formation of a task force or a series of task forces comprised of judges, prosecutors, legal professionals, law students²⁴², etc.,. These task forces would be responsible for conducting review of current pre-trial detainee population to identify and release those already imprisoned for a period longer than the sentence for the crime with which they are charged. Such reviews will likely need to be repeated at least on an annual basis until longer term reforms can take effect. Concurrently, technical support is recommended for the Ministry of Home Affairs to conduct a cost/benefits analysis of maintaining the current prisoner population versus engaging in reprogramming some of those funds to support development of early release and rehabilitation services.

Budgetary Reprogramming – Although specific budgetary information was not available during the assessment, from repeated comments, it appears that a donor supported review of current allocations with a view to possible reprogramming might be considered. For example, as noted in the 2006 Soros report,²⁴³ the amount of funding expended to house high level government officials and on representational funding, substantially exceeds allocations to major ministries, to include the MOJ. Clearly, if the GOM is serious about reforming the justice sector to meet citizen needs and expectations, a rebalancing of how public funds are used is in order and might well be a prerequisite to some donor funded initiatives.

Building Citizen Advocacy – Success in reducing corruption and human rights abuses, as well as moving forward essential reforms within the justice sector will ultimately rest on the capacity of citizens to demand change. This implies improved citizen awareness and education, but also development of a greater level of citizen intolerance for the status quo. There are numerous examples of citizens’ ability to work together to advocate for change and further strengthening of this capacity is recommended. In addition, all current USG, and other donors, should consider how existing programming, such as strengthening CSOs, civic education programs, etc., can incorporate elements of both increasing knowledge as well as foster development of networks focused on highest level priorities in rule of law reforms.

Updating and Disseminating Laws – There is a need to support the work of the Law Commission to reinforce their internal capacities to conduct a comprehensive review of current legislation. This process will identify outdated laws or codes; the need for new laws; inconsistencies between laws; lack of harmonization across justice sector institutions; and provisions that have not or cannot be implemented

²⁴² Some law schools in the US support pro bono internship programs under which students can be assigned to provide short term support (2-3 months) to international ROL programs. Costs to the USG involve travel and modest stipends for lodging and meals.

²⁴³ Malawi: Justice Sector and the Rule of Law, AfriMAP and Open Society Initiative for Southern Africa, 2006, 12.

such as financial implications of laws and the possible need to phase in provisions. Several specific objectives are also recommended: (1) Identification of the discretionary potential of existing legal provisions to support alternative sentencing and plea bargaining; (2) Streamline current legal drafting processes both internally and within the executive and legislative branches; (3) Expand dissemination of laws, both e-based and in paper form, to all justice sector institutions;²⁴⁴ (4) Support for integration of new laws and amendments into training programs and standard operating procedures for justice sector staff; and (5) Priority support for a Freedom of Information law to enhance transparency of current governmental operations.

Personal Identification System – A USG-supported Automated Fingerprint Identification System already exists in Malawi and could serve as the basis for expanding and centralizing fingerprint records that are currently maintained in manual form. Concurrently, we recommend support for development of a new national identity card system that requires all applicants to register their fingerprints. While ultimately this system should be computerized and interfaced directly to AFIS, in the interim period, fingerprints from identity card applicants should be routinely cross checked through AFIS.

²⁴⁴ We recommend consideration of the use of the US Library of Congress legal database program that will provide for electronic incorporation of national legislation into their Internet database, thereby making them available via the Web.

Annex 6. Country Report: Nigeria

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I. Background

Although USAID has supported rule of law efforts in Africa since the end of the Cold War, the impact of its programming has not been analyzed to determine whether efforts have, in fact, improved the rule of law generally across Africa or within specific regions. This assessment was commissioned to take stock of USAID programming in Africa in order to help USAID better understand the results of its efforts and map out a more strategic approach for future programming.

II. Methodology

Background materials were reviewed in the United States in October 2008 prior to traveling to Nigeria. Other materials were collected and reviewed throughout the assessment. All information reviewed is listed in [Appendix A](#).

This consultant traveled to Nigeria October 24, 2008, and conducted interviews in Abuja, Kaduna, Kano and Lagos between October 26 and November 6. A complete list of interviews conducted is listed in [Appendix A](#).

III. Constraints and Other Relevant Issues

The most recent USAID rule of law project in Nigeria, implemented by the National Center for State Courts (NCSC) in partnership with DFID, concluded in 2005. Most NCSC staff members are no longer in Nigeria, and Nigerian counterparts who participated in the project were often difficult to locate, especially since they had no advance notice that this assessment would be taking place. With only a few exceptions, however, expatriate and Nigerian personnel who could be located and interviewed spoke highly of the past USAID rule of law project.

Several other international funders were engaged in assessments and strategic planning exercises of their own during the period of this assessment, making it difficult for them to predict the focus of their own future rule of law strategies. A DFID team from the UK was meeting in Kano while this team was there, but since they were engaged in their own assessment, it was difficult to coordinate meetings with them. Since the team had invited all interested stakeholders in Kano to their planning session, it was similarly difficult to interview those people.

The European Commission (EC) was also working on its next Country Strategy Paper while this team was in Nigeria.

Because counterparts and stakeholders had not been notified in advance that this assessment would be carried out, a number of them were out of the country or otherwise unavailable. Nevertheless, it is believed that a broadly representative range of interviews was conducted and that international funders and Nigerian partners generally support the recommendations set forth below.

The current economic situation, both globally and in the United States, has resulted in uncertainty as to the size of future USAID rule of law programming in Nigeria. Mission staff has had to prioritize overall programming in the face of very limited budgets and virtually all rule of law programming has been cut. The total 2008 budget for all DG programs is \$13 million. The Mission believes that further budget cuts are likely, and that in the current climate, more immediate assistance in areas such as health care and

humanitarian interventions may be more useful than rule of law programs. However, it is reported that rule of law programming has been tentatively included in the 2010 budget for Nigeria. Given the fact that 11% of the United States' oil imports originate in Nigeria, it is likely that USAID will remain involved in the country for some time and that at some point in the future, rule of law programming will resume.

IV. Historical, Political, and Economic Contexts

Nigeria was formally united as a colony and protectorate of the British Government in 1914. During the colonial period, the country remained administratively divided into northern and southern provinces and Lagos colony. Education and economic development proceeded more rapidly in the south than in the north, and consequences of that have been felt in the country ever since. Nigeria was granted full independence in October 1960 as a federation of three regions of northern, western, and eastern. In October 1963, the country proclaimed itself a federal republic and created a new constitution. From the outset, ethnic, regional, and religious tensions have been magnified by significant disparities in economic and educational development between the south and the north.

A number of military coups, both violent and peaceful, as well as a series of elections widely deemed fraudulent, marked the three decades following independence. In 1999, former military head of state Olusegun Obasanjo, recently freed from prison, ran as a civilian candidate and won the presidential election, although irregularities marred the vote. While the emergence of a democratic Nigeria ended 16 years of consecutive military rule, the new president inherited a country suffering from economic stagnation and the deterioration of most of its democratic institutions.

Most civil society leaders and most Nigerians saw a marked improvement in human rights and democratic practice under Obasanjo. In the years following the end of military rule, however, Nigeria witnessed recurrent incidents of ethno-religious and community conflicts, many of which derived from distorted use of oil revenue wealth, flaws in the 1999 constitution, and longstanding disputes over the distribution of land and other resources. Obasanjo was reelected in 2003 in contentious and flawed national and state elections that were litigated over the next two years. In May 2006, the National Assembly defeated an attempt to amend the constitution by supporters of a third term for the president, a measure that was packaged in a bundle of what were otherwise non-controversial amendments. In 2007, the current president, Umaru Musa Yar'Adua, was elected.

Nigeria is currently the United States' largest trading partner in sub-Saharan Africa, largely due to the high level of petroleum imports. The Nigerian oil which supplies 11% of US oil imports accounts for nearly 46% of Nigeria's daily oil production. Nigeria is the fifth-largest exporter of oil to the United States and the United States is the largest foreign investor in Nigeria.

In the absence of coherent government programs, the major multinational oil companies have launched their own community development programs. The Niger Delta Development Commission (NDDC) was created to help spur economic and social development in the region, but it is widely perceived as ineffective and non-transparent. The government has promoted foreign investment and encouraged reforms in these and other areas, but the investment climate remains daunting to all but the most determined. Most critical for the country's future is Nigeria's land tenure system which does not encourage long-term investment in technology or modern production methods and does not inspire the availability of rural credit.

Nigeria continues to face intense pressure to accept multibillion dollar loans for railroads, power plants, roads, and other infrastructure. About 65% of the economically active population is serviced by the informal financial sector, including microfinance institutions, moneylenders, friends, relatives, and credit unions. Nigeria has made progress toward establishing a market based economy. In recent years it

privatized the only government owned petrochemical company and sold its interest in eight oil service companies.

The federal government has passed implementing legislation on public procurement and fiscal transparency, but must still ensure that the 36 states pass and implement similar bills. It is widely perceived that government contracting remains rife with corruption and kickbacks and that many state and local officials continue to steal public funds outright. The Nigerian government is aware that sustaining democratic principles, enhancing security for life and property, and rebuilding and maintaining infrastructure are necessary for the country to attract foreign investment.

Nigeria is not on track to meet its Millennium Development Goals because of a lack of policy coordination between the federal, state and local governments, a lack of funding commitments at the state and local levels, and a lack of available staff to implement and monitor projects on health, poverty, and education. Democratic and economic progress in Nigeria is challenged by poor governance, entrenched corruption, internal conflict, and ineffective service delivery. The country remains positioned near the bottom of the United National Development Program human development index. Deeply entrenched poverty and unemployment remain the greatest constraints to Nigeria's advancement.

Recent lobbying efforts to create additional states are reportedly linked to the desire of tribes to share oil related revenues. Whenever new states are created, new positions of power, allocated according to tribal affiliation, are also created. Those appointed to such positions are able to access funds that are controlled by elite groups within the central government.

V. Laws and Legal Systems

Three distinct systems of law are practiced in Nigeria: common law, the product of the country's former status as a British colony; customary law, the traditional system practiced throughout the country before colonization; and Shari'a law, which was introduced in the state of Zamfara in 1999 and subsequently in eleven other northern states of Kano, Katsina, Niger, Bauchi, Borno, Kaduna, Gombe, Sokoto, Jigawa, Yobe and Kebbi.

The current constitution establishes federal and state court systems. The federal system is comprised of a Supreme Court, Court of Appeal, Federal High Courts, a Shari'a Court of Appeal, and a Customary Court of Appeal. The state court system is comprised of state High Courts, state Shari'a Courts of Appeal, and state Customary Courts of Appeal.

International focus on cases involving Shari'a punishments has increased in recent years.

VI. USAID Rule of Law Activities

The most recent USAID funded Rule of Law Assistance Project was implemented between October 1, 2000 and March 15, 2005 and provided technical assistance and training to the High Courts of Lagos, Kaduna, and Rivers States, as well as the Federal Capital Territory. The project focused on nine programmatic areas: training for budget officers, legislative study tours, three-branch meetings on the judiciary, alternatives to the "written note" system, case and judicial management training, backlog and case tracking studies, assistance to civil society and Nigerian stakeholders, formulation of a judicial ethics and professional responsibility study group, and library development assistance. No further rule of law programming has been carried out by USAID after this project was terminated,.

VII. Rule of Law Activities by Other Donors

A. DFID

As has been the case for some time, DFID continues to be the major international donor active in the rule of law arena. DFID partnered with USAID in the Access to Justice Program that concluded in 2005 and reported a successful and productive collaborative relationship with USAID.

DFID's current rule of law budget is £32.8 million. They are in the process of planning programming for their next funding cycle, which is expected to be implemented with a budget of £30 million over a five year period starting in early 2010.

DFID uses a "Lead State" approach, in which programming is initiated in a limited number of states and then rolled out to others. Their current lead states are Enugu, Laos, Jigawa, Kano, and Cross River. Kaduna will probably be added in the next funding cycle.

Although strategic planning sessions for the next funding cycle had not concluded by the time this assessment was completed, DFID staff later reported that the focus areas of future rule of law programming will likely include policing services and management at the federal level and in selected states; management training and access to justice issues in selected states and possibly at the National Judicial College; work in federal and state prisons to alleviate congestion and improve infrastructure; efforts to improve accountability of judicial sector institutions, including the PSC, National Human Rights Commission (NHRC) and national anti-corruption organizations such as the Economic and Financial Crimes Commission (EFCC) and Independent Corrupt Practices Commission (ICPC); some work on human rights and justice issues in partnership with various NGOs; and improving the collection of data and statistics to improve cross sector working relationships.

B. European Commission

The EC is currently undergoing an assessment to determine the focus of future rule of law programming. The first draft of its next Country Strategy Paper was out for comment while this team was in Nigeria. Once finalized, it is expected to be signed in March 2009, but will not go into effect until the first quarter of 2010, after funding has been secured from member states.

Because so many constituent state members must agree on EC programming goals and strategies, rule of law programs have been fairly restricted so far, even though the EC's budget is large and expected to grow. In the next funding cycle, peace, security, governance including rule of law, and human rights have been identified as major areas of priority.

In the current funding cycle, the EC has been working in partnership with the United Nations Office on Drugs and Crime (UNODC) to support the Economic and Financial Crimes Commission (EFCC), especially its training institute. The EC budget for the EFCC is 24 million euros; UNODC's contribution to this work is only 700,000 euros. Programming focus includes elevating investigation and forensic capacity, and working to develop an intelligence unit. International funding has successfully given the EFCC, which bears responsibility for prosecuting cases involving government corruption, necessary independence. Before international funding was made available, the Commission was subject to governmental and political influence.

Needs identified by EC personnel include providing support to courts that handle anti-corruption cases and training judges who hear these cases.

Concern was expressed by several international funders about the capacity of the EC to plan and implement programs. EC staff themselves report that it is nearly impossible to recruit people to work in Nigeria. DFID is considering seconding a staff member to the EC to work on rule of law programs.

C. OPDAT

The US Department of Justice's Office of Overseas Prosecutorial Development, Assistance and Training (OPDAT) works with the Economic and Financial Crimes Commission in Lagos on issues relating to corruption and cyber crime. A number of training programs for EFCC staff and attorneys have recently been conducted by OPDAT.

D. American Bar Association

American Bar Association (ABA) staff members working on rule of law issues are well experienced and competent; and have participated in past USAID funded projects, including the project implemented by the International Human Rights Law Group. Their current work focuses mostly on trafficking of persons, but staff would like to expand their focus to broader rule of law areas. An assessment is planned to identify possible strategies and programming.

E. UNODC

The United Nations Office on Drugs and Crime (UNODC) is reportedly working on rule of law issues and building judicial capacity in ten states. Areas of focus include witness protection, trafficking of persons, and economic and financial crimes. They are in the process of installing law libraries and providing computers and online resources in courts in several jurisdictions, including Kaduna.

VIII. Strategies: Successes and Failures

Because the most recent USAID rule of law project ended more than three years ago, it was difficult to assess which of its components had been successful and which were not. Therefore, the following opinions, collected from both international donors and Nigerian counterparts, speak more generally to the types of international interventions that have generated successful results and which did not, and should therefore not be repeated.

Failure: Sector-wide strategies

It was uniformly reported that due to the great diversity that exists within Nigeria – geography, demographics, languages, religions, and other factors – sector wide approaches to reform have not produced replicable results and have generally failed. It has been too difficult to design and implement programs that are generally useful in more than one, or a small number, of locations. For example, the Criminal Code applicable in southern states is very different from the Shari'a inspired Penal Code in force in northern states, and budgets and financial conditions in northern states, such as in Jigawa, are very different from those in oil rich states such as Lagos and Rivers.

As a result, most funders seem to now be focusing on crosscutting thematic issues that are not institution dependent. This strategy is expected to produce more useful lessons learned that can be adapted to and replicated in other locations.

Failure: Overly sophisticated technology and equipment

Prior rule of law programs have provided a number of sophisticated technologies and sets of equipment that are dependent upon electricity, internet, and other resources that are often unavailable. For example, USAID funding was used to provide complex court recording equipment in Kaduna and elsewhere. This

equipment remains largely unused for a variety of reasons. Some of these include the frequent absence of electricity (the current Chief Justice recently filed a request with the Minister of Justice to provide a generator so that courthouse lights could be used), the fact that tapes for the equipment must be imported from the United States, and what a cultural preference not to use complex technology. Nevertheless, UNODC is in the process of installing computers and a virtual library in the Kaduna court, and court personnel, although grateful for the effort, expressed some doubt that the equipment could be used in the absence of basic electricity and telephone lines. Additionally, subscriptions to many online legal resources are required and funding for such subscriptions is typically not provided.

Failure: Short term programming

It was uniformly reported by international donors and Nigerians alike that short term interventions do not tend to succeed in Nigeria. Funding and staffing commitments of 5 to 10 years are needed to lay the groundwork for real change. Past USAID rule of law efforts were criticized as focusing on short term strategies designed to produce “quick wins.” In fact, these strategies almost always produced nothing sustainable.

Recognizing this dynamic, DFID emphasizes slower, long term programming even though it may take one or two years, or even more, before real change begins to occur. However, a shorter commitment almost guarantees no result at all.

Failure: Absence of donor coordination

The failure of international donors to effectively coordinate among themselves was criticized by everyone. Consequently, as happens in many other countries, programmatic overlaps and gaps have resulted.

Success: Partnerships with CSOs

The most frequently cited success of past USAID funded projects, both in the area of rule of law and elsewhere, was in forging effective partnerships with CSOs. USAID is perceived as having a comparative advantage over other funders in this area.

Success: Court administration reforms

Nigerian justice sector personnel frequently reported that USAID’s work in judicial administration yielded positive results that have, in fact, strengthened the work of the courts and made them more efficient. Praise was given for the Code of Ethics designed for court employees and amendments made to Rules of Court.

Success: Long-term commitment to programming

DFID’s rule of law programming is noteworthy for the comparative number of successes it has generated. DFID staff members attribute these successes to the organization’s strategy of long term planning and the realization that no gains may appear to be taking place during initial programming stages. Staff members recognize that in Nigeria, slow, deeply rooted change may be taking place even if no overt difference is visible on the surface.

IX. Recommendations

A. As reflected in the Scope of Work for this assessment, there is a strong need to focus future rule of law work within a **sound analytical framework**. Past interventions have been ad hoc, limited, and not

coordinated with projects implemented by other funders. Limited results that are not sustainable are inevitable in the absence of a sound framework.

Concrete recommendations for rule of law programming depend upon what the strategic interest of the United States in Nigeria is. If improving the investment climate is considered to be the most important goal, strengthening the federal and state court systems and providing technical assistance to their personnel is probably the most useful activity. If, on the other hand, stabilizing society, reducing conflict and working to alleviate poverty, and thereby reducing the impetus towards terrorist activities, are seen as the most pressing goals, supporting the efforts of the various alternative dispute resolution (ADR) institutions that have sprung up in recent years (see Section IX.H, below) is recommended.

B. Corruption is an ongoing issue and there is understandable reluctance on the part of USAID and some other funders to engage with federal institutions. For the time being, there is a preference for **working at local and state levels**, and this preference appears to be well founded.

C. For reasons stated in the preceding section, working in a small number of **lead states** should be considered instead of trying to develop and implement programs nationwide. If rule of law funding remains limited, consideration might be given to implementing programs in locations already designated as lead states for other USAID programs in order to leverage existing resources. A **pilot project** approach should also be considered so that overall project strategies can be regularly assessed and any miscalculations corrected before programs are rolled out to larger areas. The combination of lead state and pilot project approaches would more effectively produce useful lessons that could be incorporated into larger scale programs.

D. **Civil society groups** should continue to be effectively engaged, if for no other reason than to generate public demand that governmental institutions improve the efficient delivery of necessary services, including in the justice sector. In the current system of corruption and patronage, citizen demand represents the only real hope for change.

E. Focus should remain on **building capacity and providing technical assistance**, as opposed to providing large influxes of funding. Nigeria, as an oil rich nation, is not in need of foreign funds. It is, however, in great need of technical assistance from the international community in order to effectively use and leverage its wealth. Throughout in the course of this assessment, Nigerians stated that they did not want or need funding or physical infrastructure; what they asked for was training and support in order to elevate their own levels of competence and skills. For example, it was reported that at the end of 2006, the Supreme Court returned six billion *naira* to the government since it did not know how to use the funds. At the same time, lower courts reported wide ranging needs. The Ministry of Justice and Supreme Court may benefit from strategic planning exercises and leadership training so that they can effectively utilize their funds.

F. Maximize resources by focusing on **long term strategies** as opposed to short term programs that cannot deliver sustainable change. To the extent possible, **partner with other funders** in order to leverage funds. For example, DFID personnel had a number of useful recommendations for small programs that USAID could sponsor that would tie into and support larger programs they plan to implement themselves.

G. Engage and participate in more effective **donor coordination** to reduce duplication of efforts and more effectively fill unaddressed programming gaps. A Rule of Law Steering Committee that meets regularly should be considered.

H. Although the purpose of this assessment was not necessarily to identify specific justice sector needs, a number of **programming needs and issues** were identified:

- A variety of **alternative dispute resolution** organizations have appeared around the country in recent years in response to several factors, including the inability of the court system to meet the needs of Nigeria's citizens. In Lagos, for example, individual judges reported pending caseloads of up to 1,000 each, and it was routinely reported that both civil and criminal cases can take up to a decade to resolve. Meanwhile, large percentages of pretrial detainees remain in custody for decades without having been formally charged or even having seen a judge. The 2004 Crime Victimization Survey conducted in Lagos State, found that only 16% of survey respondents took their disputes to court for resolution, whereas 32% took them to police and 16% took them to traditional forums for resolution. The rest resorted to family members for assistance in resolving disputes.

The two most prominent organizations that have sprung up are 1) the Multi-Door Courthouses, which began as a privately funded enterprise in Lagos in 2002 and subsequently expanded to Abuja in 2003 and, more recently, to Kano; and 2) the Citizens' Mediation Centers (CMCs), created by the Lagos State Ministry of Justice in order to improve access to justice for the indigent. Although the Multi-Door Courthouses, which provide arbitration, mediation, and counseling services as well as litigation advice, do not turn away anyone seeking their services, they try to focus on commercial cases and hope that ultimately foreign investors will take advantage of their services. Citizens' Mediation Centers, by contrast, focus on providing free mediation services to the indigent and handle all types of cases including family disputes, landlord/tenant cases, contract and employment disputes, and commercial cases. The Director of the Lagos CMC has been trained by the Harvard Law School Negotiation Project.

Since backlogs in state run courts are so lengthy, these dispute resolution centers appear to be both popular and necessary. Users state that they are also consistent with traditional African preferences for resorting to local mechanisms to resolve disputes. A survey conducted by the Center for Law Enforcement Education (CLEEN) Foundation in Nigeria, for example, found that non-formal systems are preferred and more frequently used for dispute resolution and that recourse to the use of the formal system of dispute and conflict resolution, introduced by colonial powers in Africa in general, is not encouraged without first exploring resolution through traditional kin and community institutions.

Even though these ADR centers appear to be serving a need, the long term implications of supporting extra-judicial institutions to the exclusion of state institutions should be considered. They appear to be part of a growing trend towards resorting to informal institutions and groups for services the government is arguably responsible for providing in the face of failures by governmental institutions and agencies to meet the needs of citizens. For example, the number of private or community based police forces appear to be growing. Although the necessity of finding alternative methods to combat crime and resolve disputes is understandable, long term implications of failing to address systemic weaknesses should be considered. Ultimately, the failure of the court system to meet the needs of Nigerian people will have to be addressed.

Additionally, strengthening ADR systems at the expense of state institutions may not serve the interest of all groups. In particular, some women's groups prefer to have their cases resolved in the formal court system instead of in front of patriarchal local leaders who tend to enforce longstanding discriminatory practices and customs. Even this example, however, presents complexities since the ability to avoid the formal court system directly benefits women in other situations. In Kano, where Shari'a courts hear the majority of cases and Islamic law can produce results that appear to discriminate against women, diverting cases away from courts and into alternative forums results in the application of principles of mediation to solve family disputes, as opposed to more rigid Shari'a law. The Kano Multi-Door Courthouse has been made even more

female friendly, by employing women to serve as fifteen of the seventeen dispute resolution officers.

Needs identified by the Multi-Door Courthouses in Lagos, Abuja and Kano included public education programs to let citizens know about their services since none of the three MDCs are being fully utilized. Additionally, training programs for judges who have the power to refer cases out of the court system and into MDCs, and lawyers who tend to disfavor taking cases to MDCs since they lose their fees, in order to sensitize them to the advantages of submitting cases to the MDCs for resolution are needed.

Training needs were prioritized by staff of the Lagos Citizens' Mediation Center, who state that specific training in mediating family law, juvenile, commercial and other cases is needed.

- Although working directly with the **Shari'a courts** in the north may be considered controversial, it is recommended that the work of moderate and reform-minded individuals and groups who work in these courts be supported. Past DFID programs that focused on Shari'a courts and issues, were well received and generated useful programs, as well as reports and materials that are still used. Work in Shari'a issues could also be indirectly supported by providing funding, training and technical assistance to women's groups that work in these courts.
- **Legislative reform** is still needed. Many so-called dead laws remain on the books. Effort should be undertaken to analyze and triage laws. On a related topic, domestication of international conventions that have been ratified but not further implemented is needed.
- It is commonly reported that current leaders of the Nigerian justice sector are doing nothing to "**bring up the next generation.**" No mentoring, training, capacity building, or technical assistance is being provided by the older generation to young lawyers and other justice sector personnel. Consideration might be given to developing strategies to fill this gap. The suggestion was made to create and implement a **university and law school curriculum** on rule of law issues.
- A **database for court decisions** is needed so that they can be disseminated and the equal application of law ensured.
- A **judicial disciplinary system** is needed.
- **Enforcement of judgments** remains a problem.
- **Technology needs** remain a problem in the courts. Court personnel want to be able to create a system for filing and tracking cases online, both within the court system and for the benefit of the public.
- According to former Chief Justice Uwais, who is now Director of the Electoral Reform Commission, an entire generation lost a basic understanding of the meaning of the rule of law during the recently ended 30-year military dictatorship. He states that **comprehensive training programs** are needed in judicial independence, judicial ethics, judicial leadership and related areas.
- By all accounts, **constitutional reform** is urgently needed. Past reform initiatives were derailed by efforts to expand presidential term limits. Hopefully recently renewed constitutional reform efforts will prove to be more successful. Support to the Constitutional Reform Commission should be provided.

APPENDIX A

1. Documents reviewed prior to leaving US

- ARD, "Democracy and Governance Assessment of Nigeria," (Washington, DC: USAID, December 2006). http://pdf.usaid.gov/pdf_docs/PNADI079.pdf
- Lewis, Peter and Etannibi Alemika. "Seeking the Democratic Dividend: Public Attitudes and Attempted Reform in Nigeria." *Afrobarometer* Working Paper No. 52. October 2005. http://pdf.usaid.gov/pdf_docs/PNADF401.pdf
- National Center for State Courts (NCSC). *Nigeria rule of law assistance program (Phase II)* "Quarterly Report No. 10: first quarter FY 2005 (October-December 2004)". http://pdf.usaid.gov/pdf_docs/PDACD124.pdf
- NCSC. *Nigeria rule of law assistance program (Phase II)*. Quarterly Report No. 9 : first quarter FY 2005 (October-December 2004). http://pdf.usaid.gov/pdf_docs/PDACA713.pdf
- NCSC. *Nigeria rule of law assistance program*. "Report on library development assistance – draft." September 2001. http://pdf.usaid.gov/pdf_docs/PNACT947.pdf
- Hewitt, William. NCSC. Nigeria rule of law assistance program. "Report on alternatives to the written note in the high courts of the Republic of Nigeria." February 2001. http://pdf.usaid.gov/pdf_docs/PNACT933.pdf
- International Human Rights Law Group. Final Report on cooperative agreement no. 620-A-00-99-00304. December 2002. http://pdf.usaid.gov/pdf_docs/PDABX444.pdf
- A Report of Three Conferences on Juvenile Justice in Nigeria. 2002.
- Human Rights Watch. "*Political Shari'a*"? *Human Rights and Islamic Law in Northern Nigeria*. Volume 16, No. 9 (A). New York: September 2004. <http://www.hrw.org/reports/2004/nigeria0904/nigeria0904.pdf>
- Sada, Ibrahim Naiya, Fatima L. Adamu, and Ali Ahmad. *Promoting Women's Rights through Shari'a in northern Nigeria*. Centre for Islamic Studies, Ahmadu Bello University, Zaria. Written with the support of DFID Nigeria's Security, Justice, and Growth Programme implemented by the British Council. Abuja, (n.d.). <http://www.dfid.gov.uk/pubs/files/promoting-women-sharia.pdf>

2. Documents Received and Reviewed in Nigeria

- National Center for State Courts, *Nigeria Rule of Law Assistance Program: Final Report – Phase 1* (October 1, 2000 - July 31, 2003).
- Dr. Ali Ahmad, Dr. Jummai Audi, and Dr. Ibrahim N. Sada. *Resolution of Civil Disputes in Jigawa State*. Access to Justice Programme Research Report (June – August 2003).
- The Lagos Multi-Door Courthouse Brochure
- The Abuja Multi-Door Courthouse Practice Direction

Justice L. H. Gummi, *ADR Can Attract Foreign Investments*, Abuja Multi-Door Courthouse Newsletter

A Guide to the Kano Multi-Door Courthouse

Dr. Mohammed T. Ladan, *A Handbook on Shari'a Implementation in Northern Nigeria: Women's and Children's Rights Focus*.

A Simplified Summary of the Child's Rights Act, 2003.

Community Mediation Center of Lagos Newsletter

Various editions of Women's Advocate Newsletter

3. Interviews and Meetings Conducted

Thursday, October 23 (Williamsburg)

Hauwa Ibrahim (Nigerian human rights activist)

Sunday, October 26 (Abuja)

Nasiruddeen Muhammad

Monday, October 27 (Abuja)

Minnie Wright (Rule of Law advisor, USAID)

Adamu Igoche (USAID D&G advisor)

Tony Akpala (assistant to Minnie Wright)

Darren Kew (brief meeting) (University of Massachusetts, Boston)

Sharon Cromer (USAID Mission Director)

Walter N.S. Pflaumer (Counselor for Political Affairs, US Embassy)

Cheryl Fernandes (Deputy Political Counselor, US Embassy)

Tuesday, October 28 (Abuja)

Olayinka Lawal (ABA)

Yinka Lawal (Senior Staff Attorney, ABA)

Annabel Gerry (Senior Governance Advisor, DFID)

Adesina Fagbenko (Governance Advisor, DFID)

Chief Judge Gummi (High Court?)

Eneche Elejo (Dispute Resolution Officer/Head of Training, Abuja Multi-Door Courthouse)

Mrs. Amaka Ogbonaya (Head of Enlightenment, Abuja Multi-Door Courthouse above)

Aisha Abbas Umar (same as above)

Wednesday, October 29 (Kaduna and Kano)

Rebecca Sako-John (Director, League of Democratic Women) (Kaduna)

Darius Hyet Khobo (Chief Registrar, High Court of Justice) (Kaduna)

M. J. Zubairu (Legal Assistant to Chief Judge of High Court) (Kaduna)

Muhammed Tabiu (DFID Rule of Law manager) (Kano)

Thursday, October 30 (Kano)

Shuabu Jule (Chairman of Nigerian Bar Association, Kano branch)

Justice A. Mukud Haliru (Chairman of Kano Multi-Door Courts; member of national Steering Committee for Multi-Door Courts)

Abdullahi Ado Bayero (Director of Kano Multi-Door Court project, Kano)

A. B. Mahmoud (member, Nigerian Bar Association, Kano)

Friday, October 31 (Abuja)

Justice Muhammed Lawal Uwais (former Chief Justice of Supreme Court of Nigeria; Chairman, Electoral Reform Committee)

Danladi Plang (Project Officer, Good Governance and Human Rights, European Union)

Monday, November 3 (Lagos)

Latifat A. M. Folani (Chief Registrar, High Court of Lagos State)

Caroline Etuk (Director, Lagos Multi-Door Courthouse)

Adeyinka Aroyewun (Deputy Director, Lagos Multi-Door Courthouse)

Lawal Pedro (Solicitor General, Lagos State Ministry of Justice)

Atinuke Oluyemi (Director, Citizens' Mediation Centre, Lagos)

Tuesday, November 4 (Lagos)

Observed domestic mediation at High Court Citizens' Mediation Center

Sylvia Shinaba (Chairperson of FIDA for Lagos State)

Olaolu Adegbitie (Head, Advance Fee Fraud Unit (cyber crime unit) Economic and Financial Crimes Commission)

Kehinde Aina (Executive Director, Negotiation and Conflict Management Group)

Annex 7. Country Report: Rwanda

Prof. Louis Aucoin

January 2009

I. Methodology

This report is based on a desk study involving the review of an array of project reports dealing with USAID's support of rule of law and DG efforts over the last 15 years. Additionally, the author has drawn upon his extensive past professional experience in-country with these and other projects related to case management, judicial reform, and constitutional development, as well as his service as foreign advisor in the development of Rwanda's 2003 Constitution.

II. Constraints

Although the author was able to draw from a fair amount of in-country experience, this report is not based upon recent travel or data gathered on the ground. Nevertheless, it is based upon a very complete set of project reports for the relevant time period, all of which are documented in a bibliography attached as Appendix A.

III. Background

The indigenous inhabitants of Rwanda are the Twa, sometimes referred to as "pygmies." They were forest hunters and gatherers. By the fifteenth century, the territory that comprises modern-day Rwanda was also inhabited by Bantu tribes from the West (ancestors of the present-day Hutu) and tribes from Eastern Africa called Tutsi.²⁴⁵ Eventually, politics came to revolve around a Tutsi king, called a Mwami, and there was from this earliest period political and economic imbalance between the Hutu and the Tutsi.²⁴⁶ Nevertheless, in pre-colonial times, these groups lived and worked side by side. In general, the Tutsi owned cattle and the Hutu were farmers.

In 1890, an international conference awarded the territory that today comprises Rwanda and Burundi to the German Empire. During this period, the European colonizers began to introduce the idea of racial superiority. Europeans considered the Tutsi to be superior because of their taller stature and supposed Hamitic origins from the Horn of Africa. After World War I, the territory of Rwanda was awarded to the Belgians, who continued to propagate the ideology of racial supremacy through the continuation of practices begun during the German colonial period, such as measuring heads and noses to determine ethnic identity. During the Belgian period, the ethnic division was entrenched through the use of mandatory identity cards that identified each inhabitant as Tutsi, Hutu, or Twa. The Belgian colonialists pursued a "divide and conquer" strategy that granted the Tutsi political power over the Hutu population. This began a long period of oppression and disenfranchisement that served to foster deep resentment among the Hutu and ethnic tensions between Hutus and Tutsi.

Nevertheless, prior to independence, the Hutu and Tutsi had seemed so similar that some experts had questioned their characterization as two separate ethnic groups. They spoke the same language, shared religion and culture, and were sometimes mistaken for each other. Regardless of these similarities, those

²⁴⁵ The origin of the Tutsi has been contested in ethnological literature.

²⁴⁶ Today the indigenous Twa comprise only 1% of the population. Consequently, they are not the subject of the ethnic tension that characterizes the struggle between the Hutu and Tutsi and were neither perpetrators nor victims of the genocide. They are frequently reported to be victims of discrimination, however, and they have almost no voice in Rwandan politics.

who were classified as Hutu bore deep-seated animosity towards the Tutsi because of their dominance of the government and the political oppression by the Tutsi of the Hutu during the colonial period.

After World War II, Rwanda became a UN protectorate administered by Belgium. In 1960, the UN sponsored a referendum in which the Rwandan people resoundingly voted for independence. Belgium granted independence to Rwanda in 1962.

Even prior to independence, ethnic tension had turned to violence. In 1959, as many as 100,000 Tutsi were killed by the majority Hutu, and 150,000 fled into neighboring Uganda. From that point on, politics in Rwanda were dominated by the Hutus, who organized into a powerful political party called the Parmehutu party.

In 1973, Major General Juvénal Habyarimana began a long period of military rule. He abolished the Parmehutu party and established the *Mouvement Révolutionnaire Nationale pour la Démocratie et le Développement* (MRND). This move was an attempt to establish national peace and reconciliation between the two groups.

In 1990, a Tutsi army formed by Rwandan exiles in Uganda – the Rwandan Patriotic Front (RPF) – invaded Rwanda under the command of General Paul Kagame. During the ensuing strife, the international community intervened and brokered the Arusha Accords, which provided for a period of power-sharing in Rwanda between the two groups. However, in April 1994, an airplane carrying President Habyarimana of Rwanda and President Ntayamira of Burundi was shot down, and both presidents were killed. This event set off one of the worst genocides in human history. Pursuant to a well-organized plan, Hutu militias, spurred on by radio broadcasts throughout the country, went on a massive genocidal rampage in which over 1 million Tutsi and moderate Hutu were massacred in the span of 100 days. The Hutu were incited by planners and organizers who urged them to exterminate their prey, who they referred as *inyenzi* (cockroaches).

The international community failed to intervene in the genocide. The RPF, under the direction of General Paul Kagame, defeated the genocidal forces and assumed the reigns of political power. Since that time, Kagame has led the country as its president, and many members of the RPF are in government. As described below, the government has been very intolerant of political dissent. Initially, this intolerance was related to fear that Hutu extremists would regroup and resort once again to genocidal violence. Since the media was a significant tool of the genocide, this intolerance has had a dramatic impact on freedom of expression and has grown into increasing repression of any public expression critical of the RPF-dominated regime. Those who criticize the regime are systematically accused of promoting genocidal ideology and often find themselves accused of crimes related to the genocide, either in the formal courts or through informal courts known as *gacaca*. Many of the elite have been forced into exile as a result of this repression.

The scars of the genocide run deep in modern Rwanda due to the devastation of every aspect of Rwandan society. Not surprisingly, this devastation had a dramatic impact on justice and rule of law. By all accounts, the rule of law was essentially non-existent in the post-genocide period. At that time, the most significant challenge lay in the fact that the prisons were overcrowded with as many as 130,000 pre-trial detainees held in connection with the genocide.

IV. Justice Sector and Legal System

As a result of its German and Belgian colonial past, Rwanda's legal system belongs to the civil law tradition. Prior to the genocide, the judiciary was essentially controlled by the executive, creating an almost total lack of judicial independence. The political regime was characterized as lacking in the rule of law.

By and large, the country still follows the civil law tradition, although the scenario is definitely complicated by the fact that many of those who hold positions within the justice sector, including the current Minister of Justice, are Anglophone Tutsi who have been trained in the common law traditions of Uganda. This dichotomy has been a source of tension and misunderstanding that has sometimes served to slow progress along the path of legal reform.

Rwanda enacted a new Constitution in 2003, which was indeed a milestone of progress. In contrast with the situation that prevailed post-genocide, the new Constitution lays a solid framework for the establishment of a rule of law by setting out a clear separation of powers, providing a modern catalogue of human rights, and establishing an independent judiciary. Nevertheless, it, like so many other justice institutions in Rwanda, is marred by the repression of dissent described above. For example, Article 33 of the Constitution, guaranteeing freedom of expression, includes the following limiting language: “Propagation of ethnic, regional, racial, or discrimination or *any other form of division* is punishable by law” (emphasis added). Pursuant to this clause, anyone expressing dissent in modern Rwandan society is immediately subject to the accusation of *divisionisme*, which carries consequences of repression described below.

The Courts: The Supreme Court is the only court that exercises appellate jurisdiction. It has original jurisdiction over electoral disputes involving referenda, presidential and legislative elections, and disputes between different branches of government (having adopted the famous *organstreit* jurisdiction of the German Constitutional Court). It also acts as a constitutional court since it has the power of judicial review that can be exercised as part of its appellate jurisdiction (concrete review), or directly when petitioned by an interested party (abstract review). As such, it can nullify laws that it determines to be unconstitutional either upon direct legal petition of an affected party, or if a case comes before the Court on appeal. In many legal systems, a separate constitutional court, rather than the Supreme Court, determines constitutionality of legislation.²⁴⁷ The Supreme Court also presides over impeachment proceedings. Unusually, this Constitution also grants legislative initiative to the Supreme Court in matters concerning the judiciary. In other words, the Supreme Court has the right to propose bills directly to the legislature on matters involving judicial administration, and does not have to rely on either of the other branches to introduce bills seeking judicial reform.

The High Court is a first instance court with jurisdiction over the entire country. Provincial Courts and the Court of the City of Kigali are first instance courts at the provincial level. The *gacaca* and military courts are specialized courts created by law. There are also lower first instance courts at the district and municipal levels.

Judicial independence features prominently in the Constitution. Article 140 sets out the guarantee of *inamovabilité*, which is common to constitutional systems in the francophone tradition. This is a guarantee that judges cannot be removed from office, except in cases of incompetence or incapacity. Article 140 also provides for administrative and budgetary autonomy of the courts.

The Judicial Council: Article 158 provides for a judicial council, called the Supreme Council of the Judiciary, which has a varied composition, including members of the judiciary, academia, and civil society, as well as the Ombudsman. As is the case with many judicial councils in the civil law world, this Council plays a role in the appointment, promotion, discipline, and removal of judges. In Rwanda, it also plays a role in the administration of the courts, although it is not clear whether this constitutional requirement has been fully implemented in light of the predominant role that the Ministry of Justice has played in the management of the judiciary.

²⁴⁷ This is not the case, however, in many common law systems. In the US, for example, even courts of lower jurisdiction can determine issues of unconstitutionality.

The Public Prosecution: Two primary offices are responsible for the prosecution of crimes: The *Parquet Général*, which is responsible for prosecuting crimes not related to the military, and The Military Prosecution Department, which is responsible for prosecution of crimes that come under the jurisdiction of the military courts. A Supreme Council of the Prosecution serves as a judicial council, exercising the same powers over prosecutors that the SJC exercises over judges.

Security Institutions: Institutions responsible for maintaining security in the country are the National Police, the National Security Council and the Rwanda Defense Forces.

Independent Agencies: Rwanda's Constitution denominates a plethora of agencies and institutions that are designed to monitor and oversee various substantive areas. They include: The National Commission for Human Rights, The National Unity and Reconciliation Commission, The National Commission for the Fight Against Genocide, The National Electoral Commission, The Public Service Commission, The Office of the Ombudsman, The Office of the Auditor General, and The Gender Monitoring Office.

The Ministry of Justice: The Ministry of Justice and Institutional Relations (MINIJUST) is not specifically mentioned in the Constitution, but has traditionally played a predominant role in Rwanda's legal system, particularly in the period before the adoption of the 2003 Constitution. Prior to the Constitution, the judiciary was firmly under its tutelage; this led some authors reporting on the state of the judiciary in the immediate post-genocide period to conclude that judicial independence was almost non-existent.

Gacaca: The *gacaca* courts are people's courts that have been created by the government to prosecute those accused in the genocide. These courts administer informal trials of groups of prisoners, drawing upon a model of informal law that was used in Rwanda before the development of the formal legal system. *Gacaca* in Kinyarwanda means "grass," and refers to customary practices that occurred in the villages in the open air where village elders acted as judge and jury. In *gacaca* proceedings, groups of prisoners are brought before villages in the open where, under the supervision of sixteen village lay judges, they are accused of crimes in an initial stage and later tried in the same format.

In accordance with the Gacaca Law of 2001, crimes related to the genocide are divided into four categories. The first category is reserved for crimes committed by the organizers of the genocide and those accused of sexual torture. Defendants in this category are tried before the formal courts. All of the remaining crimes, including murder, are subject to *gacaca* proceedings. The law also provides that those who confess to their crimes will be given significant reductions in their sentences in exchange for a commitment to community service. In many recent cases, this has meant that defendants, even those convicted of multiple murders, are being released into the population based on reduced sentences and credit for the years they have been held in pretrial detention after the genocide. Today, some 254,000 *gacaca* courts²⁴⁸ are operating across the country.

The Rwandan government decided to implement the *gacaca* program because it would have been impossible to bring over 100,000 pre-trial detainees to trial within the formal system. Consequently, an informal procedure had to be developed that could allow for group trials. For this reason, the *gacaca* procedure includes a system of triage, i.e., only those who are charged with the most serious offences will be tried in the formal system. This informal system was also chosen because it brought justice much closer to the population. Much has been written about the public perceptions of the International Criminal Tribunal for Rwanda, located in Tanzania, and how distant its proceedings are both literally and figuratively from the Rwandan people. In contrast, in *gacaca*, residents of the village are required to come forward and testify in local *gacaca* proceedings when they have knowledge of the events of the genocide. Their testimony forms the basis of the accusations that are made in the *gacaca* proceedings, and they are

²⁴⁸ CAGEP-Consult, "Assessment of the Judicial Sector in Rwanda," (Kigali: USAID/Rwanda, 2002), 22.

also taken into consideration in deciding on the guilt or innocence of defendants and appropriate sentencing. In addition, the *gacaca* procedure encourages public confessions in exchange for a reduction in the criminal sentence, and sentences imposed subsequent to a confession typically include community service. These features of the *gacaca* procedure were designed to promote reconciliation within the population following the genocide.

Gacaca courts have been the subject of much study and comment. Most study and evaluation of *gacaca* has related to the perception of the justice they deliver and the problems associated with perpetrators of genocide re-entering their villages in large numbers, living side by side with their victims' families. Many critiques have noted the inadequacy of such procedures to adjudicate and remedy the mass atrocity of the genocide. These critics point out that the *gacaca* of Rwanda's pre-colonial past was used in very discrete matters involving petty crimes and land disputes, among other things. They insist that it is very poorly adapted as a method for arbitrating serious crimes. These criticisms have significant implications for the promotion of rule of law and must be taken into consideration in connection with future efforts promoting *gacaca*. Moreover, troubling reports have been made that *gacaca* has also come to be used as a tool of repression whereby those critical of the government find themselves accused of crimes relating to the genocide. This problem is discussed more fully below.

The International Criminal Tribunal for Rwanda (ICTR): The international community has developed an international tribunal to try those responsible for the most serious crimes associated with the genocide. This tribunal is located in Arusha, Tanzania, and operated under the auspices of the United Nations. A great deal of comment has been devoted to its work and to the problems associated with its distance, literally and figuratively, from the Rwandan population. Donors have devoted considerable resources to studying perceptions of the ICTR and of *gacaca* by the local population in order to assess their impact on the process of peace and reconciliation.

IV. Donor Programs

The **European Union (EU)** has consistently been a leading donor over the past 15 years, offering strong support in judicial training and significant financial support for the *gacaca* process and for NGOs supporting that process. With the support of the Dutch Embassy, it provided funding for media coverage in Rwanda of justice activities related to the genocide at the ICTR.

The **Belgian Government** has also offered consistent support to the justice sector during this period. In the immediate post-genocide period, it provided funding and training for paralegals who offered legal assistance to those charged in the genocide. These legal assistance efforts were also supported by the Danish Center for Human Rights and the NGO *Avocats Sans Frontières (ASF, Lawyers without Borders)*. The Belgians also offered support to the *gacaca* process by funding NGOs to monitor the process. They also supported the work of the Peace and Reconciliation Committee.

The German aid agency, **GTZ**, has worked on the establishment of a database for case management and provided some support in the area of civic education. It also provided funding to assist in the decentralization process. The **United States Institute of Peace (USIP)** also provided assistance to the Ministry of Justice to develop a database for case management. These dual database projects proved to overlap and conflict. Although donor coordination in Rwanda has not been as problematic as in some other countries, this was a significant example of lack of donor coordination. In the end, the Ministry developed its own computerized system, which is used only in the Ministry itself and in those areas of the country where conditions permit.

The **Dutch Embassy** has supported the justice sector mainly by offering technical assistance to the Supreme Court. It has also provided financial support to the main human rights organizations operating in

the country. As noted above, it also coordinated with the EU to provide funding for media coverage of genocide-related justice activities at the ICTR and in Rwanda.

CIDA has supported various projects since 1998 aimed at strengthening women's rights, particularly in the areas of property, marital, and labor rights. Otherwise, it has not been a major donor in the justice sector in Rwanda.

The **Swiss Agency for Development and Cooperation** has provided some support to *gacaca* monitoring and civic education in the area of human rights.

The **United Nations'** main role vis-à-vis justice in Rwanda has focused on investigating and prosecuting crimes related to the genocide. In the early days following the genocide, it set up the Human Rights Field Operation in Rwanda (HRFOR), which conducted criminal investigations relating to the genocide. The UN also established the ICTR in Arusha, Tanzania, which continues to function.

USAID has been a major donor in Rwanda since the genocide and has funded a number of discrete and varied interventions relating to the rule of law, including:

- A project on decentralization of judicial administration and financial management;
- The establishment and implementation of the Women's Legal Rights Initiative;
- Technical support for the establishment of an American style Office of Legal Counsel within the Ministry of Justice;
- Technical assistance for the development of a draft Press Law;
- Technical assistance in connection with Rwanda's Land Law and its implementing laws and regulations (2002);
- Funding for the training of paralegals providing legal assistance to criminal defendants in the immediate post-genocide period; and
- A comprehensive assessment of public perceptions of the *gacaca* process (2001).

VI. Key Findings and Conclusions

Operation of the judicial system has significantly improved since the immediate post-genocide period. This improvement is in no small part due to donor assistance. A DG Assessment²⁴⁹ conducted in 2002 commented on the following improvements:

- Trials today are generally run in a predictable manner with respect for the rights of the accused.
- New police force is more professional.
- Basic security of citizens has improved dramatically.
- Respect shown by RPF leaders for the rule of law since they came to power has improved, and they have demonstrated commitment to reform in this area.

²⁴⁹ MSI, "Rwanda Democracy and Governance Assessment," (Washington, DC: USAID, November 2002).

- The role of the army in national politics has diminished significantly.

This could certainly be seen as a success for donors. However, once *gacaca* began to be implemented, it drained a great deal of resources from the formal system. It is not clear that this served to reduce the quality of criminal trials but it has been reported that the pace of formal criminal trials has slowed down.

Definite successes were associated with the National Center for State Court's project on the decentralization of judicial administration. The 2006 budget for the judiciary was much more comprehensive and generous to the judiciary than previous budgets. In addition, the project pressured actual implementation of the constitutional requirement of budgetary independence of the judicial branch. This development significantly promotes judicial independence from the executive.

Rwandans have focused on judicial reform since 2002, after some of the donor interventions described above. They established a law reform commission that developed 10 key pieces of legislation designed to improve the judicial system. At least one of those bills, substituting single judges for three-judge panels in first instance courts, has been adopted. It is not clear if any of the other bills have been adopted, nor is it clear whether there has been an overall improvement in the judicial system in recent years. Apparently, the vast resources devoted to *gacaca* have cut into the resources available for the formal system, slowing criminal trials related to the genocide. The *gacaca* program has referred an additional 70,000 cases to the formal system.²⁵⁰ In light of this development, it is not clear how *gacaca* will ultimately serve one of its basic functions to address the backlog created by more than 100,000 pre-trial detainees.

VI. Assessment

There is no doubt that there has been significant improvement in the functioning of the judicial system since the immediate post-genocide period, and there is no doubt that the improvement is in no small part due to donor assistance. In the 2002 Democracy and Governance Assessment, the team noted that “the current regime has demonstrated a high degree of sensitivity to internal criticism and exercised control over critics using questionable legal tactics.”²⁵¹ As noted above, this problem has grown exponentially over the last several years and undermines significant progress in the rule of law.

Political repression is admittedly a very difficult problem for donors to address. Donor interventions in Rwanda since the genocide have tended to focus almost exclusively on institutions, including the courts, the ICTR, the Ministry of Justice, the Ministry of Finance, and the Ministry of Local Affairs (in support of decentralization policy). While the government can boast of increased separation of powers, improvement in the capacity and functioning of the courts, greater respect for the rights of the accused, and increased decentralization of power, political repression nonetheless overshadows the overall picture of rule of law.

Donors have also provided substantial support to civil society, which is often “composed of organizations in the capital, which may have very little presence outside of Kigali and may reflect more the interests of the intellectual classes and the elite than those of the masses of the population.”²⁵² This civil society support has not addressed the overarching problem of repression. USAID has responded in other developing and post-conflict countries where political repression is endemic by promoting demand through the support of grassroots civil society and civic education. Donors have not pursued this or any other strategy to address this growing political repression in Rwanda

²⁵⁰ These additional 70,000 referrals have been identified as “category 1” (the most serious cases, which are to be handled by the formal system) through the triage process described above.

²⁵¹ *Ibid.*

²⁵² *Ibid.*

Nevertheless, certain strengths in donor interventions and coordination should be noted. Focus on the courts and the Ministry of Justice including judicial training, and the training and funding of paralegals providing legal representation, has improved the quality of trials and contributed to increased respect for the rights of the accused. In addition, donors – particularly USAID – have been very supportive of Rwanda’s robust program of decentralization, which has contributed to those aspects of rule of law related to separation of powers. USAID has been very supportive of women’s rights, and Rwanda has made great strides in this domain. The Constitution reserves one-third of the seats in Parliament for women, and recent reports have noted the increased visibility of women in government ministries. Finally, although it is difficult to say whether or not this is related to donor interventions, Rwanda has a relatively low rate of corruption as compared to many other developing and post-conflict countries.

USAID clearly has a comparative advantage vis-à-vis other donors in the promotion of decentralization and the promotion of women’s rights and sensitivity to gender generally.

A great deal of attention and resources have been devoted to the *gacaca* process. This has involved training, technical support, and civic education about both *gacaca* and the ICTR. This work is clearly necessary as an important step in the process of promoting peace and reconciliation in the country. There are many problems associated with *gacaca* too numerous and complex to cover in this report; most significant are the strong indications that *gacaca*, along with many other levers of political power, is being used as a tool of political repression. Reports have been made that those who oppose the government easily find themselves accused of genocide and subjected to its proceedings.

VII. Recommendations

A. Strategic Planning and Donor Coordination Across Sectors

The problem of political repression will be daunting to address, especially in light of the government’s apparent success, at least on paper, in other areas relevant to the rule of law. Donors must therefore pool their efforts and look across sectors to develop a holistic strategy to combat this problem.

Certainly, the repression of expression that dominates Rwandan society today is a phenomenon felt not only in the justice sector, but in other sectors of society as well. Consequently, strategic planning to address this important issue should incorporate elements and actors from other sectors of society. By joining forces in a multi-sectoral approach, donors can gain new perspective on this problem that will enable the development of more comprehensive and coordinated strategies.

Some ground has been lost in recent years because the government’s repression of freedom of expression has gone almost virtually unchecked. This is symptomatic of a society where the law does not function adequately, and must be addressed or the problem will in all likelihood continue to grow, further undermining the rule of law, and potentially leading to increased executive power, as seen in other African regimes.

B. Support to Grassroots CSOs

Grassroots demand for freedom of expression is a necessary and promising strategy to overcome existing repression. However, development of civil society demand in rural areas and across the country presents substantial challenges.

Currently, civil society support focuses almost exclusively on those groups representing urban elites who have favored relations with donors. While these NGOs promote noble causes, such as human rights, gender sensitivity, and the defense of indigent criminal defendants, they do not have the strength alone to mount an effort to combat government repression. They could, however, provide an effective framework for donors to expand civil society initiatives in Rwanda to create a more broadly based demand that

would work from the bottom up. This strategy has much greater potential for success than the top-down institutional approach to rule of law promotion that has characterized donor support to date.

USAID's comparative advantage in promoting decentralization, and its experience in reaching out across the country to implement decentralization policy, is a strength that could be applied here. The USAID Mission could use lessons learned from decentralization activities to promote this new strategy. USAID could take advantage of its knowledge of local government and of particular localities to identify grassroots NGOs that could be enlisted to educate local populations of their rights as part of a strategy of creating demand for unrestricted freedom of expression.

C. Focus on Rule of Law Ends as Opposed to Institutions

Focusing donor assistance on institutions is easier because they generally have the absorptive capacity to receive donor assistance and have a long tradition of receiving it. Certainly, aid to institutions is not in and of itself undesirable. In a political context where rule of law prevails, it is important to support an independent Ministry of Justice that has the strength to confront powerful individuals who violate laws and human rights. A strong judiciary is essential to check government abuse of power and individual rights. In Rwanda, several rule of law assessments have noted that the repressive atmosphere created by the government's restriction of expression has translated to "self-censure" on the part of the judiciary. In this context, the government is able to maintain the appearance of a functioning justice system through the propagation of a general atmosphere of fear and repression.

Donors should not cease their support to institutions, but should provide that support in the context of a broader, more expansive strategy designed to attack additional challenges to the existence of a rule of law. For example, if support to justice sector institutions is combined with the promotion of civic education, legal empowerment, and the promotion of administrative law (discussed below), there will be greater potential to force the courts and Ministry to assert independence and power vis-à-vis the executive.

D. Civic Education and Legal Empowerment

Increasing civic education and legal empowerment could build a strong and broad-based demand on the government to open channels for access and adhere to the rule of law. In pursuing an overall bottom-up strategy, it is critical that citizens across the spectrum of society be educated about their rights. Donors have, in the past, offered considerable support to civic education, but that support has focused primarily on informing citizens of the status of justice after and related to the genocide. While this work has been laudable and necessary, it has not educated citizens about rights and remedies that could empower them in ways that affect their everyday lives. The formal legal system in Rwanda is much more developed than in other developing and post-conflict societies, and legal recourse must be provided for citizens to claim and enforce their rights.

Much donor assistance in the justice sector has been devoted to supporting the use of paralegals. This support has been channeled almost exclusively into representation of criminal defendants in cases related to the genocide. Donors could easily utilize and transfer this past experience to expand the paralegal system (though there have been sustainability problems with paralegal programs in other countries such as Malawi) to educate citizens and empower them to challenge government action where the law provides a remedy.

E. Promote the Development of Administrative Law

In civil law countries, administrative law is a separate branch of law that holds the administration in check while assuring that the collective interest of society is considered in every dispute between private citizens and the government. Administrative law is highly respected, and administrative law judges are often jurists of the highest reputation. Strong, intelligent, and knowledgeable judges are necessary to

effectively check abuse of power. The French phrase *détournement de pouvoir* summarizes the doctrine of abuse of power, a leading principle in this area of the law.

Not surprisingly, administrative law is totally underdeveloped in Rwanda. However, since Rwanda is a civil law country where the best-educated judges will already be familiar with civil-law style administrative law, there may well be an opening for its promotion. Any such reforms should fit comfortably within Rwanda's legal culture, rather than replicating systems from other countries. Donors from civil law jurisdictions will, of course, be particularly well placed to spearhead this reform.

F. Improve Communications Between Donors and MINIJUST

As discussed above, efforts to strengthen the Ministry of Justice should continue. The Ministry of Justice could be an ally and key partner in the continued strengthening of the courts, as well as in a broader, overall application of the rule of law. Assessments, however, have noted communication problems between donors and the Ministry that result in donors making choices that do not coincide with strategic reform approaches of the Ministry. This problem could be addressed in Rwanda by identifying a key player within the Ministry to oversee the joint development of a strategic plan by Ministry officials and donors. This approach has been successful in Haiti.

G. Re-examine Support to *Gacaca*

Donors should reevaluate their support of the *gacaca* process in light of recent reports that it is being used as a tool for political repression. It is impossible for the Rwandan government to bring to trial all those who are accused of relating to the genocide, and thus the *gacaca* process is indeed necessary; however, support for *gacaca* could undermine the rule of law if it is used a tool of repression. Much is being written and said about the many problems associated with *gacaca*, and this should be part of a more comprehensive analysis.

H. Legislative Strengthening

Donors have done little to build the capacity of the legislature in Rwanda. A strong legislature is essential to enacting new laws and remedies designed to protect citizens and shield them from political repression. As such, legislative strengthening should be considered as part of a bottom-up strategy to promote legal empowerment.

APPENDIX A
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Annex 8. USAID ROL Programming Matrix (1992-2008)

SOURCES

- 1 2004 ROL Programs at a Glance spreadsheet did not provide duration of any program, amount of funding or implementer information
- 2 2005-2006 ROL/HR funding and programs report
- 3 Implementer Report
- 4 Evaluation
- 5 Assessment/Study funded by USAID
- 6 USAID Success Stories
- 7 DEC
- 8 2007 Performance Report
- 9 Bilateral office Web page
- 10 Implementer Web sites
- 11 DCHA/DG ROL expenditures from 1992-2007

Sources for the same year may refer to the same program by different names or criteria, but without project or implementer names; it is impossible to tell.

Country Source	Type of Program / Program Name	Assistance Provided	Implementer	Notes	1992	1993	1994	1995	1996	1997	1998	1999	2000	2001	2002	2003	2004	2005	2006	2007	2008
Angola																					
1	Human Rights	HR monitoring/advocacy, incl gender		USAID provided training and computers to streamline case processing													X				
8	Strengthen Justice System	Technical assistance, training, equipment																X	X	X	
Benin																					
6	Anti-corruption	Assistance to Supreme Audit Institutions	Beninese Office of the Inspector General of Finance and the Chamber of Accounts of the Supreme Court	No specific range of dates given; "Success Story" from 2005														X			
7	Women's Rights / Women's Legal Rights Initiative	Public awareness campaign, justice sector actor training, and legislation workshops for women's legal rights with emphasis on the Family Code.	Chemonics	Work plans for Oct. 2003 - Sept. 2006; each with impacts, lessons learned, anticipated future challenges.												X	X	X	X		
6	Anti-Corruption / Front des Organizations Nationales des Anti-Corruption (FONAC)	Awareness campaign and engagement / support of NGOs in fight against corruption	various local NGOs	Unclear exact years, but mentions of program range from 1996 to 2004					X	-	-	-	-	-	-	-	-	X			
7	HR / Combating Child Trafficking in Benin	Workshops and training (ministry, local gov levels), community action plans	USAID/UNICEF in 2005; EU, Danida in 2004	Multi-country report; April 2007														X	X	?	
6	Anti-human trafficking / Community Action for Girls' Education	Awareness campaign against trafficking of young girls		Grant supplied for indicated years. Main focus is on girls' education.										X	X	X	X				

Country Source	Type of Program / Program Name	Assistance Provided	Implementer	Notes	1992	1993	1994	1995	1996	1997	1998	1999	2000	2001	2002	2003	2004	2005	2006	2007	2008
7	Human Rights / Women's Right's Initiative	Promote women's legal rights; technical services, training, legislation implementation	Chemonics													X	X				
Burkina Faso																					
7	HR , anti-Trafficking	Radio skit awareness campaign	Population Media Center	Multi-country report; April 2007													X	X	X		
Burundi																					
2	Transition Institutions and Peace Processes Strengthened	Advocacy, Access to Justice (assistance to CSOs, communities through NGOs; legal and advocacy training)														X	X	X			
2	Protect Human Rights and Equal Access to Justice	Criminal Prosecution, Legal Services (legal reform efforts, HR monitoring, legal services, paralegal training)														X	X	X			
2	Improved Community-Based Reconciliation Efforts	Truth & Reconciliation Efforts (support to youth and women's groups to promote tolerance, support for truth and reconciliation; volunteer training in conflict resolution)														X	X	X			
1	Human Rights	Truth & Reconciliation Commissions; HR monitoring / advocacy, incl gender															X				
3	Anti-Corruption Initiative		Nathan Associates																		
3, 10	Transitional justice, human rights, policy reform, legal aid and anti corruption		IFES / International Human Rights Law Group									X	X	X	X	X	X	X	X	X	
8	Land Rights Initiative	Provided assistance in land registration and tracking to reduce disputes																			X
DRC																					
2	Improve Justice Sector / Legal Framework	Criminal Prosecution, Legal Services (engage CSOs to build public demand for justice; support to HR protection and AC reform efforts)															X	X	X	X	X
8	Legal Framework / Legislation Draft	Legislation affecting the justice systems and oversight		Draft submitted in 2006, not approved as of the date of the 2007 Performance Report															X		

Country Source	Type of Program / Program Name	Assistance Provided	Implementer	Notes	1992	1993	1994	1995	1996	1997	1998	1999	2000	2001	2002	2003	2004	2005	2006	2007	2008
8	Human Rights	Draft legislation and support of outreach programs to improve public awareness		Sexual- and gender-based legislation															X	X	
1	Legal Framework	Constitutions															X				
1	Human Rights	HR monitoring, advocacy, incl gender															X				
6	Human Rights / Advocacy	Equal rights for the disabled under the new constitutions	Voice of Disabled for Human Rights (VDHR)															X	X		
Eritrea																					
11	Justice sector reform/human rights							X	X	X											
Ethiopia																					
2	Strengthen Civil Society	Public Awareness (enhance NGO capacity for advocacy; civic education on rights)												X	X	X	X	X	X	X	
2	Reduce Trafficking in Persons	Public Awareness (continuation - girls stay in school and women's rights vis-à-vis employment and human rights)															X	X	X	X	X
1	Justice Sector Institutions	Judiciary															X				
1	Human Rights	Truth & Reconciliation Commissions															X				
11	Judicial Independence																		X	X	
7	Human Rights / Counter-Trafficking Program	Counseling services, training, TV and radio awareness campaign	IOM; program start in 2001	Multi-country report; April 2007										X	X	X	X	X	X	-	
Gambia, The																					
11	Rule of Law, non-specific			Started in 1991	X	X	X	X													
Ghana																					
7	Advocacy, HR / Community-Based Organization Capacity Building for Pro-Poor Advocacy	Sub-grant for LRC, training activities for NGOs in advocacy skills and governmental engagement	AED, MSI, Legal Resources Centre															X	X		
7	Advocacy and civic engagement / Strengthening the Legislature and Increasing Citizen Participation in Democratic Governance	Training, technical, financial assistance; development of materials	National Democratic Institute for Democratic Affairs	Included drafting domestic violence legislation						X	X	X	X								

Country Source	Type of Program / Program Name	Assistance Provided	Implementer	Notes	1992	1993	1994	1995	1996	1997	1998	1999	2000	2001	2002	2003	2004	2005	2006	2007	2008
7	Women's rights / Advancing Women's Rights Globally	Legislation projects, public education sessions,	Georgetown University Law Center's International Women's Human Rights Clinic and Leadership and Advocacy for Women in Africa											X	X	X	X				
Guinea																					
2	Improve Political Process	Public Awareness (strengthen advocacy skills of CSOs, expand civic education on rights and responsibilities, promote public dialogue on important issues)									X	X	X	X	X	X	X	X			
7	HR, anti-human trafficking	<i>Anticipated:</i> Trainings for children and adults, peer education groups, awareness campaigns, development of anti-trafficking rules for local governments	Save the Children	Multi-country report; April 2007. Cooperative agrmnt in Dec. 2006. As of Feb. 2007, program had not begun b/c of political difficulties																X?	X?
9	Civic Education for Youth / Civic Education Project (PEC)	Democracy awareness workshops, anti-violence / pro-dialogue campaign	African Formation Center for Development (CENAFOD)																	X	
9	Civic engagement of women in elections / Faisons Ensemble	Awareness campaigns, training, workshops	International Foundation for Election System																X	X	
9	Anti-Child Trafficking / Strengthening Communities Against Trafficking and Exploitation (SCATE)	Training and legal reform assistance (incl activities for parents, teachers, children)		Two-year program, also active in Mali																X	X
Guinea-Bissau																					
11	Rule of Law non-specific				X	X	X	X	X	X											
Ivory Coast																					
7	HR, anti-human trafficking	Radio skit awareness campaign	Population Media Center	Multi-country report; April 2007													X	X	X		
Kenya																					
11	Human Rights								X		X										
11	Rule of Law non-specific						X				X	X				X					
2	Strengthen Civil Society	Public Awareness (support advocacy CSOs on various issues, not limited to judicial reform, and AC)	Kenyan CSOs											X	X	X	X	X			

Country Source	Type of Program / Program Name	Assistance Provided	Implementer	Notes	1992	1993	1994	1995	1996	1997	1998	1999	2000	2001	2002	2003	2004	2005	2006	2007	2008
7	Legal Framework / e-Legislation Policy Development Initiative	Supported the creation of draft legislation	Academy for Education Development	It is possible that the legislation is not approved. The final report was written in 2007.														X	X	X	
Lesotho																					
7	HR / Women's Legal Rights Initiative	Legal literacy programs, training of female attorneys, training of community members	Chemonics	Multi-country report; quarterly reports														X	X		
Liberia																					
1	Legal Framework	Criminal and Civil legal reform															X				
7	Justice sector strengthening, HR / Promoting and Protecting Human Rights	Sub-grants; administrative and technical support	Carter Center								X	X	X								
8	Access to Justice	Supported legal aid groups and created legal aid clinic																		X	
1	Justice Sector Institutions	Reform of the Prosecution and Judiciary; Law Schools															X				
1, 8	Access to Justice	ADR, arbitration, mediation, NGO provided legal services and advocacy															X		X	X	
Madagascar																					
2	Deepen and Strengthen Civil Society	Advocacy, Access to Justice (promotion of gender equality)	Chemonics, SOS aux Victimes du Non-Droit													X	X	X	X	X	X
1, 7	Legal Framework	Commercial / Administrative law reform	ARD / Checchi / JURECO	Work of the committee began in 1998							X	X	X	X	X	X	X				
1	Justice Sector Institutions	Judiciary; Bar/Lawyers															X				
1	Access to Justice	Legal literacy, community legal education; ADR, arbitration/, mediation															X				
7	Legal Framework / Madagascar Participation and Poverty Project	Arbitration, mediation, training, technological assistance	ARD, Inc.; Checchi; and Company Consulting, Inc.	May be continued by one of the above programs							X	X	X	X							
7	Human Rights / Women's Rights Initiative	Promote women's legal rights; technical services, training, legislation implementation	Chemonics	Based on multiple documents												X	X	X	X		
7	HR, anti-human trafficking	<u>Projected</u> : Work with MoJ and CSOs on awareness campaigns, legal action promotion against traffickers,	Catholic Relief Services	Multi-country report; April 2007. Agrmnt signed Aug. 2006; 2-year program. Program has started, but no date															X?	X?	

Country Source	Type of Program / Program Name	Assistance Provided	Implementer	Notes	1992	1993	1994	1995	1996	1997	1998	1999	2000	2001	2002	2003	2004	2005	2006	2007	2008
		service provision		given																	
7	Legal Framework / Madagascar Anti-Corruption Initiative	Technical Assistance, Public Awareness		Based on a 2007 quarterly report. The work is expected to conclude in 2008.															X	X	X
Malawi																					
6, 7	Access to Justice / CAREER Paralegal Program	Legal Aid, Mediation		May be the same program as below. Is included since report was submitted in 2001. Dates reflect the Success Stories (03 and 04).					X	X	X	X	X			X	X				
7	Legal Framework / Strengthening Government Integrity to Support Malawian Efforts to Roll back Corruption and Encourage Fiscal Responsibility	Training, equipment, IT		Based on a 2007 quarterly report. The work is expected to conclude in 2008.															X	X	X
2	Access to Justice	Legal Aid, ADR (Provision of training materials and operating costs to legal aid org; working with paralegals, trained citizens and trade. Leaders to resolve cases through mediation.)												X	X	X	X	X	X	X	X
7	Legal Framework / Legislative Strengthening Program	Strengthen the National Assembly (NA) Committee Department	SUNY																X	X	X
2	Advocacy	Public Awareness (radio drama group on constitutional rights and responsibilities)	World Learning											X	X	X	X	X	X	X	X
Mali																					
2	Increase Participation	Public Awareness (support to communities increasing knowledge of rights and responsibilities)	MSI prime (CARE, Save the Children, IRG subs)	Extends through 2012									X	X	X	X	X	X	X	X	X
3	Commercial Court		International Development Law Institute		X																
7	Civic education / Strengthening Civic Dialogue	Civic education and electoral education campaign, engagement activities, and sub-grants	IFES													X	X	X	X		
7	HR, anti-human	Radio skit awareness	Population Media Center	Multi-country report; April													X	X	X		

Country Source	Type of Program / Program Name	Assistance Provided	Implementer	Notes	1992	1993	1994	1995	1996	1997	1998	1999	2000	2001	2002	2003	2004	2005	2006	2007	2008
	trafficking	campaign		2007																	
9	Anti-Child Trafficking / Strengthening Communities Against Trafficking and Exploitation (SCATE)	Training and legal reform assistance (incl activities for parents, teachers, children)		Two-year program, also active in Guinea																X	X
Mozambique																					
2, 7	Anti-Corruption Initiative	Criminal Prosecution, Legal Services (training and TA for staff and centers providing legal advice, justice sector ombudsman services and confidential reporting of corruption crimes)														X	X	X	X	X	X
1	Legal Framework	Civil code reform															X				
1	Justice Sector Institutions	Judiciary															X				
1	Access to Justice	ADR / Arbitration / Mediation															X				
7	Legal Framework	Provided assessment of newly proposed legislation. Regulation concerning Bankruptcy Law and Government Works Contracts	Nathan Associates, Inc.	No data on whether a more extensive project was introduced. No information on when this study began.													X	X			
7	Human Rights / Women's Rights Initiative	Promote women's legal rights; technical services, training, legislation implementation	Chemonics													X	X				
7	HR / part of Women's Legal Rights Initiative	Anti-human trafficking legislation drafting program, NGO and CSO engagement, awareness campaign	USAID/Mozambique	Multi-country report; April 2007														X	X	X	
Namibia																					
7	Justice Sector Institutions / Consolidating Parliamentary Democracy in Namibia: Expanding Legislative Capacity Inside and Outside of Parliament	Institutional structure building, Civil Society assistance, Training	National Democratic Institute for International Affairs (NDI)	The report is provided for 1997-2000. However the program was created to run between 1995-2002.				X	X	X	X	X	X	X	X						
7	Human Rights / Women's Rights Initiative	Promote women's legal rights; technical services, training, legislation implementation	Chemonics													X					

Country Source	Type of Program / Program Name	Assistance Provided	Implementer	Notes	1992	1993	1994	1995	1996	1997	1998	1999	2000	2001	2002	2003	2004	2005	2006	2007	2008
Niger																					
5		Village Law project																			
Nigeria																					
1, 3	Justice Sector Institutions	Judiciary (budget preparation; court performance; judicial ethics; and public access and reporting)	NCSC														X	X			
1	Rule of Law reform	ROL strategy / advocacy for ROL Reform															X				
3		Legislative study tour, assistance to NGOs for advocacy efforts	International Human Rights Law Group									X	X	X	X						
7	Women's rights / Engendering Legislative Issues (ELI)	Awareness campaigns (radio, TV), legal clinics, workshops	CEDPA	Women's rights relating to FGM and widows' rights								X	X	X							
6	Women's civic engagement / Better Talk	Radio program		Allows women to engage government officials on the air; "Success Story" dated 2003, no program date given												X					
11	Judicial Independence/Judicial system reform																			X	
7	Women's rights / Advancing Women's Rights Globally	Public education, legislation projects, materials development	Georgetown University Law Center's International Women's Human Rights Clinic, Nigeria Women's Rights Advancement and Protection Alternative	Three-year program: Nov. 2001 to Oct. 2004										X	X	X	X				
Rwanda																					
1, 11	Justice Sector Institutions	Judiciary, Prosecution, Police/Prisons, <i>gacaca</i>			X			X	X	X	X	X	X	X	X	X	X	X			
1	Access to Justice	Legal literacy, community legal education; ADR /Arbitration / Mediation															X				
1	Human Rights	Truth & Reconciliation Commissions															X				
3, 7	Justice Sector Institutions	Decentralization of judicial administration and financial management	NCSC															X	X?		
3, 5, 7	Human Rights / Women's Legal Rights Initiative		Inama Yateguwe Na / Chemonics	Includes information collected from a comprehensive report encompassing multiple countries.												X	X	X?	X?		
3, 7	Legal Framework	Assistance with Land Law and Implementing Laws and Regulations	ARD														X	X	X	X	X

Country Source	Type of Program / Program Name	Assistance Provided	Implementer	Notes	1992	1993	1994	1995	1996	1997	1998	1999	2000	2001	2002	2003	2004	2005	2006	2007	2008
3, 7	Human Rights / Justice	Justice after genocide	Internews											X	X	X	X				
4, 7	Justice Sector Institutions	Eval of <i>gacaca</i> promotional campaign	Ministry of Health National Population Office / JHU / Population Communication Service													X					
3	Legal Framework	Study: opinions on the <i>gacaca</i> law	Johns Hopkins Center for Communication Programs										X?	X							
3, 7	Justice Sector Institutions	Institutional Development for the Ministry of Justice	Management Sciences for Development										X?	X?	X	X					
3	Justice Sector Institutions	Legal counsel and assistance to MINIJUST	MSD													X?					
3	Legal Framework	Opinion and translation of draft law on the press	Internews / Pact											X							
3	Human Rights / Access to Justice	Legal Assistance and Human Rights Awareness	Haguruka											X?	X						
8	Access to Justice	Legal aid clinics targeting disenfranchised groups, incl women and children		Funding planned for FY '08. No additional information																	X?
7	Justice Sector Institutions / Rwanda National Assembly Support Project	Provided training and information on legislative drafting; improve efficiency; Improve legislative process.	ARD											X	X	X	X				
Senegal																					
11	Rule of Law non-specific											X	X	X							
Sierra Leone																					
2	Broadening Community Participation	Public Awareness (stimulate citizen awareness and broaden participation in civic issues of concern; advance targeted HR issues and increase access to justice)												X	X	X	X	X	X		
1, 11	Human Rights	HR monitoring . advocacy, incl gender												X	X	X	X				
1	General ROL	ROL Strategy/Advocacy for ROL Reform															X				
11	Constitutions, Laws and Legal Systems																		X		
9	DG awareness for women / Strengthening Democratic Governance	Workshops, trainings																X	X	X	
Somalia																					
1	Justice Sector Institutions	Judiciary															X				

Country Source	Type of Program / Program Name	Assistance Provided	Implementer	Notes	1992	1993	1994	1995	1996	1997	1998	1999	2000	2001	2002	2003	2004	2005	2006	2007	2008
11	Human Rights															X					
1	Access to Justice	ADR / Arbitration / Mediation															X				
South Africa																					
2	Improve Local Government	Criminal Prosecution, Legal Services (address gender-based violence training of investigators and prosecutors; fund local programs providing access to justice to women and children)	Creative Associates, Pact						X	X	X	X	X	X	X	X	X	X	X	X	X
1, 11	Justice Sector Institutions	Judiciary, Bar / Lawyers					X	X	X	X	X	X	X	X	X	X	X	X			
1	Access to Justice	ADR / Arbitration / Mediation															X				
1, 11	Human Rights	Truth & Reconciliation Commissions; HR monitoring / advocacy, incl gender			X	X	X	X	X	X	X	X			X	X	X	X			
1	General	ROL Strategy/Advocacy for ROL Reform															X				
5	Justice Sector Institutions	Study of opportunities for private sector involvement in the justice system	South African Institute on Race Relations																		
4, 8	Justice Sector Reform	Criminal Justice Strengthening Program		Includes strengthening institutions, as well as efficiency and crime and violence prevention strategies. Work concluded in 2007. No info regarding when the work might have begun.													?		X	X	
8	Access to Justice	Training for court personnel and support of mobile courts																			X
7	Human Rights / Women's Rights Initiative	Promote women's legal rights; technical services, training, legislation implementation	Chemonics													X	X				
7	Justice Sector Reform / Review of the IJS Court Centre in Port Elizabeth	Increase efficiency in the criminal justice system		May be a related program to the one noted above											X?	X					
Sudan																					
8	Legal Framework	Support a "customary justice advisor." Work to improve relations and understanding between the customary system and the formal justice		Work set to begin in FY '08; no indication of the expected length of the program; INL supported.																	X

Country Source	Type of Program / Program Name	Assistance Provided	Implementer	Notes	1992	1993	1994	1995	1996	1997	1998	1999	2000	2001	2002	2003	2004	2005	2006	2007	2008
		system.																			
7	Justice Sector Institutions / Southern Sudan Political Party Development & Legislative Strengthening Program	Train Legislators; development of legislative process	The International Republican Institute	It is likely that the dates of this program go far beyond the dates we have information for													X	X	X		
Swaziland																					
7	Women's Legal Rights Initiative	Technical assistance, materials	Chemoincs International, CEDPA, Partners of the Americas, MetaMetrics, Inc., Development and Training Services, Inc., Turning Point Marketing, Inc.															X	X		
Tanzania																					
2	Civil Society Capacity	Legal Reform (NGO capacity building activities resulted in NGO-govt-produced HIV/AIDS Omnibus Legislation promoting equality for affected persons; advocacy training for children's rights reform, ban of genital mutilation)	PACT prime (ICNL, CIPE subs)										X	X	X	X	X	X			
2	Advocacy for Improved NGOs	Legal Reform (worked with NGOs to draft amendments to flawed law on freedom of association so it adheres to intl standards)	PACT prime (ICNL sub)										X	X	X	X	X	X			
1	Justice Sector Institutions	Judiciary															X				
1	Access to Justice	ADR/Arbitration/Mediation															X				
11	Rule of Law non-specific					X	X	X	X	X	X	X									
6, 7	Access to Justice	Supported the research and creation of the "Legislative Roadmap," designed to provide information regarding laws and regulations to civil society and other users	Lawyers Environmental Action Team (LEAT) PACT Tanzania	May be a part of any of the above mentioned programming. No information is available regarding the time frame of this project.													X				
Togo																					
11	Human Rights					X															

Country Source	Type of Program / Program Name	Assistance Provided	Implementer	Notes	1992	1993	1994	1995	1996	1997	1998	1999	2000	2001	2002	2003	2004	2005	2006	2007	2008
Uganda																					
1	Legal Framework	Criminal and Civil legal reform															X				
1	Justice Sector Institutions	Law Schools															X				
1	Access to Justice	ADR / Arbitration / Mediation															X				
7	Access to Justice / Community Policing Assessment	Provide recommendation to improve policing in northern Uganda	MSI	No information as to whether the suggestions were implemented														X	X	X	
7	Women's rights / Advancing Women's Rights Globally	Public education, legislative consultations, legislation projects, technical assistance	Georgetown University Law Center's International Women's Human Rights Clinic, Law and Advocacy for Women-Uganda	Three-year program Nov. 2001 to Oct. 2004										X	X	X	X				
Zambia																					
7	Human Rights / Trafficking	Technical Assistance	Chemonics	Press Report and Draft Legislation													X	X	X	X	
7	Civil Society Capacity / Implementation of Court-annexed Mediation in Zambia	Judiciary	Chemonics										X								
11	Rule of Law ,non-specific									X	X	X									
11	Human Rights				X	X	X	X													
6	Media Law Reform / USAID Support Makes Significant Contributions to Media Law Reform	Financial Assistance (Grant)		Project succeeded in 2002. No information on when the grant was given.											X						
Zimbabwe																					
8	Access to Justice	Provided support to ZLHR, PACT and CSU		These organizations provide legal assistance in addition to medical and psycho-social aid to victims of torture and political violence																X	
11	Rule of Law, non-specific										X						X				
11	Human Rights																X		X	X	
USAID Southern Africa																					
Searches did not return any documents with details on regional programming																					

Country Source	Type of Program / Program Name	Assistance Provided	Implementer	Notes	1992	1993	1994	1995	1996	1997	1998	1999	2000	2001	2002	2003	2004	2005	2006	2007	2008	
USAID East Africa																						
Searches did not return any documents with details on regional programming																						
USAID West Africa																						
7	HR, anti-human trafficking	Radio dramas (widely broadcasted), counseling services	USAID/WA, Population Media Center	Multi-country report; April 2007. Separates this from individual country reports as this takes a regional approach to trafficking, but with some country-specific programming elements.																X	X	X

Annex 9. USAID Presence in Sub-Saharan Africa

Sub-Saharan African countries (48)

Angola
 Benin
 Botswana
 Burkina Faso
 Burundi
 Cameroon
 Cape Verde
 Central African Republic
 Chad
 Comoros
 Congo
 Congo, Democratic Rep. of
 Djibouti
 Equatorial Guinea
 Eritrea
 Ethiopia
 Gabon
 Gambia, The
 Ghana
 Guinea
 Guinea-Bissau
 Ivory Coast
 Kenya
 Lesotho
 Liberia
 Madagascar
 Malawi
 Mali
 Mauritania
 Mauritius
 Mozambique
 Namibia
 Niger
 Nigeria
 Rwanda
 Sao Tome & Principe
 Senegal
 Seychelles
 Sierra Leone
 Somalia
 South Africa
 Sudan
 Swaziland
 Tanzania
 Togo
 Uganda
 Zambia
 Zimbabwe

USAID Bilateral Missions (23)

Angola (Luanda)
 Benin (Cotonou)
 DRC (Kinshasa)
 Ethiopia (Addis Ababa)
 Ghana (Accra)
 Guinea (Conakry)
 Kenya (Nairobi)
 Liberia (Monrovia)
 Madagascar (Antananarivo)
 Malawi (Lilongwe)
 Mali (Bamako)
 Mozambique (Maputo)
 Nigeria (Abuja)
 Namibia (Windhoek)
 Rwanda (Kigali)
 Senegal (Dakar)
 Sierra Leone (c/o
 Conakry, Guinea office)
 South Africa (Pretoria)
 Sudan (Khartoum, c/o
 US Embassy)
 Tanzania (Dar es Salaam)
 Uganda (Kampala)
 Zambia (Lusaka)
 Zimbabwe (Harare)

USAID Regional Missions (3)

West Africa

Benin
 Burkina Faso
 Cameroon
 Chad
 Gambia, The
 Guinea
 Guinea-Bissau
 Ghana
 Ivory Coast
 Liberia
 Mali
 Mauritania
 Niger
 Nigeria
 Senegal
 Sierra Leone
 Togo

East Africa

Burundi
 Central African Republic
 Congo
 Congo, Democratic Rep. of
 Djibouti
 Eritrea
 Ethiopia
 Kenya
 Madagascar
 Rwanda
 Somalia
 Sudan
 Tanzania
 Uganda
 Zambia

Southern Africa

Angola
 Botswana
 Lesotho
 Malawi
 Mozambique
 Namibia
 South Africa
 Swaziland
 Zambia
 Zimbabwe

Map of USAID Bilateral Missions in Sub-Saharan Africa



Map of USAID Regional Missions in Sub-Saharan Africa



- USAID West Africa Regional Mission
- USAID East Africa Regional Mission
- USAID Southern Africa Regional Mission

Map of Countries with USAID Rule of Law Programming in Sub-Saharan Africa*



 USAID Rule of Law Programming in Sub-Saharan Africa

* This map is a representation of programs and documents cited in Annex 8, the “USAID ROL Programming Matrix (1992-2008)”

Annex 10. Selected Regional Organizations that Address Rule of Law and Security in sub-Saharan Africa

1. *African Human Security Initiative*

www.aficareview.org

The African Human Rights Initiative is a DFID-supported organization operating in eight countries, implementing programs related to good governance, democracy, and adherence to human rights precepts. The goal is to generate information about crime, particularly information that can be used to review the scale of crime and the criminal justice systems in countries undergoing the Africa Peer Review Mechanism. The ultimate goal is to enhance the implementation of the New Partnership for Africa's Development (NEPAD) programs. Crime is a cross-cutting issue in all four areas identified in the NEPAD Declaration (Democracy and Political Governance, Economic Governance and Management; Corporate Governance and Socio-economic Development) and containing it is essential for enhancing human security, as well as achieving the levels of development envisaged by the continent. Different countries experience different rates of crime and, though management of the criminal justice system hinges on accepted principles, there are some variations across countries in the levels of performance and determinative factors. Participating country partners will thus agree on the methods to be used in each area of study, taking into account each country's specificities, as indicated in the Master Questionnaire. Sharing information will be essential for the success of the project and will enhance the quality of work by the country team.

2. *Africa Peace Forum*

www.africapeaceforum.com

The Africa Peace Forum (APFO) is based in Nairobi, Kenya and is responsible for arms management and reduction, including small arms, conventional arms, and landmines. The overall objective is to contribute to the prevention, resolution, and effective management of conflict by engaging state and non-state actors in developing collaborative approaches towards lasting peace and enhanced human security in the Greater Horn of Africa and beyond.

3. *Institute for Human Rights and Development in Africa*

www.africaninstitute.org

The Institute for Human Rights and Development in Africa is based in The Gambia and is responsible for democracy and human rights projects, including the rights of women, children, and vulnerable groups. IHRDA is an independent, pan-African, non-profit organization established in 1998. The Institute's overall goal is to work towards the full implementation of African human rights treaties through domestic application of treaty provisions and widespread, effective use of pan-African treaty bodies. The Institute has four main programs: Capacity Building, Litigation, Research & Publications, and Partnerships.

Under its Capacity Building program, the Institute holds several workshops each year for human rights workers, judges, lawyers, journalists, and others. Workshops are focused on how participants can use African human rights treaties and mechanisms in their work.

In its Litigation program, the Institute brings cases before the ACHPR, and other African treaty monitoring and enforcement bodies. The Institute may file strategic cases on its own to elicit interpretation of a particular treaty provision or draw attention to a particular issue. It also serves in an

advisory capacity to litigants prosecuting their own cases in international forums who need assistance with procedural aspects of international litigation.

4. *Institute for Security Studies (ISS)*

www.iss.co.za

The ISS is based in Kenya and addresses terrorism and organized crime programs. It was originally established as the Institute for Defense Policy in 1991 and has offices in Pretoria, Cape Town, Nairobi, and Addis Ababa. The ISS is a regional research institute operating across sub-Saharan Africa. It is registered as a non-profit trust in South Africa, a research association in Ethiopia, and as a company limited by guarantee with no share capital in Kenya.

The organization is concerned with various issues, including Training for Peace; Security Sector Governance; Organized Crime and Money Laundering; International Crime in Africa; IGAD Capacity Building against Terrorism; Environmental Security; Crime, Justice, and Politics; Corruption and Governance; Conflict Prevention; Arms Management; African Security Analysis; and the African Human Security Initiative.

5. *West Africa Network for Peace-building (WANEP)*

www.wanep.org/aboutwanep.htm

WANEP is based in Ghana. It is a non-profit membership organization with the goal of facilitating coalition building among conflict prevention and peace-building organizations and practitioners in West Africa. WANEP has 300 member organizations in 16 countries. It is governed by a General Assembly that meets once a year, an Advisory Council that advises on policy direction, and an Executive Board that supervises the Management Team. Some of WANEP's programs include: Youth and Peace Education (YPE); Capacity Building Program (CBP); Civil Society Policy and Advocacy Program; Justice Lens Program; Women in Peace-building; Early Warning and Early Response; West Africa Peace-building Institute; and Research, Monitoring, and Evaluation.

6. *African Assembly for the Defense of Human Rights (RADDHO)*

www.raddho.org/Home/tabid/36/language/en-US/Default.aspx

RADDHO supports the Senegalese Committee for Human Rights by providing it with reports of complaints about violations of human rights in the country. RADDHO is a member observer of the African Commission on Human and Peoples' Rights, where it plays an active regional role. A complaint by RADDHO with respect to Zambia led to the first decision of the Commission in a dispute between an NGO and a state.

7. *Women in Law and Development in Africa*

www.wildaf.org

Web site does not provide details about programs, other than to indicate it supports programs related to the rule of law and justice sector.

8. *Africa Law Institute (ALI)*

www.africalawinstitute.org

The ALI, founded in 2002, is based in Ontario. It publishes the *African Journal of Legal Studies*. Its principal functions include: support for non-partisan and scientific legal research promoting rule of law, and facilitating legal consultancies and training programs for judges, attorneys, and public servants. It also serves as a forum for exchange of ideas and promotion of African legal and public policy debates.

9. *Organization for Harmonization of Business Law in Africa (OHADA)*

www.ohada.com

OHADA (known by its French acronym), is a system of business laws and implementing institutions adopted by treaty in 16 West and Central African nations. It was created in 1993. The primary function of OHADA is to modernize and harmonize the business laws of member states. The wider objective of OHADA is to attract foreign investment into the OHADA zone and to achieve economic integration in Africa as whole, as other African countries join OHADA.

10. *Economic Community of West African States (ECOWAS)*

www.ecowas.int

ECOWAS, established in 1975, includes 15 states. The Web site does not describe programs of direct relevance to justice or rule of law. The Department of Defence and Security is one of the departments under the Office of the Deputy Executive Secretary Political Affairs, Defence and Security. This department was established in accordance with Article 16 of the Protocol Relating to the Mechanism for Conflict Prevention, Management, Resolution Peacekeeping, and Security.

11. *Commonwealth Legal Education Association (CLEA)*

<https://olt.qut.edu.au/law/clea>

CLEA was established in December 1971. According to the organization's Web site,

"Its objectives are to foster high standards of legal education and research in Commonwealth countries, to build up contracts between interested individuals and organizations, and to disseminate information and literature concerning legal education and research. There are now three chapters of the Association, carrying out activities on a regional level: the South-East Asian Chapter, the Southern African Chapter, and the Caribbean Chapter."

12. *Organization of African Unity (OAU)*

<http://actrav.itcilo.org/actrav-english/telearn/global/ilo/law/oau.htm>

The OAU was organized with two primary aims:

- First, to promote the unity and solidarity of the African states and act as a collective voice for the African continent. This was important to secure Africa's long-term economic and political future. Years of colonialism had weakened it socially, politically, and economically.
- Second, the OAU was also dedicated to the eradication of all forms of colonialism. When it was established, a number of states had not yet won their independence or were minority-ruled. South Africa and Angola were two such countries. The OAU proposed two ways of ridding the continent of colonialism: it would defend the interests of independent countries and help to pursue those of countries still colonized, and it would remain neutral in world affairs and global politics, preventing its members from being controlled once more by outside powers – a particular danger with the Cold War.

The OAU also aims to: ensure that all Africans enjoy human rights, raise the living standards of all Africans, and settle arguments and disputes between members through peaceful conflict resolution methods.

The 53 African states of the OAU are now members of the inter-governmental organization, the African Union.

14. *Institute for Democracy in South Africa (IDASA)*

www.idasa.org.za

IDASA, a think tank and democracy promotion advocacy group based in Cape Town, also works in human rights. It has strong ties with human rights organizations in South Africa and has worked together with other civil society initiatives to promote a human rights culture and educate citizens about their rights. It has contributed to the development of human rights training materials and the incorporation of rights education in schools. IDASA's work in this field is accomplished primarily through the Budget Information Service, the Africa Governance Centre, the Southern African Migration Project, and the Community and Citizen Empowerment Programme. IDASA is also doing some very interesting work regionally on the nexus between democratization, governance, and the HIV/AIDS epidemic.

Links to Organizations Referenced in the Report (see pages 25-27)

15. Federación Internacional de Abogadas / International Federation of Women Lawyers (FIDA) – FIDA Web sites are generally organized by member countries (e.g., FIDA Kenya, www.fidakenya.org, and FIDA Nigeria, www.fidanigeria.org)
16. International Commission of Jurists (ICJ) – www.icj.org
17. The African Commission on Human and Peoples' Rights (ACHPR) – www.achpr.org
18. The Southern African Development Community (SADC) – www.sadc.int
19. The Southern African Judges Commission (SAJC) – www.sajc.co.za
20. The Southern African Regional Police Chiefs Cooperation Organization – www.interpol.int/public/Region/Africa/Committees/SARPCCO.asp