



ACCESS TO JUSTICE BRIEF LEGAL ASSISTANCE IN TIMOR-LESTE

Summary of Assessment Findings and Recommendations
September 2014



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Counterpart International, Inc. (Counterpart) was awarded funding in 2013 from USAID/Timor-Leste to implement the four-year **Ba Distrito Project (the Project)** with the goal of increasing institutional and human capacity at local levels to deliver basic services as part of wider vision of improved decentralized governance and inclusive access to justice in Timor-Leste. The Project focuses on strengthening: local governance, decentralization and input of local institutions, legal aid organizational sustainability and district court functionality.

This brief is based on a short-term consultancy completed by legal aid technical expert Christie S. Warren, with support from the Project's Access to Justice team: Fausto Belo Ximenes, Maria Veronika N. M. Da Costa and Carlos Miguel. Professor Warren analyzed the existing legal framework to identify gaps, conducted desk and field research to identify other challenges to effective legal aid and developed recommendations for activities to be undertaken by the Project and others to improve legal aid service delivery. In addition to general recommendations, specific recommendations are made for the district of Oecusse where the Project will pilot legal aid activities that can then be rolled out to other areas. Recommendations were developed by Christie Warren in consultation with the team and Counterpart International's Carolyn Tanner, the Chief of Party for the Project. Finalization of the report was supported by Tonya Cook-Pedersen from Project partner and subgrantee Tetra Tech DPK.

The U.S. government, through **USAID**, works in partnership with the government of Timor-Leste to support broad-based and effective development. Since 2001, USAID has provided over \$253 million in development assistance to Timor-Leste, and USAID provided over \$12 million to improve the lives of people in Timor-Leste in 2013. USAID supports Timor-Leste in its efforts to build a more prosperous, healthy, and democratic country through programs that foster inclusive and sustainable economic growth, especially in the agriculture sector; improve the health of the Timorese people, particularly women and children; and strengthen the foundations of good governance—all areas which are highlighted in Timor-Leste's Strategic Development Plan 2013-2030.

Counterpart International is a global development organization that empowers people and communities to implement innovative and enduring solutions to social, economic, and environmental challenges. For nearly 50 years, Counterpart has been forging partnerships with communities in need to address complex problems related to economic development, food security and nutrition, and building effective governance and institutions. For more information visit www.Counterpart.org

Tetra Tech DPK (Tt DPK) is a leader and innovator in providing consulting services to further the rule of law and good governance. Tt DPK works around the world to help establish and strengthen productive relationships between state and society and develop sustainable government and justice systems that are responsive, transparent, accountable, fair, and efficient. Enhancing access to justice, especially for disadvantaged groups, is one of its core rule of law service areas. For more information visit www.tetratedpk.com/

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OVERVIEW: LEGAL AND JUSTICE SYSTEM

Since its independence in 2002, Timor-Leste has continued to develop formal legal institutions and processes that coexist alongside traditional Timorese systems of justice. Many justice sector laws and institutions are still in nascent stages. The current Justice Sector Strategic Plan (JSSP) developed by the Ministry of Justice (MoJ), for example, includes in the goals establishment of a high quality legal framework in the areas of justice and law by 2017 and a justice sector institutional framework by 2025.

Despite the work that lies ahead, significant progress has been made. Today the formal court system of Timor-Leste consists of four District Courts, located in Dili, Oecusse, Baucau, and Suai and one Court of Appeal in Dili. An independent Prosecution Service and Public Defender's Office have been created and district offices established. A Supreme Court, called for in the 2002 Constitution, is to be established by 2025 in accordance with the MoJ's JSSP. These courts are building their capacity to serve a population of an estimated 1.1 to 1.5 million people. Key to capacity building efforts is the Legal Training center (LTC), which is currently the primary professional training institution for the legal and justice sector.

Traditional Justice

For historical and cultural (as well as practical) reasons, a strong preference for localized, traditional mediated processes – as opposed to adjudicated solutions – still exists throughout the country, especially in outlying districts.

Prior to the arrival of the Portuguese in the sixteenth century, Timor-Leste was divided into small kingdoms ruled by local kings, or *liurais*.¹ Though the *liurais* were the authorities on matters of justice, disputes were often resolved by the families of people involved. The *liurais* had no obligation to encourage negotiation or reconciliation; the dominant feature of the justice system was retribution, and crimes were often punished by fines of money or goods, or by death. Traditional Timorese justice included the idea of collective responsibility, and crimes became controversies between the families of parties involved. Compensation for crime often took the form of payments made by perpetrators' families to families of victims. Reconciliation of the community following criminal acts also played an important role in restoring peace and repairing relationships between the spiritual and secular worlds. Disputes were often forgiven after feasting and the swearing of friendship oaths. Mediation was another important aspect of traditional justice, and community leaders often mediated settlements in disputes. Precedent played a prominent role during negotiations; settlements were often based on previous mediated resolutions. Traditional values of retribution, reconciliation and mediation play an important part in traditional Timorese systems of justice to this day.

Traditional justice continues to play a dominant role despite the influences of centuries of Portuguese colonial rule, 24 years of Indonesian occupation, three years of United Nations (UN) transitional administration, and ongoing support from various international agencies. A 2013 report by the Asia Foundation² found that the public still overwhelmingly favors the traditional justice system over formal adjudication mechanisms; this view was also reflected in the August 2014 Ba Distrito Baseline Survey conducted by Social Science Dimensions.³ Traditional processes implemented by community-level

¹ This section largely relies upon material taken from *Introduction to the Laws of Timor-Leste: Legal History and the Rule of Law in Timor-Leste* (Stanford Law School Timor-Leste Education Project). Aspects of the traditional Timorese justice system and how they were addressed during the UNTAET period are also discussed in Fitzpatrick, Daniel, *Developing A Legal System in East Timor: Some Issues of UN Mandate and Capacity* (2000) *Austrian Review of International and European Law* 5: 5-29.

² Timor-Leste Law and Justice Survey (The Asia Foundation, November 2013).

³ Although over half the respondents in the Baseline Survey reported favorable impressions of the formal court system, the overwhelming majority (98.25%) perceived dispute resolution systems administered at the *suco* level easier to access. Similarly, 90.94% of respondents considered *suco* forums to be faster than formal courts.

institutions headed by local chiefs and elders are viewed as more accessible, affordable and consistent with Timorese values and cultural practices than the formal court system. During foreign occupations, courts were often regarded as instruments of repression so people often still view the formal legal system with skepticism.

Challenges of the Current Legal System

Timor-Leste's current legislative framework reflects its complex political and legal history, and aspects of systems introduced by Portugal, Indonesia and UNTAET continue to influence the development of modern Timorese law.

Although UNTAET's administration ended in 2002 when Timor-Leste officially became independent, its regulations are still in effect in areas in which the national Parliament has not passed laws to supersede them. A complete list of UNTAET regulations implemented between 1999 and 2002 can be found at <http://www.jornal.gov.tl/lawsTL/UNTAET-Law/Regulations%20English/regenglish.htm>

The 2002 Constitution was modeled on the Portuguese Constitution. Aspects of the Code of Criminal Procedure, including the duty of judges to conduct first interviews of detainees in court⁴ and the option of adjudicating civil claims at the same time related criminal charges are tried,⁵ are distinctly based on civil code systems.⁶ Foreign lawyers who seek to practice in the courts of Timor-Leste must have five years of experience practicing law or a civil law degree.⁷

Nevertheless, there are certain aspects of the newly developing legal system of Timor-Leste that incorporate distinctly common law features. For example, Article 246 of the Code of Criminal Procedure specifically states that criminal proceedings shall be adversarial in nature – a hallmark of common law systems. It might therefore be most accurate to characterize the evolving legal system and framework as hybrid – part civil code and part common law—in nature. Many of the problems in the current legal framework are due to ongoing indecision as to which aspects of common law and civil code systems to codify.

The amalgam of influences in the legal system and the fact that many laws are still in draft form has created gaps, inconsistencies and tensions that make implementation difficult. When analyzing which laws apply in specific situations, MoJ legal advisors conduct a tripartite analysis:⁸ (1) Is there a constitutional or legislative provision directly on point? If not, (2) does an applicable UNTAET regulation exist? If not, (3) according to Laws 2/2002 and 10/2003, residual Indonesian law that applied in Timor-Leste prior to 1999

⁴ See Articles 63 and 226 of Law 13/2005, Code of Criminal Procedure.

⁵ See Preamble to Law 13/2005, Code of Criminal Procedure.

⁶ In pure civil code systems, prosecutors and judges are both included in the category of *magistrats*. During this consultancy, at least one international advisor from a civil code country stated that prosecutors in Timor-Leste are similarly considered *magistrats*. However, a review of the Constitution and Code of Criminal Procedure reveals that although Article 1 of the Code of Criminal Procedure states that “judicial authority” includes both judges and prosecutors, the roles and responsibilities of prosecutors in Timor-Leste are more similar to those in common law countries than civil code systems.

⁷ See Articles 2(3) and 2(5) of Law No. 11/2008 on the Private Practice of Law and Private Lawyers. Note that these statutes contain an apparent ambiguity; whereas Article 2(3) states that lawyers may practice law in Timor-Leste if they are qualified to practice in either Timor-Leste or another civil law system, Article 2(5) states only that international lawyers may practice in Timor-Leste if they have practiced law for a minimum of five years. On its face, the latter article does not require that international lawyers have practiced in a civil code system. The potential conflict might be resolved by referring to Article 65(1) of Law 38/2008, the Public Defender Statute, which states, “Whenever it is seen to be necessary and appropriate, the Higher Council of the Public Defender’s Office may, based on resumes submitted, select judges, prosecutors, public defenders or attorneys who are not Timorese but have a minimum of five years’ experience and come from civil legal systems to practice as public defenders or inspectors of the Public Defender’s Office in the Timorese judicial system.”

⁸ This analysis is discussed in Fitzpatrick, *Developing A Legal System in East Timor: Some Issues of UN Mandate and Capacity*, above, at footnote 1.

applies as long as it does not violate the Constitution or other laws currently in effect.⁹ Thus, in this interim period pending completion of legislative drafting and reform, legal research can be cumbersome and time-consuming. The fact that a number of laws, including immigration and customs codes, have not yet been drafted, compounds legal research problems.

THE RIGHT TO COUNSEL AND LEGAL ASSISTANCE

Efforts to enact and harmonize domestic legislation related to the right to counsel and legal assistance are ongoing. At times, steps have been incremental and sporadic, resulting in a number of legislative gaps and inconsistencies that can be – and are – abused. Work on the draft *Access to Courts Law*, as well as legislation on mediation, traditional justice and the creation of a national Bar Association has been prioritized for 2014 and 2015. The Judicial Advisory and Legislation Unit states that it plans to amend the *Public Defender Statute* during the same period. The MoJ’s JSSP also includes plans to draft, amend and revise these laws in the same timeframe.

The current legal framework setting out the right to counsel and legal assistance, as well as rights and responsibilities of defenders, is as follows:

Constitution of 2002

Section 16: Universality and Equality

All citizens are equal before the law, shall exercise the same rights, and shall be subject to the same duties. No one shall be discriminated against on the grounds of . . . language, social or economic status. . .

Section 23: Interpretation of Fundamental Rights

Fundamental rights enshrined in the Constitution shall not exclude any other rights provided for by law and shall be interpreted in accordance with the Universal Declaration of Human Rights.

Section 26: Access to Courts

Access to courts is guaranteed to all for the defense of legally protected rights and interests. Justice shall not be denied for insufficient economic means.

Section 30: Right to Personal Freedom, Security and Integrity

3. Every individual who loses his or her freedom shall be immediately informed, in a clear and precise manner, of the reasons for his or her arrest or detention as well as of his or her rights, and allowed to contact a lawyer, directly or through a relative or a trusted person.

Section 34: Guarantees in Criminal Proceedings

2. An accused person has the right to select, and be assisted by, a lawyer at all stages of the proceedings and the law shall determine the circumstances for which the presence of a lawyer is mandatory.

3. Every individual is guaranteed the inviolable right of hearing and defense in criminal proceedings.

⁹ Drug offenses, for example, are not included in the current Penal Code, and the three-part analysis cited here is used to apply Indonesian law in those cases.

2005 Code of Criminal Procedure

Article 60: Rights of the Defendant

In addition to other rights enshrined in the law, the defendant enjoys the following rights:

- (d) To be assisted by a defender where the law determines compulsory assistance or where he or she so requires;
- (e) A defender appointed by the court, in cases referred to in paragraph 68, if he or she has not done so.

Article 63: Persons to Conduct and Attend the First Questioning of the Defendant under Arrest

3. The questioning is attended by the person conducting it, the public prosecutor, the defender, the interpreter and the official tasked with taking precautionary security measures, when required, in addition to the official entrusted with putting the statements in writing.

Article 66: The Defender

- 1. A defendant has the right to retain counsel or to have a defender appointed, whether on a discretionary basis or at request.
- 2. The competence to appoint a defender rests with the judicial authority conducting the respective procedural phase.
- 3. Should there be no public defender available the defender shall preferably be appointed from among lawyers or law graduates.
- 4. The replacement of a defender, on the initiative of the defendant or of the defender himself or herself, by invoking reasonable grounds, is permitted.

Article 68: Compulsory Assistance

Assistance by a defender is compulsory:

- (a) In the first questioning of a defendant held under arrest or detention;
- (b) From the time the indictment is presented until such a time as a decision is rendered final, particularly in lodging an appeal;
- (c) In filing claims;
- (d) In such other cases as stated by law.

Article 69: Assistance to Various Defendants

- 1. Where there is more than one defendant in the same case, each one may have his or her own defender or have a common defender, if this does not thwart the work to be carried out by the counsel for the defense.
- 2. The court may appoint a defender for those defendants who have not retained counsel from among the counsels retained by the other defendants.

Article 240: Setting a Date for Trial

- 1. The order admitting the indictment and setting a trial date must also contain:
 - (a) The appointment of a defender, if counsel has not yet been retained or appointed for the entire proceeding.

Article 258: Waiving the Attendance of a Defendant

Where a defendant is practically unable to appear at the hearing due to advanced age, serious disease or residence overseas, he or she may request or agree that the hearing be held in his or her absence, in which case the defendant shall be represented by his or her defender for all possible purposes.

Article 260: Absence of the Public Prosecutor or Defender

- 1. The absence of either the public prosecutor or the defender shall not justify the postponement of the hearing.
- 2. The public prosecutor shall be replaced by his or her legal substitute and the defender by a competent person, preferably a lawyer or law graduate, under penalty of irreparable nullity.

3. Substitutes shall be given the time required for them to prepare for trial, namely for the perusal of the records and contact with the defendant.

Article 268: Statements by the Defendant

6. The public prosecutor and the defender shall, following this order and through the presiding judge, ask any questions deemed necessary for the clarification of the truth.

Article 270: Statements by the Aggrieved Person

The judge, or though him or her, the prosecutor and the defender may, following this order, ask the aggrieved person any questions.

Article 276: Oral Allegations

1. Once proof has been produced, the right to be heard is successively given to the public prosecutor and the defender for them to orally present their factual and legal conclusions. . .

Article 306: Deliberation and Decision (on Appeal)

3. Where proof need not be renewed, deliberation is made collectively; however the court may previously listen to the prosecution and the defense in oral allegations in a hearing session if the court deems it necessary for a proper adjudication of the appeal.

Article 309: Proceeding With a Case (on Appeal)

2. The public prosecutor and the defender shall at all times be summoned to the hearing.

Article 310: Postponing a Hearing (on Appeal)

2. Where the defender fails to appear before the hearing and the hearing cannot be postponed, the court shall appoint a new defender and shall give the latter the time required for him or her to consult with the defendant and to examine the records, if required.

Article 311: Hearing (on Appeal)

3. Afterwards, the public prosecutor and the defender are given the floor to make allegations. . .

Article 354: Requirements for Confirmation (of A Criminal Sentence Imposed by A Foreign Court)

1. In order for a criminal sentence imposed by a foreign court to be confirmed, the following requirements need to be met:

(d) that the defendant has been assisted by a defender and, where the defendant was not familiar with the language used in the proceeding, also by an interpreter.

Law 38/2008: Public Defender Statute

Preamble

. . . the Public Defender's Office is an agency . . . responsible for providing full and free judicial and extra-judicial aid to economically underprivileged citizens

Article 1

The Public Defender's Office is a public service, responsible for providing full and free legal, judicial and extra-judicial aid to the neediest citizens.

Article 3

The Public Defender's Office may not refuse to provide its services if it is requested to do so.

Article 4

The services provided by the Public Defender Office are free of charge.

Article 5

1. Except as provided in law to the contrary, all those who request it from this institution and declare that they do not have the means to bear the expense of a lawyer have the right to the assistance of the Public Defender's Office. . .

3. All those who are referred by the Court for assigned representation also enjoy the right to aid from the Public Defender's Office.

Article 6

1. When it is suspected that the user has the means to bear the expense of a lawyer, the Public Defender's Office invites him/her/it to prove the lack of economic and financial means.

2. When, in view of the proof submitted, the Public Defender's Office still has well-founded suspicions regarding the user's lack of means and the latter continues to insist, the matter is referred to the judge, who shall decide in a non-appealable decision after requesting other supplementary proof if deemed necessary.

Law No. 7/2010: Law Against Domestic Violence

Article 25: Legal Assistance

1. In all legal proceedings, the victim must be accompanied by a lawyer or a public defender, regardless of whether the victim has the financial capacity to retain a lawyer.

2. It is the responsibility of the lawyer or public defender to:

- a) Provide legal advice to victims of domestic violence;
- b) Report the occurrence of domestic violence to the police and the prosecutor where doing so would not result in a breach of confidentiality;
- c) Advise victims, witnesses and family members about the progress of legal proceedings relating to domestic violence cases;
- d) Monitor the attention given to the cases by law enforcement officials and judiciary officials, i.e. the police, prosecutors and courts;
- e) Contact entities, agencies and community groups regarding domestic violence cases;
- f) Advise victims of their entitlement to other necessary services;
- g) Facilitate access by the parties to information related to the cases according to this law and other applicable legal provisions.

International Law

On the date the transitional administration under UNTAET commenced, the following international laws took immediate effect: the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights and its Protocols, the International Covenant on Economic, Social and Cultural Rights, the Convention on the Elimination of All Forms of Racial Discrimination, and the Convention on the Elimination of All Forms of Discrimination Against Women. On September 18, 2003 Timor-Leste acceded to the International Covenant on Civil and Political Rights, thereby indicating its intent to be bound by the covenant's provisions. Section 9 of the Constitution states that all rules provided for in international conventions which Timor-Leste has approved, ratified or acceded shall apply in the domestic legal system.

The following provisions of Article 14 of the International Covenant on Civil and Political Rights are therefore directly binding in all Timorese courts:

3. In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality:

- (a) To be informed promptly and in detail in a language which he understands of the nature and cause of the charge against him;
- (b) To have adequate time and facilities for the preparation of his defence and to communicate with counsel of his own choosing;

- (d) To be tried in his presence, and to defend himself in person or through legal assistance of his own choosing; to be informed, if he does not have legal assistance, of this right; and to have legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it;
- (e) To examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;
- (f) To have the free assistance of an interpreter if he cannot understand or speak the language used in court;
- (g) Not to be compelled to testify against himself or to confess guilt.

Issues Arising from the Current Legal Framework

A number of problematic issues impact interpretation and implementation of the legal framework governing the right to counsel and legal assistance and should be addressed. Examples are as follows:

- Section 26 of the Constitution states that justice shall not be denied for insufficient economic means, but there is no definition of insufficiency. This broad constitutional language routinely allows the appointment of defenders for non-indigent parties. Tests to determine ability to pay for counsel need to be developed.
- Although Section 34 of the Constitution provides for a right to counsel in criminal but not civil cases and Article 14(1) of the International Covenant on Civil and Political Rights provides that a fair hearing must be provided in “the determination of any criminal charge against (someone), or of his rights and obligations in a suit at law,” Section 26 of the Constitution is used to justify the right to counsel and legal assistance in all cases, including civil cases. The term *suit at law* has been applied in a number of countries to a broad array of civil or administrative matters and used to justify a right to counsel in civil cases. In Timor-Leste, despite narrow constitutional language, the right to legal assistance is interpreted to apply in civil as well as criminal cases, and public defenders and legal assistance organizations provide legal counsel and representation to poor people in both types of cases.
- Section 34 also allows for counsel of a party’s own choosing. This right is reportedly abused by parties who first seek appointment of either a private lawyer or public defender and later request that he/she be relieved and replaced by a different lawyer. The Public Defender General reports that this constitutional language creates numerous problems for his office since parties use it to change lawyers in the middle of a case whenever they disagree with the direction a case is taking.
- In most legal systems, persons who are able to pay for legal representation are almost always able to retain attorneys of their own choosing. However, when counsel is assigned at state expense, the right to select a specific lawyer is usually restricted. The European Court of Justice, for example, has taken a strong position against the right of indigent defendants to choose their own counsel.¹⁰ The general rule in the United States is that the constitutionally mandated right to counsel does not include the right to a specific lawyer. Once a lawyer has been appointed, he or she may only be removed for good cause or in the event of a conflict of interest.¹¹
- Article 68 of the Code of Criminal Procedure lists stages of criminal cases in which the presence of a defender is mandatory. However, it does not clarify criteria for appointment of a public

¹⁰ For a complete discussion of this issue, see Richard J. Wilson, *The Right to Legal Assistance in Civil and Criminal Cases in International Human Rights Law in International Legal Aid and Defender System Development Manual* (2010), Christie S. Warren et al editors (Appendix C).

¹¹ See, for example, *People v. Marsden* (1970) 2 Cal.3d 118.

defender and does not specify that appointment shall only be made in cases in which the defendant is indigent. The lack of clarity in this statute permits its abuse; defenders are routinely appointed in cases in which parties are not indigent.

- Article 69 of the Code of Criminal Procedure states that multiple defendants in the same case may be represented by the same defender “if this does not thwart the work to be carried out by the counsel for the defense.” This statutory language places the burden of deciding whether the defense is negatively impacted on the defender, who arguably would rarely have incentive to remove himself or herself from a case. In most countries, statutory language governing conflicts of interest address appearances of conflict and require that if there is any potential for an appearance of conflict of interest, separate counsel shall be appointed for each defendant.
- Article 25 of the Law against Domestic Violence states that every victim of domestic violence shall be represented by a lawyer or public defender. This language provides an exception to Article 71 of the Code of Criminal Procedure, which states that the aggrieved party in a criminal proceeding is a mere assistant to the Public Prosecutor, and that he or she shall be represented by the Public Prosecutor.

Article 25 creates the sharp potential for conflicts of interest in domestic violence cases in which both parties are indigent since, when interpreted in conjunction with Article 60 of the Code of Criminal Procedure, it permits a lawyer or public defender to represent both a victim and defendant in the same case. In fact, this reportedly happens routinely, especially in districts outside Dili where the shortage of lawyers and public defenders is severe. One case was reported in which a public defender represented both a victim and a defendant; he approached the victim in an attempt to mediate the case and persuade the victim to drop charges.

- Separate bodies of law govern public defenders, legal aid organizations and private lawyers, which often creates confusion and conflicts. For example, Article 12 of Law 15/2004, which provides rules for the training of magistrates and public defenders, states that they shall undergo a training program at the LTC consisting of one year of academic training and six months of practical training. Article 11 of Law 11/2008, which governs the training and practice of law by private lawyers at the same LTC, states that they must undergo training consisting of 15 months of theoretical instruction and nine months of practical training. Inconsistencies such as these are confusing and should be harmonized

INSTITUTIONS DELIVERING LEGAL ASSISTANCE

A combination of factors impact inadequate delivery of legal assistance services throughout the country, including insufficient numbers of lawyers, prosecutors and public defenders;¹² institutional pressures to resolve cases; unfamiliarity with laws and legal processes; high caseloads, low management capacity within offices and institutions, and allegations of corruption. Inconsistencies in legislation also negatively impact institutions abilities to deliver services.

Institutions and organizations currently providing legal assistance in criminal and civil cases include the following:

Office of the Public Defender

The Office of the Public Defender (OPD), under the Ministry of Justice, is the entity responsible for providing full and free of charge legal, judicial and extra-judicial assistance to citizens with insufficient

economic means.¹³ The OPD was originally established in 2001 during the period of UNTAET to represent defendants before the Special Panels for Serious Crimes in the Dili District Court.¹⁴ Priority was given to hiring and training judges, prosecutors and police; only seven public defenders, supported by a minimal budget, provided legal services to the entire country. Public defenders were viewed with suspicion since it was believed they would mainly represent militia members involved in post-referendum violence. From 2005 onwards, however, the OPD's mandate was extended to provide nation-wide legal aid and in 2008 the Public Defender Statute went into effect.

The Superior Council of Public Defender¹⁵ governs the appointment, transfer, promotion and discipline of public defenders. The Council holds meetings every 3 months and extraordinary meetings can occur at the request the Chairman, Public Defender General, or the other 3 members. There are currently 20 Timorese public defenders working nationwide: 13 in Dili, 3 in Baucau, 2 in Suai and 2 in Oecusse. They are assisted by 10 lawyer interns who are in the second stage of training at the LTC. The Public Defender General believes that ultimately 40 lawyers would be able to meet nationwide demand for services. Their deployment will follow the further deployment of judges and prosecutors. The justice sector currently has approximately 23 Timorese and 2 international prosecutors and 22 Timorese judges who are assisted by 3 Portuguese judges. The Prosecutor General has reportedly committed to placing prosecutors in Viqueque, Ermera, Same and Maliana once judges and public defenders are available to be deployed to those locations.

Public defenders provide representation in both civil and criminal cases. Most of their civil cases involve land disputes. In the first three months of 2014, the office received 600 requests for services; 300 of these requests came from Dili. No requests for representation were turned down.

Legal Aid Organizations

The Director of Timor Lorosa'e Lawyers' Association (AATL) states that as of 2002, 8 donor-funded legal aid organizations employing more than 25 lawyers have assisted in providing legal advice and representation to indigent clients. Interestingly, of the approximately 90 lawyers currently working in Timor, approximately 20 are women. Of those, approximately 12 work for legal aid organizations. Many legal aid organizations close when international funding stops. Lawyers, paralegals and staff formerly employed by legal aid organizations have in many cases left their positions and moved on to other employment; some have left the justice sector entirely. This represents a loss of training and expertise.

There is a recognized need to focus more on creating sustainable legal aid organizations. 2 organizations, Instituto Juridico de Timor-Leste and Liberta, continue to provide assistance to indigent clients by reserving part of fees received from paying clients and using them for pro bono representation. Others, such as Asitensia Legal ba Feto no Labarik (ALFeLa), hope to secure partial or full funding from the Ministry of Social Solidarity. As a result of the 2010 Law Against Domestic Violence, legal aid organizations focusing on issues relating to women and children tend to be better funded and managed in the current environment. ALFeLa, for example, enjoys robust funding and support from international mentors who have helped introduce effective management practices.

Private Lawyers

It is difficult to accurately assess the number of private lawyers currently working in Timor-Leste. The Director General of LTC reports that approximately 40 private lawyers have graduated from the Center and that an additional 34 are currently studying there. Part of the difficulty in assessing the number of private lawyers is that following graduation from the LTC, an unknown number have been unable to find

¹³ Article 16 of Decree-Law 12/2008, of 30/4 (Organic Statute of the MoJ)

¹⁴ Office of Public Defender "Bringing Justice Close to the People, UNMIT/Serious Crime Investigation Team (SCIT)

¹⁵ Established by the Decree Law 38/2008 on the Statutes of Public Defenders, the Superior Council of Public Defender is currently consist of Minster of Justice who presides the Council, Public Defender General Sergio Hornai, Tiago Sarmiento appointed by the National Parliament, Alsino Barris appointed by the Office of President, and public defender Cancio Xavier elected from among the peer public defenders.

employment in private law firms and therefore either entered non-legal employment or found work in other branches of the justice sector. Private lawyers tend to represent wealthy clients and government officials. Few provide pro bono legal services; those who do are based in Dili.

There are reportedly fewer than five international law firms operating in Timor-Leste. They handle only cases involving large international business transactions. Foreign lawyers currently practicing in Timor-Leste tend to concentrate on contract and business cases.

Other Actors

To help fill the gap between the great need for legal services and the limited availability of lawyers and public defenders, several interim strategies are currently in place, such as the United Nations Development Program (UNDP) Mobile Justice Initiative, planned *Clinicas Juridicas* (Legal Clinics), paralegals, and trainees of the Legal Training Center. While these interim resources are useful in the short term, they are not necessarily part of a long-term, comprehensive and sustainable framework for providing legal assistance to poor people.

United Nations Development Program (UNDP) Mobile Justice Initiative

First introduced in 2010, the UNDP-funded mobile courts have been operational in the four districts covered by the Suai court: Ainaro, Manufahi, Bobonaro, and Covalima.¹⁶ Mobile courts are designed to resolve disputes in outlying districts while educating the public about the formal court system. Teams of judges, prosecutors, public defenders and interpreters travel to rural areas three days per month and have resolved more than 70 criminal cases. Backlogs in criminal cases have been eliminated, and mobile justice teams now plan to begin to tackle backlogs in civil cases.

Following a gap at the end of the first phase of the program in December 2012, a second phase was initiated in the Suai District Court region at the request of the incoming President of the Court of Appeal. The program has enjoyed great success since local citizens are able to observe how court proceedings are conducted and ask questions. Proceedings are as flexible as needed; in some cases hearings have continued past midnight to accommodate parties and witnesses who traveled long distances. It is uncertain whether UNDP plans to introduce mobile courts in Dili, Baucau and other districts in the near future will proceed.

Clinicas Juridicas (Legal Clinics)

The MoJ reportedly plans to introduce pilot legal clinics in a number of locations at the sub-district and *suco* levels. The Minister and his Director of the National Directorate for Human Rights and Citizenship state that the legal clinics are modeled after a similar project in Mozambique that proved to be very popular among residents of rural areas. Legal Clinics will provide community members with legal information, advice and education on topics that are relevant to each community. Although legal representation during disputes may be provided at times, representation is not the primary goal of the Clinics. The MoJ's plan specifies that the legal clinics are to be staffed by at least one lawyer, accredited by the LTC, who has received training in issues such as domestic violence and land disputes. Law faculty interns will support the work of the lawyers. Funding for the pilot programs is currently being sought by the MoJ. If the pilots are successful, legal clinics will be included as part of annual MoJ budget proposals in the future.

Paralegals

Until international funding of legal aid organizations ceased, several organizations administered paralegal programs through which paralegals provided community education and legal advice to people in Dili and outlying districts. Two organizations, Fundasaun Edukasaun Komunitade Matebian (ECM) and Fundasaun Fatu Sinai Oecusse (FFSO), formerly administered paralegal programs that employed 27 paralegals who assisted people in local communities by providing legal advice and making referrals to legal aid

¹⁶ The President of the Court of Appeal stated that mobile courts were also operational in Baucau and areas covered under the jurisdiction of the Dili District Courts, although this information could not be verified.

organizations. Paralegals previously trained and funded have for the most part left those organizations and are now employed in other fields.

Trainees at the Legal Training Center (LTC)

The two-year training program at the LTC includes two phases: a 15 month program in theoretical training followed by 9 months of on-the-job work experience in a law firm, legal aid organization, or public defender office. Article 12 of Law 11/2008 states that during the second stage of training, trainee lawyers are able to represent clients in semi-public offenses and civil cases in which the claim is less than \$1000. They can also carry out legal consultations and provide public education. Interim lawyers currently enrolled in the second stage of training are an important source of assistance to public defenders and other offices. To fully realize their potential the Public Defender Statute needs to contain similar enumeration of responsibilities permitted by those students in the second stage of training at the LTC.

LANGUAGE AND RELATED ISSUES

The Director of the Judicial System Monitoring Programme (JSMP), a Timorese led not-for-profit organization working to improve the judicial and legislative systems in Timor-Leste and subgrantee of the Ba Distrito program, considers language issues to be the greatest impediment to the delivery of justice in the formal court system at this time.

It is estimated that there are more than 30 local languages spoken throughout the country. Tetun, Makasae, Galole, Mambae, and Kemak are spoken by significant portions of the population. While the overwhelming majority of Timorese do not speak Portuguese, Section 13 of the 2002 Constitution specifies that Tetun and Portuguese are the official languages of Timor-Leste, and Article 82 of the Code of Criminal Procedure states that under penalty of nullity, procedural acts in court shall be performed using one of the official languages. Article 104 of the Civil Procedure Codes also provides judicial acts should use official languages of Timor-Leste: Tetun and Portuguese. Interviews suggested that a 2004 opinion from the Court of Appeal reportedly requires that all legal and court documents be written in Portuguese; however the Ba Distrito consultant was not able to obtain a copy of this opinion.

Article 83 of the Code of Criminal Procedure requires the appointment of an interpreter whenever a person does not know an official language or cannot use it to make a statement in court. Yet, court budgets do not include permanent funds to pay interpreters, who are subject to losing their jobs at any time. Court proceedings held in Portuguese or Tetun often have to be summarized in a local language so parties understand what has taken place, and a 2013 survey conducted by the Asia Foundation¹⁷ found that 30 percent of survey respondents who had been to court reported that they did not understand any of the legal proceedings because of unfamiliarity with language -- an increase of one percent over statistics gathered during a 2008 survey.

Training programs at the LTC, which are mandatory for anyone who wishes to practice law in Timor-Leste, are conducted exclusively in Portuguese even though many trainees enter without any knowledge of that language. Portuguese language classes are given as part of the curriculum, and in order to graduate from the LTC minimal fluency in the language must be demonstrated. During the nine month practical training stage, when trainees serve in legal offices, administrators attempt to place those with weak Portuguese skills in Dili so they can continue with language training. For all these reasons, language requirements impact the number of trainees and public defenders who can be placed in outlying districts, where the need for legal services is greatest.

¹⁷ Timor-Leste Law and Justice Survey (The Asia Foundation, November 2013).

SNAP SHOT OF LEGAL ASSISTANCE IN THE DISTRICTS OF OECUSSE AND BAUCAU

Outside of the capital Dili, needs relating to access to justice and the delivery of legal services are severely constrained by the small number of district courts and a correspondingly low number of public defenders and legal aid organizations. Interviews conducted by the Ba Distrito consultant suggested that persons accused and detained are never interviewed or assisted by lawyers before their first court appearances, and in court, public defenders and lawyers do not fulfill their obligations to investigate, call witnesses, file motions or present arguments.

A snapshot of legal assistance service delivery in two distinct districts, Oecusse and Baucau, was developed as part of consultant assessment, and key findings from interviews are presented below.

Oecusse

One judge, one prosecutor and two public defenders (one fully certified and one public defender intern who is completing the second stage of his training) are stationed in Oecusse. Another private lawyer also provides assistance to the public defender. The public defender reported a high demand for his services in both civil and criminal cases and that each month his office processes 30 – 50 cases. No formal statistics were available. Some cases are resolved by litigation in court and some are mediated in the public defender's office. Because of his heavy caseload, the public defender stated that he is not able to prepare cases before court or investigate charges. He believes five or six additional public defenders would be sufficient to meet his workload.

The public defender stated he believes he is legally obligated to accept anyone who requests his services, and he has never turned a client down. Even though Article 5 of the Public Defender Statute states that applicants for public defender services must state that they lack sufficient means to pay court costs, he believes that Article 3 of the same statute, stating that the public defender's office may not refuse to provide its services if it is requested to do so, supersedes the requirement of inability to pay costs. He believes he can represent multiple co-defendants if they are charged in the same case.

The annual budget for the Oecusse Office of the Public Defender comes from the national Public Defender Office in Dili and includes funds for transportation, infrastructure and staff, including three administrative assistants and a driver. The Oecusse public defender is never asked for an estimate of his budget needs and is given no opportunity to give input into annual budget processes.

When the current judge started working in the Oecusse court in 2012, his workload was approximately 250 cases per year. In 2013 it was 120 cases. During the first half of 2014 he processed 120 cases. The judge stated that two additional judges are needed to adequately handle his heavy caseload. When cases require a panel of three judges to adjudicate, the judge sets them aside and notifies the MoJ that he needs two additional judges to travel to Oecusse to resolve them. The majority of cases handled in the formal court system in Oecusse involve paternity and domestic violence issues. Employees of legal aid organizations and police officers report that incest is also a significant problem but is rarely reported.

The judge in Oecusse reported that he is almost always able to appoint lawyers in cases in his court. He reports that delays in case processing tend to arise from the prosecutor's heavy caseload, not an absence of defense counsel. The prosecutor's workload has increased since domestic violence was made a public crime, which means cases have to be investigated and filed with the court.

Language is a problem in court. All court documents are written in Portuguese, and proceedings in this court are conducted in Tetun. However, almost everyone in Oecusse speaks only the local language (Baekeno). One Portuguese – Tetun interpreter is employed as a permanent civil servant, but a Baekeno – Tetun interpreter is contracted for only three months at a time. No permanent budget exists for his services and he can leave at any time if a better employment opportunity arises.

There are also 172 police officers in Oecusse; 17 of these are investigating officers. Police report that when a suspect is arrested, he is brought to the police station and told he has a right to a lawyer. However, lawyers never appear during detention periods, even when suspects are held for 72 hours, and do not meet their clients until they arrive in court. People do not know they have the right to a lawyer upon arrest so they never request one. Most people in Oecusse are not aware what the formal law says or what their legal rights are. Interviewees unanimously stated that a public education campaign providing information about laws and legal rights is needed.

No interrogations are conducted at the police station; first interviews of suspects are carried out in court. Police report that they would not conduct investigations unless they received an order from the prosecutor, which they state has never happened. Judges do not order police to investigate. The majority of cases are proven by way of confession in court. Defendants do not know they have a right to remain silent under constitutional and international law. One police officer in the Vulnerable Persons Unit received specialized training from a federal police training agency in Australia. He handles mainly domestic violence cases, although he also handles some sexual assault and incest cases. He receives cases if victims make reports directly to the police or if cases are referred by NGOs.

Traditional Justice

Most cases in Oecusse are resolved through the traditional justice system; if a case cannot be resolved there, it is referred to the formal court. Most people prefer to avoid the formal court since its processes are unfamiliar and are conducted in Portuguese or Tetun, which few people speak. Victims in particular tend to prefer traditional justice mechanisms since resolution of disputes results in concrete reparations to victims in the form of something useful, such as cattle.¹⁸ People do not see useful results coming from the formal court system.

Land and Property

Most land cases are mediated at the *suco* level; if that is not successful, cases can be referred to the Land and Property Office, where mediation services are available. The Land and Property Office also has responsibility for administering state property, collecting revenue and registering land claims. Mediations involve land disputes between individuals as well as between individuals and the state. Many cases involve land that was taken from people during Portuguese times and the Indonesian occupation; The Law No. 1/2003 on the Juridical Regime of Real Estate allows people to reclaim land and property unlawfully appropriated or occupied by third parties.¹⁹ In some cases those governments built government buildings on the land. Evidence presented in these cases is most often oral. Rarely is documentation available, especially in cases involving unlawful taking by Portuguese colonizers since they happened so long ago. Two mediators work full time in the Land and Property Office.

If the Land and Property Office cannot successfully mediate land claims, they are referred to the formal court. There are reportedly more than 200 land disputes currently pending at the Land and Property Office; one has successfully been mediated in 2014 and another is in process. 4385 parcels of land have been registered in Oecusse, most of them during the USAID-funded Land Registration Program, which ended in 2011. Following these registrations, 483 disputes over title arose between individuals and the state and 61 disputes arose between private individuals.

¹⁸ However, reparations awarded by traditional leaders do not always comply with requirements of fairness and equality. One woman reported that reparations are always given to a female party's family and not directly to the woman herself, even when she is the victim.

¹⁹ Article 12 of Law No. 1/2003 provides that "*national citizens whose real estate assets have been illegally appropriated or occupied by third parties must submit their claims relating to the right of ownership over such assets within a period of one year from the date of entry into force of the present law.*"

Legal Aid Organizations

Fundasaun Fatu Sinai Oecusse (FFSO) and ALFeLa are the sole NGOs providing free legal assistance in Oecusse.²⁰ FFSSO was established to do human rights work in 1999; in 2003 it transitioned into a legal assistance organization. FFSSO has a total staff of ten. The Asia Foundation has recently contracted with two additional lawyers who graduated from the Legal Training Center to provide temporary assistance to FFSSO through December 2014, primarily to complete cases begun by FFSSO under the previous USAID-funded Access to Justice Program. Previously the organization conducted a paralegal program in the 18 villages in Oecusse, but the paralegals are no longer active due to an absence of funding.

FFSSO conducts public awareness campaigns and represents clients in court. As of 2008, FFSSO has only handled civil cases and represented victims in criminal cases; they have not represented people charged with crimes. Most of the cases they handle involve claims of paternity, straying cattle and land disputes. If victims of domestic violence request assistance, they are referred to the police or an NGO that specializes in women's cases.

FFSSO's only funder at this time is USAID through Ba Distrito Program; its monthly budget is \$1000. With this budget FFSSO is also expected to conduct needs assessments in villages. What they have learned is that there is a great need for public education about laws and rights. If additional funding becomes available, they believe the greatest need is for grassroots public education. They would also like to be trained to conduct mediations since most people prefer mediation to adjudication.

Baucau

Three public defenders cover all four districts that fall under Baucau Court Jurisdiction including Viqueque, Lautem, Manatuto and Baucau where the Court sits. In October 2014, the public defender hopes that four new LTC graduates will be assigned to his office. He believes that if he is able to increase the total number of public defenders to seven, this will adequately meet the demands placed on his office. Total case statistics for the Office of the Public Defender for January 2010 through June 2014 are as follows.

Year	Number of Criminal Cases	Number of Civil Cases
2010	174	35
2011	240	31
2012	162	17
2013	202	17
2014 (through June 15)	205	30

The majority of criminal cases handled by the Office of the Public Defender involve claims of domestic violence and assault. According to the public defender, the sharp increase in cases in the first half of 2014 is due to elevating rates of crime, not increases in reporting.

As is the case in other locations, the public defender of Baucau never turns anyone away who requests the services of his office since he believes the law requires that he accept every request for representation. He acknowledges that this results in representation of non-indigent clients, but he believes the law gives him no alternative. No specific documentation, other than a letter from a village leader, is required to establish inability to pay legal expenses. "Common knowledge," such as when someone's house burns down, is also considered valid evidence for establishing inability to pay court costs. In cases involving more than one person charged with crime, the public defender handles all defendants unless an individual lawyer decides a legal conflict is too great.

²⁰ A private law firm, J&J Law Firm, is expected to open in Oecusse soon.

The Public Defender states that although the Constitution and other laws require that public defenders act independently,²¹ the absence of adequate resources to his office compromises their independence. For example, when he travels to interview clients or witnesses, or when he is asked to participate in a UNDP Mobile Justice Clinic, he has to share transportation with judges or prosecutors. The office also has no budget for cameras or other equipment needed to gather evidence and represent clients in court. The public defender strongly believes that the national budget for the Office of the Public Defender should be separated from the MoJ. The national Public Defender Office does not request budget input or estimates from district offices in preparation for annual budget submissions to the Ministry of Justice.

Legal Aid Organizations

Fundasaun Edukasaun Komunitade Matebian (ECM) and ALFeLa are the only legal assistance organizations currently operating in the district, and outside these organizations no other private lawyers are available. Twelve staff members currently work at ECM, including two accredited lawyers, three unaccredited lawyers, and two administrators. Three lawyers are currently studying at the LTC and will return to ECM after graduating in October. They are currently interning at the Office of the Public Defender in Baucau.

ECM presently represents clients in approximately 18 cases per month. They turn down more than 20 other cases monthly due to insufficient lawyers and funding. Most of the cases they keep involve domestic violence, divorce and land titling issues. ECM interprets conflict issues strictly; they will only represent one client in a case even if there is no apparent conflict.

ECM provides legal services in Lospalos, Viqueque, Manatutu and Baucau and has units that handle legal services for women and children, land disputes and crimes. Staff also provide periodic training programs. In the past, many training programs were given on criminal and civil procedure, domestic violence and advocacy skills, and training was also provided to community leaders. Due to the absence of funding, only two training programs per year are currently offered.

From 2005 through 2012, ECM was well funded under a grant from USAID through The Asia Foundation, but that funding ended and the organization currently survives only on a small grant from CARITAS in Australia. When USAID, through The Asia Foundation, funded the organization, 42 paralegals worked at ECM, many of them village leaders. Paralegals were provided with monthly stipends to cover expenses. Although they no longer receive funding, a few paralegals still volunteer for the organization. Due to funding uncertainties, the director of ECM is currently applying for re-admission to the LTC to be trained as a judge.

The public defender believes there is sufficient need to justify the presence of additional legal aid organizations in Baucau, although he claims that public awareness of laws and legal rights is very low in the district.²²

²¹ Under current legislation, the Office of the Public Defender falls under administrative responsibility of the Ministry of Justice. See Articles 1 and 12 of Law 38/2008, Public Defender Office Statute. However, when carrying out their professional duties, public defenders are guaranteed independence. See Article 1 of Law 38/2008 (“Without prejudice to its technical and functional independence, the Public Defender’s Office is subject to the oversight of the Ministry of Justice”) and Article 48(2)(a) of the same statute (“The State also guarantees public defenders the following: Independence in the performance of their functions. . .”). Further, ethical duties owed by public defenders, as set forth in Articles 46 and 47 of Law 38/2008, require that they act impartially, diligently, assiduously and zealously on behalf of their clients, avoiding actions that conflict with functions inherent to the positions they hold. According to Article 39 of Law 11/2008, private lawyers are also ethically bound to remain independent when carrying out their professional duties. The functional independence of all defense lawyers, both private lawyers and public defenders, is further protected in Article 62 of the Draft Bar Association Law.

²² Although information gained during this consultancy in both Oecusse and Baucau consistently revealed very low levels of public awareness of laws and legal rights, the August 2014 Ba Distrito Baseline Survey showed that the majority of respondents (62.24%) reported that they had received either some or a lot of information on the district

Police do not contact lawyers at ECM for assistance during 72 hour detention periods. Most people do not realize they have a right to legal assistance following arrest. There is a great need for public education throughout the district.

Traditional Justice

As in Oecusse, most people prefer to have their cases resolved at local levels since courts are too far away and too expensive, and their processes are not familiar. Mediation by village chiefs – as opposed to community elders – is often preferred by defendants since chiefs impose no fines or sanctions, whereas elders in the traditional justice system tend to require the payment of cattle or other financial sanctions. Elders in the traditional justice system are all male. Mediation training was provided to a number of chiefs and community leaders in Baucau by *Avocats Sans Frontieres* but ended when that organization closed its offices in Timor-Leste. Most cases resolved by village chiefs involve land disputes. Criminal cases are usually referred to the formal court system, although if both parties agree, cases can be withdrawn from court and mediated by village chiefs. Although the 2010 domestic violence law requires that cases involving domestic violence must be referred to the formal court system, many are reportedly still mediated by traditional and local leaders.

Land and Property

Land disputes are also mediated at the Land and Property Office. The Director of the Land and Property Office mediates cases with assistance from village leaders, local NGOs and the police. Most cases handled by that office involve disputed boundaries between *sucos* or between owners of individual plots of land. There are also a number of disputes resulting from persons who were displaced during Portuguese and Indonesian occupations who later returned to find their land occupied by others. Some land disputes involve claims against the state when it takes control of privately owned land for public uses. The Director prefers to refer disputes to village leaders whenever possible since they are familiar with the parties and the history of occupation and ownership of the land. Land disputes are resolved by calling witnesses who can testify about the history of ownership and occupation; registration documents only exist in cities and are not available in rural areas. Claims involve a mix of formal law and local customs and are often influenced by the customary inability of women to inherit land. If a land dispute cannot be resolved at the village level or in the Land and Property Office, it is referred to the formal court system, and lawyers are required. This creates problems since there are reportedly not enough lawyers in Baucau to handle land cases in an expeditious manner.

In 2013, 30 land cases were handled by the Land and Property Office. In 2014 it is expected that four cases will be handled every three months. The ability to handle more cases was eliminated when funding previously provided by USAID ended. Mediators who had been trained under USAID funding left the office and are no longer mediating. The number of cases is expected to increase with the launch of the Sistema Nacional Cadastro (National Cadastral System) launched last July.

RECOMMENDATIONS FOR IMPROVING LEGAL ASSISTANCE SERVICES:

Legislative Review and Reform

The current legal framework governing titles, roles and competencies of lawyers has been enacted sporadically and in a piecemeal manner; the framework is confusing, overlapping and sometimes conflicting. Although Section 135 of the Constitution sets forth roles and responsibilities for lawyers and public defenders together, and Article 48 of Law 38/2008 states that public defenders enjoy the same guarantees

court system, and an even larger percentage (77.9%) reported having received information about the availability of legal aid. The Baseline Survey was carried out in Oecusse, Baucau and Covalima.

and prerogatives that other lawyers enjoy, separate codes currently regulate practice by private lawyers and public defenders.²³ Inconsistencies, ambiguities and gaps in legislation are permitting subjective, opportunistic interpretation and in some cases may lead to corruption. In the short term, pending legislative reform, it may be necessary to continue to distinguish between public defenders and other lawyers, but in the long term all lawyers and public defenders should be identified as lawyers and made subject to the same regulations and a uniform Code of Ethics.

Current rules governing representation in criminal cases in which more than one person is charged create strong potentials for conflicts of interest. Although in the short term immediately following conflict when a severe shortage of lawyers existed nationwide, Article 69 of the Code of Criminal Procedure (stating that when there is more than one defendant, the court may appoint a defender for someone from among counsel retained by other defendants) might have served the valuable purpose of ensuring that every person had access to legal representation, it should not remain in effect in the long term since it creates inevitable conflicts of interest. In order to build the Rule of Law and public confidence in the formal court system, language governing conflicts of interest should state that every potential *appearance* of conflict should be avoided. Such a rule would mandate separate counsel for every person involved in a case.

A single Code of Ethics for all lawyers is needed. Currently ethical guidelines are included in several different codes, including the Public Defender statute, Law 11/2008 Regulating Practice by Private Lawyers, Law 15/2004 governing recruitment and training of magistrates and Public Defenders, and the draft Bar Association Law. The mélange of laws creates the impression that different lawyers are subject to different ethical guidelines and creates the danger of conflicting and subjective interpretations.

A comprehensive systematic analysis of the legal framework setting out rights to legal assistance for poor people, both in and outside court, also needs to be carried out. Examples of clarifications needed include:

- Eligibility criteria for free legal services for poor people. The vague, ambiguous statutes now in effect allow for subjective interpretation and potential corruption. Even the Public Defender General states that the practice of having village chiefs write letters stating that people do not have adequate means to pay court costs is abused. The draft Access to Courts Law attempts to clarify eligibility criteria, but problems with suggested reforms have been identified by several organizations.
- When Public Defenders can refuse representation. Article 3 of the Public Defender Statute, stating that public defenders do not have the right to turn down requests for assistance, appears to be a vestige of the immediate post-conflict era when it was feared that public defenders might refuse to represent militia members and other unpopular clients. It is currently being used by public defenders to justify accepting wealthy clients for representation. At a minimum, the statute should be amended to state that there is no right to refuse to represent a client who is otherwise eligible for services.
- If and when client's can chose or replace lawyers. Article 34 of the Constitution, which is interpreted to allow clients to choose their own lawyers, is being misapplied and should be amended, especially given the absence of clear conflict of interest rules. It is reportedly not uncommon for clients to change lawyers several times over the course of a case due to dissatisfaction with legal strategy, or for less compelling reasons. Article 66(3) of the Code of Criminal Procedure, which states that a public defender can be replaced on the initiative of the defendant or defender by invoking reasonable grounds, is vague and often deliberately misapplied. It should be amended to provide clearer guidelines for replacement of counsel.

The draft Access to Courts Law attempts to create an institutional framework for state-sponsored delivery of legal services to the poor. The draft requires further revision to address the issues above and some weaknesses in several other areas:

²³ Law 38/2008 regulates the practice of public defenders, and Law 11/2008 regulates the practice of private lawyers. Article 22(3) of Law 11/2008 specifically states that that law does not apply to public defenders.

- The responsibility of the state to guarantee access to courts and protection under law is well stated in Article 2. This article complies with Timor-Leste's obligations under the International Covenant on Civil and Political Rights. However, the relationship between the draft law and other legislation currently in existence, including the Public Defender Statute and Law 11/2008 Regulating the Private Practice of Law and Training of Lawyers is unclear. Some provisions (for example, criteria for determining indigence and situations in which a defender or lawyer may request to be relieved from a case) differ from aspects of existing law. If enacted in its current form, the draft law would complicate an already crowded field and make implementation even more difficult. Instead of enacting further piecemeal legislation, consideration should be given to first conducting a comprehensive analysis of all laws governing the delivery of legal assistance and creating one harmonized legal framework not subject to conflicting or selective interpretations.
- Budget issues are not clarified in the draft law. How the draft would interface with the Public Defender Statute with respect to funding the Office of the Public Defender is not specified. The source of funds for paying non-public defenders is also unclear.
- Responsibility for administering the program appears to rest with the Bar Association, which does not yet exist. Division of responsibilities between the Bar Association and Office of the Public Defender is unclear.
- The scheme appears to provide a right to counsel in both civil and criminal cases. As noted above, a strict analysis of the Timorese Constitution appears only to mandate counsel for the indigent in criminal cases.
- A right to choose one's own lawyer is included. As noted earlier in this report, such a right is not recognized in many other countries, especially where shortages of lawyers exists. Additionally, whether a case is referred to a public defender office or to the Bar Association for appointment of counsel is unclear.
- The role of prosecutors in the determination of indigence seems to be conflicting. Article 17 seems to provide that indigence is to be evaluated by a judge, with no opposition permitted. However, sequential articles provide for participation by prosecutors. In other countries, determinations of indigence are usually made by judges in non-adversarial proceedings in which prosecutors play no role.

Improve Training and Status of Public Defenders and Lawyers Engaged in Legal Aid

Even after graduating from the LTC, the skill level of some of the graduates is often very low. A needs-based assessment and review of the training curriculum should be conducted to ensure that it meets the needs of justice sector personnel and enables them to carry out their professional duties following graduation.²⁴ Although Article 13 of Law 15/2004 on Recruitment and Training for the Professional Careers of the Judiciary and the Office of the Public Defender requires that the curriculum of the LTC be reviewed annually by the Center's Pedagogical Board, there is no evidence that any annual review takes place. Moreover, training at the LTC is currently conducted by international Portuguese-speaking trainers. This model is not sustainable in the long term, and consideration should be given to implementing a Train the Trainers program as a strategy to create a permanent cadre of Timorese trainers.²⁵

Consideration should be given to institutionalizing Mandatory Continuing Education programs for judges, prosecutors, public defenders and other lawyers as conditions of retaining their professional licenses. Ongoing professional education is encouraged in the current legal framework, including in Law 15/2004 governing recruitment and training of magistrates and public defenders, and Article 175 of the draft Bar

²⁴ Although information was received after this consultancy concluded that UNDP recently completed a curriculum assessment, it was not possible to obtain a copy of the assessment for review.

²⁵ UNDP has reportedly carried out at least one Train the Trainers program that was attended by senior magistrates, public defenders, private lawyers, and law professors. Additional programs should be conducted to ensure the creation of a sustainable cadre of Timorese trainers qualified to provide training in all aspects of law, including criminal defense.

Association Law states that continuous education is the duty of all attorneys; however, continuing education is not required as a condition of maintaining legal licenses. Promotion within the Office of the Public Defender, provided for in Article 20 of the Public Defender Statute, could be made conditional upon undergoing a certain number of hours of continuing legal education annually.

Article 71 of Law 11/2008 Regulating the Private Practice of Law and Private Lawyers states that it is the obligation of the LTC to promote the organization of seminars, conferences and training courses, and Articles 25 – 29 of the Law on Recruitment and Training for the Professional Careers of the Judiciary and Office of the Public Defender states that “complementary training shall be provided by the Legal Training Center for trainees who have already graduated.” However, with rare exception the Center currently does not fulfill these obligations.

Public defenders and lawyers in legal aid organizations do not appear to be aware of what professional responsibilities they are required or entitled to carry out under the law. They do not develop theories of cases, interview witnesses or file appropriate motions in court, although Article 60 of the Code of Criminal Procedure authorizes them to provide evidence and request that actions deemed necessary for their defense be carried out. Since a uniform training program is given to all trainees at the LTC, practical skills-based training programs specifically for public defenders and legal aid lawyers should be included as part of mandatory continuing legal education programs. In many countries, skills-based training programs are organized by legal aid and criminal defense organizations.²⁶ Although no such organizations currently exist in Timor-Leste, the country is a member of the South Pacific Lawyers’ Association, which may be willing to coordinate training programs for lawyers. Another potential training resource might be the International Bar Association.

Since the Timorese legal framework is still in flux and many laws have not yet been drafted, lawyers who were trained at the LTC during its initial years will not remain adequately trained throughout their careers. Consideration should be given to compelling the Center to fulfill its ongoing training responsibilities to ensure that judges, prosecutors, public defenders and private lawyers remain informed as laws continue to develop.

There currently exists a firm professional hierarchy throughout the justice system, in which public defenders are at the bottom. This hierarchy begins at the LTC. Article 15 of Law 15/2004 states that professional vacancies are filled according to stated preferences and final grades received at the Center; trainees who graduate at the top of their class become judges and those in the middle of their class become prosecutors. Trainees who graduate at the bottom of their class become public defenders. The stigma of presumptively having graduated at the bottom of their class remains with public defenders throughout their careers. In many countries, where both civil code and common law system exist, the role of legal aid lawyers and public defenders is highly respected, and steps should be taken to introduce a similar culture in Timor-Leste. Regional and international consultants may be able to develop workshops and conferences that assist in elevating the stature of lawyers who serve the poor, and membership in international bar associations should be encouraged.

Better Bridge Language Gaps

Language issues deeply impact the degree to which ordinary people, especially in outlying districts, have access to justice. Very few laws have been translated from Portuguese, and interpreters are not always available in court, especially in the outlying districts. This situation violates the Constitution and Timor’s obligations under international law. At a minimum, all laws should be translated into Tetun and ideally into other local languages as well. Priority should be given to distributing laws on crimes, criminal procedure and land issues. Copies of translated laws should be distributed throughout the country as part of public education programs.

²⁶ An example of an annual program for continuing legal education for public defenders and private lawyers can be found at <http://www.claraweb.us/cpdas-continuing-legal-education-calendar-of-events-page>

Introduce More Systemic and Systematic Planning

Public defense and legal assistance to the poor should be regarded as one integral part of the overall justice system, without which justice cannot be administered. Legal services should be funded and managed equally alongside other justice system actors, including judges and prosecutors. This balance would not only ensure the principle of equality of arms; it would also ensure that the justice system works smoothly and efficiently, and that decisions are not overturned on appeal due to inadequate representation of poor people. In outlying districts, whenever new courts are opened and staffed, public defenders should be assigned at the same time.

Although the Preamble to the Public Defender Statute states that the Office of the Public Defender (OPD) is an agency endowed with technical autonomy, subject to MoJ oversight, the budget for the OPD is currently intermingled with the general MoJ budget. It does not appear that a specific amount or percentage of the general budget is guaranteed each year for the OPD, and it is arguably never in the best interest of the Ministry to delegate much of its budget to that office. Complaints about corruption alleging that public defenders represent Ministry officials who are financially ineligible for their services add to arguments for separate budgets. Inputs to proposed budgets and funding needs should be solicited annually from public defenders in the outlying districts, and consideration should be given to having the budget for the national OPD should be segregated from the general MoJ budget.

Support Development of a Sustainable and Comprehensive Legal Aid System

A comprehensive sustainable plan for the long-term delivery of legal services to poor people does not yet exist. The small number of trained lawyers who provide legal services to the indigent leaves many gaps in access to justice. For example, although Section 30 of the Constitution states that a right to counsel attaches immediately upon arrest, detainees are never accorded that right prior to appearing in court. This fact not only violates the right to counsel under Timorese and international law; it also unfairly burdens judges who must conduct investigations and interview witnesses themselves in order to process cases. The need for additional OPD personnel will not disappear any time soon. Once strict conflict of interest rules are implemented, the OPD will not be able to provide legal assistance and representation to all poor people. It is inevitable that a sustainable long-term strategy will need to be developed to deliver legal services to people who cannot be represented by the OPD. In order to meet constitutional and statutory guarantees to the right to counsel and legal assistance, such a strategy will necessarily require establishment and support for new institutions and actors beyond the OPD and struggling legal aid organizations.

Past and current discussions involving the issue of sustainability refer to sustainability of individual legal aid organizations, not sustainability of delivery of legal services. It is understood that until the government develops a comprehensive scheme that provides for legal services and representation to all poor people, small legal aid organizations are needed to provide legal services to those people not represented by the OPD. Women and children in particular benefit from the services of legal aid organizations that focus on domestic violence and other problems they face.²⁷ The range of capacity and commitment in existing legal aid organizations varies widely. Although it may be possible to preserve the more effective legal aid organizations on an interim basis through donor funding, their ongoing financial sustainability is a challenge.²⁸ A successful model employed by LIBERTA and Instituto Juridico de Timor-Leste, wherein lawyers use part of funds received from paying clients to fund representation of those who are indigent, mirrors pro bono strategies in many developed nations. However, the number of indigent clients these law firms represent is small and this model cannot meet nationwide needs for additional legal services. It is therefore suggested that

²⁷ 2010 revisions to laws governing domestic violence have greatly increased reporting of these cases. ALFeLa reports that in 2005, only ten domestic violence cases were reported nationwide. In 2013, 361 cases were handled by that organization. In the first five months of 2014, ALFeLa handled 250 cases. They report that more than 900 domestic violence cases are currently pending nationwide.

²⁸ One interviewee proposed that government funds set aside in the draft Access to Courts Law for private lawyers to represent indigent people instead be channeled to support legal aid organizations.

a more comprehensive, holistic analysis be undertaken in which options for long term sustainability of a legal aid system are considered, as opposed to sustainability of individual organizations.

A number of new programs and initiatives should be considered in developing a more comprehensive and sustainable legal aid system, including:

Government-Funded Indigent Panels

In many countries, the government, through the Ministry of Justice or another executive or judicial body, funds panels of private lawyers who provide legal services in cases in which the OPD is unavailable for conflict or other reasons. Panels may be administered by bar associations, courts or local governments. In order to register as a member of an indigent panel, lawyers must meet certain qualifications, including requisite levels of practice and experience. Panel administrators are responsible for day-to-day management of the program; they review qualifications of applicants, offer periodic training to panel members, review fee requests and carry out other administrative responsibilities. Advisory Councils often oversee general operations and hire program administrators. Fee structures for panel lawyers can provide for flat fees for certain types of cases or hourly rates.

Mandatory Post-Graduate Legal Service Program

Under post graduate legal service programs, university and post-graduate students are required to serve one year in a rural area away from their home state following graduation. Law school graduates move to outlying districts and work for branches of the Ministry of Justice, legal aid organizations, and public defender offices, among other placements. Such programs make badly needed legal services available to poor people in rural areas where access to courts and legal assistance is limited or unavailable. Such programs can be managed by a national office that monitors attendance and performance on a monthly basis. A similar program could be introduced in Timor-Leste and made mandatory following graduation from the LTC. Since the MoJ provides funding for studies at the LTC, it could require in return one year of service in outlying districts as a condition of having received funding, and an annual stipend to cover living expenses could be provided. The one year probationary period required by Article 20 of the Law on Recruitment and Training of Magistrates and Public Defenders could serve as a logical framework for such service and allow for periodic monitoring of attendance and performance. Somewhat similar model currently exists in Timor for medical students who receive government funding to study in Cuba; upon graduation they are required to return to rural areas and provide medical services to people living there. Although these medical graduates are being salaried by the government as civil servants, this model could serve as the basis for a similar program for law graduates where private lawyers, upon graduation from government-funded LTC, could be provided with a modest government stipend to serve in rural areas for one or two years .

Mandatory Pro Bono Requirement

A long-term solution to the need for legal services for the indigent may include introducing the ethic of pro bono service by non-government lawyers and law firms. Article 69 of the draft Bar Association Statute speaks broadly about duties owed by lawyers to their community,²⁹ but a specific statute requiring that all lawyers not working for governmental bodies donate a certain number of hours per year to represent indigent clients may be useful. Lawyers interviewed during this consultancy supported the idea of mandatory pro bono requirements as long as the number of hours required was not excessive. In some jurisdictions, law school graduates applying for admission to practice law must demonstrate completion of a required number of hours of pro bono service. For example, Section 520.16(a) of New York's Rules of the Court of Appeals for the Admission of Attorneys and Counselors at Law requires every applicant admitted to the New York State bar on or after January 1, 2015 "to complete at least 50 hours of qualifying pro bono service prior to filing an application for admission with the appropriate Appellate Division department of the Supreme Court."

²⁹ Article 40 of Law 11/2008 Regulating the Private Practice of Law and the Training of Lawyers also specifies general obligations owed by lawyers to the community, but it does not address pro bono services.

Additionally, pro bono work by Timorese law firms should be encouraged and recognized. A prominent US legal magazine, for example, annually ranks law firms on a number of criteria, including the firms' level of commitment to pro bono work. The rankings are considered to be highly prestigious in the legal community. Law firms derive significant positive publicity from them, which in turn encourages higher contributions of pro bono work.

More Effective Use of Non-Lawyers through Paralegal Programs and Academic Clinical and Pro Bono Programs

As long as the current shortage of accredited lawyers exists, non-lawyers should be used more effectively to engage in community education activities and provide legal advice, even if non-lawyers are not able to represent people in court. Use of paralegals and LTC trainees in the final months of training should be considered for non-court activities, leaving accredited lawyers and public defenders to focus on in-court representation. At least one NGO, ALFeLa, effectively implements a paralegal program; consideration should be given to supporting and, if possible, replicating, this program in other locations.

Consideration should be given to engaging in discussions with law school administrators about initiating academic clinical programs and pro bono programs for law students. These programs could help fill the need for delivery of legal services while also sensitizing law students to legal needs of the indigent and fostering a pro bono ethic in new lawyers. There are currently four law schools in Timor;³⁰ each year, approximately 650 Timorese students graduate from law schools in Timor and Indonesia. In many countries, clinical programs are important parts of law school curricula. Students participate in law school clinical programs under the supervision of faculty to provide legal advice to indigent people, conduct interviews in detention facilities, deliver community legal education programs and engage in other activities that do not require accreditation. Students are unpaid and receive academic credit for their work.

In addition to clinical programs, many law schools have either elective or mandatory pro bono programs as part of their curricula. Under these programs, law schools make available to all law students at least once during their law school careers a well supervised law-related pro bono opportunity and either require the students' participation or find ways to attract the great majority of students to volunteer, and adopt a formal policy to encourage and support faculty members to perform pro bono work. The ultimate long-term goal is to dramatically increase the numbers of law students and law faculty involved in pro bono work.

Create Linkages between Formal and Traditional Justice Systems

As demonstrated during this consultancy and by responses received during the Baseline Assessment, justice administered by traditional and village leaders will continue to be the primary vehicle for resolving civil disputes, at least in the short term. In most outlying districts, criminal cases will also continue to be handled in these systems. During this interim period, consideration should be given to assessing ways to bridge formal, traditional and local systems to ensure consistent application of laws that do not violate the Constitution and applicable international laws. One proposal might be to require that formal courts defer to local and traditional adjudicators on the principles and application of traditional and local law and enforce their judgments, intervening only when constitutional or other requirements are violated.³¹ Consideration might also be given to training traditional and/or village leaders on constitutional and national laws to encourage them to impose judgments that do not violate national or international law. A draft law on traditional justice is reportedly under consideration, but it was not available for review during this consultancy and it is not known whether and in what potential form it recognizes traditional law.

³⁰ Universidade Nasional Timor-Leste (accredited), Universidade da Paz (accredited), Universidade Dili (accredited), and Universidade Oriental (not yet accredited). With the exception of Universidade Nasional Timor-Leste, all universities are private and have branches in some outlying districts, including Baucau and Oecusse.

³¹ See, for example, Pimentel, David, *Rule of Law Reform without Cultural Imperialism? Reinforcing Customary Justice Through Collateral Review in Southern Sudan* (2010) Hague Journal on the Rule of Law, 2: 1–28.

