



USAID
FROM THE AMERICAN PEOPLE

SRI LANKA

SRI LANKA RULE OF LAW ASSESSMENT REPORT 2010

MARCH 2010

This publication was produced for review by the United States Agency for International Development. It was prepared by ARD, Inc.

Prepared for the United States Agency for International Development, USAID Contract Number 383-C-00-08-000501-00

Authors: Assessment Team: Richard Hoffman, Barry Walsh, Sam Makkan

ARD Principal Contacts:	Ruzan Aghazadyan Project Manager ARD, Inc. Burlington, Vermont RAghazadyan@ardinc.com	Lewis Rasmussen Senior Technical Advisor, SuRG ARD, Inc. Burlington, Vermont LRasmussen@ardinc.com
-------------------------	---	--

In Sri Lanka: Susan Ward
ARD Chief of Party
Supporting Regional Governance (SuRG)
197 Court Road
Trincomalee, Sri Lanka
No. 72, Fifth Lane
Colombo – 3, Sri Lanka

ARD Home Office Address: ARD, Inc.
159 Bank Street, Suite 300,
Burlington, VT 05401
Tel: 802 658-3890, Fax 802 658-4247
www.ardinc.com

SRI LANKA RULE OF LAW

ASSESSMENT REPORT 2010

MARCH 2010

DISCLAIMER

The author's views expressed in this publication do not necessarily reflect the views of the United States Agency for International Development or the United States Government.

CONTENTS

- CONTENTS..... I**
- ACRONYMS II**
- EXECUTIVE SUMMARY..... III**
- INTRODUCTION AND ACKNOWLEDGMENTS VI**
- 1.0 STRATEGY, OPPORTUNITIES, AND RECOMMENDATIONS..... 1**
 - 1.1 OPPORTUNITIES FOR INTERVENTION 1
 - 1.1.1 Improved Case Management and Pretrial Procedural Reform to Reduce Criminal and Civil Case Delay..... 1
 - 1.1.2 Achieving Greater Whole-of-System Transparency in the Justice Sector..... 1
 - 1.1.3 Training of Judges 3
 - 1.1.4 Training of Non-judicial Personnel..... 3
 - 1.1.5 Donor Involvement in Legal Aid..... 4
 - 1.1.6 Paralegals in Jails, Police Stations and Courthouses 4
 - 1.1.7 Professionalization of Prosecution 5
 - 1.1.8 Juvenile Initiatives..... 5
 - 1.1.9 Witness/Victim Care (“No Witness, No Justice”) 5
 - 1.1.10 Land Disputes 6
 - 1.2 STRATEGIC APPROACH: GOAL, SEQUENCING AND SUPPORTING OBJECTIVES..... 6
 - 1.2.1 Strategic Objectives..... 17

ACRONYMS

AG	Attorney General
CRC	Convention on the Rights of the Child
DG	Democracy and Governance
GSL	Government of Sri Lanka
INL	[United States Department of State] Bureau of International Narcotics and Law Enforcement Affairs
JSC	Judicial Services Commission
JTI	Judicial Training Institute
LAC	Legal Aid Commission
LTTE	Liberation Tigers of Tamil Eelam
MOCA	Ministry of Constitutional Affairs
MOJ	Ministry of Justice and Law Reform
NGO	Nongovernmental Organization
OPDAT	[United States Department of Justice] Office of Overseas Prosecutorial Development, Assistance and Training
PTA	Prevention of Terrorism Act
SLLC	Sri Lanka Law College
SuRG	ARD's Supporting Regional Governance Project
UNDP	United Nations Development Program
USAID	United States Agency for International Development
US/USG	United States/United States Government

EXECUTIVE SUMMARY

This Sri Lanka Rule of Law Assessment was requested by USAID/Sri Lanka and completed under a contract with ARD, Inc., from January through March 2010. Principal researchers were Richard B. Hoffman, Barry Walsh, and Sam Makkan, advised by Mark Silva, Director, Democracy and Governance, USAID/Sri Lanka. Messrs. Hoffman, Walsh, and Makkan are independent consultants. Following preparatory meetings and document review in January, field research was conducted in Sri Lanka from February 2 to 19, and a report draft submitted to USAID/Sri Lanka on March 12, 2010. In addition to a review of primary and secondary documentation and journal articles, the team relied heavily on in-depth interviews with Sri Lankan and foreign experts for data, insights, and opinions about Sri Lanka's efforts to develop a working rule of law.

The main findings are well known to Sri Lankan legal experts and practitioners. Sri Lanka's rule of law development suffered from more than a quarter-century of internal civil war between the government and the separatist Liberation Tigers of Tamil Elam (LTTE), which only ended in May 2009. The government was victorious but large sections of the country—primarily in the north and east—remain devastated.

What are often described as the rich sources of Sri Lankan law—the Roman-Dutch system of civil law initiated during 16th century Dutch rule, almost two centuries of British common law, centuries-old legal traditions of both the Sinhalese and Tamil populations, Islamic law based on the Quran as followed by a small Muslim population, and the law of the Kandy kingdom that ruled much of Central Sri Lanka until 1815—have also resulted in tension between these systems and serious issues of legitimacy caused by lack of openness to both the Sinhalese and Tamil languages throughout the country.

Courts are encumbered in delivering effective justice by long-term procedural complexities (civil and criminal procedure codes in essence date to the 1880s and British rule) common to South Asia and resulting in extreme delays. Court cases in Sri Lanka and other South Asian nations often take more than 10 and even 20 years to be completed. Emergency regulations have placed authority to proceed in many criminal cases exclusively with the AG. Police prosecutors in Magistrates' Courts lack the professional capability of state counsel from the AG's Department who prosecute in High Court and the appellate courts. Bail is permitted by statute but is often denied in practice; as a result, the majority of prisoners in many jails are being held awaiting trial "on remand."

Even though representation provided by the Legal Aid Commission (LAC) has been expanded, many defendants still lack effective counsel. Lawyers appointed directly by judges often do not have necessary training or experience to provide adequate representation. The assessment team was told there was a lack of sufficient interpreters for courts in many locales, especially for Tamil interpreters in the north and east.

Judges receive inadequate judicial education, both upon appointment or on a continuing basis. Legal education suffers from reliance on rote learning and lecturing without requiring student participation or provision of advocacy training. The team has thus far been unable to obtain any statistics on caseloads or case activity in all levels of courts—**the first such experience in the recollection of team members** who collectively bring experience in analyzing justice systems in 15 countries.

Use of technology in courts and justice agencies is limited to an old computer system in the Court of Appeal and use of data processing system in Colombo District Court purely for docketing, excluding provision of management reports.

Parts of Justice Sector Reflect Long Sri Lankan Tradition of Rule of Law. Sri Lanka's legal system is one of the world's few hybrid systems; the principal other nations with such systems that merge aspects

of common and civil law systems are Scotland and South Africa. The Sri Lankan tradition followed under British rule was to accept features of Roman Dutch law and other legal structures of component groups, so that even today different laws regarding personal relations and other matters may govern Sinhalese, Tamil, and Muslim populations. Rather than the standard pride expressed by some in this complex legal structure, it might better be regarded as a source of some persisting legal confusion.

Consensus Exists Among Government, Bar, and Many Civil Society Observers on Needed Change.

Despite the previous chronicling of deficiencies in the rule of law observed in Sri Lanka, the team encountered a perhaps surprising degree of agreement among the Ministry of Justice (MOJ), AG's Department senior staff, leading members of the Bar and legal academe, and civil society organizations on needed reforms in the Sri Lankan justice system. This consensus may provide the political will necessary for efforts to improve the Sri Lankan justice sector to succeed.

These reforms include the following:

- **Improved case management to reduce delay**, viz., judges should take charge of the progress of cases through the system and set strict deadlines for each phase of the legal process;
- **Better judicial education**, including use of expert judges and academics from English-speaking nations within the common-law system (the US, the UK, and former UK dependencies), to assist judges here to prepare better decisions and judgments in English (English is the language of the appellate courts; proceedings in trial courts are conducted in Sinhalese or Tamil, depending on the court location);
- Introduction of **education for non-judicial officers in management of court operations**;
- Development of a **system of pretrial release** of defendants, far too many of whom are held "on remand" for long periods, i.e., in jail, pending trial;
- **Improved data collection and production of statistics** relating to management of the courts and the justice system, and greater distribution, preferably web-based, of decisional and statutory law to the bar, academics, and the public;
- **Improved transparency laws and accountability mechanisms for justice sector agency operations** in terms of general legal information, case management in courts, and accessibility of judicial services;
- **Improved public security and safety** through building police capacity at multiple levels, including developing better policies and procedures for aligning police work with other justice sector system components;
- Revised rules to permit **witnesses and victims** to refresh their testimony when called to testify years after a case has begun;
- **Professionalization of prosecution** in Magistrates' Courts by the following:
 - a. A phased replacement of police prosecutors by lawyers employed or supervised by the AG's Department, as is the practice in the High Court and the appellate courts; and
 - b. In coordination with the Office of Overseas Prosecutorial Development, Assistance, and Training (OPDAT) and/or the Bureau of International Narcotics and Law Enforcement Affairs (INL), **improved capacity of state prosecutors** to investigate and bring criminal cases to trial;
- **Expanded breadth of legal education** to increase proficiency of newly admitted and experienced lawyers;
- Expanded provision of **legal assistance**;
- Need for access to **interpreters** for court proceedings in all parts of the country;
- **Improved sentencing policies** in trial courts;
- Better means of **resolving land disputes**, especially in war areas;
- Eventual **transfer of court administration** to the judicial branch; and
- Ongoing efforts to establish separate judicial facilities for **juveniles**.

Proposed Strategy and Recommended Interventions. The Strategy, Opportunities, and Recommendations section provides phased stages of interventions which would be timed in accordance with the Government of Sri Lanka's commitment to justice sector reform. This assessment follows an expression of interest in USAID's investment in justice sector improvement by the Government of Sri Lanka's (GSL) MOJ. The MOJ has proceeded to specify several areas in which it would desire USAID assistance, including case management, judicial training, professional prosecution, procedural reform, and sentencing policy. Assuming GSL commitment, the report recommends USAID and the US government (USG) explore development of activities in these discrete areas, as well as enhanced legal education and professional regulation, legal assistance, and potential mediation of land disputes in war-affected zones. Although selective involvement in effecting these desired changes should generate better performance by key justice sector institutions such as prosecutors, judges, and the bar, improvements limited to these areas cannot by themselves produce increased regard for human and civil rights, which in the long run is critical for successful attainment of true rule of law in Sri Lanka.

A central feature of all the recommended activities is an emphasis on the need for short-term gains while working toward longer-term structural impact. Also, the team has attempted to suggest activities that can be 'scalable' subject to the availability of USAID funding levels. The team has recommended each of the improvement areas discussed above because individually, each appears clearly likely to improve the administration of justice in Sri Lanka. Continued investment, however, should be related to the perceived overall direction the Sri Lankan government follows with regard to respect for the basic human and civil rights of the population.

Strategy of Phased Interventions and Programs. Once it is clear that significant movement toward normalization is happening, programs should be developed in well-designed phases, so progress can be gauged in relation to the commitment of the government to improved rule of law. Moreover, programs should be discrete—separate efforts rather than a comprehensive, all-inclusive rule of law or overall justice system improvement project—to enable USAID to maintain measured provision of funding in relation to the demonstrated capacity of the affected justice sector institutions to employ resources effectively.

INTRODUCTION AND ACKNOWLEDGMENTS

The assessment was conducted over the course of three weeks in February 2010, by a three-person team organized by DPK (a division of ARD, Inc.) through a USAID contract known as Supporting Regional Governance, or SuRG. The Team Leader, Richard B. Hoffman, is a justice systems consultant with extensive experience in court administration, both domestically and internationally. Barry Walsh, a former court registrar in Australia, and Sam Makkan, a barrister and supervising prosecutor in England comprised the remainder of the team. The team was advised throughout their stay in Sri Lanka by Mark Silva, Esq., Director of Democracy and Governance (DG) for USAID/Sri Lanka, whose local knowledge and well-grounded viewpoint was invaluable. The team is grateful to Mr. Silva and to the entire USAID/Sri Lanka team, led by Mission Director Rebecca Cohn.

The team would like to thank the following for their assistance, time, and expertise: Lynn Carter of Management Systems International, member of two previous USAID/DG assessment teams in Sri Lanka; Susan Ward, ARD's Chief of Party for the Supporting Regional Government (SuRG) project in Sri Lanka, and her staff, especially former member Anandi Kanagaratnam, who is now serving as the Private Secretary to the Chief Justice of Sri Lanka; Sergio Zegarra and Ruzan Aghazadyan as the primary contract support officers; and William Davis, who served as the DPK project director. Other support was gratefully received from Mitch Gruner, Charlotte Chapman, Marie Lallier, and Lewis Rasmussen. The team is also indebted to several World Bank employees regarding its Legal and Judicial Capacity Building Project in Sri Lanka, and for assistance from the United Nations Development Program's (UNDP) Sri Lanka office.

Finally, the team deeply values and respects the time, opinions, knowledge, and suggestions provided by Sri Lankan interlocutors from the judicial establishment, police prosecutors, the Bar, academe, and civil society organizations. They, along with some of the reports their institutions have produced, are the primary source of the team's findings, conclusions, and recommendations. Every effort has been made to be accurate, balanced, and fair, but, as always, the assessment team alone is responsible for what is included in this Rule of Law Assessment.

While the leadership of the Ministry of Justice and Law Reform—the Minister, the Secretary, and an Additional Secretary—did meet with the team, and the team did get to meet a Supreme Court justice at a strategic planning meeting, requests to meet with the Chief Justice of the Supreme Court were referred to the MOJ and were not successful. The team is of the view that it is important to meet the judicial leadership when assessing the rule of law, although it is not always possible: in one other South Asian country, for example, one team member recalls being unable to meet with any High Court or appellate judges because of political sensitivity.

1.0 STRATEGY, OPPORTUNITIES, AND RECOMMENDATIONS

1.1 OPPORTUNITIES FOR INTERVENTION

1.1.1 Improved Case Management and Pretrial Procedural Reform to Reduce Criminal and Civil Case Delay

While efforts to introduce judicial management of court case flow may begin in the civil sector—where there are no emergency regulations delaying case progress and many parties are represented through the Legal Aid Commission’s program—the end of the emergency regulations and extensive use of the PTA are vital preconditions for any implementation of effective case flow management in criminal cases. This is also true for introduction of a system of pretrial release that is based on examination by the court of the defendant’s roots in the community, family background, employment, education, and risk of flight to determine appropriate conditions of release, which may include reporting, drug testing, or electronic monitoring.

1.1.2 Achieving Greater Whole-of-System Transparency in the Justice Sector

The following suggestions for donor interventions are concerned with fostering the adoption by the MOJ, the AG’s Department and the Sri Lankan judiciary of a commitment to transparency of their operations. The USG could distinguish its contribution from other donors by focusing on interventions aimed at improving justice system performance generally in ways that may impact on the whole apparatus of the rule of law.

- A. Develop transparency of justice system performance through annual reporting.** A fundamental barrier to the design of appropriate donor-sponsored interventions is the lack of essential information about the resources committed to the justice system and the actual performance standards of that system. It is clear that polite offers by many officials the team interviewed to provide statistical information later, which in no case has yet been actually fulfilled, or to refer the team to others instead of obtaining the information is direct evidence of the inability of justice sector agencies to accept the value of collecting and using performance data. Even if such data are actually collected and compiled by the courts and other agencies, it seems likely that these data are not used to inform decision making concerning the management of the justice system. This phenomenon is perhaps unique to Sri Lanka among the diversity of post-conflict developing countries that express interest in donors supporting their justice systems.

The team believes that the development of active systems of monitoring justice system performance should not only be a goal of any donor assistance that may be offered—it should also be a condition precedent to such assistance. The team recommends that there be donor programmatic support to developing system-wide monitoring, evaluation, and open accountability of justice system performance. Further, it is recommended that a commitment to achieve this objective by the judiciary, the AG, and the MOJ should be a condition of any other class of donor support that might be provided.

USAID may pursue this recommendation by funding the development within the Judicial Services Commission, the Ministry of Justice and / or the AG's Department of a program aimed at producing and publishing an annual report that incorporates comprehensive measures of caseloads and the financial and physical resources of the judiciary and prosecutorial agencies. This kind of program would require the establishment of a unit, or reinforcement of an existing unit within both institutions that is able to collect, compile, validate, and publish a system wide performance information report; and then to publish it via an annual printed report that is made available to the public in printed and electronic forms.

- B. Develop program to train interpreters.** In addition to the other difficulties faced in restarting courts in the Northern and Eastern Provinces after the cessation of hostilities last year, there has been a major shortage of Tamil-language interpreters. Immediate results in terms of fair administration of justice may be obtained by sponsoring a program to train needed interpreters for these court locations.
- C. Use web technology as a key medium of justice system accountability.** A key impediment to improved transparency of justice system performance is the cost of publishing information. The Lawnet system operated for some years to enable the MOJ to publish information on behalf of a range of justice sector institutions. The team was advised at different times that the service was erratic or had ceased entirely (with the website remaining active but carrying material that had not been updated), as was access to the MOJ's own website during the team's visit. While some judicial users appeared to find the existing system useful, review of the MOJ's website disclosed much outdated material. Improvement of the existing system aimed at giving justice sector agencies incentive to publish information promptly about their operational performance via web pages would benefit users and potential users. This kind of commitment would entail underwriting the development of skills within each agency for the production of original information about agency performance that may be incorporated into a website, along with support to the print production of a selection of publications, such as annual reports.
- D. Adopt the Free Access to Law Model for Sri Lankan Legal Information.** USAID could foster the development of facilities to produce a sustainable model for publishing legal information. The Free Access to Law Movement is a global federation of not-for-profit organizations dedicated to publishing statutes, case law, and other classes of legal information free of charge on Internet web pages. Lawnet has been relaying statutory and case law material to CommonLII (the Commonwealth Legal Information Institute at www.commonlii.org). CommonLII is part of WorldLII (www.worldlii.org), a portal of legal information websites that are members of the Free Access to Law Movement. The essential model of WorldLII websites is that legal information is compiled, usually by university law schools rather than government agencies, and conveyed electronically to one of the 14 legal information websites that subscribe to the free access to law philosophy. WorldLII currently links 1,155 databases from 123 countries or jurisdictions via those 14 legal information institute websites, including CommonLII.

USAID could assist the MOJ and the judiciary or Sri Lanka to make use of WorldLII as a means of publishing statutes and case law at low cost and in ways that are not necessarily dependent on sustained government financial support. To that end, USAID might assist the University of Colombo's Faculty of Law to establish the Legal Information Institute of Sri Lanka (SriLankaLII) that may join other WorldLII members. To achieve this, the capacity to convey new statutes and new court judgments in electronic form would need to be established within the legal drafting office of the MOJ and in the judiciary. This may entail providing technical assistance in the MOJ and in the new building that is to house the Sri Lanka Judges' Training Institute. The advantage of this assistance is that it would be short term and focused largely on startup capital and training

support. The WorldLII model relies on resources usually offered by institutions that are motivated to commit their own resources to access legal information in electronic form.

1.1.3 Training of Judges

The Sri Lanka Judges' Training Institute (JTI) has training programs that, for a large part, are aimed at offering training to the subordinate courts, providing only limited training opportunities to the higher judiciary, which comprises over 80 judges. This is the result of funding constraints, rather than a limitation on the institute's charter, as its legislation permits it to provide continuing judicial training opportunities to all members of the judiciary. In discussions with the MOJ, and with members of the lower judiciary that the team was able to meet, it was suggested that donors provide opportunities for members of the judiciary to pursue academic studies, including master of law degrees in universities in the UK, North America, and Europe.

There is probably little doubt that the Sri Lankan judiciary in general would be more effective if judges had increased opportunities for continuing judicial education. It appears, however, that donor support to general judicial education has been constrained by the conflict. With the exception of the World Bank project that ended in 2007, donors have so far tended to avoid assisting the judiciary except in areas that related to their programmatic objectives, such as the focus on improving access to justice to minorities affected by the conflict.

The Netherlands, however, has recently expressed interest in supporting judicial education. They want to support judicial training (and penitentiary reform). The Dutch would like to move quickly on training—their preferred option is to deliver training in Sri Lanka as opposed to taking delegates to the Netherlands, because of the cost. They could train more judges in Sri Lanka rather than take small group overseas. They seem keen to engage with other donors and are interested in raising investigative capacity and issues around delay, but these last two topics have stalled because of a lack of “political vision”.

The team recommends that any training programs offered to judicial officers be provided in such a way that leaves little room for some judges to be included and others to be excluded. This might be achieved by offering programs that are of a sufficient scale as to benefit all 60 High Court judges or all 192 magistrates, or that are confined by reference to a specific geographic area in which donor programs are active.

It is recommended that the offering of foreign development opportunities for servicing judicial officers be balanced with offering a similar number of training opportunities in Sri Lanka universities and other local educational institutions. Primary emphasis should be placed on developing the JTI's capacity through joint development of programs that feature prominent jurists and academics from common-law jurisdictions. The program should also aim to assist JTI training in shifting from lecturing to modern methodology in adult learning—making a distinction between imparting knowledge (achieved by lecturing) and equipping judges with skills to do a better job (achieved by training). Modern methods of adult education include use of observation, experimentation, and analysis in addition to pure lecturing.

1.1.4 Training of Non-judicial Personnel

There is a wide range of opportunities to impact beneficially on overall justice sector performance in Sri Lanka by offering training programs targeted at non-judicial officers. The separate proposals raised elsewhere in this report to offer training opportunities to judges and prosecutors can similarly be applied to a range of other legal and administrative officers appointed to the various justice agencies, such as the legal drafting office, registrars of the courts who are not members of the judiciary, and of course, officers of the MOJ. Donors might consider utilizing the resources of the University of Colombo, the Sri Lanka Law College (SLLC), the University of Moratuwa, the Sri Lanka Institute of Development Administration, and the University of Sri Jayewardenepura's Post-Graduate Institute of Management to offer funded training opportunities that focus on skills in legal advocacy, the development of public

policy and essential administration skills where the role of lawyers in government is largely concerned with public sector service provision. In that connection, training programs offered to agency officers might be augmented by the simultaneous procurement of tools of trade in government, such as word processing equipment, printers, and access to the Internet.

Another discrete area that the team learned was in need of support is training lawyers in the AG's Department in drafting civil contracts, especially in connection with procurement and construction programs. Providing this training would be relatively straightforward for USAID and the immediate dividends in performance improvement easy to gauge. Comparable training would be needed for the Legal Draftsman's Office to ensure it is able to keep up with demand.

Lastly, a longer-term objective should be improvement of legal education. As with judicial education, it reportedly relies excessively on antiquated pure lecturing. There are a range of programs that have been either recommended or used elsewhere that may be implemented to improve legal education in Sri Lanka, which are outlined under Objective 3 in the next section.

1.1.5 Donor Involvement in Legal Aid

There is a reasonable prospect that the current work to develop a new legal aid policy is not likely to result in the government filling the present gaps of the system. These gaps include the lack of adequate legal aid in the criminal jurisdiction of the High Court and the Court of Appeal due to the inadequacy of the assigned attorney system and the failure of the LAC to extend legal representation to criminal defendants in Magistrates' Courts. If the USG moves to support the development of prosecutor competencies and capacities in the High Court and Court of Appeal, drawing on resources such as OPDAT of the US Department of Justice or INL of the US Department of State, then corresponding commitment of support ought to be concerned with bolstering the presence and efficacy of competent criminal defense in the same courts. Other USG resources that could be utilized in this regard include the Defender Services Division of the Administrative Office of the US Courts, and the Capital Case Litigation Initiative of the Bureau of Justice Assistance, in addition to organizations such as the National Legal Aid and Defender Association.

This can be achieved by investing in the provision of legal representation services of criminal defendants via the legal aid NGOs. Until the government agrees to reform the assigned attorney system by funding reasonable levels of fees to be paid to assigned attorneys via the legal aid system, there can be little prospect of the quality of criminal defense improving. The establishment of a private legal defense fund, possibly in conjunction with other donors, may potentially play the role of offering an inducement to the government to address seriously the issue of publicly funded legal assistance in cases that involve criminal law and other actions in which the state is a party. At the same time, a private criminal defense fund will help sustain the financial viability of the legal NGOs in Sri Lanka, something that may produce further benefits in terms of their broad mandate.

1.1.6 Paralegals in Jails, Police Stations and Courthouses

Debates in many countries about the value of paralegal services are often stymied or sidetracked by agitation from the legal profession worried about encroachment of paralegals on the commercial interests of the private bar. Nonetheless, in Sri Lanka there is the prospect of developing a cadre of paralegals who might be deployed, not as substitute advocates in courts, but as agents for guiding litigants either to pro bono lawyers or to other services they can use. In a range of other countries, paralegals have been used to coach indigent prisoners on remand in jails about ways they can represent themselves in courts in the absence of any kind of lawyer. Similarly, paralegals have been used in police stations to assist newly arrested defendants on the procedures for applying for bail.

Paralegals based in police stations have also been useful in ensuring that juveniles are not wrongly processed as adult offenders and have provided a link between young detainees and relatives who might

fund their legal representation. In Magistrates' Courts in a range of countries in Africa, paralegals have been used to assist unrepresented criminal defendants by providing them with bail application forms and inducing relatives who might be sureties to attend a bail hearing. Remarkable results have been achieved in countries such as Malawi, Kenya, and Benin by training prison officers as paralegals. Unlike police, prison officers are often motivated to assist non-convicted prisoners on remand to obtain bail to reduce the numbers of prisoners in their care. So far, however, a paralegal who is not directly supervised by a lawyer has evidently not been contemplated as an alternative form of legal aid in Sri Lanka, except in limited ways associated with village-based donor projects.

1.1.7 Professionalization of Prosecution

In Sri Lanka, as described previously, the prosecution process is conducted in the Magistrates' court in which the police prosecute and in the High Court where professionally qualified, trained and skilled State Counsel prosecute. Police lack capacity to investigate criminal allegations by use of traditional methods that has caused them, in part, to resort to unfair means in seeking confessions. In order to professionalize prosecutions in Sri Lanka, the capacity to investigate by the police and the capacity of the government analyst needs to be raised. In addition there is a strong case for bringing the prosecutions in the Magistrates and High Courts much closer by allowing state counsels to work closer with the police at the investigation stage.

There is also a strong case for state counsels to prosecute all cases in all courts. Thus, the police's role would be to investigate, the AG's role would be to prosecute. This will have the effect of bringing the two streams closer to merging whilst separating out the functions of investigation and prosecution of crime in Sri Lanka. For this to happen, structural and personnel issues of recruiting and retention should be seriously examined. Until the AG's capacity expands to run all prosecutions in all courts, it may be an option to brief out cases to the junior members of the Bar to enable them to build their experience (clearly engaging with the Bar is necessary in this regard) and use of paralegals to help fill the personnel gap.

As stated before, there are a considerable number of resources the USG could draw on if decides to support the capacity improvement of state prosecutors. These include OPDAT, INL, and the Defender Services Division of the Administrative Office of the US Courts, and the Capital Case Litigation Initiative of the Bureau of Justice Assistance, and the National Legal Aid and Defender Association.

1.1.8 Juvenile Initiatives

The age of criminal responsibility in Sri Lanka is eight but there is no clear definition of the age at which a person ceases to be a juvenile. That age under the Convention on the Rights of the Child (CRC) is 18. One of the more positive developments about juveniles is occurring in Colombo where the MOJ program undertaken with Save the Children locates juvenile justice in one court center with facilities to separate the adults from juveniles and, the team was advised, is intended to be introduced in other parts of the country.

The police often hold juvenile suspects or defendants in cells with adult suspects or defendants, thereby increasing the risk of abuse. Child victims are treated similarly to suspects or defendants. There are few juvenile holding centers. The process is to keep juveniles in custody so that they appear before a Magistrates' Court to be processed in a similar way to adults, rather than releasing them to the custody of their parents or other responsible adult. Although diversionary schemes play a useful role in ensuring that the juvenile does not enter the criminal justice system when there are alternative ways of dealing with them, these are not currently available.

1.1.9 Witness/Victim Care (“No Witness, No Justice”)

Significant number of criminal cases fail because of “witness failures” (the Asian Human Rights Commission mentioned a figure of 85 per cent of Sri Lankan criminal cases in which witnesses do not

show up). Witness protection schemes can be expensive and should be sparingly used and only in seriously deserving cases. Protection often involves round the clock protection, re-housing and even change of identity.

In Sri Lanka, the team believes, victims and witnesses are not entitled to refresh their memories from their witness statement; thus, it is not surprising that the conviction—after-trial rate is reported by some to be less than five percent. Witness intimidation, before, during and after trial should be a serious offense that sends a clear message to the perpetrators to reduce witness intimidation of victims and witnesses.

Limited programs to allow witnesses to review earlier statements and to discourage intimidations could engender greater public confidence. Justice P.H.K. Kulatilake (Additional Director, Sri Lanka Judges Institute, former Judge of the Court of Appeal) has said,¹ “The victims of crime are entitled to an equal share of justice”. In Sri Lanka legislation has been drafted dealing with this issue but has not yet been enacted into law.

1.1.10 Land Disputes

Land tenure insecurity is one of the root causes of conflict in Sri Lanka, and touches upon governance and human rights concerns of the Government of Sri Lanka, the Muslim, Tamil, and the Sinhalese populations alike. Land disputes, especially in the areas most affected by the war, consume huge portions of available court time, take long periods to adjudicate, and often fail to resolve the controversy effectively. Existing Mediation Boards are not likely to be capable of resolving these often complex matters. Wider use of a variety of ADR formats should be examined based on the strategic field assessment to be conducted by the USAID Supporting Regional Governance Program (SuRG) on land tenure. The results of this assessment can be used to implement broader initiatives to resolve land disputes.

1.2 STRATEGIC APPROACH: GOAL, SEQUENCING AND SUPPORTING OBJECTIVES

The suggested strategic goal of the USG program is:

A Sri Lankan justice sector which has effected improvements sufficient to show a rise in public confidence to generate support for producing a Rule of Law that meets international standards.

While this is a desirable as well as attainable goal, it is not likely that it can be achieved through a comprehensive Rule of Law project. As discussed earlier, there are forces interested in making significant but discrete improvements in the justice sector, some large, some small. These supporters include the MOJ leadership, higher-level administrators in the AG’s Department, some judges—especially younger ones, some senior members of the Sri Lankan bar and academics, and some civil society reform groups.

The team recommends that USAID pursue this goal and objectives through discrete programs that take advantage of both the support for certain improvements in Sri Lanka and the expertise USAID may bring from Rule of Law efforts in other countries. The programs must coordinate with the Ministry of Justice and Law Reform and the UNDP-aided effort to spur judicial and legal improvement, which is serving as a strategic planning exercise for the MOJ and the judiciary. The objectives have been described below by individual programs and time phases. The time phases relate both to the need to sequence activities in terms of creating capacity and to relate continuation of efforts to progress made in the overall Rule of Law sphere. For example, it will not make any sense to try to improve criminal case processing until and unless the emergency regulations that now restrict judicial case flow management are ended.

¹: P.H.K. Kulatilake, *Criminal Prosecution and Emerging Legal Principles in the Criminal Justice System of Sri Lanka and Innovations Suggested*, II JUDGES JOURNAL 62, 68 (February 2010)

1.2.1 Strategic Objectives

The Strategic Objectives and specific entry points/activities proposed below each has a direct relationship to the achievement of the Strategic Goal. The presentation of each objective is followed by major categories of possible entry points and activities each with a rationale and course of action.

The strategy envisions **three broad objectives**, which are causally linked to the Strategic Goal.

Objective 1: Improving the capacity of the justice sector to deliver more accessible and higher quality justice

This objective has three major components focused mainly on prosecutors, judges, and legal practitioners in the Sri Lankan justice sector. The concentration will include engagement of four government institutions: the MOJ, the MOCA, the JTI, and the AG's Department. Extensive consultation should be conducted with the MOJ and the JSC, to ensure its leadership and capacity to sustain key initiatives. This consultative stage is especially important, and the relationships developed during its initiation should make it possible to ensure continued involvement of USAID and its implementing partners. Past improvement efforts such as the World Bank project have foundered on the apparent inability of institutions to assume the burdens involved. The JSC is one route toward involving and motivating the judicial leadership and needs to be involved early on, along with the JTI.

1. Improve case management with other administrative processes, such as gathering necessary statistics, with emphasis on delay reduction, more efficient case management and development of manual and, eventually, automated information systems.

Phase I activities:

- ***Gather caseload and other justice sector data to plan improvements.*** Based on data that may be provided by the JSC, prepare statistical picture of justice sector operations for use in all other programs. It appears that Sri Lanka lags behind other South Asian states in the relevant data it collects and releases concerning justice sector operations. Historically, this has been a vital first step toward improving the operations of the justice system worldwide.
- ***Plan initial delay reduction effort in civil cases.*** Under aegis of the MOJ and JTI, begin a program to train district court judges and staff in principles of case flow management.
- ***Produce annual reports and case digests.*** Increase transparency by supporting printing of annual reports with statistical as well as textual content. Develop system to distribute legal materials to bar, civil society groups, and law schools.

Phase II activities:

- If emergency regulations are lifted, ***plan and implement criminal case management and procedural improvement.*** Once conditions permit implementing case flow management in the Magistrates' Courts, train magistrates and staff in techniques. This should include
 - encouragement of continuous trials,
 - restrictions on use of confessions, and
 - allowing refreshing of witness recollection.
- If emergency regulations are lifted, ***plan and implement pretrial release program.*** A pretrial release program emphasizes the desirability of releasing defendants prior to trial provided that appropriate conditions that are based on the defendant's particular background—family connections, roots in the community, employment, risk of flight--can be set governing their release, such as reporting, drug testing, and electronic monitoring. The intent is to reduce the

large number of prisoners being held on remand awaiting trial. This system, if implemented, will also replace in most instances the bail system, which has been underused.

- ***Plan automation of case management process.*** Automation can build on successful case flow management that uses manual techniques to provide up-to-date information to judges, lawyers, and administrative staff.

Phase III activities:

- ***Undertake procedural reform program to simplify civil and criminal procedure.*** Long-term program can begin when some success achieved in earlier stages.

2. Skill building for Judges, Prosecutors, Administrators, and Defense Cadre

Major activities would include supporting efforts to develop a multi-track judicial training institutions by strengthening the JTI to provide professional training/certification for entry-, mid-, and senior-level training and re-training programs through each career stage.

Phase I activities:

- ***Initiate judicial exchange/study tour programs.*** It will be as important to initiate programs in the training area with well-planned judicial exchanges and study tours to appropriate court locations in the United States. Malaysia and the UK are possible destinations, in that the Sri Lankan jurists may benefit from seeing how much legal as well as judicial administrative reform have occurred at the source of much of the current Sri Lankan system. Both legal procedure and court administration has been thoroughly reformed in England in the past two decades; in Sri Lanka, in contrast, civil and criminal procedure codes there remained virtually unchanged for more than a century. The aim of the exchanges (such as the well-known Russian-US Judges program) is to increase the awareness of Sri Lankan judges at all levels with the kind of judicial independence with accountability that characterizes US federal and state judicial systems. Some features of American court systems that should be emphasized are the “good behavior” life terms of federal and some state judges, the role of Supreme Courts and judicial councils in administering court systems, the role of professional court administrators at the federal, state, and municipal levels, the increasingly common practice in US trial courts of scheduling the events in a case at an early date, and the willingness of US judges to take control of the case calendars from lawyers (in civil cases) and prosecutors (in criminal cases). Many US courts can also serve to demonstrate how the courts themselves become capable of performing advanced budget, personnel, and statistics functions. How automated information systems can assist courts in managing caseloads will also be gained during these study tours and exchanges.
- ***Conduct needs assessment and initiate training programs for judges, court administrators, prosecutors and defense counsel.*** These training programs should serve multiple ends: for judges, emphasis needs to be focused on improving English writing skills in decision and judgment preparation; for prosecutors, training will focus on preparing junior bar members to assume responsibilities in the Magistrates’ Courts; court administrators’ training will emphasize the shift in job orientation from performing ministerial functions such as docketing, filing, and transcribing to supporting judges in managing the progress of cases; and defense counsel who are participating in legal aid programs should be developing practical skills needed to prepare cases properly for hearing.
- ***Define a role for paralegals in Sri Lanka to meet gaps in services that cannot be met by the private bar or existing legal aid programs; and train salaried paralegals to provide practical support to indigent defendants.*** The legal aid conundrum of there never being enough supply to meet the demand may be addressed in Sri Lanka by training paralegal personnel to provide

support to rural and remote courts, prisons and police stations in ways that augment regular systems of legal aid.

Phase II activities:

- ***Continue and expand training for judges, administrators, prosecutors, and defense counsel.*** Training for judges, prosecutors and court administrators, as well as defenders (lawyers who participate in Legal Aid Commission or NGO-sponsored legal aid programs), should proceed along the different tracks described above, based at this time on the relative needs of each group, all of which are at early stages in their development as well-trained components of the justice system in Sri Lanka.

Phase III activities:

- ***Expand training of court administrators after the judges, the JSC, and the MOJ have defined the managerial responsibilities of administrative positions.*** Court administrator training should follow the judicial study tours, which themselves should follow some demonstration of acceptance of the need for reform and clear progress toward achieving some improvements, and exchanges so that the judges who now control all operations in Sri Lankan courts become aware of the need for professionalization of court administration as has occurred throughout the world. France, for example, operates a special training academy for court clerks and administrators. Once judicial acceptance is secured and training has followed, the system will be able to convert some ostensibly administrative positions now filled by judges on judicial career paths into truly administrative professional positions.

3. Phase in professionalization of prosecution

There is general support for professionalizing prosecution, that is, for replacing police prosecutors in magistrates' courts with legally trained prosecutors. Obstacles to overcome are largely financial and structural; staffing these courts will result in a significant increase in the number of state counsel in the AG's Department. Prosecutors need to improve selection processes and enforce higher standards for being appointed. Begin using junior bar members to prosecute in the Magistrates' Courts

Phase I Activities:

- ***Improve investigative skills.*** Higher forensic competencies of investigators will enable the AG's Department and State Counsel to work much closer together with the police at the investigation stage to build evidentially better and viable cases and use discretion as to what cases enter the system.
- ***Initiate training of junior members of the Bar to prosecute in magistrate courts.*** This stage will start the process of professionalization of prosecution, probably by selecting particular courts, likely in the north and east, which are already in need of trained prosecutors.

Phase II activities:

- ***Increase the range of cases that State Counsel prosecute in the Magistrates' Court*** (currently they appear in non-summary prosecutions) to include bail applications and trials – leading to a position where police investigate and the AG prosecutes.
- ***Continue to train junior members of the Bar to prosecute and integrate the new prosecution component.*** In order to institutionalize professional prosecution in Sri Lanka, it will be necessary to engage the primary prosecution office—the AG's Department—and work closely with it to expand the network of supervision.

Phase III activities:

- ***Create a separate independent prosecuting authority in Sri Lanka with all prosecutorial functions vested in the new authority headed by a Director of Public Prosecutions (or other designation) and superintended by the AG.*** By establishing a new unit superintended but not managed directly by the AG, improved professionalism and integrity of prosecution can be achieved.

Objective 2: Strengthening Citizen Legal Awareness and Access to Legal Advisory and Representational Services

- ***Expand legal aid coverage, including use of paralegals in rural area courts.*** Utilize paralegals (see Objective 1, subobj. 2, Ph. I, above) to expand availability of legal assistance especially in Northern and Eastern Provinces. As the Legal Aid Commission is working to expand criminal defendant representation, consider providing match funding for promised government expenditure to establish regular budget practice.
- ***Develop mechanism for distributing legal materials.*** Support web-based mechanism for providing greater access to legal materials, including Sri Lankan court decisions, statutes, and assistance for pro se parties, possibly through Lawnet and WorldLII services or comparable programs.
- ***Develop program for training interpreters.*** Interpreters are in short supply for use in courts, especially in Northern and Eastern Provinces, and for Tamil language speakers. Immediate need can be met, as well as longer-term adequacy of interpreter population.
- ***Enact a law prohibiting witness intimidation*** before, during and after trial, with suitable penalties built-in.
- ***Extend use of ADR to resolve land disputes in conflict areas.*** Draw on findings of current strategic assessment of land tenure being conducted by SuRG project.

Objective 3: Enhancing the Quality of Legal Profession and Legal Education

Helping to improve legal education in Sri Lanka may be one of the most fundamental opportunities to strengthen the rule of law. Quality legal education is a critical foundation of the rule of law, in preparing lawyers and judges with the necessary skills and knowledge to make the system work, and in providing the tools for the continued development of the legal system. The assessment team encountered widespread and enthusiastic support for donor engagement in this area, especially since it has been relatively neglected by previous programs.

Activities in this area would engage the Bar Councils and Bar Associations at the national level, along with the four principal law schools and the Sri Lanka Law College. Initial programs would work with individual universities, Bar Councils, and Bar Associations to develop model programs, using feasibly and affordable approaches, which could then be replicated by other universities, councils and associations. A key element of this component should be to build support and forge partnerships among key constituencies, including lawyers, judges, education officials, and ministry officials.

Phase I Activities:

- ***Strengthen practical skills training and applied legal education.*** Assistance would support efforts by law schools, the Sri Lanka Law College, and Bar Associations to introduce practical skills training into their curricula, and develop applied teaching approaches to provide practical experience to new law students. Specific approaches might include:

- a. *Develop Continuing Legal Education programs* for targeted Bar Associations, including developing curricula, training instructors in substance and pedagogical techniques, and providing written and electronic teaching materials. Efforts should be made to establish requirements for continuing education for maintenance of Bar membership. Courses should respond to demand by lawyers, and include specialized legal topics, as well as management or other inter-disciplinary approaches.
 - b. *Introduce practical skills courses.* Courses could be instituted within the curricula of law faculties, with appropriate training and materials, or developed with the Bar Councils or Bar Associations as part of the requirement for entry into the Bar, as in the UK. Courses should include such practical skills as legal writing, trial advocacy, legal research, and legislative drafting;
 - c. *Institute applied learning programs,* such as legal externships and/or internships, clerkships, legal clinics, and other programs that would enable law students to gain practical experience prior to entry into the profession. These programs should be pursued through partnerships between law schools, Bar Councils, courts, and the Ministries of Justice and Constitutional Affairs.
- ***Provide for training of AG's Department lawyers in civil contract drafting and strengthen Legal Draftsman's Office.*** These have been cited to the team as an immediate need that would produce clear benefits to government performance.

Phase II activities:

- ***Strengthen the legal education curriculum and standards.*** Assistance would support efforts by Sri Lankan legal educators and members of the Bar to upgrade and modernize legal education.
 - a. *Update the curriculum* of targeted law schools, including incorporating practical skills training, strengthening teaching skills and quality among the faculty, and introducing case law into the teaching. Examples should be drawn from the US and Indian experiences in legal education.
 - b. *Support the development of modern teaching materials appropriate to the Sri Lankan legal system,* including casebooks, law review journals and others materials rooted in the Sri Lankan legal system. Local expertise should be favored for the development of these materials.
 - c. *Develop long-term partnerships with US law schools.* The common language and similar legal heritage among US and Sri Lankan legal professionals make long-term partnerships a feasible and useful approach. A long-term partnership should be developed that included long-term exchanges, professional development opportunities, sharing of curriculum and programs, and other activities that would enable Sri Lankan and US law schools to learn and benefit from each other. Public-private partnerships should be pursued.

Phase III activities:

- ***Raise professional standards in the Bar Councils.*** Assistance would support efforts by the Bar Councils to build consensus around enforcing existing rules and standards, raising the standards for accreditation, entry into the Bar and professional ethics, and developing more effective enforcement mechanisms. This will likely require considerable consensus-building, working with key leaders who are interested in raising the standards of the legal profession. Technical assistance should also be provided for the development of tougher bar exams, accreditation processes, and enforcement mechanisms for ethics. There are now many models around the world for upgrading bar exams, improved accreditation processes, and increasing ethics enforcement.

The biggest need will be for the MOJ and the judicial leadership to participate in these efforts, or little will be accomplished, but there are huge technical resources that may be drawn on when the time is propitious.

U.S. Agency for International Development

44, Galle Road, Colombo 3, Sri Lanka

Tel: +94 11.249.8000

Fax: +94 11.247.2850

<http://srilanka.usaid.gov>