



**JUDICIAL SYSTEM MONITORING PROGRAMME**

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**PROGRAMA DE MONITORIZAÇÃO DO SISTEMA  
JUDICIAL**

## **Overview of Timor Leste Justice Sector 2005**

### **JSMP Report**

Dili, Timor Leste  
January 2006

The Judicial System Monitoring Programme (JSMP) was set up in early 2001 in Dili, Timor Leste. Through court monitoring, the provision of legal analysis and thematic reports on the development of the judicial system, JSMP aims to contribute to the ongoing evaluation and building of the justice system in Timor Leste. For further information, and to access the reports, justice updates and press releases referred to in this report, see [www.jsmp.minihub.org](http://www.jsmp.minihub.org)

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## 1. Executive Summary

2005 was an important year for Timorese justice both domestically and in relation to crimes committed under the Indonesian occupation. This report summarises the main developments and issues of concern. It is a tool for justice sector stakeholders to assist them in their efforts to build a functioning judicial system and strong democratic institutions based on the rule of law. The Judicial System Monitoring Programme (JSMP) is a partner in this process and wishes to assist the government of Timor-Leste, Timorese civil society organisations and other national/international stakeholders in achieving this goal.

Chapter two looks at the legislative process and a few key pieces of legislation. Both the Code of Criminal Procedure and Penal Code represent major steps forward for Timor-Leste, replacing UN and Indonesian law with domestic instruments. Unfortunately, the major impediment to an open and transparent legislative process remains the generally inadequate public consultation undertaken by lawmakers, the limited public availability of legislative documents and the lack of transparency when the Council of Ministers drafts legislation.

Chapter two also deals specifically with new legislation relating to demonstrations, private lawyers, criminal procedure and civil procedure. Most notably, there remain serious flaws with the Law on Demonstrations, which undermine the right to freedom of assembly.

Chapter three addresses court administration issues in the four district courts. Positive developments included: an increase in court actors from August; training for judges, prosecutors, lawyers, court clerks and administrative staff; material assistance to district courts by donors; local language interpreters in district courts; the publication of Court of Appeal court decisions; the re-opening of the Suai District Court; and the use of customary law, where appropriate, together with formal justice outcomes.

Areas of concern include: the limited processing of civil cases; the reduction in national court actors from January; ongoing language difficulties and the lack of lawyer to client translation; lack of access to court documents and decisions; illegal arrest and detention; delayed hearings due to the tardiness of court actors, electrical blackouts, and the non-appearance of witnesses or victims; and the continuing backlog of thousands of criminal cases across all courts dating back to 2000.

Chapter four very briefly provides an update on the Court of Appeal, which is making significant progress towards an international standard of efficiency.

Chapter five looks at gender issues in Timor-Leste's justice system. Positive developments included: National Women's Day; substantial gender equality in the police force; that half of the active judges are female; and the Law on

Domestic Violence, including the extensive consultation process that preceded it.

However, despite a constitutional guarantee of equality for women, many challenges remain to their full participation and protection. Many cases relating to violence against women are still not receiving adequate consideration due to both administrative issues and community attitudes to violence.

Other areas of concern include: high rates of violence towards women and children, continuing difficulties for women in pursuing formal justice; and the limited availability of legal assistance.

Chapter six looks at the justice process for crimes committed under the Indonesian occupation. It looks at the UN-appointed Commission of Experts, the Commission on Truth and Friendship; the closure of the Serious Crimes Unit and Special Panels for Serious Crimes; and the 2,500 page report marking the conclusion of the Commission for Reception, Truth and Reconciliation (CAVR).

The continuing search for justice and reconciliation is positive, however the serious crimes mechanisms used to date have proven inadequate and have not provided the accountability for human rights violations that is needed both for the Timor-Leste community to move forward, and to support global efforts to entrench universal respect for human rights.

This report was produced at the end of November 2005.

## 2. The Legislative Process

For the year 2005, 55 legislative bills were considered by the National Parliament, distributed in the following way:

First Legislative Meeting	.....	15
Second Legislative Meeting	.....	14
Third Legislative Meeting	.....	23
Fourth Legislative Meeting	.....	03
Total	.....	55

At the end of November, the following draft laws were pending for consideration before Parliament in December:

- Draft Law no. 19/I/3a on “National Parliament Organic Law”
- Draft Law no. 21/I/3a on “National Liberation Combatant’s Statute”
- Draft Law no. 16/I/3a on “Hospital Expenses and Medicinal Assistance”
- Draft Law no. 18/I/3a on “Education Bases”

### 2.1 Openness and Consultation in the Legislative Process

Parliament is the legislative body empowered to draft laws<sup>1</sup>. In addition, the government has the power to draft laws by way of decree, as set out in Article 96 of the RDTL Constitution. We acknowledge that the two aforementioned bodies have their authority guaranteed in the Constitution, however, JSMP believes that it would be preferable for the Parliament to draft laws considered to be of significant public importance as the Parliament is the legislative body chosen democratically by the people.

Furthermore, parliamentary laws are drafted in a more open process so that it is not difficult to provide commentary on a draft. Until now legislation drafted by the government has not been open to the public. We emphasize the need for a mechanism that can adequately facilitate the active participation of the community in this process enabling them to provide input and commentary on the drafting of legislative programs, as well as on the preparation and discussion of draft laws.

For this reason, a consultative process is urgently required to enable a draft to reach its full potential and be given legitimacy, and ensure that it is more appropriate and adapted to the socio-political circumstances that exist in Timor-Leste.

It is also very difficult for interested organizations or individuals to obtain legislative documents. For this reason legislative documents should be

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<sup>1</sup> Refer to RDTL Constitution, Article 95.

published to facilitate public access. It is true that these documents have been published in the “*jornal da republica*”, however, based on our observations it is very hard for all components of society to access these documents.

## **2.2 Principal Laws Considered in 2005**

### **2.2.1 Law on Demonstrations<sup>2</sup>**

The government of Timor Leste, via the National Parliament endorsed a Law on Freedom of Assembly and Expression which has been authorised by the President, despite being a controversial law which is potentially in conflict with the Constitution of Timor Leste and the International Covenant on Civil and Political Rights. Although the President sent this law to the Court of Appeal for constitutional review, the only articles removed were subsections 3 and 4 of Article 5, which the Court of Appeal considered to be unconstitutional.<sup>3</sup>

Nevertheless, there are numerous other articles which are very broad in scope and which seriously undermine the right to freedom of assembly. The Law was referred to the President for promulgation in 2005, however, the period within which it must be promulgated has long since passed and, consequently, it has not entered into force. It must therefore be returned to Parliament for further debate and consideration.

### **2.2.2 Law on Private Lawyers**

The “Private Lawyers Statute” was sent to National Parliament through Bill no. 22/1/4a for consideration at the fourth Legislative Meeting. It is currently being reviewed by the Council of Ministers.

The mentioned statute is modern and very similar to statutes in Portugal and Brazil regulating the legal profession. In Brazil, for example, the entity governing the lawyers is the OAB - Ordem dos Advogados do Brasil (Brazil Bar Association). Law graduates, to be able to practice law, have to pass the so called “*exame da ordem*” (bar exam). If the graduates pass the exam, they then register at the OAB, receiving a registration number. Only from then on can they consider themselves lawyers entitled to practice law.

It is important to note that an additional draft law pertaining to the private lawyers’ profession has been submitted to Parliament. This was submitted by the government for consideration and promulgation as a draft law.<sup>4</sup> Accordingly, there are currently two draft laws before parliament which purport to regulate the same subject-matter. It is not yet clear how the conflict between these laws – which are markedly different in their scope and content – will be resolved and the Rules of Parliamentary Procedure do not appear to offer any assistance in that regard. This is clearly a major issue which will

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<sup>2</sup> See JSMP Report, ‘Draft Law 29/1/3A Freedom of Assembly and Demonstration’, October 2004

<sup>3</sup> See JSMP Press Release, ‘Men Arrested on Complaint of Member of Parliament’, 19 July 2005.

<sup>4</sup> For more information on this draft law, see JSMP Press Release, ‘The Government Seeks to Regulate Private Lawyers’, 27 May 2005.



have to be tackled as soon as possible to ensure effective regulation of the legal profession in a timely manner.

### **2.2.3 Code of Criminal Procedure**

On 28 July 2005 National Parliament approved Authorisation Law No 15/2005, which entered into force on 16 September 2005 (“Law 15/2005”).

Law 15/2005 grants the Government authorization to approve a Code of Penal Procedure (“CPP”) and revoke the criminal laws currently in force in Timor-Leste. Article 2 stipulates that the CPP must be drafted in accordance with constitutional principles and international human rights standards.

Therefore, the Government, through a meeting of the Council of Ministers held on 20 October 2005, approved the CPP by Decree. Article 5 of Law 15/ 2005, determines that the new CPP comes into force on 1 January 2006. However, the entry into force of the CPP is subject to the entry into force of the Penal Code. Consequently, both codes will come into force on the same date.

#### **Repeal of the legislation in force**

The new CPP repeals:

- a) UNTAET Regulation No. 2000/30, of 25 September, as amended by UNTAET Regulation No. 2001/25, of 14 September, on Transitional Rules of Criminal Procedure;
- b) Sub article 6.1 and Articles 1, 3, 4 and 16 of Decree-Law No. 16/2003, of 1 October; and
- c) Other legislative provisions which sanction solutions contrary to those adopted by the Criminal Procedure Code, namely those of UNTAET Regulation no. 2000/11, dated March 6, changed by UNTAET Regulations No 2000/14 and No 2001/18, dated July 21, and no. 2001/ 25, dated September 14.

#### **General Provisions**

- **Criminal Investigation.** Investigation of standard cases (compared with cases which are processed summarily, discussed below) takes place by means of an inquiry carried out under the direction of the Public Prosecutor, with the police functionally acting on their advice. Nevertheless, at this stage, the judge has the ultimate authority to authorise and scrutinise actions which have an impact on the fundamental rights and liberties of citizens. For that reason the judge must conduct a hearing which investigates the arrest and detention of a suspect within 72 hours of that arrest (at the 72 hour review hearing).

- **Suspect, defendant and convict.** Suspects are defined as those persons who have either committed a crime or are preparing to commit a crime while defendants are those persons against whom an indictment has been issued. Convicts are those against whom a final guilty decision has been pronounced, following trial (Article 65).
- **Suspect identification.** Persons suspected of committing an offence and who are detained by the police for the purpose of identification (in circumstances where the suspect is unable or refuses to identify themselves) shall be released within 12 hours, independently of the success of the action taken by the police, provided there are no grounds for detention (Article 53.4).
- **Defendants' Rights.** Article 60 sets out the rights of the defendant.
- **Public Denunciations.** 'Denunciations' can be submitted by any citizen in relation to public crimes. These can be presented either directly to the Public Prosecutor or to a police agent, who will communicate with the Public Prosecutor (Article 213).
- **Charges.** Article 214.1 determines the persons who are entitled to lodge a complaint which will then form the basis of a subsequent criminal proceeding.
- **Extinction of the right to press charges.** The right to press charges extinguishes after six months, calculated from the moment at which the citizen became aware of the relevant facts or from the death of the offended party.
- **Sentence.** When passing a sentence the judge is required to explain the legal and factual bases for the sentence which is handed down. Not only does this assist in the consideration of appeals but it also enhances the transparency and public understanding of the judicial process.
- **Competence of the Supreme Court and District Courts.** Article 12 confers 12 heads of exclusive jurisdiction on the Supreme Court of Justice, for example, in relation to appeals on the issue of habeas corpus. Article 13 confers 6 heads of jurisdiction on the District Courts. These include exclusive competence to handle cases at the investigative, pre-trial stage and also with respect to the execution of sentences.
- **The Constitution of the Court.** Proceedings in respect to offences which carry a maximum sentence of five years imprisonment will be presided over by a panel of multiple judges; all other offences are to be tried by a single judge (Articles 14 and 15).
- **Power of the Public Prosecutor.** Article 48 sets out the competencies and functions of the Public Prosecutor. These include: conduct of the investigation; proceeding with prosecution of investigated cases where appropriate; submission of indictments and execution of court

decisions. This is reinforced by Article 57, which gives competence to the Public Prosecutor to supervise the investigation.

- **Victims' Right of Compensation.** Provided they are properly identified as such, victims are entitled to be compensated for damages by way of criminal proceedings or, alternatively, through civil proceedings as set forth in Articles 71 and 72.
- **Public Hearings.** The hearing of the initial judicial review of detention (within 72 hours) is the exclusive competence of the judge. The hearing is attended by the Presiding Judge, the Public Prosecutor, the Defender, the interpreter and the agent in charge of court security, when needed (Article 63). Criminal proceedings are public, from the moment at which the indictment is issued, under penalty of irremediable nullity<sup>5</sup> (Articles 75 and 247).
- **Time Schedule of Proceedings.** Five days is the term for any procedural action<sup>6</sup>; furthermore, procedural acts are performed only on weekdays, during office hours of the judicial sector, with the exception of procedural acts pertaining to the liberty of a person; two days is the time limit for recording proceedings and issuing warrants, except if the term affects the duration of the deprivation of liberty, in which case these acts must be carried out straight away (Articles 78 and 79).
- **Language.** Under the penalty of nullity<sup>7</sup>, all procedural actions must be undertaken in one of Timor Leste's official languages, that is, Portuguese or Tetum (Article 82). Irrespective of the language used in any given court hearing, the court must ensure that at all times proceedings are being conducted in a language which is understood by all parties.
- **House Searches.** Pursuant to Article 170, searches of inhabited houses can only take place between 6 a.m. and 8 p.m., except as provided in Article 171.2.
- **Telephone Tapping.** The interception and recording of phone conversations or communications can be used as evidence, as long as they are judicially authorised and are in accordance with the requirements prescribed in Articles 177, 178 and 179.
- **Obligation of Periodic Presentation.** If the crime with which a defendant is charged is punishable with a maximum prison sentence of at least one year, the defendant can be compelled to present him or herself before a judicial authority or police officer at pre-established dates and times, taking into account professional demands and the place where the defendant resides.
- **Serious Crimes.** In relation to serious crimes<sup>8</sup>, all standards that regulate the respective processes are retained, namely, those provided

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5 This ambiguous phrase is derived from the only (unofficial) translation of the CPP which was available to JSMP.

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8 According to Section 9 of UNTAET Regulation no 2000/11 (as amended by UNTAET Regulation No 2001/25), the Dili District Court shall have exclusive jurisdiction over "serious criminal offences", deemed to be: Genocide; War

for in Article 9 of UNTAET Regulation no. 2000/11 and UNTAET Regulation no. 2000/15.

- **Conditional release.** A convicted person with a prison sentence over six months who has served half of that sentence may be conditionally released by the court, in accordance with Article 331 and the criteria set forth in Article 332.
- **Outings while serving a sentence.** Convicted persons are in certain circumstances authorised to leave the detention centre for short and medium term periods.
- **Execution of community service penalties.** Article 342 addresses the manner in which community service penalties are carried out.
- **Appeals.** Ordinary appeals are addressed in Articles 287 to 313 while 'extraordinary' appeals are dealt with in Articles 314 to 323.

### Preventive Detention

- **Application.** Preventive detention applies in one of three situations:
  - a) When the cumulative requirements and assumptions set forth in Article 183, and defined in paragraphs a-b of Article 194, are fulfilled;
  - b) To those that have irregularly entered or remain on national territory; or
  - c) To those who are subject to extradition or expulsion proceedings.
- **Duration.** Preventive detention cannot exceed:
  - a) One year without any charges;
  - b) Two years without any conviction at first instance; or
  - c) Three years without conviction in trial, except if there is an appeal regarding issues of constitutionality, in which case the term becomes three and a half years.

Note: six months are added to these terms in cases which are exceptionally complex. When the terms expire, the defendant must be released immediately, unless they have been arrested and detained on other, unrelated charges.

- **Periodic Review of Detention.** Every 6 (six) months, the judge must review and reconsider the original grounds for a defendant's detention.

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crimes; Crimes against humanity; Murder; Sexual offences; Torture. The latter 3 offences are only defined as "serious" if committed between 1 January 1999 and 25 October 1999.

- **Habeas Corpus.** The Supreme Court has exclusive jurisdiction for determining habeas corpus applications (Article 205).

### **Crimes Committed in Flagrante Delicto**

- **Flagrante Delicto.** Article 219 defines an in flagrante delicto act as follows:
  - a) Flagrante delicto refers to all crimes in the process of being committed or that have just been committed.
  - b) Flagrante delicto also describes cases in which, immediately after the crime is committed, the suspect is followed by a witness and found with objects or evidence which reveal that they have just committed the crime or participated in it.
  - c) In case of an on-going crime, the state of flagrante delicto is only deemed to exist where there are signs that reveal that the crime is being committed and the suspect is participating in it.
- **Detention when Caught in Flagrante Delicto.** In cases of flagrante delicto, for offences which are punishable with prison sentences, suspects can be arrested and detained by:
  - a) Any police authority; or
  - b) Any person witnessing the illegal act, in the absence of a police authority (Articles 212 and 218).
- **Summary Trial.** Those caught in flagrante delicto for a crime punishable by up to five years imprisonment shall be tried by summary procedure. The trial hearing begins within 72 hours, counting from the moment of detention, and in case the hearing cannot begin within that term, the procedure shall adhere to that prescribed in Article 348.

#### **2.2.4 Code of Civil Procedure**

National Parliament approved, on 16 September 2005, the Authorising Law for Bill No 17/2005, which was promulgated by the President of the Republic on 3 September 2005.

This law grants the Government with the authorisation to approve a Code of Civil Procedure.

The Council of Ministers, at a meeting held on 16 November 2005, carefully analysed some of the principal articles in this code and decided to defer further discussion to a later meeting.

As with the Penal Codes, with the preparation of the Code of Civil Procedure and the Civil Code, Timor-Leste will in 2006 adopt its own regime of civil laws, thereby revoking the Indonesian and UNTAET laws in this area.

### **3. District Courts**

#### **3.1 Monitoring of District Courts by JSMP**

In all district courts there was a predominance of criminal cases over civil cases. From a total of 170 cases observed by JSMP, only 11 were civil and the remaining 159 cases were criminal. Criminal cases also included cases from previous years.<sup>9</sup> Approximately 86 civil cases were registered during 2005.

Only two trials were held for civil cases, respectively in January and September 2005 at the Dili District Court. However civil cases were not otherwise pursued as they are more complex and as yet there is no designated translator to translate the civil case files for the judges<sup>10</sup>.

JSMP only has complete statistical data on all cases registered in the Suai District Court. Based on data obtained from the local court administration, 67 criminal cases were registered in 2005. From this number, 41 cases have been decided and 26 cases are still in progress and awaiting a decision. From the 26 cases, some of them were left over from previous years, for instance 2 cases from 2002, 2 cases from 2003 and 3 cases from 2004. Meanwhile, 13 civil cases were registered in 2005.

#### **3.2 Practical Issues Affecting the Functioning of the Court**

##### **3.2.1 Reduction and Increase in the number of District Court Actors**

National actors still conducted a number of trials up until 25 January 2005 before results were announced on the preparation for a second stage of training. After the announcement there was a reduction in the number of court actors, especially national judges for both criminal and civil matters who were replaced by 4 international judges. The Prosecution Unit continued to be staffed by several newly appointed prosecutors who had not previously attended training. The functions of public defenders were almost entirely carried out by private lawyers although public defenders were still involved in a number of cases before the courts up until April 2005.

The replacement of court actors resulted in a decrease in the number of hearings conducted between the end of January and the start of May.<sup>11</sup>

An increase in the number of court actors took place between August and September. Currently 5 international judges have been appointed to the District Courts, namely 2 judges to the Dili District Court, 2 judges to the Baucau District Court, and 1 judge for the Suai and Oecusse District Courts.

##### **3.2.2 Training for Court Clerks**

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<sup>9</sup> For example, hearing on 9 December 2005 concerning case No 25/2002 which is still in progress.

<sup>10</sup> An informal discussion between a JSMP staff member and a court clerk from the Suai District Court.

<sup>11</sup> Refer to Press Release dated 15 February 2005 on a decrease in the number of cases heard in the district courts.

Following on from training provided to former national judicial actors (judges, prosecutors and lawyers), training was also provided to court clerks starting from 11 July 2005 at the Judicial Training Centre simultaneously with training of the first wave of administrative staff for the Dili, Suai and Oecusse District Courts. Also, judicial training was given to court clerks in the Baucau District Court in the local courthouse. JSMP observed that the international court clerks and a judge from the Court of Appeal facilitated this training. The training is forecasted to finish in March next year and will include an evaluation on the performance of participants.<sup>12</sup>

In JSMP's opinion, the aforementioned training should improve the professionalism of the court clerks and help them to perform their duties more efficiently which will strengthen the justice system of Timor Leste in the future.<sup>13</sup>

### 3.2.3 The Provision of Facilities and Court Interpreters

JSMP observed that the district courts, in particular Suai and Oecusse, have received assistance from donor institutions in the form of generators and office equipment such as computers, printers, cupboards, chairs and paper.

This assistance will facilitate the administrative work which has been delayed from time to time due to a lack of computers and cupboards to store case files.

Also from the start of September 2005 local dialect interpreters were available in each court to provide translation from regional languages into Tetum. The provision of interpreters is a major step forward although their numbers are limited, meaning that each international prosecutor or lawyer does not have a local dialect interpreter at their disposal to facilitate communication with their clients, however, efforts have been made to facilitate the trial process before the courts.

### 3.2.4 Access to Court Documents

It is difficult to access documents, particularly in the District Courts of Dili and Baucau. For instance it is still difficult for the public to obtain judges' decisions and other documents, which are only provided to the parties directly involved in a matter. As yet no clear mechanism has been established to enable the public to gain access to court documents. In JSMP's opinion, the publication of decisions made by the Court of Appeal in a two volume book is a positive step that should be encouraged. The publication of court decisions through official court reports is an important step forward in the development of wider policy on public access to judicial information in general.<sup>14</sup>

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12 Training Materials such as a professional code of ethics for court clerks, serving the public, types and forms of registration, process of registering cases and Portuguese language were providing in this training.

13 Refer to Press Release, 'JSMP welcomes training for court clerks', July 2005.

14 See Point 5, JSMP Justice Update, 'Recent Developments in the Courts', November 2005.

### 3.3 Specific Problems relating to Case Processing and Procedures

#### 3.3.1 The Process of Arrest and Detention of a Suspect

Some obstacles were encountered in the process of arresting suspects in districts outside of Dili, especially in cases which were reported by the victim to police and cases of a minor nature such as light maltreatment. Cases such as these actually require a warrant of arrests as set out in UNTAET Regulation 2001/25 (except under the circumstances set out in Section 19A.4) and after arrest the suspect must be immediately brought before a court for a review hearing. Review hearings for suspects were sometimes delayed for several days. During such delays the suspect was usually released from detention but remained under police supervision whilst waiting to be brought before a court for a 72 hour review hearing.

Problems relating to arrest and detention which were not in line with the provisions of the transitional rules of criminal procedure in UNTAET Regulation 2001/25 can be attributed to factors such as the long distances between the homes of the suspects and the police station, and the lack of vehicles to transport suspects from the Police station to the court.

One case highlights these problems, namely a case of maltreatment that was committed by three suspects on 1 August 2005 against a suspect in the sub district of Lacluta, District of Viqueque. The 3 suspects were not promptly brought before the court for a 72 hour hearing after their arrest due to difficulties in obtaining transport and the lack of logistical requirements. Therefore the arrest of the suspects was conducted on foot. The local police stated that the District of Viqueque only has two vehicles for five sub district level police stations to assist them in performing their duties which include patrols and arrests. Of those two vehicles, currently only one is available as the other one is in need of repair.<sup>15</sup>

The lack of logistical necessities has meant that police in the sub districts have decided to not detain suspects at the police station after taking statements, and suspects are allowed to reside in the home of the relative located closest to the local police station so as to remain under police supervision.

The lack of vehicles means that suspects can not be promptly brought before a 72 hour hearing, as it takes several days for information to be passed from the district police to the sub district police about the availability of a vehicle to transport the suspects to court.

This process is far from ideal in terms of adhering to the procedure set out in section 20.9 of UNTAET Regulation 2000/30 resulting in violations of the rights of the suspect, especially the right to not be detained for an indefinite period of time.<sup>16</sup> Many trials do not include regular reviews of the detention of

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<sup>15</sup> Interview between JSMP staff and police from the subdistrict of Lacluta.

<sup>16</sup> See JSMP Press Release, 4 February 2005.



the suspect. For example, in hearings held on the 21 June 2005 there were two cases where the suspect had been detained for more than a year and no review of detention had been carried out.

This is due to a lack of monitoring and a clear process for case distribution, especially in the prosecution unit after new prosecutors were appointed to replace those prosecutors attending training in the judicial training centre.

### 3.3.2 Problems of Postponed Hearings

Hearings are often postponed in the District Courts. These postponements are sometimes caused by the tardiness of court actors or non-appearance of witnesses or victims, as well as difficulties encountered in deciding particular cases.

These delays are often compounded by electrical black outs in the Dili and Baucau District Courts. The highest incidences of tardiness of court actors occurred between February and April. JSMP understands that this can be attributed to the limited number of actors such as judges and prosecutors and that during this period international actors spent more time providing training at the Dili Judicial Training Center, meaning they found themselves overloaded. The current increase in hearings mirrors an increase in international actors, although it is common for hearings to be delayed beyond their scheduled times.

In Dili and Baucau hearings have had to be postponed due to electrical blackouts. This is a particular problem in the district courts that do not possess a back up generator, where judges are unable to prepare transcripts and print out decisions. In Baucau electricity problems have been overcome by the use of a generator which is always available as a replacement for state electricity which experiences regular black outs<sup>17</sup>.

Some cases are difficult to process due to the number of suspects and witnesses involved, and judges are unable to provide a prompt decision and therefore it may take up to one or two years to complete a trial.<sup>18</sup>

In the District Courts of Suai and Oecusse, as well as for other courts, it is sometimes difficult for the victim to travel to court due to long distances and the lack of available transport. This results in the regular postponement of hearings. A judge who is appointed to conduct hearings outside of the Dili District complained about this problem and told JSMP that he wanted to ask the Minister of the Interior and the Minister of Justice to try and provide transport that would help to guarantee the presence of relevant parties in court which in turn will facilitate the trial process.

### 3.3.3 Traditional Dispute Resolution

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<sup>17</sup> In Baucau the electricity is usually off in the morning and comes back on in the evening.

<sup>18</sup> Murder case in the stadium, between March and April 2004.

Traditional customary law has been used more and more to resolve minor maltreatment cases. The parties to the dispute, especially the perpetrator and often the victim prefer an amicable settlement rather than taking the problem to the formal legal authorities.

According to recent decisions, the settling of cases via this method is only applicable for cases carrying a maximum jail sentence of less than two years, for example light maltreatment, domestic violence and extortion. However ordinary crimes carrying a sentence of more than two years such as traffic accidents and sexual assault must be resolved through the applicable criminal procedure code, even when compensation has been paid under customary law.

The courts' view is that the most important issue is that the parties reach an amicable settlement and have a sense of justice. Nevertheless, ordinary crimes that are categorized as serious must be processed in accordance with formal legal provisions as criminal responsibility needs to be established.

### **3.4 Trends in Each District Court**

#### **3.4.1 Dili District Court**

All international judges currently appointed to this court have a schedule of hearings to be held in the Dili District Court. These schedules came into use in April 2005, prior to that only Judge Silvestre regularly displayed a schedule of hearings on the Dili Court notice board. According to these schedules, for each month the respective judges are appointed to handle 7 to 11 cases which have reached the trial stage. All judges have a schedule of hearings for the Dili District Court as this court has exclusive competence to handle a larger percentage of cases in comparison with the other courts.

Five hearings per day can be held at the Dili District Court, provided that the court actors are not held up by training at the judicial training center or are not required in hearings conducted in other district courts outside of Dili. This number of hearings reflects the actual number of hearings being processed, including cases that require 72 hour review hearings.

JSMP observed that cases occurring in the jurisdiction of the Dili District Court generally involved sexual assault, domestic violence, fights, murder, traffic accidents, theft and light maltreatment.

Of the aforementioned cases, there have been dramatic increases in light maltreatment, sexual assault and theft. For light maltreatment cases the most common sentences are probationary in nature. The length of probations range between 6 months and one year.

#### **3.4.2 Baucau District Court**

Hearings are normally conducted one or two days a week, namely Wednesday and/or Thursday. At least four hearings are heard per day and they relate to all cases that have reached the trial stage. However there are

fewer hearings in cases that require 72 hour review hearings as the judge appointed to Baucau also has duties in Dili.

The majority of hearings held in the Baucau District Court related to cases of light maltreatment, murder and looting.

#### 3.4.3 Suai District Court

This court recommenced operations on 10 March 2005. For a one year period hearings were only held at the Suai District Court during one week in several months, that is March, April, September, October and November. The limited number of court staff meant that only a few activities such as general administration and only a few hearings could be conducted.

However, the availability of a judge during the aforementioned months meant that more hearings were scheduled and were conducted more effectively. The aforementioned judge held four hearings a day and issued decisions immediately, even though these cases had only reached the main trial stage.

Common cases heard by the Suai District Court were domestic violence, sexual assault and light maltreatment, especially fights between rival groups.

#### 3.4.4 Oecusse District Court

The Oecusse District Court recommenced activities on 16 March 2005.<sup>19</sup> This court conducted hearings in April, May, August, September, October and November. During the aforementioned months hearings were heard one week in every month, except for October with an increase in the number of hearings as they were conducted over a two week period. Hearings in up to four cases were usually heard in one day.

The Oecusse District Court has conducted hearings for many cases of light maltreatment and rape. Other cases include the illegal entry of goods and illegal trespass over the border or into the waters of Timor Leste.

In October the administration section of the Oecusse District Prosecution Unit started to compile data on civil and criminal cases. The data compiled indicated that approximately 1000 cases remain undecided including cases that occurred from 2000 to 2005.

## 4. Court of Appeal

While the Supreme Court remains non-operational and unable to try certain cases – such as *habeas corpus*, which is addressed in the CPP – its jurisdiction is delegated to the Court of Appeal.

The Court of Appeal has four judges, one of whom is the Chief Judge<sup>20</sup>.

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<sup>19</sup> See JSMP Press Release, 'Suai District Court Functioning Again', 15 March 2005.

<sup>20</sup> These are: Judge Ximenes (Chief Judge); Judge Antunes; Judge da Goia; Judge da Costa.

JSMP observed that, in the latter half of 2005, the number of weekly and monthly hearings has been increasing in the Court of Appeal, in accordance with the increase in cases tried in the district courts.

While monitoring the hearings, JSMP has noticed that the judges, prosecutors and defenders have developed and performed their work in accordance with appropriate rules of procedure. In the case of appeals, the court bases its decision on its detailed analysis of the original decision, the grounds for the judge's verdict, as well as the grounds of appeal raised by the appellant. This decision is not always the confirmation of the verdict pronounced by the trial court, since in some instances the reform of the sentence has been decided.

In general terms, the judicial system, which has at times been very slow in processing cases, is now operating at a much faster pace, although still not with the requisite efficiency, frustrating community expectations of the timely resolution of criminal cases. This is due in part to the small number of judges, prosecutors and defenders available to handle appeals at present.

The judges of the Court of Appeal have also been involved other activities, such as being trainers in training courses at the Judicial Training Centre in Dili and Baucau.

#### **Appeal Cases for 2005 (as of 29 November 2005)**

<b>Type of Appeal</b>	<b>Number</b>	<b>Decided</b>	<b>Pending</b>
Ordinary Crime	21	17	4
Serious Crime	9	9	0
Civil Cases	11	0	11
Total	41	26	15

### **5. Gender issues in Timor-Leste**

JSMP has a specific unit that conducts court monitoring on cases relating to gender based violence against women and children. This unit is known as the Women's Justice Unit ("WJU") which provides analysis on judges' decisions in cases involving female victims. This analysis is concerned with the consideration demonstrated by the court actors in the handling of such cases.

In the time that the WJU has been performing court monitoring, a large number of cases relating to violence against women have not been receiving adequate consideration by the community, the legal actors and the legal structure, which also includes the legal culture that exists in the community. This is closely linked to the meaning of violence, or perceptions towards violence itself that exist in the community. Regardless of how violence is viewed, it has an extremely traumatic impact on women, regardless of whether it is linked to the value of women themselves.

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## 5.1 The involvement of Women in the Timor Leste Justice System

Article 17 of the RDTL Constitution on equality between the sexes states that “*Women and men shall have the same rights and duties in all areas of family, political, economic, social and cultural life*”.

This statement provides protection and a guarantee, moreover it provides an opportunity for women to be involved and participate in the development of all sectors in Timor Leste.

Respect for the dignity and basic human rights of women in the era of independence should be given serious consideration so that in practice women are granted the same position as men. The government has demonstrated its commitment to upholding the dignity of women in Timor Leste by authorising a specific law which respects the services and struggle of women in the past. Law No.17/ I / 3 / 2005 establishes the 3rd November as National Women’s Day in Timor Leste.

Women already play a significant role in the formal justice system, as evidenced by the following information:

- In the Police Force, women are on an equal footing with men and are present in comparable numbers. A total of 569 women are employed by the PNTL; they hold positions such as police inspectors, police sub-inspectors and police agents.
- In addition, female members of the Police Force hold a number of important positions including: Director of the Human Resources Department, Deputy of the Criminal Investigations Unit, the position of Chief of Administration in all units in the districts are dominated by women. A female member of the PNTL has also had the opportunity to be involved in a world peace mission in another country.<sup>21</sup>
- Of the 10 active judges, 5 are female (two nationals and three internationals).
- Of the 13 active prosecutors, four are female (1 national, 3 internationals).
- Of the 6 public defenders, two are female (internationals).
- Of the 61 private lawyers, 14 are female.
- 32 individuals are currently participating in training held at the Judicial Training Centre as preparation for being employed as judges, prosecutors or public defenders. Of these 32 individuals, 9 are female.

Although the government has issued No.17/ I / 3 / 2005, they still face problems in relation to their emancipation in the formal justice sector.

Based on observations conducted by JSMP in all district courts in Timor Leste, it is apparent that the participation of women in the judicial process is still extremely limited. This fact is evident in the composition of judges, prosecutors, lawyers.

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<sup>21</sup> Statistical Data was obtained from the Human Resource Department of the PNTL.

It is hoped that in the coming year further positive developments will take place in relation to the position of women in the formal justice, that will also see an increased focus on female victims of violence.

## 5.2 Statistics on Cases of Violence Against Women

Criminal Act	Jan	Feb	Mar	Apr	May	Jun	Jul	Aug	Sep	Oct	Nov	Total	% of Total Cases Listed
Maltreatment (female victim)	5	6	3	3	9	7	8	8	7	6	2	64	8.84%
Domestic Violence	1	3	5	6	6	1	5	6	9	8	4	54	7.46%
Sexual Violence	3	5	2	5	0	4	3	1	2	3	5	33	4.56%
Attempted Rape	1	0	1	1	1	0	0	2	0	2	1	9	1.24%
												<b>160</b>	<b>22.10%</b>

These statistics are from the Dili Public Prosecutor's office. Cases are written in a register there and this table selects those concerning women. The status of cases was unavailable as the information had not been entered in the register.

## 5.3 Cases of Violence Against Women Monitored by the Women's Justice Unit

Between January and early December 2005, the WJU conducted monitoring in all district courts of Timor Leste. 56 cases were monitored during this period that related to violence against women (sexual assault and domestic violence). Of those cases monitored, 18 cases have been decided by the courts. However these figures are not indicative of the overall number of cases of violence against women that have been tried in court, rather they refer to the number of cases monitored by WJU staff.

The number of decisions issued shows that there has been an increase in the number of cases being determined by a judge's decision in comparison with previous years.

## **5.4 Victim Support Service**

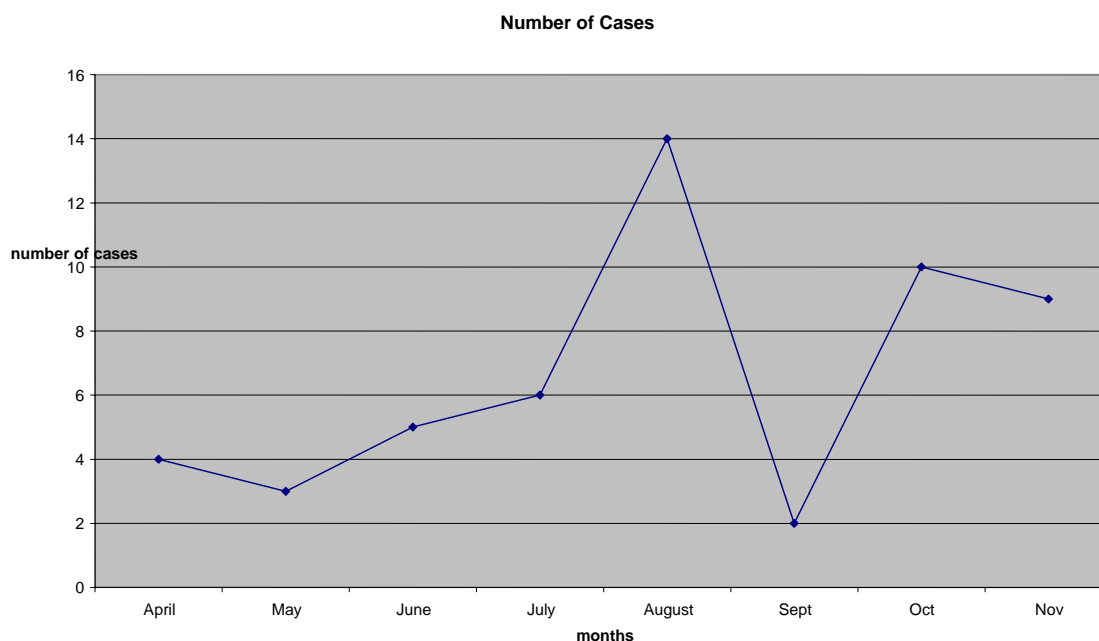
Before the Victim Support Service (“VSS”) was established in March 2005, several organizations were already working on issues of violence against women and problems of sexual violence, for example *Fokupers*, *Pradet*, *Etwave* and other local organizations. It is hoped that the presence of the VSS can strengthen and increase support for female victims of violence, especially in terms of legal representation from initial contact with the police up until the handing down of a decision by a court.

Thus, by mid 2005 a unit providing legal assistance to females and juvenile victims of sexual and domestic violence had been established. This is a step forward in providing support to female victims of violence in the context of legal support for women in the formal justice sector. Although maximum results are yet to be achieved, this still should be considered a breakthrough in relation to the provision of support for women.

During the period between April and December 2005, the VSS provided representation in approximately 52 cases of violence against women, which included domestic violence and sexual assault. From this total, 2 cases of sexual assault whereby the VSS provided representation have already been decided by the courts. The other cases are still at indictment stage or have yet to reach the prosecution unit or the courts. For a variety of reasons, the majority of cases of domestic violence where the VSS provided representation only reached to the stage where the problem had been reported to the police and was under consideration by the prosecution unit. For sexual assault cases, the majority have reached the trial stage.

## **5.5 Cases handled by the VSS**

The graph below covers the period between April and November 2005. We did not include December in this graph as this report was compiled at the beginning of December.



## 5.6 Types of Cases Handled and Legal Assistance Provided by the VSS

The VSS is intended to provide legal information to female victims of sexual assault and domestic violence. The VSS began operating on 5 April 2005 staffed by 3 nationals and 1 international. The VSS' activity program is funded by UNFPA. The VSS hopes to work together with other organizations providing similar services to female victims of violence. Although from an administrative perspective the VSS operates as a unit within JSMP, the VSS actually performs its work independently from, and has limited interaction with, the other units that make up JSMP.

The fundamental reason for establishing the VSS is to provide legal assistance to female victims of sexual assault and domestic violence. In practice the VSS provides the following legal services, amongst others:

- Assisting female victims of domestic violence and sexual violence to register their complaint to the VPU of the Police, district prosecution unit, including legal assistance during trials;
- Assisting the victim to lodge a written complaint, with written and oral clarification and cross-checking of case developments;
- Preparing the victim for the investigation process, examination during the main trial up until the court's final decision;
- Provision of information on the victim's rights during the formal legal process;
- Encouraging the victim to continue with their case after it has been lodged via the formal legal process;
- Explaining the roles, duties and responsibilities of each of the judicial actors;
- Providing legal advice in relation to the victim's case, outlining how a case may progress, the possibility of a judge's decision and the



implication and impact of a judge's decision on the interests of the victim.

Other than the provision of legal assistance to female victims of sexual and domestic violence which is aimed at facilitating access to justice, the VSS is also committed to strengthening good relations with the VPU of the Police and the Public Prosecution Unit.

## **5.7 Law**

### **5.7.1 Law on Domestic Violence**

During this year a Law on Domestic Violence ("DVL") was presented twice to the Council of Ministers. They are awaiting the promulgation of the Penal Code as the DVL will have to be harmonized with these new criminal laws.

The DVL has been finalised after much consultation with a number of institutions such as UNICEF, HRU UNOTIL, CEDAW Reporting, Department of Social Affairs etc.

It is likely that in December the law will once again be presented to the Council of Ministers.<sup>22</sup>

Hopefully the DVL will be authorized promptly as this law will be of great assistance to victims of domestic violence.

There is a real need for the DVL as it contains more specific wording and definitions on domestic violence, fundamental principles, prevention of violence, support and shelter for victims, criminal aspects and how each institution should work together to help victims of domestic violence.

The Penal Code may not address these matters, which demonstrates the need for a specific law on acts of domestic violence as well as on support and shelter for victims of domestic violence.

### **5.7.2 Penal Code**

The new Penal Code contains several provisions on Domestic Violence, namely articles 148, 149 and 150. There are numerous other provisions which have a particular impact on women:

- Article 138 - Abortion

#### Chapter IV Section I on Sexual Aggression

- Article 159 - Sexual Deviancy
- Article 160 - Sexual Coercion
- Article 161 - Rape

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<sup>22</sup> Information from a staff member of UNFPA.

#### Chapter IV Section II on Sexual Exploitation

- Article 163 - Sexual Exploitation
- Article 164 - Child Prostitution
- Article 165 - Child Pornography
- Article 166 – Sexual Violence

A positive aspect of the Penal Code is that it sets out minimal and maximal punishments. Also, the article on rape has a much wider application which includes threats, force (physical or psychological) and coercion (made against any person, including a wife or male) to have sexual intercourse.

This is very different to the Indonesian Penal Code which was previously applicable and does not mention psychological force and is not applicable in relation to a wife or male.

### **6. Justice for Crimes Committed under the Indonesian Occupation**

2005 was a momentous year in Timor-Leste's search for justice for crimes committed during the Indonesian occupation, particularly in 1999. Ultimately, however, it has been a year characterised by a lack of clarity and political will, resulting in justice processes that have inadequately addressed the demands of the Timorese people and of international law for the delivery of genuine justice.

Some of the more important landmarks of the year include:

- In February a UN-appointed Commission of Experts (COE) was announced to assess the progress in seeking justice for the crimes committed in Timor-Leste in 1999 by the Ad Hoc Jakarta Tribunal and the Special Panel for Serious Crimes (SPSC).
- In March, the Presidents of Timor-Leste and Indonesia agreed on a joint Commission on Truth and Friendship (CTF) to examine the events of 1999, including in its mandate the option of recommending amnesties for perpetrators who participate in the CTF.
- On 20 May, with the closure of the United Nations Mission of Support to Timor-Leste,<sup>23</sup> the mandate of the Serious Crimes Unit (SCU) terminated and the Special Panels for Serious Crimes (SPSC) suspended hearings indefinitely with the departure of international judges, prosecutors and defence lawyers.
- The COE Report was completed on 26 May.

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<sup>23</sup> UNMISSET was replaced by another UN mission, the United Nations Office in Timor-Leste (UNOTIL). However, UNOTIL was not given a justice mandate.

- The COE Report was transmitted to the Security Council on 28 June.
- The COE Report was officially released on 15 July.
- In August, the CTF was inaugurated.
- On 28 September 2005 the President of the Security Council issued a letter to the Secretary General requesting the him to “submit a report on justice and reconciliation for Timor-Leste with a practically feasible approach, taking into account the Commission of Experts’ Report, as well as the views expressed by Indonesia and Timor-Leste”.
- On 31 October, the Commission for Reception, Truth and Reconciliation (CAVR) delivered its 2,500 page Final Report on human rights violations committed between 1974 and 1999.

### 6.1 Commission of Experts

On 18 February 2005 the Secretary-General of the United Nations announced the appointment of the *Commission of Experts to Review the Prosecution of Serious Human Rights Violations Committed in Timor Leste (The Then East Timor) in 1999* (the COE). According to its Terms of Reference, the COE was to:

[A]ssess the progress made in bringing to justice those responsible for such violations [in East Timor in 1999]; to determine whether full accountability has been achieved; and to recommend future actions as may be required to ensure accountability and promote reconciliation.<sup>24</sup>

To carry out its mandate, the COE, comprised of 3 members,<sup>25</sup> assessed the work of the Ad Hoc Tribunal in Jakarta and the SPSC in Timor-Leste. The COE visited Timor-Leste in April 2005 and met a range of government representatives and civil society groups. JSMP provided a written submission to the COE and also met its members.<sup>26</sup>

The COE submitted its Report to the Office of the United Nations High Commissioner for Human Rights on 26 May 2005. The Secretary-General presented it to the Security Council on 28 June 2006 and released it to the public on 15 July 2005. In its report the COE concluded, amongst other things, that:

[T]he serious crimes process has not yet achieved full accountability of those who bear the greatest responsibility for

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24 Terms Of References For The Commission Of Experts To Review The Prosecution Of Serious Human Rights Violations Committed In Timor-Leste (The Then East Timor) In 1999.

25 The members of the Commission were Justice P. N. Bhagwati (India), Dr. Shaista Shameem (Fiji) and Professor Yojo Yokota (Japan).

26 See ‘JSMP’s Submission to the United Nation’s Commission of Experts’, available at [www.jsmp.minihub.org](http://www.jsmp.minihub.org) .

serious violations of human rights committed in East Timor in 1999.<sup>27</sup>

This was attributed to a number of factors, including that the SCU, the SPSC and the Defence Lawyers Unit received insufficient resources to enable them to discharge their respective mandates; that the SCU was unable to act independently of the government; and the lack of access to evidence and suspects in Indonesia, and the absence of Indonesian cooperation in that regard.

More damningly, the COE found that “the prosecutions before the Ad Hoc Court were manifestly inadequate”,<sup>28</sup> and that:

[T]he judicial process before the Ad Hoc Court was not effective in delivering justice for the victims of serious violations of human rights and the people of Timor-Leste. The failure to investigate and prosecute the defendants in a credible manner has not achieved accountability of those who bear the greatest responsibility for serious violations. Many aspects of the ad hoc judicial process reveal scant respect for or conformity to relevant international standards.<sup>29</sup>

In short, the COE found that those bearing primary responsibility for violations committed in 1999 had not yet been brought to account. Accordingly it recommended, among other things, that:

- The Security Council retain the SPSC, the SCU and the Defence Lawyers Unit to complete investigations, indictments and prosecutions;
- The Indonesian authorities review and, if appropriate, re-try indictees in accordance with international standards and with international assistance; and
- If the governments of the two countries do not initiate the recommendations, that the Security Council establishes an international criminal tribunal, to operate in a third state, under Chapter VII of the UN Charter.

At the time of writing, the COE Report had already been considered by the Security Council. On 28 September 2005 the President of the Security Council issued a letter to the Secretary General pertaining to the COE Report. According to the Letter, the SC requests the SG to “submit a report on justice and reconciliation for Timor-Leste with a practically feasible approach, taking into account the COE Report, as well as the views expressed by Indonesia and Timor-Leste”. It is not clear precisely what this means, however, in JSMP’s view, it would appear to be a request to re-consider the recommendations of the COE Report in light of the CTF.

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27 Summary of the report to the Secretary-General of the Commission of Experts to Review the Prosecution of Serious Violations of Human Rights in Timor-Leste (then East Timor) in 1999, 26 May 2005, UN Doc. S/2005/458, p. 5.

28 Ibid, p. 6.

29 Ibid, p. 6.

## 6.2 The Commission on Truth & Friendship

At approximately the same time that steps were being taken to establish the COE, the governments of Indonesia and Timor-Leste were negotiating the formation of the CTF. The agreement for the formation of the CTF was signed by the heads of state of the two countries on 9 March 2005.

As Foreign Minister Ramos-Horta stated, the CTF's primary purpose is to "resolve once and for all the events of 1999". This also meant closing off the possibility of prosecuting perpetrators for the violations that occurred in 1999. The Terms of Reference state that the CTF will "seek truth and promote friendship as a new and unique approach rather than the prosecutorial process."<sup>30</sup>

According to the principal clauses of the Terms of Reference:

- The objective of the CTF will be to establish "the conclusive truth" as to what occurred in Timor Leste in 1999 and to prevent a recurrence of similar events;
- The mandate of the CTF will be confined to "the period leading up to and immediately following" the Referendum in 1999. Consequently, none of the crimes committed during Indonesian occupation prior to 1999 will be investigated;
- According to one of its founding principles, "the CTF process will not lead to prosecution". Furthermore, offenders who "cooperate fully in revealing the truth" could be granted amnesty, that is, guaranteed immunity from future prosecution irrespective of the nature of their crimes; and
- Persons "wrongly accused" of human rights violations are to be "rehabilitated".

In August 2005 10 Commissioners, five from each country, were appointed and the Commission commenced its work. It has a mandate of one year, and the possibility of a one-year extension, at the end of which it will produce a report.

Controversially, a number of the Commissioners from Timor-Leste's CAVR are also commissioners of the CTF and the CTF's Timor-Leste headquarters are at the same site as CAVR. This has led to concerns that the work of the CAVR, which was a civil society led organisation that recommended bringing perpetrators to justice, will be effectively superseded by the CTF, which has a very different role.

The CTF has been broadly criticised for operating in contravention of international human rights law, in particular that it will offer amnesties for crimes against humanity. This also raises constitutional questions in Timor-Leste where a strong argument can be made that it is beyond the

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<sup>30</sup> Term of Reference for The Commission of Truth and Friendship Established by The Republic Indonesia And The Democratic of Timor Leste, Article 10.

constitutional competence of the government – and within the exclusive competence of the Parliament – to enter into an international agreement pertaining to the grant of amnesties.<sup>31</sup> It is questionable whether even Parliament would be empowered to enter into such an agreement without violating international law.<sup>32</sup>

In JSMP's view it is clear that the CTF is designed to shield from prosecution those who bear primary responsibility for crimes committed in Timor Leste under the guise of a truth and reconciliation function whose fulfilment is uncertain. Even this very limited mandate is potentially under threat, depending as it does on in-depth and impartial investigations and full access to sensitive military and governmental records which the ToR do not necessarily guarantee.

### 6.3 Closure of the SPSC

On 12 May 2005 the Special Panels for Serious Crimes (SPSC) conducted its final hearing and delivered a written decision in the case of Sisto Barros and Cesar Mendonca. Judge Rapoza, the presiding judge, then formally adjourned the SPSC *sine die*.<sup>33</sup>

At the time of its closure, the SPSC had tried approximately one third of all persons indicted by the Serious Crimes Unit with the remainder located beyond the territorial jurisdiction of Timor-Leste. Further, a significant number of crimes committed during and prior to 1999 were not investigated and, as a result, have not been indicted.

#### Statistical Summation of Performance<sup>34</sup>

Statistic Type	2000	2001	2002	2003	2004	2005	Total
Number of indictments issued	12	21	13	35	14	0	<b>95</b>
Number of defendants indicted	21	56	59	259	45	0	<b>440</b>
Number of indicted persons beyond jurisdiction							<b>339</b>
Number of cases for which trials have been completed	0	12	9	13	13	8	<b>55</b>
Number of defendants for whom trials held	0	21	9	17	29	11	<b>87</b>

31 According to section 2.3 of the Constitution "[t]he validity of the laws and other actions of the State and local Government depends upon their compliance with the Constitution".

32 Antonio Cassese, *International Criminal Law*, 2003, Oxford University Press, 314-5.

33 An adjournment sine die is defined as the postponement of suspension of the hearing of a case "for an indefinite time": L.B. Curzon, *The Dictionary of Law* (6th ed.), Longman, 2002, at 8.

34 SPSC statistics.

Number of defendants convicted	0	21	9	17	27	10	<b>84</b>
Number of defendants acquitted	0	0	0	0	2	1	<b>3</b>
Number of defendants whose cases were withdrawn/dismitted	2	5	0	1	5	0	<b>13</b>
Number of defendants ruled unfit to stand trial	0	0	0	0	0	1	<b>1</b>

#### 6.4 Future Prosecutions in the SPSC

Given the absence of fresh initiatives with international support, the conclusion of the SPSC marks an end to hopes that those primarily responsible for crimes against humanity perpetrated during and immediately after the 24 years of Indonesian occupation of Timor Leste will ever be indicted and/or prosecuted.

Some suspects already indicted, however, mainly low-level perpetrators, may be prosecuted if they enter Timor-Leste's territory. In August, September and November a number of serious crimes suspects returned to Timor-Leste by crossing the border from West Timor and were immediately arrested.<sup>35</sup> This included Manuel Maia, who was indicted by the Serious Crimes Unit in July 2003 but never brought to trial because he was beyond the jurisdiction.

A number of important legal issues have been raised by these recent arrivals - aside from the lessons for future transfer of functions from the UN to a post-conflict sovereign state and the broader political repercussions – and the implications are potentially huge for Timor Leste's security, stability and relationship with Indonesia. These issues can be reduced to two fundamental questions:

- What are the current legal requirements governing trial of serious crimes suspects?; and
- Are the courts of Timor-Leste, as presently constituted, competent to try serious crimes suspects in a manner consistent with the these legal requirements?

#### Legal Requirements

The requirements for the trial of serious crimes for 1999 are set out in The Constitution:

The collective judicial instance existing in East Timor, composed of national and international judges with competencies to judge

<sup>35</sup> See JSMP Press Release, 'War Crimes Suspect Returns to Timor Leste', 8 August 2005; JSMP Press Release, 'More Support and Consideration Required for Continuation of Serious Crimes Trials', 13 September 2005.

serious crimes committed between the 1<sup>st</sup> of January and the 25<sup>th</sup> of October 1999, *shall remain operational for the time deemed strictly necessary to conclude the cases under investigation.*<sup>36</sup> (emphasis added).

JSMP understands “the collective judicial instance” to refer to the UNTAET regulatory regime that established the Special Panels and determined their composition. It is the SPSC, therefore, that must remain operational as long as cases are under investigation.

In JSMP’s view “cases under investigation” encompasses at least cases in which an indictment had been filed (but may not extend to investigated cases in which indictments had not been filed).<sup>37</sup> On that basis, it is arguable that the SPSC regime would continue to apply – subject of course to repeal – for as long as indicted cases remain untried or incomplete.

The recent arrival of indicted suspects in Timor-Leste and the likely return of others demonstrate that more time is necessary to conclude cases under investigation. Both the courts and the authorities have made comments to this effect.<sup>38</sup> Therefore, the SPSC should continue to remain operational.

### The Courts in Timor-Leste

In JSMP’s opinion and in the absence of contrary national laws, only a special panel of judges validly-appointed under UNTAET regulations can investigate and prosecute returned indictees for serious crimes. The courts of Timor Leste are, therefore, presently competent to carry out this role.

Over and above legal competence, however, it is essential to ensure that trials are conducted expeditiously, transparently and with due regard to the defendants’ fair trial rights. Among other things, this will require judges with the necessary experience in the field of international and criminal law, competent, qualified prosecutors and defence lawyers and the availability of adequate court resources such as skilled interpreters. In JSMP’s view, the courts as presently composed do not satisfy these criteria.

## **6.5 The Completion of the Final Report of the Commission for Reception, Truth and Reconciliation (CAVR)**

On 31 October this year, Timor-Leste saw another major milestone in its search for justice for the crimes of 1999 and earlier when the CAVR presented its Final Report to the President.<sup>39</sup> On 28 November the President handed the Report to the Parliament, but has not yet released it to the public.

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<sup>36</sup> Article 163.1.

<sup>37</sup> The Majority appeared to have adopted an even broader interpretation i.e. cases under investigation are those “in relation to which the investigation has begun before the same date but the indictment has not yet been filed”. Judgement, Francisco Perreira, at 5-6.

<sup>38</sup> See Francisco Perreira.

<sup>39</sup> The CAVR was an independent Commission formed by the interim government in early 2002 on the initiative of the President and civil society organisations.



JSMP understands that the report, some 2,500 pages long, details human rights violations perpetrated by all sides to “political conflicts” in Timor-Leste between April 1974, the date of the Carnation Revolution in Portugal, and October 1999 when Indonesia departed the territory. It examines, among other things, patterns of killings and executions, torture and imprisonment, sexual violence, social and economic violations and abuse of children, by Indonesian forces as well as by Fretilin and other political parties.

Importantly, the Report also makes recommendations for promoting reconciliation and preventing the recurrence of such violence. According to comments by CAVR’s President, these include a recommendation to continue investigations by the Serious Crimes Unit into crimes perpetrated in the territory, and also to establish a recommendations scheme for victims of the conflicts, with contributions from Indonesia and other States complicit in the occupation, such as Australia and the United States.

The reaction from the President at the time of writing was lukewarm. Although he acknowledged the value of the Report’s truth-seeking work, he has spoken out strongly against the possibility of an international tribunal or a reparations scheme.

JSMP welcomes the completion of the Final Report and considers that it will be a seminal document not only in Timor-Leste’s current search for truth and closure regarding the past, but also in future generations’ efforts to understand the struggles of their parents. The Report belongs to the Timorese people, and JSMP hopes that it will be made available to them as soon as possible and that its release will be followed with a comprehensive dissemination campaign. It also urges the government to consider the recommendations made by the CAVR seriously in order to build a just and stable society in Timor-Leste.