

Access to Justice in Timor-Leste: The welfare of judicial actors and capacity of legal institutions

I. Introduction

In 2013 JSMP reviewed the resources and capacity of each legal institution to examine how to improve their ability to provide and guarantee justice for the people of Timor-Leste. Research was carried out to ascertain the existing constraints and challenges that the courts, the Office of Public Prosecutions (OPP) and the Office of the Public Defender (OPD) face. Research was conducted by interviewing judges, prosecutors, public defenders and court clerks.

This initiative came about as the result of JSMP court monitoring and informal conversations between JSMP staff and judicial actors, whereby JSMP became aware of judicial actors' concerns about constraints on their capacity, resources, facilities, tools for communication and working conditions.

JSMP and the judicial actors share a concern that these resource constraints negatively impact the quality of services legal institutions deliver, and thereby limit access to justice. JSMP is also concerned that the work-load and resource constraints of judicial actors are not proportional to the demands placed on them, and that this has a negative impact on the welfare and capacity of judicial actors. JSMP therefore conducted this research to make recommendations to improve the welfare and capacity of judicial actors and institutions.

There has been a welcome increase of approximately US\$4.77 million to the Ministry of Justice in the 2014 National Budget compared with the 2013 National Budget. The major budgetary changes include:

- \$0.589 million increase for the provision of better quality biometric passports and ID cards
- \$0.896 million increase for the rehabilitation of prisons in Suai District
- \$0.4 million allocated for new vehicles, computers and other electronic equipment for the Courts
- \$2.32 million increase for the development and maintenance of District Court buildings in Dili, Baucau, Suai, Oecusse and the Court of Appeal

These additional funding allocations are welcome but are far from sufficient to redress the concerns contained in this report.¹

This report begins with a background note on the OPD and a discussion of the importance of legal aid to ensure access to justice. This is followed by an outline of the main resource constraints and challenges that were identified by JSMP during interviews with judicial actors at the courts, the OPP and the OPD.

2. Office of Public Defenders

The Office of Public Defenders (OPD), a department within the Ministry of Justice, is responsible for providing free legal assistance for Timor-Leste's most vulnerable people. The OPD was originally established during the United Nations Transitional Administration in East Timor

¹ 2014 State Budget.

(UNTAET) to represent defendants before the Special Panels for Serious Crimes in the Dili District Court.² From 2005 onwards, however, the OPD's mandate was considerably extended to provide nation-wide legal aid.³

As this Report highlights, the OPD's resource constraints are complex and include both a lack of human and non-human resources. The OPD urgently needs to recruit additional lawyers and support staff in order to meet its enormous national caseload. Further, OPD branches outside Dili often operate without access to internet, email, online legal resources, information management systems or information technology services. There are often very basic resourcing concerns such as lack of electricity, running water and security. OPD branches also require better access to transportation and interpreting services in order to access and assist their most vulnerable clients. Finally, without ongoing legal education and training, Public Defenders and their support staff are not adequately equipped to manage the country's evolving and uncertain legal terrain.

This Report also discusses the OPD's limited footprint in rural and remote areas. There is an important need to expand the OPD beyond its current presence in only four districts. The Report also considers widespread public unfamiliarity with the right to legal aid and the need for further educational outreach in remote and disadvantaged communities. Finally, the Report canvasses issues of professional independence for lawyers employed by the State.

There are many justifications for reform of the OPD. Ensuring the OPD has the resources and capacity to fulfill its mandate is essential to guarantee Timor-Leste's most vulnerable people's equality before the law. More broadly, however, legal aid plays an important role in building the integrity and efficiency of Timor-Leste's maturing judicial and legal systems. Finally, reform of the OPD is also important to ensure fair and safe work conditions. Public Defenders and other staff have the right to the resources and support that are essential to doing their jobs. If the OPD continues to operate in a low-resourced environment it could damage its ability to recruit skilled professionals and risks incubating corruption and poor professional culture.

Critical resource shortfalls make it extremely difficult for the OPD to meet the needs of its clients. The Department's lack of resourcing is clear on the face of its annual budget. In 2012, the budget for the OPD was US\$ 0.63 million, compared to US\$ 4.29 million for the Office of Public Prosecutions (OPP) – making the budget for the OPP nearly seven times as large as that of the OPD.⁴ This year, the OPP has been allocated four times the funding of the OPD in the 2014 annual budget.⁵

This lack of resourcing is inappropriate in light of the OPD's broad mandate:

“[I]mplement a national policy to ensure citizens who are eligible and require the assistance of a public defender are able to receive assistance. To further this, the OPD is also mandated to conduct interventions to increase citizens' access to justice.”⁶

² 'Office Of Public Defenders: "Bringing Justice Closer To The People"', *UNMIT/Serious Crimes Investigation Team (SCIT) Newsletter*, Issue 3, March 2009 <http://unmit.unmissions.org/Portals/UNMIT/SCIT/SCIT%20Newsletter/SCITinfo3_ENG.pdf>.

³ Ibid.

⁴ 2013 State Budget, Book 4A and Book 4B cited in JSMP, *Overview of the Justice Sector: JSMP Annual Report 2012*, 15 <http://jsmp.tl/wp-content/uploads/2013/04/OJS-2012_Final_Tetum_5-April-2013.pdf>.

⁵ 2014 State Budget.

⁶ UNDP, 'Strengthening The Justice System In Timor-Leste (UNDP Project No. 00014955) Justice System Programme: 2012 Annual Report' (January 2013), 18 <http://www.undp.org/content/dam/timorleste/docs/JSP%20docs/TL_JSPannual_report_2012.pdf>.

The OPD not only advises and represents clients but also coordinates outreach, legal education and broader legal aid. As the UNDP highlights:

“PDs have to balance the demands of representing clients, providing legal assistance and undertaking outreach, leading to practical limitations on the number of outreach activities they can undertake.”⁷

3. The importance of legal aid

The right to legal assistance is a cornerstone of the rule of law. Legal assistance is a practical necessity in order to ensure an individual’s equality before the law and right to a fair trial. Legal assistance serves an especially important role in guaranteeing the rights of individuals who are marginalized or vulnerable because of poverty, illiteracy, lack of formal education or minority status (such as women, children, and people from rural and remote communities).

The right to equality before the law and the associated right to legal representation are foundations of international law. Article 10 of the *Universal Declaration of Human Rights* provides that ‘[e]veryone is entitled in full equality to a fair and public hearing’.⁸ Article 11 provides that ‘[e]veryone charged with a penal offence has the right to be presumed innocent until proven guilty according to law in a public trial at which he has had *all the guarantees necessary for his defence*’.⁹ Article 14.1 of the *International Covenant on Civil and Political Rights* further provides that a fair hearing must be provided in ‘the determination of any criminal charge against [an accused], or of [an accused’s] rights and obligations in a suit at law’.¹⁰

The benefits of legal aid extend further, however, than the benefits to the specific individuals who face prosecution in the criminal justice system. Access to legal services plays an important broader role in maturing legal systems and developing political institutions. As the *International Legal Aid & Defender System Development Manual* explains:

In many countries, legal service organizations, ... play a leadership role in promoting law as a resource for the disenfranchised and in creating a just society that respects the rights of its people. The rule of law and popular empowerment under a just system together provide the basis for social change by holding government officials accountable... Legal services have the capacity to mobilize movements and inform the public. From the struggle for criminally accused, legal services lawyers have played a powerful role in social change in different communities...¹¹

It is clear, therefore, that ensuring an effective and accessible legal aid system should be a key priority in Timor-Leste’s developing legal system.

⁷ Ibid.

⁸ *Universal Declaration of Human Rights*, GA Res 217A (III), UN GAOR, 3rd sess, 183rd plen mtg, UN DOC A/810 (10 December 1948).

⁹ Ibid (emphasis added).

¹⁰ *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, UNTS171 (entered into force 23 March 1976).

¹¹ National Legal Aid and Defender Association, *International Legal Aid & Defender System Development Manual* (November 2010) 9 (citations omitted) <http://www.nlada.org/Defender/Defender_Publications/International_Manual_2010>.

4. Lack of resources and poor work conditions for judicial actors

*'Sometimes we want to go identify cases but we can't.
Sometimes we want to go take photos of evidence but we don't have a camera.'*¹²

i) Human resources

The first resource limitation is the critical lack of human resources. As of 2012, there were a total of 22 Public Defenders responsible for the entire national caseload.¹³ The majority of Public Defenders are based in Dili. In 2012, there were 15 Public Defenders in Dili compared to only 3 in Baucau, 2 in Suai, and 2 in Oe-Cusse.¹⁴ These numbers mirror the distribution of Public Prosecutors across Timor-Leste. In 2012, there were a total of only 24 Public Prosecutors nation-wide.¹⁵

With such limited numbers, lawyers are each responsible for very large numbers of clients in an overstretched court system. The national case-load continues to grow, as is highlighted by the rising back-log in Timor-Leste's courts. In 2011, the back-log was estimated to be approximately 4723 cases, rising from 4644 cases in 2010.¹⁶ As an observer (quoted in an academic study) has commented: '[o]ne lawyer attends to so many cases – they have no time to visit prisons. Some don't ever see their clients'.¹⁷ A lawyer JSMP interviewed at the Baucau OPD describes: 'We are only three people – we cannot service all the clients.'¹⁸ The lawyer went on to explain that he had worked on at least 100 cases since January 2013, and that this did not include 'extra-judicial matters' such as advocating for elderly women and veterans in pension disputes, appearing in mediations etc.¹⁹ A second Baucau Public Defender stated that he had over 123 criminal law clients and 20 civil law clients between January 2013 and the end of July 2013.²⁰

There are also insufficient numbers of support staff such as clerks and administrative assistants working with the lawyers. A clerk at the Baucau OPD told JSMP that there are only two such clerks supporting the entire office.²¹ This is much less than the 10 clerks working for the Baucau OPP. The OPD clerk recommended to JSMP that at least six or seven additional court officials were needed to cope with the workload, and that there was no use increasing the number of Public Defenders without first increasing their own numbers.²² Similarly, the Baucau OPD does not have a receptionist and its cleaner doubles up as the security guard because there is no additional funding.²³

It should be noted that the issue of human resources is a problem for all of the courts and judicial actors. For example, each judge deals with 70 cases per year and each public prosecutor handles more than 100 cases per year. According to figures recently provided by the Prosecutor-General in his report to the President, currently there are 4,317 cases being processed (pending). Two members of the Dili judiciary, Judge Duarte Tilman and Judge Antonino Gonçalves, have identified the back-

¹² Interview, Lawyer B, Office of the Public Defender, Baucau, Tuesday 30 July 2013 ('Lawyer Interview B').

¹³ JSMP, *Overview of the Justice Sector: JSMP Annual Report 2012*, above n 4, 17.

¹⁴ Ibid.

¹⁵ Ibid.

¹⁶ *The Report of Prosecutor General of the Republic Timor-Leste* (December 2011) cited in Fragility Assessment Team, Ministry of Finance, *Summary Report: Fragility Assessment in Timor-Leste* (26 February 2013, Dili)
¹⁴<http://static.squarespace.com/static/5212dafbe4b0348bfd22a511/t/52aea919e4b0532c165f6a15/1387178265606/Timor%20Leste%20Fragility%20Assessment%20Report.pdf>

¹⁷ Interview, Civil Society Legal Adviser, Dili, 22 April 2010, cited in A Marriott, 'Justice Sector Dynamics in Timor-Leste: Institutions and Individuals' (2012) 4(1) *Asian Politics and Policy* 53, 58.

¹⁸ Lawyer Interview B.

¹⁹ Ibid (at as 30 July 2013).

²⁰ Interview, Lawyer A, Office of the Public Defender, Baucau, Tuesday 30 July 2013 ('Lawyer Interview A').

²¹ Interview, Clerk, Office of the Public Defender, Baucau, Tuesday 30 July 2013 ('Clerk Interview A').

²² Ibid.

²³ Ibid.

log of cases as a central concern of theirs and have recommended the number of judiciary increase to reduce the back-log.²⁴

This has far-reaching implications on access to justice because there is no time for judicial actors to read other references, or to conduct research in complex cases. The charges and defense prepared by each party are very brief because they don't have enough time to speak with their clients and only meet with their clients when they are at court.

ii) Capacity Building

Another central concern of many judicial actors and of JSMP is that there is insufficient capacity building available for all actors in the judicial system. Capacity building is needed for national prosecutors to reduce prosecutorial dependence on foreign nationals. As the Prosecutor General Jose Ximenes noted:

*“It is necessary to increase the capacity of prosecutors so they have expertise to deal with specific types of cases such as corruption, money laundering, and drugs, so that they can conduct investigations properly into these types of cases... to reduce the dependence on foreigners”.*²⁵

Such training could be provided to the judiciary, prosecutors and public defenders at the Judicial Training Centre in Dili and would significantly contribute to the national judicial actors' capacity to hear cases on increasing complex matters. Public Defender Sergio Hornai also identified a need for training for judicial actors so that they have a consistent interpretation of each article of law.²⁶

Senior prosecutors could also receive training in leadership and management to similarly reduce the dependence on foreign judicial actors. These types of training initiatives are necessary for the sustainability and effectiveness of the Timor-Leste legal system.

Further capacity building initiatives should also be available to court translators, who currently do not always have the language and translation skills necessary for accurate and effective court translation. Judge Antonino Gonçalves suggests that raising translator salaries would help to improve the skill level of court translators.²⁷ Malena Piedade of the Judicial Services Section of the Dili District Court also noted the relatively low wages provided to translators, and that court clerks needed Portuguese and Tetum training.

Without these capacity building initiatives, the Timor-Leste legal system will not be able to adequately address the increasingly complex criminal cases, respond to language differences that create access to justice issues or reduce dependence on foreign nationals to become self-sufficient.

²⁴ JSMP 2013 interviews of Dili court actors.

²⁵ Ibid.

²⁶ Ibid.

²⁷ Ibid.

iii) Information and Technology resources

Another major concern is the lack of information and technology resources, which are critical to legal practice. For example, the Baucau OPD operates without an online or a hard-copy legal resources library. There is no working internet or email, and no access to a fax machine or to the information on the court databases. The Office also has only limited access to computers and laptops. During an inspection conducted by JSMP in July 2013, all three of the Baucau OPD's computers were broken and unusable.

There is still no internet at the Baucau office, despite numerous visits by Dili-based technicians. Part of this problem stems from the lack of locally-based technicians; requiring information technology (IT) technicians to travel from Dili causes long delays. A recent UNDP Report states that IT units have now been established at all institutions, including the OPD.²⁸ However, locally-based and accessible IT services are very different to services that are located in Dili.

Public Defender Sergio Hornai speaks of similar challenges in Oecusse. He notes that there are no radio facilities and that there are continuing problems with the internet connection. He recommends that CB radios be provided to public defenders in all districts and that a generator be provided in Oecusse to enable the work of the Oecusse public defenders. To further facilitate the work of the OPD, Sergio Hornai also notes the need for an OPD library for legal research purposes.

The judiciary also face challenges associated with the poor internet connection and other research tools. Judge Duarte Tilman and Judge Antonino Gonçalves both expressed their concern at the poor internet connection in the judicial offices and recommended that the judiciary be provided with free internet access and legal books for the library to support the quality and efficiency of judicial work.

As a Public Defender in Baucau described, lack of internet access has profound consequences on the quality of legal advice and legal representation.²⁹ It is impossible for lawyers to do legal research or to find legal references in order to serve their clients. Lawyers cannot send emails to their colleagues or access the central online database in order to keep up to date with jurisprudence in Dili. Instead, lawyers are required to travel to Dili each time they want to access these resources. Similarly, without internet access it is too difficult to research legal developments in other relevant jurisdictions such as Brazil and Portugal.

AUSAid's Justice Facility and the UNDP's 'Enhancing the Democratic Rule of Law through Strengthening the Justice System in Timor-Leste' project (also referred to as the 'Justice System Programme' (JSP)) have been working towards establishing an Integrated Information Management Systems (IIMS) so that all justice institutions (i.e. the Ministry of Justice, Courts, Police, OPP, OPD and the prisons) use a standard information system and integrated data by the end of 2013.³⁰ However, JSMP's inspection of the OPD in Baucau reveals that IIMS is not yet fully operational. Installing IIMS will remain impossible without internet access and also if staff are not trained to use the technology. Without IIMS, however, there is no proper case flow or sharing of information between government institutions.

In addition, several public defenders and court clerks do not have computers and there is no ongoing maintenance of adequate quality.

On a positive note, in the 2014 National Budget, the Ministry of Justice received an allocation of

²⁸ UNDP, 'Strengthening The Justice System In Timor-Leste', above n 9, 9.

²⁹ Lawyer Interview A.

³⁰ See eg, UNDP, *Justice System Programme: Annual Work Plan 2013*

<http://www.undp.org/content/dam/timorleste/docs/JSP%20docs/TL_JSP_AWP_2013.pdf>.

\$149,000 for computers and other electronic equipment (compared to \$75,000 in 2013) which included an allocation of \$19,000 for the OPD (compared to nil funding in 2013), and the courts received \$304,000 (also compared to nil funding in 2013).³¹

iv) Communication with clients

Insufficient phone credit is challenge for the OPD. Although Public Defenders are currently given a monthly allowance in phone credit, they must supplement this with their own money to contact their clients. Most of the OPD's clients cannot afford to make phone calls at all, and so they deliberately leave 'missed calls' for their lawyers, requiring the lawyer to call their clients back.³²

Some concerns about translation and interpreting services are addressed above under capacity building needs. A further concern here is the OPD's limited access to interpreting services. For example, the OPD in Baucau does not receive funding for in-house interpreting or translation.³³ This is a significant difficulty because all court documents are in Portuguese and the Baucau Public Defenders have only limited proficiency in technical Portuguese.³⁴ Similarly, it is difficult to meet the short deadlines for filing of documents when translators and interpreters are not available.³⁵ Another concern is the ability for lawyers to communicate with their clients – without translating into clients' local languages it is very difficult and exhausting for lawyers to get legal instructions or to explain legal rights and obligations to their clients.³⁶ The \$4,000 allocated to the OPD for translation services in 2014³⁷ is insufficient to adequately address this need.

v) Transportation resources

Transport is necessary to facilitate the work of judicial actors and to increase their productivity and safety. Transportation continues to be a major concern for the OPD, the OPP and the judiciary, and represents a significant barrier to proper access to justice.

Judge Duarte Tilman notes that the courts are organs of sovereignty as set out in Article 118 of the Constitution but they "are not given the same treatment as the other organs of sovereignty," in terms of salary scales, security and transport facilities. By way of comparison, MPs and the National Parliament have their vehicles replaced at the start of each period and directors from a number of ministries have their vehicles replaced every year, with vehicles of a much higher quality than those provided to judicial actors. Judge Tilman notes that the judges have been using Inova vehicles for 7 years with no new vehicles being provided. He suggests that, in addition to adequate vehicles, drivers should be recruited and assigned to each of the court actors to help facilitate their work.³⁸

Similarly, Canção Xavier noted that there are insufficient transport options for the OPD, which causes several problems including making it difficult for public defenders to provide legal assistance through the mobile courts.³⁹ Several public defenders do not have any transport or have to use their own motorcycle.

At the Bacau OPD, there is only one public car and one public motorbike for the three lawyers to

³¹ 2014 State Budget, Books 4A (p 269-284) and 4B (p 571-579).

³² Lawyer Interview A.

³³ Lawyer Interview A; Lawyer Interview B.

³⁴ Ibid.

³⁵ Ibid.

³⁶ Ibid.

³⁷ 2014 State Budget, Book 4B (p 257).

³⁸ Above n 36.

³⁹ Ibid.

reach their entire caseload.⁴⁰ In reality, this means that it is often impossible for lawyers to go out to the districts for legal education sessions, attend mobile courts or to make observations for land issues. It is difficult to ensure that court documents and notices are received by clients unless lawyers are able to deliver them personally, which is presently beyond lawyers' capacity. It is also very difficult for lawyers to visit their prison-based clients.⁴¹ As one lawyer from the Baucau OPD explained:

“If one day we were invited to visit the prison, required to go to court, and also required to go to Court in Dili – with one car, it just means we have to cancel the other arrangements ... It is hard to talk to a client in the prison because transport is a big problem. We usually have to meet with clients in our spare time. So for me, on Thursday I have to look for a time to go meet with my clients in prison.”⁴²

There is a further concern that these circumstances are unsafe for the public defenders as, after providing legal assistance and returning home by motorcycle, they could be ambushed in the street (see section (vi) below).

The 2014 National Budget includes significant increases in the allocation of funding for the purchase of vehicles for the court and for the OPP, although no funding at all has been allocated for the OPD transport needs.⁴³

⁴⁰ Lawyer Interview B.

⁴¹ Ibid.

⁴² Ibid.

⁴³ 2014 State Budget, Books 4A (p 535) and 4B (p 257).

vi) Safety of judicial actors

An incident occurred in late January 2014 that brought the security risks faced by judicial actors into focus. Some Dili-based judges and their families were threatened at their homes by masked members of an organized criminal network involved in an ongoing trial in the Dili District Court. No subsequent violence against these judges has yet been reported but several judicial actors are understandably concerned about their personal safety, especially given that this was not the first time such actors have been threatened in relation to their work.

In interviews carried out by JSMP in 2013 the issue of personal security was also raised. Judge Antonino Gonçalves noted that security is ‘not optimal’ at the courts and that many things have gone missing. His Honour also noted that judges don’t have personal bodyguards.⁴⁴ It is also Judge Duarte Tilman’s view that personal security guards should be assigned to each of the court actors, especially judges and prosecutors,⁴⁵ as they are for the President and Deputy Presidents of the National Parliament.

Judge Tilman and Malena Piedade of the Judicial Services Section of the Dili District Court also articulated a concern for the security of the court clerks, who they said need protection when they are executing court orders in the field. Piedade reported that ‘the court clerks are often assaulted, threatened and verbally abused when they carry out their work in executing the decisions of the court in civil cases,’ noting that ‘the police do not have adequate knowledge on how to execute court decisions, as well as limited knowledge on how to provide protection to court clerks in the execution of court decisions.’⁴⁶

Security risks facing judicial actors are not specific to Timor Leste. Similar threats have arisen around the world, for example in the US,⁴⁷ Ukraine,⁴⁸ Afghanistan,⁴⁹ Guinea,⁵⁰ Italy,⁵¹ South Africa,⁵² Kosovo⁵³ and Northern Ireland,⁵⁴ to cite just a few. Nor are the risks experienced by the judiciary and court clerks alone. Prosecutors, in many countries, are also ‘directly exposed to security risks, especially those dealing with particularly sensitive cases such as organized crime and terrorism cases,’ notes Gabriela Knaul, UN Special Rapporteur on the independence of judges and lawyers.⁵⁵

The security recommendations made by members of the Dili judiciary during these interviews included:

- 1) CCTV should be installed at the Dili District Court;

⁴⁴ Judge Antonino Gonçalves, interview with JSMP 2013.

⁴⁵ Judge Duarte Tilman, interview with JSMP 2013.

⁴⁶ Malena Piedade of the Judicial Services Section of the Dili District Court, interview with JSMP 2013.

⁴⁷ US Congressional Research Service (CRS) Report for Congress, ‘Judicial Security: Responsibilities and Current Issues,’ (2008), accessed at: <https://www.fas.org/sgp/crs/misc/RL33464.pdf>.

⁴⁸ ‘Rada strengthens measures to ensure security of judges and their families,’ *Interfax Ukraine* (online) 16 January 2014 <http://en.interfax.com.ua/news/general/186049.html>.

⁴⁹ UN Information Centre (Canberra), ‘UN condemns deadly attacks near Kabul’s Supreme Court’, 14 June 2013 <http://un.org.au/2013/06/14/un-condemns-deadly-attacks-near-kabuls-supreme-court/>.

⁵⁰ Human Rights Watch, ‘Waiting for Justice: Accountability before Guinea’s Courts for the September 28, 2009 Stadium Massacre, Rapes, and Other Abuses, Chapter 5: Challenges to the Investigation’s Progress,’ December 2012.

⁵¹ Viviane Dutaut, ‘Angry Sicilian officials quit over Mafia killing,’ *The Independent* (online) 22 July 1992

<http://www.independent.co.uk/news/world/europe/angry-sicilian-officials-quit-over-mafia-killing-1534789.html>.

⁵² *Personal Correspondence with Selwyn Selikowitz, former High Court Justice from South Africa, 22 Jan 2014*

⁵³ Organization for Security and Co-operation in Europe (OSCE) Kosovo Mission: Department of Human Rights and Communities, Legal System Monitoring Section, ‘Intimidation of the Judiciary: Security of Judges and Prosecutors,’ 3 (2010) accessed at <http://www.osce.org/kosovo/67676>.

⁵⁴ *Personal Correspondence with Whit Mason, former head of UN justice administration in southern Afghanistan, 22 Jan 2014*

⁵⁵ UN General Assembly: Human Rights Council 20th session, Agenda item 3: A/HRC/20/19; 7 June 2012; Report of the Special Rapporteur on the independence of judges and lawyers, Gabriela Knaul.

- 2) The police should receive training on how to better protect court clerks in executing court orders; and
- 3) Court actors each should be assigned personal security guards.

JSMP supports these recommendations, noting in particular the importance of CCTV cameras in the courts, the provision of personal security guards for judges and the construction of a home compound for the Dili judiciary, as has been done in other districts. As an interim measure before a Dili judicial compound is constructed, JSMP recommends that each member of the judiciary have home security systems with intruder alarms installed and security gates erected.

It is JSMP's position that to afford the judiciary their Constitutional right to equal treatment under Article 118, the National Parliament should support the provision of personal security guards for each judge, as is the practice for the President and Deputy Presidents of the National Parliament. At a minimum, all judges in Timor-Leste need to be able to request personal security guards for cases identified as being of high risk or about which they have received threats. This minimal measure has been adopted by the judiciary in Northern Ireland, Australia and South Africa, among other nations.⁵⁶

Members of the judiciary are not the only targets of such threats in the court system. There are several aspects of legal work in Timor-Leste that contribute to the lack of safety and security experienced by judicial actors in the course of their work. For example, as there are no CCTV facilities at the courts, not only is there a concern for the safety of judicial actors, there is an additional need to protect documents that relate to ongoing cases against theft or sabotage.

Also of concern is the fact that judges and public prosecutors have to queue up at public banks to receive their salary, which creates a situation of personal risk. In addition, court clerks who execute court decisions face threats to their safety because there is no proper coordination or protection for them in the course in their field-work.

One challenge in designing a security response to these threats is that there is little collated information available on the frequency or nature of threats judicial actors face in the course of their work in Timor-Leste, though anecdotal information suggests such threats are relatively common and of significant concern to some judicial actors. Therefore, the best approach to these threats would include a survey of judicial actors on this issue to allow the security response to be better tailored to the Timorese context.

JSMP welcomes the \$51,000 allocated to the courts for new security equipment in the 2014 National Budget, but notes that none has been allocated to the other judicial actors.⁵⁷

vii) Remuneration

There is a perception among judicial actors that the remuneration offered for their work is unsatisfactory. The courts are organs of sovereignty as set out in Article 118 of the RDTL Constitution, however they are treated very differently in comparison with other organs of sovereignty, for example the President, the National Parliament and the Government/the Executive. These differences include salaries, safety and the provision of drivers.

Public prosecutors and public defenders also do not receive salaries that befit the volume of work they are entrusted with and the potential threats that they face. A further concern is that there is currently no difference between the salaries given to experienced judicial actors and to those who

⁵⁶ Above n 9 and 11.

⁵⁷ Ibid.

are just starting their careers. Differentiated salaries would act as a better professional motivation.

There are additional concerns relating to per diems. Judge Tilman notes that “it takes a very long time to process claims for per diem allowances, which creates difficulties for court clerks. They have to use their own money and are then reimbursed 2 or 3 months later.” Judge Gonçalves further states that “sometimes there are no per diems for victims, although funds are allocated for this purpose.”⁵⁸

The 2014 National Budget includes no increase in salary allocation for the OPP or the Courts. There is an additional \$90,000 allocated to the OPD in the 2014 National Budget, which is not intended to raise the salary of serving Public Defenders but to recruit a projected 13 trainees on 50% of the full Public Defender salary.⁵⁹

While this increase in funding to the OPD is welcome and will allow the Office to begin to develop greater capacity for the future, the low salaries of the Public Defenders compared to the salaries of the OPP remains a concern. The amount and quality of work expected of the Public Defenders remains incommensurate with their remuneration and this is likely to have flow-on negative effects on the recruitment of quality candidates for the OPD.

5. Expanding the reach of the OPD

There is an urgent need to expand the reach of the OPD and the judicial system more broadly. Sheer geographic isolation from legal services and legal support remains one of the biggest problems for access to justice. At present, there are only four established district courts, OPP and OPD branches: Dili, Baucau, Suai and Oe-cusse. Outside of these urban and semi-urban centres, it is very difficult for Timor-Leste’s predominately rural and remote population to access legal aid or to bring their disputes to the formal legal system. Public Defenders are thus often described as being too ‘hard to find’ due to their only very brief and irregular visits into rural and remote areas.⁶⁰ As the recent Fragility Assessment Report highlights:

“The local community feels that the formal justice [system] is still far away. In some ‘isolated’ places, people [have not even heard of] judicial actors such [as] Judge[s], Prosecutor[s] and Public Defender[s].”⁶¹

Because of the lack of formal judicial outposts in rural and remote communities, the justice sector relies upon the reach of ‘mobile courts’. However, as some judicial actors have commented, ‘mobile courts’ often fail in practice because judicial actors are already too overworked within the District centres.⁶²

JSMP commends the establishment of a new OPD branch (staffed by one prosecutor and two clerks), which is reportedly now operational in Viqueque.⁶³ The UNDP describes this as a ‘significant expansion of justice services to people living several hours from Baucau’.⁶⁴ The

⁵⁸ Ibid.

⁵⁹ Ibid.

⁶⁰ Interview, Legal Aid Adviser, Dili, 23 April 2010, cited in A Marriott, above n 17, 56.

⁶¹ Fragility Assessment Team, above n 16, 12.

⁶² Lawyer C, Office of the Public Prosecutions, Baucau, Wednesday 31 July 2013 (‘Lawyer Interview C’).

⁶³ UNDP, ‘Strengthening The Justice System In Timor-Leste’, above n 6, 12.

⁶⁴ Ibid.

Government also aims to expand judicial presence into Maliana, Same and Manatuto.⁶⁵ However, JSMP is not aware of any progress in these projects.

JSMP strongly recommends continuing to expand the judicial system into new Districts. Where new courts and OPP branches are established, new OPD branches should also be set up and properly staffed. Without physically expanding the OPD's presence into the rest of the country, the majority of the population will remain unable to access legal aid.

V. Public awareness of the state legal aid system

Another important dimension to the OPD's mandate is its requirement to deliver community legal education to ensure that vulnerable and isolated Timorese properly understand their right to legal aid and how to access it in practice. As a lawyer (quoted in an academic study) has explained:

*“Legal awareness, education, is low. How can the people get this information? New legislation is not disseminated, socialized. People don't learn about it.”*⁶⁶

Public Defenders have repeatedly expressed concerns that many of their clients have not even heard about the OPD and do not know anything about its role.⁶⁷ Litigants often go directly to Court only to discover there is an on-duty Public Defender when they arrive. By then it is too late to receive proper instructions or to research legal argument. Similarly, poor litigants often pay private lawyers that they cannot afford because they are unaware of the existence of the OPD.

The OPD is frustrated about its inability to deliver community legal education and connect with its prospective client base. The Ministry of Justice has formally allocated legal education under the Civic Education Department. However, Public Defenders claim that the Department and the Ministry have failed to prioritise and deliver sufficient civic legal education campaigns.⁶⁸

VI. Professional training and support

Developing the professional capacity of the lawyers and support staff working within justice institutions is a major challenge. As A Marriot has explained: ‘[m]uch attention has been directed to the creation of new institutions and processes in post-conflict Timor-Leste; less emphasis has yet been placed on the individuals who operate and navigate this still incomplete system.’⁶⁹

In an incomplete, unclear and constantly evolving legal system, and where practitioners' initial legal and language training is of a varying standard, ongoing legal education is imperative. As one jurist described: ‘Even I, who have a law degree and access to legislation, don't know the answers’.⁷⁰

⁶⁵ Timor-Leste Government, *Timor-Leste Strategic Development Plan 2011-2030* (2011) 181 <http://timor-leste.gov.tl/wp-content/uploads/2012/02/Strategic-Development-Plan_EN.pdf>.

⁶⁶ Interview, Law Lecturer and Private Practitioner, Dili, 23 April 2010, cited in A Marriot, above n 17, 54.

⁶⁷ Lawyer Interview A; Lawyer Interview B.

⁶⁸ Ibid.

⁶⁹ A Marriot, above n 17, 53.

⁷⁰ Interview, Law Lecturer and Private Practitioner, Dili, 23 April 2010, cited in A Marriot, above n 17, 55.

However, practitioners are not currently adequately supported through ongoing legal education and professional development. In an interview in July 2013, Public Defenders based in Baucau told JSMP they had not been provided training or legal education sessions since mid-2011.⁷¹

There is also a lack of professional training for lawyers' support staff. A legal clerk at the OPD in Baucau explained his serious concerns about the lack of investment in his skills and capacity building.⁷² Despite working for the OPD for a number of years the clerk did not think he had ever been trained in the court system or civil procedure.⁷³

JSMP strongly recommends that there is an ongoing focus on continuing legal development for both lawyers and non-legal staff.

VII. Professional independence state lawyers

JSMP is also concerned about the inability of Public Defenders (as well as Public Prosecutors) to join Timor-Leste's independent bar association, the *Asosiasaun Advogadu Timor Lorosa'e* (AATL).

In many countries, independent bar associations serve an important role in carving out professional independence, developing professional standards, regulating professional conduct and delivering continuing legal education for practitioners. Through the vehicle of their representative professional body, lawyers are able to consolidate their identities as professionals working to serve the community. Professional bodies conduct consultations, provide feedback for reform, and engage in many other projects within the legal and broader community.

In Timor-Leste, however, only private lawyers are eligible to join the AATL. This undermines the legitimacy of the AATL and its ability to develop into a robust professional body. As Marriott describes:

*... the AATL (despite registering the majority of Timor-Leste's legal practitioners since 2002) is considered by many to be simply a placeholder institution for the legislatively mandated but as yet entirely hypothetical bar association.*⁷⁴

JSMP strongly recommends that the Government allow state lawyers to join the AATL to ensure the organization can evolve into a robust, independent and properly representative professional body. Although Public Defenders are employed by the State, they should remain independent professionals like all other lawyers.

VIII. Conclusion and recommendations

This Report highlights a number of resource and organizational restraints that judicial actors face in executing their important mandate of ensuring individuals' access to justice.

JSMP recommends that legal institutions be better invested with human, technological and training resources. Further, the Ministry of Justice must prioritise the establishment of new OPD branches

⁷¹ Lawyer Interview A; Lawyer Interview B.

⁷² Clerk Interview A.

⁷³ Ibid.

⁷⁴ A Marriott, above n 17, 66.

and the delivery of better community legal education. Strengthening human resources within Timor-Leste's legal institutions also requires a commitment to the professional training of legal and non-legal staff, and allowing all lawyers to join the independent legal professional body.

JSMP makes the following 15 recommendations to ensure better access to justice in Timor-Leste:

1. Recruit additional judicial actors in order to meet the needs of the national case-load
2. Recruit additional support staff such as clerks and administrative assistants in order to meet the needs of the national case-load
3. Ensure that all branches of the public legal system have access to reliable internet, email, online legal resources and IIMS, and ensure that all staff are trained to use this technology
4. Ensure that all branches of the public legal system have access to functioning and well-maintained computers or laptops, and ensure that all staff are trained to use this technology
5. Ensure that all branches of the public legal system have access to a reasonable hard-copy legal resources library
6. Ensure that all branches of the public legal system have access to a trained, locally-based IT technician
7. Ensure that all judicial actors have effective personal security protection
8. Ensure that all judicial actors have adequate communication facilities, including radios and a reasonable professional mobile phone credit allowance
9. Improve judicial actors' access to transport, such as providing fuel reimbursements for Public Defenders' travel to mobile courts, prisons and the capital
10. Provide translating and interpreting services for all OPD branches in addition to the services currently provided to the Courts and the OPP
11. Expand the judicial system into additional Districts, ensuring that an OPD branch is opened wherever new Courts are set up
12. Allow the OPD to participate in the Ministry of Justice's community legal education programs to increase public awareness of legal aid
13. Ensure that Timor-Leste's most vulnerable and needy communities are aware of their rights to access legal aid through the OPD
14. Provide ongoing and high-quality legal education and training for judicial actors and their support staff
15. Allow all lawyers employed by the State the opportunity to join the AATL