



JUDICIAL SYSTEM MONITORING PROGRAMME
PROGRAM PEMANTAUAN SISTEM YUDISIAL

The Right to Appeal in East Timor

JSMP Thematic Report 2

Dili, East Timor
October 2002

The Judicial System Monitoring Programme (JSMP) was set up in early 2001 in Dili, East Timor. 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 East Timor. For further information see www.jsmp.minihub.org

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1. EXECUTIVE SUMMARY

“For me, the important thing is how we are working to build this judicial system for the East Timorese. If there is no Court of Appeal it’s a big problem.”

- Jacinta Correia da Costa, judge currently appointed to the Court of Appeal

It has not been possible to exercise the right of appeal in East Timor for almost a year. However the right to appeal is a central component of the right of the accused to a fair trial. Key international human rights instruments guarantee that everyone convicted of a criminal offence has the right to have their conviction and sentence reviewed by a higher tribunal. Determination of appeal proceedings is the ultimate stage of the judicial process. Independent of international human rights standards, the right to appeal is also a desirable aspect of any legal system - and particularly a legal system at a nascent stage which lacks an experienced judiciary - as the process of judicial review by a superior court considers and ultimately reinforces the quality of judicial decision-making at first instance.

This report considers both the history and the present situation of the Court of Appeal in East Timor. The absence of a functioning Court of Appeal is the result of a lack of planning and a failure to appreciate the importance of this right. In order to promote the realisation of the right to appeal, this report considers specific areas of concern and makes recommendations necessary to give full effect to the right of appeal in East Timor. Firstly, it emphasises the importance of recruitment for currently existing vacancies on the Court of Appeal. The body responsible for judicial appointments - the Superior Council of the Judiciary - should be constituted without delay. Secondly, the report emphasises the importance of international assistance to the Court of Appeal. Thirdly, it draws attention to the administrative requirements of the Court of Appeal which will need to be met when the Court eventually begins to re-function. Fourthly, the report considers the impediments to the substantive exercise of the right to appeal caused by the lack of a system of transcription of court proceedings at all levels, as well as ongoing delays in the translation of documents. Finally, it recommends the need for a greater willingness on the part of East Timor’s legal practitioners to file appeals. It is through the implementation of the recommendations contained in this report that the right to appeal will be accorded its necessary importance in the East Timorese legal system.

2. INTRODUCTION

2.1 Judicial System Monitoring Programme

The Judicial System Monitoring Programme (JSMP) is an independent non-governmental organization based in Dili, East Timor dedicated to monitoring the judicial system of East Timor. JSMP was set up in April 2001 in response to a need identified by local and international observers for a consistent and credible monitoring presence to contribute to both developing legal culture within East Timor and the international justice community

by providing information and analysis of issues arising from the ongoing process of creating a new justice system. JSMP is composed of both East Timorese and international staff from both common law and civil law jurisdictions.

JSMP maintains three main areas of focus: trial observation, judicial system analysis and public outreach. JSMP has been the only independent organisation consistently present during the trial proceedings of the Special Panels for Serious Crimes. The Special Panels for Serious Crimes are the primary focus of JSMP's monitoring due to its crucial role in the development of the new justice system in East Timor and international justice in general. JSMPs' courtroom observations provide the basis for trial reports on particular trials in addition to thematic reports on issues of ongoing structural concern within East Timor's judicial system. In addition, JSMP provides legal analysis and commentary on draft legislation regarding justice - related matters.

2.2 Methodology

This report is produced in response to the urgent need to confront the problems that prevent the exercise of the right to appeal in East Timor. This report considers international human rights law as the benchmark against which to assess the legal system of East Timor. The extent to which a nascent legal system is in accordance with the standards of international human rights law is an important indicator of the quality and institutional resilience of justice in that society.

JSMP held interviews and meetings with a wide range of individuals involved in East Timor's justice system. These have included both present and past East Timorese and international judges, the Deputy Special Representative of the Secretary General, Ministry of Justice officials, UNMISSET Human Rights Unit officials, public defenders, East Timorese legal aid lawyers, Court of Appeal administrative staff and others. JSMP would like to express its sincere gratitude to these individuals and appreciates their constant and genuine efforts to improve the functioning of the justice system in East Timor. It is in continuing this commitment to improve the quality of justice in East Timor that JSMP offers this report.

In particular, this report seeks to provide the background to issues relevant to the right to appeal in East Timor. The report aims to promote an appreciation of the importance of the right to appeal in a legal system that is yet to accord sufficient importance to the right of a convicted person to have their conviction and sentence reviewed by a competent, independent and impartial tribunal. In addition, this report provides practical recommendations regarding human and material resources that are crucial in supporting the process of judicial review by a higher court.

3. APPLICABLE LAW

3.1 Applicable domestic law

East Timor's Court of Appeal was established under UNTAET Regulation 2000/11. The Court of Appeal is located in Dili in a building that was rebuilt in January 2001. The building has two courtrooms, one equipped with a digital audio recording system, a video recording system, a pressroom with closed circuit TV, simultaneous translation facilities, a conference room and a small reference law library. UNTAET regulations established that for appeal hearings on Serious Crimes matters, the Court of Appeal must be constituted by a panel of three judges, composed of one Timorese judge and two international judges.¹ In cases of particular importance, the panel may be composed of five judges- three internationals and two East Timorese. Section 40 of UNTAET Regulation 2001/25 established that the Court has jurisdiction to hear appeals of decisions rendered by any district court in East Timor, and such other matters as are provided for by legislation. No other legislation has widened the Court's jurisdiction.

With respect to appeals from final decisions, a party may appeal to the Court of Appeal from a decision of a district court or an inferior court at first instance which is infected by (a) a violation of the rules of the criminal procedure, (b) a violation of the procedural or substantive rights of accused; (c) inconsistency within grounds of the decision, or (d) material error of law or fact.² Section 41 of Regulation 2001/25 established the procedure by which appellate proceedings in appeals from decisions at first instance must be instituted. A party shall commence an appeal by filing a Notice of Appeal within the court of first instance within ten days after the appeal decision is released, otherwise the party is deemed to have waived their right to appeal.³ A written appeal statement must then be filed with the court of first instance within thirty days. The respondent then has thirty days from the receipt of the notification to file a response. The response may include a cross-appeal, in which case the appellant has fifteen days to file a response to the cross-appeal.⁴ In certain circumstances, extensions of time may be granted "upon good cause being shown" to the competent court.⁵

With respect to appeals from preliminary or procedural matters, Section 23 of UNTAET Regulation 2001/25 establishes that a party may appeal to the Court of Appeal against the decision of the investigating judge to arrest, detain, order other restrictive measures or release the suspect. In such an interlocutory appeal, the petitioner shall present a written petition to the Court of Appeal within ten days and shall immediately serve a copy to the respondent. The Court shall summon the parties in ten days following the receipt of the petition to a hearing. The Court may confirm, reject or modify the decision from which the appeal was taken.

¹ Article 15.4 of UNTAET Regulation 2000/11 and Article 22.2 of UNTAET Regulation 2000/15.

² Section 40.1 of UNTAET Regulation 2001/25.

³ Section 40.2 of UNTAET Regulation 2001/25.

⁴ Section 40.4 of UNTAET Regulation 2001/25.

⁵ Section 51 of UNTAET Regulation 2001/25.

3.2 Situation after Independence

East Timor became a sovereign nation on 20th of May 2002. The Constitution of the Democratic Republic of East Timor (“the Constitution”) does not specifically mention the right to appeal, nor the Court of Appeal. The status of the Court of Appeal is unclear under the Constitution and, as noted below, the legal framework of the Court of Appeal depends on the continuation of UNTAET Regulations under the Transitional Provisions of the Constitution. The Constitution establishes the Supreme Court of Justice as the highest court of law with its primary function to judge on matters of legal, constitutional and electoral nature. The judges of the Supreme Court of Justice shall be East Timorese nationals, one elected by National Parliament and the others designated by the Superior Council for the Judiciary.⁶ The Constitution also stipulates that until such time as the Supreme Court of Justice is established, the powers and functions conferred on it will be exercised by the highest Court existing in East Timor.⁷ The Judicial Magistrates Law makes this constitutional provision more explicit. It provides that the Court of Appeal shall act as the Supreme Court until such a time the latter becomes operational.⁸

It appears that the Supreme Court of Justice may not be operational for some time. The Constitution states that “only career judges or magistrates of the Public Prosecution or jurists of recognised merit” may become members of the Supreme Court of Justice.⁹ The Judicial Magistrates Law specifies that “the Supreme Court of Justice may initially be composed of a minimum of 5 Counsellor Judges.”¹⁰ The law establishes a career path for judges consisting of several stages or classes, from (in ascending order) probationary judge, third class state judge, second class state judge, first class state judge to Counsellor judge. In order to progress from one class to the next, judges must accumulate a certain amount of experience in the lower class and receive a positive rating. For example, Counsellor judges are to be designated by the Superior Council of the Judiciary from among those first class judges with a “Very Good” rating and at least eight years’ practice in that class.¹¹ As all currently appointed East Timorese judges are classed as probationary judges, a considerable period of time will pass before there are a sufficient number of judges classed as Counsellor judges to constitute the Supreme Court of Justice.

Transitional Provisions of the Constitution establish that the laws and regulations in force in East Timor prior to 20th of May 2002 shall continue to be applicable to all matters except to the extent that they are inconsistent with the Constitution or principles

⁶ See Sections 125 and 127 of the Constitution.

⁷ Section 164 of the Constitution.

⁸ Further, Section 104.1 of the newly adopted law allows a party may be appeal against the decision rendered by the Superior Council of the Judiciary with the Supreme Court of Justice. The present regulation says that an appellate can lodge their appeal in fifteen days from the date of the notification.

⁹ Section 127 of the Constitution.

¹⁰ Section 29(4) of the Judicial Magistrates Law.

¹¹ Section 29(2) of the Judicial Magistrates Law.

contained in the Constitution.¹² This provision includes the above-mentioned UNTAET regulations relating to the Court of Appeal and appellate procedures. The Transitional Provisions of the Constitution also provide that the Special Panels for Serious Crimes shall remain operational for the time deemed strictly necessary to conclude the cases under investigation.¹³

It is unclear whether the Court of Appeal would continue after the formation of the Supreme Court of Justice. The Court of Appeal could be structurally placed under the Supreme Court of Justice and above the District Courts. Its relation to these Courts, as well as its relation to other Courts in the Constitution - the High Administrative, Tax and Audit Court, Military Courts, Maritime and Arbitration Courts – would need to be established by legislation. Given how long it will be until the Supreme Court of Justice is functioning, it is still highly relevant to discuss the Court of Appeal.

3.3 Applicable international law

The right to appeal is one of the most important guarantees of the right to a fair trial. The right to have a conviction and sentence reviewed by a higher tribunal is generally available to everyone convicted of a criminal offence, regardless of the severity of the offence and the sentence pronounced at first instance. The right to appeal ensures at least two levels of judicial scrutiny of a case, the second of which must take place before a higher tribunal. The review undertaken by such a tribunal must be genuine.¹⁴

Key provisions of international human rights treaties ensure this right. Article 14 (5) of the International Covenant on Civil and Political Rights (ICCPR) establishes that “everyone convicted of a crime shall have the right to his conviction and sentence being reviewed by higher tribunal according to the law”. The right to appeal is also guaranteed within various international instruments, such as provided in article 8 (2)(h) of the American Convention on Human Rights, article 2 of Protocol 7 to the (European) Convention for the Protection of Human Rights and Fundamental Freedoms, paragraph 3 of the (African) Resolution on the Right to Recourse Procedure and Fair Trial, article 24 of the Statute for the International Criminal Tribunal for ex-Yugoslavia, article 23 of Statute for the International Criminal Tribunal for Rwanda, and article 81(b) of International Criminal Court Statute.

General fair trial guarantees also apply to appeal proceedings. Hence, the right to a hearing before a competent, independent and impartial tribunal established by law also applies to appellate proceedings. These rights include adequate time and facilities to

¹² Section 165 of the Constitution.

¹³ Section 163 of the Constitution.

¹⁴ The Inter-American Commission has stated that reviews must examine the grounds for appeal, as well as whether due process had been observed: Case 9850, Annual Report of the Inter-American Commission, 1990-1991, OEA/ Ser. L/V/II.79, doc. 12, rev.41, 1991, at 74-76, (Argentina). Reviews limited only to questions of law, as opposed to an examination of the law and facts, may not satisfy this element of the right.

prepare the appeal, the right to counsel, the right to equality of arms and the right to a public and reasoned judgement. Appeal proceedings must also be timely. Article 14(3)(c) of the ICCPR guarantees the right to be tried without undue delay both in first instance and on the appeal.¹⁵ The calculation for whether a case has been unduly delayed begins with arrest and ends with appeal: it is therefore one overall timeline and not necessarily two distinct timelines for trial and appeal. The Lawyer's Committee for Human Rights considers that in situations in which appeal proceedings are not timely, the immediate effect on the right to appeal is that a court has to stay the execution of any sentence passed in the first instance until appellate review has been concluded.¹⁶

A jurisdiction in which the Court of Appeal does not function would violate the right to appeal and the right to be tried without undue delay. It would also raise serious issues of discrimination because the absence of a court of review means it is not possible to ensure an equal application of the law.

4. HISTORY OF COURT OF APPEAL

The Court of Appeal was established by UNTAET Regulation No. 2000/11 on 6th March 2000. The Court began functioning in July 2000. The Court of Appeal heard both interlocutory appeals and appeals from final decisions at first instance. It handed down its first decision in October 2000¹⁷ and continued to hear appeals until October 2001.

The Administrative Section of the Court of Appeal does not maintain a full and comprehensive copy of all decisions taken by the Court of Appeal, but instead returns Court of Appeal judgements to the courts of first instance along with the case files. Notwithstanding, it appears from the records kept by the Administrative Section of the Court of Appeal that the Court has concluded eighteen appeals to date, from both first instance and interlocutory decisions. This number includes eight judgements in appellate proceedings from the Special Panels in Serious Crimes Cases.¹⁸

4.1 Composition of the Court of Appeal

The first judges of the Court of Appeal were appointed in July 2000 by the UN Special Representative of the Secretary-General (SRSG) and Transitional Administrator, Sergio Vieira de Mello.

¹⁵ Human Rights Committee General Comment 13, para 10.

¹⁶ "What is a Fair Trial? A Basic Guide to Legal Standards and Practice", Lawyers Committee for Human Rights (March, 2000) available at www.lchr.org

¹⁷ *Joao Bosco v Prosecutor*, Case of Appeal No 2 of 2000 (6 October 2000). Unpublished decision.

¹⁸ The Judgements of the Court of Appeal in Serious Crimes Cases are: João Fernandes (Case of Appeal No. 2 of 2001), Joni Marques e Outros (9) (Case of Appeal No. 5 of 2001), Joni Marques e Manuel Gonçalves (Case of Appeal No. 6 of 2001), Julio Fernandes (Case of Appeal No. 7 of 2001), Jose Cardoso Ferreira (Case of Appeal No. 9 of 2001), Carlos Soares Carmone (Court of Appeal No. 17 of 2001), Lino de Carvalho (Case of Appeal No. 18) and Ruben Monteiro Gonsalves and Co-accused (Case of Appeal No. 25 of 2001).

The first Judges appointed to the Court were the Honourable Jacinta Correia da Costa, (East Timorese), the Honourable Claudio Ximenes de Jesus (an East Timorese judge with Portuguese citizenship) and the Honourable Frederick Egonde-Entende (Uganda). Claudio Ximenes de Jesus was elected as President of the Court. At the request of the SRSJ, Jacinta Correia da Costa joined the Independent Electoral Commission in May 2001 for the duration of four months. She did not resign from her position as a judge at the Court of Appeal during this period but also did not sit as a judge. She was replaced by two temporarily appointed judges, the Honourable Cirilio Jose Cristovao and the Honourable Carmelita Caetano, and resumed her work as a judge at the Court of Appeal after 14th September 2001.

At the end of October 2001 Frederick Egonde-Entende completed his period in East Timor and he left shortly afterwards. As a result, the Court could not be properly constituted because it lacked the required number of international judges.

The other international judge of the Court of Appeal and President of the Court, Claudio Ximenes de Jesus, returned to Portugal in late January 2002.

In April 2002 the Transitional Administrator recommended the temporary appointment of two international judges to alleviate this problem. By Executive Order 2002/4, dated 1st April 2002, two international judges who were serving at the time as judges of the Special Panels (the Honorable Antero Luis and the Honorable Benfeito Mosso Ramos) were appointed to serve as judges of the Court of Appeal. These appointments were to expire on 20th May 2002. The appointment of these Judges to the Court of Appeal was contemporaneous with the exercise of their existing judicial functions with the Special Panels, with the proviso that they should not sit on any case in which they had been previously involved. Therefore the Court of Appeal was fully and correctly constituted for a period of approximately one month, during which time it disposed of one appeal.¹⁹ As anticipated by the Order, the appointments expired on the date of East Timor's Independence.

4.2 Recruitment of Judges

It is therefore correct to state that since October 2001, with the exception of a one month period immediately before Independence, there has been no functioning Court of Appeal in East Timor. No permanent replacements for the international judges that departed East Timor in November 2001 and January 2002 have been recruited. The only judge currently appointed to the Court of Appeal is Jacinta Correia da Costa.²⁰ Consequently, neither interlocutory appeals nor appeals from final decisions can be heard in East Timor.

¹⁹ Odete Dos Santos (Case of Appeal No. 8 of 2001)

²⁰ Jacinta Correia da Costa went on maternity leave at the end of August 2002.

The Right to Appeal in East Timor

The absence of a functioning Court of Appeal is the result of a lack of planning and a failure to appreciate the importance of this right within both UNTAET and the East Timorese Ministry of Justice. Further, the lack of coordination between these two institutions has frustrated significant opportunities available to resolve the issue of recruitment of judges.

With UNTAET Regulation 1999/3 the Transitional Administrator established a Transitional Judicial Service Commission (TJSC) composed of three Timorese and two international experts. Initially, the TJSC was tasked with recommending to the Transitional Administrator the appointment of Timorese judges. The ultimate power to appoint the judges and prosecutors was retained with the Transitional Administrator, to be exercised after close consideration of the recommendations of the TJSC. The TJSC did not initially have the power to make recommendations regarding international judges and prosecutors. However UNTAET Regulation 2000/11 established that East Timor's judiciary should be composed of both national and international judges appointed in accordance with UNTAET regulation 1999/3. This required a modification of the mandate of the TJSC in order to enable them to recommend both national and international judges for appointment. In August 2000, UNTAET Regulation 2000/25 amended UNTAET Regulation 1999/3 so as to grant the TJSC the authority to consider international appointments. Ultimate authority for the appointment of judges remained with the Transitional Administrator.²¹

Following the swearing in of the Second Transitional Government on 20th September 2001, joint responsibility for justice-related issues lay with the Ministry of Justice (under the new Minister for Justice, Ms. Ana Pessoa) and UNTAET (ultimately under the Transitional Administrator). It appears that UNTAET believed the initiative for recruitment of Judges should come from the Ministry of Justice, while the Ministry of Justice believed the opposite to be true. Consequently, no judges were recruited to replace the vacancies on the Court of Appeal following the departure from East Timor of the international judges on the Court of Appeal in November 2001 and January 2002.

In December 2001, Ministry of Justice officials expressed to the Transitional Administrator their concern over issues of recruitment for the Court of Appeal. After some disagreement on the nature of the recruitment notices, job advertisements were issued by the UN recruitment cell in January 2001. The two judges of the Court of Appeal were among the 100 core positions – the Civilian Support Group - identified by the United Nations as crucial to provide administrative support to the new government. Funding for the Civilian Support Group was assured by the Administrative and Budgetary Committee of the UN General Assembly and the posts were advertised in February 2002.²²

²¹ Section 8.2 of UNTAET Regulation 1999/3 as amended by UNTAET Regulation 2000/25 and UNTAET Regulation 2000/26.

²² Of the twelve posts within the Civilian Support Group under the Ministry of Justice, seven remain unfilled. This includes the two judges on the Court of Appeal, as well as the posts of Executive Secretary, Prisons Advisor, Registry & Notary Advisor, Public Prosecutor and Public Defender.

Throughout February and March 2002 the TJSC was not satisfied that any applicants to the positions had sufficient judicial experience. This may be a reflection of the inappropriateness of the UN recruitment process for senior positions in the judicial sector. Few judges, particularly senior judges, are regularly scanning the UN website for employment possibilities. Concurrently, the TJSC also attempted to recruit outside the formal UN channels by contacting ex-judges and various bar associations, and were assisted by an international organisation specialising in the recruitment of experienced legal personnel.

A few days after their meeting on 8th of May 2002, the TJSC recommended to the Transitional Administrator various appointments, including two judges to the Court of Appeal (one Canadian and one Irish) and one judge (Australian) to the Special Panels for Serious Crimes. As these recommendations were made immediately before Independence, it was considered inappropriate for the Transitional Administrator to simply appoint the recommended candidates without coordination with the Ministry of Justice.

After Independence on 20th of May, lengthy discussions took place between UNMISSET and Ministry of Justice officials regarding these potential appointments. The Minister of Justice left the country shortly after Independence and the discussions took place at a Vice Ministerial level. It appears that the Ministry was prepared to proceed with the appointment of the UN candidates so that they be appointed as judges of the Special Panels for Serious Crimes as opposed to the Court of Appeal. It was considered more appropriate for the UN to undertake recruitment for the Special Panels because the Serious Crimes process was and remains primarily UN-funded. In addition, the Vice Ministers may not have been inclined to make a decision about the Court of Appeal in the absence of the Minister. Further, there was a preference within the Ministry of Justice for Court of Appeal judges to come from Lusophone countries.

The candidates recommended by the TJSC never took up their positions.

At approximately the same time - shortly after Independence - the Ministry of Justice proffered an alternative (an Italian judge) to fill one of the vacancies on the Special Panels, not the Court of Appeal. As the position was a United Nations funded position – one of the 100 core positions identified and funded by the UN – the UN was not inclined to proceed with this candidate because their application had not progressed through the formal UN recruitment channels.

The appointments of the members of the TJSC expired on 20th of May. Prior to Independence, there were discussions regarding whether the mandate of the TJSC should be renewed on a transitional basis. This might have avoided the creation of an institutional vacuum and allowed a body to oversee judicial issues - such as recruitment and disciplinary measures - until the creation of the Superior Council of the Judiciary, the supervisory body of the judiciary foreshadowed in the Constitution. It was foreseeable that the Superior Council of the Judiciary could not be created in the short term. It was also felt that transitional clauses of the Constitution might allow the TJSC to continue.

Consequently, UNMISSET suggested to the Ministry of Justice that the TJSC might continue to function after Independence. It was suggested that the five person structure of the TJSC could continue, either with or without internationals appointed to work alongside the Timorese appointments. However, the Ministry of Justice was disinclined to allow the TJSC to continue to function. Although there was some suggestion that an alternative interim body would be formed without international members, no such body was created.

Lamentably, there has been no body to supervise judicial matters in the months since Independence.

4.3 Current workload

According to the records maintained by the Administrative Section of the Court of Appeal, thirty eight appeals were filed in 2001 and nineteen appeals were filed in 2002.

Thirty nine cases are presently pending. This figure includes eight appeals from decisions of the Special Panels for Serious Crimes.²³ The noticeboard of the Administrative Section is used to record details of appeal cases. It nicely encapsulates the situation that this noticeboard has been filled up and the five most recent cases have not been listed on this noticeboard because there is no room. This situation is alleviated by the fact that electronic and written lists of appeals are also kept by administrative staff. Nevertheless the “overflowing” noticeboard situation represents a genuine problem of ongoing and increasing concern: the re-functioning Court will be burdened by a significant backlog of appeals.

5. IMPORTANCE OF THE RIGHT TO APPEAL FOR EAST TIMOR

The right to appeal is an important right within any legal system. Independent of international human rights standards, the process of judicial review by a superior court serves to strengthen the justice system. This process of consideration is particularly vital in a nascent legal system and ultimately reinforces the quality of judicial decision-making at first instance.

There are perhaps two broad general reasons why the right to appeal is of special importance in East Timor. Firstly, the regime of law applicable to East Timor is particularly complex. One of the first acts of the Transitional Administrator was to

²³ The eight Serious Crimes cases are Carlos Soares (Case of Appeal No. 24 of 2001), Francisco Pedro (Case of Appeal Case No. 26 of 2001), Jose Valente (Case of Appeal No. 27 of 2001), Francisco Dos Santos Lako (Case of Appeal No. 28 of 2001), Leondrus Kasa (Case of Appeal No. 29 of 2001), Marcel Gonçalves (Case of Appeal No. 31 of 2001), Agosto Asumeta Tavares (Case of Appeal No. 33 of 2001) and Agostinho Da Costa (Case of Appeal No. 3 of 2002). It is anticipated that an appeal will be filed against the decision at first instance in Armando Dos Santos, Serious Crimes Case No. 16 of 2001 (9 September, 2002)

establish that the laws applied in East Timor prior to 25 October 1999 should continue to apply *to the extent that* they do not conflict with international human rights standards, UN Security Council Resolution 1272 (1999) or any Regulation or Directive issued by the Transitional Administrator.²⁴ The Constitution established that the laws and regulations in force in East Timor on 20th of May shall continue to be applicable to all matters except *to the extent that* they are inconsistent with the Constitution or the principles contained therein.²⁵ Therefore the applicable law in East Timor is a complex hybrid system, based on Indonesian law to the extent that it is compatible with international human rights standards and the Constitution and to the extent that it has not been replaced by UNTAET regulations or laws passed by the new Government. Such a situation clearly means there will often be room for divergent views on what the applicable law is on any particular matter. This heightens the need for judicial review of the applicability of law.

Secondly, JSMP has observed a line of judicial reasoning by which ‘the margin of appreciation’ allowed in the application of standards of international human rights law is disconcertingly wide in the context of East Timor. This tendency, whereby the difficulties and problems that confront the justice system in East Timor are regarded as justifying the relaxed application of standards of international human rights law, is a particular cause for concern for JSMP.

One area in which this tendency is most apparent is in relation to the issue of detention. When it operated, the Court of Appeal issued judgements that were highly critical of decisions taken by the Special Panels for Serious Crime in relation to detention. One notable example is the Court of Appeal decision in the case of Julio Fernandes and nineteen others.²⁶ Julio Fernandes, one of the first Serious Crimes indictees, had been released because his detention order had expired. The detention orders for the other nineteen named in the indictment had either lapsed or were about to lapse. In effect, many were being illegally detained. The Special Panel, without holding a hearing, extended those detentions by issuing warrants of arrest for all the identified detainees. On appeal, the Court of Appeal was scathing of the impugned decision, and declared that it was “totally useless and made no sense to issue warrants of arrest against accused already in custody according to indictments filed with the court.”²⁷ The majority stated that “one can neither continue an illegal detention nor legalise it by issuing a retrospective continuation of preventative detention.”²⁸

Detention-related decisions are a source of ongoing concern. JSMP has monitored one trial in which a detention order for a person indicted for Serious Crimes expired in mid

²⁴ Section 3.1 of UNTAET Regulation 1999/1.

²⁵ Section 165 of the Constitution.

²⁶ *Julio Fernandes and 19 Others v Prosecutor General*, Criminal Appeal No 1 of 2001 (14 February 2001) with a separate opinion by Egonda-Ntende J, ‘Ruling of the Court of Appeal of East Timor’, *Julio Fernandes and 19 Others v Prosecutor General*, Criminal Appeal No 1 of 2001 (14 February 2001). For an academic discussion of early detention decisions, see Suzannah Linton, “Prosecuting Atrocities at the District Court of Dili” Issue 2, Volume 2, *Melbourne Journal of International Law* (October 2001)

²⁷ *Julio Fernandes and 19 Others*, Criminal Appeal No 1 of 2001 (14 February 2001) 11.

²⁸ *Julio Fernandes and 19 Others*, Criminal Appeal No 1 of 2001 (14 February 2001) 6.

May 2002. The Public Prosecutor requested a review of the detention of the indictee shortly before the detention order expired, although it appears the request only arrived at the Court three days after its expiry. Five weeks later a single judge, without a hearing, granted the Prosecutor's request to continue to remand the indictee in custody. The judge reasoned that "[t]he fact that the detention was not reviewed on time only constitutes a mere irregularity in such circumstances and not a situation of illegal detention."²⁹ When the Defence filed a motion seeking the immediate release of the indictee on the basis *inter alia*, that the earlier detention order was illegal, a panel of three judges confirmed the decision of the single judge. The Panel reasoned "We are not in the presence of a situation of illegal detention. What exists is the fact that a procedural step has not been complied with."³⁰ The judge who made the impugned decision was part of the panel which deliberated upon and ultimately affirmed the decision.³¹

JSMP is concerned that no possibility for judicial review of detention-related decisions is currently available. The need for authoritative guidelines on issues such as applicable law, illegal detention and the procedure applicable to detention reviews has been made clear in previous decisions of the Court of Appeal.

6. SPECIFIC AREAS OF CONCERN

6.1 Recruitment of Judges

"Just waiting for Judges a long time, it's not fair"

– Jacinta Correia da Costa, judge currently appointed to the Court of Appeal

The importance of urgently appointing judges to the Court of Appeal has been glaringly obvious for a year. The single major impediment to realising the right to appeal in East Timor is the vacancies that exist on the bench of the Court of Appeal. This situation should be remedied as soon as possible.

The Constitution establishes that the Superior Council of the Judiciary is responsible for the appointment of judges, as well as being generally responsible for issues of management and discipline of judges. The structure, functions and procedures to be followed by the Superior Council of the Judiciary are established by the new Judicial Magistrates Law. Section 15(a) of the Law confirms that the Superior Council of the Judiciary is charged with "appointing, assigning, re-assigning and promoting judges".

For appointments to the Court of Appeal to occur in the not too distant future, the positions on the Superior Council of the Judiciary must be filled as soon as possible. The

²⁹ "A não revisão atempada da prisão apenas consubstancia uma mera irregularidade em tais situações e nunca uma situação de prisão ilegal."

³⁰ "Aqui não estamos em presença de uma situação de prisão ilegal. O que existe é o não cumprimento de um prazo processual."

³¹ The indictee was, however, granted conditional release on other grounds.

designation of the five members of the Council is the responsibility of the President of the Republic, the National Parliament, the Government and the currently appointed judges. It is therefore of utmost importance that these individuals and institutions do not delay in making their respective designations.

The President of the Superior Council of the Judiciary must be the President of the Supreme Court, who is appointed by President of the Republic from among the judges of the Supreme Court of Justice.³² In the interim, the President of the Superior Council of the Judiciary shall be the President of the Court of Appeal³³ - a position that is currently vacant. Although there are no explicit provisions in either the Constitution or the Judicial Magistrates Law on who has power to appoint the President of the Court of Appeal, presumably the President of the Republic could make this appointment. Of the other four members of the Superior Council of the Judiciary, one each must be designated by the President of the Republic, the National Parliament and the Government. The final member must be a judge elected by his or her peers.

The Judicial Magistrates Law establishes that the members of the Superior Council for the Judiciary designated by the President of the Republic, the Government or elected by the National Parliament shall be jurists with at least five years of relevant professional experience. The member elected by his or her peers must be a judicial magistrate.³⁴ In the interim, the jurists appointed by the President of the Republic, the Government or the National Parliament need only be East Timorese citizens who hold a University degree in law. The member elected by his or her peers need only be a probationary judge.³⁵

JSMP understands that UNMISSET has commenced the process of recruiting two international judges to fill the two vacant posts at the Court of Appeal. This process is being undertaken on the understanding that potential candidates will need to be appointed by the Superior Council of the Judiciary - when it is established - in accordance with the Judicial Magistrates Law. JSMP also understands that recruitment for these positions is in addition to recruitment for current vacancies in the Special Panels for Serious Crimes, positions which will also require appointment by the Superior Council of the Judiciary.

Once constituted, the Council should, as a matter of emergency, prioritise appointing judges to the Court of Appeal. In addition, the National Parliament must also appoint one judge to the Court of Appeal. The appropriate criteria for such judges are established by the transitional provisions of the Judicial Magistrates Law. Section 110 states that until the Supreme Court of Justice starts to function, “judicial magistrates for the Court of Appeal shall be appointed by the Superior Council of the Judiciary from among probationary judges, taking into consideration their abilities or qualifications.” The Law also specifies that where it is not possible to fill the existing vacancies on the Court of Appeal from the currently-appointed judiciary, up to two judges may be appointed from among magistrates from the Public Prosecution Service, lawyers of recognised merit with

³² Section 124 (3) of the Constitution.

³³ Section 109 of the Judicial Magistrates Law.

³⁴ Section 9 of the Judicial Magistrates Law.

³⁵ Section 109 of the Judicial Magistrates Law.

at least ten years forensic experience, or even University lecturers in law with ten years teaching experience.

Recommendation 1: The President of the Republic should appoint, as a matter of urgency, the President of the Court of Appeal. The President of the Republic, the National Parliament, the Government, and the currently sitting Timorese judges should not delay in providing their respective designations to the Superior Council of the Judiciary.

Recommendation 2: Once constituted, the Superior Council of the Judiciary should take all steps necessary to ensure that international and national vacancies on the Court of Appeal are filled as quickly as possible.

6.2 International assistance to Court of Appeal

The lack of judicial experience among a Court of Appeal comprised solely of Timorese judges could effectively undermine the right to appeal. None of the resident Timorese judiciary had experience as a judge prior to the judicial appointments made by UNTAET in 2000. JSMP believes that a Court of Appeal comprised solely of East Timorese judges will ultimately be compatible with the fundamental right of an accused to have their conviction reviewed before a competent, independent and impartial tribunal. However, in the interim, international judges should be appointed to the bench of the Court of Appeal to sit alongside their Timorese counterparts. The appointment of international judges to the Court of Appeal is provided by the Judicial Magistrates Law. The law provides that the Superior Council of the Judiciary may, in exceptional cases, select non-East Timorese judges with at least 15 years experience and coming from a civil judicial system, to enter the judiciary of East Timor on a provisional basis.³⁶

In respect of the Special Panels for Serious Crimes, international judges would be necessary to hear all appeals. UNTAET regulations establish that the Court of Appeal for Serious Crimes cases must be comprised of one Timorese judge and two international judges.³⁷ Such panels would be necessary to avoid the paradoxical scenario in which decisions from panels of both international and Timorese judges would be reviewed by panels of solely Timorese judges. Ideally international judges have had a more extensive exposure to international law. Further, they provide important practical and ongoing assistance in the exercise of judicial functions. The Judge presently appointed to the Court of Appeal expressed to JSMP her preference for international judges to sit on the Court of Appeal, on the basis that international judges have greater experience in how to judge.

³⁶ Section 111 (2) of the Judicial Magistrates Law.

³⁷ Article 15.4 of UNTAET Regulation 2000/11 and Article 22.2 of UNTAET Regulation 2000/15. The Regulations do not provide for the composition of the Court except in Serious Crimes cases.

JSMP understands that the issue of continued international assistance to the Court of Appeal is an issue of current sensitivity, as it raises the scenario of foreign judges sitting on the bench of a superior court of a sovereign nation. These sensitivities are greater if panels including international judges were to hear appeals on all matters within the jurisdiction of the Court of Appeal. Such concerns clearly gave rise to Section 127(1) of the Constitution, which establishes that only East Timorese nationals may become members of the Supreme Court of Justice.

However, the lack of experience amongst the Timorese judiciary is not only relevant to Serious Crimes matters: it is equally applicable to judicial decisions regarding other issues within the jurisdiction of the Court of Appeal, such as constitutional, electoral and legal matters. Further, the prospect of a Court of Appeal comprised of solely East Timorese judges raises serious concerns of the effectiveness of the process of judicial review. As the judges are all similarly experienced, there is no layer of senior judges in East Timor. Such a scenario raises the serious concern that the Court of Appeal would rehear or retry a matter before it, as opposed to judicially review the decision at first instance. It is for these reasons that JSMP recommends that the international and Timorese judges form 'mixed' panels to hear all matters within the jurisdiction of the Court.

In meetings between JSMP and the Ministry of Justice, Ministry officials recognised that international judges sitting alongside Timorese judges on the Court of Appeal would provide important support and assistance to their Timorese counterparts. Accordingly, these Ministry officials foresaw that both international and national judges should be appointed to the Court of Appeal. JSMP supports such a move.

Recommendation 3: The Court of Appeal should consist of at least two international judges and one Timorese judge to hear all matters on appeal. Ideally, still more judges - both international and Timorese - will need to be recruited.

6.3 Transcripts and interpretation

The unavailability of written records of Court proceedings is a fundamental impediment to realizing the right of appeal in East Timor. In general, written records mean that the legal process can be accurately assessed and an informed decision on the grounds for appeal, with supporting evidence, can be formed by either the Prosecution or the Defence. An accurate written record of trial proceedings is also essential for the decision-making process of the judges during appellate proceedings. Transcripts also play a role in ensuring that legally informed decisions are taken and that the previous reasoning of the court at first instance can be considered. During the course of court proceedings judges often make oral orders on procedural matters which may not lead to a written decision reflecting the process of judicial reasoning. Therefore it is desirable that a record of the reasoning on procedural rules is created so that the law in East Timor can develop in a manner that is both consistent and fair.

The importance of written records is recognised by various UNTAET Regulations. Section 26.1 of UNTAET Regulation 2000/11 states that “the court shall ensure that, in each hearing by a judge or panel of judges, written or recorded notes of the proceedings are taken...” Section 31 of UNTAET Regulation 2000/30 establishes that in proceedings in criminal cases, the record shall be used to produce transcripts. The section provides that the record shall contain *inter alia*, “a shorthand, stenographic or audio recording of the proceedings. Recorded media shall be used as necessary during further proceedings to produce transcripts and otherwise facilitate the functions of reviewing authorities.”

No complete written records of Court proceedings of any type are made in cases before the District Courts of East Timor except the Special Panels for Serious Crimes. The only records of proceedings are notes taken by the judge in Court. Serious Crimes cases before the Special Panel are recorded by a video recording system, as well as an audio recording that is then stored on compact disc. As has been noted in previous JSMP Trial Reports, video and audio recordings are problematic means of recording proceedings as they make it extremely difficult to review a particular section of the record.³⁸ No arrangements have been made for transcribing these records of proceedings. JSMP understands that the frequent practice of judges on the Special Panels is to refer to their own notes taken during Court proceedings and disregard the audio and video recordings completely.

The appeal in the Los Palos Case³⁹ is one clear example of the general importance of ensuring that transcripts are made from the recordings of the trial proceedings. The Notice of Appeal filed following the judgement on 11th December 2001 cites as evidence to be presented “the records of the proceedings in this matter”. On 4th February 2002 the Special Panel for Serious Crimes granted an extension of time to the appellants to file their appeal. That decision included an order to the Court Registrar to make the official trial record available to parties to enable them to proceed with their preparation of the appeal. The Court Registry made available the video compact disc records of the proceedings, but not the official transcript - which does not exist. On 22nd March 2002 the Court ordered the Registrar to make the official trial records available to the appellants by 15th April 2002. The appellants were to file the statements of appeal by 30th April 2002. JSMP understands that the appellants have not yet received the transcript of the trial proceedings and as a consequence the appeal proceedings appear to be suspended. JSMP is not aware of any transcript currently being prepared.

In the meantime Alarico Fernandes, who was convicted and sentenced to four years imprisonment and who was one of the appellants who filed the notice of appeal, was conditionally released on 21nd June 2002 following the completion of two-thirds of his sentence.⁴⁰ JSMP is concerned by this situation, in which appellants may wait until the completion of two-thirds of their sentence rather than the conclusion of the judicial process. This concern is discussed in greater detail below.

³⁸ See JSMP, “The Prosecutor General v Joni Marques and 9 Others (The Los Palos Case) JSMP Trial Report”, Dili, East Timor, March 2002, pg 28.

³⁹ *Prosecutor v. Joni Marques*, Case No. 9 of 2000 (11 December 2001).

⁴⁰ “Conclusão”, 21 June 2002, Judge Antero Luis.

A related matter is the considerable problems associated with translation and interpretation of proceedings and documents. Previous JSMP Reports have noted the impact on court proceedings of interpretation and translation issues.⁴¹ Of particular importance to the issue of the right to appeal is the issue of translation of documents. Translation of documents is currently performed by a small number of translators, and delays are considerable.

The longest currently pending appeal before the Court of Appeal was filed on 21nd May 2001. The appeal was filed by the Public Ministry and relates to the sentencing of Sergio Castro de Jesus on 26th March 2001. One reason why the appeal has been pending for this extended period of time - more recently filed appeals have been concluded by the Court - is that significant documents in the case file require translation from Indonesian to Portuguese in order that the judge assigned to the appeal can review the case file. To date, a proportion of the documents are still awaiting translation.

Currently there are seven interpreters in the Translation Unit of the Ministry of Justice.⁴² They are responsible for interpreting in court as well as translating court documents. The Unit also provides translation services to the Ministry of Justice, as well as translation for Ministry of Justice trainings, the District Court and national Parliament. As a consequence, the currently employed translators/ interpreters are stretched to capacity. JSMP understands that the Unit will recommend at least four additional translators will be appointed as a matter of urgency. Training is required in order to familiarize these translators with the terminology of law, human rights and justice.

Recommendation 4: Technology currently exists for a system that creates a written record of video or audio recordings. As a matter of urgency, such technology, compatible with the current system in the Court of Appeal building, should be purchased and installed.

Recommendation 5: As a matter of urgency, typists should be recruited for both the Special Panel and District Courts to create a system of transcripts from the recordings currently available. This should be accompanied by the proper archiving and dissemination of such transcripts under the administrative control of the Court Registry.

Recommendation 6: Interpreters and translators need to be recruited in order to alleviate the current delays in the translation of documents for the Court of Appeal. These should be in addition to current requirements for additional translators to the Special Panel for Serious Crimes or the District Courts.

⁴¹ JSMP, "The Prosecutor General v Joni Marques and 9 Others (The Los Palos Case) JSMP Trial Report", Dili, East Timor, March 2002, p. 27.

⁴² The Unit is presided by Mr. Jacinto Dos Santos and composed of four national interpreters and three international interpreters.

6.4 Administrative necessities

“I think it is necessary to put in place... everything.”

- currently appointed judge

Currently, the Court of Appeal is comprised of one judge and three support staff (one Administrator, Jose Gomes, and two clerks, Maria De Fatima and Leonel Amando Sarmiento). The Administrative Section of the Court of Appeal currently accepts appellate filings from District Courts and maintains records of appeals pending. Currently employed administrative staff expressed to JSMP the need for training in administrative tasks. They also commented that no language training has been provided to them. These administrative staff use Indonesian and Tetum, but do not feel comfortable using English and Portuguese- which are often the languages used in the documents they are expected to administer.

JSMP believes that competent and efficient court administration provides the essential foundation for any court system. Once functioning, the Court of Appeal will require greater administrative support than present personnel can reasonably be expected to provide. Current levels of administrative support are well below those envisaged in an early concept paper which was designed for use within the Judicial Affairs Department to guide the establishment of the Court of Appeal in East Timor. The paper set out the requirements in terms of personnel for administrative staff, a registrar, clerks, secretaries and other supporting staff essential to the basic operation of the court. These personnel were never actually recruited. The need for sufficient administrative support is more acute given the substantial backlog of appeals pending before the Court.

A related matter is the administration of the budget for the Court of Appeal. JSMP understands that it is undesirable to burden the Court of Appeal with administrative tasks that are not essential to its functions. At the same time, a Court of Appeal without its own financial independence raises serious concerns regarding the independence of the judiciary. The ideal situation may be that the budget of the Court of Appeal is a ‘separate line item’ of the Ministry of Justice, but that the Court should then administer its own internal budget.

Recommendation 7: An assessment should be undertaken of the current needs of the Court of Appeal in terms of administrative support. This assessment should review both the number of personnel as well as any training required to provide effective administrative support. This review should consider the administrative necessities for the internal budgetary management of the Court of Appeal.

Recommendation 8: JSMP recommends the creation and recruitment of the post of Coordinator for Court of Appeal, similar to the recently created position of Administrative Coordinator for the Special Panels.

6.5 Standard practice

The current state of the legal system in East Timor dissuades the practice of filing appeals. Based on JSMP's observations and discussions with lawyers practising in East Timor, certain issues work against a rigorous and informed approach to the filing of appeals by legal professionals in East Timor. There is no attitude among legal professionals which reflects that the filing of appeals is standard practice if the situation merits. Many lawyers - and in particular public defence lawyers - are not accustomed to filing appeals because of their limited practical experience as a lawyer. Awareness among lawyers is a factor which impedes the effective realisation of the right to appeal.

Delays in the trial process- both at the first instance and the Court of Appeal- also dissuade the practice of filing appeals. The uncertainty that surrounds the legal process in East Timor has accustomed lawyers to put their energy and time on the case at the court of first instance at the expense of filing at the appellate level. The fact that the Court of Appeal has not been functioning for a year clearly exacerbates this problem.

In particular, JSMP is concerned by the prospect that defence lawyers might prefer to wait until their clients comply with two-thirds of their sentence and seek conditional release as an alternative to filing an appeal. JSMP is aware of at least one example in which an appellant withdrew his appeal as he was conditionally released following the completion of two-thirds of his sentence. Crispin Carado was sentenced in the District Court of Baucau on 1st May 2001⁴³, and filed an appeal on 2nd July 2001. His lawyer requested the withdrawal of the appeal because he was about to finish two-thirds of his sentence. Obviously, JSMP does not question the practice of conditional release. However it is concerned at the prospect of a practice whereby defence lawyers await the completion of two-thirds of a sentence as opposed to a final legal determination of the appeal process. The determination of an appeal- which may resolve issues of innocence and guilt - is a legally distinct concept from the release of a convicted person on the grounds of good behaviour following the completion of two thirds of a sentence. A legal system that encourages the conflation of these notions is in clear violation of the right to appeal.

To the extent that the problems above arise from a lack of practical experience, JSMP believes that Practice Directions would be a simple method to minimise some of the problems associated with the practice of filing appeals. Practice Directions on the filing of appeals could help standardise the procedure, easing the process for legal professionals, judges on the Court of Appeal and administrative staff. This type of Practice Direction has been used in various judicial systems. Practice Directions provide a means of regularising the filing of a statement of appeal and following them would become one of the proper steps of appeal procedure. They are particularly desirable in a legal system where the lack of judicial personnel and administrative resources continue to persist.

⁴³ The decision is cited in the records of the Administrative Section of the Court of Appeal with the reference 01/PID.B/2001/PD.BCU.

According to JSMP's knowledge, no Practice Directions in relation to appeals have ever been issued since the establishment of East Timor's judicial system. UNTAET Regulation 2001/18 (amending UNTAET Regulation 2000/11) establishes the President of the Court of Appeal as the head of the judiciary with the authority to issue practice directives regarding procedural matters not regulated by law. Ideally, they would include information such as the precise title and the date of filing of the appealed decision, a summary of proceedings including an identification of the relevant documents in proceedings before the Trial Chamber, the provision of the rules pursuant to which the appeal is filed, a concise statement as to why it is contended that the provision relied upon is applicable to the appeal, and the ground on which the appeal is made including the relief sought.

Recommendation 9: There is an urgent need is call for ongoing training of Timorese lawyers. This would accustom them to consider the filing of appeals as a fundamental prerequisite to the protection and enforcement of a fair trial.

Recommendation 10: It is important that Practice Directives are issued in relation to the Court of Appeal in order to assist a party wishing to appeal both interlocutory matters and the final decisions of the courts at the first instance.

7. CONCLUSION

JSMP recognises the context in which the judicial system of East Timor functions. The East Timorese justice system continues to suffer from the impact of physical destruction during and prior to 1999, as well as a lack of both human and financial resources. The justice system is in an ongoing process of construction.

JSMP believes that this context makes the application of international human rights standards more – and not less - pressing. The belief that the particular situation confronting the East Timorese justice system requires a wide 'margin of appreciation' on international human rights standards is both confused and dangerous. It assumes that the mechanisms of a justice system can be established without the principles and standards necessary to safeguard its operation. Put more specifically, it assumes that a criminal justice system can function without providing full guarantees of a right to a fair trial. In addition, the belief masks issues that have little to do with the context of the East Timor and are more accurately described as a lack of planning and a failure to give those standards their due importance.

The findings of this report show that the right to appeal is a central component of the right to a fair trial. They also show that the right to appeal has a particular importance to the judicial system of East Timor. It is in the spirit of constructive recommendations that this report has provided practical proposals that are necessary to give effect to the right to appeal in the immediate future.

The Right to Appeal in East Timor

Recommendation 1: The President of the Republic should appoint, as a matter of urgency, the President of the Court of Appeal. The President of the Republic, the National Parliament, the Government, and the currently sitting Timorese judges should not delay in providing their respective designations to the Superior Council of the Judiciary.

Recommendation 2: Once constituted, the Superior Council of the Judiciary should take all steps necessary to ensure that international and national vacancies on the Court of Appeal are filled as quickly as possible.

Recommendation 3: The Court of Appeal should consist of at least two international judges and one Timorese judge to hear all matters on appeal. Ideally, still more judges - both international and Timorese - will need to be recruited.

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Recommendation 10: It is important that Practice Directives are issued in relation to the Court of Appeal in order to assist a party wishing to appeal both interlocutory matters and the final decisions of the courts at the first instance.