



**JUDICIAL SYSTEM MONITORING PROGRAMME  
PROGRAM PEMANTAUAN SISTEM YUDISIAL**

**The Role, Practice and Procedure of the Court of  
Appeal**

**JSMP Report**

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

*Judicial System Monitoring Programme  
Rua Setubal, Kolmera, Dili  
Alamat pos: PO Box 275, Dili, Timor Leste VIA Darwin, Australia  
Tel/Fax: (670) 3323 883  
Mobile: (670) 72 46227  
Email: [info@jsmp.minihub.org](mailto:info@jsmp.minihub.org)*

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## 1. Executive Summary

The Court of Appeal (“the CA”) has now been functioning since July 2003 following a hiatus since its establishment in July 2000<sup>1</sup>. In JSMP’s view it is therefore an appropriate time at which to conduct a holistic review of the CA’s role in the judicial system, its relationship with the other courts in Timor Leste and general trends and patterns which JSMP has observed in its disposal of appeals since commencement of hearings. As the highest court in Timor Leste, and one which has the consequent role of managing and supervising the functioning of the other courts, a broad knowledge of the CA’s role, and any aspects of its performance which need to be improved, is essential to obtaining a sound understanding of the judicial system in Timor Leste. This is particularly important at a time of uncertainty for the judicial system in Timor Leste, with national court actors undergoing a crucial training programme, thereby restricting them to a limited role in court proceedings at present, and with the possible closure of the UNMISSET mission in May. In writing this report JSMP hopes to be able to identify critical focal points for reform of the CA, as arguably the most important court in Timor Leste’s judicial system, and to provide a meaningful contribution to ongoing attempts to implement effective measures for that reform.

Section 3 will give a brief overview of the pattern and nature of the functioning of the CA since 2003 and statistics will be provided by way of illustration. Section 4 will discuss the relationship between the CA and the District Courts, in particular the process by which District Court decisions are appealed and the influence of CA decisions as a precedent for District Courts. Under section 5 the relationship between the CA and the Supreme Court will be examined. In JSMP’s view it is clear that, in light of recent CA decisions, there is an urgent need to establish a second court of review. Section 6 provides an analysis of present trends in the hearing of cases by the CA though a general discussion of the CA’s jurisprudence, procedure and general approach to the hearing of appeals. The report will then conclude with a consideration of the supervisory and administrative role of the CA, as exercised by way of the President of the CA.

Without diminishing the importance of the formation of the CA and its resumption of functions as a permanent court in the judicial system of Timor Leste, it is clear from monitoring conducted by JSMP that the CA continues to be hampered by a range of defects which impede the broader judicial system in general. For example, aside from the hearing of appeals within its jurisdiction, applicable laws in Timor Leste clearly require both the CA and the President of the CA to supervise and administer the judicial system of Timor Leste. There are several examples which indicate that this responsibility is not being discharged in as broad or comprehensive a manner as was intended – for example, there is evidence of a weak relationship and lack of communication between the CA and the District Courts.

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<sup>1</sup> See *JSMP Press Release*, ‘Court of Appeal Recommences in Timor Leste’, 2 July 2003.

Apart from the position and role of the CA in the judicial hierarchy, there are a number of problems which were identified by JSMP in 2004 in relation to the practice, procedure and process of appeals. For example, there is apparently some confusion as to the appropriate manner of execution of sentences when the relevant decision is able to be appealed, in particular, whether or not an appellant who appeals against a prison sentence should remain free pending the determination of their appeal. There are also problems which have emerged in connection with the application and analysis of legislation by the CA. JSMP has observed that during the conduct of its hearings and in its consideration of applicable laws the CA sometimes fails to address each ground on which the original decision is being appealed and, further, that the CA addresses issues which are *not* the subject of appeal. Another prominent trend is excessive delays involved in hearing interlocutory appeals from decisions concerning pre-trial detention measures, however, it has to be emphasised that JSMP has in this regard observed significant improvements during 2004.

Without forgetting the defects identified above, it must be remembered that the judicial system of Timor Leste is still at a very early stage of its development and so it has to be stressed that, in JSMP's view, the existence and continued functioning of the CA, together with the consolidation of its operations, constitutes significant progress. The analysis and commentary contained within this report is submitted in the spirit and with the objective of contributing to the continuation of that progress.

## **2. Recommendations**

### ***Funding for Court of Appeal Judges***

- *In order to ensure the continued functioning of the CA further funding for international judges is essential. JSMP urges the donor community to consider the critical role that the CA plays in Timor Leste's judicial system, the dependency of that role on international judges and, on that basis, to provide additional funding to secure the CA's future.*

### ***Management and Determination of Appeals***

- *Absences of public prosecutors and public defenders from CA hearings must be closely monitored and followed up, if necessary by the President of the Court of Appeal.*
- *Systems to assist monitoring of time periods between initiation of appeal and hearing must be implemented in order to ensure compliance with the case management milestones prescribed by regulations, for example, the requirement to hear interlocutory appeals within 10 days of filing the petition. The implementation of this system would be facilitated by installation of a comprehensive information technology package such as that which is being considered under the auspices of the UNDP's 'Strengthening the Justice System' program.*

- *It is necessary to clarify, by legislation if necessary, the means by which an appellant can apply for a stay of execution of a decision pending determination of an appeal against that decision, and the factors which ought to be considered by the judge in determining whether or not to grant that stay.*
- *The CA acknowledge and focus on the need to address all appeals by systematically responding to each of the grounds raised in the appellant's notice of appeal.*

#### ***Relationship between the Court of Appeal and the District Courts***

- *Systems must be put in place which ensure that case files are transferred between the CA and the District Courts in a timely manner and that, in conjunction with that transfer, the results of appeals are properly communicated to the court of first instance as soon as practicable.*
- *Parliament must clarify the role and effect of superior court decisions on lower courts particularly in relation to a) the obligation of courts of first instance to execute appeal decisions b) whether or not principles enunciated by superior courts are binding on inferior courts generally.*
- *It is necessary to promulgate rules which entitle court officials to request meetings with the President of the CA on specified matters as and when the need arises and to prescribe in detail the means for doing so .*
- *It is necessary to establish a clear obligation for both the CA and the District Courts to provide to the President of the CA regular reports on functional and administrative issues with which those courts are faced and to implement guidelines for this reporting which must be adhered to uniformly by all courts.*

#### ***Relationship between the Court of Appeal and the Supreme Court***

- *JSMP strongly encourages members of parliament, members of government, parliamentary groups and civil society to consider and debate the need for:*
  - *the establishment of the Supreme Court as an additional court of judicial review and as a court of specific expertise in the field of constitutional review;*
  - *appropriately qualified international judges to be appointed to the Supreme Court, if established; and*
  - *constitutional revision in order to permit appointment of international judges to the Supreme Court.*
- *The person occupying the position of President of the CA ought to be limited to a restricted number of official judicial appointments to ensure concentration on and dedication to the most pressing tasks of court administration expected of the President. In exercising this role the President ought to ensure a strong working relationship with the chief clerk of the Registry and be given additional support in the form of staff, if necessary.*

#### ***Access to Judicial Information***

- *A more effective, transparent and functional directive on case file access needs to be adopted.*
- *The courts should publish a regular update of basic statistics relevant to the functioning of the courts in Timor Leste. This could be by way of the Government Gazette, a bulletin specially created for this purpose or in a special section of a daily newspaper.*
- *CA decisions must be published on a regular, systematic basis by way of an official case law reporter. Once established steps should be taken to expand publication and reporting of decisions to the District Courts. These will in the long run provide a significant contribution to the development of Timor Leste's jurisprudence.*
- *These matters need to be addressed in a holistic fashion by way of a consolidated, comprehensive law on public access to court information.*

### **3. Statistics Concerning Case Flow in the Court of Appeal**

JSMP collected and analysed statistics on cases in all courts of Timor Leste from the period January 2003 to June 2004<sup>2</sup>. The results of this research were recorded in a JSMP report which was published in August 2004<sup>3</sup>. Those statistics illustrate a number of trends in relation to the CA.

Firstly, a relatively large proportion of the appeal cases lodged with the CA were finally disposed of within the time period the subject of the research (that is, 44 of a total of 73 cases which were commenced in 2003 and 11 of a total of 33 cases for 2004). Nevertheless, a large portion of those cases which were completed were appeals which were required to be disposed of expeditiously. An extremely large portion of all completed appeal cases were appeals from the Dili District Court. Apart from this court, the Special Panels for Serious Crimes ("SPSC") was the only other jurisdiction from which there was a large number of completed appeals.

Secondly, cases before the CA in 2004 were able to be processed more smoothly in comparison to 2003 cases. For example, the average period between the registration of a case until decision was 4 months and 5 days in 2003 but only 4 weeks and 5 days for 2004 cases. Nevertheless, it has to be acknowledged that the CA did not function for an 18 month period until June 2003 because of a lack of judges available to hear appeal cases. There continue to be delays<sup>4</sup>, particularly bearing in mind the fact that a large

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<sup>2</sup> In November 2004 JSMP made numerous requests both orally and by email to the office of the President of the CA to obtain statistics pertaining to cases heard after June 2004. This request was refused and JSMP was therefore unable to access information on cases processed since that date.

<sup>3</sup> *JSMP Report*, 'Case Flow and Management: A Statistical Analysis, 2003-mid 2004', August 2004 ("Statistics Report").

<sup>4</sup> For example, as noted in the Statistics Report, in the research period, for those appeal cases which remained undecided there was an average period of 11 months 3 weeks and 3 days since commencement.

majority of the cases heard by the CA were appeals from interlocutory decisions which are required to be heard expeditiously.

Thirdly, there are major delays in relation to hearing of appeals from pre-trial interlocutory decisions of the District Court ordering detention of the suspect. For the period July 2003-June 2004 the CA on average required 87 days to determine an appeal from a decision ordering pre-trial detention of the suspect, which is a time period far in excess of that which is considered proper under UNTAET regulations<sup>5</sup>. Nevertheless, JSMP commends the CA for achieving significant progress in reducing the above-mentioned delays, from 104 days in the second half of 2003 to 54 days in the first half of 2004.

Therefore, the CA is now functioning and, although the case flow is not always consistent, compared with the 18 month period until June 2003 during which time the CA did not hear any cases, this represents significant progress.

#### **4. Relationship between the Court of Appeal and the District Court**

The District Courts are the only courts of first instance in Timor Leste. The next court in the judicial hierarchy is the CA and then, in theory at least, the Supreme Court<sup>6</sup>. In practice, however, the District Court and the CA are the only functioning courts in Timor Leste at present and so the relationship between them is critical to the smooth operation of the judicial system. There are four District Courts i.e. Dili, Baucau, Suai and Oecusse. These courts each have their own specific, limited territorial jurisdiction<sup>7</sup>.

##### **4.1 The Appeals Process**

Section 14.2 of *Regulation 2000/11* prescribes the general jurisdiction of the CA. According to this section, the CA is competent to “hear appeals of final judgements rendered by any District Court in Timor Leste, and such other matters as are provided for in the present or any other UNTAET regulation”.

Jurisdiction to hear criminal appeals is established by *UNTAET Regulation 2000/30*. According to section 23.1 of that Regulation, the CA is competent to hear appeals from decisions of investigative judges issued at review hearings into the detention status of the defendant (i.e. an interlocutory appeal). The process of appeal from interlocutory decisions is initiated by the filing of a petition within 10 days of the decision of the investigative judge. The CA is then required to summons all parties to appear at the hearing on a date within 10 days of the receipt of the appeal<sup>8</sup>. After the hearing and the

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<sup>5</sup> See generally sections 20 & 23 of *UNTAET Regulation 2000/30 on the Transitional Rules of Criminal Procedure as amended by UNTAET Regulation 2001/25 (“Regulation 2000/30”)*.

<sup>6</sup> See Part 5 of this Report.

<sup>7</sup> Section 7 of *UNTAET Regulation 2000/11 on the Organisation of Courts in Timor Leste as amended by UNTAET Regulation 2001/25 (“Regulation 2000/11”)*.

<sup>8</sup> Section 23.2.



proclamation of the decision, the CA returns the case to the District Court for execution of its order and continuation of the case<sup>9</sup>.

According to section 40.1 of *Regulation 2000/30*, the CA is also competent to hear appeals from final decisions of the District Courts on the grounds prescribed in that section. The appeals process is initiated in this case by lodgement of a Notice of Appeal (“Notice”) with the court of first instance. If the Notice is not submitted within the time limit, that is, within 10 days of the proclamation of the decision, the right to appeal will be extinguished<sup>10</sup>. Furthermore, the right to appeal will also be extinguished if the appellant fails to submit their written statement within 30 days of the filing of the Notice<sup>11</sup>. The next step requires the Registry to open the appeal case file and to inform the respondent of the filing of the Notice<sup>12</sup>. The respondent must submit their written response within 30 days of the date of receipt of notification. The Registry of the court of first instance will then prepare and send the case file to the registry of the CA either when the response to the appeal is received or when the time period for submitting a response has expired, whichever is the earlier<sup>13</sup>.

According to a clerk at the CA Registry, the CA finalises its written decisions with a concluding note and the signature of the presiding judge who then returns the case file to the CA Registry<sup>14</sup>. The file is then sent back to the District Court Registry for execution of the order and, in the event that the appeal was interlocutory, continuation of the case.

#### **4.2 Obstacles in the Relationship between the Court of Appeal and the District Court**

In practice, there is evidence that the CA sometimes fails to inform the court of first instance of its decisions and to expeditiously return the case after disposal of the appeal. For example, in the case of *Diamantino* (no. 45/2004) an appeal against a decision extending pre-trial detention was lodged with the CA. The CA overturned the detention decision and the defendant was thereby released from detention. It was, however, some time before the case file was returned to the District Court and it only became aware of the result of the appeal when the defendant visited its Registry and notified the clerks of the result of the appeal<sup>15</sup>. Delay in returning case files to the District Courts has been confirmed by a senior public defender<sup>16</sup>. In a more recent case the CA was forced to adjourn a hearing as the presiding panel was not in possession of the relevant case file<sup>17</sup>. It was apparent to JSMP that the CA had not made any attempt to obtain the case file

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<sup>9</sup> Section 23.8

<sup>10</sup> Section 40.2

<sup>11</sup> Section 40.3

<sup>12</sup> Section 40.4

<sup>13</sup> Section 40.7

<sup>14</sup> Information obtained from interviews conducted by JSMP staff with CA clerk on 20 July 2004.

<sup>15</sup> Information obtained from interviews conducted by JSMP staff with a Dili District Court clerk on 20 July 2004.

<sup>16</sup> Information obtained from interviews conducted by JSMP staff with a Public Defender on 20 July 2004.

<sup>17</sup> *JSMP Press Release*, ‘Appeal in Murder Case Highlights Lack of Co-ordination between Court of Appeal and District Courts’, 7 April 2005.

before the hearing even though it had already been scheduled for two weeks. The transfer of a case file from a court of first instance to an appellate court is a basic, fundamental step in the appeal process. Aside from demonstrating a lack of preparation, the failure of the CA to obtain the file from the Baucau District Court prior to the hearing demonstrates a serious lack of co-ordination and communication between the CA and the District Courts.

Given these co-ordination and communication problems it is not surprising that there have been several cases in which the Dili District Court refused to follow or ignored CA decisions<sup>18</sup>. For example, the CA has on several occasions decided that investigative judges do not have authority under applicable regulations to order deportation<sup>19</sup>. Nevertheless, investigative judges of the District Court have in several instances ignored CA decisions and ordered deportation of the suspect before them. The case of *Wilfred Jan Reiner Mentik v. Public Prosecutor I* is an example of this problem. In this case the suspect appealed against a decision of the Investigative Judge. The CA ordered that he be released conditionally. In its decision the CA emphasised that only the Border Police Unit has authority to order deportation. The Investigative Judge cannot therefore order the deportation of a suspect<sup>20</sup>. Despite that order, 5 days after the CA's decision the Investigative Judge ordered that the suspect be deported. The judge's decision was appealed once again and the CA held that the deportation order was unlawful<sup>21</sup>. This case represents one example of the lack of co-ordination and communication between the District Court and the CA.

If Timor Leste is to develop a strong legal system it is essential to establish a policy and guidelines which are clear with respect to the relationship between all courts in Timor Leste. Nevertheless, as discussed above, there are many co-ordination problems between the CA and the District Courts, especially as CA decisions are often very slow in reaching the District Court Registries. There also appears to be a lack of uniformity in practice between the courts. Consequently, it is impossible to ignore the fact that CA decisions are frequently not followed by the District Courts and whichever governmental departments<sup>22</sup> are involved in the case. There are, in short, major problems arising from the relationship between the District Courts and the CA.

### **4.3 Implications of Court of Appeal Decisions for the District Courts**

According to section 2.3 of *Regulation 2000/30*:

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<sup>18</sup> In contravention of the requirements of UNTAET regulations and national laws – see below, at section 4.3 of this Report.

<sup>19</sup> See *Innocent Anike and Sebastian A. Ndubuisi v. Public Prosecutor*, Case number 12/2003, decided on July 23, 2003; *Maria Graciana Noka, Berta Tabita e Outras v. Public Prosecutor*, Case number 48/2003, decided on Nov. 11, 2003; *Wilfred Jan Reiner Mentik v. Public Prosecutor II*, Case number 72/2003, decided on Jan. 26, 2004.

<sup>20</sup> *Wilfred Jan Reiner Mentik v. Public Prosecutor I*, Case number 64/2003, decided on Nov. 21, 2003.

<sup>21</sup> *Wilfred Jan Reiner Mentik v. Public Prosecutor II*.

<sup>22</sup> It is in this regard important to bear in mind section 42.1 of *Regulation 2000/30* which obliges the prosecution to inform the competent authorities of their duties to execute, and not ignore, the court's decision.

“Judges, notwithstanding their rank or grade within the hierarchy of courts have to respect all decisions made by the Court of Appeal. Such decisions are binding and the independence of the individual judge is not affected.”

In JSMP’s view, this provision indicates that the legislative drafters intended the doctrine of precedent, which applies in states which have adopted the common law system, to be incorporated into Timor Leste’s legal system. This principle of binding precedent, referred to as ‘Stare Decisis’, rests on the notion that decisions of higher courts are authoritative and binding for those below. The doctrine of Stare Decisis essentially requires that “like cases should be decided alike” and that the grounds for the decision adopted by the higher court must subsequently be followed by inferior courts in decisions involving the same legal issues. Although, in theory, the principle of Stare Decisis is not applied in civil law systems, in practise even within the civil law system a form of precedent informs judicial decision making so that decisions of superior courts are, in general, usually followed by inferior courts<sup>23</sup>.

According to JSMP’s interpretation, the wording and meaning of section 2 of *Regulation 2000/11* is clear and unequivocal, that is, judges of lower courts are bound by decisions of the CA. This provision now appears, however, to have been superceded by the *Judicial Magistrates Law Law 8/2002*.

Section 4 of the *Judicial Magistrates Law* provides that:

“Judicial magistrates shall adjudicate in accordance with the Constitution, the law and their conscience and they shall not be subject to orders, instructions or directions, except for the duty of lower courts to obey to decisions awarded by higher courts on cases appealed against.”

This issue has already been addressed by the SPSC in the *Mendonca* case. According to that case section 4 violates section 119 of the *Constitution of Timor Leste* – which guarantees judicial independence – because it requires the judge to follow decisions of superior courts. Consequently, in the opinion of the SPSC, section 4 is invalid so that lower courts are not obliged to adopt CA decisions. The SPSC therefore refused to apply the CA’s decision in *Dos Santos*<sup>24</sup>.

JSMP is of the opinion that section 119 of the *Constitution* simply reinforces the doctrine of the Separation of Powers as incorporated under section 69 and does not of itself

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<sup>23</sup> As stated by John Merryman, “[a]lthough there is no formal rule of stare decisis, the practice is for judges to be influenced by prior decisions...the fact is that courts do not act very differently toward reported decisions in civil law jurisdictions than do courts in the United States [a common law jurisdiction]... the practice of courts is to decide similar cases similarly, in much the same way as do common law courts”: Merryman, J.H., *The Civil Law Tradition* (2<sup>nd</sup> ed.), Stanford University Press, California, 1996, at 47.

<sup>24</sup> In this case the CA decided that, among other things, Indonesian law has never been validly in force in East Timor, and that the applicable subsidiary law (i.e. law used in the absence of East Timorese law promulgated post independence, or an applicable UNTAET Regulation) according to section 165 of the Constitution is the law of Portugal and not the laws of the Republic of Indonesia.

prohibit adherence to decisions of higher courts. In JSMP's view, section 4 of the *Judicial Magistrates Law* does not infringe the *Constitution*. Nevertheless, although a strong argument can be made to the effect that section 4 only requires the court of first instance to obey superior court decisions issued on appeal in relation to the specific case originally before it, and not superior court decisions generally, the precise scope and intent of this provision remains somewhat unclear. As such, consideration must be given to the possibility of drafting either legislation or subsidiary rules to clarify the effect of superior court decisions in Timor Leste's legal system. This will add much needed clarity and certainty in an infant judicial system struggling to establish itself.

## 5 Relationship between the Court of Appeal and the Supreme Court

### 5.1 Position of the Supreme Court under the Laws of Timor Leste

The *Constitution of Timor Leste* does not specifically mention the CA. On the other hand, the *Constitution* does establish the Supreme Court as the highest court of Timor Leste. The primary role of the Supreme Court is, according to the *Constitution*, "to administer justice on matters of a legal, constitutional and electoral nature"<sup>25</sup>. Section 126 confers jurisdiction on the Supreme Court to determine constitutional and electoral matters of the type prescribed by that provision. According to the *Constitution*, Supreme Court judges must be citizens of Timor Leste, one of whom is to be chosen by the National Parliament with the other judges to be selected by the Superior Council of the Judiciary<sup>26</sup>.

At the time of publication of this report the Supreme Court is yet to be established. The present transitional position is reflected in the *Constitution* which stipulates that, until established, the powers and functions conferred on the Supreme Court are to be exercised by the highest court in existence in Timor Leste<sup>27</sup>. The *Judicial Magistrates Law* reinforces the constitutional provisions by way of section 110.1, which states that the CA "shall exercise the competencies specifically falling under the purview of the Supreme Court of Justice" until the Supreme Court becomes operational<sup>28</sup>. The CA would therefore appear to have, in addition to its general appellate jurisdiction<sup>29</sup>, jurisdiction to hear those matters conferred exclusively on the Supreme Court under section 126 of the *Constitution*. That is, the CA can exercise both its own appeal jurisdiction (conferred under *UNTAET Regulations*) and Supreme Court jurisdiction (conferred under the *Constitution* and the *Judicial Magistrates Law*). The absence of a Supreme Court, and the CA's consequent dual-role, gives rise to a number of problems, including the inherent potential for conflict in the exercise of the CA's functions. It also deprives appellants of a further right of review which, in light of several recent CA decisions, is a critical failing in Timor Leste's judicial system.

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<sup>25</sup> Section 124.2 of the *Constitution*.

<sup>26</sup> See Sections 125 and 127 of the *Constitution*.

<sup>27</sup> Section 164 of the *Constitution*.

<sup>28</sup> Section 110.1 of the *Judicial Magistrates Law*.

<sup>29</sup> That is, "to hear appeals of decisions rendered by any District Court in Timor Leste...": section 14.2, UNTAET Regulation No. 2000/1 on the Organization of Courts in Timor Leste.

## 5.2 The Position of the Supreme Court and Court of Appeal in the Future

### 5.2.1 Supreme Court

According to current indications the Supreme Court will remain non-operational for a long time. This situation is a consequence of the onerous qualifications imposed by the *Judicial Magistrates Law* as a condition of judicial appointment to the Supreme Court. According to the *Constitution* “[o]nly career judges or magistrates of the Public Prosecution or jurists of recognized merit” can become Supreme Court judges<sup>30</sup>. The *Judicial Magistrates Law* states that “the Supreme Court of Justice may initially be composed of a minimum of 5 Counsellor Judges”<sup>31</sup>. It also provides for the career path of judges which includes several levels, from probationary judge, third class state judge, second class state judge, first class state judge to Counsellor Judge. To progress to a higher level judges are required to accumulate adequate experience in the lower categorisation and obtain a positive valuation. For example, counsellor judges have to be selected by the Superior Council of the Judiciary from amongst first class judges who have a “Very Good” valuation and a minimum of eight years experience in that class<sup>32</sup>. Given that judges are presently committed to judicial training at the Judicial Training Centre for at least another two years, it is likely to be at least 10 years before there are judges classified as ‘Counsellor Judges’ of a sufficient number to constitute the Supreme Court<sup>33</sup>.

### 5.2.2 Court of Appeal

Irrespective of whether or not the Supreme Court is established, there is a real risk that the CA itself will cease functioning in the near future. The international judges’ positions at the CA are funded by UNMISSET. In order for the judges to continue after 20 May 2005, when UNMISSET is scheduled for termination, unless UNMISSET is extended, it would therefore be necessary to identify national judges sufficiently qualified to preside over its hearings. As it is, there are no national judges for the District Courts at present due, amongst other reasons, to judicial training commitments and a 100% failure rate in qualifying exams<sup>34</sup>. In short, unless UNMISSET is extended or without significant bilateral donor support, it is virtually inevitable in JSMP’s view that the CA will cease to function after 20 May 2005.

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<sup>30</sup> Section 127 of the *Constitution*.

<sup>31</sup> Section 29(4) of the *Judicial Magistrates Law*.

<sup>32</sup> Section 29(2) of the *Judicial Magistrates Law*.

<sup>33</sup> According to the requirements of the training program, judges who failed exams held in 2004 would be required to undergo further training for at least two years. Results released by the Judicial Training Centre on 25 January 2005 indicated that all probationary judges failed their exams and are therefore committed to this additional period of training. See generally *JSMP Press Release*, Results of Judges Evaluations Released, 26 January 2005; *JSMP Press Release*, Announcement of Results of Preparatory Phase of Training for Court Actors, 26 January 2005; *Justice Update No. 3/2005*, Problems since the Judge’s Evaluations.

<sup>34</sup> *Ibid.*

As mentioned above, Timor Leste was without a CA for a significant period until 2003. Aside from a denial of the right of appeal, a well entrenched requirement of a fair trial under international law<sup>35</sup>, it would be a major blow to the general development of Timor Leste's judicial system, and to foreign confidence in that system, if the CA was to once again cease functioning. JSMP urges the UN and donors to pay heed to this prospect when considering future funding for Timor Leste.

### 5.3 Problems with the Position of the Supreme Court

JSMP acknowledges that there are, as discussed above, several legal and practical obstacles impeding the establishment of the Supreme Court in the future, nevertheless, it is necessary to point out two principal problems which arise from the absence of a properly functioning, independent Supreme Court.

Firstly, there are serious ethical issues raised by authorizing judges to preside, in their capacity as judges of a superior court, over an appeal from their own previous decision. The potential for this to occur has, to JSMP's knowledge, already arisen in two cases.

In July 2003, the Prosecutor General of Timor Leste, Mr Longuinhos Monteiro, filed an application with the CA sitting in its capacity as the Supreme Court requesting a review of their decision in the appeal of *Armando dos Santos*. The grounds for the application were that the CA erred in finding that Portuguese Law is the applicable subsidiary law and that *UNTAET Regulation 2000/15 on the Establishment of Panels with Exclusive Jurisdiction over Serious Criminal Offences* is unconstitutional. The CA has still not, to date, responded to the prosecution's application so as far as JSMP is aware the case remains adjourned. The second case is an appeal from the SPSC decision in the case of *Paulino de Jesus* (No. 29/2004). The Notice was filed by defence counsel on 19 November 2004<sup>36</sup>. On 17 December 2004 the CA issued a half page decision in which it refused to hear, in the exercise of its Supreme Court jurisdiction, the appeal from its own decision on the grounds that there was currently no Supreme Court in existence in Timor Leste. This decision has helped to clarify a significant source of uncertainty for the judicial system in Timor Leste. In JSMP's view it is not appropriate for judges to hear appeals from their own decisions, raising as this does serious conflict of interest issues. JSMP commends the CA for confirming this and supports the decision to that extent, however, the CA's decision was unsupported by any reasoning other than to simply refer to article 164 of the *Constitution* as being the basis for its conclusion. A decision from the highest court in Timor Leste on an issue as significant as the existence of the Supreme Court clearly warranted a proper explanation of the grounds on which it was made. Furthermore, it was arguably improper for the panel of judges to have ruled on whether not there was a further avenue of appeal in Timor Leste, in the form of the Supreme Court, in a case in which their own decision was the subject of appeal. This clearly raises at least the *appearance* of a conflict of interest.

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<sup>35</sup> See for example Article 14.5 of the *International Covenant on Civil and Political Rights*.

<sup>36</sup> Appeal Case No. 70/2004.

Secondly, the absence of a Supreme Court has obvious implications for the quality of judicial and constitutional review. As outlined above, the Supreme Court has exclusive jurisdiction to adjudicate on disputes or issues of interpretation arising out of the Constitution. This competence is currently being exercised by the CA, however, the CA is also occupied with hearing appeals from the District Courts. As a result, it would appear that the CA is unable to properly consider and adjudicate on issues of constitutional review that come before it in a timely manner. For example, on 5 March 2005, in accordance with section 149.1 of the *Constitution*, the office of the President submitted the draft law on Freedom of Assembly and Demonstration to the CA “to undertake an anticipatory review of the constitutionality” of the law which had been submitted to the President for promulgation. According to section 149.2 of the *Constitution*, the Court of Appeal “shall hand down its ruling within twenty-five days”. That twenty-five day period expired on 31 March. However, to date, the CA has not yet handed down its ruling. When the CA does hand down its ruling, this ruling will therefore itself be unconstitutional, as it has ignored the time limit set by section 149.2. As the basis for the political and legal order in Timor Leste it is essential that any issues arising from the Constitution are disposed of in as comprehensive but time-efficient manner as possible. A constitutional court must also be comprised of judges expert in the field of constitutional law.

International law entrenches a right of appeal, however, it does not require that there be multiple avenues of appeal. Nevertheless, as Hakan Friman states (in the context of discussing the CA in Timor Leste), “[i]t is self-evident that the right to appeal requires that a genuine review take place”<sup>37</sup>. In JSMP’s view the CA’s judicial reasoning and decision-making has been poor in a number of recent appeal cases. It might therefore be argued that the CA has not satisfied the standard required by “a genuine review”<sup>38</sup>. In light of these decisions JSMP feels that there is a critical need for a superior court to provide final review of CA decisions<sup>39</sup>. Judicial error and misapplication of law is an inescapable feature of all judicial systems and for this reason multiple forums of appeal are essential to filter out and minimise fault. It is of course inevitable that the same should be true of Timor Leste and so, irrespective of its infancy and funding limitations, its judicial system must be reinforced by a third court in the judicial hierarchy constituted by well qualified and experienced judges.

A Supreme Court can only be established, however, if appropriate judicial candidates are identified and available. This is clearly the single biggest obstacle to its creation. There are effectively two alternative means of overcoming this obstacle. These are, however, subject to significant practical limitations.

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<sup>37</sup> Friman, Hakan, ‘Procedural Law of Internationalized Criminal Courts’, in Romano, Cesare, Nollkaemper, Andre & Kleffner, Jann (eds.), *Internationalized Criminal Courts*, Oxford, Oxford University Press, 2004, at 344.

<sup>38</sup> See section 6.3 of this Report; see also *JSMP Report*, ‘Overview of the Justice Sector: March 2005’, March 2005, at 20; *JSMP Report*, ‘The Paulino de Jesus Decisions’, April 2005, at 12, 18.

<sup>39</sup>

The first option would be to relax the stringent qualifications required for appointment to the Supreme Court<sup>40</sup>. This would require amendment of the *Judicial Magistrates Law*. As discussed above, these criteria are particularly onerous and it is unlikely that there will be any judges able to satisfy them for at least 10 years. Nevertheless, it must be stressed that the criteria are there for a purpose – to ensure final judicial review of a high quality. If these criteria were not stringent enough the Supreme Court would be likely to replicate the problems which JSMP has observed at the CA. The second option may, for that reason, be preferable.

It is clear to JSMP that at present in Timor Leste a properly functioning Supreme Court should be composed of well-qualified international judges. Section 127 of the *Constitution* presents a significant obstacle to this occurring, however. According to section 127.1, Supreme Court judges must be of Timor Leste nationality. Section 127 can be amended to authorise appointment of international judges but, according to sections 154.3 and 154.4, the *Constitution* can only be amended prior to May 2008 with the support of a four fifths majority of members of parliament. In short, even if an amendment was supported and passed, the Supreme Court could not function for at least three years. Both options for the creation of the Supreme Court are far from ideal, nevertheless, it is essential for the reasons stated above. Lobbying for a constitutional amendment authorising appointment of international judges should therefore commence now.

## 6 Conduct and Procedure of Appeal Hearings

The proper and efficient conduct of court hearings is a central facet of all organized judicial systems. The objective of trials is to achieve justice in a manner consistent with community interests and within the legal capacity of the competent courts. Proof of the guilt of the suspect or the claim of the plaintiff at hearings is influenced by a range of elements, for example, the presence of the suspect together with their lawyer, proper legislative analysis and so on.

### 6.1 Grounds for Appeal

A party can appeal a final decision delivered by the CA on one or more of the grounds stipulated in section 40.1 of *Regulation 2000/30*<sup>41</sup>.

The CA occasionally fails to address all of the issues which are raised by the applicant as grounds for appeal. For example, in the case of *Raimundo Soares*<sup>42</sup>, the suspect appealed

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<sup>40</sup> See section 5.2. The requirements of section 127 of the *Constitution* must still be considered, however. For example, international judges are prohibited from becoming Supreme Court judges.

<sup>41</sup> That is, if there is:

“(a) violation of the rules of the criminal procedure;  
(b) a violation of the procedural or substantive rights of the accused;  
(c) inconsistency within grounds of the decision;”  
(d) material error of law or fact”.



the 1 year prison sentence he received for the offence of maltreatment, for having beaten his wife, and the defendant requested an acquittal or, failing that, a reduction of sentence. The applicant request to be released on the basis that the victim had provoked him, by telling him that she was pregnant and that this pregnancy was to another man. The applicant then stated that his wife's words violated local traditions and that this provocation justified his attack on the victim. The CA looked at the facts and decided that the defendant's actions amounted to a violation of physical integrity on the basis of Portuguese laws. In relation to the sentence, the CA affirmed his prison sentence of 1 year on the ground that the defendant intended to hit his wife and the physical scars from which she suffered were sufficiently serious because the defendant bound and gagged his wife before beating her.

The CA failed to address the two principal grounds of appeal in the *Raimundo Soares* case – namely, the defence based on provocation and the argument pertaining to violation of cultural norms. The failure to address all issues raised by the applicant in the *Raimundo Soares* case infringes section 41.5 of *Regulation 2000/30*, which provides that “[a] decision of the CA ... shall address each issue raised by the appellant”<sup>43</sup>. Moreover, the CA missed a valuable opportunity to address the extent to which womens' rights under international law can restrict conduct otherwise acceptable under local traditions and cultural practices. In relation to the defence of provocation, it would have been better if the CA had clarified the circumstances and type of provocation which would fulfill the conditions required to establish the defence of provocation, in determining the guilt of the defendant or as a factor to be considered in the sentencing process<sup>44</sup>.

Recently, in the *Paulino de Jesus* decision, the CA again failed to specify which of the section 40.1 grounds it relied on in reaching its decision and failed to address all issues submitted by the Prosecutor as grounds for appeal<sup>45</sup>.

## 6.2 Presence of the Defendant and their Lawyer

As officers of the court, lawyers and prosecutors have a legal duty to ensure that, to the best of their abilities, the cases in which they are involved are disposed of fairly and in accordance with applicable laws. Specifically, they are obliged to ensure that decisions are appealed from the District Courts to the CA if there is a clear error of law and to ensure that, as much as possible, those appeals are decided in accordance with the law.

Notwithstanding that obligation, there are often no lawyers present at appeal hearings<sup>46</sup>. Through investigation and observation of court records and decisions JSMP is aware that:

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<sup>42</sup> *Raimundo Soares*, Case 14a/2001, decided on 21 October 2003.

<sup>43</sup> Section 41.5 of *Regulation 2000/30*.

<sup>44</sup> The Portuguese Penal Code provides that sentences can be reduced where proven that the defendants actions were influenced by provocation. The Indonesian Penal Codes states that the suspect will not be convicted where their actions amounted to an attempt to defend themselves from an immediate attack.

<sup>45</sup> *Paulino de Jesus Report*, at 13.

<sup>46</sup> Information obtained from a Public Defender by way of an interview conducted on 21 July 2004.

In late 2004 JSMP analysed a sample of 67 cases decided by the CA during 2003-2004. Information on the submission of written statements and attendance at hearings by both parties was available in 46 cases. Of these 46 cases it was found that:

- In 21 cases (46%) the prosecution did not submit a written response to the appeal by the defendant. The defense did not submit a response to the prosecution's appeal in 2 cases;
- The prosecution was not present in 19 of the 46 cases (41%). Defence lawyers were not present in 10 of those cases (21%). There was an overlap in the absence of prosecution and defense in 8 cases (17%), meaning that in these cases a decision was made though no hearing was held;
- The prosecution failed to both file a written response to the notice of appeal *and* attend in court in 11 cases. As a result, 24% (that is, nearly a quarter of all cases) were decided in the absence of the prosecution. The defence lawyer failed to submit a written response or attend court in one of these cases.

The absence of lawyers at appeal hearings is a major problem. Without lawyers a client's interests are not being represented or properly advanced and appeals will not be heard thoroughly because there are no lawyers present to assess and debate relevant legal and evidentiary issues. In October 2004 for example, both parties, that is the defence lawyer and prosecutor, were not present at the hearing of 2 appeal cases<sup>47</sup>. JSMP staff members were informed by the court clerk that, with respect to one of these cases, the parties were already notified of the hearing date. As a result one of the cases had to be adjourned, however, the other case proceeded without lawyers being present. The absence of lawyers in this way can undermine the appeals process to a significant extent. The absence of the prosecution is particularly important. As state officials, prosecutors represent the interests of the community and their failure to attend hearings potentially undermines the faith of that same community in the appeals process and the judicial system in general. Public trust in the courts is critical to Timor Leste's future, particularly as it is still a very young, developing country. Consequently, stronger steps have to be taken to ensure that lawyers, and in particular prosecutors, are always present at the hearing of appeals.

### 6.3 Legislative Analysis and Judicial Reasoning

It is a fundamental feature of any judicial system that there is an appeal court which can be used as a venue for testing and applying difficult areas of the law. Nevertheless, according to court actors and observers, the CA is not properly discharging this function. Consequently, decisions delivered by Judges are frequently inconsistent with or reflect an ignorance of current applicable law. For example, in *Beny Ludji v. Public Prosecutor*, the Court of Appeal held that "the judge only has the duty to review the period of detention every 30 days if there are new factors or evidence which supports that the suspect or accused should be conditionally released or released without conditions"<sup>48</sup>. This

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<sup>47</sup> One of which was *Cristovao de Sousa Freitas (32/2001)*

<sup>48</sup> *Beny Ludji*, Case 40/2003, decided on Sept. 12, 2003 (The judgment was written in Bahasa Indonesia and the quote is based on a translation by JSMP).

contradicts the clear language of section 20.9 of *Regulation 2000/30* which provides that “the Investigating Judge shall review the detention of a suspect every thirty days and issue orders for the further detention, substitute restrictive measure or for the release of the suspect”. Similar reasoning was adopted in the case of *Mateus Punef v. Public Prosecutor*, in which the Court held that “the lack of review or review of detention after the period established in art. 20.9 does not make the pre-trial detention illegal, since, until revised, the existing situation must be maintained. On the other hand, the non-prolongation of pretrial detention in the period of time provided for by articles 20.10, 20.11, and 20.12 immediately places the defendant in the situation of illegal detention”. The Court’s decisions in this case directly contradicts its own earlier decision in the *Julio Fernandes* case<sup>49</sup>.

Another, more recent, questionable decision is that of *Paulino de Jesus*<sup>50</sup>. The CA reversed the acquittal decision of the SPSC on the basis of what was, in JSMP’s view, weak, equivocal evidence and adopted flawed reasoning in choosing to rely on that evidence. For example, in discrediting the evidence of SPSC witnesses, whose testimony was not observed by the CA, the CA appeared to rely on the fact that they were excessively precise in their recall of events thereby making it, in the CA’s view, likely that their evidence was false. Furthermore, the CA failed to appreciate the basic but critical distinction between murder as defined under the Indonesian Penal Code and murder as a crime against humanity as defined under international criminal law.

#### **6.4 Execution of District Court Decisions which are Appealed**

According to JSMP, there is in practice in Timor Leste uncertainty in relation to the process of executing decisions of the District Courts, sitting in their criminal jurisdiction, when the convicted person appeals to the CA. This problem was well illustrated in the case of *Virgilio Smith*<sup>51</sup>. In that case the Dili District Court found the suspect to be criminally liable for his involvement in a traffic accident. He was sentenced to two years imprisonment, however, he appealed against the decision to the CA. He remained free pending appeal because the prosecution is, in its view, obliged to stay execution of the sentence pending final resolution of the appeal. The continued freedom of the suspect following conviction created considerable anger and confusion for the family of the victim.

According to section 42.6 of *Regulation 2000/30*, where the penalty is one of imprisonment, the convicted person will be immediately imprisoned unless an order is issued to the contrary. Consequently, the prosecution is obliged to execute the sentence directly and without delay. On the other hand, according to its own interpretation of the law, the Prosecution was not obliged to execute the sentence when an appeal was pending.

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<sup>49</sup> *Julio Fernandes and others*, Case 07/2001, decided on Feb. 14, 2001.

<sup>50</sup> See generally *Paulino de Jesus Report*.

<sup>51</sup> See *JSMP Justice Update No. 10/2004*, ‘Execution of the Court’s Decision in the Case of Virgilio Smith’, 6 November 2004.

It appears that section 40.9 of *Regulation 2000/30* at least partially clarifies this uncertainty. Under section 40.9, “the CA is competent with regard to all matters concerning the detention of the accused, until final disposition of the appeal”. In JSMP’s view this section confers jurisdiction on the CA, not the court of first instance, nor the prosecution, to determine whether a convicted person who has lodged an appeal against a sentence of imprisonment must begin serving that sentence. Section 40.9 appears to grant a broad discretion in this respect, however, there are no apparent guidelines to regulate the exercise of this discretion.

In many jurisdictions around the world, both civil and common law, there are prescribed factors which must be taken into account in determining whether or not a convicted appellant should remain free pending appeal, for example, the likelihood of their absconding, the nature of their offence and so on. On the other hand, in Timor Leste there are no express criteria or grounds to which the CA’s broad discretion is subject. Furthermore, there are still many important matters concerning execution of penalties which are not addressed by the legislation, for example, the extent to which the judge of first instance is competent to determine the detention of the appellant, whether or not the prosecution is entitled to apply for the detention of the accused if it lodges an appeal and whether the execution of sentence can be raised only “[u]pon receipt of the case file by the CA”, as suggested by a literal reading of section 40.9. If not it is necessary to address the extent to which the court of first instance is capable of deciding the matter during the interim period between the issue of the decision and the receipt of the case file by the CA.

## **7 Supervising and Administering the Judicial System**

### **7.1 Supervisory and Administrative Role of the President of the Court of Appeal**

#### **7.1.1 According to Law**

Within Timor Leste’s judicial system, the President of the CA has the responsibility for the overall administration of the courts, including the supervision of their work<sup>52</sup>. Section 17 of *Regulation 2000/11* explicitly includes in this role the duty “to issue Administrative instructions to all the courts”<sup>53</sup>, to “prepare a precise plan outlining the general system of distribution of incoming cases to the judges of the court and the District Courts”<sup>54</sup> and to address issues of administrative practice not dealt with by regulations<sup>55</sup>. *Regulation 2000/11* also provides specifically for the President to direct court registry clerks and

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<sup>52</sup> Section 17 of *Regulation 2000/11*. The role of the President of the CA was added with the amendment in 2001, UNTAET Regulation 2001/25. Before 2001, more powers and tasks were given to the Court Presidency of each District Court. See Sections 16 to 18 of *UNTAET Regulation 2000/11* (not amended).

<sup>53</sup> Section 17.2. In November 2004 JSMP requested a list of the directives issued by the President of the CA under this provision, however, this was refused on the basis that directives are internal court documents and for that reason not available to the public.

<sup>54</sup> Section 17.3.

<sup>55</sup> Section 17.5.

general staff in the exercise of their duties<sup>56</sup> and to transfer court staff to any other court or office where necessary for work expediency<sup>57</sup>.

Furthermore, in JSMP's view, the scope of "overall administration" entails supervision of whether the courts are properly functioning, for example, if judges and prosecutors are attending hearings as scheduled, if the courts are facing any challenges, including lack of material resources, that are preventing them from realising their work, etc. In short, overall competence with respect to the administration and supervision of the courts, and submission of reports to the government in that regard, is vested in the President of the CA.

### 7.1.2 In Practice

In JSMP's view, and as demonstrated above, there is inadequate cooperation between the CA and the District Courts and this reflects a lack of supervision and co-ordination by the President of the CA<sup>58</sup>. JSMP feels that important information is sometimes neither distributed nor explained to all court actors in a clear, comprehensive manner. For example, a training program for national judges was established in September 2004. To ensure that the training could be properly carried out a number of international judges were contracted in August 2004 to hear the cases which would otherwise be heard by the national judges occupied with training. Nevertheless, despite the scale and complexity of these issues, court actors in the District Courts have informed JSMP that the implications of the training program and the role of the new international judges were not fully explained to all court actors<sup>59</sup>.

JSMP is aware that the President of the CA is currently exercising three functions: Judge of the CA, President of the CA and President of the Superior Council of the Judiciary. Moreover, the President is also involved in the following additional groups and commissions: Management Council of the Judicial Training Centre; Co-ordinating Council of the 'Strengthening the Judicial Sector' project; Evaluation Committee of National Prosecutors (as chairman); Evaluation Committee of National Defence Lawyers. Judge Ximenes is therefore at this point in time involved in *seven* bodies or agencies in the legal sector, either as president or as a member of those agencies.

JSMP places great value on the President's extensive involvement in and commitment to judicial reform in Timor Leste and the development of the legal system, however, it is arguable that even the three principal functions noted above cannot be properly discharged by one individual alone. Consequently, JSMP is of the opinion that it is extremely difficult for one person to perform these functions successfully without dedicated administrative support and comprehensive resources. Additionally, the

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<sup>56</sup> Section 21.2; section 22.1.

<sup>57</sup> Section 22.4.

<sup>58</sup> See also Section 4 of this Report.

<sup>59</sup> See *JSMP Justice Update No 6/2004*, 'New training Program for Court Actors', 10 September 2004; *JSMP Justice Update No 7/2004*, 'Directive 03/2004 On the New Rules for Distribution of Cases and the Constitution of Special Panels', 4 October 2004.

accumulation by one person of many functions related to the justice sector is not sustainable. In many countries, the administration of the courts is supervised by a Court Administrator who could be a retired Judge. This alternate structure allows for one person to be solely dedicated to the duty of supervising the administration of the courts. In short, it is clear that the tasks of the President must be divided and distributed amongst a range of appropriately qualified court actors.

Another obstacle identified by JSMP is the apparent lack of formal rules or guidelines as to when issues can be brought to the attention of the President of the CA and the procedure by which this is achieved. Without an established procedure, the judges of the District Courts cannot be expected to know how and when they can bring relevant issues to the attention of the President. JSMP has observed that this lack of procedures has created confusion in the past and makes it difficult to distinguish between formal and informal means of raising issues with the President. JSMP believes that any issue related to court administration which is brought to the attention of the President of the CA should be evaluated and, if necessary, followed up as soon as possible.

The courts were, until July 2003, operating under limited supervision<sup>60</sup> and the process of establishing effective supervision and cooperation takes time. However, the building of a strong relationship between court actors, staff and the President of the CA is the essential basis for successful court administration, which itself underpins the strength of the judicial system.

## 7.2 Providing Access to Judicial Information

According to Edward B. McConnell “[c]ourts exist to serve the public, not to serve judges, court managers, or lawyers. Everything that managers do are but means to an end and that end is service to the public”<sup>61</sup>. JSMP is equally of the opinion that communal understanding and knowledge of the legal system in Timor Leste is crucial to the development of that system. Consequently, a lack of rules or regulations which guarantee access to judicial information, and the resulting difficulty of obtaining that information, constitutes a major problem in relation to the development of the legal system and the rule of law in Timor Leste. As has been recognised in many other countries, of both common and civil law background<sup>62</sup>, public access to judicial information serves an

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<sup>60</sup> For approximately 18 months the CA was not functioning and consequently the duties to be discharged by the President of the CA were not fulfilled.

<sup>61</sup> President Emeritus, National Center for State Courts (US). The NCSC website is accessible at [www.ncsconline.org](http://www.ncsconline.org).

<sup>62</sup> For example, according to the *Guidelines for Public Access to Court Records* issued by the state courts of New Hampshire, USA, “[a] presumption exists that all court records are subject to public inspection”. The *Guidelines* are accessible at [www.courts.state.nh.us](http://www.courts.state.nh.us). Similarly, the courts of the Canadian province of British Columbia have issued Practice Directions and Court Circulars granting public access to criminal files in specified circumstances: see [www.adidem.org/articles/singer1.html](http://www.adidem.org/articles/singer1.html). In Brazil, according to Article 37 of National Decree No. 4.553 of 27 December 2002, access is even granted to what are deemed to be confidential legal documents if the court is satisfied that there is a ‘collective interest’ in this access. See also *Australian Law Reform Commission Report No 98, ‘Keeping Secrets: The Protection of Classified and Security Sensitive Information’*, 2004, at paragraphs 7.22 – 7.41.

important communal function, namely, the promotion of an informed public and encouragement of openness and accountability in the judicial system. Moreover, article 14.1 of the *International Covenant on Civil and Political Rights* establishes a right to be heard by way of an open, public trial. This principle of open justice has been recognised by the Supreme Court of Canada as conferring a public right to “discuss and put forward opinions and criticisms of court practices and proceedings”<sup>63</sup>. In considering the need for public access to judicial information it is necessary to distinguish between the information retained on case files held by the court, to which access must obviously be limited, and more general information which gives an insight into the functioning of the judicial system and therefore ought to be reported.

### **7.2.1. Access to Case files**

JSMP has previously observed that there is a lack of guidelines determining the situations in which access to case files of Timor Leste’s courts is permitted and the conditions of that access<sup>64</sup>. Furthermore, in late January 2005 public access to all case files in all courts was prohibited by way of verbal instruction from the President of the CA<sup>65</sup>. JSMP therefore welcomes the issue of Court Directive 6/2005 by the President on 4 February 2005 pursuant to section 17.2 of *Regulation 2000/11*<sup>66</sup>. On the face of it, the Directive entrenches the right of the public to access case files, but only if the applicant satisfies the judge responsible for the file that there are ‘legitimate reasons’ justifying this access. In practice, however, JSMP has experienced major difficulties in obtaining access to case files under authority of the Directive. The burden of demonstrating that there are ‘legitimate reasons’ is unduly onerous given the ambiguity of the phrase and the fact that even judges are unaware of its scope, due to a lack of guidelines in that regard<sup>67</sup>. Practical difficulties have therefore been encountered by JSMP in obtaining judicial authorisation.

### **7.2.2. Reporting of Case Statistics and Judicial Information**

It is also essential in JSMP’s view that the courts publish on a systematic and regular basis a summary of court statistics to be made available to the public<sup>68</sup>. Statistics could, for example, be published on a quarterly basis by way of either the Government Gazette, in an ad hoc statistical bulletin or even in an appropriate section of a major newspaper. A small but carefully selected range of statistics would provide a good insight into the

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<sup>63</sup> *Canadian Broadcasting Corp v New Brunswick (Attorney General)* [1996] 3 SCR 480, [23] (Justice La Forest). See also Cohen, A.E., ‘Access to Pre Trial Documents Under the First Amendment’, (1984) 84 *Columbia Law Review*, 1813, at 1827.

<sup>64</sup> Statistics Report, at 23-24.

<sup>65</sup> *JSMP Press Release*, ‘Public Access Barred to Decisions from District Courts’, 25 January 2005.

<sup>66</sup> See *Justice Update No 6/2005*, ‘Administrative Matters at Dili District Court’.

<sup>67</sup> *Ibid.*

<sup>68</sup> Although the President of the Court kindly authorised JSMP access to court information for the purposes of the Statistics Report, this permission was withheld when further case statistics were sought in relation to the CA for the period following June 2004 (the end of the research period for the Statistics Report). JSMP notes that the publication of court statistics on a regular basis was recently recommended by the World Bank in a working draft of its *FY2006 Results Matrix – Justice*, produced in respect of the ‘First Consolidation Programme’.

functioning of the judicial system without requiring anything more than minimal resources. The benefit of a statistical publication to judicial actors and to the community in general would be significant beyond all proportion to the effort required to implement it. The trust and confidence which genuine judicial transparency cultivates amongst the public is critical in developing nations with a history of judicial corruption, as is the case with Timor Leste (formerly under Indonesian occupation). Regular publication of statistics would not only promote this transparency but would also greatly assist the government and court officials to identify shortcomings in the judicial system and develop responses to these shortcomings<sup>69</sup>.

The issue of the Directive is a positive first step in acknowledging the significance of public access to judicial information, however, in JSMP's view there is a need to develop a comprehensive, exhaustive law on access to judicial information in general, ideally by way of legislation (the drafting of which entails more consultation). This law should at the very least distinguish between court records which contain confidential case information and those which do not<sup>70</sup>. The types of information which ought to remain confidential must therefore be clearly defined. It will then be necessary to address matters such as times of access to and costs of copying non-confidential information. Furthermore, the courts should be subjected to an obligation to "inform and educate" the public by disseminating basic but important information on the functioning of the judicial system<sup>71</sup>.

JSMP is aware that the Draft Code of Criminal Procedure ("DCCP") currently before Parliament<sup>72</sup> addresses the issue of public access to court hearings. For example, section 71 affirms the public nature of criminal proceedings following issue of the indictment. Nevertheless, the DCCP merely reiterates in a general way the universally accepted principle requiring a public hearing of criminal trials and the legitimate exceptions to this right. The DCCP therefore leaves unanswered numerous, specific questions relating to access to judicial information which are identified above. Consequently, the provisions contained in Chapter I, Title IV of the DCCP merely provide the framework, and do not obviate the need for, a comprehensive law on access to judicial information.

JSMP is also aware that a major project is currently being implemented and carried out, under the auspices of the UNDP 'Strengthening the Judicial Sector' project, in relation to improvements for the collection and management of judicial information in the registries

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<sup>69</sup> The importance of public access to judicial information was recognized by the Australian Law Reform Commission in ALRC 98, 'Keeping Secrets: The Protection of Classified and Security Sensitive Information', at paragraph 7.40; see also Dakolias, M. and Said, J. 1999, 'Judicial Reform: A Process of Change Through Pilot Courts,' *World Bank Legal and Judicial Reform Series*, The World Bank, Washington, D.C., at 115.

<sup>70</sup> For a good example of a model policy on public access, and the complexity of the issues involved, see Steketeer, Martha & Carlson, Alan, *Developing CCJ/COSCA Guidelines for Public Access to Court Records: A National Project to Assist State Courts*, The National Center for State Courts and The Justice Management Institute, October 18 2002. The report is available at [www.ncsconline.org/WC/Publications/Res\\_PriPub\\_GuidelinesPublicAccessPub.pdf](http://www.ncsconline.org/WC/Publications/Res_PriPub_GuidelinesPublicAccessPub.pdf)

<sup>71</sup> *Ibid*, section 8.

<sup>72</sup> As at the date of publication of this Report the Government is seeking authorization from Parliament to develop the Draft Code as a Decree Law pursuant to section 96 of the *Constitution*.



of all courts in Timor Leste. Through this project a new technological system will be established linking computer networks in all registries to ensure that, amongst other things, a broad range of judicial information is collected by the registries, access to specified types of information will be granted to members of the public and the status and progress of cases can be ascertained quickly and easily<sup>73</sup>. A policy on access to judicial information should therefore be developed in conjunction with this program. JSMP welcomes this development and urges the Ministry of Justice and the President to properly assess the program and, if adapted to the needs of Timor Leste's judicial system, ensure that it is fully implemented as soon and with as much support as possible. Furthermore, it is JSMP's opinion that, if given full support, the CA's system of administration, and consequently its capacity to supervise the work of the District Courts, will be significantly strengthened by the implementation of a comprehensive IT-judicial support system which is appropriate within the context of Timor Leste's judicial system.

## 8 Conclusion

The CA was established pursuant to UNTAET Regulations in 2000. Although not expressly created under the *Constitution*, as for example with the Supreme Court, the CA has come to occupy an important position in the judicial system of Timor Leste as the highest functioning court of judicial review, thereby providing a critical means of 'judicial oversight' with respect to the District Courts. The importance of the CA is entrenched by the establishment of the office of the President of the CA as a supervisory and administrative body to provide guidance to all of the courts. This role assumes an even greater significance in a country whose judicial system is still in its infancy and is therefore struggling to address a number of fundamental, systemic flaws undermining its operation.

Since the resumption of functions in July 2003 after an 18-month lapse in operations, the CA has consolidated its important position in the judicial hierarchy of Timor Leste. The continued and more-or-less consistent conduct of hearings since recommencement represents in JSMP's view significant progress given the basic problems which are impeding the functioning of the judicial system at present. There have also been a number of improvements in the actual appeals process, for example, the drastic reduction of time periods between the filing and hearing of appeals against interlocutory decisions authorising pre-trial detention.

Nevertheless, notwithstanding this progress, the role and functioning of the CA continues to be plagued by a number of basic problems and any further progress will not, in JSMP's view, be possible unless these issues are fully acknowledged and properly resolved.

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<sup>73</sup> For more information on the use of technology systems in court administration see generally *Technology for Justice 2002 Report*, Jeff Leeuwenberg & Anne Wallace, Australian Institute for Judicial Administration, available at [www.ajja.com](http://www.ajja.com). See also [www.pogar.org/publications/judiciary/wmalik/ict.html](http://www.pogar.org/publications/judiciary/wmalik/ict.html).

In general terms, perhaps the most serious problems associated with the CA lie in its relationship with the other courts of Timor Leste, namely, the District Courts from which decisions are appealed to the CA and the Supreme Court, which, although the highest court in Timor Leste, is yet to be established. As the highest functioning court in Timor Leste, and in accordance with UNTAET Regulations, the CA has the critical role of managing and administering the judicial system, including court finances. The discharge of this role is of course ultimately dependent upon, and constrained by, the budgetary programme of the Government, however, this does not negate the responsibility of the CA in managing its relationship with the other courts in order to ensure the smooth functioning of the judicial system.

It is clear from this report that there is a weak relationship and lack of communication between the District Courts, the only courts of first instance in Timor Leste at present, and the CA. JSMP was unable to acquire specific information as to the extent of regular meetings between court staff of these courts and the nature and frequency of internal instructions issued by the President of the CA; nevertheless, there is sufficient evidence to indicate that these networks are inadequate. Improved lines of communication between the District Courts ought to be implemented in a systematic manner. The problems experienced by the District Courts at present must be addressed in a timely manner and as a means of providing guidance and uniformity to the courts at a time of considerable uncertainty in the judicial system. Furthermore, there is also an urgent need to begin taking measures to establish the Supreme Court. A third court in the judicial hierarchy will help to ensure timely constitutional review by a panel of judges with specialist expertise in the field of constitutional law and will minimise the errors and remedy the flaws in decision making which JSMP has occasionally observed at recent CA hearings..

It is JSMP's view that a large part of the answer to these problems lies in clarifying the role of the President of the CA. The role and responsibilities of the office of the President in this regard have not been prescribed in any real detail by law. The difficulty of this task would be significantly ameliorated in JSMP's opinion by a reduction in the external responsibilities of the President of the CA and by clarifying the precise duties which the supervisory role entails, particularly in terms of communications with, and management of, the District Courts.