



JUDICIAL SYSTEM MONITORING PROGRAMME
PROGRAMA DE MONITORACAO DO SISTEMA JUDICIAL

Overview of the Courts in East Timor in 2004

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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

2004 was a dynamic year in the Timorese court system. While many day-to-day problems continued, larger structural developments were implemented. This year marked the beginning of the process of appointment for permanent court actors, a long term training programme for others and the introduction of international judges for district court, training and mentoring functions. These developments are still ongoing and the first half of 2005 will be monitored closely regarding the outcomes of these processes.

Since the beginning of 2004 until November the greatest obstacle to the smooth functioning of the justice system in East Timor was the lack functioning of the district courts in their respective districts. This occurrence was based on a number of factors including insufficient funds for vehicle and generator operation and training commitments for court actors in Portugal and Dili. However, in November, with the introduction of four international court judges positive developments could be seen, especially for the Suai court which functioned for the first time since 2001. The resumption of the courts in the districts is still limited in that the judges only travel to the districts for a few days, one or two times a month. It is hoped that with the permanent appointment of national court actors next year that the district courts can function regularly with staff placed permanently within the district.

One other area of important development in the district court system in 2004 has been with regard to cases involving women. Since the establishment of the Women's Justice Unit in JSMP in April 2004 we have observed advancements in the number of cases of domestic violence which are being processed by the courts in comparison to last year. The decisions appear to be comprehensive and determine significant punishments for serious crimes. It is noted that improvements are required in relation to evidentiary procedures and in relation to the conduct of police in domestic violence cases.

The administration of the courts as public and accountable institutions is important for the effective administration for parties involved in the case and the wider community and unfortunately is something which continues to suffer in the Dili district court. The administration system became further problematic in 2004 as it took on the characteristics of two separate systems, one for cases handled by international judges and one for national judges. This resulted in confusion for court staff and the public.

In the later half of 2004 a number of guidelines on the performance of the courts functions – by means of Directives - were issued to the courts. The guidelines are issued in Portuguese and JSMP is aware that the guidelines are therefore not likely to be well-understood by all court actors. JSMP does not question the legality of the language used, however in practice, this situation can influence the execution of the court's judicial functions in a significant way. Given the current language abilities in the courts, JSMP believes that it would be best, for the time being, to provide an additional translation of the guidelines which will impact on the work of the courts to ensure it will assist them discharge the functions of the court in an effective manner.

The Evaluation for court actors seeking formal admission as judicial officers commenced this year. The Process of evaluation is based on aspects relating to commitment and general professionalism during the probationary period. The results of the Evaluation for the Judges, which began on May 2004, and for Prosecutors and Public Defenders, which effectively was to run from the 10 December 2004 to 15 December 2004, are still yet to be released. The court actors who are not admitted into their career by way of this evaluation may¹ only have the opportunity to attend training, and if they pass the exam to commence the training, they will need to continue this training for one and a half years before they are eligible to be given probationary status.

Aside from the above-mentioned evaluation process, a preliminary training for all court actors and legal graduates was held between September-November 2004. This preliminary training provided an opportunity for assessment of persons to enter the complete one and a half year training program, from which they could achieve probationary court actor status. JSMP recognizes that this training is extremely important for all court actors and legal academics. Nevertheless, in the practical application of the preliminary training JSMP understands that there were a number of difficulties, primarily, the inability of some participants to fully understand the contents of the training as it was predominately in Portuguese.

Investigations into serious crimes concluded in November 2004, and trials and other activities must be concluded on 20 May 2005. In 2004, the efficiency of the SPSC was improved by the appointment of a third East Timorese judge and the use of split panels. There has been a noticeable increase in the judges' awareness of time pressures and the speed with which the SPSC is conducting cases. Although it is expected that the current trials should be completed by the May deadline the resolution of serious crimes cases on appeal is not so certain. Issues surrounding what will happen to the Special Panel after May 2005 remain unresolved.

In relation to the Court of Appeal, 2004 has seen a year of continued operations for the court and consolidation of its important position as a court of final review in the judicial hierarchy in Timor Leste following an 18 month period, until July 2003, during which it ceased to function. In 2004 there also appear to have been some improvements in the time taken to reach a decision, particularly with respect to interlocutory decisions. Nevertheless, there are a number of issues which remain of concern to JSMP, notably the Court's relationship with the District Courts and the (yet to be established) Supreme Court together with consistent flaws identified in the actual practice and procedure of appeals.

2005 promises to be another dynamic year in the court system. The results of permanent appointments of court actors and the commencement of the long-term training will be welcome developments. The end of UNMISSET in May 2005 will also bring significant changes to the serious crimes jurisdiction although it is yet not clear what form these changes will take. Planning, particularly with regard to funding is required now by the government of East Timor to ensure that the international court actors who have recently joined the national system, as actors, trainers and mentors will be able to continue their work post UNMISSET.

¹ The fate of those who do not pass the evaluation or are not eligible at this stage to sit for the evaluation is not yet certain due to possible conflicting laws.

2. District Courts and Administration

The first level of courts in East Timor are the district courts which have the jurisdiction to hear criminal and civil cases. In East Timor there are four district courts, located in Dili, Baucau, Suai and Oecussi. In this paper JSMP wishes to provide a short review of the courts and the overall progress in 2004.

2.1 The number of cases in district courts of Baucau, Suai, Oecussi in 2004

In the Baucau court this year there are 92 criminal cases, including 15 new cases and 87 cases which continued from 2003. Out of the 92 cases, 7 have been finalised. Review hearings only occurred in 17 cases. At present there are 14 civil cases, all of which have been carried over from last year and of which there have been no decisions.

From January until December 2004, 46 new cases have been filed in the Suai court, with 30 cases decided and the remaining outstanding. In relation to these 30 decided cases, 26 were decided by national judges and 4 by international judges. In relation to civil cases, there are a total of 12 cases, all awaiting decisions.

In the Oecussi court, the administrator reported that there are a total of 27 cases. This total consists of 10 cases which have been carried over from 2003 and 17 new cases. Out of the 27 criminal cases, two cases have been decided and 18 cases have been transferred to international judges².

2.2 The Non-Functioning of Some District Courts and the Centralisation of the Dili District Court

This year, until November, extremely limited court proceeding occurred in the district courts outside of Dili. Suai remained unopen and continued to function in Dili, as it has done since the creation of the district court system. While the administration functioned in Baucau and Oecussi, hearings were held in Dili rather than the districts

The main reason why some courts did not function in their respective districts is that approximately one third of all judges were attending training in Portugal between July 2003 until June 2004. In this period the reduced number of judges meant that in Oecussi the only judge left for Portugal and was not replaced. Despite a proposed arrangement that judges would attend Oecussi on a rotation basis, this did not occur as planned.

In addition, other District courts were unable to function fully due to funding difficulties. In Baucau, court actors interviewed in May 2004 indicated that there was a lack of funds to pay for fuel for vehicles and the generator. This inhibited the court in delivering case documents. The operation of the court was also affected by the lack of fuel which resulted in court actors

² For further statistical information see JSMP Report, *Case Flow and Management – A Statistical Analysis, 2003 – mid 2004*, August 2004.

not being able to drive to Baucau from Dili or use the generator. This lack of funds for the district courts also caused a delay in hearing cases.³

These aforementioned factors were also compounded by the general lack of court actors for the courts in the districts, for example, there being no public defender for Suai, and a general lack of judges.

2.3 The Resumption of Functioning of the District Courts

The district courts commenced hearing cases in their respective districts in Baucau at the start of November 2004, in Suai at the end of November and in Oecussi at the start of December. The monitoring of the courts by JSMP in Baucau and interviews with court clerks in Suai and Oecussi revealed that there are still some obstacles to the smooth operation of the court in Baucau, Suai and Oecussi. The obstacles related to lack of staffing, as all national court actors from each of the courts attended training in Dili. This situation resulted in their duties, such as running trials and making decisions, being transferred to international staff in the middle of September 2004. On this basis the cases from Dili district Court were transferred to Judges Elias Tomé and Joana Vaz and cases from Oecussi and Suai district courts were transferred to Judge Sandra Silvestre. The international judges were assisted by international court clerks and interpreters to assist in the ease of conducting the hearing.

Other obstacles include the fact that the four new international judges sit in Dili and also occasionally work in Baucau or Suai and Oecussi. This arrangement impacts on the effectiveness and smooth functioning of the courts in the districts because the hearings are held infrequently, one or twice per month and only for a few days. In particular the preliminary hearings, detention review hearings and habeas corpus actions for the respective courts are sometimes held in Dili.⁴

2.4 The New Distribution System in the District Courts

With the introduction of the new international court actors, a new system of case distribution was implemented. Of all the district courts, Dili has the most complex scheme of distribution of cases and is also the only one in which Timorese judges will still be actively participating. Cases will be distributed as follows:⁵

- Cases that are within the jurisdiction of the Investigating Judge will all be assigned to Judge Emiliano.
- Pending criminal cases and new criminal cases in which the defendant is in pre-trial detention will be distributed to all four international judges.
- Pending criminal cases in which the defendant is not in pre-trial detention with a case number ending with 1, 2, 3, 4, 5, 6, 7 or 8 will be redistributed to all four international judges.

³ See JSMP Press Release 6 May 2004

⁴ JSMP Justice Update 16/2004, *Hearing Regarding the Bus Accident Case*, 22 November 2004.

⁵ See Directive 3/2004 which is further discussed in JSMP Justice Update 7/2004, *Directive 03/2004 on the New Rules for Distribution of Cases and the Constitution of Panels*, 4 October 2004.

- Pending criminal cases in which the defendant is not on pre-trial detention with a case number ending with a 9 or 0 will be redistributed to Judge Aderito, Angelino, Constancio, Carmelita, Deolindo, Jose Ximenes, Reinato, Sergio, Cirilo, Duarte, Edite, Francisco, Guilhermina, Ivonia, Joao, Jose Araujo, Nelson, Sebastiao and Rui.
- Pending civil cases with a case number ending in 1, 2, 3, 4, 5, 6, 7 or 8 will be redistributed to all four international judges.
- Pending civil cases with a case number ending in 9 and 0 will be redistributed to Judge Aderito, Angelino, Constancio, Carmelita, Deolindo, Jose Ximenes, Reinato, Sergio, Cirilo, Duarte, Edite, Francisco, Guilhermina, Ivonia, Joao, Jose Araujo, Nelson, Sebastiao and Rui.
- Criminal cases in which the defendant is not in pre-trial detention and civil cases that were registered after 20 September 2004 will be distributed to all four international judges.
- Cases awaiting final oral arguments or the reading of the final decision will remain with the judge to whom they were distributed.

Distribution is made by lottery and following alphabetical order. Individual papers with the case numbers are to be put in a box. The judge presiding over distribution is to randomly take out the papers and cases will be assigned to judges following the alphabetical order of their names. JSMP considers this to be a fair procedure that excludes any possibility of biased choices, thus guaranteeing the impartiality of the judges.

To ensure its implementation, it is necessary that all court actors are able to understand the new changes which will occur. The instruction was sent to the Judges and the Public Defender's Office, but was reportedly not sent to all court clerks. The lack of access to information may affect the ability of the clerks to implement the directive. Their ability may also be hampered by the fact that the directive is in Portuguese – a language not mastered by all of the clerks.

JSMP is concerned that this instruction arranges for files that are already being handled by national judges to be redistributed to international judges. According to the rules for the conduct of criminal trials, a judge who takes part in the final decision must have attended every trial hearing in the court. Therefore, many trials will need to be commenced again⁶. JSMP suggests that cases in which important evidence or witnesses have already been heard should be able to be resolved by the existing national judges where possible.

2.4.1 Distribution System During the Holiday Period

With the occurrence of the Christmas holiday and the end of the year, Directive 4/2004 has been issued by the President of the Court of Appeal. This directive was issued to coincide with the holidays of the international judges for one month, from the middle of December until the middle of January next year. During the time when the international judges will not be in the courts, the courts will be operated by national judges in a way that is set out in the

⁶ Section 30.1 of UNTAET Regulation 2000/30 as amended by UNTAET Regulation 2001/25

directive. This change in position will apply to the District Courts, the Special Panel and the Court of Appeal. However, JSMP notes that in the latter two courts there are currently no scheduled trials.

JSMP does not understand which categories of cases will be affected by the directive. If the role only involves conducting 72 hour hearings, it is possible that there will be no significant problems. However if it includes trials then there is a possibility that these arrangements will breach the applicable criminal procedure rules which require presence of all judges making the decision in all hearings. These conditions are less than clear and the directive does not explain how the substitution of judges will be done. If the cases handled by international judges are to be taken over by national judges, it is unclear how this process will occur. According to one court actor, the directive does not apply to cases currently being handled by international judges. Whichever situation is intended it is necessary for these arrangements to be clarified expeditiously.

JSMP does not have information about which cases are scheduled for this period and if they include any cases usually handled by international judges. JSMP only obtained information that there is one civil case which is handled by an international judge that has been scheduled for January.

Despite this development, JSMP observes that the planning and the arrangement of the work of the international judges in the judicial system of Timor Leste have not been well planned. For example in several cases there has been a change of prosecutor and/or lawyer because of the training. In situations like this where a lawyer and prosecutor are attending training, often the judge must delay the proceedings to search for a prosecutor or delay the proceedings to search for another actor in order to continue the trial.

JSMP fully supports the training that is being undertaken by the court actors, however JSMP is concerned that the planning for the training and trial timetable for the court actors often collide, making trials less efficient.

2.5 Administration and Public Information

The right to access information about trials in the courts was reported by JSMP in a report entitled 'Justice in 2003'.⁷ That right is guaranteed in law. JSMP observed a number of problems and recommends improvement in relation to several aspects. For the past year, JSMP observed that in relation to problems of court administration, especially improved access to information, meaningful change has not yet been achieved. As a simple example: the public information board, as far as JSMP has observed, is yet to function effectively. At the moment, to get information about trials one must check the trial agenda in the court clerks' room, which often upsets the atmosphere and calm work of the clerks in this area. JSMP has previously recommended improvement in the access to information for the public, but so far there has not been any change guaranteeing information to trial information.

⁷ See JSMP Report, Justice in the Districts, December 2003

Recently, even trying to obtain information about cases is a very confusing process, as the information about cases which are being handled by the international judges must be obtained from different clerks (international clerks). The international clerks are not in daily attendance at the Dili District Court and their offices are currently not located in the District Court. It has been observed that even when these clerks are present in the District Court they do not work in the same room as the local court clerks. The international judges and international court clerks currently have offices in the Court of Appeal, even though they spend a large part of their working time in the District Court.

When JSMP has tried to check the trial agenda with the local clerks, the information for the cases that are handled by the international judges has not been on that same schedule. Employees in the secretariat informed JSMP that they are only aware of the scheduling of a hearing if they are asked to provide notification for that particular hearing.

JSMP understands the specific need of the international judges to have their own their own clerks, but, so far, it has been observed by JSMP that this situation has lead to the appearance of two systems of administration in the Dili District Court. Information about trials involving the national judges can be obtained from the court registry , but information on trials in the cases of the international judges can only be obtained via the international clerks, who do not have a permanent office in the District Court.

When the international judges began work in the district courts, it was observed that only the international court clerks attended the trial hearing. However, JSMP has observed changes to this situation, with local court clerks being called to participate in several trials. This shows promising signs for positive development in their learning. Nevertheless JSMP believes that it must be ensured that local clerks are sufficiently included in the process so that they are aware of the scheduling and can also give out trial information before trial. This will develop a uniform and unified system.

2.6 Language Directive

In February 2004, the Superior Council of the Judiciary issued a directive on the use of the official languages in court. The directive required the implementation of the official languages – being, Tetum and Portuguese – for use in all courts documents after a period of 7 months. The directive implicitly forbids the use of Bahasa Indonesia in court. In light of the impact of the implementation and the response of the court actors when the directive was promulgated, JSMP wrote a special report covering the impact of the application of the directive. In principle, JSMP does not question the legality of the official language, however JSMP is of the opinion that the directive has had a significant impact in its practical application in the court as many of the court actors have never used both languages in the court, particularly in the writing of documents. JSMP observes that at present there has been a change in the use of languages in court, from the working languages to the official languages. Normally, two languages are used (Tetum and Portuguese) if the hearing is chaired by an international judge, unless all court actors are East Timorese. If there is an international judge presiding, the usual practice is for the interpreter to translate from Portuguese to Tetum,. Nevertheless, it appears that there is no permanent interpreter assigned to the district court to assist the national judges

either during or outside of hearings (for example, translating documents and attending to other administrative matters).

3. Women in the District Court System in 2004

At the beginning of 2004 JSMP published a report entitled “Women in the Formal Justice System”, which was based on monitoring of the courts during September and October 2003 of cases in the Dili District court which involved women. JSMP observed in this period that the:

- Cases involving women made up the majority (55 percent) of all criminal cases scheduled during the period.
- 78% of cases involving women were sexual violence cases;
- There were no cases which progressed significantly or to decision in that time.

Since JSMP formally established its Women’s Justice Unit (WJU) in April 2004, it has monitored cases involving women and around 6 cases have been decided by the district courts, in matters of domestic violence and sexual assault. The WJU has monitored more than 30 cases and overall JSMP has seen an improvement in the sector in which women are victims in violent cases.

3.1 Positive Aspects of Cases in 2004

- There has been an increase in final decisions made this year in domestic violence cases.
- In addition, a significant number of the cases decided have provided reasonably comprehensive judgements and lengthy punishment. For example the cases decided in the Dili District Court in November in 2004 sentenced the accuseds to 7 and 10 years imprisonment. These decisions may have a preventative effect and send a clear message to the community that domestic violence is a crime and punishments for committing such a crime are not light.⁸

3.2 On-going Problems

- Although JSMP has seen an increase in the number of cases being decided, the process of formal justice is still very long and many unnecessary delays occur.
- There is a lack of suitable precise terminology used for parts of the body in identifying the nature of the sexual assault which occurred.
- There is a tendency for doctors not to attend court to answer questions about their medical reports.

⁸ For more information see JSMP Justice Update 13/2004, *Dili District Court Delivers Two Decisions on Cases of Domestic Violence* , 19 November 2004.

- Throughout East Timor, and especially in the districts, there are limited communication tools and often there are no telephones or transportation and therefore it is difficult to report these cases even to the police.
- Women continue to feel inhibited to inform the police about the violence which has occurred especially if it is of a sexual nature, preferring to deal with it themselves. Women are also worried that if they inform the police then that information will become known by many people.

3.3 Police Treatment of Cases Concerning Women

In research conducted by JSMP in late 2004 in all districts about the treatment of women and police it was found that there is some gender discrimination against women. It appears that many police officers do not consider cases of domestic violence seriously. All the PNTL officers interviewed said they know domestic violence is a crime, but they only take the cases through the formal justice process where the violence has caused “serious” injury. They refer the “less serious” cases back to the traditional justice process. Even when the PNTL arrest the suspect, they use the 72 hour pre-hearing detention limit to give the victim time to ask to withdraw the case from the formal justice process. It is usual in these cases that the police make the suspect sign a statement indicating that he will not repeat the actions toward the victim. However, all of the PNTL officers interviewed said they know that sexual assault is a crime, and most of them indicated they always deal with these cases through the formal justice process.

4. Special Panels for Serious Crimes

The Special Panel for Serious Crimes, a Panel of the Dili District Court continued to function during this year, with an increased number of decisions being made from previous years. The Special Panel for Serious Crimes (‘SPSC’) was established pursuant to *UNTAET Regulation 2000/15* s1 to exercise jurisdiction over the ‘serious crimes’ of murder and sexual offences, committed between 1 January 1999 and 25 October 1999, and genocide, war crimes and crimes against humanity, whenever they occurred.

The investigation of serious crimes by the Serious Crimes Unit concluded in November 2004, as required by *Security Council Resolution 1543/2004*. Of the estimated 1500 murders reported, approximately 800 were investigated and about 400 are being closed because of lack of evidence.⁹ 237 arrest warrants have been requested before the Special Panels, 203 of which have been issued.¹⁰ 49 arrest warrants are still pending.¹¹

There was speculation that no more indictments would be issued after November 2004 due to Security Council Resolution 1543/2004. However, 4 new indictments were filed on 3 and 6

⁹ SCU Statistics, current at 8/12/2004.

¹⁰ SCU Statistics, current at 8/12/2004.

¹¹ SCU Statistics, current at 8/12/2004.

December 2004. Presumably the Serious Crimes Unit can continue filing indictments until 20 May 2005, when all trials and other activities must be concluded.¹²

Currently 90 indictments have been filed with the SPSC, charging 377 individuals.¹³ 48 of these accused people are of Indonesian Nationality, with the remaining 329 accused being East Timorese Nationals or of unknown or uncertain nationality.¹⁴ Only 81 of the accused are within East Timor, with 290 presumably outside of East Timor.¹⁵ The number of indictments (and accused persons) from the different districts is as follows: 18 indictments from Bobonaro (charging 122 accused), 14 indictments from Dili (charging 62 accused), 13 indictments from Oecussi (charging 43 accused), 8 indictments from Ermera (charging 14 accused), 6 indictments from Liquiça (charging 26 accused), 5 indictments from Lautem (charging 23 accused), 7 indictments from Suai/Covalima (charging 42 accused), 4 indictments from Aileu (charging 6 accused), 4 indictments from Manatuto (charging 5 accused), 3 indictments from Same (charging 6 accused), 2 indictments from Ainaro (charging 23 accused), 1 indictment from Viqueque (charging 7 accused), and 1 National indictment (charging 7 accused).¹⁶

The SPSC began hearing trials in 2001. Since then, 74 defendants had been convicted and 2 defendants have been acquitted of all charges.¹⁷ Trials for 13 defendants are currently pending before the SPSC.¹⁸

Two International judges and one East Timorese judge are required to sit on each Panel of the SPSC.¹⁹ The appointment of a third East Timorese judge, Judge dos Santos, to the SPSC, who began hearing cases in November 2004 has improved the efficiency because three Panels can now operate. The implementation of using a split panels (due to national judges attending training) whereby one panel sits in the morning and another in the afternoon has also increased efficiency.

As 20 May 2005 draws closer, when trials before the SPSC must be concluded, there has been a noticeable increase in the judges' awareness of time pressures and the speed with which the SPSC is conducting cases. It has been monitored that in at least three recent cases; Anton Lelan Sufa and others, Mateus Lao, Domingos Amati and others that decisions by the panels on hearing of witnesses and adjournments appeared to have been made with direct or implied reference to the fact that cases need to be completed quickly. While it is desirable that the SPSC seek to minimize delays, promote efficient case management and avoid cases being unfinished in May 2005, it is important that the need to conduct cases quickly is balanced

¹² *Security Council Resolution 1543/2004*.

¹³ SCU Statistics, current at 8/12/2004.

¹⁴ SCU Statistics, current at 8/12/2004.

¹⁵ SCU Statistics, current at 8/12/2004.

¹⁶ SCU, 'Distribution of SCU cases, which led to indictments, by district', current at 8/12/2004. The number of cases does not correspond exactly to the number of indictments since some of the cases were rejoined and/or severed, but all these cases led to indictments filed with the Court. Also one accused can be in multiple cases.

¹⁷ SCU Statistics, current at 8/12/2004.

¹⁸ SCU Statistics, current at 8/12/2004.

¹⁹ *UNTAET Regulation 2000/15* s 22.1.

against the defendant's right to a fair hearing guaranteed under *UNTAET Regulation 2000/15* s 2.

It appears, if the rate of decisions currently being made by the panels continues, and there are not significant numbers of new indictments filed in which the defendants are available to the court, that the cases should all be completed by May 2005. However it does not seem as likely that the appeals pending before the Court of Appeal will necessarily be completed by May 2005.

One significant legal development that has occurred in relation to decisions by the Court of Appeal in Serious Crimes cases is the overturning of a previous decision which held that certain key sections of the UNTAET legislation relied on by the Special Panel were unconstitutional because they breached principle of non-retrospectivity. In the recent appeal case of Paulino de Jesus, the Court of Appeal found the defendant guilty of Crimes Against Humanity Murder under the same provisions of the UNTAET regulation it previously found unconstitutional. It is assumed from this decision that the Court of Appeal is affirming the legality of the provisions contained in UNTAET regulation 2001/25.²⁰

As discussed below in the section 'End of UNMISSET', no decisions have yet been made about the future of serious crimes after May 2005 by the government of East Timor. Options regarding nationalization of the process or further international mechanisms are still to be fully explored by United Nations and national decision makers²¹.

5. Court of Appeal

The Court of Appeal began functioning in July 2000, however, there was an 18 month hiatus during which the Court was unable to operate due to a lack of suitably qualified judges. In light of this background the resumption of Court of Appeal operations in July 2003 was a welcome development. Furthermore, the Court has continued to function consistently during 2004. The Court has therefore consolidated its important position in the judicial system as a final court of review and the highest court in East Timor.

Between January and 1 June 2004 the Court of Appeal had heard 33 appeals²². The vast majority of appeals were interlocutory, which are required by law to be heard expeditiously. Overwhelmingly the primary source of these appeals was the Dili District Court with the Special Panels for Serious Crimes being the only other jurisdiction from which there was a substantial number of appeals. A small minority of these were appeals from civil cases. JSMP was unable to access information relating to appeal case information for the period 1 June 2004 to date (15 December 2004).

²⁰ See JSMP Report, Case of Paulino de Jesus,

²¹ See JSMP Report, *Justice for East Timor: Civil Society Strategic Planning – Conference Papers*, JSMP Conference, September 23-24, 2004

²² For a more detailed discussion of statistics relating to the functioning of the Court of Appeal see JSMP Report, *The Process and Flow of Cases: A Statistical Analysis for the Period January 2003 to June 2004*, August 2004 (Michael, the BI translation of this that we have adopted is as follows: Laporan JSMP, *Proses dan Pengelolaan Kasus: Analisa Statistik untuk periode Januari 2003 hingga Juni 2004*, Agustus 2004)

Notwithstanding its establishment and resumption as a permanent court within the Timorese judicial system, research and monitoring by JSMP reveals that the Court's progress continues to be impeded by systemic flaws. In particular, the relationship between the Court of Appeal and the District Courts appears to be problematic, as evidenced by a lack of communication. For example, in the case of *Diamantino* (no 45/2004) the defendant appealed against the interlocutory decision of the Dili District Court to extend the period of his pre-trial detention. The appeal was successful and the defendant was accordingly released from detention, however, the District Court was not informed of this decision and it was only when the defendant came into the Registry several weeks later that District Court staff became aware of the situation.²³ This follows similar worrying cases in which the Court of Appeal ordered that deportation orders from lower courts were unlawful however the persons were deported despite the Court of Appeal order.

The Court's uncertain relationship with the Supreme Court has also created a degree of confusion in the legal system. Although provided for under the Constitution, the Supreme Court has not yet been established. Transitional provisions adopted under the *Constitution* and the *Judicial Magistrates Law* authorise the Court of Appeal to exercise the jurisdiction of the Supreme Court.²⁴ Theoretically, therefore, the Court in the exercise of its Supreme Court jurisdiction can hear appeals from its own decisions. The Court of Appeal is currently comprised of only three judges (Judge Claudio Ximenes, Judge José Maria Calvário Antunes and Judge Jacinta Correia da Costa). Furthermore, the Supreme Court is unlikely to be established for a number of years due to the lack of Timorese judges²⁵ sufficiently qualified to satisfy the criteria for appointment as a Supreme Court judge²⁶. This effectively ensures that any appeals from Court of Appeal decisions will, if heard, be presided over by the same judges who issued the original Court of Appeal decision. Clearly judicial impartiality will be compromised in this situation and the hearing of appeals in this manner is simply not a feasible option. Nevertheless, the right of appeal remains a theoretical possibility and one which has been exercised in at least two situations of which JSMP is aware²⁷. The Court did not process the first appeal and is yet to respond to the second, which was lodged recently. This situation has created considerable uncertainty which urgently needs to be resolved, if necessary by legislation which would clarify whether, and if so how, the Court of Appeal can hear appeals from its own decisions. If the Court is to have competence to hear appeals from itself it must, in doing so, be constituted by different judges to those who issued the original decision.

Aside from the Court's position and role in the judicial hierarchy, there are a number of issues which JSMP has identified during the course of the year in the practice, procedure and

²³ This information was obtained by way of an interview between JSMP staff and a court clerk at the Dili District Court on 20 July 2004.

²⁴ Respectively section 164.2 and section 110.

²⁵ Only nationals of East Timor are entitled to serve as a Supreme Court judge pursuant to section 127.1 of the Constitution.

²⁶ These criteria are provided for in section 29 of the *Judicial Magistrates Law*.

²⁷ *Armando dos Santos; Paulino de Jesus*.

hearing of appeals.²⁸ For example, there appears to be some confusion as to the appropriate manner in which sentences should be executed when the relevant decision is subject to appeal, in particular whether or not an appellant against a prison sentence should remain free pending resolution of the appeal²⁹. There are also issues which arise in relation to the application and analysis of laws by the Court of Appeal. In terms of the actual hearings and the Courts' legal reasoning, JSMP has observed that the Court has at times failed to address each of the grounds of appeal and, conversely, has discussed and re-determined legal issues which were *not* the subject of appeal. Another notable trend is that there have been excessive delays in disposing of interlocutory appeals on the question of pre-trial detention. For the period July 2003-June 2004, the Court of Appeal took an average of 87 days to decide interlocutory appeals of pre-trial detention orders. This was a much longer period than ordinarily acceptable under UNTAET regulations. Nevertheless, JSMP commends the Court of Appeal on its significant progress in reducing these delays from 104 days in the second half of 2003 to 54 days in the first six months of 2004.

Notwithstanding the deficiencies identified above, JSMP would like to stress that in its view, and particularly in light of the infancy of the judicial system in East Timor, the consolidation of the functioning of the Court of Appeal and improvements in case flow of itself represents significant progress. This summary of JSMP's findings in relation to the functioning of the Court of Appeal in 2004 is offered in the spirit of contributing to the continuation of that progress. The transfer of the financial control of the courts from the Ministry of Justice to the Court of Appeal in the second half of 2004 also significantly contributed to the institutional development of an independent court system.

6. Evaluation on Probationary Court Actors

Significant progress was made initiating the system for securing the positions of court actors in 2004. The process for evaluation of the careers of judges, prosecutors and public defenders commenced this year. In the Decree-Law No. 1/2002, section 3 states that once the relevant legislation has been approved and after the appraisals have been carried out, the judicial actors shall enter their respective career. Based on this reason, all the court players have been required to follow an evaluation in order to receive their effective appointment in their respective careers.

The evaluation of the court actors is based on the personal qualifications such as commitment and general professionalism and the specific terms are contained in decree laws

6.2 Probationary Judges

There are 23 probationary judges, all of whom are working the ordinary crimes district courts except three who are working in the SPSC and one at the Court of Appeal. Most of the judges

²⁸ See generally JSMP Report, *Overview of the Jurisprudence of the Court of Appeal in its First Year of Operation Since East Timor's Independence*, August 2004.

²⁹ See JSMP Justice Update No 10/2004, *Execution of the Court's Decision in the Virgilio Smith Case*, 6 November 2004

were nominated as probationary judges by the Transitional Administrator during UNTAET time commencing from January 2000. After more than four years probation, the evaluation of their permanent positions commenced this year.

In February 2004, the Rules for Evaluation of the Current Probationary Judges for their acceptance into the Judicial Career was approved by the Superior Council of Magistrates. Similarly with the Prosecutors and Public defenders, the evaluation consists of two parts: a written test and evaluation of performance during the probationary period³⁰. The written test was undertaken by the probationary judges in East Timor in May 2004 and for those judges who returned from Portugal in July 2004, the exam was conducted in September 2004.

The results of these examinations have not been released to the participants. In addition it is not known when the evaluation of the judges performance during the probationary period will occur. JSMP acknowledges that there are a number of important developments occurring within the judicial sector at present, however, a timely completion is desirable. Consideration needs also to be given to how the work of the judges during the probationary period will be assessed since a majority of the work during this period was conducted in Indonesian and currently the evaluating committee do not all have Bahasa Indonesia and Tetum language skills.

6.3 Probationary Public Prosecutors and Public Defenders

There are approximately 15 probationary public prosecutors. However it is understood that only about two thirds of these prosecutors have had the minimum 3 years experience required to be evaluated for a permanent position. In addition there are approximately 9 public defenders eligible for assessment. Government Decrees 9/2004 and 8/2004, being the respective legal rules for the evaluation of the probationary Public Prosecutor and Public Defenders, governs the procedures for assessment of these court actors.

The decree law provides that the evaluation of these probationary court actors is composed of a written evaluation worth 70% and an evaluation of their performance during the period of probation worth 30%. The written test was conducted with the public defenders on 10th of December. It is not known when the performance evaluation will occur. The law provides a time limit of the 15 December for all assessments to be carried out. However as of this date it had not been completed and it is likely that further time in the new year will be required for the assessment.

The appointment of permanent national court actors is a welcomed development and will impact on the functioning and relationship between international judge/mentor positions in the court next year. While adhering to thorough process, it is hoped that the results will be available in the early new year to allow for overall planning and efficiency within the justice system. The importance of these evaluations for individual court actors who have already worked hard in the formation of the judicial system of East Timor over the last three years should be recognized. If these court actors are not successful in the evaluation and do not pass the exam to enter the training (discussed below) it is understood that they will no longer have

2. See Article 1 Evaluation Rules.

jobs within the court system. Ensuring a fair, transparent and reviewable system is important for the integrity of the system and long term reputation of the judiciary.

The results of the evaluations may also have significant impact for the Special Panel for Serious Crimes in which one Timorese judge is required on each panel. There are currently three Timorese judges acting in the Special Panel and the ability for all panels to function will depend on the successful result of evaluation for the Timorese judges, who would otherwise be required to undergo the academic section of the training provided they passed the training entrance examination.

7. Training

This year saw the introduction of a new preparatory training course located in the judicial training centre for all court actors and also open to other law graduates. JSMP commends this initiative which is a new approach, both comprehensive and coordinated. The program was planned by the Council of Coordination for the development of the judicial sector (whose members are: the Minister of Justice, the President of the Court of Appeal and the Prosecutor General) with funding provided through UNDP. This half day, daily training program started in October and finished on 26 November. Approximately 60 persons participated, including all current court actors except one. The Vice-Minister for Justice and Prosecutor General also attended this preparatory training. Prior to the commencement of the training, Portuguese language training was held in half day sessions for one month in September.

According to Decree Law 30/2004, those who successfully pass the December exam will be able to express a preference whether they will become judges (in any court), prosecutors, or public defenders. Future positions will not depend on previous experience but on the results of the December 2004 exam and successful completion of the training internship. The training internship has two stages: academic (one year) and practical (six months). After this, interns will be allocated to a court for a trial period of one year. Their performance will be considered after six months.

Following the completion of the Portuguese language course, the legal preparation and selection course commenced for all court actors to be assessed for the complete and long term training program to be started in the new year. The legal training covered a number of interesting topics, including code of ethics, examination of evidence, differences between civil and criminal proceedings, legal interpretation, legal procedures, civil proceedings, criminal proceedings, punishments for criminal proceedings and civil remedies, public and semi-public crimes, evidentiary standards, sentencing and accusations.

At the start of the training, tetum language was used but a few weeks into the course a translator was no longer used. Many of the participants in the training experienced difficulties in fully understanding the training due to language they did not understand, as it was all conducted in Portuguese. JSMP understands that the participants were pleased with the material presented in the training but the issue of language caused difficulties in understanding it.

Some of the participants who had difficulty understanding the language wrote a letter to UNDP to ask for the provision of translator in the training sessions and to understand the material provide. UNDP responded that they could not provide an interpreter but could try to provide dictionaries. It is without doubt that some of the participants did not understand exactly the material that was presented.

Although there were a number of difficulties in the implementation of the training, JSMP has no intention to criticize it as a whole and JSMP welcomes the brief introduction to the full training plan.

The exam to determine who will be admitted to the training internship program was held on 28 August 2004. The exam was in Portuguese and was understood by the participants as it consisted of multiple choice questions. After the examination was completed the participants were told that they would be informed of the results on 6 December 2004. However, at 15 December 2004 now these results have not been released.

The participation of 8 judges in the one year training programme in Portugal was completed in June this year. JSMP is unaware of any evaluation process or results of the training. It appears from the institution of a the long term training programme to be held at the Judicial training centre, as described above, that training in Portugal will not continue for other judges.

8. End of UNMISSET

The withdrawal of the United Nations Mission of Support in East Timor in May 2005 appears a certainty. This withdrawal will affect a number of sectors of governance in East Timor, and particularly justice. There are currently 7 UNMISSET working groups established in these areas to discuss issues and planning for the withdrawal.

This will impact on the justice sector in both the Serious Crimes jurisdiction and the ordinary crimes. At present significant international personnel funded by UNMISSET are acting in both jurisdictions. To date, it is not certain how many of those persons will be funded through other mechanisms after 2005.

8.1 The Serious Crimes process

All indications support the view that the UN mission in its current form will withdraw from East Timor in May 2005 and, with it, any support for domestic prosecution of serious crimes. During 2004 some consideration has been given to the issue of the future of Serious Crimes processes³¹ but as yet no public view has been expressed by the government or by the United Nations. Without knowing whether any processes will continue after the departure of UNMISSET and what form it will take, it is difficult to assess what short-fall of numbers of international personnel and material, currently provided by UNMISSET, will be required.

³¹ See JSMP Report, *Justice for East Timor: Civil Society Strategic Planning – Conference Papers*, JSMP Conference, September 23-24, 2004

The serious crimes process, consisting of the Special Panel for Serious Crimes together with the Prosecution and Public Defenders Unit for Serious Crimes, is staffed predominately by international staff funded by UNMISSET. It is imperative that the East Timorese government considers the options for addressing serious crimes after May 2005 because for many of the options available changes in legislation and international personnel are likely to be required. Such planning needs to be in place before 20 May 2005 to ensure a smooth transition. (see JSMP report on conference papers)

Confirmation of the formation of the UN endorsed Commission of Experts to investigate both the processes in Indonesia and East Timor regarding the violence in 1999 was not provided this year. An announcement by the United Nations Secretary General was expected after the Indonesian Election in October but as of 15 December 2004 this has not occurred.

8.2 Ordinary Courts

8.2.1 District Courts

During this year radical change occurred in relation to the participation of national justice court actors in a training programme. (See above section on training programme and court administration). The training programme resulted in a shortage of actors in the courts, and it necessitated the employment of international court actors. Four international District Court judges, four international court clerks, two international public prosecutors and one public defendant are funded by UNMISSET to work in the district ordinary crimes jurisdiction.³² These appointments were made from about October and is it not known how they will be funded after May 2005. The number of international actors required after UNMISSET is also not certain as it is not yet known how many national court actors will be appointed after the completion of their evaluation. (See above section on evaluation of court actors). The current planning surrounding the international court actors includes them in having an active role in the courts after May 2005 and mentoring of national actors. This mentoring role would necessarily require them to continue working post May 2005 irrespective of the numbers of national court actors who return to the courts after a successful evaluation. The majority of these court actors are also providing training to the national court actors through the Judicial Training centre program. This training involves one year academic training commencing in January 2005. It is necessary that there are sufficient numbers of trainers to continue for the entirety of the training.

8.2.2 Court of Appeal

The regulations³³ currently provide that the judges of the Court of Appeal shall include national and international judges. Currently all the international judges assigned to work with the Court of Appeal (3) are funded by UNMISSET. Before the results of the evaluation of judges is known, it is not possible to assess whether there would even be sufficient number of national judges to fill this role, however considering the court of appeal may need to hear

³² See JSMP Justice Update, 6/2004.

³³ Section 15.4 of UNTAET Regulation 2000/11 as amended by 2001/ 25.

Serious Crimes cases and only one national judge has had experience acting in this court there are likely to be issues of capacity.

It is also of concern that one of the international judges funded under the UNMISSET programme performs a number of leading functions. These include: President of the Court of Appeal, Member of the Management Council for the Centre for Judicial Training, Chairperson of the Judicial Council of Superior Magistrates, Member of Council for Coordination of the program for justice strengthening.³⁴ The reliance on UNMISSET for funding for this international judge, who holds so many central functions, requires urgent attention.

In addition, it is possible that all appeals from Special Panel for Serious Crimes will not be completed before May 2005 (See above section on SPSC and the hearing of such matters shall continue. This issue needs to be considered in light of the fact that it is possible that international prosecutor and public defender positions from the Serious Crimes process may no longer continue after May 2005.

The process that has now commenced requires the presence of significant number of international court actors to perform judicial functions, provide mentoring and training. Without funding and planning for these positions for at least two years it will not be possible to reap the benefits of this programme.

³⁴ Other roles include trainer at the Judicial Training centre, Chairman of the evaluation committee of the National Prosecutors for their accession to the Prosecutors Office, Chairman of the evaluation committee of the National Public Defender's for their accession to the Public Defender's Office.