



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

**Dili District Court**  
**Final Report 2003**

Dili, East Timor  
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## DILI DISTRICT COURT – FINAL REPORT 2003

<b><u>1 EXECUTIVE SUMMARY.....</u></b>	<b><u>4</u></b>
<b><u>2 SOURCES OF LAW.....</u></b>	<b><u>13</u></b>
2.1 Applicable Laws .....	13
<b><u>3 PRACTICE AND PROCEDURE.....</u></b>	<b><u>17</u></b>
3.1 Rules of Evidence .....	17
<b><u>4 ROLE OF THE JUDICIARY.....</u></b>	<b><u>21</u></b>
4.1 Impartiality of Judges.....	21
4.2 Promotion of Judges.....	25
4.3 Accountability of Judges .....	26
4.4 Training of Judges .....	28
<b><u>5 ROLE AND AUTHORITY OF THE INVESTIGATING JUDGE .....</u></b>	<b><u>31</u></b>
5.1 Initial detention hearing (72 hours review hearing).....	32
5.2 Review of Detention Orders.....	35
5.3 Unlawful Orders by Investigating Judges.....	37
<b><u>6 HABEAS CORPUS .....</u></b>	<b><u>38</u></b>
6.1 Circumstances which may give rise to a habeas corpus action.....	39
6.2 Time frame for deciding a habeas corpus application.....	41
6.3 Options after a Habeas Corpus Action has been Resolved.....	41
<b><u>7 THE ROLE OF THE PROSECUTOR.....</u></b>	<b><u>42</u></b>
7.1 Unlawful arrests and indictments.....	43
7.2 Prosecutors as Mediators.....	44
7.3 Training for Prosecutors .....	45
<b><u>8 ROLE OF THE DEFENCE.....</u></b>	<b><u>45</u></b>
8.1 The Administrative Support to the Public Defenders.....	46
8.2 Case Preparation and Work Practices.....	47
8.3 Mentoring Programme.....	48

<b>9</b>	<b>COURT OF APPEAL AND DILI DISTRICT COURT.....</b>	<b>51</b>
9.1	The right to appeal and the Appeal Procedure .....	51
9.2	Appeals from the Dili District Court .....	52
9.3	Challenge to the right of appeal.....	53
<b>10</b>	<b>COURT ADMINISTRATION .....</b>	<b>56</b>
10.1	Public Availability of Information.....	56
10.2	Delays.....	61
10.3	Administrative Support to the Dili District Court .....	62
10.4	The Registry and Court Clerks .....	65

## 1 EXECUTIVE SUMMARY

2003 was a dynamic year for the East Timorese legal system, and significant legal and professional development occurred. However, structural problems still remained.

The issue of the applicable subsidiary law was without doubt an issue which impacted on many aspects of the judicial system in East Timor. Once the Court of Appeal decided that the applicable subsidiary law was that of Portugal, instead of Indonesian law, the fundamental basis of the legal system was shaken. The result was that different laws were applied in the two levels of courts in East Timor.

Training of the prosecutors and public defenders continued this year. However, the most significant training event during the monitoring period was the departure of more than a third of the judges of the Dili District to undertake a year-training in Portugal. While long-term benefits are envisaged, in the meantime, the Dili District Court is struggling to maintain its functions without these judges.

Shortage of personnel and material resources is identified by JSMP across most of the institutions which work as a part of, or are related to, the Dili District Court. Remedying this situation should be dealt with as a matter of priority. Lack of computers, vehicles, means of communication, access to materials as well as staff shortages exacerbate the many other challenges to Dili District Court's effective functioning.

Significant progress has been made in the area of *habeas corpus* applications. Habeas corpus applications are attempts by defence counsel to challenge the widespread problem of unlawful detention. It is unfortunate that so many applications are necessary as a consequence of Investigating Judges failing to discharge their duties in protecting the rights of the suspects and the accused.

The Dili District Court has been operating since March 2000 and JSMP believes that it is now timely for the Government and other stakeholders to evaluate its functioning. This evaluation would be an essential tool in considering the permanent appointment of judges that are in the final stage of their probationary period. Such appointments are a precondition for the independent and smooth running of the Court. The formal appointment of recently trained prosecutors, as well as a director for the Public Defender's office, is required to secure the foundations of these integral institutions of the judicial system. An evaluation is also important to identify the financial needs of the courts for the next budgetary year.

The description and analysis included in this report is based on JSMP's monitoring of the Dili District Court from the beginning of June to end of August 2003. This report builds

on the monitoring developed during this year and should be read in conjunction with the Interim Dili District Report published in April 2003.<sup>1</sup>

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<sup>1</sup> JSMP Interim Report on the Dili District Court can be found at <http://www.jsmp.minihub.org>. Copies can also be collected from JSMP's office in Dili. The former monitoring period shall be referred to as the "pilot monitoring period" in this report.

## Summary of Report Recommendations

### Recommendations relating to the Sources of Law

JSMP recommends that:

- 1. Training and increased access to materials on international human rights law and its relationship with the Constitution of East Timor be provided to judges, prosecutors and public defenders of the Dili District Court; and*
- 2. All court actors, particularly judges, must take greater care to familiarise themselves with the applicable law. An increased level of legal precision is required in the drafting of court documents, particularly judgements, so that the legal basis for any exercise of the court's power is clear.*

### Recommendations relating to Practice and Procedures

JSMP recommends that:

- 1. Judges should make a thorough enquiry concerning every allegation before accepting evidence that is alleged to have been obtained through force or coercion. Further, if the allegation of coercion is shown to be true, the evidence must be excluded;*
- 2. The prosecutor in a case should start an investigation and consider charging the police officer involved; if there is an indication that evidence was obtained through force or coercion; and*
- 3. Judges be trained regarding the rule of non-corroboration in cases of sexual assault.*

### Recommendations relating to the Judges

JSMP recommends that:

- 1. Judges, lawyers and prosecutors should ensure that they are fully aware of the procedures to be followed regarding the disqualification of judges;*
- 2. Steps be taken as soon possible to start compiling information regarding the performance and the merits of the current judges as the pre-entrance probationary period is due to expire early next year. Evaluating the current performance of judges will also serve to identify future training needs;*

3. *A transitional provision be drafted in order to enable the practical implementation of the complex East Timorese Statutes of Judicial Magistrates Law;*
4. *Judges of the Dili District Court ensure that they are present in Court during the Court working hours in order to prevent postponement of cases, inconvenience of all parties affected and to promote the effective management of the judges' time;*
5. *The Superior Council of the Judiciary ensure that it has a close relationship with judges of the Dili District Court so as to enable the Superior Council to have knowledge of working practices at the Dili District Court and to afford judges the opportunity to raise their concerns and issues with the Council. JSMP suggests that regular meetings be established in which judges of the Dili District Courts attend and provide a regular report on their activities;*
6. *The Dili District Court re-allocates the cases that belonged to those judges currently training in Portugal as soon as possible in order to prevent further delays; and*
7. *Any future training initiative considers the necessity to the Dili District Court of continuing its normal functioning while the training is being implemented.*

#### Recommendations relating to the Investigating Judges

JSMP recommends that:

1. *Investigating judges and court administrators institute a formal roster or other appropriate system whereby investigating judges are available for hearings as necessary on Saturdays and Sundays to safeguard the rights of suspects to be brought before an investigating judge within 72 hours of arrest;*
2. *A standard procedure be developed to encourage investigating judges, when writing decisions on detention, to briefly state the facts of the case that support the criteria mandated in sections 20.7 and 20.8 of UNTAET Regulation 2000/30 as amended by 2001/25;*
3. *Investigating judges pay greater attention to their roles in protecting the rights of the accused in the conduct of criminal investigations, particularly by giving due regard to evidence presented in hearings by the defender and not just considering the evidence provided by the prosecutor;*
4. *The UNTAET Regulation 2000/30 as amended by 2001/25 governing 72 hour review hearings be amended to provide that the hearings should be open to the public except in exceptional circumstances;*

5. *Continued training be provided to Investigating Judges on their role as provided for in UNTAET Regulations. Such training should include international law instruments and East Timorese laws, with a special emphasis on new legislation, such as relevant sections of the Immigration and Asylum Law, affecting Investigating Judge;*
6. *Investigating judges should conduct detention review hearings every 30 days in the presence of the suspect or accused and their lawyer; and*
7. *Prosecutors and defenders should advocate for detainees to have a review hearing or present written documents to the investigating judges, if there are new circumstances which support their release.*

#### Recommendations relating to Habeas Corpus

JSMP recommends that:

1. *Judges hearing habeas corpus cases pay the necessary attention to the time constraints and hold a hearing make a decision within 24 hours. By law, there is no possibility to postpone habeas corpus cases;*
2. *The Office of the Prosecutor comply with the regulation to do an investigation into any successful habeas corpus cases in order to reduce the chance that people would be arrested or detained illegally; and*
3. *Defense lawyers take pro-active steps to protect the rights of their clients who are detained or arrested illegally. If investigating judges refuse to order the release of a person who is detained illegally, the defense should consider bringing a habeas corpus action to the court. If the habeas corpus action is successful, the defense lawyer along with the client should consider whether they wish to make an application for compensation for illegal detention.*

#### Recommendations relating to the Prosecution

JSMP recommends that:

1. *Sufficiently experienced prosecutor trainees be sworn in as prosecutors as an urgent measure to help alleviate the increasing workload of Office of the General Prosecutor;*
2. *Prosecutors carefully examine the criminal elements of charges under investigation to ensure that arrest warrants and detention orders are not granted in cases that are in reality are not criminal. Training regarding differences between criminal and civil matters to prosecutors should also be provided; and*



3. *Prosecutors should not engage in mediation of cases, criminal or civil, as JSMP has previously recommended. Separate mediation services should be established.*

#### Recommendations relating to the Public defenders

JSMP recommends that:

1. *The Ministry of Justice consider recruiting more public defenders in order to help minimize current caseloads in the Office of Public Defenders;*
2. *Public defenders should be subject to periodic review of their performance and case management skills using the Public Defender Code of Conduct as a benchmark for performance evaluation;*
3. *The current temporary administrative staff in the Public defender's be appointed as permanent staff in order to provide stability to the administration of the Office of the Public Defenders;*
4. *The management of the Office of the Public Defenders should develop policies for effectively dealing with absences of public defenders from work to ensure that absences in court hearings are minimised and informed in a timely manner to the court. JSMP suggests that these might include a roster system of other public defenders attending court for the absent lawyer where a prior knowledge of the matter is not essential. A system of notifying the court of expected absences prior to the hearing should be implemented in cases where another public defender cannot replace the absent lawyer;*
5. *A director be formally appointed to the Office of the Public Defenders;*
6. *A detailed plan be developed for the mentoring programme to guarantee a proper and efficient coordination between mentors employed by different organisations and in order to guarantee sustainability of initiatives recently developed;*
7. *International mentors be present during the hearings of public defenders on a more regular basis in order to identify areas of need and to evaluate the effectiveness of previously mentored skills;and*
8. *The mentoring programme be expanded to include mentoring in civil matters.*

## Recommendations relating to the Court of Appeal

JSMP recommends that:

- 1. The President of the Court of Appeal should hold meetings with defence counsel, prosecutors and judges to discuss the parties' perceptions of the consequences of bringing an appeal;*
- 2. The President of the Court of Appeal develop a directive to prevent judges from asking whether the parties will appeal at the moment the decision is handed down;*
- 3. Judges engage in an active discussion with legal counsel and prosecution on issues that the court considers relevant to the matter;*
- 4. Efforts should be made to develop the language skills of Court of Appeal judges so that all three judges have knowledge of a language commonly used at District Court level. Until that time, interpreting services should be made available at the hearings;*
- 5. In every hearing, the Court should enquire about the language understood by the appellant/respondent. In cases where s/he does not understand the language used by the Court of Appeal, JSMP recommends that an interpretation be provided; and*
- 6. Translations be made of decisions of the Court of Appeal, which are not in a language commonly used by the Dili District Court, to a language that both parties can understand.*

## Recommendations related to Court Administration

JSMP recommends that:

- 1. The noticeboard at the Dili District Court be updated with the daily court schedule every day as a matter of top priority. Every afternoon, the following day's court schedule should be distributed to newspapers so that it may be published for a wider audience;*
- 2. Consideration be given to the implementation of separate boards, which list the cases that are punishable with less than 5 years detention from the more serious criminal cases. In addition, a separate board for the list of expedited trial hearings would be an ideal. This system would inform the public about the category of crimes listed before the court;*

3. *There is a need to establish, as a matter of urgency, a clear mechanism for the public to access publicly available court documents, such as indictments, judgements and court orders;*
4. *A Public Information Officer be located within the Court Administration in order to deal with the specific issue of public access to the court;*
5. *Legislative amendments should be enacted as a matter of priority in order to provide the public access to court documents. Corresponding formal procedures be established for public access to documents;*
6. *Clear directives be issued and supervised regarding the need for transcripts of proceedings to be taken. Training and facilities should be provided to allow transcripts and recordings of trials to be taken at the Dili District Court;*
7. *The current ad-hoc system of court reporting be changed immediately by providing specific training and directives on how and when to make a detailed court transcript;*
8. *Each of the judges should be provided with basic work equipment as a matter of top priority. Such equipment should include portable printers and computers in order for judges to work more effectively. In addition, judges should also be provided with sufficient transportation facilities;*
9. *There should be at least one landline fixed in each of the judges' rooms in order to guarantee the security of the judges and avoid judges' appearance in public places and public galleries. In addition, arrangements should be made to allow judges not to gather with other public servants to collect their monthly salary;*
10. *The judges should be provided with Internet Access as a matter of urgency in order to assist them to conduct legal research. Furthermore, there is a need for a court library with a trained and professional court librarian who could assist judges by providing identified resources;*
11. *A temporarily renewable appointment of judge's research assistant and/or associate would be an ideal option in order to assist judges conducting research on legal-related matters;*
12. *There is a need to recruit more trained and professional court staff, including additional court clerks, in order to assist the current court registry staff with the heavy workload;*
13. *There should be further trainings provided to the court clerks particularly on the creation of a manual and computer based case-database system. This should include systematic legal training for the court clerks and the court staff;*

- 14. There should be a vehicle provided to the Registry Unit of Dili District Court as a matter of urgency including additional motorbikes, printers and computers; and*
- 15. At least four additional court translator/interpreters should be recruited and these translators/interpreters should also have local language proficiency. These translators/interpreters should be provided with necessary support and specialised training in legal terminology.*

## 2 SOURCES OF LAW

### 2.1 Applicable Laws

Determining the applicable law on any particular issue in East Timor requires an analysis of the interplay between five different sources of law. The hierarchy of the sources of laws are as follows<sup>2</sup>:

1. Constitution of the Republic of East Timor
2. International Law
3. East Timorese Law
4. UNTAET Regulations
5. Subsidiary Law: law applied before 1999, if not contrary to the Constitution and the principles contained therein

There is no doubt that this complex legal framework is difficult to comprehend and apply. Many difficult issues of legal interpretation obviously arise from such a framework. However, JSMP observed that in the day-to-day proceedings of the Dili District Court, questions relating to the legitimacy and applicability of laws were rarely raised. The law was handled with a disturbing degree of generality. Over and over again, the Court failed to engage in the task of precisely identifying the applicable law, taking into account the legal framework set out above, and then carefully applying the law to the facts.

Members of the legal profession have limited experience in applying the provisions of the Constitution as it is a relatively new document. It is not surprising therefore, that there is limited use of the Constitution in arguments before the Dili District Court. However, during the recent monitoring period, JSMP observed that there has been a development of cases in the Dili District Court which utilise the Constitutional provisions specifically on habeas corpus.<sup>3</sup>

The main issues that JSMP found needed attention during our monitoring of the Dili District Court are the issues of international law and the applicable subsidiary law.

#### 2.1.1 *International Law*

As provided by the Constitution, international instruments take precedence over laws applied in East Timor,<sup>4</sup> in that rules that are against international treaties which East

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<sup>2</sup> See sections 2 and 9 of the Constitution of East Timor, section 4 of UNTAET regulation 1999/1 section 4 and section 1 of Law 2/2002.

<sup>3</sup> See Chapter on Habeas Corpus.

<sup>4</sup> Section 9(3) Constitution of RDTL states: All rules that are contrary to the provisions of international conventions, treaties and agreements applied in the internal legal system of East Timor shall be invalid.

Timor has ratified are invalid. An understanding of international law is also necessary when analysing the subsidiary law applicable in East Timor, as the subsidiary law shall not apply to the extent that it is inconsistent with international law.<sup>5</sup>

In 2003, many international instruments were ratified by the National Parliament and by October, most of the important international instruments were incorporated into domestic law as they were published in the Government Gazette. The National Parliament formally ratified numerous international treaties, including the: International Convention on the Rights of the Children (and its Optional Protocol on Child Soldiers and Child Pornography); Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment; International Convention on the Elimination of All Forms of Discrimination, Convention on the Elimination of All Forms of Discrimination against Women (and its optional protocol) and International Convention on Economic, Social and Cultural Rights.<sup>6</sup> The ratification of the most important United Nations' treaties is a positive step for the development of the law and for human rights guarantees in East Timor. It is of utmost importance now for legal professionals to become familiar with the guarantees provided in these treaties as they now form part of the legal system in East Timor and can be applied in the Courts.

From our monitoring, JSMP has observed that there is a lack of a basic understanding of international human rights law standards and the principles established by international treaties by some court actors.

For example, in the case of Fernandes da Costa and Others (Case Number 2002/30) the indictment included allegations of violations of the right to life as provided in Article 3 of the Universal Declaration of Human Rights (UDHR) and Article 6.1 of the International Covenant on Civil and Political Rights (ICCPR).

The UDHR and the ICCPR do not create crimes and, the violation of their provisions does not necessarily result in sanctionable individual conduct. The codification of the crime of murder, in the case of East Timor, in the Indonesian Penal Code, is based on the inalienable right to life which can also be found in international instruments.

In this case there was a definite misunderstanding by the prosecutor drafting the indictment, which could have resulted in the accused being found guilty of a crime which was not qualified in law as a criminal offence at the time it was committed which would violate the guarantee provided in Section 31(2) of the Constitution of RDTL.

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<sup>5</sup> See Section below on the applicable subsidiary Law.

<sup>6</sup> See East Timor Government Gazette (Jornal da República) for the ratification documents at <http://www.gov-east-timor.org>. The English version of the treaties are accessible at the United Nations High Commissioner for Human Rights website at <http://www.unhcr.ch>.

On the other hand, in July 2003 one of the judges, in her decision ordering the release of a suspect from detention appropriately relied on international instruments and principles under international law.<sup>7</sup> JSMP commends the decision as it emphasizes the importance of ensuring that the State is bound by the standards it has adopted when ratifying international instruments. Unfortunately, decisions using applicable international laws are the exception rather than the rule.

" (...) Considering that the detention of the accused violates regulation 9.1 of the International Convention on Civil and Political Rights and that he has already been detained following a reckless procedure which is not supported by strong reasons and violates procedures as specified by the law."

Decision on the Habeas Corpus Application of Francisco Alves dated 10 July 2003.

A lack of training and access to international law materials creates an impediment to effectively implementing international law standards. The Dili District Court has neither access to the Internet nor a proper library that can provide judges and other court actors access to the relevant materials.<sup>8</sup>

### 2.1.2 *Applicable Subsidiary Law*

The issue of the subsidiary applicable law in East Timor recently became one of the most important legal issues in all Timor's courts, including Dili District Court, because of a decision of the Court of Appeal on 15 July 2003 in the case of Armando dos Santos.<sup>9</sup>

The first UNTAET Regulation promulgated by the Transitional Administrator established that the laws which applied in East Timor prior to 25 October 1999 should continue to apply *to the extent that* they do not conflict with international human rights standards, UN Security Council Resolution 1272 (1999) or any Regulation or Directive issued by the Transitional Administrator.<sup>10</sup> The Constitution of the Democratic Republic of East Timor which came into force on 20 May 2002 established that the laws and regulations in force in East Timor on 20 May 2002 shall continue to be applicable to all matters except *to the extent that* they are inconsistent with the Constitution or the principles contained therein.<sup>11</sup>

Until July 2003, it was generally accepted that Indonesian law was the subsidiary law in East Timor. This general perception was challenged with the decision of the Court of Appeal in the case of Armando dos Santos which was of the opinion that Portuguese, instead of Indonesian law, was the subsidiary law in East Timor.<sup>12</sup>

<sup>7</sup> Habeas Corpus decision of Francisco Alves, 10/HC/2003 10 July 2003, Dili District Court.

<sup>8</sup> See section Administrative support for Dili District Court

<sup>9</sup> 16/PID.C.G./2001/PD.DIL.

<sup>10</sup> Section 3.1 of UNTAET Regulation 1999/1.

<sup>11</sup> Section 165 of the Constitution of East Timor.

<sup>12</sup> Court of Appeal Decision, Armando dos Santos 15 July 2003. See also JSMP Report on the Case of Armando dos Santos, August 2003 (<http://www.jsmp.minihub.org>).

JSMP has observed that the majority of the legal community was not in agreement with the decision of the Court of Appeal in the case of Armando dos Santos and the decision was consequently not followed by the Dili District Court.

From the time of this decision – 15 of July– until the end of August 2003,<sup>13</sup> there was a clear conflict between the laws applied at the courts of first instance and the appellant level, as the Dili District Court continued applying Indonesian law as the subsidiary law. During this period there were no requests to amend an indictment in order to change the legal basis of the crime from Indonesian to Portuguese law.<sup>14</sup> However, during the monitoring period, an appeal was made to the Court of Appeal in the civil case, Foo Hau Kuin v J.J.McDonald<sup>15</sup>, requesting the application of Portuguese Law.

JSMP is of the opinion that the Court of Appeal erred in deciding that the Portuguese Law, instead of Indonesian law, should be the subsidiary law applicable in East Timor.<sup>16</sup> For this reason, JSMP does not challenge the Dili District Court's use of the Indonesian law.

In terms of Regulation 1999/1 and the Constitution, Indonesian Law is applicable only if there is no contradiction with internationally recognised human rights standards.<sup>17</sup> The consequence is that even when applying Indonesian Law, the judges, prosecutors and lawyers should analyse whether the specific legal provision being applied is in accordance with internationally recognised human rights standards or not.

For example, the provision under Article 285 relating to rape in the Indonesian Penal Code can be challenged as being contrary to human rights, or more specifically, for violating the right to non-discrimination on the basis of marital status (article 16(2) Constitution of RDTL).

Article 285 of the Indonesian Penal Code reads:

'Any person who by using force or threat of force forces a woman to have sexual intercourse with him out of marriage, shall, being guilty of rape, be punished by a maximum imprisonment of twelve years.'

During JSMP's monitoring, JSMP did not observe any case where the defence or the judge challenged the application of a certain provision of the Indonesian Penal Code alleging it to be contrary to the East Timorese Constitution and/or human rights.

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<sup>13</sup> August 2003 being the time that JSMP's monitoring of the Dili District Court finished.

<sup>14</sup> It is noted that such applications were made in the Special Panel for Serious Crimes division of the Dili District Court.

<sup>15</sup> Case number 29/ 2001

<sup>16</sup> JSMP has previously expressed this opinion publicly. See JSMP Report on the Case of Armando dos Santos, August 2003.

<sup>17</sup> Section 2 of UNTAET Regulation 1999/1 provides a list of international human rights instruments with which the applicable subsidiary law should be compliant.



*JSMP recommends that:*

- 1. Training and increased access to materials on international human rights law and its relationship with the Constitution of East Timor be provided to judges, prosecutors and public defenders of the Dili District Court; and*
- 2. All court actors, particularly judges, must take greater care to familiarise themselves with the applicable law. An increased level of legal precision is required in the drafting of court documents, particularly judgements, so that the legal basis for any exercise of the court's power is clear.*

### **3 PRACTICE AND PROCEDURE**

Criminal procedure in the Dili District Court is governed by the Transitional Rules of Criminal Procedure (the Regulation).<sup>18</sup> These, temporary rules, were developed by the UNTAET administration and were intended to replace the Indonesian Criminal Procedure Code<sup>19</sup> until an East Timorese law was developed.

The Regulation forms the framework for conducting criminal cases in courts in East Timor. The Regulation, which only contains 55 sections, does not, and could not, establish every element necessary to conducting criminal matters. For a country based on a civil law system, where codes rather than precedents determine the law, there are necessarily gaps in the current Regulation. In attempting to fill some of these gaps, the President of the Court of Appeal has issued some directives.<sup>20</sup>

JSMP understands that it is common for the judges, as well as prosecutors and lawyers, who were trained within the Indonesian legal system, to make use of their knowledge of that system and to adopt those procedures. In many areas, as analysed below, JSMP observed situations where the Regulations are clear on certain issues, however the practice in the court deviates significantly and in the opinion of JSMP such practice is therefore unlawful.

#### **3.1 Rules of Evidence**

The rules of evidence contained in the Regulation are limited and simply provide that the court can admit any evidence deemed relevant and probative,<sup>21</sup> provided that its probative

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<sup>18</sup> UNTAET Regulation 2000/30, as amended by UNTAET Regulation 2001/25. To be referred hereafter as the Regulation.

<sup>19</sup> Section 54.2 of the Regulation states that: the present regulation takes precedence over Indonesian laws on criminal procedure; provided, however, that at any point of criminal procedure which is not specified in the present regulation shall be governed by applicable law as provided in Section 3 of UNTAET Regulation 1999/1.

<sup>20</sup> For example the Practical Directive 2001/1 (as amended by Directive 2001/4) on the allocation of cases.

<sup>21</sup> Section 34.1 of the Regulation.

value is not outweighed by any prejudicial effect.<sup>22</sup> A further section relates to the rules on the evidence in cases of sexual assault, including the non-corroboration rule.<sup>23</sup>

In addition, Section 35 provides guidelines for witnesses' eligibility and the guarantee of non self-incrimination. Section 36 provides guidelines on the procedures to follow in questioning witnesses. In Section 37, the presentation and admission of other types of evidence, such as physical or documentary evidence, are also regulated.<sup>24</sup>

The rules of evidence applied by the Court illustrated a tendency to follow Indonesian Criminal Procedure Law, without due consideration for the actual provisions of the applicable laws.

The same issues identified in JSMP's previous report remained present in the Dili District Court during this period of monitoring.<sup>25</sup>

An issue that was highlighted in the previous report and that JSMP observed in this period was the issue of administering the oath to witnesses. Section 36.2 of the Regulation provides that witnesses should take an oath before testifying. Similar to our previous monitoring, JSMP observed that witnesses with familial relationships with the accused were not requested to take an oath. In addition, JSMP also observed that witnesses with working relationships with the accused were also not requested to take an oath. These types of exceptions are not contained in the rules of procedure applied in East Timor.

In the case of Antonio Luis Soares (Case Number 05/2003), before one of the witness testified, the judge stated that the witness did not need to take an oath because he had a working relationship with the accused.

Other issues that were observed during the present monitoring period and that deserve further analysis are the exclusion of evidence obtained through force or threats and the rule of non-corroboration.

### *3.1.1 Exclusion of evidence obtained with force or threats*

According to the Regulation<sup>26</sup> evidence obtained through torture, coercion or threats to moral or physical integrity shall not be admitted.

The application of the Regulation demands that it should first be established whether the evidence was indeed obtained through coercion or other threats. In JSMP's opinion,

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<sup>22</sup> Section 34.2 of the Regulation.

<sup>23</sup> Section 34.3 of the Regulation.

<sup>24</sup> Section 37 of the Regulation.

<sup>25</sup> See JSMP Interim Dili District Court Report, April 2003, p. 20 -23.

<sup>26</sup> Section 34.2 of the Regulation.

although not explicitly stated in the Regulation, the judge has a duty to, or if being prudent, should raise the question with a person pleading guilty as to whether their confession was obtained under threat or force. Irrespective of how allegations of force or threat are raised the judge needs to enquire as to whether the allegations of the suspect/accused are founded or not. This type of enquiry is often called a ‘mini trial’ within the trial, as sometimes it is necessary to search for evidence and even hear testimony of witnesses. If it is established that there was indeed some form of coercion as prohibited by the Regulation, the evidence should be excluded. The Regulation does not provide for any exceptions to the exclusion of this evidence.

During the monitoring of JSMP, there were a number of cases in which suspects claimed that their statement, usually before the police, was given under pressure from police officers. Often, questions on the issue of force were not asked directly by the court. In a number of cases the issue of force arose when the accused was asked about discrepancies in the statement made before the police and the one made to the court. However, even when the issue of force was raised by the accused it was often ignored and no follow-up inquiry or orders were made by the court on the issue.

In the case of Constantino Pinto Pereira (Case Number 326/2003), charged with maltreatment, the accused raised the issue of force in response to questions by the court as to why there were differences between the statements given before the Court and the one given to the police as found in the files. The judge of the case did not enquire whether the allegation of force against the accused was founded and accepted the statement given before the police as evidence.

### 3.1.2 *Rule of non-corroboration in Sexual Assault Cases*

According to the Regulation<sup>27</sup>, in cases of sexual assault, no corroboration of the victim’s testimony is required.

It should be noted that JSMP was unable to be present in the hearings related to sexual assault during the monitoring period on the basis that such hearings are closed to the public.<sup>28</sup> But through general monitoring, JSMP has observed that on occasions Dili District Court has not followed this rule. JSMP is of the opinion that the intention of the Regulation providing that there is no need for corroboration of a testimony of a victim of a sexual assault is in line with the general international trend in law. The non-corroboration rule emanates from the historical discredit of a woman’s testimony and the general need to have other evidence as a requirement to find the accused guilty.

To require corroborative evidence has been considered discriminatory on the basis of gender. The need to provide corroborated evidence specifically in the cases of sexual assault results in differential treatment of female witnesses, as it is presumed that the

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<sup>27</sup> Section 34.3 of the Regulation.

<sup>28</sup> Section 28.2 of the Regulation. JSMP is currently preparing a specific report of women in the formal justice system for which JSMP was able to monitor sexual assault cases and this issue will be covered in more detail in that future report.

victim's testimony is not as reliable as the testimony of other witnesses in different crimes.

The rule as provided in the Regulation should not be regarded as challenging the rights of the accused. The rule does not diminish the burden of proof applicable in a criminal case, which is that of beyond reasonable doubt. Even with the non-corroboration rule the burden continues to be beyond reasonable doubt, and in practice this rule means that if the judge is convicted beyond reasonable doubt that from the case presented by the prosecution the accused is guilty of the charge there is no formal requirement to require that there must have more than the victim's testimony as evidence.

As in any criminal case, in a case of sexual assault, the right to present a defence, to call and examine witnesses and to present evidence should be guaranteed.

In the case of Pascoal Mean da Costa (Case Number 11/2002) the accused was not convicted by Dili District Court for rape for lack of evidence. The prosecution appealed the case to the Court of Appeal; one of the grounds for appeal was that the evidence was not properly evaluated as there was enough evidence to convict the accused.

The Court of Appeal in this case was of the opinion that Section 34.3 of UNTAET Regulation is unconstitutional in that it violates the right of every accused to a hearing and a defence in terms of Article 43.3 of the Constitution of East Timor. The Court expressed its view that the provision that requires corroboration of the victim's testimony is based on the principle that the testimony of the victim always represents the truth, which in turn goes against common sense and can lead to the conviction of innocent people.

JSMP is of the respectful opinion that the Court of Appeal erred in its decision in the case of Pascoal Mean da Costa and misinterpreted the non-corroboration rule and misunderstood its application in practice. JSMP strongly believes that the non-corroboration rule protects victims of sexual violence from discriminatory challenges to their credibility. Courts are traditionally subject to the discriminatory belief that women who make complaints of rape are not trustworthy. In fact the majority of cases of sexual assault go unreported because of the great personal cost and the modest chance that the perpetrator will be convicted. Clearly the rule of non-corroboration of victim's testimony in a case of sexual assault does not violate the Constitution or the rights of the accused; but indeed it is a means to guarantee the non-discrimination of women in Courts as guaranteed by Section 17 of the Constitution.

JSMP's opinion that there is a lack of thorough understanding by judges of the Dili District Court on the application of the non-corroboration rule is, supported by a recent decision of the Court of Appeal.

*JSMP recommends that:*

- 1. Judges should make a thorough enquiry concerning every allegation before accepting evidence that is alleged to have been obtained through force or coercion. Further, if the allegation of coercion is shown to be true, the evidence must be excluded;*
- 2. The prosecutor in a case should start an investigation and consider charging the police officer involved; if there is an indication that evidence was obtained through force or coercion; and*
- 3. Judges be trained regarding the rule of non-corroboration in cases of sexual assault.*

#### **4 ROLE OF THE JUDICIARY**

Judges have a central role in the court system as the decision makers in cases. Judges also have the role of guaranteeing that the laws are applied correctly, in accordance with the Constitution and the laws.

Once independent, East Timor encountered the difficulty of forming a legal community to develop its legal system. Difficulties were also faced in identifying judges with the necessary training.

Judges were appointed by the United Nations Transitional Administration in accordance with Regulation 1999/03<sup>29</sup>. Because most of the appointed judges did not have extensive legal experience, they were all nominated as probationary judges. Ten judges were appointed to the Dili District Court, including three investigative judges and one judge administrator.

##### **4.1 Impartiality of Judges**

*‘Justice must not only be done, it must also be seen to be done’*

This chapter analyzes the important issue of impartiality of judges. The issue of independence of the judiciary is of a more structural nature and goes beyond the information that JSMP is capable of collecting in monitoring the Dili District Court. It is fundamental that the right of every accused to be tried before an independent and impartial tribunal be realized.

The Constitution of East Timor provides expressly only for the independence of the judiciary, but it fails to mention the requirement of impartiality. The requirement that the

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<sup>29</sup> See also UNTAET Notification 2000/1, Notification 2002/1, and Notification 2002/4.

judiciary be both impartial and independent is however affirmed by Section 2 of UNTAET Regulation 2000/11 as amended by Regulation 2001/25.

The impartiality of the judiciary is guaranteed at the international level by the International Convention on Civil and Political Rights (Article 14(1)). The United Nations Basic Principles of the Independence of the Judiciary is an important document that provides guidelines on how to guarantee, in practice, the independence of the judiciary.

Impartiality demands that judges be unbiased. Impartiality requires further that judges have no preformed opinions or interest in a particular case. In practice, it means that the impartial judge(s) will not favor one of the parties during the proceedings and that the decision will be taken based only on the law and evidence presented.

Both the impartiality and the appearance of impartiality are determining factors in establishing whether a judge is impartial. Impartiality also requires that Judges are free from the influence or the perceived influence of members of the public, and particularly parties appearing before them.

In reality, the impartiality of a judge has to be analyzed on a case-by-case basis.

In analysing the challenges to the impartiality of judges in the Dili District Court, JSMP has realised that many factors can contribute to an impression of lack of objectivity of judges.

Firstly, as highlighted in the previous report, the small legal community in East Timor results in close relationships between judges, lawyers and prosecutors.<sup>30</sup>

JSMP observed that some defence council share the feeling that filing an appeal will 'upset' the judge who took the decision subject to the appeal. One of the reasons for this feeling may be the close relationship between court actors highlighted above.

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<sup>30</sup> See JSMP Interim Dili District Court Report, April 2003, p. 36 -37.

During the monitoring period, JSMP also encountered a number of situations where impartiality of the judges was explicitly challenged. In two cases monitored by JSMP, where the issue of impartiality of judges was at stake, the respective judges took different actions, one chose to withdraw and the other decided to continue.

In terms of UNTAET Regulation 2000/11, Section 20.1, a judge should be disqualified if the judge's impartiality might 'reasonably be doubted on any ground'.

In the case of Foo Hau Kuin v JJ McDonald (Case Number 29/2001) (often called the East Timor Construction Case), the respondent, JJ McDonald, alleged that the presiding judge had a personal interest in the case and consequently she should withdraw.

The request of the respondent was rejected by the Panel. The respondent also made an application to the President of the Court; this application was also rejected. The respondent then sent a letter to the Superior Council of the Judiciary. When no response was provided to this letter, the respondent filed an appeal to the Court of Appeal. At the time of writing this report, this appeal was pending.

Under UNTAET Regulation 2000/11, as amended by Regulation 2001/25, a judge has, on his/her own initiative to make a request for his/her disqualification if s/he is participating in a case where his/her spouse, partner or a relative of second degree is a party to the proceedings<sup>31</sup>

In the case of Mario Carrascalao (Case 53/ 2003), one of the judges sitting in the panel withdrew. The reason for his withdrawal was a personal relationship with Mario Carrascalao. The judge withdrew soon after being assigned the case, and after discussing the matter with the other judges of the panel.

JSMP is aware that one of the channels for requesting the disqualification of judges is to file an appeal.<sup>32</sup> JSMP considers this an important channel, but in some circumstances, a considerable amount of time might elapse before a

decision on the appeal is rendered. Because most of the challenges to the impartiality of judges will be made while the case is still before the district courts, a speedy resolution of this issue is fundamental.

In analysing the two examples above, it can be noted that different procedures were taken regarding disqualification of judges, irrespective of the fact that UNTAET Regulation 2000/11 provides for a procedure to be followed in the disqualification of judges.<sup>33</sup> In relation to the first case, the plaintiff attempted different channels, including an application to the Judge Administrator, then to the Panel of the case, followed by a letter to the Superior Council of the Judiciary and finally filed an appeal before the Court of Appeal. In the second example, according to JSMP's knowledge, the procedure used was an informal procedure of discussing with the other penal judges. JSMP is of the opinion that it is necessary to ensure that judges and the parties are fully aware of, and follow, the procedure to be followed.

<sup>31</sup> Section 20.3 UNTAET Regulation 2000/11, as amended by Regulation 2001/25.

<sup>32</sup> Section 40.1(b) of the Regulation.

<sup>33</sup> See Section 20 UNTAET Regulation 2000/11, as amended by Regulation 2001/25.

#### *4.1.1 Allocation of Cases in Dili District Court*

The manner of distribution of cases is an important safeguard for the impartiality of judges. It is important that the case allocation mechanism is an objective and fair procedure which does not allow 'picking and choosing' of cases.

In the Dili District Court the distribution of cases has to be made in accordance with the Practical Directive 2001/1 (as amended by Directive 2001/4) issued by the President of the Court of Appeal.<sup>34</sup>

This directive establishes a procedure based on a draw of the cases. The case numbers of the new cases are written in papers that are then drawn and allocated to the judges of the Court following the alphabetical order of the judges' names. According to this directive, the Judge Administrator, together with a court register, should organise the allocation of cases.<sup>35</sup>

In JSMP's view the procedure established by this directive can, if applied correctly, afford an objective approach for the allocation of cases, thus preventing allegations of improper case allocation.

In Dili District Court, JSMP was informed by Court Registry staff that the court has not been following the procedure established in Directive 2001/1. Instead, as explained, the Dili District Court follows the procedure below:

Step 1: Once new cases arrive, the administrator counts the number of cases allocated to each judge at that moment;

Step 2: New cases are then allocated to the judges with the lowest number of current cases, following alphabetical order of the judge's names.

In JSMP's view, problems may arise when there is more than one case to be allocated. If there is more than one case, the judge in charge of the allocation can easily choose which cases will be distributed among the judges having the fewest cases. This procedure allows room for abuse and challenges to the impartiality of the judges.

The reason provided by the Dili District Court staff to JSMP monitors for not following the procedure established by Directive 2001/1 was the constant difficulty of having all the judges of Dili District Court present at the same time in Court to make the draw.

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<sup>34</sup> Before the issuing of this directive, allocation of cases was regulated by UNTAET Regulation 2000/11. This regulation was amended in September 2001 and the current law does not contain any provision on the distribution of cases.

<sup>35</sup> See Article 4(7) of Practical Directive No. 2001/01 (as amended by Practical Directive No. 2001/04).



Directives coming from the President of the Court of Appeal are not optional and must be followed. JSMP is concerned about the Dili District Court choosing not to comply with the directive.

By way of comparison, during the monitoring of Baucau District Court, JSMP monitors were present at the time of distribution of cases. The procedure used in Baucau, which basically followed the Court of Appeal directive, was a simple and quick procedure, taking no longer than five minutes. Additionally, the procedure established in this Directive does not require the physical presence of every judge but simply the participation of a judge and a court registrar.

JSMP is of the opinion that if the underlying reason for deviating from the established procedure is a great disparity between the number of cases of different judges in the Dili District Court, then the Presiding Judge of this Court should communicate the problem to the President of the Court of Appeal in order to suggest a revision on the current procedure as established by Directive 2001/1.

#### **4.2 Promotion of Judges**

One of the fundamental aspects in the development of the judiciary is the promotion of the careers of the judges. It is important to note that a professional and competent judiciary will be achieved not only from adequate resources and sufficient incentives for judges and administrative personnel but also from transparent and rule-based promotion process for judges. In East Timor, this competence lies with a body created under the Statutes of Judicial Magistrates Law by the name of Superior Counsel of the Judiciary.<sup>36</sup>

All the current judges of the Dili District Courts are probationary judges. In terms of Section 25(1) of the Statute of Judicial Magistrates, in order to enter the judicial field, a probationary judge needs to fulfil certain requirements. Among them, a judge candidate has to have completed the probationary period of between 3 to 4 years<sup>37</sup> and to have been evaluated with a “good” rating. By 2004, the current probationary judges will have completed the required period. It is therefore critical that the Superior Council of Judiciary to face this issue.

Efforts should be taken to establish steps in order to commence gathering information on the performance, merit and professional integrity of the current judges. This is important not only to assist the promotion of the current judges but also to evaluate the overall status of the judiciary, and to identify its needs and deficiencies. This evaluation could also be used as a tool to identify further education or training that aims at strengthening the judges’ performance.

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<sup>36</sup> Section 15.1(a) of Statutes of Judicial Magistrates.

<sup>37</sup> Section 112 of Statutes of Judicial Magistrates. It shall be noted that the ordinary probation time is between 2 to 3 years. However, Section 112 is the currently relevant , which results in requiring a further year.

### 4.3 Accountability of Judges

It is of utmost importance that judges undertake their work in a professional manner and fulfil their duties as established in law.

JSMP found it important to deal with this issue in this report as in its monitoring of the Dili District Court has observed instances where the conduct and performance of judges are contrary to the basic duties of judges.

In East Timor the recent Statutes of Judicial Magistrates establishes to what extent judicial magistrates are to be held accountable in the fulfilment of their work<sup>38</sup>. In attempting to hold judges accountable, a disciplinary system has been established by this law. The body in charge of disciplining judges is the Superior Council of the Judiciary.<sup>39</sup>

Section 61 of the Statute of Judicial Magistrates establishes that a disciplinary infraction has been committed when a judicial magistrate, amongst other things, has violated his/her professional duties.

The professional duties of judges are listed in Section 37 of the Statutes of Judicial Magistrates:

- a) to discharge their duties with honesty, detachment, impartiality and dignity;
- b) to maintain professional secrecy in accordance with the law;
- c) to have a low profile behaviour in public and private life, in accordance with the dignity and prestige that the office held involves;
- d) to treat with courtesy and respect those involved in cases, especially the Public Prosecution Service, legal professionals and officers;
- e) to report punctually to scheduled acts;
- f) to refrain from giving out by any means opinion on a case pending trial or decision, or judgement on awards, advices, votes, sentences by judicial bodies, except censure in records of a lawsuit in the exercise of judicial duties or in judicial and technical works;
- g) to refrain from advising or instructing parties to a dispute on any pretext, except in cases specifically provided for by procedural laws; [and]
- h) anything else provided for by law.

Many possibilities for penalties for breach of duties are provided, including light penalties, such as a simple reprimand or a recorded admonition<sup>40</sup>.

As worded in the Statutes of Judicial Magistrates, the above mentioned mechanism is applicable only to judicial magistrates, which excluded probationary judges.<sup>41</sup> JSMP has previously expressed its criticism in relation to this position<sup>42</sup>.

<sup>38</sup> The accountability of judges does not extend to liability for their judgments and decisions. See Section 5 of Statutes of Judicial Magistrates.

<sup>39</sup> Section 8.1 and 15.1(a) of Statutes of Judicial Magistrates.

<sup>40</sup> Section 64.1 of Statutes of Judicial Magistrates.

<sup>41</sup> Section 25(3) of Statutes of Judicial Magistrates.

JSMP supports the approach by which probationary judges continue to be regulated by UNTAET Regulation 1999/3 (as amended by Regulation 2001/26), at least its provisions that are not contrary to the Judicial Statute of Magistrates.<sup>43</sup>

Under Regulation 1999/3, the Transitional Judicial Service Commission is tasked with providing recommendations in relation to the discipline of judges.<sup>44</sup> This Commission does not exist anymore. Since 2002, some of its functions are being developed by the Superior Council of Magistrates.

JSMP is of the opinion that the Superior Council of Magistrates should also be responsible for the discipline of probationary judges as there should be a body responsible for ensuring the fulfilment of judges' duties in establishing and enforcing justice.

JSMP suggests that the Superior Council of Magistrates develop a clear directive on the procedure for holding probationary judges accountable for their performance and conduct. In JSMP's view, this Council has a choice of, in this directive, providing that the disciplinary procedure for probationary judges to be used is the procedure established in Regulation 1999/3 as amended or in the Statutes of Judicial Magistrates.

During its monitoring, JSMP identified lack of compliance with court schedules as a problematic issue. JSMP has monitored many cases that had to be postponed because of a judge's unavailability.<sup>45</sup> Some of the excuses given to JSMP by different court actors in different situations for judges' absence in Court varied from 'judge busy building his house', to "judge needs to attend a party in the district".

JSMP also observed that during the Court recess in August 2003 the roster of judges that needed to be present in Court for any emergency was often not complied with, only resulting in further delays and postponements.

JSMP was also aware that after the Court recess, three judges of Dili District Court were attending a training seminar in Malaysia. While JSMP strongly supports this kind of activity and concurs with its importance, it is necessary that judges make contingency plans before their absences from Court. JSMP monitored that during the absence of judges while in Malaysia, some hearings had to be postponed. This shows a lack of planning and coordination. In JSMP's view, the non-postponement of these hearings prior

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<sup>42</sup> See JSMP Report on Statute of Judicial Magistrates, July 2003.

<sup>43</sup> See Section 113 of Statutes of Judicial Magistrates.

<sup>44</sup> The Transitional Judicial Commission in June 2001 (UNTAET Notification 2001/5) recommended the dismissal of an Investigative Judge working in the Dili District Court at that time.

<sup>45</sup> For example, one hearing in each of the following cases was not held due to the absence of the judge: Criminal case 146/2001 Public Prosecutor v Marquelino do Santos; Criminal Case 80/2002 Public Prosecutor v Miguel Soares and Afonso Ximenes; Criminal Case 37/2003 of Public Prosecutor v Miguel Metan Freitas and others; Criminal Case 80/ 2002 Public Prosecutor v Afonso Ximenes and Miguel Soares; and Criminal Case 49/01 Public Prosecutor v Manuel Barbosi.

to the judges' departure to Malaysia constituted a breach of their duty to report punctually to scheduled acts.

In the month of September,<sup>46</sup> JSMP observed that the Dili District Court had very limited activity throughout the day. Lunch breaks would many times last more than 2 hours, many hearings were postponed and it was very difficult to schedule meetings with judges during the Court working hours.

JSMP believes that it is important to maintain a 'close eye' on the functioning of the judiciary in order to ensure that judges fulfil their basic tasks. The Superior Council of the Judiciary has the task of developing inspections into the working of the judiciary<sup>47</sup>. The conduct of inspections guarantees that the Superior Council of the Judiciary has constant contact with the work at district level, including Dili District Court, and can consequently provide recommendations and assistance as needed.

To JSMP's knowledge there have been no inspections carried out in the Dili District Court in terms of the Statutes of Judicial Magistrates because the necessary legal requirements to appoint an inspector has not yet been fulfilled.<sup>48</sup>

JSMP believes that a regular inspection of the work at the Dili District Court can assist the Superior Council of the Judiciary to identify judges' failures to fulfil their duties, and provide the Council important information to undertake any disciplinary matters it deems appropriate.

Without the possibility of inspection in terms of the Statutes of Judicial Magistrates, JSMP is of the opinion that it is necessary to strengthen the direct contact between the judges of District Courts and the Superior Council of the Judiciary. JSMP is aware that in terms of UNTAET Regulation 2000/11 (as amended by UNTAET Regulation 2001/25), the Judge Administrator of the Dili District Court has to periodically report to the President of the Court of Appeal on any administrative matters. With the establishment of the Superior Council of the Judiciary, an opportunity was given to judges to discuss issues directly related to the judicial profession. Thus, JSMP believes that this channel could be used more effectively in requesting the direct participation of judges in periodic special sections of the Superior Council of the Judiciary.

#### **4.4 Training of Judges**

It is widely perceived that judges in East Timor, including judges of the Dili District Court, need training to enhance their skills.

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<sup>46</sup> September was not included in the monitoring period. However, JSMP is of the opinion that a constant presence in Dili District Court is necessary in order to have a complete view of the situation in this Court.

<sup>47</sup> Section 15.1(d) of the Statutes of Judicial Magistrates.

<sup>48</sup> In accordance with Section 22.4 inspectors shall be appointed amongst the judges having 'very good' ratings. At the time of writing of this report, the Supreme Council of the Judiciary had not yet conducted any evaluation in terms of Section 56 of the Statutes of Judicial Magistrates.

#### *4.4.1 Training in Portugal*

One of the Government's initiatives in the training of judges was the development of a training programme in cooperation with the Portuguese Government. The training is based on a one-year programme at the judicial training centre in Lisbon, Portugal. Eight judges from the district courts of East Timor went to Portugal in July 2003 to participate in this training. From the Dili District Court, one investigative judge and two panel judges are taking part in this training.

JSMP is not fully aware of the contents of the training, but was informed by court authorities that the training is skills-oriented, where judges are to be trained in areas like legal reasoning, writing of documents, such as decisions, and other important skills. One of the elements of the training is education on the Constitution of East Timor and laws applied in the country.

JSMP attempted to discover the selection criteria for judges going to Portugal but was not completely successful. In attempting to identify the criteria for selection, JSMP met with different responses from different court actors interviewed. Amongst the criteria told to JSMP were: the level of Portuguese language skills, the speed of judges in handling their current cases and the gender (preference was to be given to females). JSMP was also informed that there was some reluctance by some members to go to one year of training to Portugal. JSMP also heard allegations that the choice of judges was politically motivated. In JSMP's opinion, the lack of transparency in the selection process contributed to speculation and allegations of improper procedure.

One of the criterion that JSMP believes was not fully considered was the continued functioning of the Courts once the judges departed. This opinion is based on the fact that the Government of East Timor sent to Portugal two judges from Baucau (resulting in the inability of establishing a 3-judge panel), the only judge from Oecussie (resulting in a total breakdown of the Court) and two judges from Dili District Court, the busiest Court in East Timor (leaving only 3 judges at the Dili District Court).

With the departure of the judges, the Dili District Court faced serious consequences which negatively hampered its work.

Firstly, only 3 judges remained in the Dili District Court, which meant that if one of the parties in a civil or criminal matter requested a panel of 3 judges<sup>49</sup>, all judges of the Dili District Court would be occupied in the case, and no judges would be remaining to preside in other matters. JSMP is aware that judges from Suai District Court have been requested to assist Dili District Court judges if necessary.

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<sup>49</sup> See section 12 UNTAET Regulation 2000/11 as amended by 2001/25.

While monitoring the Dili District Court, JSMP observed that the possibility of appointing judges from Suai to some cases of the Dili District Court has not prevented some irregularities from occurring.

In the case of Fernandes and others (Case Number 30/2002), a request was made to have a 3 judge panel. After the departure of one of the panel judges to Portugal, the case was re-allocated to another judge without problems as the case was still at its preliminary stages. In one of the trial hearings, where witnesses would be called to testify, JSMP noticed that one of the judges assigned to the case was replaced by another judge for that hearing only. In another trial hearing, JSMP noticed that the hearing was held with the presence of only the Presiding Judge.

This was a clear violation of the rules of procedure. In JSMP's view, the scarcity of judges at Dili District Court was one of the underlying reasons for this violation.

Secondly, even with a direction from the Court of Appeal that all current cases should be finished before judges depart to Portugal, the reality was that some cases remained open, including some cases at the trial stage.

Re-allocation of the cases of judges who left to Portugal which had not yet reached the trial period were re-allocated one month after the judges' departure, in mid-August. Staff at the Court Register told JSMP that cases that were at the trial period had not yet been re-allocated because the Judge Administrator was still considering the options for re-distribution.

It is important to highlight that the Regulation clearly provides that all judges taking the final decision in a case must be present at all sessions of the trial.<sup>50</sup> The consequence of this rule is that if the case is already at the trial stage, once one of the judges from the case departs and another judge is appointed, the case has to be re-started.

To JSMP's knowledge, the Dili District Court is aware of this rule and conscious of the burden that the need to re-start some cases will impact on the functioning of the Court with only three judges already struggling to cope with the normal work at the Dili District Court.

#### *4.4.2 Future Training Initiatives*

The non-governmental organisation, International Development Law Organisation, has been developing a training programme for the judges in East Timor. Although the same programme has commenced for prosecutors, to date this project has not been implemented for the judges as the training has not been approved by the Superior Council of the Judiciary.

The Government of East Timor, specifically the President of the Court of Appeal, the Prosecutor-General and Vice-Minister of Justice, are developing a national training

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<sup>50</sup> Section 30.1 of the Regulation.

policy for the justice sector. Within the programme, a Council of Coordination has been established to oversee the implementation of the programme.<sup>51</sup>

*JSMP recommends that:*

*1. Judges, lawyers and prosecutors should ensure that they are fully aware of the procedures to be followed regarding the disqualification of judges;*

*2. Steps be taken as soon possible to start compiling information regarding the performance and the merits of the current judges as the pre-entrance probationary period is due to expire early next year. Evaluating the current performance of judges will also serve to identify future training needs;*

*3. A transitional provision be drafted in order to enable the practical implementation of the complex East Timorese Statutes of Judicial Magistrates Law;*

*4. Judges of the Dili District Court ensure that they are present in Court during the Court working hours in order to prevent postponement of cases, inconvenience of all parties affected and to promote the effective management of the judges' time;*

*5. The Superior Council of the Judiciary ensure that it has a close relationship with judges of the Dili District Court so as to enable the Superior Council to have knowledge of working practices at the Dili District Court and to afford judges the opportunity to raise their concerns and issues with the Council. JSMP suggests that regular meetings be established in which judges of the Dili District Courts attend and provide a regular report on their activities;*

*6. The Dili District Court re-allocates the cases that belonged to those judges currently training in Portugal as soon as possible in order to prevent further delays; and*

*7. Any future training initiative considers the necessity to the Dili District Court of continuing its normal functioning while the training is being implemented.*

## **5 ROLE AND AUTHORITY OF THE INVESTIGATING JUDGE**

The authority of the Investigating Judge, as outlined by the Regulation,<sup>52</sup> includes the duty to guarantee the rights of persons subject to criminal investigations as well as

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<sup>51</sup> Letter signed by Vice-Minister of Justice, president of the Superior Council of Judiciary and Prosecutor General on the National Training Policy for the Justice Sector, 14 October 2003.

<sup>52</sup> Section 9.1 of the Regulation.

victims of crimes. The investigating judge<sup>53</sup> also has specific duties to issue detention orders and review the lawfulness of the arrest and detention, and to issue various types of orders and warrants in relation to the investigation of criminal matters.

JSMP observed numerous incidents of unlawful conduct of the investigating judges of the Dili District Court in both issuing and reviewing detention orders.

### **5.1 Initial detention hearing (72 hours review hearing)**

Detaining a person violates the basic principle that a person has a right to freedom. As provided in the Constitution of RDTL “every person has the right to personal freedom, security, and integrity.” Detaining a person is permissible only pursuant to terms that are clearly established in law.<sup>54</sup> The Regulation, which defines the circumstances under which a person can be detained, provides that a person must be brought before an investigating judge for a hearing within 72 hours from the time of arrest... This hearing must be conducted in the presence of the accused and their lawyer if they have one. The investigating judge’s role is to examine the circumstances of the case to ensure that the rights of the accused have not been violated and to determine whether the arrest and detention are legal. The Investigating Judge also has the duty to make orders relating to whether the suspect should continue to be detained or released with or without conditions.

During the current monitoring period, JSMP observed a number of cases in which the investigating judge misapplied the Regulation which governs initial detention hearings. Problems included: hearings being conducted outside the requisite time, orders made without due regard to the exclusive factors required for detention and inadequate attention to the duty to protect the rights of the suspect.

#### *5.1.1 Time limits*

The Regulation stipulates that within 72 hours of a suspect being arrested, the Investigating Judge must conduct a hearing to review the detention and determine whether the arrest and detention are lawful. The Investigating Judge also has the duty to issue orders stipulating whether the detention should be extended or the suspect should be released with or without conditions.

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<sup>53</sup> There are currently four investigating judges in the Dili District Court, excluding one Investigating Judge from Suai and one from the Serious Panel for Serious Crimes who are attending the training in Portugal for the year.

<sup>54</sup> See sections 30.1 and 30.2 of the Constitution of RDTL. The Constitution reflects the rights outlined in section 9.1 of the Convention of Civil and Political Rights which states that: Everyone has the right to life, liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedures as are established by law.



In the period of monitoring, JSMP came to know about numerous cases in which the accused was only presented for the “initial detention hearing (72 hour hearing)” after the expiration of the time period. Two main reasons for the hearings not occurring within the requisite time were: (1) the difficulties experienced by police in transporting suspects from outside of Dili and, (2) a lack of investigating judges present at the court, especially at weekends. One case followed by JSMP which illustrates this problem is a case from Ermera district where it was difficult for the suspect to be brought to the Dili district court because of a transportation problem for the police.<sup>55</sup> In addition, police, especially in the districts, have commented that sometimes when they bring suspects to the Dili District court there is not an investigating judge available to conduct the hearing. JSMP was informed that this problem worsened if the 72 hour period expired on a Saturday or Sunday.

JSMP spoke with court staff about the necessity for review hearings to be able to be conducted on weekends. JSMP was told that such arrangements are difficult because increases in salary and overtime are not given adequate attention and court staff, including judges, prosecutors and lawyers, often complain that they are required to work to maximum capacity but their well-being is not prioritised.<sup>56</sup> Although the judges, prosecutors and lawyers complained about conditions and weekend work, they indicated that they did attend 72 hour review hearings on Saturdays and Sundays especially if the suspect was being transferred from places outside Dili such as Ermera and Liquisa.

#### 5.1.2 *Exclusive factors required for detention*

A detention order can only be issued by the investigating judge, irrespective of the charge, if the following cumulative and exclusive factors exist:

##### Section 20.7<sup>57</sup>

- (a) there are reasons to believe that a crime has been committed; and
- (b) there is sufficient evidence to support a reasonable belief that the suspect was the perpetrator; *and*
- (c) there are *reasonable grounds* to believe that such detention is necessary.

##### Section 20.8 *Reasonable grounds* for detention exist when:

- (a) there are reasons to believe that the suspect will flee to avoid criminal proceedings; or
- (b) there is the risk that evidence may be tainted, lost, destroyed or falsified; or
- (c) there are reasons to believe that witnesses or victims may be pressured, manipulated or their safety endangered; or
- (d) there are reasons to believe that the suspect will continue to commit offences or

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<sup>55</sup> See the decision of Public Prosecutor v Mario da Costa aka Karlito.

<sup>56</sup> From discussions between JSMP staff and judges, prosecutors and public defenders.

<sup>57</sup> Sections 20.7 and 20.8 of the Regulation.

poses a danger to public safety or security.  
(*Emphasis added*)

The intention of the above Regulation is that if there is a reasonable suspicion that a suspect has committed a crime they still must be released, if none of the factors listed in section 20.8 exist. In JSMP's interim report the problem of investigating judges appearing only to look at the seriousness of the offence when deciding whether to detain someone was identified and our recent monitoring suggests that this problem has not changed.

JSMP observed that generally the written decisions of investigating judges cited the elements contained in s20.7 and 20.8 of the Regulation which is commendable. However, the reference to the factors appears to be cursory and usually very limited. Further, only generic reasons are given relating to the factors outlined in section 20.8. According to JSMP, a practice of providing brief reasons in the decision related to each of the factors in section 20.7 and section 20.8 would allow greater transparency and assist in ensuring that the Regulation is properly applied.

Another problem identified in the conduct of the Investigating judge in determining whether someone should be detained was reliance on arguments from the prosecution without sufficient regard to the suspect. For example, in the case of the Public Prosecutor v Win Kee Jin<sup>58</sup> the Investigating Judge appeared to only listen to the position of the Prosecutor without paying attention to the rights of the accused or the evidence supporting the accused.

The case of Public Prosecutor v Win Kee Jin concerned a charge of illegal exportation of goods by the suspect however the investigating judge appeared to refuse to look at let alone consider documents which the accused sought to present regarding a permit he had been provided by the Transitional Administration for the exportation of goods as well as the nature of the goods themselves as private property rather than goods belonging to the state.

In addition, it appeared that little regard was had by the investigating judge to the circumstances of the arrest or the manner in which the suspect was arrested. The arrest was later found to be illegal on the basis that the police did not have the necessary warrant. The role of the Investigating judge in this case appeared to be disproportionately focused on trying to show that the suspect could be reasonably suspected of committing a crime from the evidence presented by the prosecution while little regard was given to ensuring the suspect's rights were fully protected.<sup>59</sup>

### 5.1.3 Public Access to 72 hour hearings.

Public access to court proceedings assists in ensuring accountability on behalf of the court actors and especially the judges. When deciding whether a court proceeding should

<sup>58</sup> Public Prosecutor v Win Kee Jin, case number 09/HC/2003.

<sup>59</sup> Section 14.2 of the Regulation

be open, the need for accountability should be considered against the need for privacy for actors involved in the proceedings. These competing concerns have been addressed in the Regulation which allows for public hearings except in certain exceptional circumstances. The exceptional circumstances, outlined in section 28.2, stipulate that cases may be closed to the public if the court determines that, if open, prejudice to national security interests, privacy of persons involved in cases of sexual offences or minors and or the interests of justice would occur. Contrary to trials, “initial detention hearings/72 hour hearings” are closed to the public unless requested by the suspect and ordered by the investigating judge.<sup>60</sup> As previously mentioned, these hearings are used to determine questions of continued detention, and the lawful nature of arrest and detention, all of which are essential elements in determining whether a person has been lawfully deprived of their liberty. Due to the important nature of such hearings, JSMP is of the opinion that they should be open to the public unless exceptional circumstances exist which could reflect those considerations discussed above.

## **5.2 Review of Detention Orders**

JSMP spoke with suspects who were present in the cells in Dili District Court who often complained that their rights were violated with regard to detention review procedures. JSMP observed that detention reviews were not completed within the required time frame for many suspects detained in Becora prison. Further, prisoners complained they were not informed when the review would be done and it appeared to them that the detention extensions were done automatically. In addition to the comments of the suspects themselves, JSMP observed that there were numerous problems with procedures followed by the Investigating Judges. For example, the Investigating Judge often did not have regard to time limits of detention reviews, hearings were not held for the purpose of assessing the detention and if hearings were held suspects were rarely present.

The Regulation<sup>61</sup> provides that the Investigating Judge must review a suspect’s or accused’s detention every thirty days, then give an order either extending the detention, granting conditional release or releasing the suspect. The Regulation does not state that a hearing should be held to conduct the review however, according to JSMP it is preferable if a hearing occurs. In order for investigating judges to fulfil their duties, they should have regard to all new evidence which should be presented at a hearing at which the suspect is present. For a judge to make a proper assessment about whether there are sufficient reasons for a person to remain in detention it is necessary to question the suspect regarding possible changes in relevant circumstances. JSMP is aware that this opinion is contrary to current jurisprudence in East Timor.

The Court of Appeal in the case of *Beny Ludji*<sup>62</sup> held, among other things, that a detention review must be done only if there is new evidence. In the decision it was stated that:

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<sup>60</sup> Section 20.2 of the Regulation.

<sup>61</sup> Section 20.9 of the Regulation.

<sup>62</sup> *Beny Ludji v Public Prosecutor* case number 40/ 03.

It is already clear that the detention review is to be done every 30 days for which it is intended by Article 20.9 of the Criminal Procedure Law, Regulation UNTAET 30/ 2000 which was amended by Regulation 25/ 2001 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>63</sup>

JSMP respectfully believes that the above decision of the Court of Appeal misapplies the Regulation relating to detention review. Section 20.9 of the Regulation states in clear and plain language 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

In JSMP's opinion the language of the above section imposes a clear requirement to review the detention of a suspect every 30 days. There is also an explicit duty to make another order. There are no sections within the Regulation which support an interpretation that the obligation to review the detention is determined by the existence of new circumstances. In addition, the reasoning of the Court of Appeal is confusing as it would be difficult for an Investigating Judge to know whether any changes in circumstances or new evidence exists if a review is not done.

The Regulation does not explicitly provide that the review should be done in hearing at which the suspect is present, however JSMP believes that best practice in determining whether a change in circumstances has occurred or whether new evidence is present requires the judge to ask the suspect or accused about these possibilities. Judges at the district court have told JSMP that it would be too difficult for suspects or accused to be presented before them every thirty days because of logistical arrangements and time pressures. JSMP believes that greater consideration should be given to the issue and discussions should be held with prison authorities to determine a workable arrangement for bringing prisoners before Investigating Judges every thirty days.

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<sup>63</sup> Beny Ludji v Public Prosecutor case number 40/ 03. Note that the judgement was written in Bahasa Indonesian and the above version is based on a JSMP translation. Please see the Bahasa Indonesian version of this report for the original wording.

### 5.3 Unlawful Orders by Investigating Judges

During the monitoring period JSMP observed that orders were made by Investigating Judges that were outside their authority. As stated above, Investigating Judges have the power to make orders relating to detention and also warrants related to criminal investigations. During the period of observation there were a number of cases relating to foreigners who were suspected of committing offences and the investigating judge issued orders for their deportation.<sup>64</sup> The power to order deportation is not within the authority of the Investigating Judge. The Regulations do not provide for the authority of investigating judges to order deportation and further, UNTAET regulation 2000/9 on the “Establishment of a Boarder Regime in East Timor” which was in effect at the time of the decisions,<sup>65</sup> provides that the Boarder Control officers have the power of deportation. A decision of the Boarder Controller can be challenged in a court in East Timor, however the cases in question did not involve an appeal from a decision of the Boarder Controller, nor does the review of a court imply that it can be a decision of an investigating judge rather than a usual hearing. The Court of Appeal considered this issue and ruled that investigating judges do not have the power to issue sanctions and therefore the actions of the investigating judge were unlawful.<sup>66</sup>

“ (...) It is known that the investigative judge has the powers provided in sections 9, 19A, 20, 21 and 22 of the Regulation 2000/ 30 as amended by Regulation 2001/25 of UNTAET. From that it results that the investigative judge has no powers to apply any sanction to the accused. Even because, every and any accused is presumed innocent until the final judicial conviction (Article 34.1 of the Constitution of East Timor) and no one can be subjected to a sanction or security measure not through a proper procedure. (...)”

Decision of the Court of Appeal dated 23 July 2003 on the case of Innocent Anike and Sebastian A. Ndubuisi (Case Number 12/03)

JSMP is concerned that despite the ruling of the Court of Appeal, this practice will continue due to difficulty in communicating decisions of the Court of Appeal to the district level and the barriers faced by those who have been deported to obtain review of the decision. JSMP’s monitoring revealed that the practice of issuing deportation orders by the investigating judges continued after the Court of Appeal’s ruling that such orders were not lawful.

<sup>64</sup> See for example the cases of Public Prosecutor v Innocent Anike and Sebastian A Ndubuisi, case number 12/ 2003 and Public Prosecutor v Maria Nove and Others, case number 48/ 2003.

<sup>65</sup> It is noted that the East Timorese Immigration and Asylum law is now applicable in East Timor.

<sup>66</sup> Prosecutor v Innocent and Sebastian A. Ndubusidi (Case Number 12/2003).

*JSMP recommends that:*

- 1. Investigating judges and court administrators institute a formal roster or other appropriate system whereby investigating judges are available for hearings as necessary on Saturdays and Sundays to safeguard the rights of suspects to be brought before an investigating judge within 72 hours of arrest;*
- 2. A standard procedure be developed to encourage investigating judges, when writing decisions on detention, to briefly state the facts of the case that support the criteria mandated in sections 20.7 and 20.8 of UNTAET Regulation 2000/30 as amended by 2001/25;*
- 3. Investigating judges pay greater attention to their roles in protecting the rights of the accused in the conduct of criminal investigations, particularly by giving due regard to evidence presented in hearings by the defender and not just considering the evidence provided by the prosecutor;*
- 4. The UNTAET Regulation 2000/30 as amended by 2001/25 governing 72 hour review hearings be amended to provide that the hearings should be open to the public except in exceptional circumstances;*
- 5. Continued training be provided to Investigating Judges on their role as provided for in UNTAET Regulations. Such training should include international law instruments and East Timorese laws, with a special emphasis on new legislation, such as relevant sections of the Immigration and Asylum Law, affecting Investigating Judges;*
- 6. Investigating judges should conduct detention review hearings every 30 days in the presence of the suspect or accused and their lawyer; and*
- 7. Prosecutors and defenders should advocate for detainees to have a review hearing or present written documents to the investigating judges, if there are new circumstances which support their release.*

## **6 HABEAS CORPUS**

The expression 'habeas corpus' is a Latin phrase meaning to 'present the person'. It is a cause of action that can be used to allow a detainee to be presented to the court for a determination on whether their detention is lawful. The provision for habeas corpus is enshrined in the Constitution of East Timor which guarantees that every person has the right to request habeas corpus if they are illegally denied their freedom.<sup>67</sup> JSMP has

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<sup>67</sup> Section 33.1 of the Constitution of East Timor.

observed a recent sharp increase in the numbers of habeas corpus actions, a high proportion of which are being instigated by East Timorese defenders. JSMP believes that this is a positive sign for the professional development of East Timorese defenders as such actions require pro-active steps in order to protect their client's fundamental rights.

### **6.1 Circumstances which may give rise to a habeas corpus action**

Habeas corpus actions involve the determination of whether arrest and detention are lawful and therefore it is an action that is closely linked with the role of the investigating judge. As discussed above, the investigating judge has the duty to review detention orders and to examine the lawfulness of detention and arrest. It is therefore necessary to ensure that wherever possible, the investigating judge is able to pro-actively remedy situations of unlawful arrest or detention through existing procedures. However, in circumstances when the investigating judge does not recognize the illegal nature of an arrest or detention, it may be appropriate for the lawyer of the detainee to take the necessary proactive steps to commence a habeas corpus action.

In the case of *Public Prosecutor v Wong Kee Jin* (Case Number 09/2003)<sup>68</sup> the investigating judge ordered the continued detention of the suspect when the police illegally arrested and detained the suspect. It was later found by the court in the habeas corpus action that the police had arrested the suspect without a warrant and on basis of a direction from the State Secretary for Trade and Industry. The habeas corpus action was successful and the release of the suspect from detention was ordered.

In another habeas corpus action brought before the Dili District Court, the court ordered the release of the suspect as it was found, contrary to the orders of the investigating judge, that the case concerned a civil rather than a criminal matter.<sup>69</sup>

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<sup>68</sup> It should be noted that this case actually involved two requests for habeas Corpus as after the first successful application the suspect was re-arrested.

<sup>69</sup> *Public Prosecutor v Francisco Alves* Nomor: 10/HC/2003.i.

Detaining a person for a period in excess of six months may allow for an action of habeas corpus.<sup>70</sup> If a crime carries a maximum sentence of over 5 years but less than 10, the maximum period of pre-trial detention is 9 months. Such a lengthy pre-trial detention period can only occur in exceptional circumstances. A person who is charged with a crime for which there is a maximum penalty of 10 years or more may be held in excess of 6 months for any period that is reasonable given there are exceptional circumstances.<sup>71</sup> The Dili District Court has released suspects in response to a habeas corpus application when it could be shown that the length of pre-trial detention was not reasonable in the circumstances.

The case of Public Prosecutor v Crisantos Amaral, the suspect was charged with sexual assault a crime which carries a maximum sentence in excess of 5 years. The suspect had been held in pre trial detention since March 2002. The court held that the suspect should be released as the detention was not reasonable in all the circumstances. The suspect was released with conditions. Although JSMP is of the opinion that in a habeas corpus action the judge only has the authority to order the release of the suspect, not with conditions, the decision is important in demonstrating that there needs to be exceptional circumstances and a reasonable time period to detain a person in excess of 6 months.

JSMP visited the Becora prison and observed that many detention orders had expired.<sup>72</sup> Although in the opinion of JSMP, detaining a person once their 30 day detention order had expired would give rise to a habeas corpus action, it is possible that it would be unsuccessful given current judicial interpretation of the Regulation. As previously discussed in the Chapter on Investigating Judges, contrary to JSMP's view, the current opinion of the Court of

**Comment:** This para is a bit awkward. Could the description of the limits of detention be put in a footnote?

**Comment:** Extra info would be useful for this example. When was the HC action heard, ie how long illegally detained? Also, do we know what the exceptional circumstances were in this case?

Appeal is that detention reviews within the initial six month period are not necessary unless circumstances have changed. The habeas corpus decisions in the Dili district court appear to follow the same reasoning of the Court of Appeal. JSMP observed that in hearings for requests for habeas corpus in the Dili District Court the judge often stated that the issue of 30 day review hearings is not clear and confirmed that it is not unlawful for detention of the suspect to be automatically extended by the investigating judge. In one habeas corpus case<sup>73</sup> in the Dili District Court, an action was brought on the basis that two detention extensions were done without the accused or his lawyer being informed. The judge in the decision refusing the application said that the extension of detention can be done automatically and there is no requirement to conduct a hearing or inform the lawyer or client.

The current jurisprudence suggests that not reviewing a detention order within six months or not holding a hearing within that time to review the circumstances will not render detention unlawful. Due to this lack of procedural safeguards for the accused, it is very important for the defence lawyers to be proactive in advocating for their clients before the investigating judges. It is necessary for lawyers to visit their clients in detention and seek instructions as to any changes in circumstances which will assist them in satisfying the

<sup>70</sup> If a crime carries a maximum sentence of less than 5 years the maximum time in pre-trial detention is 6 months.

<sup>71</sup> See sections 20.11 and 20.12 of the Regulations.

<sup>72</sup> An interview with a detainee at Becora prison by JSMP staff in August 2003. Becora.

<sup>73</sup> See for example Public Prosecutor v Bruno do Rosario da Costa, case number 05/HC/ 2003.



investigating judge that they should be released. The lawyers should provide written submissions to the investigating judges at the time the detention is reviewed and request in chamber conferences or hearings for the suspect to give evidence.

## **6.2 Time frame for deciding a habeas corpus application**

The Constitution of East Timor imposes that:

Requests for habeas corpus will be decided by the court in eight days in a hearing attended by both parties<sup>74</sup>

The Regulation further defines the time the case is allocated to a judge a time period of 24 hours for holding the hearing and also directs that the decision must be made in the same session. The Regulation states that:

The judge shall conduct a hearing of the case within 24 hours of assignment of the case, after notice to the petitioner and to the person whose release is being sought.<sup>75</sup>

JSMP observed that there have been instances when the time period was not complied with either because the hearings were postponed or decisions were not made on the same day.<sup>76</sup>

In the case of Bruno da Costa Magalhaes, the petitioner had been detained since 3 March 2002 on suspicion of smuggling arms into East Timor. The case for habeas corpus was heard by the court on 3 June 2003. Evidence was presented on the 3 June 2003 and the case was postponed until the 4 June. On 4 June the case was again postponed until 5 June 2003 at which time the judge decided that the accused was lawfully detained.

## **6.3 Options if a Habeas Corpus Action is Successful**

Lawyers and their clients have the right to make an appeal to the Court of Appeal if their habeas corpus application is unsuccessful.<sup>77</sup>

If the application is successful, actions for compensation can be lodged. The Regulation provides that:

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<sup>74</sup> Section 33.3 of the Constitution of East Timor.

<sup>75</sup> Section 47.7 of the Regulation.

<sup>76</sup> Public Prosecutor v Francisco Alves case number: 10/HC/2003 was postponed overnight because the electricity was not working and the judge could not print the decision. Public Prosecutor v Bruno do Rosario Nomor: 05/HC/2003, was postponed overnight to allow the judge to consider the decision.

<sup>77</sup> Section 40.1 of the Regulation.

Any person who is subjected to unlawful arrest or detention shall be entitled to compensation in an amount and from a source of public funds which are allocated to the administration of justice, to be determined by the competent court. An award of compensation pursuant to the present section may be made as a part of the final disposition of a criminal case involving the claimant, or by means of a separate civil action.<sup>78</sup>

The request for compensation for unlawful arrest and detention is being pursued in the successful matter of the Public Prosecutor v Wong Ke Jin referred to above. The action for compensation at the time of writing the report has not been finalised. Such actions raises the awareness of when detention is not lawful and provides a way of protecting the rights of the accused and promoting future compliance with legal procedures.

It is also noted that if in a habeas corpus matter the judge orders the release of a person the Prosecutor must order an investigation into the matter.<sup>79</sup> JMSP is not aware of any such investigations occurring however, such investigations are another way of identifying, with an aim to changing, problematic procedures and therefore protecting the rights of accused and suspects.

*JSMP recommends that:*

- 1. Judges hearing habeas corpus cases pay the necessary attention to the time constraints and hold a hearing make a decision within 24 hours. By law, there is no possibility to postpone habeas corpus cases;*
- 2. The Office of the Prosecutor comply with the regulation to do an investigation into any successful habeas corpus cases in order to reduce the chance that people would be arrested or detained illegally; and*
- 3. Defense lawyers take pro-active steps to protect the rights of their clients who are detained or arrested illegally. If investigating judges refuse to order the release of a person who is detained illegally, the defense should consider bringing a habeas corpus action to the court. If the habeas corpus action is successful, the defense lawyer along with the client, should consider whether they wish to make an application for compensation for illegal detention.*

## **7 THE ROLE OF THE PROSECUTOR**

The Public Prosecutor has an integral role in any criminal matters and is the representative of the state in prosecuting breaches of the criminal law. Prosecutors have no role in civil matters. The role of the Public Prosecutor is primarily governed by section

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<sup>78</sup> Section 52.2 of the Regulation.

<sup>79</sup> Section 47.7 of the Regulation.

7 of UNTAET Regulation 2000/ 16 as amended by Regulation UNTAET 2001/ 16. The Public Prosecutor is responsible for the leading all criminal investigations and with that duty they are responsible for examining the circumstances of the matter in relation to factors which are against the suspect and moreover those which are in favour of the suspect. In most cases the Prosecutor has the duty to request an arrest warrant if appropriate and after the investigation, has the responsibility to decide whether indictments should be made in individual circumstances and prepared the indictment. If the matter is a minor offence of with a possible punishment of less than one year the police investigator can proceed directly to the judge in such matters without having to go via the Prosecutor. The Prosecutor also has a role in requesting detention orders from investigating judges while investigations are ongoing.<sup>80</sup>

Currently there are only three prosecutors assigned to the Dili district court, in addition two prosecutors from the Serious Crimes Unit and one each from the Baucau and Suai Courts act on occasion within the Dili District Court. JSMP observed that the prosecution staff at the Dili district court was minimal compared with the number of cases to be handed by the staff. It is important for that there are a sufficient number of suitably skilled prosecutors with adequate resources to ensure that sufficient numbers of prosecutors to be available as well as sufficient skills and facilities and in order to ensure the quality of services delivered by the Prosecutors office.

### **7.1 Unlawful arrests and indictments**

As the prosecutor has responsibility for leading the police investigations and in most cases requesting arrest warrants and issuing indictments it is an essential skill of prosecutors to be able to determine what action constitutes a criminal offence. JSMP observed that there was a lack of understanding of differences between civil and criminal matters by some prosecutors and other court actors. According to Indonesian law matters such as not repaying a loan, without an element of fraud, are civil matters. However, there appeared to be a perception of behalf of police, plaintiffs and some prosecutors and investigating judges that these matters were indeed criminal. In one matter a person was arrested and detained on the basis of not returning money owed from a loan. After mediation was unsuccessful the plaintiff was arrested with a warrant was issued by the investigating judge on the request of the prosecutor.

In the case of Francisco Alves (Case Number10/2003), the suspect was arrested and detained on 6 May 2003 in relation to breaching a contract for the loan of funds totalling Rp. 15.000.000 and 30% interest. The defence council in a Habeas Corpus application argued that this case of a civil instead of a criminal but civil and the case should be correctly classified as a breach of contract as defined by article 1338 of the Indonesian civil code.

The judge accepted the arguments of the defence and held that the investigating judge on the request of the prosecutor had breached Article 31.2 of the Constitution of RDTL that provides that no one shall be tried and convicted for an act that does not qualify as a criminal offence at the time it was committed. The suspect was released from detention on 10 July 2003.

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<sup>80</sup> Section 7 of the Regulation.

Prosecutors also issued indictments which included charges that are not criminal offences in East Timor. JSMP observed that breaches of an International Convention was also included as specific charges against an accused. For example, as discussed in the Chapter on International law of this report, there are instances when the prosecutor has included as part of the indictment a breach of an International Covenant, such as Article 6.1 of the International Covenant on Civil and Political Rights (ICCPR).<sup>81</sup> International Conventions are not part of the standard criminal law of East Timor. Rather, international conventions, such as the ICCPR are used to provide standards for states to adhere to and bestow rights to people, they cannot be used to bring charges against individuals.

The prosecution also instigated investigations and requested arrest warrants for cases in which there was not an applicable crime or the penal code provisions required significant manipulating of the wording and intent to charge the suspect. A number of people were arrested during the monitoring period and brought before the investigating judge for prostitution. There is no crime of prostitution according to the Indonesian Penal Code. It appears that attempts are made to try prostitutes pursuant to Articles 296 and 506 of the Indonesian Penal Code which relate to a person who makes an occupation of intentionally facilitating obscene acts by others with third parties and; any person who as a pimp takes advantage of the prostitution of a woman. These Articles are clearly directed at those organising prostitution as opposed to prostitutes themselves.

Comment: Can this be quoted?

The case of Public Prosecutor v Maria Nove and others (case number 48/ 2003) involves 7 women who were arrested for engaging in prostitution. The matter is currently before the Court of Appeal. One of the grounds of the appeal is that prostitution is not criminalised and therefore the charges are unlawful. It is noteworthy that the women in this case have already been deported on the order of an investigating judge.

Drafting indictments and leading criminal investigations are extremely powerful and important positions within the legal system. It is therefore essential that Prosecutors are aware of the correct criminal laws and also have the skills to discern how the law should apply to the facts of each case. Without these key skills, it is almost impossible to ensure that wrongful arrest, illegal detention or other abuses of the prosecution process do not occur.

## 7.2 Prosecutors as Mediators

As noted in the interim Dili District Court report, prosecutors continue to engage in mediation even though it is outside the scope of the role of the Prosecutor, as outlined by the Regulations.<sup>82</sup> Mediation generally occurs when it is requested or when the prosecutor believes that the two parties could resolve their differences without formal

<sup>81</sup> Public Prosecutor v Fernandes da Costa and Others (Case Number 2002/30)

<sup>82</sup> Section 7 of the Regulations.

court proceedings.

From discussions with Prosecutors it appears that what are regarded as smaller criminal matters are more frequently mediated, including domestic violence where serious physical injuries have not been sustained. Mediation of criminal matters should not occur<sup>83</sup> and although mediation in civil matters may be a useful process this is not within the role or authority of the prosecutors. JSMP reiterates its statements made in the interim Dili District Court report that it is not appropriate for Prosecutors to act as mediators and consideration should be given to the establishment of alternate mediation services.

**Comment:** Need to say why mediation of criminal matters should not occur

### 7.3 Training for Prosecutors

The prosecution unit, including the Prosecutor General, are currently attending training conducted by the International Development Law Organisation. The training commenced in October 2003 and is due to continue until at least October 2004. At the time of writing three training sessions had been conducted, primarily related to the role of the prosecutor.

*JSMP recommends that:*

1. *Sufficiently experienced prosecutor trainees be sworn in as prosecutors as an urgent measure to help alleviate the increasing workload of Office of the General Prosecutor;*
2. *Prosecutors carefully examine the criminal elements of charges under investigation to ensure that arrest warrants and detention orders are not granted in cases that are in reality are not criminal. Training regarding differences between criminal and civil matters to prosecutors should also be provided; and*
3. *Prosecutors should not engage in mediation of cases, criminal or civil, as JSMP has previously recommended. Separate mediation services should be established.*

## 8 ROLE OF THE DEFENCE

International fair trial standards dictate that everyone facing a criminal charge has the right to a lawyer at all stages of proceedings, including during the pre-trial period.<sup>84</sup> This right is confirmed in section 6.3(a) of the Regulation. Article 6 of the United Nations Basic Principles on the Role of Lawyers states that the lawyer should have experience and competence that corresponds with the seriousness of the offence allegedly committed by his or her client.

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<sup>83</sup> See Interim Dili District Court Report on discussion on inappropriateness of mediation of criminal matters.

<sup>84</sup> See the UN Basic Principles on the Role of Lawyers, Principle 1.

The duties and responsibilities of public defenders are set out in UNTAET Regulation 2001/24. A Code of Conduct for public defenders is set out in the Schedule to this Regulation. Their role is to provide legal assistance and representation to persons who are involved in criminal investigations and criminal and civil proceedings and who do not have adequate financial resources to pay for such representation.<sup>85</sup> The role of the public defender is critical in an environment where many accused have a limited understanding of the rule of law and when the legal processes they are going through are to them and the community at large.

JSMP is aware that in March 2003 an initiative for a further regulation of the public defenders was sent to the Minister of Justice.<sup>86</sup> JSMP is unaware of any further steps taken by the Ministry regarding this proposal. In addition, a proposal for a Law of the Statute of Lawyers which was aimed at regulating the East Timorese Bar Association has also been proposed and presented to Committee "A" of the National Parliament in October 2003. It is intended that the law would be primarily tasked in accrediting lawyers, including public defenders.<sup>87</sup>

### **8.1 The Administrative Support to the Public Defenders**

Currently there are seven public defenders at Dili District Court<sup>88</sup> supported by one permanent administrative officer and three other temporarily recruited staff. The job of the administrative staff is, amongst other things, case management and other related-administrative tasks in the Office of the Public Defenders. During the period of monitoring, JSMP observed that the shortage of public defenders and trained administrative support staff has, in JSMP's view, acutely impacted on the quality of legal representation provided by public defenders.

A lack of resources may well be a contributing factor to the standard of legal representation currently provided. JSMP believes, however, that more could be achieved with existing staffing levels.

The fact that public defenders have little experience and have an overload of cases requires close administrative and management monitoring to assist them in the successful implementation of their duties.

Observing public defenders in practice at the Dili District Court raises a question as to whether the administration of the Office of the Public Defenders could be strengthened by improving the level of central management and administration. It is of utmost importance to guarantee that the Office of the Public Defenders is supported by effective management so as to maximise its resources and skills. JSMP is aware that the current

<sup>85</sup> See also section 135.2 of Constitution of East Timor.

<sup>86</sup> The proposal was supported by *Advocats Sans Frontières*.

<sup>87</sup> Proposal on the Law on the Statute of Lawyers, October 2003.

<sup>88</sup> They also represent accused before the Suai District Court which currently sits at the building of the Dili District Court.

public defender whose duties include managing the office is in an acting capacity only, as his appointment has not, at the date of writing of this report, been formalised by the Ministry of Justice. A consequence of only having a person acting in this position is that it is easier for people to question their authority or to challenge their decisions, resulting in difficulties for developing directives that have to be applied by all public defenders.

**Comment:** Meaning unclear, need to explain what 'target of challenges' means

## 8.2 Case Preparation and Work Practices

JSMP observed both in its pilot and the current monitoring projects that the level of case preparation undertaken by public defenders appeared to be unsatisfactory.

In criminal cases monitored it was difficult to discern a defence strategy. As noted in the previous report, public defenders arrived in court with little documentation and scant notes were taken during the trials.

JSMP is aware that sometimes public defenders face difficulties in obtaining access to copies of statements of witnesses, including the accused, from the prosecution. This difficulty means that public defenders have to take a further step in attempting to obtain access to these documents through the Court Registry files. Undoubtedly, the lack of access to statements taken by the police in the investigation of crimes, represents a significant barrier in preparing a case.

JSMP has also observed instances where accused had not met with their defence counsel prior to the day of the hearing. If public defenders only meet with their clients on the day of the hearing it becomes very difficult to develop a defence strategy, including attempting to call witnesses for the defence.

JSMP also observed occasions where the public defender failed to attend hearings without informing the court or their client.

The absence of public defenders at scheduled hearings is not only unprofessional and creates unnecessary delays, but it also threatens public confidence in the formal justice system. Witness and victims may be less likely to participate in criminal matters when such conduct occurs.

In the case of Public Prosecution v. Antonio Luis Soares (Case Number 5/2003) upon the failure of the public defender to attend one of the hearings, the judge ordered the suspect to look for another legal representative.

In the case of Public Prosecutor v. Afonso Ximenes and Miguel Soares (Case Number 80/2002), JSMP observed that one of the key witnesses in this murder trial, who was a student from Liquiça, had to take time off from his studies in order to travel to Dili to attend the hearing at the Dili District Court. The case was unable to proceed on the scheduled day due to the absence of the public defender. No reasons were provided to the court for his absence.

In JSMP's view, the Office of the Public Defenders should be responsible for managing absences of public defenders in order to minimize their impact. For example upon the absence of a public defender, the Office of the Public Defenders could organize replacements<sup>89</sup> or, if not possible, should notify the Court administration of the absence and the

reasons thereof as soon as practicable.

The reality of this situation is that it stretches the resources of those public defenders present at the court and also impacts on the right of the accused to a proper defence.

Public defenders who spoke with JSMP explained that they have onerous caseloads which made it difficult to dedicate the time needed to any particular case. That the human resources of the Office of the Public Defender's are overstretched is most apparent in cases where one public defender had to represent multiple clients. Such a situation not only stretches the capacity of the public defenders, but also may create a situation where there is a conflict of interest. If a number of accused are being represented by the same defence lawyer the lawyer may not be able to discharge his/her duties properly if, for example, one accused incriminates another accused or a different accused tells a different versions of events. These factors severely limit the right of accused to a defence.

In the cases of General Prosecutor v. Zafal and others (Case Number 47/2003) and Public Prosecutor v. Domingos Ximenes and three others (Case Number 131/2002), only one public defender represented all the accused in this case.

**Comment:** Would be beneficial to know how many defendants were represented by the same lawyer

With the limited resources as well as the actual failure to comply with their obligations to their clients, it is important to ensure that public defenders are subject to periodic evaluations and performance review. In addition it is important to ensure that public defenders' conduct is analysed against the Code of Conduct and that disciplinary proceedings take place where appropriate.

### 8.3 Mentoring Programme

The mentoring programme with public defenders has continued during this report's monitoring period with the engagement of three mentors (two from Brazil and one from

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<sup>89</sup> JSMP is aware of the problems of appointing another public defender, who does not have a good knowledge of the case, to attend a hearing when another public defender is prevented from attending. The substitution of public defenders should be done in relation to certain proceedings and hearings in order not to impact on the right of accused to have a proper defence. For example, replacement may be appropriate in hearings where the decision is read by the judge and other instances where a thorough prior knowledge of the case is not essential.



Cape Verde). Their work remained similar to the work of previous mentors which is basically to provide individual mentoring following the lines of a private tutorship.

Two main projects were initiated during this monitoring period: internal training and regular visits to prisons.

Mentors are currently developing training sessions to public defenders on a bi-weekly basis. The area of training varies, and has included, for example, areas such as basic principles of criminal law and human rights.

For a long time public defenders were criticised that they only rarely visited their clients in prisons. The establishment of monthly visits to prisons is an attempt to fill this gap. The visits started in July 2003 and their aim is to conduct one visit per month to each of the prisons in East Timor. During the visits, public defenders are to meet with their clients in prisons and discuss the present status of their cases. During some visits, the public defenders also developed seminar sessions with the objective of making prisoners aware of their rights.<sup>90</sup> In order to be effective, this kind of initiative demands basic resources, preparation from public defenders and an effective case management system. It is then important to, besides developing a roster of public defenders to go to prisons, to ensure that time is allocated for preparation before the visits.

Similar language barriers highlighted in the previous report<sup>91</sup> are still a current challenge, in JSMP's view. JSMP acknowledges that there has been an important effort on the part of the international mentors to improve their language skills in order to be able to effectively communicate with public defenders. However, JSMP is aware that currently none of the mentors are able to provide mentoring on documents written in Bahasa Indonesia or to monitor hearings that are conducted in Bahasa Indonesia.

Another issue that JSMP would like to highlight is the fact that mentoring only covers criminal cases, excluding civil matters. In JSMP's view it is important to provide public defenders with as wide as possible mentoring in order to develop the sustainability of their skills. If the programme is to be extended, it is important to ensure that international mentors have experience and knowledge of the law applicable in civil matters in East Timor.

During its monitoring period, JSMP noticed the presence of international mentors in the hearings on very few occasions. JSMP is aware that the nature of the relationship between international mentors and public defenders might mean that public defenders should, ideally, invite mentors to attend hearings where they are appearing. However, JSMP believes that the importance of observing in practice the conduct of the hearings, in order to both identify areas in need of mentoring and to evaluate the effectiveness of the previously mentored areas, should not be sidelined due to issues such as poor communication. JSMP is of the opinion that international mentors should openly discuss

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<sup>90</sup> One seminar session that was conducted with prisoners in Becora dealt with the issue of conditional release once two thirds of the sentence has been served.

<sup>91</sup> See JSMP Interim Report on the Dili District Court, April 2003, p. 46.

with public defenders this issue in order to explain the importance of mentors' presence in Court for effective mentoring. Alternatively, the management of the Office of the Public Defenders could motivate or direct public defenders to request, on a regular basis, the presence of mentors at hearings.

JSMP recommends that:

1. *The Ministry of Justice consider recruiting more public defenders in order to help minimize current caseloads in the Office of the Public Defender;*
2. *Public defenders should be subject to periodic review of their performance and case management skills using the Public Defender Code of Conduct as a benchmark for performance evaluation;*
3. *The current temporary administrative staff in the Office of the Public Defender be appointed as permanent staff in order to provide stability to the administration of the Office of the Public Defenders;*
4. *The management of the Office of the Public Defenders should develop policies for effectively dealing with absences of public defenders from work to ensure that absences in court hearings are minimised and informed in a timely manner to the court. JSMP suggests that these might include a roster system of other public defenders attending court for the absent lawyer where a prior knowledge of the matter is not essential. A system of notifying the court of expected absences prior to the hearing should be implemented in cases where another public defender cannot replace the absent lawyer;*
5. *A director be formally appointed to the Office of the Public Defenders;*
6. *A detailed plan be developed for the mentoring programme to guarantee a proper and efficient coordination between mentors employed by different organisations and in order to guarantee sustainability of initiatives recently developed;*
7. *International mentors be present during the hearings of public defenders on a more regular basis in order to identify areas of need and to evaluate the effectiveness of previously mentored skills; and*
8. *The mentoring programme be expanded to include mentoring in civil matters.*

## 9 COURT OF APPEAL AND DILI DISTRICT COURT

### 9.1 The right to appeal and the appeal procedure

The right to appeal is a central component of the right of the accused to a fair trial. Key international human rights instruments guarantee that everyone convicted of a criminal offence has the right to have their conviction and sentence reviewed by a higher tribunal. Independent of international human rights standards, the right to appeal is also a desirable aspect of any legal system - and particularly a legal system at a nascent stage which lacks an experienced judiciary - as the process of judicial review by a superior court considers and ultimately reinforces the quality of judicial decision making at the first instance. Section 40 of the Regulation established that the Court has jurisdiction to hear appeals of decisions rendered by any district court in East Timor, and such other matters as are provided for by legislation. No other legislation has widened the Court's jurisdiction.

Comment: Insert footnote citing conventions etc

In East Timor, the Constitution establishes two levels of appeal, namely the Court of Appeal and the Supreme Court of Justice. Due to the lack of human resources to constitute the Supreme Court of Justice, the Court of Appeal has been given the competence to exercise the tasks of the Supreme Court of Justice in terms of the East Timorese Constitution<sup>92</sup> and UNTAET Regulation 2000/11.<sup>93</sup>

Even being the only channel for appeals in East Timor, the Court of Appeal was not functioning for a period of almost 18 months from October 2001 until July 2003. The Court was unable to sit because one of the judges had left the country, the requisite panel of 3 judges could not be composed.<sup>94</sup>

With respect to appeals from final decisions, a party may appeal to the Court of Appeal from a decision of a district court on the following grounds:<sup>95</sup>

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

The Regulation<sup>96</sup> stipulates a time-limit of 10 days from the time of release of the decision of the court of first instance to lodge the appeal with the Court of Appeal. If the time limit has passed it is presumed that the parties have waived their right to appeal. A written appeal statement, a document which basically includes the arguments for the

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<sup>92</sup> Section 164(2) provides that: "Until such a time as the Supreme Court of Justice is established and starts its functions all powers conferred to it by the Constitution shall be exercised by the highest judicial instance of the judicial organization existing in East Timor.

<sup>93</sup> See Articles 4 and 14 UNTAET Regulation 2000/11.

<sup>94</sup> For more information see JSMP Report: The Right to Appeal in East Timor, October 2002.

<sup>95</sup> Section 40.1 of UNTAET Regulation 2001/25.

<sup>96</sup> Section 40 and 41 of Regulation.

appeal, must then be filed with the Court of Appeal within thirty days of the appeal application. The respondent then has the opportunity to respond to the allegations.

JSMP observed that it a common practice in criminal cases for judges of the Dili District Court to ask the parties, once the decision has been given, whether they are satisfied with the decision, which is an indirect question as to whether they will file an appeal. This question may alert the accused to the right to an appeal, however in JSMP's view, the greater danger is that such a question will intimidate defence counsel to agree with the both the judge and the decision. Of greatest concern is that defence counsel may be reluctant to file an appeal after indicating to the judge that they were satisfied with the decision. JSMP observed that in most cases the defence council said that they were satisfied with the decision when a conviction was recorded. This procedure is not established in the Regulation and in JSMP's knowledge it represents a legacy from the procedures applied in Indonesia.

JSMP believes that none of the parties can take a conscious and certain decision as to whether they will file for appeal at the time the decision is given, especially since instructions from the client will have to be ascertained as to whether s/he now wishes to appeal. Even if the matter has been discussed prior to the handing down of the decision, circumstances may arise which require further consideration on whether an appeal is appropriate. In addition, it is necessary to have access to the written decision of the Court in order to understand the arguments and reasoning followed by the Court. This need is reiterated by the fact that the time for filing an appeal starts counting only once the written decision is released.<sup>97</sup>

The Regulation also provides for the possibility of an interlocutory appeal, which is an appeal that is lodged before a final decision is handed down. Most interlocutory appeals concern decisions of Investigative Judges. These appeals are of a more urgent nature, and are generally treated as such by the Court of Appeal as the case at the District Court is not suspended pending the decision of the Court of Appeal.

## **9.2 Appeals from the Dili District Court**

Between May and August 2003, approximately 19 appeals were filed from decisions of the Dili District Court. Out of these, 11 were related to civil matters and the remaining 8 to criminal matters. Out of the appeals on criminal cases, the vast majority – 6 appeals – related to interlocutory appeals.

In comparing the amount of appeals from Dili District Court between the periods of January to April and May to August, 13 cases were filed for appeal. In contrast, in the same period in 2002, there were only 6 appeals filed.

These numbers may only support the general understanding that once the Court of Appeal started functioning – or there was an expectation that it would soon re-start its

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<sup>97</sup> Section 40.2 UNTAET Regulation 2000/30 as amended by UNTAET Regulation 2001/25.

functions – a higher number of appeals were filed compared to when the Court was not functioning. JSMP understands that in certain situations it might be meaningless to file for an appeal when the Court of Appeal cannot hear the application; this is especially relevant in relation to interlocutory appeals. But other appeals, such as appeals on sentence and conviction could still have a meaningful outcome for the accused once the court re-started. It is therefore important that appeals such as these were filed within the 10 day appeal period if there were errors in the process or decision of the court of first instance. Some decisions on such cases have now been heard by the Court of Appeal even though there was a significant delay.

**Comment:** Need another sentence to explain the status of these appeals or how the closure of the court impacted on the appeal process.

As the Court of Appeal was closed for approximately 18 months, there is a significant backlog of cases. The Court of Appeal decided to prioritise criminal cases and interlocutory appeals. Consequently, during the time that JSMP monitored the Dili District Court, none of the appeals on civil cases were scheduled for hearing or were decided.

### **9.3 Challenges to the right of appeal**

In monitoring both the Dili District Court and the Court of Appeal, JSMP could identify three main obstacles to the overall fulfilment of the right to appeal in East Timor:

- a) lack of attendance of prosecution;
- b) lack of willingness by prosecution and defence to lodge appeals;
- c) languages used in Courts and in the decisions;

#### *9.3.1 Lack of attendance of prosecution*

In a number of the cases before the Court of Appeal, there was an absence of a representative from the public prosecution.

In JSMP's view there are dual reasons behind the absence of the prosecution. First, a lack of organisation and effective case management from the public prosecutor, which has at times been compounded by the lapse of time between the date of the appeal and the hearing. Secondly, the fact that the decision of the Court of Appeal may not have any practical effect in some cases has also contributed to the failure of the prosecution to attend appeal hearings.

#### *9.3.2 Lack of willingness by prosecution and defence to lodge appeals*

It is clear that the number of appeals on cases originating from the Dili District Court have increased in the last few months. However, some issues have led to an apparent unwillingness on the part of public prosecutors and defenders to lodge an appeal.

One main issue requiring attention is an apparent lack of interest from defenders and prosecution in appearing before the Court of Appeal. JSMP has observed that both public

prosecutors and defenders are to some extent disappointed with the way that appeals are being handled by the Court of Appeal.

JSMP gathered information that, in addition to the language issue highlighted below, the parties are of the opinion that the Court of Appeal is not providing the necessary attention to the cases, including study of the case files in preparation for hearings and also an apparent disinterest of judges during the hearings.

Based on its monitoring, JSMP shares a similar view as the one expressed by some of the public defenders and prosecutors. Court of Appeal judges appear to come poorly prepared to the hearings and during the hearings often do not play any active role in asking questions to the parties or clarifying the legal arguments presented. During the Dili District Court monitoring period, another issue of significant importance in the unwillingness of parties to file an appeal was the fact that the Court of Appeal was applying Portuguese, instead of Indonesian, law. Prosecution and defence knew that if a case would go on appeal their arguments based on the Indonesian law would be replaced by the Court of Appeal opinion in applying Portuguese Law. In addition, most defenders and prosecutors are not familiar with Portuguese law.

In the case of Pascoal Mean da Costa (Case Number 11/2002), the Court of Appeal not considered the argument of the prosecution that the Dili District Court had erred when applying Article 195 of the Indonesian Penal Code because Indonesian law was not, in the opinion of the Court the applicable subsidiary law.

Another important issue which impeded the prosecution and defence from lodging an appeal is the general view that their relationship with the judges might be damaged if they bring an appeal against a decision of the judge of first instance. This concern was expressed by both public defenders and prosecutors to JSMP when discussing why they did not appeal in certain matters. JSMP did not receive reciprocal confirmation from the judges that an appeal would damage the relationship between legal council and the judge. However, the mere fact that this perception exists on the part of some prosecutors and defenders raises concerns which should not be overlooked.

The defender's primary duty is to their clients and the clients interests should always remain paramount.<sup>98</sup> Defenders must adhere to this fundamental principle and judges must consequently understand the underlying professional reasons for any appeal.

Likewise, Public Prosecutors have the duty to discharge their functions in an impartial manner, without improper influence from any source.<sup>99</sup> Improper influence would include taking actions based on a judge's perception of the prosecutor as an individual.

<sup>98</sup> Section 1 of Code of Conduct for Public Defenders, UNTAET Regulation 2001/24.

<sup>99</sup> Section 4.2 of UNTAET Regulation 2000/26 provides that: "In exercising the prosecutorial authority as defined in Section 3 of the present regulation, public prosecutors shall act without bias and prejudice and in accordance with their impartial assessment of the facts and their understanding of the applicable law in East Timor, without improper influence, direct and indirect, from any source, whether within or outside the civil administration of East Timor."

Nevertheless, if the Court of Appeal believes that the appeal has no legal grounds, it always has the power to dismiss the appeal and affirm the decision of the judge at first instance. In JSMP's view, this is a sufficient safeguard to ensure that appeals could not be used to target the reputation of judges of the Dili District Court without any valid legal grounds.

### 9.3.3 *Languages used in Court of Appeal*

JSMP understands that the issue of languages in East Timor is a complex one. JSMP is also aware of the financial and personal resources needed to overcome the differences of languages used in Courts. However, the rights of the accused, including the right to an effective appeal, which includes an ability to understand the proceedings, are paramount and should not be diminished by lack of financial and personal resources.

According to Regulation 2000/11 as amended by 2001/25, the working languages of the courts in East Timor are Tetum, Portuguese, Bahasa Indonesia and English.<sup>100</sup> Hearings before the Court of Appeal are held in all these languages, generally dependent on the language spoken by the prosecution and defence.

In appeals from the Dili District Court, the prosecution and the defence often elect to speak Tetum before the Court of Appeal and the President of the Court of Appeal, who is often the only judge actively speaking during the hearings, will in these cases conduct the hearing in Tetum. One of the judges in the Panel in the Court of Appeal does not understand Tetum and translation is not formally provided. If the parties prefer to use Bahasa Indonesia in making their allegations, the only judge in the panel who understands Bahasa will take the lead and then they substitute the President of the Court of Appeal in conducting the hearing.

JSMP has observed a general lack of consideration to the language spoken by the accused. Without adequate translation services, this aspect of the procedure before the Court of Appeal decreases the involvement of the accused in the process.

Another important issue in relation to the use of languages in the Court of Appeal is the language used in its written decisions. The vast majority of the decisions of the Court of Appeal are written in Portuguese. No translation services are in place to provide written decisions in a language that the parties, including the accused, understands.

Generally, the parties appealing do not have the financial resources to translate the decision. In addition, the hearing where the decision is given is often a short hearing where only a general summary of the decision is provided orally. These factors contribute to the alienation of the parties and the accused in the process. JSMP has observed situations where the defenders and prosecutors appear disinterested or do not understand the written decisions of their own case.

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<sup>100</sup> Section 35 of Regulation 2000/11 as amended by 2001/25.

*JSMP recommends that:*

- 1. The President of the Court of Appeal should hold meetings with defence counsel, prosecutors and judges to discuss the parties' perceptions of the consequences of bringing an appeal. JSMP believes that an open discussion on this issue can provide further support to the defence and prosecution in deciding to appeal a decision from the Dili District Court;*
- 2. The President of the Court of Appeal develop a directive to prevent judges from asking whether the parties will appeal at the moment the decision is handed down;*
- 3. Judges engage in an active discussion with legal counsel and prosecution on issues that the court considers relevant to the matter;*
- 4. Efforts should be made to develop the language skills of Court of Appeal judges so that all three judges have knowledge of a language commonly used at District Court level. Until that time, interpreting services should be made available at the hearings;*
- 5. In every hearing, the Court should enquire about the language understood by the appellant/respondent. In cases where s/he does not understand the language used by the Court of Appeal, JSMP recommends that an interpretation be provided; and*
- 6. Translations be made of decisions of the Court of Appeal, which are not in a language commonly used by the Dili District Court, to a language that both parties can understand.*

## **10 COURT ADMINISTRATION**

### **10.1 Public Availability of Information**

The right to a public hearing is specifically recognised in the Regulation which states that trial hearings must be open to the public, except in circumstances where it might harm national security; where the case involves sexual offences or minors; or where the interests of justice would be prejudiced.<sup>101</sup> This right is further elaborated in Article 14(1) of the ICCPR which guarantees the right to a public hearing, including that an accused

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<sup>101</sup> See section 28.2 of UNTAET Regulation 2000/30 as amended by UNTAET Regulation 25/2001. These limited exceptions to the public nature of a trial are in accordance with the international standards mentioned above



person has the right to be tried in public, and that the public has a right to attend criminal trials.<sup>102</sup> The full realisation of this right requires that the public have access to hearings and importantly can readily obtain information about when and where public hearings are to be held,<sup>103</sup> or otherwise are informed of why the hearings are not open to the public. It is important to note that during the period of occupation, East Timor was ruled under a corrupt and inefficient judicial system, and through this period there was no public confidence in the justice system. Thus, there is a need to re-establish public confidence in the new formal judicial system. Toward this aim, mechanisms that can effectively provide information about court proceedings and provide transparency to the judicial system will assist in re-building trust in the system.

### 10.1.1 Trial Schedule

At the Dili District Court there is a white board on public display where the daily hearing schedule is supposed to be posted. During JSMP's pilot monitoring in early 2003 it was observed that the board was only sporadically updated with information. Since then, JSMP has observed that the white board on public display was left blank and the daily trials schedule was never up-dated.

JSMP generally obtained information about what criminal matters were listed by reading the diary kept by the court clerks, which they made available each morning. For information about what civil matters were scheduled, JSMP either inquired orally with the civil registry court clerks, or accessed a diary which contained the schedule for the hearing of civil matters at the Civil Registry Division. Many visitors to the Court appear intimidated, or at least disorientated, by the court environment and would not know who to direct their inquiries to, even if they felt sufficiently confident to do so. JSMP believes that the system of providing and gathering a reliable and accessible source of information as to daily court hearings is a necessary task for the public to understand that the newly-refurbished East Timorese courts are operating publicly. It is therefore important that information about the daily schedule should be clearly displayed on the board provided so that visitors to the court, be they witnesses, accused persons, victims or other interested members of the public, can know immediately what cases are on and when they are scheduled to commence.

Furthermore, the publication of the trial schedule on the public board in front of the court room will assist the already overburdened court clerks as they will not have to deal with questions about the court schedule. JSMP suggests that the public display board should be updated daily at the end of the day. This will help the public participants to know what cases are scheduled for the following day. However, this procedure should in no way detract

<sup>102</sup> See also Article 10 of the Universal Declaration of Human Rights; Articles 64(7)

<sup>103</sup> *Van Meurs v the Netherlands* (215/1986) 60.

JSMP was told by some of the accused's family members that in some circumstances they would have to wait for many hours to attend the trial without certainty of whether or not the trial in their case will be held. This is of particular importance when the witnesses', family of the victim or the accused travelled from the districts out of Dili.

from the necessity for formal notification that is required from the court to the parties and also to the prison authorities regarding the daily transfer of prisoners.

JSMP also believes that there is an urgent need to efficiently publicize the court schedule so that a larger audience could be aware of what matters are scheduled to be before the Court on any particular day. An ideal option to widely publicise such information would be to print the schedule in a daily newspaper. Small steps such as these would help make the court more accessible and genuinely open to the public.

It is also necessary to publicise cases that are not open to the public and to inform the public why they are closed. JSMP observed that in most of the closed cases, the public participants who were present in the courtroom when the judge announced that the hearing was closed were not informed of the reason why the hearing was to be closed. JSMP believes that, such a practice can be inferred from the law and will further enhance the understanding by the public of court proceedings.

#### *10.1.2 Availability of case documents to the public*

Public access to information about cases before the Court, including access to certain important case documents, is important for public and transparent justice. Indictments, for example, set out what charges a particular accused is facing and what facts are relied on to support the charges. Orders and judgements set out any exercise of the Court's power and, in the case of judgements, the basis and reason for that exercise of power.

In the Criminal Division Registry of the Dili District Court, there is a large white board drawn up so that information about each case can be recorded, including the case number, name of the accused, date filed and information about the progress of the case. It has been blank since JSMP's pilot monitoring project and appears to have been blank since 2001. JSMP was informed that the case load is now of such a size that it is no longer practical to maintain the whiteboard. However JSMP suggest that despite the current caseloads there is still a possibility to record information about current cases. An example can be drawn from Baucau District Court, where the board in the Criminal Registry's office only contains the current ongoing case information, while the information on the already-finalized cases are removed from the board. Further, JSMP also observed in Baucau that information on the cases punishable for less than five years are recorded on a separate board to those serious criminal offences. This kind of practice should be implemented in other district courts.

During the pilot monitoring and the current three-months monitoring project at Dili District court, JSMP was given access by the court clerks to criminal court documents on request, provided the files had not been removed temporarily to a Judge's office. Court files for criminal matters contain, amongst other documents, the indictment, statements taken by the police, detention records and the final judgement. The court clerks were very cooperative and endeavoured to answer all questions asked.

As stated in our previous report that although information was made available to JSMP on an ad hoc basis there are no clear guidelines on how and what information should be made available. There is also confusion about what law regulates access to documents<sup>104</sup>. JSMP is aware that there are a limited regulations governing the public access to court documents, specifically transcripts,<sup>105</sup> however JSMP is of the opinion that any documents from cases that were opened to the public should be made available to the public and as a matter of urgency the courts need to establish a formal mechanism regarding how the public can access copies of the court documents. This position is supported by the Regulation<sup>106</sup> which currently guarantees that trial hearings should be open to the public except in certain circumstances. Access to court documents is especially important for the family of the victim and or perpetrator to understand the nature of the case, in which their family member is involved including the court's legal grounds under which their family member is affected.

Comment: Same issue as before

Furthermore, JSMP thinks that the issue of the public information in Dili District Court may be assisted by recruiting a Court Public Information Officer located within the administration of the court. The duties of the Court Public Information Officer would include, among others, the publication of the court schedule and other required court documents such as indictments, judgements and other public court related documents requested by the public or third parties. The position of a Court's Public Information Officer would also help to reduce the workload of the court clerks who are currently being used as source of information, which is outside their duties and capacity. A Public Information Officer could also publicise major decisions and ensure that the community is informed about proceedings before the court, a process that does not occur at present.

Comment: My idea, please check you want this in the report

### 10.1.3 Transcripts of Proceedings

One of the most important aspects of the court process is the availability of the court transcripts. As previously noted by JSMP and continuing to the present no transcript is made of proceedings before the District Court. JSMP observed further that handwritten notes taken by court clerks were very cursory. Judges, Prosecutors and public defenders made some notes for their own purposes but by no means record all, or even a significant number, of questions and answers asked and answered during witness testimony. This is contrary to Section 26.1 of UNTAET Regulation 2000/11 which states that:

The court shall ensure that, in each hearing by a judge or panel of judges, written or recorded notes of the proceedings are taken and made available,

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<sup>104</sup> See Interim Dili District Report for discussion on Indonesian law provisions for access to documents. See section 17 Indonesian Law No 13 of 1965- which appear to bar the general public access to the court documents by which it precisely stated that the prosecutor/plaintiff, accused/defendant and legal counsel may study case files held in the registry and make excerpts as required within the hours set by the head of the court.

<sup>105</sup> Section 26.2 of UNTAET Regulation 2000/11 as amended by UNTAET Regulation 2001/25

<sup>106</sup> Section 28 of the Regulation.

on request, to all parties to the proceedings, including their legal counsel.<sup>107</sup>

In addition this approach does not comply with the Transitional Rules of Criminal Procedure which state that:

The court shall make a record of all the proceedings. It shall contain:

- (a) the time, date and place of the hearing;
- (b) identity of judges, parties, witnesses, experts and interpreters, if any;
- (c) a shorthand, stenographic or audio recording of the proceedings. Recorded media shall be used as necessary during further proceedings to produce transcripts and otherwise facilitate the functions of reviewing authorities. Recorded media shall be preserved until the later of
  - (i) six months following the conclusion of all appeals or expiration of the time within which an appeal may be taken; or
  - (ii) six months following the full release of the accused from post-trial confinement;
- (d) any matter that the court so orders or the parties request to be recorded; and
- (e) the decision of the court and, in case of conviction, the penalties.<sup>108</sup>

A transcript of proceedings is essential for the judges and parties to review the evidence and arguments presented at trial, both for the purposes of the trial itself and also for the purposes of any appeal. A clear example on the importance of the court transcript could be drawn from the current departure of the judges to Portugal, which demands other judges take over cases. This means that without accurate transcripts the Court is unable to undertake any sophisticated or comprehensive evaluation of oral testimony. Instead the Court is forced to rely on general impressions or written statements included on the file but not actually admitted into evidence.<sup>109</sup> In addition, as JSMP has pointed out in previous reports,<sup>110</sup> an important safeguard for a fair trial is the right to appeal to ensure judicial scrutiny of a court's decision at a higher level. This is recognised in Article 14(5) of the ICCPR which states that "[e]veryone convicted of a crime shall have the right to his conviction and sentence being reviewed by a higher tribunal according to law".<sup>111</sup> If the reasoning or outcome in the decision of the court at first instance is

<sup>107</sup> Section 26.1 of UNTAET Regulation 2000/11 as amended by Regulation 2001/25.

<sup>108</sup> Section 31 of the Regulation.

<sup>109</sup> Section 36.3 of the Regulation provides that witness statements may be admitted into evidence in certain specified circumstances, such as when the witness has died before trial. Section 36.4 provides that witness statements may be used to refresh the memory and where his or her memory cannot be refreshed prior statements cannot be used as substantive evidence. Outside these specific exceptions it appears that witness statement are not intended to have any evidentiary value.

<sup>110</sup> Right to Appeal in East Timor – JSMP Thematic Report 2, October 2002; Justice in Practice – JSMP Thematic Report 1, November 2001.

<sup>111</sup> See also Article 2 of Protocol 7 of the *European Convention on Human Rights*; Article 8(2) (h) of the *American Convention on Human Rights*.

challenged, an accurate transcript is often an important basis upon which the appeal court is able to assess the basis of the challenge.<sup>112</sup>

## 10.2 Delays

Article 14(3) (c) of the ICCPR guarantees the right to a trial “without undue delay”. The UN Human Rights Committee has noted that:

This guarantee relates not only to the time by which a trial should commence, but also the time by which it should end and judgement be rendered: all stages must take place “without undue delay”. To make this right effective, a procedure must be available in order to ensure that the trial will proceed “without undue delay”, both in first instance and on appeal.<sup>113</sup>

What may be considered “undue delay” will depend on the particular circumstances of the case. The progress of cases through the Dili District Court is not uniform. As was the situation in our previous report, there are still cases from the latter half of 2002 which have already been tried to completion, while other cases from early 2001 involving charges of the same gravity have not yet been finalised. Generally this difference cannot be attributed to the varying complexity of the cases. Delays are caused by recurring postponements which impact differently, and largely randomly, on different cases.

During JSMP’s pilot monitoring in the month of November 2002, there were more hearings which were postponed than hearings which proceeded according to schedule. JSMP has observed some positive changes in this regard. During the start of the current monitoring period it was observed that almost 75% of the trial hearings scheduled were able to proceed. This situation however was no longer maintained following the departure of judges for one year judicial training in Portugal on 16 July 2003.<sup>114</sup> The judicial training for judges in Portugal is a positive step towards the development of the judges’ knowledge and experience, however, the judges’ departure impacts not only on the slow pace of the court process and increases the number of pending cases, but has also led to the failure of the court to meet some of the legal provisions provided by the law<sup>115</sup>.

**Comment:** Is there an example of this?

JSMP observed that the reason for postponement was generally the absence of one or more key players.<sup>116</sup> Often the Court did not convene to explain why a listed hearing had

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<sup>112</sup> See Chapter on Administrative Support for the Dili District Court for more information on the resource available for the Dili District Court Clerks

<sup>113</sup> UN Human Rights Committee General Comment 13, 13 April 1984, at paragraph 10.

<sup>114</sup> Dili District Court judges went for judicial training in Portugal were former Judge Administrator Aderito Tilman, Judge Edite Palmira dos Reis and an Investigating Judge Constancio Barros Basmeri

<sup>115</sup> See section 6.3(f) of UNTAET Regulation 2000/30 as amended by UNTAET Regulation 25/2001. Also Article 14.(c) of ICCPR. See for more information the Chapter on Judges for more information on the training of judges in Portugal.

<sup>116</sup> See section on judges for examples of cases in judges were absent.

to be postponed. As a result, there was often no court record generated by a court clerk which noted, for the benefit of the case file, why a particular hearing did not proceed. JSMP often had to seek unofficial oral information about reasons for postponement from court clerks and other court actors. It was further observed that a handful of cases were postponed due to the failure of the witnesses to appear before the court. JSMP was told that it was difficult for the witnesses outside Dili District to appear before the court due to their financial constraint. Some of the witnesses summoned by the court live in isolated suburbs and it is not possible for them to access the transport facility. In addition, JSMP observed that the lack of the electricity has caused further postponements in Dili District Court. For example JSMP observed a case which was postponed due to the inability of the judge to print out his judgement due to a power blackout.<sup>117</sup> JSMP therefore suggests that the court should hold a hearing to announce such postponements. This will allow the court clerks to generate formal court records, which will further be made available to the parties involved in the case to explain the reason for postponement.

Comment: Can we explain what the transport facility is?

### 10.3 Administrative Support to the Dili District Court

#### 10.3.1 Resources available to the judges

During the transitional period, UNTAET was given responsibility to provide the necessary financial and technical support to the courts in East Timor.<sup>118</sup> This crucial responsibility was to be implemented by the independent government of East Timor following 20 May 2002, the date where East Timor was internationally recognized as a new independent and democratic country. One of the fundamental aspects towards the development of justice system is the availability of resources, both material and human, to enable the judiciary to properly perform its functions. JSMP observed that the lack of adequate resources in the Dili District Court is particularly acute. For example, insufficient printers for the judges and the court registry staff as well as inadequate communication facilities is one of major factors inhibiting the effectiveness of the Dili District Court.

JSMP observed that all the judges in Dili District court have a portable computer, however there are only two printers available for five judges. One of the printers is used by the Judge Administrator while the other printer is used by two judges who share the same room. JSMP was told that the other two judges who do not have printers take their documents including their case decisions to the criminal or civil registry division for printing. In this way, their decision might be viewed by other people before it is released raising questions impartiality and confidentiality.<sup>119</sup> JSMP further observed that there is an

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<sup>117</sup> Criminal Case no 10/2003 of Public Prosecutor v Fransisco Alves. For more information, see Dili District Court weekly summary on JSMP's website at: [www.jsmp.minihub.org](http://www.jsmp.minihub.org)

<sup>118</sup> Section 34 of UNTAET Regulation 2000/11 as amended by UNTAET regulation 2001/25

<sup>119</sup> Section 25.4 of Regulation 11/2000 as amended by Regulation 2001/25 states that the deliberation of the judge or panel of judges shall remain confidential.

urgent need to provide an experienced Computer Technician who could help with the virus updating and other computer problems in Dili District Court.

Furthermore, there is only one landline available for Dili District Court. It was observed that the landline that was available at the time JSMP conducted its observation was in the Criminal Registry Division<sup>120</sup>. This means that the judges are required to come down stairs to use the landline and have to pass through a public waiting area. As JSMP had previously noted in its Interim Dili District Court Report, this interferes with the need for the judges to project an appearance of independence in front of the public. However JSMP thinks that this problem will only be solved if the judges are sufficiently equipped with the necessary materials such as phone lines in each of judges rooms, computers with portable printers and other basic equipment. These are the fundamental materials required for the judges to effectively carry out their daily duties.

**Comment:** Need to explicitly state how mixing with public affects appearance of independence

In addition, JSMP observed that another problem is the lack of the transportation facilities in Dili District Court. JSMP was told that since their initial appointment in early 2000, the judges were only provided with two Tata Sumo vehicles and at least three motorbikes.<sup>121</sup> JSMP believes that the current resource situation may affect the effectiveness of the court process. Providing personal transportation each judge is important as a matter of providing sufficient incentives to judges and as a security precaution. The provision of sufficient incentives to the judges will help not only to the improvement of the judges' welfare and the prevention of possible corruption in the body of the judiciary, but it will further encourage future East Timorese lawyers to become judges and more importantly to be able to select future qualified judges. Thus it is imperative that keen attention be given to the courts including providing the already-identified basic materials as matter of urgency.

**Comment:** This para needs a bit of work. The concepts of transport to perform the functions of the court and transport as an incentive to become a judge and corruption prevention (?) seem a bit confused

Further, JSMP observed that there is a possible lack of security for judges in Dili District Court<sup>122</sup>. For example, where a judge has to ride a motorbike or take communal transport to their workplace or in a situation where the judges line up, amongst other public servants who appear before the court, to collect their monthly salary in the Central Payment Office. This kind of practice may allow threats to the security of judges as the current system creates a situation where the judges are demanded to frequently appear in public areas. Thus JSMP is of the opinion that the current system should be re-organized in order to reduce the judges' appearance from the public areas both for their security and the impression of independence. This is also a requirement of the law that the judges should be treated with deference by his or her function<sup>123</sup>.

<sup>120</sup> JSMP noticed in October 2003 that another landline is being fixed in the office of court administrator.

<sup>121</sup> Currently there are twelve judges for Dili District court, three investigating judges, two judges sitting on the Special Panel for Serious Crimes Cases and five judges sitting in the trials of ordinary crimes cases.

<sup>122</sup> Section 40(d) of Statutes of Judicial Magistrate Law states that a judge in full exercise of his or her function shall be entitled to special protection for himself or herself, his or her spouse, descendants and property, whenever plausible reasons of security so required

<sup>123</sup> Section 40(a) of Statutes of Judicial Magistrate Law.

### *10.3.2 Research facilities*

The current judges are part of the first judicial appointment involving East Timorese lawyers. None of the current judges sitting in the Dili District Court have practiced or appeared in court during the Indonesian occupation. It is therefore of paramount importance to provide them with the necessary support to assist them to improve their knowledge and experience, especially as the judges need to apply many laws that they did not study at university. JSMP observed that there is currently no research facilities available to judges at Dili District Court.

One of the easiest ways to conduct research is through internet access. However, JSMP observed that the judges at Dili District Court and other district courts still do not have access to the internet. As a result, JSMP was told by one of the judges that it was not possible for the judges to conduct legal research through the internet. This also means that the judges will be hampered in learning jurisprudence on cases that are similar to those they are hearing.

Furthermore, JSMP observed that there is currently no court library at Dili District Court. JSMP is aware that there is a judicial library located in the Centre of Judicial Formation, however it was observed that the judges did not frequently visit the library due to their high workloads in the court. One of the possible options is the creation of an accessible and functioning library within the court building. JSMP observed that there is a small room at Dili District Court that was said to have been used as court library during Indonesian occupation, but it has not been functioning since Indonesia pulled out of East Timor. JSMP was informed by the court administrator that there are a small number of books which have been donated to Dili District Court, however the Court library was not functioning due to the lack of staff trained librarians. Therefore a well-trained court librarian is needed as matter of urgency in order to maintain the court library and to assist judges with any research needs. Another option is the appointment of a research assistant or judge's associate, selected from recent law graduates and/or final year law students, to assist judges in conducting legal research. Such a system may be beneficial both for judges and the associates and/or research assistants to become familiar with the system, and to assist them in pursuing their future legal careers.

Another considerable concern in respect to the resources is the situation under which the judges carry out their daily work. Both judges at the Dili District Court, except the judge administrator, currently share one medium-sized office. The condition of the room is worsened by the absence of air conditioning. This creates an environment that is not conducive for the judges to do their daily work. JSMP believes that if this unconducive work environment continues, it would certainly influence the effectiveness and productivity of judges.



## 10.4 The Registry and Court Clerks

### 10.4.1 Current status of Dili District Court registry staff

Every court in East Timor shall have a registry which is responsible for the receipt of the documents that are filed with the court, the organization and the security of the court documents, including any other function as are permitted by UNTAET regulation or directive.<sup>124</sup>

Comment: Quote this?

Currently, there are 13 registry staff working in Dili District Court. They include two court registry staff for Special Panel for Serious Crimes Cases, one for the investigative judges, while Civil and Criminal Registry Division have eight registry staff. It was observed that a senior administrative officer who is known as Court Administrator supervises the court registry and staff. The Regulation creates a division between court staff and registry staff. The Regulation provides that:

Each court in East Timor shall have qualified staff as may be required for the proper functioning of the court and the discharge of the responsibility of the judges', and that each individual judge or panel of judges shall be assisted during the proceedings by such court staff as maybe necessary.<sup>125</sup>

Comment: Meaning of last sentence unclear, could this be resolved by quoting the provision?

However, in practice, there is no such court staff currently employed at Dili District Court. JSMP observed that registry staff perform both roles including bringing court notification to the prisons or to those conditionally released, which according to a senior court registry was the duty of the court staff.

Furthermore, registry staff also informed JSMP that although there is division on the legal provisions, there has never been any court staff recruited since the initial establishment of the court. It was also explained that during the Indonesian occupation, there were staff separately recruited with specific tasks, including registration of cases, and the delivery of the court notification and filing system. While the court clerks, on the other hand, were mainly tasked with assisting judges in the courtroom which includes making court transcripts. JSMP further observed that sometimes the court notes of proceedings are not typed after the hearing due to, among other factors, the lack of resources available to the Dili District Court registry staff.<sup>126</sup>

The current situation of the registry staff in Dili District Courts deserves continued attention. JSMP was informed that there has not been any formal training to the court registry staff. It was said that although there were a few training sessions provided by UNDP, the training was conducted on an ad hoc basis and did not fulfil actual needs of the court registry staff. During the monitoring period at Dili District Court, JSMP

<sup>124</sup> Section 21.1 and 21.2 of UNTAET Regulation 2000/11 as amended by UNTAET Regulation 25/2001

<sup>125</sup> Section 22.1&2 of UNTAET Regulation 2000/11 as amended by UNTAET Regulation 2001/25

<sup>126</sup> See further information on section 8.2.b about Administrative support to the court registry staff

identified numerous areas where training is needed by the court registry staff as a matter of priority. They include, among others, training on case management and the court database, both in terms of the current manual system and potentially a computer system in the future. At the moment the court registry staff still keep all the court documents in a file that contains almost all of the court information.

While the court database is drawn up in the white board in each registry office in Dili District Court, JSMP was told that the current system would no longer be maintained, for example the white board for incoming cases at Dili District Court was no longer used as the number of the cases continue to increase. JSMP was also informed that there is no computerised case database at the Dili District Court. This type of training is essential not only to assist the work of court registry staff clerks but also to enable them to perform their duties and responsibilities more professionally. Furthermore, the requirement for court registry staff to have legal and administrative skills is a pre-requisite provided by the law.<sup>127</sup>

JSMP acknowledges that most court registry staff have had experience from their long employment with the courts during the period of the Indonesian occupation. It was observed, however, that future legal training is still needed for the staff to be familiar with the newly passed East Timorese laws and regulations.

#### *10.4.2 Administrative equipment for the court registry staff*

The struggling situation of Dili District Court Registry is exacerbated by the lack of the administrative support to the court registry staff. To date there are four motorbikes for 13 court registry staff currently working in Dili District Court. JSMP was told that lack of transportation facilities for the court registry staff has constantly hampered their work. One of the motorbikes is used by two court registry staff at Special Panel Court of Dili District, this makes it very difficult for the court registry staff to work effectively. For example, staff often have to deliver court notification to the parties including to the prisons and other districts out of Dili. This situation may result in possible danger both for the security of the court clerks and court documents in the wet session. It is therefore recommended as a matter of urgency to provide a vehicle for the registry unit that can be used for the delivery of court notifications.

As previously mentioned, there are four court registry staff in each registry unit<sup>128</sup> However, each unit is only provided with two computers and a printer. This sometimes hampered the work of the court clerks in making their court notes, where they are to help others to type their notes from the hearings. JSMP therefore suggests that at least one

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<sup>127</sup> Section 21.3 of UNTAET Regulation 2000/11 as amended by UNTAET Regulation 2001/25

<sup>128</sup> Currently there are two Registry Unit at Dili District Court known as Civil Registry Unit and Criminal Registry Unit. Each of the Registry Unit is assisted by four court clerks. Each of the Registry Unit has two desktop computers and one printer. There is no telephone line at Civil Registry Unit, while the only-one telephone line fixed in the Criminal Registry Unit is regarded as central court phone which is used by every parties in Dili District Court including Judges, Prosecutor, Public Defenders, Court Staff and private lawyers and the police officers.

computer should be installed in each of the courtrooms for the court clerks to start making more detailed court transcripts in a timely manner. Training is also required to assist the court clerks to record the transcript. An additional computer and printer in each of the registry units would be ideal.

#### *10.4.3 Interpreter and translator services in Dili District Court*

Section 23 of UNTAET Regulation 2000/11 as amended by UNTAET Regulation 2001/25 states that; ‘the court shall provide translation and interpretation services in every case where a party to proceedings, or a judge, or a witness, or expert witness does not sufficiently speak or understand the language spoken in the court’. Although the majority of the people who appeared before the Dili District Court speak either Tetum or Bahasa Indonesia, JSMP observed that there are also some people appeared before the court who only speak English or Indonesian.

JSMP observed that currently there are only two translators who provide both translation services and interpretation in the courtroom. The translators at Dili District Court are employed by UNDP. The translator is required to provide translation services for court documents including judgements for both criminal and civil cases. It was observed that due to the absence of sufficient numbers of court translators and court interpreters, in some cases judges had to do the translation for the parties who appeared before the court.<sup>129</sup> Furthermore, JSMP observed that if a defendant only speaks an East Timorese indigenous dialect, the court will ask one of the court clerks who is able to speak the respective dialect to do the translation.

Despite the fact that the Constitution provides that the official language of East Timor is Tetum and Portuguese,<sup>130</sup> JSMP believes that this should not challenge the need to continue to provide adequate court interpreters and translators to safeguard the rights of the accused. It is therefore crucial to provide adequate trained court translators/interpreters who are proficient in the languages used in the court including local dialects. JSMP further identified that there is a need to provide systematic training specialising in criminal and legal terminology to the current and future court translators/interpreters.

*JSMP recommends that:*

- 1. The noticeboard at the Dili District Court be updated with the daily court schedule every day as a matter of top priority. Every afternoon, the following*

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<sup>129</sup>For example in a criminal case, which involved three Indonesian nationals who did not speak Tetum, Criminal case number 47/2003. JSMP observed that the judge in this case made translation of the proceedings following the absence of the court interpreter or translation. For further information please see Dili District Court weekly summary on JSMP website at [www.jsmp.minihub.org](http://www.jsmp.minihub.org)

<sup>130</sup> Section 15.1 of the Constitution of East Timor.

*day's court schedule should be distributed to newspapers so that it may be published for a wider audience;*

- 2. Consideration be given to the implementation of separate boards, which list the cases that are punishable with less than 5 years detention from the more serious criminal cases. In addition, a separate board for the list of expedited trial hearings would be an ideal. This system would inform the public about the category of crimes listed before the court;*
- 3. There is a need to establish, as a matter of urgency, a clear mechanism for the public to access publicly available court documents, such as indictments, judgements and court orders;*
- 4. A Public Information Officer be located within the Court Administration in order to deal with the specific issue of public access to the court;*
- 5. Legislative amendments should be enacted as a matter of priority in order to provide the public access to court documents. Corresponding formal procedures be established for public access to documents;*
- 6. Clear directives be issued and supervised regarding the need for transcripts of proceedings to be taken. Training and facilities should be provided to allow transcripts and recordings of trials to be taken at the Dili District Court;*
- 7. The current ad-hoc system of court reporting be changed immediately by providing specific training and directives on how and when to make a detailed court transcript,;*
- 8. Each of the judges should be provided with basic work equipment as a matter of top priority. Such equipment should include portable printers and computers in order for judges to work more effectively. In addition, judges should also be provided with sufficient transportation facilities;*
- 9. There should be at least one landline fixed in each of the judges' rooms in order to guarantee the security of the judges and avoid judges' appearance in public places and public galleries. In addition, arrangements should be made to allow judges not to gather with other public servants to collect their monthly salary;*
- 10. The judges should be provided with Internet Access as a matter of urgency in order to assist them to conduct legal research. Furthermore, there is a need for a court library with a trained and professional court librarian who could assist judges by providing identified resources;*
- 11. A temporarily renewable appointment of judge's research assistant and/or associate would be an ideal option in order to assist judges conducting research on legal-related matters;*

- 12. There is a need to recruit more trained and professional court staff, including additional court clerks, in order to assist the current court registry staff with the heavy workload;*
- 13. There should be further trainings provided to the court clerks particularly on the creation of a manual and computer based case-database system. This should include systematic legal training for the court clerks and the court staff;*
- 14. There should be a vehicle provided to the Registry Unit of Dili District Court as a matter of urgency including additional motorbikes, printers and computers; and*
- 15. At least four additional court translator/interpreters should be recruited and these translators/interpreters should also have local language proficiency. These translators/interpreters should be provided with necessary support and specialised training in legal terminology.*