



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

**JUSTICE IN PRACTICE:  
HUMAN RIGHTS IN COURT ADMINISTRATION**

JSMP Thematic Report 1

Dili, East Timor  
November 2001

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

*Judicial System Monitoring Programme  
1/1a Rua do Mozambique, Farol, Dili  
Postal address: PO Box 340, Dili, East Timor VIA Darwin, Australia  
Tel/Fax: (670) 390 323 883  
Mobile: (61) 419 366 404  
Email: [info@jsmp.minihub.org](mailto:info@jsmp.minihub.org)*

# CONTENTS

<b>EXECUTIVE SUMMARY .....</b>	<b>1</b>
<b>1 INTRODUCTION.....</b>	<b>2</b>
1.1 Background .....	2
1.2 Methodology .....	3
1.2.1 Judicial System Monitoring Programme .....	3
1.2.2 Assessment criteria .....	4
1.2.3 Scope of the report .....	5
<b>2 COURT ADMINISTRATION.....</b>	<b>6</b>
2.1 The importance of court administration.....	6
2.2 The administrative structure of the Special Panels .....	7
2.2.1 Judges as administrators.....	8
2.2.2 Registry and court staff.....	8
<b>3 SPECIFIC AREAS OF CONCERN.....</b>	<b>9</b>
3.1 Judicial resources .....	9
3.1.1 Research facilities .....	10
3.1.2 Material resources.....	10
3.1.3 Administrative support.....	11
3.1.4 Resource mobilization.....	11
3.2 The right to trial without undue delay.....	12
3.2.1 Liaison with prison authorities and CIVPOL .....	13
3.2.2 Management of the Special Panels .....	14
3.3 The right to a public hearing .....	16
3.3.1 Public access to hearings .....	17
3.3.2 Access to information about court proceedings .....	17
3.3.3 Public access to court documents.....	18
3.3.4 Publication of judgments .....	19
3.4 The right to examine witnesses .....	21
3.5 The right to an appeal.....	21
3.6 The right to an interpreter .....	24
3.6.1 Language needs in Special Panel cases.....	24
3.6.2 Shortage of interpreters/translators .....	25
3.6.3 Impact on court proceedings .....	26
3.6.4 Simultaneous interpretation .....	28
<b>4 CONCLUSION .....</b>	<b>28</b>
<b>APPENDIX A.....</b>	<b>30</b>
<b>APPENDIX B .....</b>	<b>32</b>



## EXECUTIVE SUMMARY

This report examines the effectiveness of the administration of the Special Panels for Serious Crimes of the Dili District Court that have been created by the United Nations Transitional Administration in East Timor (UNTAET). These Special Panels are mandated to deal with Serious Crimes committed during the Indonesian occupation, including the campaign of violence in 1999. Their ability to dispense justice in a fair and independent manner is vital for the ongoing reconciliation process. In the past two years, enormous progress has been made in building a system in which international and East Timorese judges sit together to hear these cases. JSMP has consistently observed almost every court hearing before the Special Panels between February and November 2001. Through these observations and discussions with court personnel, it is clear that despite the progress several aspects of the current administrative structures within the courts are impacting adversely on the quality of justice. If left unchecked, these threaten the extent to which the Special Panels for Serious Crimes are able to provide a fair trial.

A functioning court administration is part of the institutional basis of the fundamental right to a fair trial before a competent, independent, and impartial tribunal. Particular elements of this right are currently affected by the lack of an effective administrative structure in the Special Panels. The judges do not have adequate resources, such as research facilities and administrative support, which are the essential tools of their trade. The right to trial without undue delay is jeopardised by poor administrative liaison with external parties as well a lack of organisational planning in the allocation of cases. The right to a public hearing is undermined by access problems, including access to information about the court proceedings. The rights to examine witnesses and to appeal decisions of the Special Panels are hampered by resource constraints that prevent witness expenses being reimbursed and transcripts of hearing being produced. The numbers of interpreters and translators are inadequate for the volume of court hearings and judgments.

The Serious Crimes cases are not the only ones affected by the current situation. These concerns also have broader implications for the building of a sustainable justice system that enjoys the public trust and confidence that is necessary for a society based on the rule of law and respect for human rights. This is the first thematic report to be produced by JSMP and aims to contribute to public debate concerning the present state and future directions of East Timor's justice system by making a series of recommendations for reform. To summarise the recommendations presented here: comprehensive strategic planning, based on a full needs assessment, should be a priority. This should lead to substantial reforms of the court administration, including significantly improved resource mobilisation and coordinated training and mentoring of East Timorese staff. It concludes that without a clear administrative structure, well defined responsibilities and adequate training and technical assistance, East Timor's new justice system and the Special Panels for Serious Crimes will continue to struggle.

## 1 INTRODUCTION

### 1.1 Background

When the United Nations Transitional Administration for East Timor (UNTAET) was established on 25 October 1999 by the UN Security Council it was mandated to “exercise all legislative and executive authority, including the administration of justice.”<sup>1</sup> The task at hand was undisputedly overwhelming and has been well-documented in many reports<sup>2</sup>; court buildings were destroyed, all judges and most other practising lawyers had left the territory and a legal regime no longer existed. UNTAET proceeded to create four District Courts, appointed East Timorese judges, prosecutors and public defenders and put in place a transitional legal system that retained the application of Indonesian law to the extent that it was consistent with international human rights standards and was not replaced by UNTAET regulation.<sup>3</sup> The establishment of a functioning legal system for the transition period and laying the foundations for the future courts of an independent East Timor was not the only pressing issue. There was also the overriding need for justice for crimes committed throughout the period of the Indonesian occupation, including the campaign of violence that engulfed East Timor when the Indonesian military and its militia groups terrorized the civilian population in the lead up to and aftermath of the popular consultation in 1999. Reconciliation and trust in a justice system for the future depended in part on justice for the past.

As a result, in June 2000 UNTAET created special panels of the Dili District Court and the Court of Appeal to deal with genocide, crimes against humanity, war crimes and torture – whenever and wherever they occurred – as well as murder and sexual offences under the Indonesian Penal Code where the offence was committed between 1 January 1999 and 25 October 1999.<sup>4</sup> The first Special Panel commenced operation in January 2001 and the second Panel in November 2001. Each Panel consists of one East Timorese judge and two international judges. Furthermore, a specialised branch of the Public Prosecution Service was created to investigate and prosecute serious crimes. A small public defender service was also established. To date, the General Prosecutor has issued over 30 indictments against more than 50 individuals. 13 serious crimes trials have already taken place, a significant achievement by any standard. In November 2001 there had been 11 convictions, no acquittals and 2 cases were dismissed on procedural or jurisdictional grounds without proceeding to trial. The Court of Appeal has heard two final appeals in serious crimes cases. Of the cases that have been heard so far, all except one have involved charges under the Indonesian Penal Code. The trial of the first crimes against humanity case, the “Los Palos case” took place between July and November 2001.

It is against this remarkable background that this report is set. Any court system stands in need of continuous evaluation and periodic review. The present justice system in East Timor has been introduced by UNTAET with considerable rapidity. The time frames and manner in which the system was established appears to have married design and implementation into a

---

<sup>1</sup> Security Council Resolution 1272/99, 25 October 1999.

<sup>2</sup> See for example the progress reports of the Secretary-General to the Security Council on the Transitional Administration in East Timor, especially that of 24 July 2001; See also Report of the Security Council Mission to East Timor and Indonesia, 20 November 2000; Hansjoerg Strohmeyer “Building a New Judiciary for East Timor: Challenges of a Fledgling Nation” (2000) 11 *Criminal Law Forum*, 259-285; Suzannah Linton “Rising from the Ashes: the Creation of a Viable Criminal Justice System in East Timor” (2001) 25 *Melbourne University Law Review* 122–180.

<sup>3</sup> UNTAET Regulation 1999/1 section 3.

<sup>4</sup> UNTAET Regulation 2000/15 sub-sections 2.1, 2.3 and 2.4. It should be noted that in the original jurisdiction of the Special Panel granted by Regulation 2000/11, torture was subject to the temporal restriction. Although Regulation 2000/15 clarified the position, recent amendments to Regulation 2000/11 have not resolved the inconsistency.

single phase.<sup>5</sup> UNTAET's decision to begin the immediate transfer of formal roles to East Timorese meant that the key court actors were introduced into an emergency court system with minimal training and the effective absence of an operational court administration. In saying this, as stated above, it must be acknowledged that UNTAET was faced in October 1999 with an almost complete absence of existing material resources and local experienced professionals available to it in seeking to establish and develop judicial capacity. The transitional administration did not just have to deal with a damaged social infrastructure, but an entirely destroyed one. It is undeniable that an enormous amount of progress has been made given the circumstances that confronted the mission in late 1999. However, the devastation inherited by UNTAET does not diminish the need for an evaluation to ascertain whether present arrangements constitute a suitable basis upon which to take the justice system in East Timor forward.

## 1.2 Methodology

### 1.2.1 Judicial System Monitoring Programme

The Judicial System Monitoring Programme (JSMP) is a non-government organisation based in Dili, East Timor that monitors the operation of the Special Panels for Serious Crimes. JSMP was set up in April 2001 in response to a need identified by local and international observers for a consistent and credible monitoring presence for the developing justice system that was independent of the United Nations Transitional Administration. JSMP works closely with East Timorese legal and human rights NGOs to contribute to both the developing legal culture within East Timor and the international justice community by providing information and analysis of issues arising from the ongoing process of creating a new justice system. JSMP monitors include an East Timorese human rights worker and international lawyers from both common law and civil law jurisdictions, with international comparative experience in court administration and human rights law. They do not represent the Transitional Administration, any defendant or any other group.

The Special Panels for Serious Crimes have been selected for particular monitoring due to their special role in both the new justice system in East Timor as well as the contribution they make to developments in international justice. Within East Timor, the interest in seeing those who were responsible for atrocities brought to justice is integral to the ongoing process of reconciliation.<sup>6</sup> The high profile nature of the cases before it also mean that the Panels are being viewed as a litmus test of the ability of the new justice system to decide cases impartially and effectively. Furthermore, the success or otherwise of the Special Panels will also directly impact on international initiatives in this area, including the possibility of an international criminal tribunal for East Timor and the future of other hybrid domestic/international justice mechanisms in other post-conflict societies. For each of these reasons, UNTAET will be assessed by the international community and the East Timorese people according to whether it has fulfilled the mandate entrusted to it by the Security

---

<sup>5</sup> Fredrick Egonda-Ntende, "Building a new judiciary in East Timor: The first steps and missteps..." *Commonwealth Judicial Journal*, forthcoming. Judge Egonda-Ntende was a judge of the Court of Appeal of East Timor from its inception until November 2001.

<sup>6</sup> UNTAET Regulation 2001/10 establishes a Commission for Reception, Truth and Reconciliation. The public consultation process that was undertaken prior to drafting this regulation consistently emphasized the need for justice before reconciliation. As a result, Schedule 1 to the Regulation states, "in no circumstances shall a *serious criminal offence* be dealt with in a Community Reconciliation Process"[emphasis in original]. "Serious criminal offence" is defined in section 1(m) to mean an offence as defined in section 10.1 of Regulation 2000/11 and sections 1.3 and 4-9 of Regulation 2000/15.

Council to prosecute the atrocities from 1999 and to set up a sustainable East Timorese justice system.

The findings in this report are drawn from over eight months of observations of the court proceedings before the first Special Panel for Serious Crimes in the Dili District Court. JSMP monitors have been present at almost every proceeding that has come before the Special Panel during this period, including preliminary hearings, trials, disposition of sentences and reading of decisions.<sup>7</sup> Furthermore, these observations have been supplemented by discussions and interviews with a range of individuals involved in the justice system in a professional capacity, including judges, prosecutors, public defenders, court staff and others. As the only independent organization that has consistently monitored the Special Panel for Serious Crimes, JSMP is uniquely placed to draw conclusions that are necessary and appropriate for the system's current stage of development.

### 1.2.2 *Assessment criteria*

Assessing the functioning of a justice system will vary according to the criteria against which the particular system is assessed. Some internationally accepted standards include for example, access to justice, expedition or timeliness of processing cases, equality, fairness or integrity, independence or accountability, and public trust and confidence in the justice system.<sup>8</sup> Although such standards are helpful, in East Timor it is hardly appropriate to compare the functioning of a new system that has been built from scratch with limited resources with that of a well-resourced court system in a developed country. Nevertheless, it is important to identify some basic benchmarks against which to measure the new system's development. The Department of Justice tends to refer to quantitative benchmarks, such as the number of investigators, the number of cases heard or how many indictments have been filed.<sup>9</sup> While these are important markers of *what* the new justice system is doing, they do not provide much insight into the *quality* of the justice being administered. In the context of both UNTAET's mandate and East Timor's history, JSMP believes that is also useful to assess the level of development of the new system on the basis of *qualitative* compliance with international standards that relate to the provision of a fair trial.

There are several reasons for choosing this method of assessment. If the new justice system fails to meet international human rights standards, it will not be able to fulfil its important role in establishing the rule of law and overcoming the legacy of impunity and selective justice that characterized the Indonesian occupation. Furthermore, East Timor has been under UN administration for two years and the UN has agreed to continue to provide significant ongoing assistance after independence.<sup>10</sup> UNTAET has an obligation, pursuant to its mandate, to observe international human rights standards in the course of its work to help build the newest independent nation, including the work of building the judicial system<sup>11</sup>. UNTAET's legacy will be determined according to whether the system it has put in place is

---

<sup>7</sup> For a complete list of cases monitored, see Appendix A to this report. Although JSMP was formally established in April, case monitoring had begun in February 2001.

<sup>8</sup> The United States Commission on Trial Court Performance Standards (1990). These principles have been adapted and applied in courts in the United States, Australia, Singapore and the Netherlands.

<sup>9</sup> See for example "Justice and Serious Crimes" UNTAET Fact Sheet #6, July 2001.

<sup>10</sup> See Progress Report of the Secretary General on the Transitional Administration in East Timor, 18 October 2001 and also Security Council Press Release No 7192, 31 October 2001.

<sup>11</sup> See Section 5.1 of UNTAET Regulation 2000/11 and Section 3 of UNTAET Regulation 1999/1 which states that all public servants in East Timor shall observe internationally recognised standards including relevantly those contained within the International Covenant for Civil and Political Rights (ICCPR) (1966) and the Universal Declaration of Human Rights (UDHR)(1948).



ultimately sustainable for years to come and whether it promotes or undermines the UN's own minimum standards.

The observations detailed in this report indicate that there are still serious deficiencies in the functioning of the court administration, including that of the Special Panels for Serious Crimes. JSMP is concerned that these deficiencies are compromising the quality and fairness of the justice being administered by the new court system, and threaten the enjoyment of international human rights standards that are fundamental to a society based on the rule of law. Section 2 of this report highlights the main elements of a court administration, its role within a fair and effective justice system and some general concerns relating to the current structure of the administration of the Special Panels of the Dili District Court. The final section organises JSMP's observations in areas of specific concern by reference to international fair trial standards and makes recommendations for reform where appropriate.

### **1.2.3 Scope of the report**

Although the Special Panels are the primary focus, many of the observations and recommendations may also apply to the administration of the entire court system. Although there are other aspects of the new judicial system that deserve similar analysis, such as those relating to the applicable legal regime and the structure of the judiciary, these are beyond the scope of this report. Similarly, this report is limited to considering the administrative operation of the Special Panels. It should be noted that for the purposes of this report, the phrase "court administration" is used to mean all aspects of the operations of the Special Panel other than the actual judging of cases. Although there is considerable overlap between the court administration and the administration of both the Office of the Deputy General Prosecutor for Serious Crimes (the Serious Crimes Unit) and the Public Defenders, this report is limited to the Special Panel itself except where there is a direct inter-relationship with issues in these other offices. The same applies to the role of the prison authorities, the UNTAET Civilian Police (CIVPOL) or the Timor Lorosae Police Service (TLPS). These are all integral parts of the legal system in East Timor and have been the subject of other reports.<sup>12</sup> Furthermore, the role of the investigating judge has not been expressly considered in this report. Although many of the administrative issues discussed below also may apply to the investigating judges in each District Court, to date JSMP has not monitored their work sufficiently to make an assessment at this stage.

This report would not have been possible without the assistance and input of many people, particularly judicial personnel and other Department of Justice officers in the Transitional Administration. Similarly, the court officials, staff of the Serious Crimes Unit, the Human Rights Unit of UNTAET and others have facilitated the JSMP monitors in their work. JSMP would like to express its gratitude to these individuals and appreciates the hard work that they are doing and their achievements to date amid difficult circumstances. JSMP offers these recommendations in the spirit of contributing to the development of a sustainable and fair justice system for the people of East Timor.

---

<sup>12</sup> See for example, Anne Marie Devereux, *Strengthening the Judicial Process in East Timor* Issues Paper for the Jesuit Refugee Service, 30 June 2000; Amnesty International, *Justice past, present and future*, Report ASA 57/001/2001, 27 July 2001; Erin Mobekk, *Policing Peace Operations: United Nations Civilian Police in East Timor*, Department of War Studies, Kings College, London, October 2001.

## 2 COURT ADMINISTRATION

### 2.1 The importance of court administration

The right to be tried before a competent, independent and impartial tribunal is the cornerstone of the institutional basis of a fair trial. It is recognized in numerous international instruments, most notably Article 14(1) of the International Covenant on Civil and Political Rights (ICCPR).<sup>13</sup> The transitional court system in East Timor is certainly founded on such a basis, at least in law.<sup>14</sup> Both international and regional standards relating to the independence of the judiciary link this broad, fundamental right with the practical application in a court system, urging that “the organization and administration of justice in every country should be inspired by those principles, and efforts should be undertaken to translate them fully into reality.”<sup>15</sup>

As with any organisation or institution, proper administration of a court system is essential to all aspects of the court’s work. Models of court administrations vary between countries and court systems; however, the responsibility for court administration is increasingly seen as rightly belonging to the judiciary itself.<sup>16</sup> This responsibility may include for example, supervision and control over administrative personnel, preparation of court budgets and maintenance of court buildings. This is an important feature of an independent judiciary, and is sometimes described as the “collective” or “institutional” aspect of judicial independence. While the chief judicial officer therefore often has ultimate responsibility, a chief administrative officer, usually called the Registrar, manages the Registry, which is the administrative centre of a court. Although many of the most obvious administrative tasks are often undertaken by the Registry office, such as the management of case files, the publication of court judgments, and the organization of hearings, the administration of a court encompasses a much broader range of activities than these tasks alone. Adequate administrative support for judges and close liaison between judges and other court personnel are both essential if the judges’ primary business of deciding disputes accordingly to law is to work effectively and fairly. Furthermore, in safeguarding the impartiality and independence of the judiciary, a court administration often serves as an intermediary between the judges themselves and others who interact with the court, from government, to prison officials, to media, the public and the parties who use the courts.

To use just one example, the Registry of the International Criminal Tribunal for the former Yugoslavia is responsible for “the administration and judicial support services of the Tribunal...[including] translation and interpretation of court proceedings, supervising the Detention centre, provision of legal aid to indigent accused and maintaining diplomatic contact with states and their representatives along with all official communications to and from the Tribunal”<sup>17</sup>. The ICTY rules of procedure explicitly state that the Registrar’s function is to support the judges in the performance of their functions and that “[u]nder the

---

<sup>13</sup> See also Article 10 of the Universal Declaration of Human Rights, Article 8(1) and 27(2) of the American Convention on Human Rights, Article XXVI of the American Declaration of the Rights and Duties of Man, Article 6(1) of the European Convention on Human Rights, Articles 7(1) and 26 of the African Charter on Human and Peoples’ Rights, and the Basic Principles on the Independence of the Judiciary

<sup>14</sup> Section 2.1 of UNTAET Regulation 2000/30; although the words “independent and impartial” are omitted, they are an integral aspect of international human rights standards and as such are covered by section 3 of Regulation 1999/1 referred to above in note 11.

<sup>15</sup> See for example the preambles to both the UN Basic Principles on Independence of the Judiciary (1985) and the Lawasia Beijing Statement of Principles of the Independence of the Judiciary (1995); also,

<sup>16</sup> See Shimon Shetreet, “The Challenge of Judicial Independence in the Twenty-First Century”, (2000) 8 *Asia Pacific Law Review* 153.

<sup>17</sup> See the ICTY website at [www.icty.un.org](http://www.icty.un.org).

authority of the President, the Registrar shall be responsible for the administration and servicing of the Tribunal and shall serve as its channel of communication.”<sup>18</sup>

In recognition of the importance of court administration, the UN Human Rights Commission has appealed to governments “to include in their national development plans the administration of justice as an integral part of the development process”.<sup>19</sup> In many situations, it is in fact the court administration that is the backbone of a functioning court system and is therefore instrumental in whether a court system meets international human rights standards.

## 2.2 The administrative structure of the Special Panels

As the Special Panels for Serious Crimes are part of the Dili District Court, they are subject to the same administrative structures that apply to the rest of that court. Initially, a “Presidency” of each District Court, composed of three judges, was given responsibility for each court’s administration, “including the orderly and expeditious discharge of duties”.<sup>20</sup> However, a recent overhaul of the regulation governing the organisation of the courts has seen the administration significantly restructured. The senior judicial officer of all courts in East Timor is now the President of the Court of Appeal who is “responsible for the overall administration of the courts in East Timor.”<sup>21</sup> The regulation also gives the President of the Court of Appeal broad power to decide upon all matters of “administrative practice”.

For each District Court, a new position of Judge Administrator was created in July 2001.<sup>22</sup> The Judge Administrator is now responsible for all administrative matters of that court, subject to the direction and control of the President of the Court of Appeal. A judge from each District Court is to be appointed to this position for a renewable period of one year.<sup>23</sup>

Section 21 of Regulation 2000/11 created a Registry at every court. Each Registry is responsible for the receipt of documents that are filed with the court, organisation and security of court documents, “and for such other functions as are permitted by an UNTAET regulation or directive.” The regulation also notes that the registry staff exercise these responsibilities under the direction of the Judge Administrator *or* the President of the Court of Appeal and that they “shall have legal and administrative skills”.<sup>24</sup>

There is a separate provision that states that “each court in East Timor shall have such qualified staff as may be required for the proper functioning of the court and the discharge of the responsibilities of its judges” and that “each panel of judges shall be assisted during the trial sessions by a member of the court staff.”<sup>25</sup> The court staff also work under the direction of the President of the Court of Appeal, who has the power to move them between courts or roles as deemed necessary for “an equitable distribution of human resources and for work expediency.”<sup>26</sup> Although the regulation makes no mention of it, the senior administrative officer is the somewhat curiously titled “Court Register” who in practice seems to supervise all the registry and court staff at each court.

---

<sup>18</sup> Rule 33, ICTY Rules of Procedure.

<sup>19</sup> UN Human Rights Commission Resolution 2000/39, 20 April 2000, paragraph 4.

<sup>20</sup> Section 17.1 of Regulation 2000/11.

<sup>21</sup> Section 17.1 of Regulation 2000/11 as amended by Regulations 2001/18 and 2001/25.

<sup>22</sup> Section 1.9 of Regulation 2001/18

<sup>23</sup> Section 6A of Regulation 2000/11 as amended by Regulations 2001/18 2001/25.

<sup>24</sup> Sections 21.2 and 21.3 of Regulation 2000/11, emphasis

<sup>25</sup> Section 22 of UNTAET Regulation 2000/11, as amended by UNTAET Regulation 2001/25.

<sup>26</sup> *Ibid.*

Despite the legislative division, there is no real distinction between court staff and registry staff in practice; court clerks perform both roles. Of the team of twelve court clerks for Dili District Court, two are responsible for the separate Serious Crimes Registry office<sup>27</sup>. Their role includes receiving documents filed by the parties, maintaining the serious crimes case files, keeping statistics of the caseload, and maintaining a central schedule of court hearing listings.

### **2.2.1 Judges as administrators**

The creation of the position of Judge Administrator seems to be a positive step to correcting the earlier lack of focus on administrative issues within the courts. While this may be a useful way to ensure that the new East Timorese judges gain an understanding of all aspects of the court operations, it is essential that specialised training in court administration be provided to these first Judge Administrators. Ordinary judicial training and legal training do not equip a judge with the requisite skills and knowledge to run a court administration, particularly given that the new judges have extremely limited experience of court practice themselves.

In any event, it may be questioned whether it is appropriate for the Judge Administrator of the Dili District Court to be responsible for the administration of the Special Panels for Serious Crimes. Different and more complex administrative issues arise, such as the multilingual nature of hearings and the large volume of court documents, particularly in the cases involving multiple defendants on crimes against humanity charges. In reality the Special Panel has always operated somewhat separately from the rest of the Dili District Court. The judges of the Special Panels between themselves attempt to manage most aspects of the administration, including publication of judgments and listing of cases, generally even retaining the court files for the active cases before them.<sup>28</sup> Section 3 of this report examines the major administrative problems facing the Special Panels. It is worth noting that to date, there has been no noticeable improvement in the administration of the Special Panels despite the advent of the new Judge Administrator system. This may be due to the changes in personnel at the Dili District Court, however, the situation should be the subject of careful ongoing monitoring and review.<sup>29</sup>

### **2.2.2 Registry and court staff**

In mid-2000 a Courts Administrator was contracted to the Judicial Affairs Department (as it was then called) from the New Zealand government. Although he set up a business plan and organisational structure for the court administration, he only stayed for three months. It seems that his plans were not continued and the process of developing a court administration system was then stalled until it began again from scratch in February 2001 when the current Court Administrator was appointed. JSMP understands that she has previous experience in court administration training and she has been supervising the capacity building of the court clerks and establishing procedures for each of the courts in East Timor. She is assisted by two international court clerk mentors who are provided as part of UNDP's contribution to

---

<sup>27</sup> There were three clerks but one recently left to study law in Portugal. It is not certain that he will return to the court.

<sup>28</sup> See section 3.1 below for further detail.

<sup>29</sup> Judge Domingos Sarmiento, President of the Dili District Court, was appointed as the first Judge Administrator of that Court but only served in that position for a matter of weeks before being appointed as Vice Minister for Justice in the second transitional government. Judge Aderito Tilman has recently been announced as the new Judge Administrator for Dili District Court.

the development of the justice system; they arrived in April and July 2001 respectively. Although this mentoring and coordination is an extremely positive development, there are still many areas of the court administration that are not yet functional at all. The Court Administrator's task has been hampered by the fact that very few of the East Timorese staff had any prior experience in the area, and furthermore, no legal training. This has been compounded by the fact that court administration staff have reported that judges and prosecutors do not seem to understand the role of court staff and as a result there is a lack of coordination between their work.

Court staff also report that their training to date has been ad hoc and directed only to specific tasks rather than a broader understanding of the roles and responsibilities involved in the administration of the courts. They complain that training materials from foreign court systems have been simply transferred to the current situation without adequate modification and critical assessment. The court clerks recognise the need for more systematic training that focuses on creating sustainable systems and that encourages East Timorese staff to take more responsibility for the range of tasks.

***Recommendation 1:*** *That the administrative structure of the Special Panels for Serious Crimes be monitored and reviewed, including considering whether a separate administrative structure would be more effective.*

***Recommendation 2:*** *That the President of the Court of Appeal, each of the Judge Administrators and the Court Administrator together undertake a systematic assessment of administrative needs, including those relating to further training of staff, and areas of responsibilities.*

***Recommendation 3:*** *That a comprehensive program of specialised training in court administration be provided to the court clerks as well as to the judges appointed as Judge Administrators as part of the judicial training programme.*

### **3 SPECIFIC AREAS OF CONCERN**

#### **3.1 Judicial resources**

International standards relating to an independent judiciary require the governing authority to provide adequate resources to enable the judiciary to properly perform its functions.<sup>30</sup> This is reflected in Section 34 of UNTAET Regulation 2000/11 that states that “[d]uring the transitional period, UNTAET shall provide the necessary financial and technical support to the courts in East Timor.”

However, JSMP monitors have noted certain recurring resource-related problems in the administration of the Special Panels. If left unchecked, these have the potential to directly affect the extent to which the right to a trial before an independent tribunal is enjoyed by those accused appearing before the Panels. According to many court actors and independent observers, it is clear that UNTAET's own legal requirements are not being met. Financial and technical support are stretched to capacity. While this situation is obviously limited by the financial resources available, both through the assessed budget of UNTAET as well as through the Combined Trust Fund for East Timor budget for ETTA, the judges and the court administration should play a significant role in identifying the resource priorities for the judiciary and the courts generally. The international community, through the UN Human

---

<sup>30</sup> See Principle 7 of the UN Basic Principles of Independence of the Judiciary; see also UN General Assembly Resolution 54/163, 23 February 2000.

Rights Commission, has repeatedly invited its members to assist with requests for financial and technical assistance for the strengthening of the administration of justice, particularly in post-conflict situations.<sup>31</sup>

### 3.1.1 *Research facilities*

The lack of legal research assistance is particularly acute. All judges need adequate research facilities but in East Timor the need is exacerbated by lack of experience and the newness of the Serious Crimes jurisdiction. For the East Timorese judges on the Special Panel, this is their first judicial appointment. However, even for the international judges who have served as judges in their home countries, applying international law as contained in UNTAET Regulation 2000/15 is a new experience for them too. This is despite the fact that this same regulation requires that “[i]n the overall composition of the panels due account shall be taken of the experience of the judges in criminal law, international law, including international humanitarian law and human rights law.”<sup>32</sup>

Not a single decision rendered by the Special Panel to date has contained any reference to any international jurisprudence.<sup>33</sup> They are literally breaking new ground with each new decision. One of the major sources of guidance for the Special Panel judges and their Court of Appeal colleagues is the jurisprudence of the ICTY and ICTR, as well as other international law sources such as the work of the International Law Commission and the Preparatory Commissions for the forthcoming International Criminal Court (ICC). The number of judges world-wide who do have experience in such a relatively new field is still small. Yet since the creation of the ICTY, there has been an explosion of interest in the area amongst both academics and practicing lawyers and the judges.

Furthermore, the judges still do not have access to the internet, which is one of the easiest means of providing crucial legal research facilities. At present the judges have to compete for time at UN internet cafes to conduct basic research or to contact international colleagues on matters of law. JSMP notes that the lack of computer facilities and the absence of internet access was cited as a problem in June 2000, over one year ago.<sup>34</sup>

### 3.1.2 *Material resources*

Research facilities are obviously related in part to fundamental material resources such as a court library. A functioning court library, that is accessible to practitioners, public defenders and the judges, still does not exist. Currently there is an ad hoc collection of books that have been donated and are housed in a single bookshelf in a Department of Justice meeting room. When JSMP recently inspected the collection to find that many books were upside down

---

<sup>31</sup> See UN Human Rights Commission Resolution 2000/39, 20 April 2000.

<sup>32</sup> Section 23.2 of Regulation 2000/15. Furthermore, UNTAET Regulation 1999/3 created a Transitional Judicial Services Commission that is to make recommendations to the Transitional Administrator regarding judicial appointments. However, none of the international judges appointed to the Special Panels have gone through this process, raising questions about whether the Special Panels are legally competent. For further discussion see Fredrick Egonda-Ntende, “Building a new judiciary in East Timor: The first steps and missteps...” *Commonwealth Judicial Journal*, above n5.

<sup>33</sup> This was so even in the case of *The Public Prosecutor v Joseph Leki*, in which the Prosecutor and Public Defender both made reference to ICTY and ICTR decisions in their written and oral submissions. However, all decisions rendered to date have been in cases in which the accused has been charged with offences under the Indonesian Penal Code. This situation should therefore change once the first decision in a case involving charges of crimes against humanity is published.

<sup>34</sup> See Annemarie Devereux, “Strengthening the Judicial Process in East Timor”, an Issues Paper prepared for the Jesuit Refugee Service, 30 June 2000, Recommendation 2.

with their spines against the wall. Many of the books are out of date texts from the Australian legal profession in highly specialised areas of law. There were no books on international criminal law, human rights law or basic legal reference texts. Most of the books were in English. A well-trained court librarian is needed who can organize and obtain the necessary materials defined by the needs of the judges themselves.

In terms of other material resources too, the situation of the Special Panel judges is of considerable concern. The three judges who currently form the first Special Panel all share one medium-sized office that contains only two desktop computers and one portable laptop computer. It is not an environment that is conducive to considered and independent judicial reasoning by each of the judges. The computers are not networked to allow efficient information management and sharing of scarce resources such as the one printer. The final electronic versions of judgments are stored on the hard drive of one individual judge only, and the Indonesian translated versions are even more impractically stored, with some on one judge's computer and others with individual translators.

### **3.1.3 *Administrative support***

In terms of technical support, one of the most notable omissions to date is the lack of any support staff for the Special Panel judges in their chambers. Without any legal clerks, the judges must not only conduct all legal research but also the writing, editing and proofreading of judgments themselves. Without any administrative clerk support, the judges must even type and format their own judgments. The production quality of the judgments that have been produced to date reflects these problems.

In court, JSMP monitors have regularly noted the absence of the court clerk. Even when a clerk is present during a hearing, responsibility for the liaising with the other court actors continues to rest with the judges. It is generally the presiding judge who will run around the court building before a hearing trying to determine if all the counsel, accused, and interpreters have arrived and are ready for the hearing. On the regular occasions where the commencement of a hearing is delayed due to the non-presence of one or more of these court actors, it is the judge who comes back to the courtroom and announces the situation to those assembled, including the public. When there are disturbances outside the courtroom or media who are not observing the restrictions on filming in court for example, it is still the judge and not the court clerk who takes responsibility for managing the situation.

### **3.1.4 *Resource mobilization***

Many of the material and personnel resource issues listed above have been the subject of regular complaint from Special Panel judges. Many international donors and NGOs have repeatedly offered assistance to the Department of Justice. It seems that one of the only reasons for the persistent lack of such resources is the lack of an adequate administrative structure to collate the needs, prepare funding or resource requests and to follow through such requests with donors. Whether this responsibility is allocated to the Department of Justice or to an official within the court hierarchy is a matter for the court to decide. The desperate situation that confronted UNTAET over two years ago should have mandated a coordinated and committed search for assistance. It is unacceptable that in several instances memoranda of understanding with donors have taken over twelve months to finalise. In other cases, offers of greatly needed assistance have been declined. Several donors have reported that the lack of donor coordination is the greatest impediment to the provision of

material and technical assistance to the Department of Justice. Such administrative delays are crippling an already struggling system.

***Recommendation 4:*** *That one international legal clerk or research assistant with particular knowledge in international criminal law be recruited for each Special Panel and Court of Appeal judge as a matter of urgency.*

***Recommendation 5:*** *That internet access be made available to the chambers of the Special Panel judges as a matter of urgency.*

***Recommendation 6:*** *That a permanent position for an East Timorese court librarian be created and filled immediately. This person should have responsibility for administering a library budget, sourcing relevant books and journals, and receive specialised training in legal librarianship skills. Ideally, this capacity building would take place within East Timor by an experienced international court librarian who is provided by UNDP or another donor or NGO for at least three months.*

***Recommendation 7:*** *That one of the Special Panel court clerks is assigned the responsibility of liaising closely with judges about ongoing general resource needs and mobilizing resources through a Donor Liaison Coordinator.*

### 3.2 The right to trial without undue delay

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>35</sup>*

Compared to many tribunals and courts around the world, the first Special Panel has so far managed to process the cases before it relatively quickly.<sup>36</sup> Comparisons, particularly with ICTY and ICTR should be made with great caution, however. It should be noted though that so far all cases that have proceeded to trial, except one, have been relatively simple murder cases involving a single defendant and very few prosecution witnesses and no defence witnesses at all.

The issue of unacceptably long pre-trial detention was a considerable problem in the early stages of the justice system’s development. In the first half of 2001 there were still significant numbers of Serious Crimes detainees being held unlawfully as their detention orders had expired. The UNTAET Human Rights Unit reported that this was “due to the inability of the judiciary to hear applications to extend the detention orders”.<sup>37</sup> In relation to Serious Crimes cases, this problem appears to have largely been resolved, although there are reports of ongoing problems in the ordinary crimes jurisdiction. However, the Serious

---

<sup>35</sup> UN Human Rights Committee General Comment 13, 13 April 1984, at paragraph 10.

<sup>36</sup> The second Special Panel is yet to complete a case.

<sup>37</sup> UNTAET Human Rights Unit Report, March 2001. For further discussion of the problem see Suzannah Linton, “Cambodia, East Timor and Sierra Leone: Experiments in International Justice” (2001) XII *Criminal Law Forum*, forthcoming.



Crimes cases are now facing other administrative problems that are jeopardising the right to trial without undue delay.

What may be considered “undue delay” will depend on the particular circumstances of the case. The European Court of Human Rights has listed several criteria, in addition to the objective time taken for a case to proceed through to final judgment. These criteria include such things as the complexity of the case, what is at stake for the accused, the handling of the case by the authorities and the conduct of the accused. Although in mid 2001 those Serious Crimes cases for which indictments had been already filed with the first Special Panel were beginning to move through the court system reasonably well, residual administrative causes of delays were not addressed and then were exacerbated by the commencement in July of the Los Palos case, at which point all other serious crimes active cases were effectively frozen due to lack of court capacity to hear them. It is relevant to note that the European Court of Human Rights has held that this is generally not a valid excuse when evaluating due process, as the contracting states have an obligation to organise the administration of justice in such a way that the courts meet the minimal fair trial standards.<sup>38</sup> JSMP monitors have noted that the “procedure” referred to above by the Human Rights Committee seems to break down on a regular basis due to what appear to be recurring administrative problems that are threatening to undermine this aspect of a right to a fair trial. These problems can be broadly divided into two categories: first, problems in the liaison with prison authorities and second, poor management of the panels themselves.

### **3.2.1 *Liaison with prison authorities and CIVPOL***

JSMP monitors note that it is almost a matter of course that proceedings are delayed because the accused is not in court at the time listed for the hearing. Very often, the Special Panel will even formally enter the courtroom as no court clerk seems to take responsibility for ensuring that all parties are present and informing the judges. What is all the more remarkable about this situation, is that it often occurs in relation to accused who are in state detention. In many instances the reasons given are that the necessary arrangements for transporting the accused to the court have not been made with the relevant prison authorities. On some occasions this has resulted in only a short delay of half an hour or more while the court (often the presiding judge personally) organised for the prison to bring the accused to court. However, there have been a significant number of cases where the hearing has been adjourned to another date altogether, sometimes repeatedly. For families, witnesses and others who may have travelled to the court in Dili from remote districts for the sole purpose of attending the hearing, they may not be able to repeat the exercise and so the adjournment effectively ends their ability to participate in the justice process<sup>39</sup>.

Prison authorities report that the court administration frequently fails to provide them with the necessary documentation to support a request to transfer the person from the prison to the court for trial or pre-trial proceedings. In some cases the prison has not even been notified that the accused is required to attend the court at all. JSMP has been present in court when, after substantial delays, the somewhat annoyed presiding judge has instructed the court staff to “just call the prison and tell them to bring him in!” Not surprisingly however, the prison authorities are not prepared to act on such a request without supporting documentation.

---

<sup>38</sup> See for example the *Milasi* judgment, A119, p47.

<sup>39</sup> See the discussion below relating to public access to hearings.

Where the defendant is not in detention, but has to comply with reporting requirements in the districts, arrangements are sometimes made with CIVPOL to bring the accused to Dili. On a number of occasions however, CIVPOL has had neither the vehicles, nor the staff, to bring the defendant to Dili on the day of the hearing. In a number of instances, this has been because the court has notified them too late to make the necessary arrangements. In practice, the Prosecutor will often liaise with CIVPOL directly to ensure that transport is organised. Even if the responsibility for such arrangements rests with the prosecutor, one of the court clerks should take responsibility for confirming the arrangements with the parties at least 24 hours ahead of time so that valuable court time is not wasted.

Similarly, the Special Panel currently does not make any regular order at the end of each preliminary hearing for the prison authorities authorizing or requiring the defendant's presence in court on that future date. If this were the case a court clerk or someone within the court administration should be made responsible for ensuring that such orders are made, and then ensuring that copies of the orders are received by the police, the prisons or any other relevant party. That individual should also serve as a court liaison officer with the police and the prisons.

There are other related examples of poor communication between the court and CIVPOL/TLPS. On one occasion the Special Panel adjourned for a lunch break and the accused, who was in detention at the time, was left alone in the courtroom. On another occasion, the Special Panel delivered a guilty verdict and announced that the prison sentence was effective immediately. As the accused had been conditionally released pending the trial, he was not already in the custody of a particular CIVPOL or TLPS officer. The hearing ended and everybody left the courtroom, leaving the defendant wondering what he was supposed to do. He eventually left the court too. CIVPOL soon realised what had happened and sent officers to search for the "escaped" prisoner, who was later found waiting at his house.<sup>40</sup>

### 3.2.2 *Management of the Special Panels*

Although the UNTAET regulations that created the Special Panel seem to contemplate the existence of multiple panels to hear serious crimes cases, in practice there has only been one Panel in operation since it began in January 2001 until mid-November 2001. An important element of the Special Panels and Court of Appeal is the fact that they are comprised of both international and East Timorese judges for the purpose of hearing serious crimes cases<sup>41</sup>. Even though for many months there were enough international judges to rotate the composition of the two international judges for any given case, there has been only one East Timorese judge appointed to that first Special Panel. Not only does this judge not get any break between cases, as do her international colleagues, but the Special Panel is unable to function should she become ill or require other leave.

The Court of Appeal faced a similar problem when the only East Timorese Judge was appointed as an Election Commissioner for the 30 August 2001 Constituent Assembly elections.<sup>42</sup> Her departure – and more importantly the lack of administrative planning to

---

<sup>40</sup> *Public Prosecutor v Carlos Soares*, 15 May 2001.

<sup>41</sup> In relation to the Special Panel see section 22.1 of UNTAET Regulation 11/2000. In relation to the Court of Appeal see section 22.2 of UNTAET Regulation 15/2000.

<sup>42</sup> Although the President of the Court of Appeal is of East Timorese origin, he is a national of Portugal and occupies one of the international positions on the bench for the purpose of Serious Crimes appeals.

replace her - left the Court of Appeal unable to hear appeals for many weeks until two Dili District Court judges were temporarily appointed as “Acting Judges of the Court of Appeal”<sup>43</sup> - despite the fact that her new appointment was announced several weeks before she was required to depart from the court and that several cases had been scheduled for this period.<sup>44</sup> As one of the international Court of Appeal judges has now left East Timor, the Court is currently unable to hear serious crimes cases again.

Similar problems also continue to threaten the Special Panels. Since the Los Palos trial began in early July 2001, all other serious crimes cases were unable to proceed at all as the second Panel was still not operational. Although several cases had already been given trial dates, even preliminary hearings were adjourned *sine die* pending the Los Palos decision. Furthermore the contract of one of the international judges hearing the Los Palos case was due to expire and he had indicated his intention to return to his home country. Despite the fact that this was likely to occur before the trial had been completed, no administrative steps were taken to deal with the situation. The judge, after considerable pressure, generously agreed to stay on to finish the case, but this has not resolved the ongoing administrative hiatus.<sup>45</sup>

Importantly, the effective shut down of the rest of the serious crimes cases for over four months has now created a considerable backlog of cases. For several months the Department of Justice had been foreshadowing the creation of a second Special Panel. A new international judge from Cape Verde was appointed in June 2001 to replace the departing Italian judge. However, between that time and mid-November this judge only heard one preliminary hearing in over four months. The other international judge intended for the Second Panel was until recently the Deputy Director of the Justice Department but has now joined the second Special Panel. One of the East Timorese Dili District Court judges who had been temporarily appointed to the Court of Appeal and who heard several serious crimes appeal cases, was supposed to be joining the second Special Panel but has been unable to do so due to health problems.<sup>46</sup> Although on 8 October 2001 another District Court judge was appointed to replace him, cases that had been listed for trial were still not proceeding more than one month later.

One such case had already been adjourned on three previous occasions, and on two of these occasions the prosecution team had arrived at the court with witnesses who had been transported by helicopter from a remote district to be told only then that the long-awaited second panel was still not ready<sup>47</sup>. It is also worth noting that one of the reasons cited was the fact that the public defender representing the accused was still involved in the Los Palos trial, and indeed the inadequate numbers of public defenders is a major problem in the entire

---

<sup>43</sup> See Notification of 7 June 2001. These temporary assignments were only supposed to be until 30 September 2001. More curiously, the notification stated that “During the period of the temporary appointment, the appointees will continue to perform their normal duties at the Dili District Court, and they will participate as Judges of the Court of Appeal on a case by case basis, when summoned by the Court of Appeal.”

<sup>44</sup> The paid position of Electoral Commissioner is incompatible with judicial office in accordance with section 2.4 of UNTAET Regulation 2000/11.

<sup>45</sup> According to section 19 of Regulation 2000/11, it seemed unlikely that the court would have been able to appoint a replacement judge had the judge in question not agreed to stay. More importantly, the judge was placed in a difficult situation because of the fact that there had been no successor planning within the court administration.

<sup>46</sup> It is not clear whether his temporary appointment to the Court of Appeal has finished, which would raise the question of whether he should be sitting the bench of a lower court at the same time.

<sup>47</sup> *Public Prosecutor v Anigó de Oliveira* 7 November 2001.

court system.<sup>48</sup> While in every court hearing dates unavoidably change from time to time, the causes for the regular changes and the lack of effective communication with other affected parties wastes everyone's time. Regardless of exactly which section of the court administration is responsible for organising the panels, it is clear that the current system is not functioning properly and is leading to increasingly serious delays.

On 13 November 2001, another Dili District Court judge was reassigned to the second Special Panel and the first trial before the second Panel commenced the following day. Although this Panel is facing some predictable teething problems, these mainly relate to the additional interpretation necessitated by the fact the international judges on this Panel are operating in Portuguese. Of more concern however, is the fact that the current level of administrative organisation and support has been inadequate for one Panel. In order to manage two panels, substantial reform must be effected immediately.

***Recommendation 8: That court administration task one staff member as Prison Authority and Police Liaison Officer with responsibility for ensuring that prisoner transfer documentation is in order with sufficient notice to ensure the presence of the accused at scheduled proceedings and that detainees be taken to the prison after sentencing.***

***Recommendation 9: That the procedures for managing the work plans of the special panels be immediately reviewed.***

***Recommendation 10: That a court clerk be tasked as a listing manager who works closely with the judges and is responsible for managing changes in hearing schedules, including communicating such changes to the prison liaison officer, the parties and the public.***

### **3.3 The right to a public hearing**

In addition to the guarantees mentioned in the previous section, article 14(1) of the ICCPR also guarantees the right to a public hearing.<sup>49</sup> Primarily, the right to a public hearing means that the accused person has the right to be tried in public, and that the public has a right to attend such trials. This is one of the most fundamental elements of the concept of a fair trial as it is “an essential safeguard of the fairness and independence of the judicial process, and a means of protecting public confidence in the judicial system.”<sup>50</sup> This right is recognised in the transitional rules of criminal procedure that state that trial hearings are open to the public, subject to circumstances where national security, sexual offences or the interests or justice would be prejudiced.<sup>51</sup>

However, in order to give meaning to the right to a public hearing, the UN Human Rights Committee has declared that the court must make information about the time and venue of the public hearing available, and to provide adequate facilities for attendance by interested

---

<sup>48</sup> The frustration of the judges on this issue is well known – in a recent case when a public defender asked to be excused to attend another trial, one judge exclaimed “I am not going to delay this trial just because of the dysfunctions of this court system!”

<sup>49</sup> See also Article 10 of the Universal Declaration of Human Rights; Article 6(1) of the European Convention; Articles 64(7) and 67(1) of the ICC Statute.

<sup>50</sup> Chapter 14, Amnesty International *Fair Trials Manual*

<sup>51</sup> Section 28 of Regulation 2000/30; these limited exceptions to the public nature of a trial are in accordance with the international standards mentioned above.

members of the public in addition to allowing the public and the press to attend the hearings freely.<sup>52</sup>

### **3.3.1 Public access to hearings**

The judges of the Special Panel have repeatedly emphasised during the serious crimes cases observed that the proceedings are public.<sup>53</sup> However, during the first major trial involving crimes against humanity, JSMP observers noted repeated problems with the CIVPOL and Justice Department Security Staff who were refusing entry to the courtroom to several members of the public, including family members of the accused and East Timorese legal observers. The reason given was that they didn't have UNTAET identity cards. On the first day of the trial this happened to approximately 20 members of the public who had come to see the hearing. The presiding judge spoke directly to the CIVPOL involved during a court break after a member of the public drew the issue to his attention; however, the problem recurred on subsequent days when security staff changed. Once again, the court clerks did either not notice the problem or did not see it within their role to be alert to such problems. The issue partly arose due to the fact that the Department of Justice currently is housed in the same building as the Special Panel, and it is commonplace for UNTAET or ETTA departments to require such identification from visitors. However, nobody within the court administration seemed to have explained to CIVPOL that the public courtrooms should not be subject to the same requirements.

### **3.3.2 Access to information about court proceedings**

The monitors from JSMP are often the only observers in the public gallery of the courtroom. USAID has funded a closed circuit television to increase the number of people that can view proceedings in the new Court of Appeal building. It would be welcome if the numbers coming to see the proceedings were such that a closed circuit television was required. A further problem is that the Special Panels for Serious Crimes are only sitting in Dili, which means that it is often impossible for interested people from remote areas in East Timor to attend, including families of victims or the accused.

The East Timorese people have consistently called for justice in relation to the Indonesian occupation. Currently and for the foreseeable future, the Special Panel's work is the only formal judicial mechanism presently addressing the events of that period. In addition, in a country marked by a corrupt and inefficient legal system under colonisation and occupation, there is a need for the activities of a court system that aspires to manifest the rule of law to be publicised. However, there is a dearth of public information on the activities of the courts. The public nature of the courts should be publicised and encouraged. Court administration could take responsibility for organising for groups of school students or other public groups to visit the court when it is session. The provision of public information about the court should be one of the main tasks of the court administration.

The lack of general information is exacerbated by the lack of specific listing information about current cases. Over 90 per cent of the Serious crimes cases have not been publicly listed. It is difficult, even for the parties, to determine when a proceeding is being heard. Occasionally a notice about an individual case is put up in the courthouse, but it is usually displayed on the same day as the listed hearing. In the week commencing 3 June 2001 a notice of that entire week's Serious Crimes proceedings was posted outside the door of the

---

<sup>52</sup> *Van Meurs v the Netherlands* (215/1986) 13 July 1990, Report of the UN Human Rights Committee, at 60.

<sup>53</sup> This is usually in the form of an announcement at the beginning of the preliminary or trial hearing.

Dili District Court at the start of the week for the first time since JSMP observers began monitoring the situation. Since that time, however, the list was not updated regularly and the practice was only maintained for two weeks before lapsing altogether. In the Court of Appeal building there is no public notice board for the Special Panel or the Court of Appeal at all. There is one pin-board outside the Court of Appeal courtroom that very occasionally does contain a notice announcing forthcoming hearing dates, however, these are frequently wrong and surrounded by internal Department of Justice Memoranda and announcements. There is nothing to indicate that public listing information will be posted there. Indeed, the day that the Special Panel moved to these premises from the Dili District Court, there was no public indication of the change of venue at all. The hearing scheduled for that day was adjourned as the prison had sent the accused men to the Dili District Court – upon arrival there and finding no Special Panel, the prison vehicle returned to the prison with the accused.

JSMP monitors frequently rely on individual calls to the judges, prosecutors or even court interpreters to confirm when hearings are listed. Other than these ad hoc methods, that are not readily available to the ordinary public, the official source of information is the whiteboard inside the court clerk's office where the clerks record matters before the Special Panel. This is rarely up to date, and in any event, the office is frequently locked or unattended as the court clerks are often in court. It is difficult to see why this basic task of court administration is still not functioning, after so many months. The lack of a simple system for gathering and providing a reliable or accessible source of information about court hearings is having a direct impact on the extent to which the Special Panel can be described as operating publicly.

### **3.3.3 Public access to court documents**

Another aspect of providing information to the public about the cases before the Special Panels, is allowing the public access to certain fundamental documents, most importantly, indictments, orders of the court and judgments. Just as is the case with listing information, it is extremely difficult to gain access to these public court documents. While some documents may be reasonably withheld from public access, such as statements of the accused or witnesses, and other private or prejudicial information about the accused or witnesses, or internal court documentation, many registry offices in different jurisdictions address this issue by a system of supervised or restricted public access. However, no policy decisions appear to have been made on this issue at all. Court staff, including judges, give contradictory answers to enquiries about whether any court documents are even available to the public.

The lack of ready access to documents also has implications for the right to adequate time and facilities for the preparation of a defence that is guaranteed in Article 14(3)(b) of the ICCPR, if the systems for accessing court files are inadequate.<sup>54</sup>

*“It is the duty of the competent authorities to ensure lawyers access to appropriate information files and documents in their possession or control in sufficient time to*

---

<sup>54</sup> See also Article 6(3)(b) of the European Convention; Article 8(2)(c) of the American Convention and Article 67 of the ICC Statute. Further exploration of this right is beyond the scope of this report, except to the extent that it is related to the lack of registry procedures for accessing court files.

*enable lawyers to provide effective legal assistance to their clients. Such access should be provided at the earliest appropriate time.”*<sup>55</sup>

A related issue is ability of the parties to have access to an authoritative court file to ensure the completeness of their own files (a much needed service, particularly given the absence of any effective defence administration, and the frequently incomplete files that result), is impeded by the lack of administrative procedures for doing so.

At present original court files are supposed to be kept in a filing cabinet in the registry office. There is no public information about any procedure by which the public may apply to search a court file or obtain copies of documents. As described above, the registry office is often unattended and has no public area. Furthermore, until June 2001 when the Special Panels moved to the Court of Appeal, the registry had no photocopier. To obtain a copy of a court document in the Dili District Court, the court staff would direct enquiries to the CIVPOL office nearby, which only allowed access to their photocopier but not their paper supply.

### **3.3.4 Publication of judgments**

The right to a public hearing also extends to the publicity of the judgment rendered in the case. Indeed, this aspect of public access is even broader than that relating to the hearing itself; article 14(1) of the ICCPR notes the only exceptions to judgments being made public are where the interests of children or matrimonial disputes are involved.<sup>56</sup> Although a judgment is considered to have been made public either when it is orally pronounced in court or when it is published, given the problems detailed above in relation to the general absence of information and access to court hearings, it is doubtful whether the current system of ‘publication’ is effective: the determining factor is whether the judgment is accessible to all.<sup>57</sup>

The importance of publicly accessible judgments in Serious Crimes cases cannot be underestimated. The crucial role of the Serious Crimes cases to the broader reconciliation efforts in East Timor has been described above. Furthermore, the decisions of the Special Panel make an important contribution to international jurisprudence of crimes against humanity and similar crimes. For the East Timorese public, and especially the East Timorese legal community, these early judgments provide a fascinating insight into the developments within the new legal system. Additionally, as international judges on the Special Panel are regularly replaced and new East Timorese judges are appointed, it is vital that an organised collection of judgments is managed well.

Despite these reasons, there is still no system for publication of court judgments.<sup>58</sup> Although judgments are always read out publicly in court, the court administration does not prepare copies of important judgments in advance so that members of the public or the press can take away copies for accurate reporting or further perusal. Paper copies of judgments are stored in a folder in the office of the Court Registrar rather than in the Special Panel Registry office, further complicating the current absence of a single public contact point

---

<sup>55</sup> Principle 21, UN Basic Principles on the Role of Lawyers (1990).

<sup>56</sup> See also UN Human Rights Committee General Comment 13, paragraph 4.

<sup>57</sup> *Curne v Jamaica* (377/1989) 29 March 1994, Report of the UN Human Rights Committee, vol II (A/49/40) 1994 p73.

<sup>58</sup> Judgments of the first Special Panel have so far been read out in English and Bahasa Indonesia, with the English text declared authoritative. The critical understaffing in terms of translators means that the day allocated for reading the judgment is sometimes postponed as the translator has not had time to translate the document.

within the court administration for serious crimes cases. On some occasions court staff have seemed confused as to whether they are able to release copies of judgments and even direct such enquiries to the judges.<sup>59</sup>

Although language and translation issues are covered in a section later in this report, special mention must be made of certain problems in relation to the publication of Special Panel decisions. All decisions of the Special Panel have to date been publicly read in court in both English and Bahasa Indonesia, by one of the international judges and the East Timorese judge respectively. The written decisions always note that the English version of the text is the authoritative version. However, access to copies of the Bahasa Indonesia version of the decisions is often considerably more difficult than the 'original' English version. Given that this version is the one that most of the East Timorese public, and certainly, the legal profession, are able to understand, it is important that equal priority be given to the publication of the translated versions of decisions.

The situation is even worse in the Court of Appeal. Many recent Serious Crimes decisions of that court have not been translated out of the original language of drafting at all. The majority opinions have all been written in Portuguese, usually with a minority opinion in English, and yet no Bahasa Indonesian versions have even been produced, let alone made available to the public<sup>60</sup>. Although some limited summaries have been given orally in the courtroom in Tetun, this is no substitute for a full and accurate translation of the court's decision<sup>61</sup>. In a multi-lingual country where there are several official languages of the court, this practice is unacceptable. East Timorese legal organisations have repeatedly complained to JSMP about the need for Serious Crimes decisions to be made available in Bahasa Indonesia. All court decisions must be fully translated both orally and in writing in order to comply with the accessibility requirement of the right to a public judgment.

***Recommendation 11:*** *That the listing manager or other court officer be tasked with preparing an up to date court schedule to be posted outside the court building, and at set public locations, and publicized through local media networks including radio as a matter of urgency.*

***Recommendation 12:*** *That the court administration publish a clear court policy about which court documents are available to the public and the procedure by which the documents may be viewed or copied. This policy should ensure that the registry office be staffed between certain hours and set out whether there will be costs involved for accessing or copying documents.*

***Recommendation 13:*** *A series of court reports containing the judgments of the Special Panel should be published and distributed to all courts in East Timor, and made available to the legal profession and the wider public through the Special Panel Registry office.*

***Recommendation 14:*** *All court judgments should be translated into Bahasa Indonesia. Significant cases should have short summaries prepared for the press and the public.*

---

<sup>59</sup> JSMP publishes such judgments and indictments as it is able to obtain in electronic form on its website ([www.jsmp.minihub.org](http://www.jsmp.minihub.org)). The number of East Timorese with access to the internet is small. More to the point, the unsatisfactory nature of an arrangement whereby an independent NGO project is the only public source of court documents is evident.

<sup>60</sup> One of the Court of Appeal judges has been consistently placed in the unacceptable situation where there are no court translation facilities available to translate his colleague's draft reasons for judgment, despite the fact that he cannot understand Portuguese, necessitating his separate opinion in English in each case.

<sup>61</sup> On one recent occasion, two court interpreters were even present in the courtroom but the Presiding Judge chose not to use them.



### 3.4 The right to examine witnesses

The ICCPR guarantees that in the determination of any criminal charge, an accused is entitled “[t]o examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him.”<sup>62</sup> It is certainly not in dispute that this right is recognised and respected by the Special Panel. However, JSMP has observed significant obstacles to its practical application.

Although section 53.3 of UNTAET Regulation 2000/30 provides for reimbursement of witness expenses, the issue of the administration of such reimbursement has been a recurring problem in Serious Crimes cases. It is appropriate, and in the East Timorese context vital, that witness expenses be covered by the court. As a witness, an individual is rendering the court a service, and accordingly has their expenses covered by the court. Witnesses in the Serious Crimes trials are drawn from all over East Timor. Many of them are farmers or others whose livelihood suffers in the days spent travelling to Dili and serving as a witness. To date, all such witnesses have been presented by the Public Prosecutor, who has paid witness expenses personally and then sought reimbursement from the Department of Justice. However, extensive delays and administrative confusion have meant that such reimbursement has not been forthcoming. JSMP understands that one of the reasons seems due to the lack of planning in the court budget for such expenses. In such a situation, funding should be immediately be sourced from a bilateral donor without further delay.

Although the international prosecutors in the Serious Crimes Unit may be able to wait for reimbursement of witness expenses, the predominantly East Timorese public defenders are in no such position. The fact that there is no administrative support from the court in relation to witnesses may well be exacerbating the current problems where not a single defence witness has been called in any Serious Crimes case so far.

***Recommendation 15:*** *That provision be made in the court budget for witness expenses and that the Court Administrator implement a system to manage payment for such requests.*

### 3.5 The right to an appeal

An important safeguard of 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>63</sup> While UNTAET has created a Court of Appeal, to hear appeals from each of the District Courts including from the Special Panel, the lack of an accurate and comprehensive court record upon which to base any appeal undermines the effectiveness of this right.

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, but also more crucially for any appeal. If the reasoning or outcome in the decision of the court at first instance is challenged, an accurate transcript is the primary basis upon which the appeal court is able to assess the challenge.

---

<sup>62</sup> Article 14(3)(e) of the ICCPR. See also Article 6(3)(d) of the European Convention; Article 8(2)(f) of the American Convention; and Article 67(1)(e) of the ICC Statute.

<sup>63</sup> See also Article 2 of Protocol 7 of the *European Convention*; Article 8(2)(h) of the American Convention.

Production of a court transcript does require considerable resources and in the prevailing circumstances in East Timor the lack of sufficient resources will remain a significant obstacle for some time to come. However, in the design of the court system in East Timor UNTAET recognised the importance of this particular aspect of court administration. Section 26.1 of UNTAET Regulation 2000/11 states that:

*The court shall ensure that, in each hearing by a judge or panel of judges, written or recorded notes of the proceedings are taken and made available, on request, to all parties to the proceedings, including their legal counsel.*<sup>64</sup>

This was further elaborated by 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>65</sup>

However, the resources required to implement these two provisions fully have never been made available and to date no official transcript of any serious crimes case has ever been produced by the court. While the provision of recording goes somewhat towards satisfying the section, this carries with it separate problems<sup>66</sup>. Nevertheless, the importance and complexity of the serious crimes cases before the Special Panel still warrants a properly transcribed record. In the first six months of the Special Panel's operation, all cases were heard in the main courtroom of the Dili District Court which has no facilities for any type of recording of proceedings. As described in the previous section of this report, a court clerk is supposed to be in attendance during each hearing of the Special Panel, whether it be for a preliminary hearing, trial, disposition of sentence or delivery of the written decision. However, the court clerk is only able to make very limited handwritten notes about the proceedings and is often only intermittently present during a hearing.<sup>67</sup>

To compensate for this situation, one of the judges on the Special Panel has resorted to taking detailed notes on a portable computer. Although one judge is nominated as the Judge Rapporteur for each case, in reality the note-taking is done by the same one judge who is the

---

<sup>64</sup> Section 26.1 of UNTAET Regulation 2000/11 as amended by Regulation 2001/25. Interestingly, the original version of this provision only made reference to transcripts. It seems to be no coincidence that the amendment takes into account the changed situation of the Special Panel, as well as perhaps reflecting a more realistic view of what is feasible for the entire court system.

<sup>65</sup> Section 31 of UNTAET Regulation 2000/30.

<sup>66</sup> It is worth noting that the Dili District Court building has no generator and as Dili is still subject to regular power cuts, any form of recording or transcription would also require an alternative power source.

<sup>67</sup> JSMP monitors have observed numerous hearings where there was no court clerk present at all.

most proficient typist, despite the fact that this judge is very often the Presiding Judge on the Panel and therefore stopping repeatedly to ask questions or to direct proceedings.

JSMP notes that there have been limited improvements in recent months. The Special Panel moved into the Court of Appeal building in time for the first crimes against humanity trial to start.<sup>68</sup> In preparation for this case, a video recording system was installed in the newly refurbished courtroom and has functioned for the majority of the hearing sessions that have stretched to almost 60 days over a four-month period. Furthermore, an audio recording system is now being used that stores the recording on compact disc. Nevertheless, the first Special Panel has continued its own practice of note-taking as the video cassettes and CDs are only filed by date which gives no indication of what particular stage of the trial is contained there. At this stage, it would be extremely difficult for an appeal court to find a particular section of the record for review. Furthermore, the complexity of the audio recording of multiple interpretations cannot be underestimated.

The situation has been an ongoing source of frustration for both the judges and the parties appearing before the Special Panel, to the extent that the following comments were included as part of the published decision in the case of *The Prosecutor v Joseph Leki*:

*“The Court also notified both parties that the record of the hearing would be provided by the rapporteur judge, considering that there is no audio or video recording apparatus, no stenographers and no shorthand writer available to the judicial administration in East Timor. The rapporteur judge made a record after summarizing as accurately as possible on a portable computer the statements made by the parties and the questions, orders and decisions of judges during the hearing.”*<sup>69</sup>

Comments such as the one above have begun to be commonplace in judgments of the Special Panel for Serious Crimes.<sup>70</sup> Similarly, the serious implications of the lack of an accurate and comprehensive court record has been noted with concern by at least one judge of the Court of Appeal, in the first final appeal from a decision of the Special Panel. Although his was the minority opinion, Judge Frederick Egonda-Ntende found that the official record of the trial proceedings was not consistent with the report contained in the Special Panel’s judgment, noting that “[t]he imprecise language leaves the record somewhat confused”.<sup>71</sup> He ultimately found that the lack of clarity in both the trial decision and the court record – upon which an appeal court must rely – led him to conclude that the Special Panel’s decision was not based on law and was therefore a nullity. The importance of the court record in the serious crimes cases is made all the greater due to the fact that the President of the Court of Appeal has imposed a verbal rule that the judges are not allowed to question the parties on matters of law during appeal hearings.<sup>72</sup>

---

<sup>68</sup> The ‘Los Palos’ case commenced in early July 2001, shortly after the Special Panel moved.

<sup>69</sup> *Public Prosecutor v Joseph Leki*, Case No 05/2000, 11 June 2001.

<sup>70</sup> See also *Public Prosecutor v Carlos Soares* Case No 12/2000, 31 May 2001; *Public Prosecutor v Francisco dos Santos Laku* Case No 8/200, 25 July 2001. Similar comments were made verbally by Judge Dolzany da Costa (presiding) during the trial of *Public Prosecutor v Manuel Gonsalves Leto Bere* Case No 10/2000 on 20 April 2000.

<sup>71</sup> *Joao Fernandes v Prosecutor General Criminal Appeal 2/2001*, 29 June 2001, Separate Opinion of Judge Egonda Ntende. See also the discussion of this decision in Suzannah Linton, “Prosecuting Atrocities at the District Court of Dili” (2001) 2 *Melbourne Journal of International Law* 301 at pp 318-323.

<sup>72</sup> See p 17 of Judge Egonda Ntende’s decision.

Furthermore, public defenders and prosecutors have reported that they have decided not to appeal several cases because of the lack of a transcript and have expressed reluctance to proceed with some of the more complex crimes against humanity cases unless this problem is resolved. In circumstances where a new and complex legal regime is being applied by judges, prosecutors and defence lawyers, from different backgrounds and levels of experience, in trials that are breaking new ground daily, the need for transparent review is vital. Without a detailed and clear record of the trial proceedings, the right to an appeal may be rendered meaningless.

***Recommendation 16: That a court transcription service be provided urgently, with the staff and equipment necessary to operate such a service. In the event that recording equipment at the Court of Appeal is used, that a position be created for someone with responsibility for using and maintaining that equipment.***

### **3.6 The right to an interpreter**

One of the most important issues that has dogged the administration of the Special Panel for Serious Crimes is that of interpretation and translation. Article 14(3)(a) of the ICCPR guarantees that in the determination of any criminal charge an accused is entitled to be informed promptly and in detail in a language which he understands of the nature and cause of the charge against him.<sup>73</sup> This right requires that information from the court and the Prosecutor must be translated; whether the translation is oral or written depends on the form in which the information was originally provided. This means, for example, translation of indictments must be provided in writing. Article 14(3)(f) of the ICCPR states that everyone charged with a criminal offence has the right to an interpreter if they do not understand or speak the language in the court. This is reflected in Section 23 of UNTAET Regulation No. 2000/11 which provides that:

*Courts shall provide translation and interpretation services in every case where a party to the proceedings, or a judge, or a witness or expert witness does not sufficiently understand the language spoken in that court.*

However, in practice there are many problems that mean this right is often only nominally observed.

#### **3.6.1 Language needs in Special Panel cases**

Currently in the courts in East Timor there are four official languages: Tetun, Bahasa Indonesia, Portuguese and English.<sup>74</sup> The needs of the Special Panels of the Dili District Court reflect this multi-lingual reality more than any other part of the new East Timorese court system. The Serious Crimes Prosecutors and their staff are drawn from a variety of nations but largely use English even when it is not their first language. The language of the Public defenders is primarily Bahasa Indonesia, although their international mentors have to date generally used English.<sup>75</sup> As with the majority of East Timorese lawyers who trained in Indonesia, the only East Timorese judge on the Special Panel uses Bahasa Indonesia, or

---

<sup>73</sup> See also Article 6(3)(e) of the European Convention; Article 8(2)(a) of the American Convention and Article 67(1)(f) of the ICC Statute.

<sup>74</sup> Section 35 of UNTAET Regulation 2000/11 as amended by Regulation 2001/25.

<sup>75</sup> One international mentor uses Portuguese, but several public defenders have reported difficulties in communicating with her effectively. A former Portuguese mentor reported that he found it easier to use English than Portuguese for professional communication with the public defenders.

where necessary, Tetun, although she is one of the only people in the court who has some command of all four court languages. The three international judges who have sat on the first Special Panel to date use English, although two of these judges have also been able to speak Portuguese. The international judges on the second Special Panel use Portuguese. No international judges have been able to speak either Bahasa Indonesia or Tetun. To date, all Special Panel cases have been translated between either English or Portuguese and Bahasa Indonesia as the two main languages, with ad hoc translations into Tetun or other Timorese languages as necessary.

As the language of the second transitional government is Portuguese, and in all likelihood it will be the future official language of East Timor, there has been a concerted Departmental effort to encourage the use of this language in the court system. This does not diminish the need to continue to provide adequate interpretation facilities. The majority of the defendants who come before the Court, the witnesses, and the public observing the case for the most part speak either Tetun or Bahasa Indonesia, although there are many occasions where defendants or witnesses only speak another East Timorese indigenous language other than Tetun.<sup>76</sup> Furthermore, senior East Timorese jurists have stressed that the East Timorese judiciary will need to continue using Bahasa Indonesia and Tetun for at least a decade: "The courts will not risk using a language that is not understood by the majority of the Timorese people".<sup>77</sup>

### 3.6.2 *Shortage of interpreters/translators*

To meet these complex linguistic needs, the Justice Department has only six translators/interpreters; one Tetun-Bahasa Indonesia-English, three Bahasa Indonesia-English, and two Portuguese-Bahasa Indonesia. Despite the regulation referred to above, the court has still been unable to provide interpreters in other Timorese languages for court hearings. To date, when such interpreters have been required they have been provided by the Public Prosecutor, raising questions of impartiality. None of the Departmental translators/interpreters are allocated exclusively to the Special Panel or even to the courts, but rather they do work for all aspects of the Department of Justice. Only one has any legal background and none have received any formal interpretation training. Their responsibilities extend well beyond just interpreting for court hearings. They are also required to translate court documents (including judgments), departmental and court correspondence, and interpret in meetings between Departmental staff and prisoners. JSMP understands that Australian Volunteers International provided eight translators/interpreters to the Justice Department between May and December 2000; however, many of these were not replaced after their contracts expired.

The acute shortage of translators/interpreters means that only a portion of the necessary translation work is ever done. The translators estimate that an additional seven translators are required just to keep up with their current workload. Some of the problems that have arisen in relation to translation of judgments, particularly in the Court of Appeal, were touched upon above.

Although some of the current staff have offered to have a Timorese counterpart "shadow" them, thereby learning on the job the skills needed in addition to fluency in another language, this offer has not been taken up by the administration. Furthermore, there is little

---

<sup>76</sup> Examples observed include Fateluku, Makasae, Boonak speakers.

<sup>77</sup> See for example "Courts will continue using Bahasa Indonesia and Tetun" *Timor Post* 6 September 2001 p3.

coordination of their work in terms of different sectors' priorities and very often they divide up the work amongst themselves. This lack of administrative structure also means that no one takes responsibility for ensuring that the translators have adequate resources, such as specialised training in Serious Crimes terminology, legal dictionaries or other materials.

Furthermore, the number of interpreters for the court is completely inadequate, especially given the prevailing circumstances where illnesses are common in East Timor. At one hearing JSMP monitors noted that the only interpreter available was in fact severely ill but was continuing to work because of the acute shortage of interpreters. The interpreter was so ill that he had to repeatedly ask for a short break, however, on one occasion he had been asking for several minutes before any of the judges noticed as they were using English and therefore not listening to the interpretation.

### **3.6.3 *Impact on court proceedings***

In court, the strain is obvious. One person often has to interpret for many hours without a break as there is no-one available to take over. The shortage is especially acute in relation to Tetun-English interpreters. When the one Tetun-English interpreter was on leave two Tetun-Bahasa interpreters sat with the witnesses and defendant and simultaneously whispered the Tetun interpretation while the formal interpretation was done between English and Bahasa Indonesia. Not only was there incessant whispering while the prosecutor and judges were speaking (in English), but the families of the victims and witnesses, as well as the local media present, were unable to hear the Tetun interpretation.

On another occasion when there was no Tetun-English interpreter available and yet there were witnesses who only spoke Tetun, the presiding judge had no real option but to use the following complex and time consuming system for each question/answer: the judge asked each question of the defendant first in English (for the benefit of the international Prosecutors), and then repeated the question in Portuguese. Interpreter A (who did not speak English) translated the question from Portuguese into Tetun. After hearing the defendant's response (in Tetun), Interpreter A translated the answer into Bahasa Indonesia. Interpreter B (who did not speak Tetun) then translated this into English. Similarly, the public defender asked each question in Tetun, repeated it in Bahasa Indonesia, waited for the Interpreter B to translate it into English, and then turned to the defendant to hear his response in Tetun. Interpreter A then translated the response back into Bahasa Indonesia so that Interpreter B could translate it into English. When the prosecutor, who only spoke English out of the four languages, asked a question there was a further step involved. He asked a question in English, which Interpreter B translated into Bahasa Indonesia. Interpreter A translated it into Tetun, and the defendant's Tetun response came back through the same process.<sup>78</sup>

Almost everyone in the courtroom had difficulty at some time in following the discussion. On several occasions the confusion necessitated a repetition of a question/answer, and what should have been a relatively short and straightforward oral examination turned into a protracted ordeal, not least of all for the witnesses who were recounting traumatic events about seeing a relative killed by militia, and had to answer the same question sometimes several times.

---

<sup>78</sup> *Public Prosecutor v Carlos Soares* 8 May 2001

The defendants in several of the cases have had obvious problems understanding the judges' questions although it is unclear whether this is due to the translation or simply the way the questions are phrased. The greatest difficulties appear when the judges are trying to ascertain whether a defendant's pre-trial rights have been respected, whether he understands the charges against him and whether or not he wishes to plead guilty. In circumstances such as these, familiarity with legal concepts is essential to an accurate interpretation of legal terminology. Only one interpreter has legal training, and he only became a full-time interpreter for the Justice Department on 1 November 2001; for the several months prior he was only "lent" to the Justice Department from another ETTA department on a part-time and somewhat unpredictable basis. There is an urgent need for translators who have some legal background, particularly of either the Indonesian legal system or of international criminal law and human rights law. One recent example involved the translation of the word "premeditated" into Bahasa Indonesia. The literal translation of "premeditated murder" or "pembunuhan yang direncanakan terlebih dulu" is "murder which was planned before". In English, the mental state of premeditation as an element of the crime of murder does not require that one have "planned" it. The interpreter's lack of awareness of this subtle distinction led to possible misunderstanding of the defendant's testimony. The accused's response to questions from the prosecutor and judges about whether a killing he had admitted to was premeditated, was translated as if he was responding to a question as to whether or not he had "made the plan", which in the particular case the defendant claimed he had not; he kept repeating that the TNI had "made the plan", although he admitted to having killed the victim.<sup>79</sup>

The problem of a lack of clarity in some court exchanges due to language difficulties, becomes dire when the court adopts the practice of attaching considerable weight in its judgments to quotes from the accused, as it has in the Leki decision in which the defendant's credibility was impugned because of apparent inconsistencies in his testimony as to whether or not he had a gun on the night of 25 September 1999.<sup>80</sup> The possibility cannot be discounted that the alleged inconsistencies were simply the product of language difficulties between the participants in court.

At a general level, there seems to be a lack of adequate training for all parties in how to use translators properly, to ensure that all translations are as accurate as possible. Almost all parties tend to speak for several minutes at a time, often involving complex legal or factual material, rather than speaking in short clear sentences. The judges try to remind parties in the court of this point, but inevitably some material simply never is translated. One recurring problem is when informal exchanges take place between court actors who speak the same language. There have on several occasions been long discussions between the prosecutor and the judges which have not been translated into either Bahasa Indonesian or Tetun. Often these are related to seemingly minor court procedural issues, such as organising times for filing of documents, or how to proceed in the case, but the media, general public and defendant have no way of knowing what is being discussed. Likewise, the defence will often talk to witnesses in Tetun without full translations into English. It is not unusual for the interpreters to forcibly interrupt the discussion, asking for permission to translate.

In addition, many court actors fall into the trap of using the interpreter as an active participant in the proceedings, rather than as a passive medium. For example, a judge or prosecutor may ask the interpreter to ask the defendant something, rather than directly

---

<sup>79</sup> *Public Prosecutor v Jose Valente* 2 May 2001.

<sup>80</sup> *Public Prosecutor v Joseph Leki*, Case No. 05/2000, June 11, 2001, factual findings at pp 4-7.

asking the accused a question. As a result, the interpreter may often reply, “He said that...” instead of reporting the response directly in the first person. While the interpreters sometimes do this deliberately to avoid confusion about whose words they are interpreting, in the context of oral evidence in such serious criminal trials, the importance of accurately hearing exactly what a person says cannot be underestimated.

#### **3.6.4 Simultaneous interpretation**

The recent installation of simultaneous interpretation facilities has been a welcome development in the Special Panel’s courtroom. Many of the problems referred to in the preceding paragraph, relating to use of the interpreter, have been alleviated since the interpreters are now in a separate room. However, simultaneous interpretation is a highly developed skill and requires specific training, none of which has been provided to the interpreters who are using the equipment. In addition, it is an extremely exhausting exercise for the interpreter and requires regular changes in staff, further straining the limited number of interpreters within the department. In any event, the facilities only exist in one of the two courtrooms in the Court of Appeal building. If both Special Panels are sitting at the same time one hearing will have no access to the new system.

***Recommendation 17: That at least seven additional court translators/interpreters proficient in a varying combination of the four court languages be employed by the Department of Justice. At least four of these are specifically assigned to work with the Special Panels for Serious Crimes. Each translator should be assigned an area of primary responsibility, with those in that area of the administration taking primary responsibility for ensuring the translator has the necessary support.***

***Recommendation 18: That the court develop a list of interpreters fluent in regional Timorese languages who can be used as necessary on an ad hoc basis.***

***Recommendation 19: That all court participants be given training on how to use interpreters in court.***

## **4 CONCLUSION**

In the space of the past two years, East Timor has come a long way. From the rubble of totally destroyed infrastructure and a traumatised population, there are now cases proceeding in refurbished court buildings and judgments breaking new legal ground being pronounced. Significantly, a small group of cases relating to the violence that engulfed the country as Indonesia withdrew are now being heard. Furthermore, a constitution is now being drafted that will lay the blueprint for the long-term construction of state institution, including the structure of the court system and the judiciary.

UNTAET’s mandate was not just to administer the territory awaiting independence; more importantly, it was to create structures and build capacity in a way that would enable East Timorese self-governance. The transitional judicial system as it currently stands, is likely to carry forward in many respects into any future system. In the next phase of the transition process, it will be very important to carefully assess which aspects should be retained, which should be modified, and which should be left by the wayside. It should be noted that in its haste to fill the judicial vacuum in East Timor after the end of the Indonesian occupation, UNTAET appointed judges, prosecutors and defenders before they had any jurisdiction to exercise, any court building in which to reside, or any court administration. The judges now



have a jurisdiction to exercise and, in the case of three of the District Courts, a building. However, the emphasis on these aspects of the justice system has resulted in a lack of sustained institutional commitment to the development of a functioning court administration.

This report has attempted to offer some guidance in relation to one crucial aspect of the court system. A good court system should in fact be invisible – when a court system is running smoothly, the administration is doing its job properly. A worrying feature of the current system is that there appears to be a lack of understanding of the requirements of court administration, as evidenced by the absence of institutional budgetary commitment and appropriately defined roles and responsibilities of staff.

East Timor is a small country which could be served by a relatively small, effective judiciary supported by an efficient court administration. While there is no doubt that limited resources will continue to be a significant challenge, resources will not solve the problems unless well planned structures and systems are implemented by fully trained staff to organise, allocate and use such resources. Many of the problems observed above seem to have resulted from oversight in the delegation of responsibilities for various aspects of the court management. JSMP observers have noted that many times the same problems are recurring, and yet are treated in an ad hoc way with court staff, including judges, failing to resolve the source of the problems. Such resolution can only take place through a coordinated approach at the highest levels of court administration, that must be communicated effectively to the staff who will implement the policies and procedures. Staff must be employed and trained in the functional needs of the court administration, allocated clearly defined responsibilities that respond to the needs of an effective administration, and provided with the necessary equipment to perform those functions.

The findings in this report call for an urgent review of the administrative structures that support the Special Panels for Serious Crimes, that the Special Panels be given the level of material and personnel support that they need to do their difficult job, and that significant improvements in the day to day running of the court are urgently needed. To summarise the recommendations presented here: comprehensive strategic planning, based on a full needs assessment, should be a priority. This should lead to substantial reforms of the court administration, including significantly improved resource mobilisation and coordinated training and mentoring of East Timorese staff. The implications of ignoring these findings are serious; although the transitional administration and the East Timorese political leadership have indicated a strong commitment to the protection of human rights, in practice the justice system is steering dangerously close to falling below international minimum standards. The new judiciary as a whole, and the Special Panels for Serious Crimes in particular, must be able to uphold such standards if they are to earn the public confidence necessary for a society based on the rule of law.

UNTAET – and soon the first East Timorese government – has been faced with a rare opportunity to make the most of the “clean slate” situation it faced in 1999 by establishing best practices in the justice system. The second and final phase of the transitional government must seize what remains of this opportunity before problems become entrenched and then all the more difficult to change.

## APPENDIX A

## SERIOUS CRIMES CASES MONITORED BY JSMP

Case #	Case name	Hearing date	Type of hearing
1/2000	Joao Fernandes	25/06/01	Appeal
2/2000	Julio Fernandes	01/03/01	Decision
2/2000	Julio Fernandes	25/06/01	Preliminary appeal hearing
2/2000	Julio Fernandes	29/10/01	Appeal decision
5/2000	Yoseph Leki	18/05/01	Trial
5/2000	Yoseph Leki	22/05/01	Trial
5/2000	Yoseph Leki	29/05/01	Disposition
5/2000	Yoseph Leki	11/06/01	Decision
6/2000	Benjamin Sarmiento	22/05/01	Preliminary hearing
7/2000	Augustino da Costa	27/04/01	Preliminary hearing
7/2000	Augustino da Costa	21/06/01	Trial
7/2000	Augustino da Costa	28/06/01	Trial
7/2000	Augustino da Costa	16/07/01	Disposition
7/2000	Augustino da Costa	10/05/01	Preliminary hearing
8/2000	Mateus Tilman	29/05/01	Trial
8/2000	Mateus Tilman	06/06/01	Trial
8/2000	Mateus Tilman	13/06/01	Trial
8/2000	Mateus Tilman	16/06/01	Disposition
8/2000	Mateus Tilman	24/08/01	Decision
9/2000	Los Palos	16/02/01	Preliminary hearing
9/2000	Los Palos	03/05/01	Preliminary hearing
9/2000	Los Palos	27/04/01	Preliminary hearing
9/2000	Los Palos	17/05/01	Preliminary hearing
9/2000	Los Palos	06/03/01	Preliminary hearing
9/2000	Los Palos	9/07/01 - 8/11/01 (inclusive)	Trial
10/2000	Manuel Gonsales Bere	14/02/01	Preliminary hearing
10/2000	Manuel Gonsales Bere	19/04/01	Trial
10/2000	Manuel Gonsales Bere	20/04/01	Trial
10/2000	Manuel Gonsales Bere	24/04/01	Disposition
10/2000	Manuel Gonsales Bere	15/05/01	Decision
11/2000	Leonardus Kasa	14/02/01	Preliminary hearing
11/2000	Leonardus Kasa	26/04 /01	
11/2000	Leonardus Kasa	09/05/01	(Interim decision)
12/2000	Carlos Soares	16/02/01	Preliminary hearing
12/2000	Carlos Soares	24/04/01	Trial
12/2000	Carlos Soares	15/05/01	Disposition
12/2000	Carlos Soares	31/05/01	Decision
12/2000	Carlos Soares	08/05/01	Trial
12/2000	Carlos Soares	11/05/01	Trial

1/2001	Francisco Pedro	02/04/01	Preliminary hearing
1/2001	Francisco Pedro	04/05/01	Preliminary hearing
1/2001	Francisco Pedro	18/04/01	Preliminary hearing
1/2001	Francisco Pedro	23/05/01	Interim decision
1/2001	Francisco Pedro	11/05/01	Preliminary hearing
2/2001	Augusto Tavares	06/07/01	Disposition
2/2001	Augusto Tavares	15/06/01	Trial
2/2001	Augusto Tavares	28/09/01	Decision
2/2001	Augusto Tavares	12/06/01	Trial
3/2001	Jose Valente	02/05/01	Preliminary hearing
3/2001	Jose Valente	26/04/01	Preliminary hearing
3/2001	Jose Valente	16/05/01	Trial
3/2001	Jose Valente	23/05/01	Trial
3/2001	Jose Valente	30/05/01	Disposition
3/2001	Jose Valente	19/06/01	Decision
4/2001	Lolotoe	03/04/01	Preliminary hearing
4/2001	Lolotoe	27/04/01	Preliminary hearing
4/2001	Lolotoe	05/07/01	Preliminary hearing
4/2001	Lolotoe	06/04/01	Preliminary hearing
4/2001	Lolotoe	28/06/01	Detention appeal
4/2001	Lolotoe	07/06/01	Preliminary hearing
5/2001	Gaspar Leite	04/06/01	Preliminary hearing
5/2001	Gaspar Leite	24/05/01	Preliminary hearing
5/2001	Gaspar Leite	31/05/01	Preliminary hearing
6/2001	Augusto dos Santos	13/06/01	Preliminary hearing
7/2001	Anigio de Oliveira	02/05/01	Preliminary hearing
7/2001	Anigio de Oliveira	15/05/01	Preliminary hearing
7/2001	Anigio de Oliveira	23/05/01	Preliminary hearing
7/2001	Anigio de Oliveira	14/11/01	Trial
7/2001	Anigio de Oliveira	15/11/01	Trial
8/2001	Francisco dos Santos Laku	30/05/01	Trial
8/2001	Francisco dos Santos Laku	06/06/01	Trial
8/2001	Francisco dos Santos Laku	13/06/01	Disposition
8/2001	Francisco dos Santos Laku	25/07/01	Decision
8/2001	Francisco dos Santos Laku	09/05/01	Preliminary hearing
10/2001	Lino de Carvalho Ruben Monteiro Ruben Tavares	15/05/01	Preliminary hearing
10/2001	Lino De Carvalho etc	29/10/01	Interlocutory appeal decision
12/2001	Sergio da Costa	5/07/01	Preliminary hearing

## APPENDIX B

### SUMMARY OF RECOMMENDATIONS

#### *Court administration generally*

**Recommendation 1:** That the administrative structure of the Special Panels for Serious Crimes be monitored and reviewed, including considering whether a separate administrative structure would be more effective.

**Recommendation 2:** That the President of the Court of Appeal, each of the Judge Administrators and the Court Administrator together undertake a systematic assessment of administrative needs, including those relating to further training of staff, and areas of responsibilities.

**Recommendation 3:** That a comprehensive program of specialised training in court administration be provided to the court clerks as well as to the judges appointed as Judge Administrators as part of the judicial training programme.

#### *Judicial Resources*

**Recommendation 4:** That one international legal clerk or research assistant with particular knowledge in international criminal law be recruited for each Special Panel and Court of Appeal judge as a matter of urgency.

**Recommendation 5:** That internet access be made available to the chambers of the Special Panel judges as a matter of urgency.

**Recommendation 6:** That a permanent position for an East Timorese court librarian be created and filled immediately. This person should have responsibility for administering a library budget, sourcing relevant books and journals, and receive specialised training in legal librarianship skills. Ideally, this capacity building would take place within East Timor by an experienced international court librarian who is provided by UNDP or another donor or NGO for at least three months.

**Recommendation 7:** That one of the Special Panel court clerks be assigned the responsibility of liaising closely with judges about ongoing general resource needs and following through such requests to a Department of Justice official tasked with responsibility for donor coordination.

#### *The right to trial without undue delay*

**Recommendation 8:** That court administration task one staff member as liaison officer with responsibility for ensuring that prisoner transfer documentation is in order with sufficient notice to ensure the presence of the accused at scheduled proceedings and that detainees be taken to the prison after sentencing.

**Recommendation 9:** That the procedures for managing the work plans of the special panels be immediately reviewed.

**Recommendation 10:** That a court clerk be tasked as a listing manager who works closely with the judges and is responsible for managing changes in hearing schedules, including communicating such changes to the prison liaison officer, the parties and the public.

### *The right to a public hearing*

**Recommendation 11:** That the listing manager or other court officer be tasked with preparing an up to date court schedule to be posted outside the court building, and at set public locations, and publicized through local media networks including radio as a matter of urgency.

**Recommendation 12:** That the court administration publish a clear court policy about which court documents are available to the public and the procedure by which the documents may be viewed or copied. This policy should ensure that the registry office be staffed between certain hours and set out whether there will be costs involved for accessing or copying documents.

**Recommendation 13:** A series of court reports containing the judgments of the Special Panel should be published and distributed to all courts in East Timor, and made available to the legal profession and the wider public through the Special Panel Registry office.

**Recommendation 14:** All court judgments should be translated into Bahasa Indonesia. Significant cases should have short summaries prepared for the press and the public.

### *The right to examine witnesses*

**Recommendation 15:** That provision be made in the court budget for witness expenses and that the Court Administrator implement a system to manage payment for such requests.

### *The right to an appeal*

**Recommendation 16:** That a court transcription service be provided urgently, with the staff and equipment necessary to operate such a service. In the event that recording equipment at the Court of Appeal is used, that a position be created for someone with responsibility for using and maintaining that equipment.

### *The right to an interpreter*

**Recommendation 17:** That at least seven additional court translators/interpreters proficient in a varying combination of the four court languages be employed by the Department of Justice. At least four of these are specifically assigned to work with the Special Panels for Serious Crimes. Each translator should be assigned an area of primary responsibility, with those in that area of the administration taking primary responsibility for ensuring the translator has the necessary support.

**Recommendation 18:** That the court develop a list of interpreters fluent in regional Timorese languages who can be used as necessary on an ad hoc basis.

**Recommendation 19:** That all court participants be given training on how to use interpreters in court.