

JUDICIAL **SYSTEM** MONITORING PROGRAMME
PROGRAMA DE MONITORIZAÇÃO DO **SISTEMA** JUDICIAL



THE CRISIS 2006: A LESSON FOR THE FUTURE



Australian Government

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Index

1. The 2006 crisis: Lessons to be learned for the future.....	2
2. _How effectively have justice sector actors responded to the 2006 crisis?.....	3
a) The judiciary and legal advocates.....	3
b) Office of the Prosecutor General.....	8
c) Office of the Public Defender.....	10
d) President of the Republic.....	13
e) Provedor for Human Rights and Justice.....	<u>16</u>
3. _What structural barriers to justice exist in relation to the 2006 crisis?.....	17
a) Delay.....	18
b) Limited resources.....	18
c) Transparency and public access to information.....	19
4. Conclusion: Lessons to be learned for the future.....	22
5. Recommendations.....	22

The 2006 crisis: Lessons to be learned for the future

Executive Summary

In its report of October 2006 on the political crisis in Timor-Leste in April and May 2006 ('the 2006 crisis') the United Nations Independent Special Commission of Inquiry for Timor-Leste recommended that:

The Commission encourages the office of the Provedor for Human Rights and Justice, UNMIT and NGOs to continue monitoring the progress of cases related to the events of April and May.¹

Since the 2006 crisis took place, JSMP has monitored the progress of cases relating to the findings of the Special Commission of Inquiry, in line with this recommendation and its own mandate.

This report is intended to disseminate information in relation to the most recent progress of cases before the court relating to the 2006 crisis. However, it also has two broader purposes. The first is to examine the relative strengths and weaknesses of various key justice sector actors in responding to issues arising from the 2006 crisis over the past three years. The second is to examine a number of structural barriers that have impeded access to justice in the aftermath of the 2006 crisis.

JSMP believes that reflection upon these issues is a necessary prerequisite for justice to be done in each of the outstanding cases arising from the 2006 crisis. In relation to structural issues, the broader themes and recommendations of this report may also be used to guide improvements to the justice system in the future.

JSMP maintains that adherence to the rule of law must be maintained both in times of crisis and of peace. Therefore, the recommendations of this report are not solely directed at remedying the weaknesses in the justice sector that were exposed in the aftermath of the 2006 crisis. Instead, they are targeted at developing a strong and well-resourced judicial system with the capacity to operate effectively in the long-term.

¹ *Report of the United Nations Independent Special Commission of Inquiry for Timor-Leste (2006)* Recommendation 18.

This report proceeds in the following sections:

Section 1 describes the role played by various justice sector actors in their work after the 2006 crisis. It considers the challenges inherent in equipping judicial actors with the skills and facilities to adequately try cases involving serious crimes, and critically examines the role of external justice sector actors in the resolution of cases arising from the 2006 crisis.

Section 2 considers a number of structural problems within the justice system that have affected the resolution of cases arising from the 2006 crisis. It examines the progress made in the resolution of these issues, and comments on some of the challenges still to be overcome.

Section 3 reflects upon lessons that can be learned from the 2006 crisis, and concludes with a number of recommendations for various agencies and actors operating in the justice sector in the future.

Appendix 1 provides a summary of JSMP's monitoring work in the case of Vicente da Conceição ('Railos'), Mateus dos Santos Pereira ('Maurakat') and Leandro ('Grey Harana') Lobato, the most recent suspects to be tried in relation to the 2006 crisis.

1. How effectively have justice sector actors responded to the 2006 crisis?

(a) The judiciary and legal advocates

Legal Knowledge and Training

Over the past three years, it has been widely acknowledged that two important contributing factors to the 2006 crisis were the security vacuum left in the wake of the departure of United Nations Mission (UNMIT) staff in 2005, and a failure by the international community to foster a strong culture of compliance with the rule of law. As a response to these problems, much has been done to strengthen the legislative

framework in Timor-Leste over the past three years, as well as the knowledge and skills of individuals involved in legal practice.

Together, UNMIT and the Ministry of Justice have overseen the drafting and adoption of a number of significant pieces of legislation, which have contributed significantly to the creation of an organic national legal framework in Timor-Leste. In particular, the drafting and passage of both the Criminal Code and the Criminal Procedure Code have been significant steps forward.

The development of the Legal Training Centre, which manages and streamlines the professional training of new legal advocates, has also contributed significantly to improving the quality of legal graduates' knowledge and skills. Under its stewardship, Timor-Leste has made considerable progress in expanding the number of its national judicial actors over the last three years. In June 2007, the 27 graduates of the first Legal Training Centre course were sworn in as the nation's first judges, prosecutors and public defenders. Following the appointment of a second group of judicial actors on May 22, 2009, Timor-Leste now has 37 national judicial actors, consisting of 13 national judges, 13 national prosecutors and 11 national public defenders.

The passage of the law regarding private advocacy and training of lawyers (the 'Private Lawyers Statute') in July 2008 was also a welcome development. By creating a legal framework for the admission of legal practitioners, the statute has now clarified how private lawyers may receive registration in order to practice and appear in Timor's courts. JSMP expects that as more private lawyers become registered to practice, the increased availability of advocates can be expected to considerably reduce delay in the court system.

In spite of significant measures of progress having been taken, JSMP is concerned that the relatively low level of knowledge and experience of lawyers in Timor-Leste is an issue that requires ongoing attention. While the underdevelopment of legal skills and training was by no means unique to cases arising out of the 2006 crisis, JSMP has frequently noted over the past three years that both the judiciary and legal advocates

appearing in those cases often appeared to be unfamiliar with the content of much of the law being discussed before the court.

One of JSMP's primary observations during its monitoring of cases arising from the 2006 crisis was that there have been frequent and troubling incidences of departure from the rules and standards set out by the Criminal Procedure Code. In its monitoring of cases in which the Criminal Procedure Code was first applied, JSMP commented that the lack of knowledge demonstrated by legal advocates as to the content of the law was exacerbated by a number of ambiguities in the Code itself, resulting from poor drafting and inadequate consultation prior to the Code's enactment.

Given that many of these problems continue to arise in cases currently before the court, closer attention must be given to the shortcomings that remain in the training given to courtroom actors, and the opportunities that they have to become acquainted with relevant laws and practices before they are required to apply them.

In large part, many of the problems experienced by judicial actors stem from the speed with which new laws are now being introduced and applied in the courts. While some legal practitioners may have the opportunity to study the content of legislation prior to its passage through parliament, it remains difficult for practitioners to gain experience in the application of those laws. As a result, legal actors, including judges, are often unsure as to which points of law to contest during trials, and which errors of law are sufficient to generate an appeals process.

JSMP believes that the legal training available to Timorese court actors must be more frequent and comprehensive than is currently the case. While the legal system is currently benefiting from the two-year teaching program administered by the Legal Training Centre, as well as other *ad hoc* UN-sponsored training programs, at this point in time there is no ongoing system of continuing legal education through which registered legal practitioners can update and maintain their skills, and learn about the passage of new legislation. JSMP believes that such a program would strengthen the knowledge and skills of courtroom actors considerably.

It is also important that training programs for court actors are scheduled well in advance, so that they do not interfere with established court schedules. For example, JSMP understands that throughout April and May 2009, a number of judges in the Dili District Court received training on the Criminal Procedure Code, and on the reviews process in the Court of Appeal. While this training was both necessary and welcome, it is unfortunate that in at least one case recorded by JSMP, scheduled criminal trials were postponed on the day that their hearings were scheduled to occur, so that the training in question could take place.

Timorese ownership of legal proceedings

Even prior to the 2006 crisis, the justice system faced serious challenges regarding the limited number of Timorese judicial actors available to represent individuals in court proceedings. This shortcoming became further apparent in cases arising from the 2006 crisis, where extensive international legal support became necessary in order to try cases successfully before the court.

International jurists assigned to hear cases arising from the 2006 crisis brought with them considerable knowledge of international law, as well as greater prosecutorial experience than that of their Timorese counterparts. International support was also crucial when national court actors became reluctant to become involved in highly politicised cases. Judges in particular harboured concerns that their independence would be called into question in cases arising from the crisis, because of perceived bias towards either the East or West of Timor-Leste, depending on their place of origin. After the violence experienced by the entire Timorese community in 2006, some court actors also recorded their concern that they may face personal danger as a result of being involved in highly politicised trials.

While acknowledging that the international assistance afforded by foreign jurists in cases arising from the 2006 crisis was both timely and necessary, JSMP recorded its concern at the time that in many of the most prominent trials, there was little visible Timorese ownership of the judicial process. For example, in the trial of former interior minister Rogerio Lobato, the defendant was represented by an international public defender,

while the Office of the Prosecutor General-General was represented by two international prosecutors. The judge hearing Lobato's case at first instance, Justice Silvestre, was also a foreign jurist.

While international judicial actors continue to be crucial to the resourcing of the justice sector, much of the support given in the aftermath of the 2006 crisis has now been considerably scaled back. It is therefore important to evaluate some of the continuing effects of the international legal support given to court actors in cases arising from the 2006 crisis, and the extent to which national actors now feel confident to operate without that assistance.

JSMP believes that the capacity of many national court actors to manage cases involving serious crimes has improved significantly since the 2006 crisis. As well as assisting the resolution of trials, the international legal assistance given in cases arising from the 2006 crisis has been of considerable long-term benefit to Timorese judges and prosecutors, who, by assisting their international counterparts, have learnt important lessons in case management and the application of international legal principles.

The levels of intimidation encountered by judicial actors are also considerably lower than was the case in the aftermath of the 2006 crisis. While this change is undoubtedly due, in part, to the lower level of political tensions in Timor-Leste that exist at the present time, according to JSMP's observations, they also relate to renewed confidence felt by members of the legal profession that the rule of law will protect them in the exercise of their duties. There is little evidence that judges are now reluctant to try highly politicised cases, and to JSMP's knowledge, none have faced personal problems in relation to the exercise of their functions in court.

JSMP believes that while these developments are extremely positive, the issue of language remains a considerable obstacle to Timorese participation in and ownership of court processes. JSMP believes that in order to lessen the difficulties inherent in multiple legal translations being made, and to prevent certain advocates being put at a disadvantage because of their level of Portuguese language skills, formal documents, including the preparation of charge sheets and indictments, should be made available in

whichever language legal advocates feel that they are most competent. While acknowledging the important status of the Portuguese language in Timor-Leste, JSMP believes that more frequent use of Tetum would enable Timorese advocates to take greater control of legal processes, without recourse to international assistance in the future.

(b) Office of the Prosecutor General

Resource Constraints

The Constitution of Timor-Leste provides that prosecutors have the responsibility for promoting the enforcement of the law and that this must be done with legality, objectivity and impartiality.² However, the Office of the Prosecutor General has, since its inception, suffered from a shortage of material and human resources which has made carrying out this responsibility a considerable challenge.

In 2007 and 2008, a number of new appointments were made to the Office of the Prosecutor General which were designed to improve its capacity to function with its increased workload in the aftermath of the 2006 crisis. However, the case backlog of the Prosecutor-General continues to be estimated at between 4000 and 5000 pending cases. While the issue of delay in the justice system is also dealt with in Section 2 of this report, it is worth noting that as an institution, the Office of the Prosecutor General is often cited as the major bottleneck in the resolution of cases in the Timorese court system, including those involving serious crimes.

Aside from resource issues, a number of other factors impeded the ability of prosecutors to undertake their work successfully in many of the cases arising from the 2006 crisis. According to JSMP's observations, key witnesses were often unwilling to co-operate with the Office of the Prosecutor General. JSMP believes that one reason for this lack of co-operation was because of a lack of public trust in the way in which the Office of the Prosecutor General would use their evidence. As a result, the Office of the Prosecutor

² *Constitution of the Democratic Republic of Timor-Leste*, article 132(1)(3).

General was frequently unable to secure convictions against the perpetrators of serious crimes even when the prosecution brief indicated a strong case.

Another obstacle to the work of the Office of the Prosecutor General in many cases arising from the 2006 crisis was that many witnesses to serious crimes were often keen to defend the actions of perpetrators, because of their long histories of friendship and mutual association prior to Timor-Leste gaining its independence. For example, Rafael Alfes Correia, ostensibly a witness for the prosecution in the case against Vicente “Railos” da Conceição, declared in court that although Railos had forcibly detained him for periods during April and May 2006, he had done so only for his own protection. Persuading witnesses to truthfully testify against alleged perpetrators of serious crimes remains a considerable challenge.

Reform initiatives

In JSMP’s view, the appointment of Ana Pessoa to head the Office of the Prosecutor General in March 2009 was a welcome step. While some public concern has been aired about her political sympathies - given her former position as the Minister of Justice in the previous FRETILIN government – Ms Pessoa is nevertheless well-qualified for the position, and her intelligence and knowledge of the justice sector is highly regarded. However, as one of the most important actors in Timor-Leste’s justice system, it is of the utmost importance that the Prosecutor-General stands outside the realm of politics in order to defend justice with impartiality, and be seen to do so. Ms Pessoa must therefore take care to strictly guard the independence of the Office of the Prosecutor General, and take care to prevent outside interference from affecting the resolution of highly politicised cases.

JSMP believes that Ms Pessoa must also take concrete action to reduce the number of pending cases in the justice system, with special priority to be given to those cases involving serious crimes committed during the 2006 crisis. In order to increase the effectiveness of prosecutorial processes, Ms Pessoa also needs to work strategically to improve relations with police and criminal investigators, in order to build the strongest possible cases against the alleged perpetrators of serious crimes.

JSMP believes that in the future, the work of the Office of the Prosecutor General must also be more transparent. In many cases arising from the 2006 crisis, JSMP has experienced considerable difficulty accessing information concerning proceedings or inquiries were being initiated by the Office of the Prosecutor General. For example, in 2006 JSMP noted its concern that the Prosecutor-General had delayed taking action against Vicente “Railos” da Conceição, in spite of Railos having made public statements that he received and possessed firearms, and agreed with other individuals to use them for the purpose of carrying out assassinations. Although Railos has now come before the court on charges associated with his actions in the 2006 crisis, the delay in prosecuting his case also raises serious questions about the level of responsibility which rests with the Prosecutor-General in respect of considerable delay which remains within the Timorese justice system.

For similar reasons, the Office of the Prosecutor General also needs to communicate better with civil society and with the general public to counter perceptions that special treatment is being given to high profile suspects. For example, when investigations into the involvement of former Prime Minister Mari Alkatiri and Leandro Issac in the 2006 crisis were closed on the basis of insufficient evidence in 2006 and 2007 respectively, there was a strong public perception that the decision to terminate these was closely related to the political standing and influence of the individuals involved. While JSMP does not mean to suggest that the Prosecutor-General’s conduct during those investigations was necessarily improper, the failure of the Office of the Prosecutor General to communicate clear information about its investigations has the potential to undermine public confidence in its operations.

(c) Office of the Public Defender

Resource Constraints

Like the Office of the Prosecutor General, the Office of the Public Defender, currently headed by Sergio de Jesus Fernandes da Costa Hornai, has suffered from a chronic shortage of human and material resources. Both prior to and following the 2006 crisis,

JSMP's observations have led it to conclude that the Office of the Public Defender has been significantly under-resourced, even compared to the Office of the Prosecutor General.

JSMP has observed that the Public Defenders are particularly at a disadvantage when undertaking duties in courts outside Dili. Indeed, resourcing of the courts in the districts is a problem for both the Office of the Public Defender and the Office of the Prosecutor General. During sittings of the court in Oecusse and Suai, there is typically only one lawyer available to act in each of the roles of Prosecutor and Public Defender. In Baucau there are sometimes two court actors available to fill each of these positions.. These numbers compare unfavourably with human resources in the Dili District Court, which typically has eight public defenders and seven prosecutors available to act at any one time.

Transportation and other facilities available to Public Defenders operating in the district courts are typically far lower than those available to their counterparts in Dili. For example, in 2008 JSMP recommended that permanent accommodation was needed for judicial actors operating in the district courts. JSMP noted that this accommodation would help to encourage judicial actors to travel long distances, and stay for long periods, in areas far from Dili, where the majority are permanently based. While this recommendation was accepted by the Ministry of Justice, up until the present time it is only judges, and on occasion, for prosecutors, for whom accommodation has been arranged.

In part, JSMP believes that this critical under-resourcing stems from an under-valuing of the role of the Office of the Public Defender as compared with the Office of the Prosecutor General. The graduation system used by the Legal Training Centre supports this contention. At present, the top graduates from the Centre are selected to become members of the judiciary, and middle-ranking members are offered jobs in the Office of the Prosecutor General. The role of Public Defender is offered to only the lowest ranking graduates.

While JSMP understands the desirability of the most capable lawyers receiving appointment to judicial office, a system which results in only the poorest performing graduates becoming public defenders is likely to adversely impact upon the right of accused persons to a fair trial.

Under international law, the right to a fair trial, enshrined in Article 14 of the ICCPR, requires that two main concepts be satisfied: the right to equality before the law; and the presumption of innocence. With regard to equality before the law, the notion of *equality of arms* refers to the balance that must exist between the prosecution and the defence counsel for a fair trial to occur. Discussing the internationally-recognised concept of equality of arms, the European Court of Human Rights has commented that it necessarily implies that “each party must be afforded a reasonable opportunity to present his case under conditions that do not place him at a disadvantage *vis-à-vis* his opponent”.³

JSMP believes that in order for Timor-Leste to meet its obligations to uphold the rights of defendants under international law, that state must ensure that it creates the conditions in which equality of arms exists between defence and prosecutorial services. It is therefore of the utmost importance that in the material resourcing of the justice sector in the future, the Office of the Public Defender is not disadvantaged compared to the Office of the Prosecutor General.

In spite of the resource constraints mentioned above, JSMP has observed that the capacity of lawyers working within the Office of the Public Defender has increased since 2006, when its officers merely ‘shadowed’ international lawyers in the course of trials arising from the 2006 crisis. The Office of the Public Defender has also recently received into its ranks 11 graduates of the Legal Training Centre, who had already received two years training and streamlined experience. Notwithstanding the shortcomings in the graduation processes of the Legal Training Centre noted above, JSMP expects that the addition of these new graduates to the Office of the Public Defender will significantly improve the Office’s capacity to assist its clients.

Reform Initiatives

³ *Bulut v. Austria* (1996) European Court of Human Rights Reports 1996-II, p 359, para. 47.

During its monitoring work in cases arising from the 2006 crisis, JSMP recorded its concern that where clients were remanded in custody prior to trial, public defenders would rarely visit them in order to obtain legal instructions. Whether this problem was related to bureaucratic problems associated with visits to custodial centres, or was simply due to reluctance on the part of Public Defenders to visit prisons, this issue remains a matter of serious concern.

The right to communicate with one's counsel on a free basis is enshrined by the ICCPR article 14(3)(b), which provides that a defendant must have the opportunity

(b) To have adequate time and facilities for the preparation of his defence and to communicate with counsel of his own choosing.

Considering this principle, the Human Rights Committee has explained that right to a fair trial is not upheld where “the accused is denied the opportunity personally to attend the proceeding or where he is unable properly to instruct his legal representative”.⁴

JSMP maintains that it is of the utmost importance that in performing their duties, Public Defenders take pains to ensure that their counsel is available to their clients prior to court hearings, so that the right to a fair is upheld. The failure to make legal counsel available to suspects, whether or not they are remanded in custody, has the potential to seriously undermine their right to a fair trial under international law.

(d) President of the Republic

As the principal holder of the executive arm of government, the President of the Republic can be distinguished as an entirely separate entity from the institutions considered above. However, while the President holds an office that is entirely outside of the judicial arm of government, the actions of holder of that office can have significant ramifications for the operation of the justice system

⁴ Human Rights Committee, *D. Wolf v. Panama*, Communication No. 289/1988 (Views adopted on 26 March 1992) UN doc A/47/40.

In regard to cases arising from the 2006 crisis, the most notable step taken by the President of the Republic, Dr Ramos Horta, has been to grant sentence reductions to a significant number of prisoners convicted of serious crimes, including several individuals already determined by the Court to have been among the principal authors of the 2006 crisis.

On 23 May 2008, the President announced that he would exercise his power under section 85(i) of the Constitution in order to pardon more than 80 convicted prisoners. The section in question provides:

Section 85

(Competencies)

It is exclusively incumbent upon the President of the Republic:

...

i) To grant pardons and commute sentences after consultation with the Government;

Despite receiving advice from the Ministry of Justice that a reduction of sentence for around 100 prisoners would be more appropriate, the President formalised his announcement of pardon in Presidential Decree 53 of 2008. The decree specified that five categories of prisoners would have their sentence commuted, with the result that Rogerio Tiago Lobato and others convicted of involvement in the 2006 crisis had their sentences halved.

While the President's stated aim in commuting these sentences was to promote a culture of forgiveness and national reconciliation, JSMP commented at the time of his announcement that such actions could have extremely dangerous consequences. JSMP noted that wholesale commutation and reduction of sentences could jeopardise efforts to ensure fair and consistent application of the laws in Timor-Leste. As well as affecting the viability of the rule of law in Timor-Leste, such actions also have clear security implications for the future.

As an office safeguarded with maintaining the security and wellbeing of the Republic of Timor-Leste, it is deeply troubling that the President has recently evinced an intention to further derail the due process of law in respect of those found guilty of involvement in the 2006 crisis. As well as speaking frequently about the need for forgiveness and reconciliation as an alternative to legal prosecutions, on 24 June 2009, the President signaled that he would consider granting a general amnesty to all individuals who committed serious crimes in Timor-Leste in the period 1974 - 2006.

In JSMP's view, wholesale sentence reductions, pardons and amnesties for perpetrators of serious crimes compromises the viability and credibility of the Timorese justice system. First, such actions encourage a culture of impunity, sending the message that the state is either unable or unwilling to mete out punishment for actions constituting the most serious crimes under both national and international law. Second, they may undermine public confidence in the judiciary, since large-scale sentence reductions inevitably call into question the validity of judicial arbitration at first instance.

It is also JSMP's view that an amnesty of the kind announced by the President would be outside of the scope of his constitutional power, as prescribed by section 85 of the Constitution. While the National Parliament has the power under section 95 of the Constitution to grant amnesty to perpetrators of crimes, the President's power as outlined by section 85 is limited to pardoning individuals after their crimes have been heard by a competent tribunal, and after a sentence has been handed down.

However, even if the President is not empowered under the Constitution to grant an amnesty in accordance with his stated intentions, public pronouncements alone also have the tendency to undermine the rule of law in Timor-Leste. If the general public are led to believe that the President is likely to grant amnesty to any defendant coming before a court or competent tribunal facing charges of serious crimes (or to retrospectively pardon them, as is within the scope of his power) this may render any resulting trials ineffectual, and seriously undermine the public's confidence in the justice system.

Section 69 of the Constitution provides that in the exercise of their functions, each organ of the Timorese state must respect the principle of the separation of powers:

Section 69

(Principle of separation of powers)

Organs of sovereignty, in their reciprocal relationship and exercise of their functions, shall observe the principle of separation and interdependence of powers established in the Constitution.

Accordingly, JSMP believes that all state actors, including the President, must carefully evaluate the effect of their engagements with the justice sector, and take care to respect the independent functions of the judiciary. If the general public have reason to believe that the processes of the court are likely to be undermined or set aside by executive decree, it will be increasingly more difficult to build and maintain the rule of law in a sustainable way.

(e) Provedor for Human Rights and Justice

Although the operations of the Provedor for Human Rights and Justice ('the Provedor') are external to those of court actors, in the aftermath of the 2006 crisis the Provedor took on a number of new functions, some of which had a significant effect on cases that would later enter the judicial system. In reflecting upon cases arising from the 2006 crisis, it is therefore useful to evaluate the impact of the functions undertaken by the Provedor and to assess its institutional capacity to operate in a similar manner in the future.

In the days immediately following the start of the crisis, the Provedor initiated an investigation into the events of 28 and 29 April, in order to record the extent of human rights violations that had occurred. According to its own documentation, the Provedor received excellent cooperation from government and state officials, PNTL and F-FDTL officers in carrying out this investigation in 2006.⁵

In early 2007, the Provedor formed a network with other NGOs to monitor the implementation of the recommendations of the United Nations Independent Special

⁵ Provedor for Human Rights and Justice, *Annual Report 2006 (2007)* p 1.

Commission of Inquiry. The Provedor's investigations into these events were critical, in particular because of the many unconfirmed reports of human rights violations.

The resulting network, also called the Monitoring Group for Human Rights, still exists, although its meetings and capacity are less frequent than in the aftermath of the 2006 crisis. Nevertheless, JSMP considers that the role of the Provedor in co-ordinating this group represents a significant step forward for the future, since a formal network now exists for national organisations that can be built upon for future advocacy and information sharing in the case of human rights violations in times of crisis.

Like other state institutions, the Provedor has been faced with the challenges inherent in limited funding to its institution, especially as it carries out its dual roles as both Ombudsman and National Human Rights Institution. However, JSMP considers that the 2006 crisis demonstrates that the Provedor, with its independent nature and legal powers, represents an important State mechanism to identify human rights violations, and objectively uncover the facts surrounding those occurrences. JSMP encourages the Provedor to focus its thematic work on human rights training for institutions, so that greater foundations are built for human rights compliance in the future.

JSMP also believes that the Provedor should publicise its investigations more thoroughly, in order to make civil society, government and the general public aware of its existence and mandate. Records kept by the Provedor reveal that this information sharing is particularly necessary in the districts: in 2006, around 70% of human rights complaints made to the Provedor came from residents of Dili.⁶

2. What structural barriers to justice exist in relation to the 2006 crisis?

(a) Delay

The 2006 crisis substantially increased the workload of Timor-Leste's already overburdened court system, and further increased delays in the delivery of justice. As well as hearing cases relating to criminal culpability in the events of April and May 2006, the

⁶ Provedor for Human Rights and Justice, *Annual Report 2006 (2007)* p 14.

breakdown of law and order following the crisis led to a surge of criminal activity, which increased the general caseload of matters coming before the court.

JSMP understands that in a fledgling court system, many obstacles must be overcome in order to streamline access to justice. However, progress towards accountability for the perpetrators of the 2006 crisis continues to be unacceptably slow.

As recorded in Section 1 of this report, much of the delay encountered in bringing cases to trial is due to the critical under-resourcing of justice sector institutions, particularly the Office of the Prosecutor General. However, many of the suspects identified by the United Nations Independent Special Commission of Inquiry for Timor-Leste as having been involved in the events of April and May 2006 have sought refuge overseas, and when their cases come before the court, they are postponed indefinitely due to the unknown whereabouts of the defendant.

In part, the solution to the problem of apprehending suspects of serious crimes must be a political one. JSMP believes that in order to avoid impunity, the state of Timor Leste must forge stronger ties with its neighbours in order to apprehend and extradite individuals whose cases are currently pending before the court.

As noted above, when considerable delays occur in the judicial system, justice is denied to both victims and the community at large. However, it is also worth noting that in relation to suspects awaiting trial, delay also poses a threat to the rights of defendants under international law to be tried promptly: according to Article 14(3)(c) of the ICCPR, in the determination of any criminal charge, every person shall be entitled to be tried without undue delay.

(b) Limited resources

The limited human resources devoted to the courts has been one of JSMP's most enduring criticisms of the justice system in Timor-Leste. Although the issue of limited resources for justice sector institutions has been discussed in section 1 of this report,

those resource constraints also continue to extend to the courts and their internal operations.

It is concerning that from tracking JSMP's records of court monitoring over the past three years, it is evident that many problems and corresponding recommendations in relation to resourcing the court system remain the same as they were in 2006. Perhaps most notably, the human resources in place to support the operation of the courts, including the staff and support personnel, are still far too few. Furthermore, the staff currently in place require significant training in areas that would assist them in fulfilling their roles, particularly in the district courts. In particular, training in Portuguese language, computer and organisational administration would be useful in order for the courts to function more effectively.

More promisingly, JSMP has observed that much of the equipment and facilities used by courts has improved since JSMP's initial monitoring of cases arising from the 2006 crisis. Facilities which did not exist in 2006, such as internet access and telephone systems to link each of the courts, are now generally being made available. Computers and printers are also now more prominent, and are being used to begin managing cases electronically. Better and more frequent interpreting services are now slowly being put in place. Additionally, court staff appear to be better resourced with motorbikes. However, it is clear from JSMP's court monitoring in the District Courts that these improvements in resources are not spread evenly between Dili and the districts.

(c) Transparency and public access to information

In general, JSMP experiences significant barriers to accessing information within the court system. During monitoring of cases arising from the 2006 crisis, these difficulties were more pronounced than ever. Hearings in high profile cases, such as that of Mari Alkatiri and Rogerio Lobato, were closed to members of the public, including JSMP.

According to article 75(1) of the Criminal Procedure Code, a criminal proceeding is open to the public from the time that an indictment is presented. While the court has the discretion under article 76(1) of the Criminal Procedure Code to restrict public access to

proceedings, the article in question specifies that such restrictions will only take place in exceptional circumstances, and ‘as a way of protecting other values, notably public morals and human dignity’.

While JSMP understands that there may be reasons – particularly in the case of vulnerable defendants, or in some highly politicised cases – that courts should sit in closed proceedings, it is concerning that according to JSMP’s observations, it is common that trials are conducted in closed proceedings simply because the defendant makes this request of the judge at the outset of the trial. Conducting *in camera* proceedings solely to meet the defendant’s preferences presents a serious obstacle to court monitoring processes. Since in-court observations and reporting are currently the only method available of tracking trials, judgments and reasons for decisions, JSMP believes that it is essential that monitoring services be allowed access to cases unless it is strictly necessary for the safety of the victim to hold closed proceedings.

During its monitoring of cases arising from the 2006 crisis, JSMP also found that many of its requests for legal documents such as indictments and charge sheets were not met by the courts. Gaining access to court documents remains a problem for JSMP, especially in the districts, where JSMP legal staff are frequently informed that only lawyers involved in a case may gain access to relevant legal documents.

It is also concerning that on a number of occasions, court staff have given access to documents to UN agencies and other international NGOs, while refusing to give access to JSMP and other nationally run NGOs. On some occasions, JSMP has also been told that the courts are only allowed to make one external copy of documents, and that JSMP should seek to access that copy from third parties, rather than from the court itself. While JSMP understands that the dissemination of court information to international NGOs and the UN and its agencies is extremely important, JSMP is currently the only organisation that operates with the mandate of sharing information with the Timorese community, who have a right to be informed about the processing of court cases within the justice system.

As an institution with the established capacity for public monitoring, it is unfortunate that JSMP's access to information in both the courts and legislative systems must still occur primarily through a network of personal relationships. Furthermore, at present the capacity of any organisation to access information and monitor court proceedings depends on that organisation possessing resources necessary to have an officer physically sit in court or parliament to monitor proceedings as they occur.

On 8 May 2009, at an UNMIT sponsored public seminar on access to justice, JSMP raised the question of public monitoring of serious crimes with the President of the Appeals Court, Dr Claudio Ximenes. At that meeting, Dr Ximenes promised that a website would soon be launched recording the cases pending in the court, as well as upcoming court schedules for the Court of Appeal. However, to JSMP's knowledge, no such website yet exists, making exact statistics on pending cases difficult to record.

There has been some uptake of relatively simple measures proposed by JSMP in its 2003 review, such as public notification, by display at court locations, of case schedules and activities. However, JSMP believes that a suggestion which it first made in 2003 - for the establishment of a Public Information Office with the central responsibility of disseminating information relating to court data, indictments, orders and decisions – would still be a worthwhile step to implement today. Not only would the creation of such an institution assist both government and non-government organisations in formulating evidence-base proposals for reform, such an institution could also be a central point of contact for media inquiries relating to statistics in the justice system, and conduct its own media releases when cases of public importance occurred.

It would also be appropriate that such an institution take responsibility for the public dissemination of court information by public gazette and notices relating to information as it occurs. Such information sharing would allow timely and appropriate analysis of justice sector developments, and greatly enhance public access to public communication.

3. Conclusion: Lessons to be learned for the future

It is clear that there is much to be learned from the progress made by justice sector actors and institutions in the three years since the 2006 crisis took place. Considering the strain placed upon the justice sector in the aftermath of the crisis, in many ways the primary legacy of the past three years is a positive one. Many improvements have been made by both internal and external justice sector actors that have consolidated the rule of law in Timor-Leste.

In spite of this progress, there is also another, more comprehensive lesson to be learned from the 2006 crisis: that Timor's justice system, and its broader process of development is fragile, and must be carefully protected. It is in this spirit that JSMP makes the following recommendations, directed at the justice sector actors and agencies discussed in this report.

For its part, JSMP will continue to monitor the progress of cases relating to the crisis of April and May 2006, and strive to promote greater compliance with the rule of law and the right to a fair trial through its oversight of the courts. JSMP believes that while there remains some way to go, the past three years of progress demonstrate that where justice sector actors are led by international human rights standards, a strong and transparent justice system will continue to develop in Timor-Leste.

Recommendations:

For the judiciary and legal advocates

- Further training is needed to build the knowledge and skills of all judicial actors. Further training is particularly needed on the Criminal Procedure Code, the Penal Code, the Civil Code, and the Civil Procedure Code.
- Ongoing legal education courses be mandatory for all practicing Timorese lawyers. These courses should aim to improve the advocacy and case management skills of lawyers working within the court system, and also make lawyers aware of the specifics of new laws as they come into place.

- The Legal Training Centre should be reviewed by external evaluators to so that improvements can be suggested in the future. In particular, JSMP recommends that particular attention be given to its system of stratifying employment pathways for graduates of the Centre.

For the Office of the Prosecutor General

- Additional resources should be devoted to the Office of the Prosecutor General to improve the Office's resources and capacity.
- In partnership with the Ministry of Justice, the Office of the Prosecutor General should develop a public and reliable mechanism to specify the exact number of cases currently pending in the court system, and determine which should take priority in terms of prosecution.
- As the Prosecutor-General, Ana Pessoa should strictly guard the independence of the Office of the Prosecutor General.
- The Office of the Prosecutor General should work strategically to improve relations with police and criminal investigators, in order to build the strongest possible cases against perpetrators of serious crimes.
- The Office of the Prosecutor General should ensure that its work is transparent, and that it communicates its decisions about the prosecution of cases effectively to civil society and the general public.

For the Office of the Public Defender

- Additional resources should be devoted to the Office of the Public Defender to improve the Office's resources and capacity. This resource allocation should ensure that the Office of the Public Defender and the Office of the Prosecutor-General have the capacity to operate on an equal basis.

- Public defenders must take the utmost care to make themselves available to clients and obtain instructions throughout the pre-trial process. Special attention should be given to adequacy of representation in cases in which the defendant is remanded in custody.

For the President of the Republic

- The President should take care in his public pronouncements not to give the appearance of undermining the operation of the judicial system.
- The President should only take actions with regard to amnesty and pardon of serious crimes as are afforded to him by his powers under the Constitution and international law.

For the Provedor for Human Rights and Justice

- The Provedor should ensure that cooperative arrangements with human rights monitoring NGOs are maintained, in order to better share information concerning human rights violations in the future.
- JSMP encourages the Provedor to focus its thematic work on human rights training for institutions, so that greater foundations are built for human rights compliance in the future.
- JSMP encourages the Provedor to publicise its investigations more thoroughly, in order to make civil society, government and the general public aware of its existence and mandate. In particular, JSMP encourages the Provedor to focus on engagement with the community and civil society organisations operating in the districts.

Concerning delay

- JSMP recommends that the Ministry of Justice forge stronger ties with police services operating in international jurisdictions in Timor-Leste's region, in order to more effectively apprehend and extradite individuals whose cases are currently pending before the court.

Concerning resources

- JSMP welcomes the independent needs analysis of the judicial sector currently being undertaken by the United Nations, led by Justice Phillip Rapoza. JSMP encourages the government to fully implement the recommendation of that analysis, in order to allow a co-ordinated approach to improving the resources and capability of the justice sector over time.
- JSMP recommends that in its future resourcing of the judicial sector, the government pays particular attention to the equal resourcing of District Courts.

Concerning transparency and public access to information

- JSMP encourages the Ministry of Justice to make a website available to record cases still pending with the Prosecutor-General, the current status of those cases, and upcoming court schedules for the Court of Appeal.
- JSMP recommends that a Judicial Public Information Office should be established within the Ministry of Justice, with the central responsibility of disseminating information relating to court data, indictments, orders and decisions.
- JSMP recommends that the Ministry of Justice develop guidelines on the dissemination of court information, with a view to maximising transparency of judicial operations. Court staff should then be given training on those guidelines, so that they are aware of the correct protocols regarding access to legal information.

Appendix 1: The case of Vicente da Conceição ('Railos'), Mateus dos Santos Pereira ('Maurakat') and Leandro Lobato ('Grey Harana')

2 October 2006: United Nations Independent Special Commission of Inquiry for Timor-Leste recommends that Vicente da Conceição ('Railos'), Mateus dos Santos Pereira ('Maurakat') and Leandro Lobato ('Grey Harana') be prosecuted for involvement in the events of 8 May and 21 May 2006.

26 January 2007: Dili District Court holds a judicial hearing for Railos and orders that the Office of the Prosecutor General launch a criminal investigation into his actions during the events of May 2006.

12 January 2009: First date set for the trial of Railos, Grey Harana and Maurakat. Hearing cannot proceed because Maurakat is not present in court. The prosecutor requests that the trials of each defendant be heard separately to prevent further delay, but the judge declines to follow this request.

1 April: Second trial date. Hearing cannot proceed because the Prosecutor is called to Cape Verde after the death of his son. The replacement Prosecutor declares that he has not had sufficient time to study the case and requests an adjournment.

28 April: Third trial date. Judge declares that the case of Maurakat will be heard separately from that of Railos and Grey Harana, since Maurakat's whereabouts remain unknown. The indictment is read out, and both Railos and Grey Harana indicate that they will exercise their right to silence.

15 May 2009: Further hearings in the case are delayed because of judicial training sessions on the new Penal Code.

17 May 2009: Trial proceeds, with the Office of the Prosecutor General represented by Felismo Cardoso, and the Office of the Public Defender represented by Jose Pedro Camoes. The prosecutor calls evidence from the witnesses Afonso de Jesus and Leonel de Jesus Carvalho.

2 June 2009: Three further witnesses called by the prosecution.

15 June 2009: Trial continues. Three further witnesses called by the prosecution.

24 June 2009: Trial continues. Court hears evidence from one further witness for the prosecution, Rafael Alfes Correia.

24 July 2009: Trial continues. Court hears evidence from the final witness for the prosecution. The defence counsel asks the prosecutor whether he will call Rogerio Tiago Lobato as a witness, but the prosecutor replies that Rogerio Lobato's involvement in the case is already on the public record. The defence counsel indicates that he does not wish to call any witnesses.

12 August 2009: Final submissions are heard. The Prosecutor, Felismino Cardoso requested that the judge sentence Railos and Grey Harana for the following crimes:

- The crime of using illegal arms and rifles, in contravention of article 4 and 4.7 of UNTAET regulation 5/2001;
- Four counts of homicide, in contravention of article 338 of the Indonesian Criminal Code;
- Two counts of threatening behaviour, in contravention of article 336 of the Indonesian Criminal Code; and
- Five counts of kidnapping, in contravention of article 333 of the Indonesian Criminal Code.

Additionally, the Prosecutor requested that Rai Los be sentenced for

- Two counts of assault, in contravention of article 352.1 of the Indonesian Criminal Code.

The prosecutor argues that the actions of Railos and Grey Harana are commensurate with the crimes of Rogerio Tiago Lobato, and that therefore the defendants should be sentenced to no less than 8 years prison, in line with Lobato's original sentence.

The defence counsel argues that the prosecutor has not proven the case against Railos and Grey Harana beyond a reasonable doubt. Counsel submits that it has not been shown that Railos was the leader of the group in possession of rifles during the events of May 2006, and that when rifles were procured by the PNTL for Railos' group, they were delivered to Maurakat, and not to Railos himself. Counsel also argues that while it was true that Rogerio Tiago Lobato had asked Railos to eliminate the leader of the opposition, the leader of the petitioners, and the leaders of the Catholic Church in Timor Leste, Railos had acted according to his conscience and refused to lead an insurrection against his countrymen.

It is expected that the judgment in this case will be handed down on 28 September 2009: nearly three years after the United Nations Independent Special Commission of Inquiry for Timor-Leste recommended that Railos, Grey Harana and Maurakat be prosecuted for their involvement in the events of May 2006.