



## JUSTICE UPDATE

**Period: 15 June – 25 July 2005**

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### Closure of Detention Review Hearings

#### Assault Case before the Dili District Court

On 15 June 2005 the Dili District Court conducted a 72-hour detention review hearing in a case involving a fight that occurred on or about 10 June 2005. Four suspects were brought before the court in order to review the legality of their arrest and detention.

Purportedly on the basis of section 20.2 of the Transitional Rules of Criminal Procedure<sup>1</sup> the presiding judge, Judge Nusolini, closed the hearing to the public. According to that section “[t]he review hearing shall be closed to the public, unless requested otherwise by the suspect and ordered by the Investigating Judge”. On that basis, the judge denied permission to JSMP staff who sought to attend the hearing.

JSMP has observed differing judicial interpretations of the application of section 20.2 of the TRCP. For example, review hearings presided over by Judge Silvestre were open to the public. The differing interpretations between judges indicate that there is some flexibility and ambiguity in the implementation of section 20.2. Nevertheless, in JSMP’s view rules regulating public access to court hearings are fundamental and ought to be applied consistently throughout the courts. The failure to do so may create confusion amongst members of the public and ultimately undermine community respect for the judicial system. This Justice Update will therefore analyse the scope and function of section 20.2 TRCP, particularly in light of ‘open justice’ principles requiring public court hearings, in the hope that this analysis will contribute to further discussion of, and improved consistency in, its application.

In JSMP’s view Judge Nusolini was clearly obliged by section 20.2 of the TRCP to close the review hearing in question. This is, however, subject to the *right of the suspect to request the hearing to be open to the public*. JSMP therefore believes it clear that the judge should, as a matter of priority, provide suspects with an opportunity at the earliest possible moment to indicate their preference regarding public access to the hearing. Furthermore, there is a clear implication that if a suspect is unaware of this right – as is usually the case in such hearings – the judge is obliged to inform that suspect that he is entitled to request an open hearing in accordance with section 20.2.

<sup>1</sup> UNTAET Regulation 2000/30 as amended by UNTAET Regulation 2001/25 (hereafter “TRCP”).

It appears to JSMP that the judge did not explain this right to the suspects in the extant case. The judge closed the hearing to the public before it even began, and the suspects' lawyers subsequently informed JSMP that the judge did not ask their clients about the nature of the hearing. JSMP believes that, in accordance with the procedure required by section 20.2, the judge does not have the authority to unilaterally determine the nature of the hearing without first asking the suspect. The judge then has the discretion, if the suspect requests, to decide either that the hearing be opened in accordance with that request or that there are competing interests which justify the hearing's remaining closed. In the absence of any such competing factors a judge should in JSMP's view ordinarily accede to the suspect's request and open the review hearing.

### **The Principle of 'Open Justice'**

The principle of 'open justice' is a presumption common to both civil and common law jurisdictions requiring, among other things, court hearings to remain open to the public. This is enshrined in Article 14.1 of the International Covenant on Civil and Political Rights. Public interest demands that public scrutiny be allowed to ensure that justice is delivered even-handedly, transparently and in accordance with the rights of the suspect. The principle is nevertheless subject to numerous well-grounded exceptions.<sup>2</sup> An important consideration, for example, is the need to protect the reputation of the untried suspect, who is entitled to be presumed innocent. Where circumstances demand it, public (and in particular media) access to hearings may be limited for that purpose.<sup>3</sup>

A survey of various jurisdictions around the world reveals that *presumed closure* of detention review hearings, as stipulated by section 20.2 TRCP, is highly unusual. Nevertheless, in Timor-Leste the presumed closure of detention review hearings may be rationally justifiable. For example, disclosure of the case against the suspect at such an early stage of criminal proceedings would, arguably, be needlessly prejudicial. The unsettled state of society and the lack of a functioning judicial system in Timor Leste in 2000 gives this argument added weight: it may be that the drafters of the TRCP thought it appropriate in these exceptional circumstances, and in the absence of experienced judges and lawyers, to buttress the suspect's fair-trial rights by closing review hearings.

In JSMP's view the purpose of closing review hearings – whether justifiable or not – is primarily *to protect the interests of the suspect*. In the absence of competing, broader public interests which justify a closed hearing, judges therefore ought to exercise their discretion in favour of a suspect's request for an open hearing.<sup>4</sup> It follows that the right to request an open hearing is hollow and meaningless if the suspect is not aware of it. In a nascent legal system of the type that exists in Timor Leste suspects are less likely to be aware of their rights. The burden on the judge to ensure that suspects are aware of them is correspondingly more onerous.

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<sup>2</sup> According to Art 14.1: "The press and the public may be excluded from all or part of a trial for reasons of morals, public order (*ordre public*) or national security in a democratic society, or when the interest of the private lives of the parties so requires, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice". See also Colleen Davis, 'The Injustice of Open Justice', (2001) 8 *James Cook University Law Review* 92 at 104.

<sup>3</sup> Art 14.1, *Supra* note 2; See also Davis, 'The Injustice of Open Justice' at 98-99.

<sup>4</sup> For example, if opening the hearing would divulge the identity of a juvenile victim or the victim in a sexual assault case.

JSMP acknowledges the clear presumption of the TRCP that review hearings be closed to the public. Failure to do so may potentially undermine the suspect's presumption of innocence, which is one of the most important rights to be respected at this early stage of criminal proceedings, which is intended to assess the legality of arrest and detention. Nevertheless, the suspect also has the right to a public hearing, a long-standing right deemed fundamental to ensuring a fair trial and subject only to limited public-interest exceptions. In JSMP's respectful view *section 20.2 of the TRCP therefore obliges investigative judges to fully inform suspects of their right to request an open review hearing; to provide them with an adequate opportunity to submit that request; and to grant that request unless there are countervailing factors that, on balance and in consideration of the public interest, require that the hearing remain closed.*