



JUSTICE UPDATE

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DIRECTIVE 03/2004 ON THE NEW RULES FOR DISTRIBUTION OF CASES AND THE CONSTITUTION OF PANELS

The President of the Court of Appeal, Dr. Claudio Ximenes, has issued a directive to court actors on the new rules for distribution of cases and the constitution of panels in district courts. This Directive means to respond to the significant reduction in courts operations caused by the ongoing training course for all judges, prosecutors and public defenders. JSMP welcomes the initiative of the President of the Court of Appeal to develop a strategy that tries to ensure the regular functioning of the courts under the Directive. Until Timorese judges can perform their duties on a full time basis, court proceedings will be mainly conducted by the four new international judges: Judge Emiliano Nasolini dos Santos, Judge Elias Tomé, Judge Sandra Silvestre and Judge Joana Vaz. This directive also provides for the possibility of holding panel trials in the district courts from now on. However, JSMP believes that the implementation of this directive will pose difficulties not only on the operations of the district courts but also for the functioning of the Special Panel for Serious Crimes (SPSC).

New rules on the distribution of cases

The current training for court actors has led to a significant decrease of courts operations, specially in the District Courts but to some extent also in the Special Panel for Serious Crimes. This has led to concern as to the immediate future of judicial proceedings, particularly in situations in which defendants have remained in pre-trial detention after the court order has expired. JSMP therefore welcomes the initiative in the new Directive to address these concerns. It is important however, that international judges and all Timorese court actors understand the changes that will come into place under the new Directive and are able to act according to them. Directive 3/2004 has been sent to all judges and to the Office of Public Defenders but, to JSMP's knowledge, it has not been sent to court clerks. If court clerks do not have a full understanding of the new system they will not be able to implement it. JSMP is also concerned because at present there is only a Portuguese version of this Directive. Although, to JSMP's knowledge, all new international judges are from Portuguese speaking countries, there are considerable doubts as to whether the Timorese court actors are able to understand the complexity of this Directive written

in a language they are not familiar with. It is therefore important the President of the Court of Appeal thoroughly explains the new directive to all court actors as well as their role in its implementation.

JSMP is also concerned with the fact that, according to Section 30.1 UNTAET Regulation 2000/30 as amended by Regulation 2001/25 (The Rules of Criminal Procedure), the judges that participate in the final decision must have been present in all sessions of the trial. A situation in which the international judge gives continuity to a trial in which a Timorese judge had been sitting will be in clear violation of the Rules of Criminal Proceedings. The international judges can however carry out 72 hour hearings since Section 30.1 only covers trial proceedings.

SPSC

The distribution of cases under the jurisdiction of the SPSC has not been altered by the Directive: cases will continue to be distributed to all judges of the SPSC. JSMP considers that in practice this may bring some difficulties. All Panels for Serious Crimes have one Timorese judge who can act as presiding judge or as member of the panel. Since the new training programme began, hearings of the SPSC have been postponed or only take place in the morning or in the afternoon, depending on the time the training takes place. In JSMP's opinion, this raises an important problem. Since the Serious Crimes Unit's mandate is due in the end of May 2005, there is an interest in conducting hearings in a timely manner. Further postponements may lead to more unfinished cases than would otherwise occur.

District Courts

According to the data provided by the President of the Court of Appeal in Directive 03/2004, there is currently a total of 420 cases before the Dili District Court: 220 civil cases and 200 criminal cases. In Baucau District Court, there are 64 cases awaiting trial, 14 civil cases and 49 of a criminal nature. In Oecussi, there are 34 cases, 21 of a civil nature and 13 criminal cases. Finally, in the Suai District Court, there are 26 pending cases, 9 civil and 17 criminal cases.

The fact that the training course is taking place in Dili makes it impossible for judges of the Baucau and Oecussi District Courts to carry out any court proceedings in those districts. All cases from these two courts are now distributed to international judges.

The cases from Baucau District Court are to be distributed to Judge Elias Tomé and Judge Joana Vaz. JSMP understands that these two judges, an international prosecutor, an international translator and an international court clerk went to Baucau last week. However, JSMP has knowledge that they have returned to Dili. JSMP hopes this is a temporary situation and that all internationals will return to Baucau as soon as possible.

The cases from Oecussi and from Suai District Court are all to be distributed to Judge Sandra Silvestre. As far as JSMP has knowledge, operations from these courts are only to begin in two weeks time.

Of all the district courts, Dili is the one that has the most complex scheme of distribution of cases and is also the only one in which Timorese judges will still be actively taking part. Cases will be distributed as follows:

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

How to distribute the cases

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

The constitution of Panels in the District Courts

Apart from establishing the new rules of distribution of cases, the Directive also lays down the composition of the panels of the district courts. JSMP praises this initiative that allows for the conducting of trials by panels for more serious crimes to be conducted in the district courts. This practice, although provided by Section 9 of UNTAET Regulation 2000/11, has to date rarely been followed by the district courts. The judges sitting in each panel are as follows:

Baucau District Court: the judge to whom the case was distributed (who will also be the presiding judge), the other judge to whom the case has been distributed and the judge to whom the Suai and Oecussi cases are distributed.

Suai and Oecussi District Courts: The judge to whom the case was distributed (who will also be the presiding judge) and the judges to whom the Baucau cases are distributed.

In practice, since the cases from Baucau, Suai and Oecussi are all distributed to international judges, the panels will also always be composed solely by international judges. The Directive does allow for the possibility of the intervention of a Timorese judge as a second substitute, that is, in cases in which one of the members of the panel cannot attend nor can the first substitute (who is also an international).

Dili District Court: The judge to whom the case was distributed to (who will also be the presiding judge) and two other judges according to a table published as an annex to this directive. This table shows a rotation between international judges and Timorese judges. Dili is the only district court in which not only will there always be a Timorese judge sitting in the panel but also where the panel can be composed only by Timorese judges. In JSMP's opinion, the lack of experience of Timorese judges in working as members of panels should be taken into account when deciding on the composition of the Panel. Although the initiative of having panels in the District Courts is in itself a commendable one, JSMP believes that as a first step Timorese judges should sit with international judges in order to gain experience progressively, as has been done in the SPSC.

Hearings

JSMP has heard that in the week commencing 27 September, a number of 72 hour hearings which were heard before international judges proceeded in the absence of a defence lawyer. JSMP is concerned that the rights of an accused cannot be adequately protected if the accused is unrepresented. Furthermore holding a hearing in the absence of the accused's defence lawyer may be in breach of Section 34.2 and 34.3 of the Constitution and of Section 6.3 (a) of UNTAET Regulation 2000/30 that give the accused the right to have a legal representative present at all stages of the proceedings.

Possible problems with the implementation of Directive 3/2004

- If the court actors do not understand the new rules of distribution then it will not be possible to implement the Directive effectively. It is therefore necessary to translate the Directive to a language all court actors can understand. It would also be beneficial to have a meeting to clarify the Directive to all court actors. It is particularly important that court clerks have a full understanding of the Directive.
- Since most court proceedings will be carried out by international judges, there must be translators to assist them both in hearings and in the reading of the case files. JSMP considers the initiative to have an international translator in

Baucau a commendable one and hopes the same will happen in the other district courts.

- The new international judges do not have competence to continue with trials that began with a different judge. Under Section 30.1 of UNTAET Regulation 2000/30 all judges who are required to sit in the final decision of a case must be present at all sessions of the trial (ie. a trial must recommence if there is a change in the judge after the trial begins). JSMP does not know the tenure of the international judges but it is to be noted that previous problems have occurred in the SPSC when international judges have left their positions at the end of their contract or for personal reasons (in the middle of trials) and all the cases they had been hearing had to restart. It is hoped that there is sufficient cooperation between the government administration and the UN for their contracts to of sufficient length to allow planning.
- The constitution of panels in the district courts should have uniform rules. If in Baucau, Oecussi and Suai District Courts all panels are only composed of international judges, it is maybe incongruous that in Dili a panel can be composed only of Timorese judges. It is important to keep in mind that such a panel would be composed exclusively of judges that are still in training.
- 72 hour hearings are apparently being heard before some international judges in the absence of a defence lawyer. Holding a hearing in the absence of the accused's defence lawyer may be in breach of Section 34.2 and 34.3 of the Constitution and of Section 6.3 (a) of UNTAET Regulation 2000/30 that give the accused the right to have a legal representative present at all stages of the proceedings.