

# **The East Timorese Judiciary: at the Threshold of Self-Sufficiency? Update\***

Update to address to the Conference of Supreme and Federal Court Judges - Darwin,  
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By the Honourable Justice Shane Marshall\*\*

Since the presentation of my previous paper “The East Timorese Judiciary at the Threshold of Self-Sufficiency?” at the conference of Supreme and Federal Court Judges in January 2005 (“the previous paper”), justice and democracy have continued to be difficult issues in East Timor’s development as a nation. Events of the past six months have highlighted the critical areas in this process towards establishing a self-sufficient judiciary. The threshold for self sufficiency is yet to be attained and, perhaps even more than six months ago, there is an urgent need for an adequately functioning court system based on the principle of the rule of law. A first step towards instilling the conceptual foundations for the rule of law is to ensure that justice be done in respect of the serious crimes prior to, and during, 1999. Simultaneously, serious staffing and resource issues must be overcome within the court system to allow the people of East Timor access to justice on a day to day basis. This journey will be difficult and will require the combination of ongoing international support together with the domestic political will for improvement.

## **An overview of the past six months**

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\* The considerable assistance of my Associate Mr James McKenna in the preparation of this paper is acknowledged.

\*\* A Judge of the Federal Court of Australia.

On 20 May 2005 the mandate for the United Nations Mission in Support of East-Timor (“UNMISSET”) ended, as did the UN Sponsored Special Crimes Unit and Special Panels for Serious Crimes. The conclusion of the Serious Crimes Process has left a significant gap in the ability to pursue human rights violations committed in East Timor in 1999.<sup>1</sup>

UNMISSET has now been replaced by the United Nations Office in Timor-Leste (“UNOTIL”).<sup>2</sup> UNOTIL represents a one-year follow-on and special political mission that will remain in East Timor until 20 May 2006.<sup>3</sup> It amounts to a continued, although reduced, UN presence in East Timor, and is an acknowledgment by the international community that continued support is essential for the development of critical state institutions in East Timor.<sup>4</sup>

The practical functioning of the judiciary faced a significant setback on 25 January this year following the announcement of Judge Claudio Ximenes, President of the Court of Appeal, that all 22 East Timorese judges had failed their evaluations because they had failed written examinations undertaken in May and September 2004.<sup>5</sup> As a result, all East Timorese judges have been suspended from hearing cases in the District Courts. This decision is subject to an appeal petition from nineteen of the judges, however the President of the Superior Council of the Judiciary is yet to make a determination of the validity of the appeal, which is required before he is to appoint three judges to hear the appeal.<sup>6</sup>

Similarly, on 25 May 2005 Judge Ximenes announced that none of the East Timorese Public Defenders or Prosecutors (including the Prosecutor General) passed their evaluations conducted in late 2004. As a result, only three Prosecutors (who had not been working long enough to take the evaluation) and one international Prosecutor remain eligible to work in the courts of East Timor.<sup>7</sup>

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<sup>1</sup> This process is now also to be subject to review by the Commission of Experts (as discussed below).

<sup>2</sup> UNSC Resolution 1599 (2005).

<sup>3</sup> UNOTIL follows a final 6 months extension to the UNMISSET mandate until 20 May 2005 as announced on 16 November 2004: see the UN SC (Resolution 1573(2004)).

<sup>4</sup> Press Statement in Timor-Leste by Security Council President SC/8326, 1 March 2005.

<sup>5</sup> JSMP (Report) “Overview of the Justice Sector: March 2005”, 12.

<sup>6</sup> JSMP (Report), *opcit* at 5, 12.

<sup>7</sup> JSMP Press Release, “Prosecutors and Public Defenders Fail their Evaluations”, 26 May 2005.

There are now no Timorese Public Defenders eligible to work in the court system. There is currently one international Public Defender operating and a further two international positions have been advertised by UNOTIL and the United Nations Development Programme. This will be the status quo until mid 2006, at which time those who continue training at the Judicial Training Centre will be eligible to become probationary Public Defenders or Prosecutors.<sup>8</sup> As such, Timorese private lawyers will continue to be the main source of representation for defendants, which raises concern given that there is currently no law which regulates the practice of private law.<sup>9</sup>

The failure of the Judges, Prosecutors and Defenders to successfully complete their evaluations has raised serious concerns about the language medium used in both the examinations and evaluations. In an article published in the *Timor Post* it was noted that the prosecutors and defence lawyers were struggling with the use of Portuguese. According to Alexandra Cortereal, member of the National Parliament, the criteria that the Superior Council of Magistrates uses for the evaluations does not concern the actual capacity of the candidates, but rather their Portuguese language skills.<sup>10</sup> There is also anecdotal evidence of problems occurring in the translation of the evaluations from Portuguese into Tetum and back into Portuguese in the Evaluation of Timorese judges.<sup>11</sup> One such report was in regard to a question in the Judicial Exam which in Portuguese read “Which are the 10 Articles of the Constitution that contain Human Rights”, but when translated into Tetum read, “Which Human Right is contained in Article 10 of the Constitution”.

The months since the Previous paper have also seen the winding down of the Commission on Reception, Truth and Reconciliation (“CAVR”) the substantive aspect of which concludes on 7 July 2005 with its report due around this time.<sup>12</sup> As

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<sup>8</sup> Ibid.

<sup>9</sup> Note that Parliament is currently considering two draft Bills to regulate private lawyers, one prepared by the Ministry of Justice and one by the Timor Leste Lawyers' Association - see JSMP Press Release, “The government seeks to regulate private lawyers” 27 May 2005.

<sup>10</sup> See - UNOTIL Daily Press Review, Compiled by the Public Information Office, “Legal practitioners experience language difficulties- Timor Post” 27 May 2005.

<sup>11</sup> JSMP Press Release “Prosecutors and Public Defenders fail their evaluations” 26 May 2005.

<sup>12</sup> United Nations Secretary General End of Mandate Report at [17] to [21].

the CAVR has been winding down another two new commissions have been established to address the human rights abuses of 1999. On 18 February, the UN Secretary General announced the establishment of a UN backed Commission of Experts to Review the Prosecution of Serious Human Rights Violations Committed in Timor-Leste in 1999 (“the Commission of Experts”). The Commission of Experts is specifically charged with investigating the quality of the trials by the Ad-Hoc Human Rights Court in Jakarta (“Ad Hoc Court”) and the Special Panels for Serious Crimes in Dili, both of which have failed to bring the principal perpetrators to justice.<sup>13</sup>

Meanwhile, on 9 March 2005 the governments of East Timor and Indonesia launched the bipartisan Commission for Truth and Friendship (“the CTF”), with the objective of establishing the “conclusive truth” of what occurred in East Timor in 1999, and to prevent a recurrence of similar events.<sup>14</sup> There exists an obvious tension between the objectives of these two commissions, with the CTF seeking to close the book on the human rights abuses of 1999, and the Commission of Experts to reopen previous processes with a mandate to recommend measures or mechanisms to hold the perpetrators accountable. This tension was manifest in the initial refusal by the Indonesian government to grant visas to the three legal experts of the Commission of Experts, a decision only reversed in late May, following amendments to the mandate of the CTF.<sup>15</sup>

### **Ordinary Crimes and The District Courts**

As was identified in the previous paper, the gaping deficit in human resources has been one of the major impediments to the self-sufficiency of the courts, the justice system in East Timor and the progress of democracy. Indeed, in their “Overview of the Justice Sector: March 2005”, the Dili based NGO, the Judicial System Monitoring Programme (“JSMP”) declared that:

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<sup>13</sup> The Terms of Reference for the Commission of Experts to Review the Prosecution of Serious Human Rights Violations Committed in Timor Leste (The then East Timor) in 1999: see [http://www.jsmp.minihub.org/News/March%202005/03mar05\\_un\\_torce\(e\).htm](http://www.jsmp.minihub.org/News/March%202005/03mar05_un_torce(e).htm) .

<sup>14</sup> Terms of Reference for the Truth and Friendship Commission: see <http://www.deplu.go.id/2003/detail.php?doc=96e52248b11d7ca67014e8008f2fdead>.

<sup>15</sup> See: Dede A Rifai “Decision to accept UN experts prudent” *Jakarta Post* 1 June 2005 and Chris Brummitt, “Indonesia to Deny Entry to UN Experts” *The Associated Press*, 10 April 2005.

*“In 2004 the greatest obstacle to the smooth functioning of the justice system in Timor Leste was the lack functioning of the district courts in their respective districts.”<sup>16</sup>*

It had previously been hoped that the appointment of four international judges to work in the District Courts late last year would reduce the backlog of ordinary cases as well as providing guidance and training to the Timorese judiciary. Initially, 80% of the district court cases were distributed to the international judges to allow Timorese judges to partake in the preparatory training course at the Judicial Training Centre.<sup>17</sup> However, since the failure of all 22 East Timorese judges in their evaluations, the international judges have taken on all cases in the District Courts.<sup>18</sup>

As a result, the capacity of the District Courts have been significantly reduced. Whereas the Dili District Court had previously conducted up to six sessions per day, this figure has been reduced to between two and zero since the restriction on Timorese judges. Similar reductions have also occurred in the other district courts.<sup>19</sup>

Information relating to the functioning of the District Courts was provided by the President of the Court of Appeal last year in Directive 03/2004. In this Directive it was reported that there were a total of 420 cases awaiting trial before the Dili District Court, 64 cases in the Baucau District Court, 34 in the Oecussi District Court and 26 pending in the Suai District Court.<sup>20</sup> These figures were starkly contrasted by the data prepared by the Office of the Prosecutor General which indicated a backlog of around 3000 cases.<sup>21</sup> However, whatever the figures last year, it now seems almost certain that the restriction placed on the Timorese judges, Prosecutors and Public Defenders will further impede the functioning of the District Courts and further increase the backlog of cases awaiting trial.

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<sup>16</sup> JSMP (Report), opcit at 5, 12.

<sup>17</sup> JSMP (Report), opcit at 5, 12.

<sup>18</sup> JSMP (Report), opcit at 5, 12.

<sup>19</sup> JSMP (Report), opcit at 5, 13.

<sup>20</sup> Directive 03/2004 from the President of the Court of Appeal – cited JSMP (Report), opcit at 5, 13.

<sup>21</sup> JSMP (Report), opcit at 5, 13: see also US Department of State, Bureau of Democracy, Human Rights and Labor, *Country Report on Human Rights Practices – 2004* “East Timor” 28 February 2005.

Inadequate administration and resources of prosecutors and public defenders has also placed significant strains upon judges and the administration of justice. Even prior to the recent announcement of the failure of all Timorese Prosecutors and Public Defenders, problems of continuity in representation or prosecution have arisen due to insufficient staffing and the requirement to attend training at the Judicial Training College.<sup>22</sup>

An illustration of the difficulties arising in the justice sector is a proceeding that was heard in Dili where members of the National Police Service stood accused of the rape of a woman.<sup>23</sup> At the original 72-hour hearing, there had been a total of 5 Prosecutors and 7 private/LBH (legal aid lawyers), following which a number of the accused were held in pre-trial detention for ten months until the commencement of the trial. At the trial there was only one Prosecutor (who had not been present at the 72 hour hearing) and two private/LBH (legal aid) defence lawyers, only one of who had been present at the 72-hour hearing. The judge only questioned one of the accused before adjourning the trial. When the court recommenced over a week later, two different defence lawyers and a different prosecutor were present. Unable to contact the defence lawyers who had previously acted for their clients, the new defence lawyers requested the judge to adjourn the remainder of the trial until the other lawyers were available. They then left the court. The judge then appointed an apparently random Portuguese person sitting in the body of the court to represent the accused, before releasing them because of the lack of evidence and because they had been in long term pre-trial detention.<sup>24</sup> Whilst it is unclear how frequent these types of events are, there is little doubt that such occurrences reflect poorly on the state of the judicial system and undermine public faith in the process.

There are also ongoing significant problems with court administration arising from the fact that matters do not receive a case number until they are scheduled for trial, rather than when initially filed. As a result, it has been reported that thousands of cases have been “lost” in the court or prosecutor’s office because they never actually

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<sup>22</sup> JSMP Press Release, “Dili District Court Acquits Three PNTL Officers in Rape Case” 13 April 2005.

<sup>23</sup> Ibid.

<sup>24</sup> Ibid

reach a trial.<sup>25</sup> This is compounded by the fact that many of the court administrators and court actors have received no formal case management training. Even after a case has been scheduled and given a case number, many of the files are misplaced.<sup>26</sup>

The District Courts also face other difficulties arising from insufficient resources and administration. Many of these were documented in the previous paper. In addition to these, the JSMP have outlined issues which they have identified through their monitoring process. These include a lack of:

- coordination and communication between different groups in the justice sector;
- staff management to provide supervision;
- case management;
- financial management;
- computer networking;
- equipment such as printers or photocopiers;
- translation of East Timorese laws into Tetum; and
- a designated room for victims in the courts.<sup>27</sup>

Despite the challenges, the Timorese judicial system has managed to develop and evolve in some areas. In particular, the Suai District Court commenced operating in Suai on 10 March 2005, having previously operated out of the Dili District Court. Similarly the Oecussi District Court recommenced its operation on 15 March 2005 and continued to operate one to two weeks per month.<sup>28</sup> However, as discussed above, the functioning of the District Courts is now almost entirely in the hands of international judges, Prosecutors and Public Defenders and therefore still to achieve self-sufficiency. It can only be hoped that the training undertaken at the Judicial Training Centre will be thorough enough to equip the judges, defenders and prosecutors with the necessary skill and knowledge to take control of the judicial system when the UN finally withdraws from East Timor. It is noted that the current mandate is to end on 20 May 2006, with the probationary Prosecutors and public

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<sup>25</sup> JSMP Press Release “Difficulties encountered in finalizing long running cases” Period 6 June 2005.

<sup>26</sup> Ibid.

<sup>27</sup> JSMP (Report), *opcit* at 5, 18 – 19.

<sup>28</sup> JSMP Press Release “Suai and Oecussi District Courts” 10 – 18 March 2005.

defenders not due to return until mid next year.<sup>29</sup> It is also noted that the JSMP estimates the current cost of the international court staff currently operating in East Timor to be approximately USD 6.5 million per year.<sup>30</sup> As such, the need for a self-sufficient justice system is becoming increasingly urgent.

The weakness of the current Timorese justice system with all its human resource and administrative shortcomings has also been criticised for ignoring systems for traditional justice. It has been suggested that the establishment of the official judiciary took so long that villagers started to depend entirely upon local justice and it is now left to the people of East Timor to reconcile the two justice systems in their daily lives.<sup>31</sup> However, there has now been at least one decision in the Oecussi District Court where the presiding international judge determined that the case did not need to be tried under applicable formal laws because all parties had resolved their problems in accordance with traditional laws and customs.<sup>32</sup>

The application of traditional law is subject to a constitutional dilemma, as the primacy of formal criminal law is entrenched by Art 31 of the Constitution, whilst Art 2.4 requires the State to “recognise and value norms and customs of East Timor and any legislation dealing specifically with customary law”<sup>33</sup>. Nonetheless, it seems clear that given the difficulties facing the Timorese judiciary, traditional law will play a significant part in the practical application of justice. From this perspective, some form of recognition of the validity of traditional justice by the District Court would be a step in the right direction.

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<sup>29</sup> Ibid.

<sup>30</sup> JSMP (Report) opcit at 5, 29.

<sup>31</sup> Tanja Hohe, “Justice without judiciary in East Timor” *Conflict, Security & Development* 3:3 December 2003, 353 and 336.

<sup>32</sup> JSMP Press Release, “Judge Applies Customary Law in a Criminal Case” 19 May 2005. This case involved maltreatment of a woman by a minor, in which the parties had been reconciled through a traditional settlement process involving payment of compensation to the victim.

<sup>33</sup> Constitution of the Democratic Republic Of East Timor.

## The Court of Appeal

For the immediately foreseeable future, the Court of Appeal remains the ultimate judicial body in East Timor pending the establishment of a Supreme Court of Justice.<sup>34</sup>

Like the District Courts, the Court of Appeal suffers from significant problems of efficiency and effectiveness. Foremost amongst these is the fact that as of March this year there appear to have been no civil matters heard.<sup>35</sup> The explanation given for this by the UNMISSET TWG Report on Justice is that some of the judges in the Court of Appeal cannot read the Indonesian Civil Code.<sup>36</sup> However, JSMP notes that an English version of the Code is available. As such, there is, at present, no effective process to appeal a civil law decision of the District Court. This is compounded by the fact that as of March this year, no international judge had heard a civil case in a District Court.<sup>37</sup> This is an unacceptable situation for the business community, both local and international, as it offers little comfort to potential investors who ordinarily would rely on the court system to protect their investments. The consequence of this is obviously dire for an emerging nation which will become increasingly dependent on private foreign investment as the UN involvement recedes.

Reports from those monitoring the Court also suggest that sessions often commence at least one hour after scheduled times and is subject to unexplained postponements.<sup>38</sup> Also of concern is the coordination and communication between the Court of Appeal and the District Court. In particular, there is a lack of notification of scheduling to District Courts, which means that relevant parties and court actors are not in court when required and the transfer of court files are delayed, impeding adequate examination of court files prior to appeals.<sup>39</sup>

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<sup>34</sup> The Timor Leste Constitution stipulates that the Supreme Court of Justice is to be Timor Leste's highest Court, however Art 164 states that the functions of this court will be exercised by the highest judicial organisation existing in Timor Leste.

<sup>35</sup> JSMP (Report), opcit at 5, 22.

<sup>36</sup> JSMP (Report), opcit at 5, 22.

<sup>37</sup> JSMP (Report), opcit at 5, 22.

<sup>38</sup> JSMP (Report), opcit at 5, 22.

<sup>39</sup> JSMP (Report), opcit at 5, 22.

## **Serious crimes and dealing with the atrocities of 1999**

The issue of “serious crimes” in this context refers to violations of human rights including genocide, war crimes, crimes against humanity, murder, sexual offences and torture, particularly relating to that which occurred during the wave of violence that swept East Timor in 1999. With the closure of the Special Panels for Serious Crimes on 20 May 2005 and the conclusion of the Ad Hoc Court last year, there is now no formal mechanism to ensure that justice is delivered for the victims of human rights abuses in 1999. However, the Commission of Experts does have a mandate to review the functioning of the Special Panels for Serious Crimes and the Ad Hoc Court and can advise the Secretary General on measures to ensure the accountability of perpetrators and justice for victims.<sup>40</sup>

A review of the results of the Special Panels for Serious Crimes indicates that many of those guilty of human rights abuses are yet to be held accountable. Through the Special Panels for Serious Crimes, the Special Crimes Unit has filed 95 indictments charging 391 persons (440 defendants) with serious crimes.<sup>41</sup> Of these, only 101 defendants have been before the Court, with 87 tried to verdict, 13 cases withdrawn or dismissed and one found incompetent to stand trial. As such, 339 defendants have not come before the court. In many cases this is a result of the accused being in Indonesia, with Timorese law not permitting trials in absentia and there being no extradition treaty with Indonesia.<sup>42</sup>

This failure to prosecute is even more alarming when considered in the light of the fact that the 95 indictments filed in the Special Panels for Serious Crimes account for only 572 of the estimated 1400 people killed in the violence of 1999. Although similar statistics are not available for other serious crimes, such as rape, the percentage prosecuted is likely to be even lower.<sup>43</sup> It is little wonder then that Judge

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<sup>40</sup> See The Terms of Reference for the Commission of Experts to Review the Prosecution of Serious Human Rights Violations Committed in Timor Leste (The then East Timor) in 1999.

<sup>41</sup> Judge Phillip Rapoza, “The serious crimes process in Timor-Leste: Accomplishments, Challenges and Lessons Learned” delivered in Dili to the International Symposium on UN Peacekeeping Operations Inn Post-Conflict Timor Leste: Accomplishments and Lessons Learned, 5: See also US Department of State, Bureau of Democracy, Human Rights and Labor, “East Timor” *Country Report on Human Rights Practices – 2004*, 28 February 2005.

<sup>42</sup> Judge Phillip Rapoza, *opcit* at 41, 5-6.

<sup>43</sup> Judge Phillip Rapoza, *opcit* at 41, 7.

Phillip Rapoza, former chief judge of Special Panels for Serious Crimes, expresses the view that “the job is not done”<sup>44</sup>.

The Secretary-General of the UN acknowledged in his end of UNMISSET mandate Report that:

*[m]any participants, particularly families of the victims of the 1999 violence, have expressed concern that the process was ending prematurely.*<sup>45</sup>

This also reflects the general concern expressed by both the Timorese civil society and the international community that economic and diplomatic relations with Indonesia be put before justice. The International Federation for East Timor,<sup>46</sup> the Timorese Catholic church,<sup>47</sup> the international media<sup>48</sup> and Timorese labour organisations have called for the establishment of war crimes trials and rejected the attempt by the governments of East Timor and Indonesia to “resolve once and for all the events of 1999”<sup>49</sup> through the Truth and Friendship Commission.

Much of hope of establishing some further form of war crimes trial is pinned on the Commission of Experts, given that the Commission’s mandate to recommend measures and or a mechanism to ensure accountability, justice and reconciliation.<sup>50</sup> However, without the support of the government of East Timor, let alone the Indonesian government, such a trial would be very difficult in practice. Nonetheless, the Commission of Experts does serve the important role of keeping the serious

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<sup>44</sup> Judge Phillip Rapoza, *opcit* at 41, 7.

<sup>45</sup> S/2005/310 *End of mandate report of the Secretary-General on the United Nations Mission of Support in East Timor (for the period 17 February to 11 May 2005)*.

<sup>46</sup> The International Federation for East Timor is a body representing more than two dozen non-governmental organisations from all over the world: see IFET letter to UN Commission of Experts, 20 April 2005.

<sup>47</sup> See for example comments of East Timorese Bishop that “‘all’ Timorese people supported war crimes trials” as quoted in “Timorese church opposes war crimes deal” *Australian Financial Review* 7 February 2005.

<sup>48</sup> See for example - Seth Mydans “East Timor Atrocities Will Go Unpunished” *International Herald Tribune*, 11 May 2005.

<sup>49</sup> Timor-Leste’s Minister for Foreign Affairs and Cooperation, cited in JSMP Press release “Commission for Truth and Friendship” seeks to end search for justice whilst ‘Commission of Experts’ seeks to keep it alive”, 14 March 2005.

<sup>50</sup> Art 3(c) of See: The Terms of Reference for the Commission of Experts to Review the Prosecution of Serious Human Rights Violations Committed in Timor Leste (The then East Timor) in 1999.

crimes process alive and with it the hopes of the Timorese victims that justice will be done.

## **Conclusion**

Six months after the previous paper, both justice and reconciliation are still needed to heal the wounds of the past and allow East Timor to proceed towards self-sufficiency. The Committee of Experts provides a possible avenue to achieve this as other roads come to an end. Meanwhile, the administration of justice has faced significant setbacks through the failure of judges, Prosecutors and Public Defenders in their evaluations. When this is considered along with the administrative challenges facing the courts, it is evident that dramatic advances will be needed before the withdrawal of international support.

It is still unrealistic to expect the East Timorese administration to pursue justice from the Indonesian Administration. However, the assistance of the international community must continue to be channelled towards the pursuit of justice for the atrocities committed in 1999 and to provide a platform for the rule of law. At the same time, an East Timorese domestic commitment is required to begin to takeover the practical day to day functioning of the courts. A great number of challenges are to be overcome in this process, yet through this joint commitment, a self-sufficient judiciary in East Timor remains achievable.