



**JUDICIAL SYSTEM MONITORING PROGRAMME**  

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**PROGRAMA DE MONITORACAO DO SISTEMA JUDICIAL**

**Overview of the Justice Sector: March 2005**

Dili, East Timor  
March 2005

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

*Judicial System Monitoring Programme  
Rua Setubal, Kolmera, Dili – East Timor  
Postal address: PO Box 275, Dili, East Timor  
Tel/Fax: (670) 390 323 883  
Mobile: +670 7246227  
Email: [info@jsmp.minihub.org](mailto:info@jsmp.minihub.org)*

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## **1. INTRODUCTION**

JSMP last released an overview of the operations of the courts in December 2004. Since that time however, there have been a number of important changes made to the functioning of the courts and a number of important draft laws affecting the justice sector have come to our attention. JSMP hopes that during the three months preceeding the end of UNMISSET, careful consideration to some of the issues and recommendations raised in this report when deciding on future support to be given to the justice sector in Timor Leste.

This report summarises some of the main issues of current (as of March 2005) concern in the justice system in Timor Leste. In particular, it considers some of the problems with new legislation, the courts (District and Court of Appeal), perceptual problems caused by lack of transparency in decision making and difficulties in accessing information, and recent attempts to improve the system through the introduction of the training program at the Judicial Training Centre. Finally recommendations are provided as to how some of these problems could be resolved.

Like UNMISSET and the donors, JSMP wishes to assist the government of Timor Leste to build a functioning judicial system and strong democratic institutions which are based on the rule of law. We are particularly concerned at recent actions, directives, decisions and statements by certain public figures in the justice sector (including UNMISSET employees) indicating a lack of respect for the rule of law in Timor Leste, and a lack of understanding of the importance of transparency to ensure good governance. We hope that attention can be paid to building respect and understanding for the rule of law and the importance of transparency among East Timorese and international justice actors in Timor Leste.

Many of the concerns raised in this report highlight the lack of planning that has gone into the justice sector in Timor Leste from 2000 – 2004. JSMP hopes that from March 2005 proper planning can be made for the future good functioning of the justice sector. We particularly hope that the Ministry of Justice, Ministry of Planning and Finance, and the Parliament will give consideration to the budgetary considerations of future plans for the justice sector.

## 2. NEW LEGISLATION

The legal framework in Timor Leste is still heavily dependent on UNTAET regulations and applicable subsidiary law, and a somewhat ad hoc approach to developing the legal framework has been adopted. This has meant that laws are sometimes poorly drafted and have been adopted with inadequate attention to policy considerations and consequently there have been difficulties in their implementation. Further, the laws are often not widely disseminated and misunderstandings and lack of uniform application occur.

A number of important laws critical to the development of the justice sector have been drafted in the past 12 months, including: the draft Criminal Code, draft Code of Criminal Procedure, draft Civil Code, draft law on Public Prosecutors, and draft law regulating the accreditation of Private Lawyers. The passage of these laws will be a welcome development, as they are, in the main, far more progressive than the currently applicable Indonesian law (especially the Penal Code), and will help to clear up confusion in regard to the concurrent application of UNTAET Regulations and Indonesian subsidiary law.

The **draft Criminal Code** is currently with the Council of Ministers. JSMP has written an analytical report on the Code (available at [www.jsmp.minihub.org](http://www.jsmp.minihub.org) and see summary below). We understand that the Council of Ministers is also currently considering the draft Code of Criminal Procedure and draft Civil Code. The **draft law on Public Prosecutors** is now with the parliament, and public hearings on the law are scheduled for 25 March. JSMP has also written a short analytical report on this law (see summary below). We understand that the **draft law regulating accreditation of Private Lawyers** is still in the process of drafting by the Ministry of Justice. ASF and the Timor Leste Bar Association (AATL) are in the process of writing comments to the Ministry of Justice about this extremely controversial law. A summary of some of the problems with the law is below.

A number of other laws critical to the development of the justice sector are expected before the Parliament in the next 12 or more months including the following:

- Organic Law of the Ministry of Justice
- Organic Law of the Public Defenders Office
- Rules of Civil Procedure
- Revision of law on organisation of the courts
- Revision of the Prison Regulation

### 2.1 DRAFT CRIMINAL CODE

JSMP has published a report analyzing Timor Leste's draft Penal Code. This report is based on the November 2004 draft. We hope that these comments, and the recommendations for amendments to the draft Penal Code contained in this report, will be useful to the drafters, members of Government and the Parliament currently considering this important law.

JSMP's comments are limited to the draft Penal Code provisions on: defamation, domestic violence, offences against sexual freedom, crimes against humanity and war crimes. JSMP has chosen to reserve its comments to these particular areas which are pertinent to JSMP's current expertise.

JSMP is particularly concerned that on 19 January 2005, the Council of Ministers conducted a preliminary examination of a Bill on Legislative Authorisation for the future approval of the Penal Code.<sup>1</sup> The Parliament may give the government this authorization under Section 96<sup>2</sup> of the Constitution, but an NGO letter to the

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<sup>1</sup> Democratic Republic Of Timor-Leste Secretariat Of State For The Council Of Ministers 97<sup>th</sup> Meeting Of The Council Of Ministers Of The First Constitutional Government Press Communiqué Dili, Thursday, 19 January 2005, 2:30pm.

<sup>2</sup> **Section 96 (Legislative authorization)**

Parliament dated 3 December urged the Parliament to use its discretion not to give the government this authorization. As elaborated in this report, if the government were to authorise the Penal Code as a decree law, this would not only bypass the opportunity for public comment, but run the risk of being unconstitutional, being inconsistent with the provisions of s 95.2(e) which makes law on rights, freedoms and guarantees (which the Penal Code will undeniably affect) the exclusive domain of Parliament. The criminal legal system is so fundamental to society and public order that there is a strong need for the Penal Code to be passed in a manner that is open to public scrutiny and in accordance with Timor Leste's Constitution.

*JSMP recommends that the nature of the Penal Law means that Parliament should not exercise its option to authorize Government to make the Penal Code, and that the Penal Code as a foundational societal document should instead be subject to vigorous Parliamentary debate and passed as a Parliamentary Law.*

### **Defamation: Articles 172 - 177**

*JSMP recommends deleting Articles 172 – 177 of the draft Penal Code and to protect individual's reputations with appropriate civil defamation laws instead.*

JSMP is very concerned that defamation is criminalized under the draft Penal Code. Freedom of opinion and expression are important to the development of a democratic society. In JSMP's opinion, articles 172 – 177 of the draft Penal Code (which provide for one to two years imprisonment) place too strong a limit on individuals' and institutions' rights to freedom of expression. These articles could have the effect of stifling criticism of, and opposition to, the current and future Timor Leste governments. Criminal sanctions might dissuade journalists or individuals from reporting or discussing important issues for fear of prosecution and result in self-censorship by the media.

In JSMP's view the criminalisation of defamation may be unconstitutional in Timor Leste because articles 172 – 177 of the draft Penal Code do not comply with Timor Leste's obligations under article 19(3) of the ICCPR.

Although freedom of expression should not encroach on an individual's right to reputation, this right to reputation can be sufficiently protected through civil defamation laws. Civil defamation laws can provide monetary compensation to victims where appropriate and the threat of civil action should be sufficient to deter defamatory acts.

Although many countries that are developed democracies have criminal defamation provisions (including Portugal), these are very rarely enforced and defamation is usually addressed by civil defamation laws. However, a mature judicial system is necessary to ensure that defamation cases are judged in court in a balanced manner. Timor Leste's probationary judges recently all failed to pass their evaluations, and all the judges, prosecutors and public defenders are currently undergoing a full time training program. There therefore exists a serious risk in Timor Leste that criminal defamation provisions could be misapplied or interpreted too expansively, to the detriment of freedom of expression and it will likely be some time before the Timor Leste justice system is able to properly apply criminal defamation laws.

If the government does not accept JSMP's recommendation to replace the criminal defamation law with a civil law, JSMP recommends at a minimum, that the following amendments be made:

*A good faith belief in the truth of the statement should be a defence to defamation.  
Any higher penalty for defamaton of a public figure should be abolished.*

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1. The National Parliament may authorize the Government to make laws on the following matters:
    - a) Definition of crimes, sentences, security measures and their respective prerequisites.

## **Domestic Violence and Offences against Sexual Freedom (Articles 148 – 150, and 159 – 171)**

JSMP welcomes the recognition of the seriousness of crimes of domestic violence in articles 148 – 150 of the draft Penal Code. However, these articles should be expanded to include a wider variety of domestic relationships and types of violence. Further, in JSMP’s view, the drafters of the Penal Code should consider the original draft Domestic Violence Law which contained far more thorough definitions and guidelines to sentencing for decision makers.

JSMP welcomes the expansive definitions and relatively harsh penalties provided under articles 159 – 171 for crimes of sexual violence. In JSMP’s view, the penalties provided will have a deterrent effect on future perpetrators of these serious criminal offences, and provide a far more just outcome for victims of such offences than currently provided under the Indonesian Penal Code.

JSMP recommends the following major amendments to these articles.

Article 160 (Sexual Coercion) *should be amended to include: “force, or by threat of force or coercion, such as that caused by fear of violence, duress, detention, psychological oppression or abuse of power, against such person or another person, or by taking advantage of a coercive environment, or the invasion was committed against a person incapable of giving genuine consent.”*

Article 161(Rape) *be amended to: “by the introduction of another object or any other part of the body into an orifice to practice sex”.*

A. *That the following sub-articles be added to Article 162 (Aggravation)*

Article 162.1(d) *“at the time of, or immediately before or after, the commission of the offence, the alleged offender maliciously inflicts bodily harm on the alleged victim or any other person who is present or nearby.”*

Article 162.1(e) *“at the time of, or immediately before or after, the commission of the offence, the alleged offender threatens to inflict actual bodily harm on the alleged victim or any other person who is present or nearby by means of an offensive weapon or instrument.”*

Article 162.1(f) *“the perpetrator has deliberately passed any venereal, syphilitic or immune-deficiency syndrome to the victim.*

Article 164 (Child Prostitution) *should be reworded to make it clear it also applies to clients of the child prostitutes.*

*That the words “but the victim could choose to end the criminal procedure after it has started” be deleted from Article 171.1 (Criminal Procedure).*

## **Compliance with the Rome Statute**

The draft Penal Code also adapts Timor Leste criminal legislation to the *Rome Statute of the International Criminal Court (Rome Statute)*, defining conduct that constitutes crimes under international law as defined in the *Rome Statute*. As a party to the *Rome Statute*, Timor Leste must comply with its obligations under the Statute. Also, if a rule in the Penal Code is contrary to the *Rome Statute* it will be invalid pursuant to s 9(3) of the Timor Leste Constitution (which states that rules contrary to international conventions are invalid).

It may be instructive for the drafters of the draft Penal Code to consult the Amnesty International *Checklist for Effective Implementation of the Rome Statute*, (see [www.amnesty.org](http://www.amnesty.org), AI Index: IOR 40/019/2003, July 2000), which is designed to assist states in fulfilling their obligations under the Rome Statute and other international law when drafting implementing legislation.

The customary law definitions of genocide, crimes against humanity and war crimes, which are the same as the *Rome Statute* definitions and have been replicated in *UNTAET Regulation 2000/15*, will continue to apply for prosecution of perpetrators of atrocities committed during 1999 or any time prior to the implementation of the draft Penal Code. This is due to the principle of *nullum crimen sine lege*, which is guaranteed in the *Constitution of East Timor* s 31(2) that “(n)o one shall be tried and convicted for an act that does not qualify in the law as a criminal offence at the moment it was committed” and s 31(5) that “(c)riminal law shall not be enforced retroactively, except if the new law is in favour of the accused.”

### **Genocide: (Article 120)**

Article 120 adopts an identical intent element for genocide as in the Rome Statute “intent to destroy, in whole or in part, a national, ethnical, racial or religious group”. However, JSMP is concerned that some aspects of Article 120(1)(a)-(i) do not comply with the Rome Statute. To ensure that Timor Leste fulfils its obligations under the Rome Statute with respect to genocide, JSMP recommends the following amendments:

*That “mental harm” be added to Article 120(1)(a).*

*That “by violent means” in Article 120(c) be changed to “forcibly”*

### **Crimes Against Humanity: (Article 121)**

The definition of Crimes Against Humanity in Article 121 must comply with the definition in Rome Statute Article 7. To ensure that Timor Leste fulfils its obligations under the Rome Statute with respect to Crimes Against Humanity, JSMP recommends that the following amendments be made:

*That the definition of torture be amended so that it is not limited to official agents*

*That definitions of ‘attack directed against any civilian population’ and ‘enslavement’ be added*

*That the definition of ‘extermination’ be amended*

*That ‘with knowledge of the attack’ be added*

### **War Crimes Articles (122 – 127)**

The definition of War Crimes in *Draft Penal Code* articles 122 - 127 must comply with the definition in *Rome Statute* article 8. The penalties stated for war crimes in the draft Penal Code indicate unequivocally the weight and importance of the values protected by the provisions. Imprisonment penalties go from ten to up to twenty or twenty-five years. However, JSMP is concerned that some of the definitions of crimes in these articles 122 – 127 are weaker than in the Rome Statute. To ensure that Timor Leste fulfils its obligations under the *Rome Statute* with respect to war crimes, JSMP recommends that the following amendments be made:

*That an equivalent sub-article to Article 8.2(d) and (f) of the Rome Statute be inserted*

*That the term “children” be clarified in Article 122.1(e)*

*That the terms “in large scale” and “goods of high value” be deleted from Article 126(a)*

*Amend Article 123(h) to include the expression “belonging to the hostile nation”*

## 2.2 DRAFT LAW ON PUBLIC PROSECUTORS

Among civil law countries with consolidated democratic systems, the role of Public Prosecution is treated with special concern. According to Article 132.1 of the RDTL Constitution “(p)ublic Prosecutors have the responsibility for representing the State, prosecuting, ensuring the defence of the underage, absentees and disabled, defending the democratic legality, and promoting the enforcement of the law”. Clearly the Public Prosecution is intended to safeguard the public interest. This role is further enshrined under article 69 the Constitution, which declares the principles of separation and interdependence of Powers, and states that Public Prosecutors should be provided with autonomy and be governed by their own Statute. Given these foundations, JSMP is concerned that the Public Prosecution Statute complies in its provisions, with clarity and adequacy, with the principles and values stated in the Constitution, and particularly with the value of autonomy, which is instrumental to independence from the state.

JSMP commends the Drafters’ intention to comply with the fundamental principles declared in the Timor Leste Constitution (Title V, Chapter II) by submitting the Public Prosecutors performance to legality, objectivity and impartiality criteria (art.2.2), binding them to principles of accountability, hierarchy (art.30, art. 31) and permanency (art.32). The Public prosecution’s autonomy is defined within the Public Prosecutor’s Office hierarchy by directive powers. The proposed draft law also states a non unconditional duty to obey the hierarchical grading, respecting the personal freedom of the Prosecutor when facing a moral dilemma. Additionally, the Draft , also protects the value of autonomy by listing the roles incompatible to the work of a Prosecutor (Chapter II, Articles 35 to 38).

However, despite these commitments, it is JSMP’s view that the Draft is structurally deficient – the articles are disorganized and there are many important provisions lacking. The organization provided in the Portuguese Public Prosecutors Statute is preferable. The wording of great part of the provisions is inaccurate, vague and, in many occasions, confusing. JSMP recommends that Articles 16.1(d), 20, 25, 51.1, 51.2, 51.3 and 74.4 be rewritten to more closely reflect, with clarity and precision, the constitutional imperatives. Also, the Draft leaves out provisions which deal with issues such as *Hierarchy Appeal, Disciplinary Proceedings, Election Proceedings or Press Cabinets* (cooperating with the Public Prosecutor’s Offices). In JSMP’s opinion, it is vital that such provisions are included in the draft law.

Furthermore, it’s crucial that Section II Chapter IV provisions (regarding the Office of the Prosecutor-General as the highest authority in Public Prosecution) protect, in a explicit manner, the autonomy of the Public Prosecutors. Any decisions taken bearing upon the protection of that value (such as, recruitment, discipline, career and salaries) must be exclusively within the competence of the Superior Council for the Public Prosecution. JSMP also has the same concern about Article 34 of the Draft which deals with the ministerial interdependence. As stated in the Constitution, the Government, through the Ministry of Justice, may only intervene respecting the principles of division and interdependence of powers, and is absolutely not permitted to intervene in the Public Prosecutor’s concrete field of action.

Finally, although JSMP praises the list of disciplinary infractions set fourth in Chapter XI, we are concerned with the lightness of the penalties stated in the Draft. Under the Portuguese Law, the penalties for disciplinary infractions are substantially harsher. And, due to the rights and prerogatives given to Public Prosecutors and the importance of their role in the judiciary system, JSMP would welcome the extension of sentences for such infractions.

### ***Recommendations:***

*That the recommended sections be rewritten to accord more closely with constitutional imperatives of autonomy.*

*That issues such as Hierarchy Appeal, Disciplinary Proceedings, Election Proceedings or Press Cabinets be included within the draft law*

*That the autonomy of the Public Prosecutors be protected through an explicit provision establishing decisions about their employment as the exclusive domain of the Superior Council for the Public Prosecution.*

*That the sentences for breaches of the Public Prosecutors' Law be extended to reflect their severity.*

## **2.3 DRAFT LAW REGULATING ACCREDITATION OF PRIVATE LAWYERS**

It appears that this law is still being drafted by the Ministry of Justice. It has apparently not yet been discussed by the Council of Ministers. In JSMP's view the law needs considerable amendments and we hope that such amendments will be made after the Ministry of Justice receives comments on the law from ASF and the Timor Leste Bar Association. We note that in most countries (including Portugal) it would be the Bar Association which would decide on the rules regulating private lawyers, training criteria, and disciplinary procedures.

According to Article 2 of the law, in order to practice law it is necessary to register with the Judicial Training Centre: "(t)o be permitted to be registered, you must be a Timorese citizen who:

- a) possesses a law degree;
- b) possesses written and spoken knowledge of the national languages of Portuguese and Tetum;
- c) has regularly attended and successfully completed the training course and respective trainee stage administered through the Judicial Training Centre;
- d) has attained the age of majority/adulthood.

According to Article 3, in order to prove you possess a law degree, it is necessary to present a diploma or certificate of the law degree written in the official Timorese language. The diploma or certificate must also have a certificate of competency from the Ministry of Education, or it will not receive consideration.

Under Articles 5 to 17 and 35 to 37 the Executive Board/Managing Council of the Judicial Training Centre retain all power to select the candidates admitted to the training program, conduct the training program (the law does not say how long the training program will be), determine accreditation criteria, determine compliance, and ultimately admission into the practice of law, including disciplinary procedures.

According to Article 36, no Bar Association will be recognized until it has 30 registered/accredited members and then only upon application and approval by the Ministry of Justice, unless previously granted by the Ministry of Justice. We note that there is already a Bar Association in Timor Leste (Assosiasaun Advogados Timor Leste) and the law is silent as to recognition of this pre-existing organization.

The law does not mention what will happen to the rest of the private lawyers who are not admitted into the training program. It is presumed they would not be allowed to continue practicing in the courts. The law also does not say what will happen if there are no private lawyers to assist with legal aid (according to UNTAET Regulation 24/2001 they cannot be replaced with international lawyers as the judges, prosecutors and public defenders have been).

Article 35 provides for a potential maximum of 3 years in prison for a violation of any provision of the law, including refusal to wear the proper robes.

Laws regulating private lawyers are crucial to both ensuring and protecting the integrity of an autonomous legal profession. Without closely considered and drafted laws regulating the accreditation, practice and

discipline of private lawyers, the rule of law is undermined by both the threat of internal deterioration through individual wrong doing as well as the threat of an ill public perception of the law. This is especially the case in a country as young as Timor Leste, which needs solid foundations upon which its infant legal system can develop without compromise.

***Recommendations:***

*That the laws regulating private lawyers be developed in conjunction with the existing organizations such as Assosiasaun Advogados Timor Leste as well as other public interest groups and be vigorously debated in Parliament to ensure a public forum for concise but unintrusive regulation of private lawyers.*

*That the Draft Law Regulating Private Lawyers be made available to the legal and general community for comment before it is passed in Parliament.*

### **3. COURTS**

While the legislative culture of Timor Leste has been developing within the Parliament, the judicial system has been another essential component of Timor Leste's nascent justice sector. As with the new legislation, however, there can be observed both positive and negative elements within the courts.

From 2000 to September 2004, international assistance to the Courts of Timor Leste was limited to small scale mentoring and some ad hoc training for judges, prosecutors and court clerks. Timorese court actors were therefore recruited and worked in their positions for three years without any significant international assistance to strengthen and develop their skills. These are amongst the main factors that contributed to the problems currently found within the Timor Leste judicial system.

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. This occurrence was based on a number of factors including insufficient funds for vehicle and generator operation and training commitments for court actors in Portugal and Dili. However, in November, with the introduction of four international court judges positive developments could be seen, especially for the Suai court which functioned for the first time since 2001. The resumption of the courts in the districts is still limited in that the judges only travel to the districts for a few days, one or two times a month.

#### **3.1 JUDICIARY**

On 25 January 2005 the the President of the Court of Appeal, Judge Claudio Ximenes, announced that all 22 East Timorese judges had failed their evaluations because they had failed the written tests they had done in May and September 2004. On 2 February nineteen judges signed an appeal petition appealing their results. According to Article 109.7 of Law No.11/2004 (of 29 December 2004), the President of the Superior Council of the Judiciary should appoint three judges to hear the appeal. Before appointing these judges the President of the Superior Council of the Judiciary should decide on the validity of the appeal. To date, there has been no decision on the appeal.

In September 2004 four new international (from CPLP countries) judges (Judge Emiliano Nosolino dos Santos, Judge Elias Tomé, Judge Sandra Silvestre and Judge Joana Vaz) were employed by UNMISSET to work in the District Courts. Since all of the Timorese judges were enrolled in the preparatory training course at the JTC from September 2004 onwards, 80% of cases were redistributed to the international judges. Since the failure of all the East Timorese judges in January 2005, the international judges have taken on all cases at the District Courts.

### **3.2 EVALUATIONS OF PUBLIC PROSECUTORS AND DEFENDERS**

The evaluations of the Public Prosecutors and Public Defenders have still not been completed. The written exams were conducted in December 2004. JSMP is not sure if the members of the Commissions of Evaluation of the Public Prosecutors and Public Defenders have carried out any of the first stage of the evaluations (evaluation of the Prosecutors and Defenders work performance) in accordance with Decree Laws 8/2004 and 9/2004. JSMP notes that all the Public Defenders and most of the Public Prosecutors (apart from five who failed the preparatory stage of the training program, only three of whom are eligible for evaluation) are now engaged in full time training at the JTC. It may therefore be difficult for the Commissions of Evaluation to carry out the first stage of the evaluation process (as the Prosecutors and Defenders are no longer working in the courts). JSMP recommends that every effort is made to carry out the evaluation process transparently.

### **3.3 DISTRICT COURTS**

According to the data provided by the President of the Court of Appeal in Directive 03/2004 there are 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. JSMP believes that this backlog of cases has probably increased since Directive 03/2004 because, since the announcement of the results of the evaluation of national judges on 25 January there has been a noticeable decrease in the volume of cases heard by the District Courts. We also note, that according to data from the Office of the Prosecutor General, the backlog across all the courts is about 3000 cases. We are not sure of the reasons from the huge discrepancy between the figures from the Office of the Prosecutor General and the figures from the President of the Court of Appeal.

Before the evaluation of the national judges, the Dili District Court would often conduct four to six sessions per day. These included 72 hour hearings, trial hearings, the reading out of indictments and the delivery of verdicts. However since the results from the evaluation of the national judges were announced, only one or two court sessions have been conducted per day and sometimes none at all. A similar situation has occurred in Baucau District Court which has only been held one or two days a week in 2005. Suai District Court has heard three cases in 2005 and Oecussi District Court will commence sitting on 15 March 2005. The problem is particularly acute in regard to civil cases, which, to JSMP's knowledge, are yet to be heard by an international judge.<sup>3</sup>

In regard to 72 hour hearings, JSMP is aware of a number of hearings where the accused was held beyond the 72 hour limit, or the police had to release and re-arrest the accused, because of the unavailability of the investigating judge within the 72 hour period.<sup>4</sup>

The four international judges are not only busy dealing with the huge volume of cases in the courts but now must also give training in the Judicial Training Centre.

In JSMP's view a distinction should be made between a judge's core and auxiliary functions. The primary and most important function of a judge is to settle legal problems in the court. Judges may of course have auxiliary functions, including as trainers, during which they can impart to trainee judges valuable knowledge and skills. However, in JSMP's view, this performance of auxiliary functions should not jeopardise the performance of the judge's primary function as a judge in a court of law. The judge's performance of this

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<sup>3</sup> For example, see JSMP's Justice Update No. 4/2005 25- 28 January 2005. ('Civil Cases in the Baucau District Court').

<sup>4</sup> For example see JSMP's Justice Update No. 4/2005 25- 28 January 2005 ("72 hour review hearings at the Baucau District Court").

primary function is made even more pressing in a country such as Timor Leste, which now has no judicial resources of its own, but a continuing growing number of cases requiring the attention of a judge.

JSMP has therefore urged the President of the Court of Appeal to allow the four international judges to fulfil their primary role as judges in the district courts of Timor Leste. JSMP has also requested the Judicial Training Centre to find other people to replace the international judges as trainers in the important court actor training program at the JTC.

### **3.3.1 Recent controversial decisions or conduct by the international judges**

Although the international judges working in the District Courts have improved the efficiency of decision making in the courts, and have made a number of commendable decisions, JSMP has also been concerned by the following:

#### **a) Court Hearing regarding the Lawfulness of Arrest and Detention.**

On 4 October 2004 a hearing on the lawfulness of arrest and detention (pre-trial hearing) was held at the Dili District Court. The case was one regarding physical assault, based on article 351.1 and 2 of the Indonesian Penal Code. In this case it is alleged that an elderly man, aged 45 was assaulted by four men, all of whom were present as accused at the public hearing.

During the hearing, the judge and prosecutor inquired about the resolution of the matter within the context of the informal mediation between the families involved. JSMP observed that the suspects and accused agreed to resolve the matters in customary way (during the hearing) but JSMP is not sure whether this resolution was intended by both parties to be the finalisation of the court process. Nevertheless it was noted in the record of the hearing that the accused were required to pay to the victim, on the basis of the informal agreement reached in court, \$US 200 for damage to the house and further compensation for injuries to the victim.

In JSMP's opinion, the investigating judge, as proscribed by UNTAET Regulation 2000/30 (as amended by UNTAET Regulation 2001/25),<sup>5</sup> is not in a position to determine or sentence a punishment at the pre-trial hearing - that is the role of the trial judge. JSMP is worried that this decision by the judge, that both sides agree to reach a decision in an informal manner- resulting in compensation in a criminal matter, can give the impression that the accused have already been determined to be guilty before there is a decision by the trial judge. In addition, the hearing record which details the provision of damages at the investigating judge stage of proceedings has the potential to violate the basic legal standard of the presumption of innocence. This is due to the fact that before there has been a decision regarding their guilt by a judge who has the lawful competence to do so, they have had an order of damages against them.

In order that such situations do not occur as detailed above, JSMP is of the opinion that investigating judges should be careful not to act outside their competency and try to act clearly within those procedures established in law. These aspects are important to ensure that the process of examination at this level is done properly and is done as provided by the applicable law.<sup>6</sup>

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<sup>5</sup> UNTAET Regulation 2000/30 (as amended by UNTAET Regulation 2001/25) outlines the procedures and competencies of the investigating judges and limits to their role in the context of a pre-trial hearing. In accordance with that regulation, the purpose of the pre-trial hearing is to review the lawfulness of arrest and detention of the suspect. Further, the function of the investigating judge to ensure that the rights of the suspects and the victim are upheld in accordance with the applicable criminal procedure code. In the same regulation, section 20.6 mentions three possibilities which can be decided in the hearing, namely: verify the arrest and order detention, order conditional release and release without condition.

<sup>6</sup> JSMP understands that in the context of formal justice (especially with regard to criminal offences) the interaction with the traditional law is complex and difficult to clarify. Although the resolution of cases between families (where the

## **b) Decision in rape case that partially broken hymen means only attempted rape occurred**

On 10 January 2005 an international judge of the Dili District Court sentenced the accused to four years imprisonment for attempted rape.<sup>7</sup> The case involved the rape of a minor by her father. The victim said her father threatened her with a knife, hit her with an electric cord, covered her mouth, and raped her three times in April 2004. The accused denied all charges. Medical evidence was submitted which stated that the accused had been raped. The victim's body also had lesions caused by the beatings with the electric cord. The Court applied Article 34.5 (the non-corroboration rule in cases of sexual violence) of UNTAET Regulation 30/2000 as amended by UNTAET Regulation 25/2001.

However, the court's two page decision also referred to the medical evidence and decided that since the victim's hymen was apparently not completely torn rape did not occur. The Judge therefore found the accused guilty of attempted (under Article 53 of the KUHP) rape (under Article 285 of KUHP), and said that accordingly, the maximum sentence that could be imposed for rape (twelve years), would have to be reduced by one third (according to Article 53) to eight years.

JSMP is concerned that this decision is not in line with well known medical evidence that some women can engage in sexual intercourse without the hymen breaking. It is also not in line with the definition of rape in Article 285 of KUHP, according to which the offence involves sexual intercourse (penis-vagina penetration) (for more on these issues see JSMP's report "An Analysis of a Sexual Assault Decision from Dili District Court").

Moreover, the decision is not in compliance with the international law definition of rape as provided in Article 7(1)(g)-1 of the Elements of Crimes Annex to the ICC Statute. According to this article two elements must be satisfied in order to establish the offence of rape:

1. The perpetrator invaded the body of a person by conduct *resulting in penetration, however slight*, of any part of the body of the victim or of the perpetrator with a sexual organ, or of the anal or genital opening of the victim with any object or any other part of the body.<sup>8</sup>
2. The invasion was committed by force, or by threat of force or coercion, such as that caused by fear of violence, duress, detention, psychological oppression or abuse of power, against such person or another person, or by taking advantage of a coercive environment, or the invasion was committed against a person incapable of giving genuine consent.

In JSMP's respectful opinion therefore, the accused should have been found guilty of rape rather than attempted rape, and a maximum sentence of twelve years under Article 285 KUHP could have been considered.

JSMP is also concerned that although the judge referred to the accused's relationship with the victim (he is her father), the fact that he had threatened her with a knife and caused physical injuries to her with an electric cord, and the fact the accused raped the victim three times, these aggravating factors do not appear to have

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parties use adat/ or applicable traditions to resolve conflicts) plays an important role in the resolution of local disputes and also as a mechanism of social control in East Timor however the question of how far traditional agreements and adat can be considered in the formal justice system is a difficult problem. Nevertheless JSMP is of the opinion that resolution of matters in a traditional way can only be noted down as a factor (admission) in the pre-trial process as mention (which possibly) is important information to be considered by the trial judges if the person is found guilty, in consideration in sentencing the accused.

<sup>7</sup> This is the second longest sentence delivered in a sexual violence case since JSMP commenced monitoring such cases in 2003.

<sup>8</sup> Emphasis added

been taken into account in the judge's sentencing decision. Furthermore, at no stage did the judge refer to the fact the victim is a minor. Given these aggravating factors, in JSMP's respectful opinion, a longer sentence than the four years decided by the judge may have been appropriate.

**c) Selective application of the law by an international judge in Dili District Court**

On 17 February 2005 JSMP attempted to monitor a sexual assault case in the Dili District Court. Prior to the commencement of the hearing the presiding international judge questioned the age of two journalists in attendance at the court. When they both replied they were 18, the judge told them that "children" could not attend trial proceedings at the court.

According to Article 28.1 of UNTAET Regulation 30/2000, as amended by 25/2001 "(t)rial hearings shall be open to the public."

JSMP is not aware of any Timor Leste law stating that people aged eighteen years and under are not allowed to attend trial hearings.

Also in attendance in the public area of the court room were 19 Timorese trainees (former judges, prosecutors and defence lawyers) from the Judicial Training Centre. The 19 trainees explained to JSMP that the presiding international judge, who was that morning scheduled to give them academic training at the JTC, had instead decided to take them to the court to watch him presiding over the trial.

Upon opening the trial, the judge announced that the trial was closed to the public, and asked all those present in the public area of the court room, except the 19 Timorese trainees from the JTC, to leave the court.

According to Article 28.2:

The court may exclude the public from all or part of a hearing in circumstances where: (b) it is necessary to protect the privacy of persons, as in cases of sexual offences or cases involving minors.

JSMP does not understand the international judge's application of Article 28.2 in this instance to only certain members of "the public". If the judge decides to exclude "the public" from a hearing for the reasons outlined in Article 28.2(b), this relates to every person in the room, apart from the parties to the case (the judge, prosecutor, defence, court clerk, translator, accused, and witnesses), should be excluded from the trial. Although the trainees at the Judicial Training Centre were all previously judges, prosecutors, and defence lawyers (and will presumably resume such functions once they have completed their training at the JTC), they were certainly not parties to the sexual assault case being heard on 17 February. JSMP is thus unsure why the judge decided to selectively apply Article 28.2 to allow them to remain present during the hearing. JSMP is unaware of any law which states that, for the purposes of Article 28.2, trainees at the JTC are not members of "the public".

**d) Problems with translation and limitations placed on the role of the prosecutor and the defence**

On 16 November 2004 a Panel of three international judges re-commenced the trial of five men accused (under Article 285 of the Indonesian Penal Code) of raping an 18 year old girl.

During the hearing on 16 November JSMP was concerned that not all of the trial proceedings were being translated from Portuguese into Tetum for the Prosecutor and Public Defender to understand. At one stage, the presiding judge was questioning one of the accused in Portuguese and when the Prosecutor asked for a translation into Tetum the presiding judge and another member of the panel told him that since he had undertaken a course in Portuguese he should be able to understand. The Prosecutor explained that the Portuguese language course had only been of one month duration, and had unfortunately not adequately

prepared him to fully understand legal Portuguese. At this stage in proceedings the presiding judge then congratulated the accused on his good spoken Portuguese. The judge still refused to have the questions and answers translated into Tetum. The Prosecutor then threatened to leave the court room, as he said there was little point in his presence if he could not understand proceedings. The judge then agreed to provide a summary of the questions and answers in Tetum.

It is important for the court to ensure full and proper translations are provided into a language that all the court actors and parties to the case can understand. In order for the Prosecution and Defence to properly establish their arguments it is imperative that they be able to comprehend all of the facts and testimony presented before the court. It is also a fundamental right of the accused under Article 14.3(a) of the International Covenant on Civil and Political Rights that he/she be fully informed, in a language which he/she understands, of the charge against him.

During the hearing on 16 November, and again on 19 November JSMP was also concerned by the presiding judge's refusal to allow the Prosecutor and the Public Defender to ask the questions they wished to ask. The judge said he would not allow the questions to be asked because he thought he had already asked similar questions and he was satisfied with the answers. He did not, however, disallow the questions for any reasons of law. This has also been regularly observed by JSMP monitors over the last 6 months. JSMP believes that the Prosecutor and Defence lawyer should be allowed to ask the questions they think are necessary to establish their arguments in the final indictment and defence statement (as long as such questions are lawful and comply with the rules of evidence). The international judges may have introduced a new system by which they are exercising greater control over the mode and order of questioning witnesses (as the judge is entitled to do under Section 26 of UNTAET Regulation 25/2001. In JSMP's opinion it would be useful if the international judges would discuss this new system with the Timorese Prosecutors and defence lawyers so that all court actors are familiar with the court's new operating procedures.

The judge would also not allow the Prosecutor or Public Defender to ask the questions to the accused. He insisted that after the translator had translated the questions to the Portuguese judges that she (the translator) ask the question to the accused. JSMP is concerned that such behaviour confuses the roles of the court actors, as one of the major functions of the Prosecutor and the Defence lawyer is as advocates (this involves asking questions directly to the witnesses and gauging their response). In order to work as a Prosecutor or Public Defender in Timor Leste it is necessary to have studied law and passed a Prosecutor or Public Defender exam.

### **3.3.2 Problems with Administration in the District Courts**

#### **a) Public notice board**

JSMP has recommended in numerous reports since 2001 that the daily hearing schedule be posted on the white board on public display at the court to allow the public to know the schedule for trial hearings. This allows the public to know that Timor Leste's courts are actually operating publicly and transparently. However, the notice board is still not yet being used, meaning that in order to obtain information about the court's daily schedule it is necessary to enter the court administration section to access the schedule of hearings from the administration desk. This disrupts the work of the court clerks, as they must assist the public to access this information from the administration desk. JSMP has recommended to the Chief of Administration that the white board on public display at the court be used to post the daily hearing schedule so as to allow the public to know what cases are on and when they are scheduled to commence.

#### **b) Other administrative problems**

The following is a brief list of some of the administrative problems continuing to face the district courts. For more complete lists please see JSMP's reports: "Case Flow and Management: a Statistical Analysis, 2003 – mid 2004" and "Justice in the Districts 2003".

**i) Lack of coordination and communication between different groups in the justice sector**

At present there are no meetings between the President of the Court of Appeal, Jurists Association, Court Administration staff, and Ministry of Justice. This lack of communication results in confusion about changes that are taking place within the justice system and about the roles of various court actors (for an example of such confusion please see JSMP's Justice Update 6/2004).

JSMP is strongly of the view that if there were regular meetings between the President of the Court of Appeal, Jurists Association, and Court Administration staff, and a system of regular meetings between Ministry of Justice and court actors, this would facilitate the President of the Court of Appeal to explain directives from the Superior Council of the Judiciary. The Ministry of Justice could explain changes to the law, and proposed changes. Court actors and court staff could actively discuss the problems they are facing implementing directives, laws, with training programs etc. Such discussion would hopefully lead to agreed solutions, and more efficient implementation of directives, and changes to laws.

JSMP is also concerned that there does not appear to be adequate communication between the new international judges and the Timorese court actors. For instance, the international judges have unreasonable expectations about the Portuguese language ability of the East Timorese and sometimes refuse to provide translations of the full trial proceedings into Tetum. Given that Tetun is the national language of Timor Leste and one of the official languages of the Court, there can be no reasonable objection to the provision of trial proceedings and legal documents in Tetun upon request. The interpretation of legal proceedings into a language that the accused and their counsel can understand is also guaranteed by international fair trial standards which Timor Leste is subject to through the operation of its Constitution.

**ii) Lack of staff management**

At present nobody is providing any sort of management to the court staff. As a result many are dissatisfied with their work, are not performing their jobs to their full capacity, and are sometimes absent from the office without reason.

Each of the court staff could have a performance agreement, and go through performance reviews. Their work would be supervised on a daily basis. They would be rewarded for good work performance, and disciplined for unsatisfactory work performance. This would lead to more efficient processing of cases through the courts.

**iii) Lack of case management**

At present there are numerous delays in trial proceedings due to poor case management by all the court actors, and especially the court clerks.

**iv) Lack of financial management**

At present the courts suffer from lack of financial management. Sometimes, although there are adequate funds in the budget, the court's phone bill has not been paid so court clerks cannot telephone to notify parties of trial dates, the fuel bill has not been paid so court clerks cannot deliver letters to parties to notify parties of trial dates, the electricity bill has not been paid so computers, printers etc do not function.<sup>9</sup> A better run financial system in the court so delays caused by logistical problems are avoided.

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<sup>9</sup> For example see JSMP Press Release 7 May 2004.

**v) Lack of computer networking**

At present none of the computers are networked, and most of the court actors need training in how to use a network. Networking would allow for more efficient communication between court actors and more efficient case management. Access to the internet would lead to increased use of international law and precedents from other jurisdictions, leading to a higher quality of jurisprudence in East Timor.

**vi) Lack of equipment**

At present there is a lack of equipment in all of the district courts which leads to great inefficiency, as it is often necessary to take documents (including laws and case decisions) to a photocopy shop to be printed or photocopied. Equipment within the Court would lead to greater efficiency in the work of court actors as they will be able to print and photocopy documents necessary for their work in their own office.

**vii) Lack of translation of East Timorese laws into Tetum**

Although according to section 73 of the Constitution, legislation is to be published in the official gazette and according to the law on Publication of Acts (Law No. 1/2002), the Official Gazette is supposed to be published in the two official languages (Tetum and Portuguese) to JSMP's knowledge only three laws to date have been published in Tetum. As most court actors and government officials are not yet proficient in Portuguese, it is very difficult for them to appropriately apply the law. For instance, the recent Directive from the President of the Court of Appeal regarding access to decisions was never translated into Tetum and as a result most of the court clerks in the district court have not understood the Directive and have been unable to properly apply the Directive. The translation of legal documents however will lead to greater familiarity with, and application of, the law among court actors, government officials and ordinary Timorese.

**viii) Lack of a designated room for victims in the courts**

At present victims have to wait with the accused, and/or the accused's family and friends, and the general public, to give their testimony. This can be very intimidating for the victim and JSMP is unsure of what communication goes on between some of these other parties and the victim prior to the victim giving their testimony. Also, often the victim actually sits in the court room while the accused and other witnesses are giving their testimony. The victim's presence during the delivery of other evidence could influence the testimony that they will give. There was also recently an occasion where the victim was inadequately protected from the accused while giving her evidence. During a court recess, the accused was able to walk up to the witness and accuse her of not telling the truth.<sup>10</sup> While the accused was cautioned by the Court on the resumption of the hearing this highlights the need for more care to be taken in protecting the witnesses when they present themselves at Court. JSMP recommends that the creation of victim waiting rooms will help to create a level of comfort for victims attending the proceedings, and help to prevent possible intimidation of the victim by other parties to a case.

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<sup>10</sup> *Xisto Barros and Cesar Mendonca* 01/2004 (12-03-05).

### **3.4 COURT OF APPEAL**

The highest court stipulated in the Constitution of Timor Leste is the Supreme Court of Justice but under Article 164 it states that until such time as the Supreme Court of Justice is established its functions will be exercised by the highest judicial organisation existing in Timor Leste. Consequently the Court of Appeal currently fills this role as there is a lack of judges with the necessary experience to form the bench of the Supreme Court of Justice.

As there is currently no Supreme Court of Justice there is no further appeal beyond the Court of Appeal and the decisions made there have additional weight.

Within any legal system the right to appeal is a central component of the right of the accused to a fair trial. Key international human rights instruments guarantee that everyone convicted of a criminal offence has the right to have their conviction and their sentence reviewed by a higher tribunal. Determination of appeal proceedings is the ultimate stage of the judicial process. Independent of international human rights standards, the right to appeal is also a desirable aspect of any legal system, and particularly a legal system at a nascent stage- which lacks an experienced judiciary, as the process of review by a superior court considers and ultimately reinforces the quality of judicial decision making at first instance.

From November 2001 until June 2003 the Court of Appeal in Timor Leste did not function for lack of judges and there was no ability to hear appeals from the District Courts or the Special Panels for Serious Crimes being heard during that time. The seriousness of this issue was highlighted in JSMP's report on "The Right to Appeal in East Timor" of October 2002 available at [www.jsmp.minihub.org](http://www.jsmp.minihub.org).

The current composition of the Court of Appeal is: President of the Court of Appeal, Judge Claudio Ximenes (Portuguese), Judge Jose Antunes (Portuguese), Judge Jose Luis Goia, Judge Jactina Correia da Costa (Timorese).

#### **3.4.1 Controversial decisions**

Since the recommencement of the Court of Appeal in June 2003 many controversial and important decisions have been made. Some of these are in clear violation of the Timor Leste Constitution and widely accepted international human rights law. Further, these decisions are not well known or understood by the Timor Leste community including the Parliament and the judges of the lower instance courts.

Some of the more controversial decisions of the Court of Appeal include:

- Appeal in the case of Armando dos Santos (15 July 2003). This decision marked a watershed in the development of the Timor Leste legal system as the Court decided that the applicable subsidiary law in Timor Leste should be that of Portugal, not that of Indonesia as had been widely understood. It also found that parts of UNTAET Regulation 2000/15, which establishes the Special Panels for Serious Crimes, to be invalid and purported to significantly expand the commonly understood notion of genocide. It also convicted Armando dos Santos of the crime of genocide, a crime of which he was not accused.
- Cases of Benny Ludji (Case Number 40/2003), Rusdin Mabere (Case Number 6/2003) and Mateus Punef (Case Number 60/2003) The Court found that pre-trial detention does not become automatically illegal once the detention order has expired. It was held that the review of the detention order did not necessarily have to occur until the expiration of the initial six months pre-trial detention period as the detention order remains in force. This is contrary to international human rights jurisprudence, including the European Court of Human Rights. In addition, it is in conflict with the Court of Appeal's own jurisprudence in 2001.

- Appeal in the case of Pascoal Mean da Costa (Case Number 11/2002). The Court found that the non-corroboration rule in relation to sexual assault in the UNTAET Transitional Rules of Criminal Procedure was unconstitutional. Such a case is not consistent with the international position that the non-corroboration rule indeed redresses a problem of discrimination against women.
- Appeal in the case of Paulino de Jesus (Case Number No. BO-086-99-SC). (JSMP report on this case to be published March 2005.) On 4 November 2004 the Court of Appeal overturned the decision of acquittal of the Special Panel for Serious Crimes (SPSC) and convicted the defendant, Paulino de Jesus, to twelve years imprisonment for murder. In November 2003, the SPSC had by majority acquitted the accused of the charges of murder and attempted murder.<sup>11</sup> This is the first SPSC acquittal to be overturned by the Court of Appeal. The Court of Appeal considered that there was enough evidence to prove the accused committed the facts of which he was accused. According to the Court of Appeal there are statements of witnesses that prove beyond reasonable doubt that the accused committed the crimes. The Court acknowledged the statements of the other witnesses that stated the accused was at another place at the time the crime was committed but had doubts in supporting this version of the events. The Court considered the statements of the witnesses who claimed to have been with the accused to be so precise that there were reasons to doubt their veracity. The statements of these witnesses not only referred to where the accused was at the time but also gave very precise information as to the time the witnesses had been with the accused. The Court pointed out that one of the witnesses had even been able to state to have been with the accused at a quarter past a given time. For these reasons, the Court of Appeal found the accused to be guilty of murder with premeditation, a crime punished by article 340 of the Indonesian Penal Code and the crime of attempted murder for which he was sentenced to five years imprisonment. The accused was convicted to a total of twelve years imprisonment.<sup>12</sup>
- Appeal in the case of Alberto Pires (Case No. 46/2004 decided on 15 September 2004). The Court decided that UNTAET Executive Order 2000/2 (The Decriminalization of Defamation) did not have the force to overturn Articles 310 to 321 of the Indonesian Penal Code (Defamation). The Court decided that an Executive Order had less authority than legislation. This decision clearly contravened the intention of UNTAET Executive Order 2000/2. It also failed to take into account international legal obligations especially under Article 19(3) of the ICCPR. As such, the decision could be unconstitutional as it is trying to reapply law which is in violation of Timor Leste's international legal obligations in contravention of Article 9 of the RDTL Constitution.

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<sup>11</sup> The acquittal decision was based on the statements of witnesses who claimed to have been with the accused at the moment the acts were committed thus giving him an alibi. The SPSC considered that the statements of the victim's parents, who were present when the crime was committed, had several contradictions throughout the different stages of the process and therefore could not be used as enough evidence to conclude that the accused had committed the crimes.

<sup>12</sup> The written decision was released on 9 November. This decision contests the decision of first instance on the grounds that the statements of the victim's parents may have had some 'apparent' contradictions but that were all together solid and proved the accused was the perpetrator of the crime. The Court of Appeal considers these statements to be in themselves enough to establish the responsibility of the accused, even if it was not so, there were two more witnesses confirming the victim's parents statements. The Court of Appeal's decision refers to the fact that the SPSC also took into account the statements of witnesses who claim to have been with the accused at the relevant time but does not rebut them directly.

### **3.4.2 Problems with efficiency and effectiveness**

In addition to some of the decisions of the Court of Appeal being widely identified as problematic by the Timor Leste Government, UNMISSET, NGOs and the business community, concerns have also been raised on the operation of the Court of Appeal, including its efficiency and effectiveness. Through its monitoring, JSMP has identified the following issues in the operation of the Court of Appeal:

- No civil matters have ever been heard.<sup>13</sup> This has the potential to significantly impede economic development and deter foreign investment. According to the UNMISSET TWG Report on Justice (4 February 2005), Civil Cases have not been heard because some of the judges in the Court of Appeal cannot read the Indonesian Civil Code. However, an English version of the civil code is available (English is the working language of UNMISSET, including the international judges employed to work in the Court of Appeal) and JSMP is thus perplexed as to why the international judges of the Court of Appeal have not simply referred to the English translation.
- Lack of notification of schedule to district courts, which means that relevant parties and court actors are not in court when required
- Delay in the transfer of court files from lower instance courts in a timely manner. This practice slows the operation of the court and impedes an adequate examination of the files prior to the time of hearing;
- The Court of Appeal has only sat in seven criminal cases in 2005. In two of these cases final decisions were rendered. JSMP has been unable to obtain information as to how many cases are currently awaiting hearing by the Court of Appeal, but according to the Timorese court actors we have spoken to the number is quite extensive. According to the UNMISSET TWG on Justice Final Report 68 cases are pending a decision.
- On every occasion when JSMP has monitored the Court of Appeal in 2005 it has commenced at least one hour after it was scheduled to commence. On one occasion the Court was postponed for no reason, while the prosecutor and defence waited for more than an hour to be informed of the postponement.

JSMP hopes that the professionalism and efficiency with which the Court of Appeal hears appeals can be improved before the end of UNMISSET.

### **3.4.3 Legality of current composition of Court of Appeal**

Despite failing the evaluation, on 13 January, in a meeting attended by three of its five members, the SCJ voted to allow Jacinta Correia da Costa to continue in her roles as Judge in the Court of the Appeal until the end of the UNMISSET mandate on 20 May 2005.<sup>14</sup> It appears that the SCJ's decision was taken pursuant to Article 25.3 of the Law on the Superior Council of Judicial Magistrates (Law No.8/2002 as amended by Law No. 11/2004). (JSMP has tried to meet with the President of the Court of Appeal to discuss the legal basis for the reappointment but he has unfortunately been unavailable to comment on this issue.)

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<sup>13</sup> JSMP has been unable to obtain information from the Court of Appeal regarding the extent of the current backlog.

<sup>14</sup> Judges Antonio Helder Viana do Carmo, Deolindo dos Santos, and Maria Natércia Gusmão Pereira were also allowed to continue working as judges in the Special Panels for Serious Crimes. The same concerns exist regarding the legality of their reappointments.

According to Article 25.3: “The SCJ can nominate to perform a judicial function, as trainee judges, trainees (estagiários) who have demonstrated necessary preparation for the performance of that function.”<sup>15</sup>

JSMP is unsure as to the SCJ’s interpretation of the word “estagiário” (and we would have liked to clarify this issue with the President of the SCJ). The interpretation of “estagiário” is unclear from interpreting Article 25.3, nor does Law 8/2002 provide a definition of terms used.

However, in Decree Law 15/2004 (which sets up the training program for Court Actors, the word “estagiário” is used to refer to those receiving training at the Judicial Training Centre

Article 22.1 and 22.2 of UNTAET Regulation 2000/15 (On the Establishment of Panels with Exclusive Jurisdiction over Serious Criminal Offences) provide that the Special Panels for Serious Crimes and the Court of Appeal shall be composed of two international judges and one East Timorese judge.<sup>16</sup> Article 23.2 goes on to provide:

”The judges shall be persons of high moral character, impartiality and integrity **who possess the qualifications required in their respective countries for appointment to judicial offices.....**”

In JSMP’s opinion, since the East Timorese judges have failed their evaluations as probationary judges, they cannot be said to “possess the qualifications required in Timor Leste for appointment to judicial office”. The reappointment of three East Timorese former probationary judges to their positions in the SPSC and the Court of Appeal would appear to be in contravention of Article 23.2 of UNTAET Regulation 2000/15. In JSMP’s opinion therefore, the composition of the Court of Appeal since 26 January could be challenged, as could any decisions issued by the Court of Appeal since 26 January, on the grounds that the Court is invalidly constituted.

#### **4. CORRUPTION**

There have been a number of allegations of corruption made against court actors by the government and parliament. Until January 2005, all such allegations had been unsubstantiated, and those making the allegations had been unwilling to name any particular court actor or provide any evidence for their claims.

In January 2005 a case was brought against a prosecutor alleging a number of instances of corruption by a lawyer from Perkumpulan HAK and Vox Populi. This case was well prepared by the plaintiff’s lawyers. The documents allege that the prosecutor abused his power, because he used his position as a prosecutor to take on civil cases then recategorised them as criminal cases and resolved them through mediation. The documents also allege that the prosecutor was bribed. According to the accusation he received USD 2000 to buy a car from a lawyer from Vox Populi. The prosecutor was defended by Liberta, VSP, Tane Timor, LBH TL, Consultadora da Lei, Ukun Rasik An, and one public defender. Following the release of the allegations, the prosecutor was suspended from his duties on 20 January. On 15 February, the Prosecutor General said he had carried out an investigation into the allegations and was satisfied that the prosecutor had not abused his power. An investigation is continuing into the bribery allegations.

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<sup>15</sup> Art.25.3 E.M.J “O Conselho Superior de Magistratura Judicial pode nomear para exercer a função jurisdiccional, como juízes estagiários, os estagiários que revelem ter a preparação necessária para o efeito.”

<sup>16</sup> Section 22.1 “in accordance with Sections 9 and 10.3 of UNTAET Regulation No. 2000/11 the panels in the District Court of Dili shall be composed of two international judges and one East Timorese judge.

22.2 “In accordance with Section 15 of UNTAET Regulation No. 2000/11 the panels in the Court of Appeal in Dili shall be composed of two international judges and one East Timorese judge. In cases of special importance or gravity a panel of five judges composed of three international and two East Timorese judges may be established.

This case highlights the uncertainty over the type of procedure currently in place for investigating allegations of corruption by any court actor. Neither UNTAET regulations, nor the new Public Prosecutor's Bill currently before the parliament, nor any new draft law for the justice sector, mention a complaint procedure or who has ultimate authority to investigate allegations of corruption by a court actor. In JSMP's view, laws setting out complaint procedures, and investing investigative powers in someone to investigate allegations of corruption are needed.<sup>17</sup>

Unsubstantiated allegations of corruption by the East Timorese judiciary (no names have been mentioned) have also been made by members of the government and others. In regard to these allegations JSMP would like to note the following. From September 2003 – September 2004, 8 of the Timorese judges were in Portugal. Of the judges remaining in Timor Leste, two were serving on the SPSC, one on the Court of Appeal, three in the Dili District Court, two in the Suai Court, four in the Baucau Court and zero in the Oecussi court. During this period (and for some months before) not one civil case was heard in any of these courts. It therefore seems extremely unlikely that bribes were being offered to judges in any commercial cases over the past at least year and a half. In regard to criminal cases, it must be noted that in all the courts of Timor Leste there have been very high conviction rates. While it is not impossible that some victims may have offered financial incentives to ensure a conviction, given the financial status of most of the victims and accused appearing before the courts of Timor Leste (most of them are subsistence farmers or unemployed) it seems extremely unlikely.

We also note that allegations of corruption have been made against the international judges of the District Courts, and the President of Court of Appeal. It has been alleged that all of these judges were receiving two salaries: one from UNMISSET and one from UNDP (as these judges are all working as judges for UNMISSET and trainers at the JTC for UNDP). JSMP has clarified with the UNDP that none of these judges are receiving a salary from UNDP for the training they are conducting there. Allegations have also been made that the judges from Portugal are continuing to receive their judges' salaries from the Portuguese government as well as their UNMISSET salaries (in contravention of UN rules). JSMP has been unable to obtain information verifying such allegations.

The Vice-Minister for Justice is now enrolled in the JTC training program, which, as discussed below, is being conducted on a full time basis (in order to pass candidates must maintain an attendance rate of 90%). To JSMP's knowledge, he is still continuing to work as Vice-Minister for Justice, despite his participation in this full time program.

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<sup>17</sup> JSMP notes that the planned Office of the Provedor would have powers to investigate and report on allegations of corruption by a court actor. However, we also note that the Provedor is yet to be elected, and as such, it is likely to be some months, if not years, before its office is fully functional.

## **5. PERCEPTUAL PROBLEMS: LACK OF TRANSPARENCY AND PERCEIVED CONFLICTS OF INTEREST**

### **5.1 The number and extent of positions held by Judge Claudio Ximenes**

JSMP has previously expressed concern about the number of positions held by the President of the Court of Appeal, Judge Claudio Ximenes. As noted in the UNMISSET Transitional Working Group on Justice, Judge Ximenes currently holds the following positions:

President of the Court of Appeal  
Chairman of the Superior Council of the Judiciary  
Member of the Executive Board of the Judicial Training Centre  
Member of the Council of Coordination of the Program for the Strengthening of the Justice Sector  
Chairman of the Evaluation Committee of the National Trainee Prosecutors  
Chairman of the Evaluation Committee of the National Trainee Public Defenders

While JSMP applauds Judge Ximenes' diligence in attempting to fulfill all of these functions, JSMP is concerned that if one person holds all of these positions there will be a problem with a lack of transparency and the independence and impartiality of the justice system could be jeopardized. We wish to stress that no allegations of wrongful conduct have actually been made against Judge Ximenes. However, there is concern that through his extensive number of roles, Judge Ximenes will soon effectively gain control over appointments to positions as Judges, Prosecutors, Public Defenders, and private lawyers. Having control over all of these appointments would be a blatant conflict of interest with his role as President of the Court of Appeal and President of the Superior Council of the Judiciary. It is clearly undesirable for so much power to be held by one person in such a crucial arm of a democracy. Such an outcome could have extremely detrimental effects on the development of an independent and transparent legal system.

### **5.2 Problems with access to decisions**

The President of the Court of Appeal issued Directive 6/2005 on 4 February 2005 regarding access to case files. According to this Directive, those people who are not direct parties to a case are only allowed access to a case file when they have legitimate reasons which can validate such access. In order to gain access it is necessary to request permission in writing from the judge.

However, monitoring bodies and other institutions and people who wish to access information from the courts are finding it difficult to obtain documents or information as a result of Point 2 of this directive. The first difficulty arises from the requirement to demonstrate that they have legitimate reasons which justify access. JSMP recognizes that case files sometimes contain privileged information as well as information that should not be disclosed for the protection of victims and witnesses. We therefore understand the need for judges to examine requests for access to case files. However, in JSMP's view, in regard to final written decisions (which form part of the case file), this requirement is contrary to Section 26.2 of UNTAET Regulation No. 2000/11 which states: "(u)pon request, the transcript shall be made available to the public". S 26.2 does not require the public to demonstrate legitimate reasons for seeing the court transcript. Furthermore, East Timor's international legal obligations under Article 14(1) of the ICCPR, insist that judgments in trials - criminal or otherwise - must be made public except in certain narrowly defined circumstances.

JSMP wrote to the four international judges in the District Courts to request permission to view their final written decisions on 31 January (as we had already been told on 25 January by the Chief Court Administrator that we could no longer gain access to decisions without going through this process). After four attempts to

locate the four international judges to obtain their response to our 31 January letter we have received the following responses:

- Two judges have written letters granting approval to JSMP to view all of their decisions.
- One judge has told JSMP that according to the Directive he can only grant approval if JSMP provides a legitimate reason, in writing, for each decision that we want to see.
- One judge told JSMP that once a final decision has been rendered in a case the decision is handed over to the administrative section of the court and from that point on is not handled by the judge but by the administrative staff. He said he would not write a letter to allow us to view his decisions as his job as a judge does not involve such administrative tasks, and that anyway, we have a constitutional right to view the decisions.

JSMP is also concerned that the failure to translate this directive from Portuguese into Tetum is leading to misunderstandings in its implementation by the East Timorese court clerks.

JSMP is aware that at some levels court documents must have restricted access, as indicated in the aforementioned directive. However, it is also important for any directive to set out unambiguous criteria about which documents may or may not be accessed by the public, or have restricted access. Without such clarification, the implementation of this directive is problematic and there is the potential for elastic interpretations.

JSMP continues to be concerned that Directive 6/2005 is effectively restricting public access to final decisions from the District Courts. The principal aim of the right to a public judgment is to ensure that the administration of justice is public and open to public scrutiny. According to the Amnesty International Fair Trial Manual, the right to public judgment is violated if judgments are made accessible only to a certain group of people or when only people having a specific interest are allowed to inspect judgments.

We are also concerned because the East Timorese court clerks at Dili District Court informed JSMP that, since the international judges commenced work in September 2004, they have only given two final written decisions to the administration section of the court. Therefore, although JSMP has now received authorization from two international judges to view their final decisions, we have only actually been able to view two final decisions. According to a radio interview with Judge Ximenes, at least 45 final decisions have been delivered by the international judges. JSMP is not sure where these other (perhaps more than) 43 final written decisions are currently located, but has called on the international judges to ensure copies of these decisions are given to the administration section of the court so they can be archived appropriately with the case files.

## **6. ATTEMPTS TO IMPROVE THE SECTOR**

### **6.1 Overview of the Training Program at the Judicial Training Centre**

JSMP has welcomed the coordinated and serious training initiative being implemented for court actors by the Judicial Training Centre (JTC). This programme, introduced by the Council of Coordination (whose members are the Minister of justice, the President of the Court of Appeal and the Prosecutor General), is funded by UNDP. This is the first time that such a coordinated training has been attempted and its need is without doubt.

Academic training is now being conducted on a full time basis for 39 participants (mostly former judges, and prosecutors and public defenders, as well as the Vice-Minister for Justice) over one year.<sup>18</sup> The trainers are international judges and prosecutors from the District Courts and Court of Appeal. Training is being conducted on the following topics: theory of law, introduction to civil procedure law, criminal law, criminal procedure law, legal Portuguese, and legal Tetum.

JSMP is concerned that the criminal, civil and criminal procedure and civil procedure laws which are being used for the training are the draft Timorese laws which have not actually been passed by the Council of Ministers or the Parliament. JSMP is concerned that training time will be wasted if training is conducted in draft legislation which is not yet law, as there is a possibility that the content of these laws may be changed. It may also take a number of months, and perhaps more than one year, before these draft laws are passed and become law.

The training is being conducted in Portuguese. During the preparatory stage of the training program a number of participants wrote a letter to UNDP requesting a translator to translate the training sessions and materials into Tetum or Bahasa Indonesia. This request was refused because UNDP said that the Ministry of Justice had a policy that all training at the JTC should be in Portuguese. UNDP did offer to provide dictionaries. Unfortunately most of the participants in the course do not yet have sufficient proficiency in Portuguese to fully understand the contents of the training (having only received one months language training prior to commencement of the training program). Many of the participants in the training have informed JSMP that they do not feel they are gaining the full benefit of the training as a result.

Training is not being conducted in professional groups. A problem in previous judicial trainings in East Timor has been with training of prosecutors, judges and public defenders together when their needs and duties are varied. The 2004 IDLO Prosecutorial training program focused specifically on the training requirements of Prosecutors. This focus contributed to the success of the program.

JSMP understands that upon successful completion of the training program, court actors will be able to choose their future roles. JSMP is concerned that future roles of court actors are to be decided on the basis of exam results (in Portuguese) after the training program, rather than appraisals of work performance over the past four years of court experience.

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<sup>18</sup> Eleven of the eighteen Public Prosecutors and eight of the nine Public Defenders are participating in the Judicial Training Centre training program. Those who did not pass the preparatory stage of the training program are continuing to work in the district courts, as are all of the private lawyers (most of whom did not attend the preparatory stage of the training program). JSMP has also observed that some of the Public Prosecutors and Public Defenders who are enrolled in the JTC training program have ongoing court commitments and are still participating in trials in the district courts. Given these ongoing commitments it appears it will also be difficult for some of the Public Prosecutors and Public Defenders to meet the 90% attendance requirement at the JTC.

## 6.2 Training commitments of international judges interferes with their court responsibilities

The international judges training commitments at the JTC are causing extensive delays in the courts. At present, only one or at the most two, cases are being heard a day.<sup>19</sup> It appears that the current backlog of cases will continue to increase if the District Courts continue to hear trials at such a slow rate.

The international judges have the following training commitments:

Judge Elias Abrantes Tome:	Thursdays 14.00 – 17.30
Judge Joana Vaz:	Mondays 08.30 – 12.00
Judge Emiliano Nosolino:	Tuesdays 08.30 – 12.00
Judge Sandra Silvestre:	8 days a month, 3 hours per day

JSMP has strongly recommended that new trainers be recruited to work at the JTC so the international judges have more time to work in the courts and more than one or two cases can be heard per day.

JSMP is particularly concerned about the apparent misinformation given by the President of the Court of Appeal to national media institutions in regard to the training program. On 28 February 2005 Radio Timor Leste (RTL) phoned JSMP to clarify some information regarding the functioning of the courts during the training period. RTL told JSMP they had spoken to the President of the Court of Appeal to confirm that the Baucau district court was only functioning two days per week due to the training commitments of the international judges assigned there. The President of the Court of Appeal apparently told RTL this was not true and that the international judges are working full time in the courts, not providing training. The President of the Court of Appeal was broadcast on 28 February (in Portuguese) and 1 March (in Tetum) saying that it was not true the international judges were busy giving training at the JTC. He blamed the lack of functioning of the courts on the failure of the Timorese prosecutors and defence lawyers to appear at trial. JSMP calls on the President of the Court of Appeal to ensure he provides correct information to national media institutions to prevent causing more confusion about the justice system.

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<sup>19</sup> JSMP notes that that prior to the employment of international judges, the district Courts (Baucau, Suai and Oecussi) had been basically non-operational in their respective districts for many months due to lack of personnel.

## **7. PLANS FOR THE JUSTICE SECTOR**

From 2000 – 2004 it appears that there was never a comprehensive plan for the Timor Leste justice sector. As a result, the justice sector has remained, as described by the UN Secretary General on 18 February 2005 as “particularly weak”<sup>20</sup>. Until September 2004 there was only limited involvement of international court actors in the courts of Timor Leste. However, by 4 February 2005, the involvement of international court actors in the courts was described (by the UNMISSET Transitional Working Group on the Justice Sector) as “critical” to ensure the courts continue to function effectively. If, as looks increasingly likely, UNMISSET does not continue past 20 May 2005, the government of Timor Leste must decide whether it wishes to continue to use international court actors and if so, how they will be funded.

For instance, one international on a UN salary working in the courts costs an average of USD 250,000 per year (including salary and benefits) (although high level UN employees such as judges would cost considerably more). In the UNMISSET Transitional Working Group on the Justice Sector 4 February report, the following positions were identified as critical to the effective functioning of the Timor Leste courts: 3 international judges in the Court of Appeal, 4 international judges in the District Courts, 4 international court clerks, 2 international prosecutors, the international public defender, 5 translators, and 3 national language assistants. It was further claimed that it might be necessary to recruit 2 more international prosecutors and 3 more international public defenders. This is a total of 26 internationals at a possible cost of at least USD 6.5 million per year. This would be a sizeable proportion of Timor Leste’s budget (and it does not include the other costs involved in ensuring the operation of the courts such as salaries for Timorese court administrators, fuel for generators, electricity, telephone costs, stationary, equipment, maintenance etc). It is questionable whether the Timor Leste parliament would agree to pass a National Budget containing such high costs for international salaries.

Thought must therefore perhaps be given to the possible re-evaluation of the East Timorese Judges, as it seems likely they may be reappointed to work in the courts of Timor Leste. (According to an interview with Judge Ximenes on 9 March, despite the East Timorese Judges failure of their evaluations he can reappoint them as probationary judges to work at any time. JSMP disagrees with this interpretation of Article 25 of Law No.11/2004 as amended by Law No.8/2002 (the Statute of Judicial Magistrates)). It is also important that the evaluations of the Prosecutor and Public Defenders be completed promptly so as to allow for planning of work in the court and future training needs.

## **8. RECOMMENDATIONS**

### **8.1 LEGISLATION**

#### **Draft Penal Code**

*That the government engage in community consultation in regard to the draft Penal Code and make amendments in accordance with community suggestions and ensure that the law complies with international law.*

*That the law be passed as a Parliamentary law.*

#### **Draft law on Public Prosecutors**

*That the drafters ensure the law is well structured and that inaccuracies and omissions in the draft law are fixed.*

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<sup>20</sup> Progress report of the Secretary-General on the United Nations Mission of Support in East Timor (for the period 10 November 2004 to 16 February 2005), 18 February 2005.

## **Draft law regulating accreditation of private lawyers**

*That the law be completely redrafted to recognize the existing Timor Leste Bar Association and to allow the Bar Association to write the rules regulating private legal practice and training criteria.*

## **8.2 COURTS**

### **Evaluations of Public Prosecutors and Defenders**

*That the evaluations of public prosecutors and defenders be carried out transparently and completed expeditiously.*

### **District Courts**

*That accurate statistics be made publicly available from the District Courts and Office of the Prosecutor General regarding completed cases and backlogs of cases.*

*That the District Courts and Office of the Prosecutor General provide these statistics according to the same categories of cases.*

*That the four international judges in the District Courts be allowed to fulfill their primary role as judges in the District Courts of Timor Leste.*

*That the Judicial Training Centre find other trainers to replace the international judges as trainers in the court actor training program.*

*That the decisions of the international judges in the District Courts and Court of Appeal be reviewed for consistency with Timor Leste's international treaty obligations, the Indonesian Criminal and Civil Codes and Codes of Criminal and Civil Procedure, and fair trial standards.*

*That Tetum language training be provided to the international judges in the District Courts and Court of Appeal.*

### **Administration**

*That the white board on public display in the District Courts be used to post the daily hearing schedule so as to allow the public to know what cases are on and when they are scheduled to commence.*

*That there be a system of regular meetings between the President of the Court of Appeal, Jurists Association, and Court Administration staff, and a system of regular meetings between Ministry of Justice and court actors.*

*That Human Resources management training be provided for whoever is supposed to be managing the court staff.*

*That case management training be provided for all court actors, including, and especially, court clerks.*

*That financial management training be provided for court administration staff.*

*That computer networking be provided for prosecutors' office, public defenders, judges, court clerks, and extensive training in how to use this technology.*

*That internet access be provided for all prosecutors, public defenders, and judges.*

*That more photocopiers, computers and printers, and funds for the maintenance of this equipment, be provided for the offices of all court actors.*

*That all laws laws which have been promulgated since Independence be translated into Tetum.*

*That victim waiting rooms be designated in the District Courts where victims are allowed to wait to give their testimony.*

### **Court of Appeal**

*That Law 8/2002 on the Superior Council of Judicial Magistrates be amended to allow for the establishment of the Supreme Court of Justice.*

*That the Supreme Court of Justice hear appeals from the Court of Appeal decisions which are in flagrant violation of international law, and established judicial practice.*

*That the Court of Appeal and Supreme Court of Justice start hearing civil cases.*

*That the Court of Appeal make its weekly schedule publicly available and display it in a public place in the Court of Appeal building. That amendments to the schedule be made in ample time and notification given to the parties affected.*

*That the Court of Appeal operate in a punctual manner.*

### **8.3 CORRUPTION**

*That a law be written setting out complaint procedures, and investing investigative powers in someone to investigate allegations of corruption by court actors.*

### **8.4 PERCEPTUAL PROBLEMS: LACK OF TRANSPARENCY AND PERCEIVED CONFLICTS OF INTEREST**

*That some of the roles currently held by Judge Ximenes be divided among other people (eg. Member of the Executive Board of the Judicial Training Centre, Chairman of the Evaluation Committee of the National Trainee Prosecutors, Chairman of the Evaluation Committee of the National Trainee Public Defenders) to prevent perceptions of as well as the potential for conflicts of interest.*

*That Directive 6/2005 (regarding access to decisions) be translated into Tetum so that court actors and court administrators can fully understand the Directive.*

*That Directive 6/2005 be enforced in regard to all judges working in the Courts of Timor Leste.*

*That the President of the Court of Appeal direct all international judges working in the district courts to give copies of their decisions to the administration section of the court so they can be archived properly with the case files.*

## **8.5 THE JTC TRAINING PROGRAM**

*That an evaluation be carried out of the JTC training program conducted to date.*

*That interpretation of training and translation of training materials be provided into Tetum and Bahasa Indonesia where appropriate.*

*That training be in professional groups.*

*That training be conducted on the basis of laws currently applicable in East Timor.*

*That adequate consideration be given to appraisal of work performance of court actors over the past four years in deciding their future roles and in accordance with the Judicial Magistrate Law within the judicial system.*

*That consideration be given to the fact it is unrealistic to expect court actors to attain proficiency in legal Portuguese after only one month of Portuguese language training.*

*Clarification of the future role of court actors not involved in the training internship be provided through a meeting with the actors.*

## **8.6 PLANS FOR THE JUSTICE SECTOR**

*That the Ministry of Justice, Ministry of Planning and Finance, the Council of Ministers, the President of the Court of Appeal, and the Parliament decide on short term and long term plans for the Timor Leste justice system. In particular, that thought be given to the future of the courts post 20 May 2005.*