JUDICIAL SYSTEM MONITORING PROGRAMME
PROGRAM PEMANTAUAN SISTEM YUDISIAL

Interim Report
on the Dili District Court

Dili, East Timor
April 2003

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*

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EXECUTIVE SUMMARY

With the end of the Indonesian occupation of East Timor came the historic opportunity to create a new judicial system which was both compliant with international standards and compatible with the particular circumstances of East Timor. This report aims to evaluate the performance of that nascent system in the context of the Dili District Court. International fair trial standards and the domestic regulations designed to give effect to them provide the benchmark against which performance is measured.

The information and commentary contained in this report is based on a monitoring programme carried out in the Dili District Court in November 2002. Judicial System Monitoring Programme (JSMP) tracked and observed all cases, criminal and civil, which were held or were scheduled to be held in the Court during that month. JSMP also gathered supplementary information from documents such as indictments and detention orders and from discussions with court actors.

The report finds that there is a disconcerting degree of informality within the judicial system. Procedural rules and regulations are frequently ignored. Both the identification and application of the law is imprecise and cursory. Evidence is presented without any evaluation of its prejudicial or probative value. Little attempt is made to limit or focus the evidence. The right to silence and the right against self-incrimination are not properly understood or applied. In short, although proceedings at the Dili District Court are imbued with the authority of formal judicial proceedings governed by the law, in practice they are often ad hoc and arbitrary.

In particular the role of the Investigating Judge is misunderstood and misused within the judicial system. The title "Investigating Judge" is misleading because the Investigating Judge does not conduct or have responsibility for criminal investigations. The limited mandate of the Investigating Judge is essentially to safeguard the rights of suspects during criminal investigations and to determine, according to law, whether a suspect should be detained or subject to restrictive measures while they are under investigation. However, contrary to the provisions of the law, proceedings before the Investigating Judge are approached as a mini-trial where suspects, who are not charged with any offence and who have had only very limited contact with their lawyer, are interrogated by the Judge and Public Prosecutor. Whether suspects are detained or subjected to restrictive measures depends primarily on a preliminary evaluation of their guilt rather than factors such as whether they are a flight risk, risk to the investigation or risk to public safety.

Lesser offences often never progress beyond the Investigating Judge, instead after a mini-trial suspects are made to report to police weekly or twice weekly. By default this becomes the "sentence" for a crime in relation to which they are never charged or convicted. In the worst case scenario, by default, a period of one or several months detention becomes the "sentence" for a crime for which the suspect is never charged or convicted. Meanwhile procedures providing for the simplified and expedited hearing of lesser offences are not utilised. This problem is exacerbated by staffing shortages within

the Public Prosecution Service which compromise the ability of the Public Prosecutors to prepare and prosecute cases in accordance with the law.

Timeframes for reviewing detention, both following arrest and after the expiry of initial orders, are not rigidly adhered to, with the result that some suspects are unlawfully detained for a period. There are no repercussions when this occurs. There is no apparent acknowledgment from the Prosecution Service, the Court or the Public Defender's Office of the seriousness of failing to adhere to the timeframes set out in law. Administrative and logistical difficulties are regarded as adequate justification for the violation of rights protected by the law.

The dangers of detaining suspects for lengthy periods in pre-trial detention are masked by Judges handing down final sentences which precisely correspond with the time already spent in detention. In such circumstances, it appears that Judges do not consider whether any or a lesser prison sentence would be more appropriate. Given that the time has already been served, a lesser sentence is viewed as making no material difference.

One of the obvious and harmful manifestations of the casual approach adopted towards the judicial process by various court actors was the prevalence of delays and postponements. More cases were postponed than proceeded as scheduled with most postponements caused by a court actor's failure to appear. Generally no hearing was held to explain or announce a postponement and there was no accountability, even where a postponement meant further delay in the trial of an accused in pre-trial detention.

Laws which provide for special procedures in cases involving minors as a suspect or accused were not observed. Minors were not afforded the protections provided to them by law.

As a result of their inexperience and current level of competency, it was observed that the Public Defenders were not vigilant in defending the rights of their clients and demanding compliance with the procedures designed to protect them. In general, the representation provided by the Defence was passive, under-prepared and ineffective.

Another concerning consequence of the blurred line between the formal judicial system and informal dispute resolution was the involvement of the Public Prosecutor as mediator or arbitrator in the resolution of cases. After a decision had been taken not to indict a suspect, the Public Prosecutor sometimes remained involved in a case using the authority of the office to bring the parties to agreement. It was apparent that structured alternatives for the resolution of civil disputes or disputes involving trivial infringements of the law should be available outside the formal justice system so that court actors are not compromised by assuming roles outside their authority.

Ultimately, East Timor will produce its own substantive and procedural laws which govern the work of Judges, Prosecutors, Public Defenders and private lawyers. It may be that those laws place little emphasis on procedural formality and provide court actors with broad discretion and the authority to resolve cases using very flexible means. This

may accord more closely with East Timorese notions of justice. However, at present, there are other laws which govern the procedures and powers of the Court. To have those laws, but not to follow them, for whatever reason, undermines the rule of law in favour of the arbitrary exercise of power and discretion.

This report, which is a precursor to a six month District Court monitoring programme, aims to be of benefit in a number of ways. Specifically, it is hoped that this evaluation of current practice will help direct further training initiatives, encourage the provision of resources necessary to facilitate compliance with procedural rules and safeguards and promote accountability amongst court actors and those responsible for the judicial sector. To that end a number of recommendations are attached to the report.

1 SUMMARY OF REPORT RECOMMENDATIONS

PRACTICE AND PROCEDURE

Recommendations relating to the Application of the Law

Recommendation 1: Greater care must be taken by all court actors, particularly Judges, to familiarise themselves with the applicable law. An increased level of legal precision is required in the drafting of court documents including judgements so that the legal basis for any exercise of the court's power is clearly understood.

Recommendation 2: To help create a culture of rigorous legal thinking and discussion amongst the judiciary, judgments, including from the Special Panels, should be circulated to all Judges.

Recommendation 3: Urgent steps must be taken to re-activate the Court of Appeal so that first instance judgements are subject to scrutiny and review in a manner which encourages an improvement in the level of judicial reasoning.

Recommendations relating to the Rules of Evidence

Recommendation 4: Further intensive training on the content and application of the rules of evidence currently applicable in East Timor is required. Court actors should not revert to the use of the Indonesian Criminal Procedure Code, which is not fully compliant with international standards. In particular, further training is required on the practical operation of the right to silence and the right against self incrimination and the need to focus the evidence on matters relevant to proving the elements of the crime or civil action, rather than allowing extraneous and/or prejudicial evidence. The translation of judgments relating to evidentiary issues from other jurisdictions with similar rules of evidence may assist Judges to gain a better understanding of the purpose and operation of rules of evidence.

Recommendations relating to the Processing of Guilty Pleas

Recommendation 5: The procedures set out in section 29A of the Transitional Rules of Criminal Procedure should be employed to process guilty pleas so as to avoid unnecessary delays in the disposition of cases and so as to avoid calling witnesses in circumstances where their evidence is not required and there are no matters in issue. At present, the section is often referred to by court actors but the procedures set out therein are rarely followed.

Recommendation 6: Specific training for court actors is required on the application of section 29A procedures. A procedural manual is required which explains, step by step, how to proceed in cases where the accused wants to plead guilty. Examples of how actual cases where the accused has pleaded guilty have been processed by the Dili District Court should be used as training and discussion materials.

Recommendations relating to Proceedings before the Investigating Judge

Recommendation 7: Regardless of the seriousness of the crime, detention of suspects should only be ordered where there is a flight risk, risk of interference with potential evidence or witnesses, risk of re-offence or risk to public safety AND where restrictive measures would not be sufficient to counter that risk. In each case where detention is ordered, the Investigating Judge should provide written reasons setting out why there is a need for detention according to the provisions of section 20.7 and 20.8 of the Transitional Rules.

Recommendation 8: To ensure that suspects do not become "lost" in the system after an initial detention order is made, clear and detailed procedures are required to regulate what must be done when a detention order expires and is not extended. This may involve automatic release of a suspect by the prison even without further order of the Court. It may involve an obligation on Investigating Judges to diarise when detention orders are due to expire and, if no application for extension or other order is made before that time by the Prosecutor, automatically issuing a release order. The release of a suspect after the expiration of a detention order should not depend on the Prosecutor or Defence taking a pro-active step, although it is nonetheless their responsibility to take such steps.

Recommendation 9: If a person is suspected of a crime which carries a maximum sentence of five years or less and is in detention, the Prosecutor has an obligation to file an indictment and a request for an expedited hearing within 48 hours of detention. To encourage compliance with that obligation, the Investigating Judge should only be empowered to make 48 hour detention orders in such cases.

Recommendation 10: Review Hearings should not be misused as mini-trials. In particular, in accordance with the Transitional Rules of Criminal Procedure, suspects should only be questioned by the Judge or Prosecutor at the Review Hearing if the suspect chooses to make a statement. Suspects should be told by the Judge that they do not have to make a statement, that if they do not make a statement they will not be questioned further and that no inference will be drawn from the choice not to make a statement. They should only be questioned on the contents of any statement given rather than questioned generally about the suspected offence.

Recommendation 11: Witnesses should only be called to Review Hearings in the rare circumstances where witness statements are not sufficient to allow the Investigating Judge to reach a decision on the matters set out in section 20.7 and 20.8 of the Transitional Rules of Criminal Procedure. This recommendation is subject to the right of the victim to be present and represented at any Review Hearing.

Recommendation 12: Restrictive Measures should only be imposed on suspects by the Investigating Judge where they are necessary to ensure the integrity of evidence and the safety and security of witnesses and victims. They should not be employed as an ad hoc mechanism for punishing suspects accused of lesser offences in circumstances where the suspect has neither been officially charged nor convicted. Instead the procedures for the

expedited hearing of lesser offences set out in the Transitional Rules for Criminal Procedure should be utilised.

Recommendation 13: Clarification of the rules governing whether and how an Investigating Judge is able to process a guilty plea made during a Review Hearing is required. If Investigating Judges are empowered to hear and determine a guilty plea, greater safeguards are required to ensure that suspects have adequate time with their defence lawyer prior to Review Hearings and have a better understanding of the right to silence.

Recommendation 14: To avoid suspects being held in detention for more than seventy-two hours before being brought before the Court, Investigating Judges should be scheduled on a rotating five day roster so that there is always a judge on duty over the weekend period. Similar administrative arrangements should be made for Public Prosecutors and Public Defenders.

Recommendation 15: In circumstances where a suspect is arrested without an arrest warrant and then subsequently released, for whatever reason, by the Prosecutor, unless re-arrested the suspect must not be required to later appear before the Investigating Judge for a hearing. In such circumstances the Investigating Judge has no jurisdiction to conduct a Review Hearing.

Recommendations relating to the Use of Expedited Proceedings

Recommendation 16: Greater use must be made of the provisions designed to expedite the hearing of lesser offences. To that end, at least one additional Public Prosecutor must be hired for the Dili District Court and specifically designated to handle lesser offences in accordance with the requirements of the Transitional Rules of Criminal Procedure.

ROLE OF THE JUDICIARY

Recommendations relating to Independence of the Judiciary

Recommendation 17: In order to safeguard the perception of independence and the security of the Judiciary, Judges' offices should not be openly accessible to the public or legal practitioners.

Recommendation 18: Any communication relating to a case, including requests for adjournments or hearings, should be made in writing through the Registry and a copy should be provided to other parties to the case.

Recommendation 19: Judges must maintain a degree of isolation within the court building and should not openly socialise with lawyers and others in the public waiting area. To help facilitate this each Judge should have an internal phone in his or her office so that they may communicate with the Registry without having to continually pass through the public waiting area crowded with accused, witnesses, victims, plaintiffs and

defendants. Ideally Judges would have a separate parking area and a designated entrance and exit from the court building.

Recommendations relating to Sentencing

Recommendation 20: Sentences handed down after final judgment should be determined independent of whether and how much time has already been spent in detention. (Except, of course, to the extent that time already spent in detention must be deducted from any time remaining to be served.) For example, Judges must be prepared, where they consider it appropriate, to hand down a prison sentence which is shorter than the time already served in detention. Only when Judges are prepared to approach final sentences in this way will problems with lengthy and indiscriminate pre-trial detention be exposed.

ROLE OF THE PROSECUTOR

Recommendations Relating to Staffing Issues

Recommendation 21: Recommendation 21: There is an urgent need for the appointment of at least two new Public Prosecutors to the Dili District Court.

Recommendations relating to the Prosecutors Acting as Gatekeepers and Mediators

Recommendation 22: Once the Public Prosecutor decides not to file an indictment in a particular case, that must signal the end of the Public Prosecutor's involvement in the matter. The Public Prosecutor should not act as a mediator or arbitrator between parties. The Public Prosecutor must not assume a quasi-judicial role in the resolution of disputes and should not use his or her authority to help prepare documents which people view as binding agreements.

Recommendation 23: There is an urgent need for mediation facilities to which the Public Prosecution Service can refer people involved in disputes. Such a facility, which might take the form of a neighbourhood dispute centre, should be free and staffed by trained mediators. It should exist outside the formal justice system and participation should be voluntary. Private lawyers or Public Defenders acting as mediators in circumstances where they are hired by one of the two parties to a dispute is unsatisfactory.

Recommendations Relating to Cooperation with the Defence

Recommendation 24: Before the preliminary hearing, it should be standard practice for the Defence and Prosecution to hold an informal case conference where the factual and legal matters in issue are discussed. This should be a chance for the two sides to discuss whether any witness statements may be admitted by consent, whether the accused intends to plead guilty to some or all of the charges, and to set out a timetable for preparing and hearing the case that could be submitted to the Court at the preliminary hearing. Neither party would be bound in any formal way by undertakings or agreements made at such a conference.

Recommendation 25: Copies of documents and submissions to be presented to the Court should be exchanged in advance of hearings on an informal basis so that the other side is

in a position to respond immediately without the need for continued delays and adjournments.

ROLE OF THE DEFENCE

Recommendations Relating to Case Preparation and Work Practices

Recommendation 26: There is an acute and urgent need for more intensive and practical training of Public Defenders. While international mentors are one way to deliver such training, it is imperative that mentors who are appointed are able to communicate with the Public Defenders in a language they understand, have considerable experience as a defence lawyers and are familiar with the laws of East Timor, (which at this stage includes the Indonesian Criminal Code).

Recommendation 27: Public Defenders should be subject to periodic review of their performance and case management skills using the Public Defender Code of Conduct as a benchmark for performance evaluation.

Recommendations Relating to the Prioritisation of Criminal and Civil Matters

Recommendation 28: The Public Defender's Office should be exclusively concerned with providing advice and representation to those accused of criminal offences. Representation in proceedings or negotiations involving civil matters may be provided by other legal aid organisations.

COURT ADMINISTRATION

Recommendations Relating to the Public Availability of Information

Recommendation 29: The noticeboard must be updated with the daily court schedule each morning as a matter of priority. Each afternoon the court schedule for the following day should be distributed to newspapers and other media outlets so that it may be published for a wider audience.

Recommendation 30: Formal written procedures are required to regulate public access to court documents. The procedures could be issued by the President of the Court of Appeal or take the form of legislation. The procedures should set out what documents may be viewed and/or copied by members of the public and on what basis. Such procedures should guarantee that the public has a right to access indictments, court orders, and judgements. The procedures should set out whether there will be costs involved for accessing or copying documents.

Recommendation 31: Records of orders made by the Investigating Judges should be held in the Registry with other court records. Written procedures should be formulated which regulate access to court documents related to proceedings before the Investigating Judges. At the very least, the public should have access to a written copy of orders which lead to the detention of a suspect or the application of other restrictive measures such as reporting requirements.

Recommendations relating to Adjournments

Recommendation 32: Scheduled hearing should always be convened even in circumstances where one of the court actors is not present, so that a record can be made about why the case is unable to proceed. Where there is a failure to appear by a court actor, witness or accused, the Court should ascertain in open court the reason for that failure and take appropriate steps to ensure that it does not reoccur. This may include compelling a person to appear or instigating disciplinary proceedings.

Recommendations relating to Timetabling

Recommendations 33: A more structured and standardised approach to timetabling is required. All preliminary hearings should be listed to commence at 9.00am so that Judges involved in preliminary hearings are not precluded from conducting trial hearings on the same day. When cases are to be listed for trial, the Court should ascertain at the preliminary hearing how long the case requires and list it for an entire day or, if necessary, a number of consecutive days so that it can be disposed of in a confined space of time rather than progressing sporadically and incrementally in short, spread out half day sessions.

Recommendations relating to the Production of Transcript

Recommendation 34: Some method of recording proceedings so that a transcript may be produced on request should be provided together with the staff necessary to operate such a system.

MINORS

Recommendations Relating to Minors

Recommendation 35: It is imperative that within the Public Prosecution Service, the Public Defenders Office and the Judiciary there are designated staff with expertise in dealing with cases involving minors. Further, a procedural manual dealing specifically with the issue of minors as suspects and accused should be created for the benefit of court actors to help alert them to issues arising in cases involving minors and provide guidance and instruction on options available.

2 INTRODUCTION

2.1 Scope and Purpose of the Report

This report is concerned with the work of the Dili District Court which has been in operation now for over two and a half years. The report is prompted, in part, by frequent discussion in the media and amongst the NGO community, donors and government officials about a perceived crisis in the judicial sector. Such discussion is fuelled by incidents such as the mass break-out from Becora Prison in August 2002, a lengthy lawyers' strike, manifest animosity between the judiciary and the government and a commonly held view that the court process is plagued by repeated and lengthy delays. Against that backdrop, there is a wider debate about who is responsible for the current state of affairs and what is required to ensure the strength and longevity of a competent and independent judicial sector in East Timor. JSMP believes that, at present, this debate suffers from a lack of comprehensive and independent information about the day to day operations of the District Court.

In November 2002 JSMP conducted a pilot monitoring programme in the Dili District Court.[1] JSMP tracked and observed all cases, criminal and civil, which were held or were scheduled to be held in the Dili District Court during that month. Where hearings were closed to the public or where there were multiple hearings held simultaneously, JSMP relied on those involved for information about what occurred. Supplementary information was also gathered from indictments, Court orders and final judgments. JSMP was a constant presence at the Court during the month of November and during that time had conversations with victims, witnesses, suspects, accused persons, court clerks, Prosecutors, Public Defenders, private lawyers and Judges. This interaction also provided a valuable source of information.

On the basis of the information gathered, this report aims to examine the quality of the justice delivered by the Court. Quality is measured in terms of compliance with both international fair trial standards and, more specifically, the domestic regulations designed to give effect to those standards. The report focuses on the extent to which the Court is compliant with the rules of procedure which are intended to govern the processes of the Court and demarcate the boundaries of the Court's power. In that context, issues of concern are raised about the independence and competency of the judiciary, the competency and practices of Public Prosecutors and Public Defenders, the treatment of minors within the system, and the general administration of the Court.

Previous reports have focussed more heavily on the resource needs of the justice sector. Some of the recommendations included in this report also relate to resource issues. However, although the quality of the justice delivered and the available resources of the Court are undeniably linked, this report is more concerned with an assessment of what *is or is not* being achieved within current resource limits rather than providing a list of

[1] In 2003, this will be followed by a six month monitoring programme which also covers the District Courts in Baucau, Oecussi and Suai.

resources which the Court does not have at present. JSMP believes this is a valuable contribution to the current discourse. An informed and independent assessment of the current situation, based on time actually spent at the Court, is a necessary starting point to any discussion about how the operation of the Court might be improved. For example, future training needs cannot be properly identified without an evaluation of the current performance of court actors. Without an assessment of how current resources are used, an informed decision cannot be made about what resources are still required. Likewise, an analysis of the practical operation of current procedural rules is a necessary precursor to any discussion about amendment or replacement of those rules. In addition, as with any review of current practice, the report serves to promote accountability amongst court actors and those responsible for the judicial sector.

2.2 Background to the Establishment and Operation of the Dili District Court

When the United Nations Transitional Administration for East Timor (UNTAET) was established on 25 October 1999 by the UN Security Council it was mandated to "exercise all legislative and executive authority, including the administration of justice."[2] With respect to the latter, the challenge faced by UNTAET was immense. Court buildings had been destroyed during the violence and destruction which followed the popular consultation. There were very few East Timorese jurists qualified and available to act as judicial officers in the new judicial system. Community knowledge of and faith in formal justice processes was non-existent or very limited. In short, a new judicial system had to be built from scratch.

UNTAET Regulation 1999/3 established the Transitional Judicial Services Commission which was tasked with establishing a judicial system and recruiting East Timorese jurists as Judges, Prosecutors and Public Defenders. The first Judges and Prosecutors were appointed on a probationary basis on 7 January 2000. More were appointed on a probationary basis in subsequent recruitments during the following six months. There were no East Timorese at that time with prior experience as judges and many of the recruits had no practical experience working within the judicial system. Nonetheless, Regulation 1999/3 provided the jurists with full authority to act and exercise their responsibilities from the moment of appointment.

UNTAET Regulation 2000/11 of 6 March 2000 established District Courts in Dili, Baucau, Suai and Oecussi[3] and vested them with jurisdiction over all matters at first instance, except for genocide, war crimes and crimes against humanity whenever committed and murder, sexual offences and torture committed between 1 January 1999 and 25 October 1999. In respect of these crimes the Special Panels for Serious Crimes were established as part of the Dili District Court. Further UNTAET Regulations were

[2] Security Council Resolution 1272/99, 25 October 1999.

[3] Not all the District Courts became immediately operational. Buildings needed to be rehabilitated and staff appointed. The Baucau District Court formally became operational on 15 September 2000. The Oecussi District Court formally commenced operations on 31 May 2000. The Suai Court became operational in November 2002.

promulgated establishing a Public Prosecution Service and a Legal Aid Service and setting out the role and responsibilities of Prosecutors and Public Defenders.[4]

Little changed with independence on 20 May 2002. The Constitution declared that the judicial system existing at independence would remain operational until a new judicial system was established and had commenced its functions.[5] The continued appointment on probation of the Judges of the District Court was affirmed by Decree Law No1 of 2002 dated 24 May 2002 and promulgated on 5 July 2002.[6]

At present the Dili District Court is located in a complex of two-story buildings which were rehabilitated by the Portuguese Government. The same building complex was also used as a Court in Indonesian times. There are five court rooms available for use. Excluding international Judges appointed to the Special Panels, there are ten Judges currently appointed to the Dili District Court.[7] Two of those Judges also work as Judges of the Special Panels for Serious Crimes which are located in a separate building with the Court of Appeal. Three Judges work exclusively as Investigating Judges, with one designated to handle serious crimes matters and the remaining two handling ordinary crimes matters. Excluding international staff involved in the Special Panels for Serious Crimes, at present there are at least three Public Defenders appointed to work at the Dili District Court and three Public Prosecutors.[8] The Judges' offices, the Civil and Criminal Registry, the Office of the Public Defender and holding cells are all housed in the Court complex. The Public Prosecution Service is located in a house opposite the Court Building.

The Dili District Court is the busiest of the District Courts in East Timor. In 2001, 148 criminal cases and 54 civil cases were lodged with the Court. In 2002, 123 criminal cases and 76 civil cases were lodged with the Court. During the month of November, there were 131 scheduled hearings, although only 61 of those proceeded as scheduled.

2.3 Judicial System Monitoring Programme

The Judicial System Monitoring Programme (JSMP) is an independent non-governmental organization based in Dili, East Timor dedicated to monitoring the judicial system of East Timor. JSMP was set up in April 2001 in response to a need identified by local and international observers for a consistent and credible monitoring presence to contribute to both the developing legal culture within East Timor and the international justice community by providing information and analysis of issues arising from the ongoing

[4] UNTAET Regulation 2000/16 (6 June 2000) established the Public Prosecution Service and UNTAET Regulation 2001/24 (15 September 2001) established the Legal Aid Service.
[5] Section 163(2)
[6] The issuance of this decree was prompted by a Judge's strike. The Judges had refused to work on the basis that until their tenure was affirmed by the new independent government, their status and authority to exercise judicial power was unclear. As too was their contractual status as employees.
[7] When this report was researched there were 11 Judges but Pedro A de Oliveira resigned in January 2003.
[8] The Attorney General is not included in this figure because he is generally not involved in directly prosecuting crimes.

process of creating a new justice system. JSMP is composed of both East Timorese and international staff from both common law and civil law jurisdictions.

JSMP maintains three main areas of focus: trial observation, judicial system analysis and public outreach. Originally, JSMP concentrated on proceedings before the Special Panels for Serious Crimes and has been the only independent organisation consistently present during proceedings before Special Panels. JSMP is now also committed to providing the same monitoring presence at the District Courts. JSMP's courtroom observations provide the basis for trial reports on particular trials in addition to thematic reports on issues of ongoing structural concern within East Timor's judicial system. In addition, JSMP provides legal analysis and commentary on draft legislation regarding justice - related matters.

3 PRACTICE AND PROCEDURE

The boundaries and basis of the Dili District Court's jurisdiction, the rules by which the Court operates and the substantive law it must apply are all matters set out in law. The validity and authority of any order made by the Court derive from its foundation in law. UNTAET Regulation 2000/11, which established the District Courts in East Timor, states that Judges shall perform their duties "in accordance with the applicable laws in East Timor"[9] and that Judges shall decide matters before them "in accordance with their impartial assessment of the facts and their understanding of the law". [10]

JSMP observed that in practice the work of the Dili District Court was not strictly governed by law. Often the substantive law applied by the Court was only identified in broad terms. Procedural laws were regularly ignored, sometimes in favour of no longer applicable Indonesian procedural laws, sometimes in favour of more convenient ad hoc practices and sometimes in favour of an apparent vacuum of procedure. These matters are best illustrated by the rules of evidence applied by the Court, the processing of guilty pleas and proceedings before the Investigating Judge.

3.1 Application of Laws

Determining the applicable law on any particular point in East Timor requires an analysis of the interplay between four different sources of law. The first UNTAET Regulation promulgated by the Transitional Administrator established that the laws which applied in East Timor prior to 25 October 1999 should continue to apply *to the extent that* they do not conflict with international human rights standards, UN Security Council Resolution 1272 (1999) or any Regulation or Directive issued by the Transitional Administrator.[11] The Constitution of the Democratic Republic of East Timor which came into force on 20 May 2002 established that the laws and regulations in force in East Timor on 20 May 2002 shall continue to be applicable to all matters except *to the extent that* they are

[9] Section 2.1 of UNTAET Regulation 2000/11
[10] *Ibid*
[11] Section 3.1 of UNTAET Regulation 1999/1.

inconsistent with the Constitution or the principles contained therein.[12] As a result, the applicable law in East Timor is to be found first and foremost in the laws promulgated by the competent authorities of the Democratic Republic of East Timor. If no relevant law of that type exists, the applicable law is the law as set out in UNTAET Regulations to the extent that those regulations are consistent with the Constitution. If no UNTAET Regulation exists, the Indonesian law which was in force on 25 October 1999 applies to the extent that it is compatible with international human rights standards and the Constitution. On some matters, where there is an East Timorese law or UNTAET Regulation but it is not sufficiently comprehensive, the law might represent a compilation of laws from a variety of sources.

There is no doubt that this complex legal framework is difficult to comprehend and apply and one would expect that it would present many difficult issues of legal interpretation. However, JSMP observed that in the day to day proceedings of the Dili District Court questions related to the legitimacy and applicability of laws were rarely raised. The law was approached with a concerning degree of generality. The Court did not engage with the task of precisely identifying the applicable law, taking into account the legal framework set out above, and then carefully applying the law to the facts. The following examples from cases monitored by JSMP illustrate this point.

JSMP observed that during the course of several rape cases which came before the Court in November, one element of the crime of rape was always stated to be that the alleged victim was not married to the accused. This accords with section 285 of the Indonesian Penal Code. It is strongly arguable that this definition of rape is inconsistent with international standards of human rights and therefore is no longer applicable in East Timor. Indeed, in a dissenting judgment delivered by Judge Benfeito Mosso Ramos in the Special Panels, his Honour cited the *Convention on the Elimination of All Forms of Discrimination Against Women* and the *UN Declaration on the Elimination of Violence* before concluding that, to the extent that section 285 of the Indonesian Criminal Code allows marital rape, it does not apply in East Timor.[13] Of course, this was a dissenting judgement and even if it was not, Judges of the Dili District Court would not be bound to follow a Special Panels Decision. Nonetheless, the fact that the issue of possible inconsistency was not once raised or discussed by Prosecutors, Defenders or Judges, even in light of the dissenting judgement from Judge Ramos, illustrates that the relevant court actors are not necessarily attuned to their difficult task of systematically working through the applicable law in East Timor. It is true that none of the rape cases before the Dili District Court in November involved an allegation of marital rape. However, that is not the real point. It is enough that the extra-marital nature of the alleged rape must be satisfied in each case, even if this is generally done with a brief assertion from the Prosecutor during closing arguments that the accused and victim are not married.

Another good illustrative example of the Court's reluctance to reason through the applicable law was a simple traffic infringement case, where an accused had been

[12] Section 165 of the Constitution.
[13] The Prosecutor v Francisco Soares, Case No 14 of 2001, Dili District Court Special Panels for Serious Crimes, 12 September 2002

charged with travelling at 69km per hour in a 45km per hour zone. The accused did not expressly deny that he was travelling at 69km per hour but rather asserted that he was in a 60km zone when he was stopped and was therefore only exceeding the speed limit by 9kms per hour. He called a witness to testify that there were no signs declaring a 45 km zone until after the point where he was stopped, which was between the towns of Hera and Manatutu. There was an exchange of views between the accused and the policeman concerned. The Judge was not involved. The Judge did not ask the Prosecution to state what zone it was and on what basis it should be considered such a zone. After half an hour of assertion and counter-assertion had passed, the Prosecutor rose and read section 3.1 of UNTAET Directive 7/2001 which provides:

> *"A person shall not drive a motor vehicle in excess of the following speed limits:*
> *a) 80km/h on roads declared to be highways by the Cabinet member for Infrastructure;*
> *b) 45km/h on all other roads in East Timor;*
> *c) such other limit as may be set by the Cabinet member for Infrastructure and notified in the Official Gazette of East Timor, for certain roads or certain classes of vehicles from time to time."*

Once the Prosecution cited that section, it was regarded as the end of the debate. The Judge did not ask the Prosecution whether the particular road in issue, the main road between Dili and Baucau, had been declared a highway for this purpose. Likewise, the Judge did not inquire whether the Cabinet member for Infrastructure had set some other limit for the particular road and notified it in the Official Gazette of East Timor. These questions would appear quite routine and a necessary part of working through the applicable law. Particularly, in a context where there are infomercials on Televisão Timor Leste which state that the speed limit inside towns is 45km per hour and 60km per hour outside towns and where at the entrance to some towns there are signs which indicate a 45km zone and at the exit to the town there are signs which indicate the end of that zone.

Although in this case, the debate was ultimately resolved by the Prosecutor citing a piece of legislation, until that point the process had been pursued as though the law had nothing to contribute to the debate and the Judge at no point intervened to ask the pertinent questions. One would expect that once the accused had put in issue whether it was a 45km zone, the Judge would ask the Prosecutor to clarify by citing the relevant provisions such as they were.

(It should be noted that JSMP inquired with the Traffic Investigation Unit at the Dili District Police Station and was told that no notices or declarations have been issued pursuant to subsection (a) or (c) of the directive cited above, with the result that the speed limit throughout East Timor is 45km per hour. It is not known who authorised and prepared a public information campaign with information contrary to this.)

A third case example is particularly illustrative of the Court's tendency to use broad assertion in place of detailed analysis of the applicable law. In a civil case where the plaintiff was suing to recover compensation for damage suffered to her reputation when

supermarket attendants asked to inspect her bags, the Judge dismissed the case on the basis that the plaintiff had sued the wrong defendants. The Judge found that although the evidence presented suggested that the plaintiff had a strong case, she should have sued the company responsible for the supermarket and not the employees. It is disconcerting that the Judge did not cite any legislative provisions or rules to support his conclusion. The Judge simply stated that Landmark Trading Pty Ltd which was responsible for the supermarket was incorporated and therefore *"according to law (the law which regulates legal entities) the claim should have been directed towards the company."* That was the extent of the analysis.

What is the law which regulates legal entities? What is the section which regulates when the company will be liable rather than individual staff? The claim was based on a violation of the Indonesian Criminal Code (section 310) giving rise to a right for compensation under the Indonesian Civil Procedures Code (variously section 1365 and 1372). Can a company violate section 310 of the Indonesian Criminal Code? Does that matter? What prevents a plaintiff from bringing a claim against the actual perpetrator of the alleged legal violation, who may in turn, if he or she is found liable, have a right to seek indemnity from some third party, such as an employer? Is a company liable for everything done by its employees or was there something special in this circumstance which made the company liable, such as the fact that the search was done pursuant to store policy? These are just some of the preliminary legal questions which should have been addressed in the judgment even before embarking on the application of the law to the facts of this particular case.

Although it seems fair that store employees should not be legally liable for implementing a store policy, determining who is or is not liable in a certain circumstance is a complex matter which deserves and requires more detailed legal analysis. It is not enough to rely on vague statements about the general law and certainly not enough to rely on instincts about what appears to be the most just outcome. This is one element that separates a formal justice system from informal community based justice. JSMP does not suggest that the judgement is wrong in law. However, that is not the issue. The issue is whether the Court genuinely understands what it means to be governed by law and to apply the law.

In general, the Court's first step in every case should be to identify the applicable law. While there might be room for differences of opinion regarding the interpretation of the applicable law, the Court should never purport to exercise its power without first *precisely* identifying the legal framework within which it is operating. This requires more than reciting a few section numbers from various regulations. Likewise, applying the law involves more that stating the law, stating the facts and then briefly concluding one way or the other without an analysis of the application of the law to the facts.

In fairness, it should be noted that the Judges of the Dili District Court must hear all types of civil and criminal matters. On a particular day, a Judge may have listed a traffic infringement case, a murder and a civil property dispute. Given the complexity of overlapping laws within East Timor, it is very difficult for Judges to have a working

knowledge of all the areas of law which they are required to deal with. This will only become more difficult as new East Timorese laws are introduced which bear no relationship to the laws which the Judges studied at university and worked with as practitioners.

Recommendation 1: Greater care must be taken by all court actors, particularly judges, to familiarise themselves with the applicable law. An increased level of legal precision is required in the drafting of court documents including judgements so that the legal basis for any exercise of the court's power is clearly understood.

Recommendation 2: To help create a culture of rigorous legal thinking and discussion amongst the judiciary, judgments, including from the Special Panels, should be circulated to all Judges.

Recommendation 3: Urgent steps must be taken to re-activate the Court of Appeal so that first instance judgements are subject to scrutiny and review in a manner which encourages an improvement in the level of judicial reasoning (see JSMP Thematic Report 2 on the Right to Appeal in East Timor).

3.2 Rules of Evidence

The rules of evidence applied by the Court illustrated a tendency to follow known procedures without due consideration for the actual provisions of the applicable law. To the extent that rules of evidence were applied in the Dili District Court, they were often the rules of evidence found in the Indonesian Criminal Procedure Code, rather than the rules of evidence found in the Transitional Rules of Criminal Procedure set out in UNTAET Regulation 2000/30 as amended by UNTAET Regulation 2001/25. According to the hierarchy of laws in East Timor, the Indonesian rules are no longer operative in East Timor if they conflict with the UNTAET Transitional Rules.[14]

The Transitional Rules of Criminal Procedure set out the following rules of evidence:

> *34.1 The Court may admit and consider any evidence that it deems is relevant and has probative value with regard to issues in dispute.*
>
> *34.2 The Court may exclude any evidence if its probative value is substantially outweighed by its prejudicial affect, or is unnecessarily cumulative with other evidence. No evidence shall be admitted if obtained by methods that cast substantial doubt on its reliability or if its admission is antithetical to, and would seriously damage, the integrity of the proceedings, including without limitation, evidence obtained through torture, coercion, or threats to moral or physical integrity.*
>
> *34.3* … [this section deals specifically with evidence in cases involving sexual offence charges]

[14] Section 3.1 of UNTAET Regulation 1999

It is clear that the section requires the Court to consider what the issues in dispute are; to consider whether the evidence sought to be adduced is relevant to deciding those issues; and to consider whether the evidence, although relevant to some degree, is so much more prejudicial than it is helpful with regard to deciding upon the issues in dispute, that it ought not be admitted. One would expect that pursuant to this section objections from the Defence and Prosecution would be raised about questions posed to witnesses. However, JSMP observed that during monitoring period objections were never raised to questions asked and there was never any discussion about the types of questions which could be asked. Leading questions from Judges as well as the Prosecution and Defence were the norm rather than an exception. Witnesses' answers were often allowed to range far beyond the question asked. If a witness' evidence differed from the statement that they had earlier given to the Prosecutor, the witness would often be cross examined by the Judge, Prosecutor and Defence on the differences.[15] Often witnesses would be examined by the Judge, Prosecutor and Defence and then once again by the Judge, Prosecutor and Defence and then on occasion, once more. It appeared, in practice, that the process was not a reductive one, narrowing the issues in dispute and limiting admissibility accordingly so as to focus the proceedings and exclude material not strictly related to proving or disproving the charges. Rather the process appeared to be an expansive one, more directed towards allowing the entire "story" to be aired.

Section 33.1 of the Transitional Rules of Criminal Procedure provides that evidence should be presented, unless otherwise directed, in the order of:

a) statement, if any, from the accused;
b) evidence from the Prosecution
c) evidence from the Defence

In the Dili District Court, evidence was invariably given first by the alleged victim, (if still alive), followed by other Prosecution witnesses, followed by Defence witnesses (if any), followed by the accused. This accords with section 160(1) of the Indonesian Criminal Procedure Code. This order was followed quite rigidly by the Court with the consequence that once other witness testimony had been given, it was viewed as the "accused's turn". The Court did not appear to entertain the possibility that an accused might decline to give evidence and be questioned, as is his or her right according to section 6.3(h) of the Transitional Rules of Criminal Procedure.[16] A further problem with this order was that by leaving any statement or evidence from the accused until last it did not become apparent what, if any, matters were at issue until after unnecessary witnesses had been called.

[15] According to section 163 of the Indonesian Criminal Procedure Code – Indonesian Law 8 of 1981 – if a witness gives evidence that is not consistent with the evidence recorded in the case file; the Judge must remind the witness of that matter and ask him or her to explain the difference.

[16] Section 175 of the Indonesian Criminal Code provides that "if an accused does not want to answer or refuses to answer a question which has been directed towards him or her, the presiding judge shall direct him or her to answer and after that the examination will be continued".

Another practice followed by the Court was that after testimony from a witness the accused was always asked whether the testimony was true, false or partly true and partly false. This accords with section 164(1) of the Indonesian Criminal Procedure Code. There is no equivalent provision in the UNTAET Regulations and JSMP suggests that the practice represents a serious threat to the right to silence and the right against self incrimination. In that way, it is inconsistent with section 6.3(h) of the Transitional Rules of Criminal Procedure which guarantees those rights to every suspect and accused.

Such a practice also serves no valuable purpose, given that the matters at issue, if they are to be narrowed by concessions from the Defence, ought to be narrowed in advance of the hearing and not after the witness testimony has already been given. Moreover, it is not clear what is the significance or status of any answer given by an accused to such a question from the Court. If the accused agrees that incriminating evidence is true, is that an admission which must be processed according to section 29A of the Transitional Rules of Criminal Procedure? If the accused accepts incriminating evidence as true, does that mean that the Court too must accept it as true without evaluating it further?

In a related matter, witnesses with a familial relationship to the accused often did not take the oath before giving evidence. According to the Indonesian Criminal Procedure Code, certain relatives of the accused including children, grandchildren, parents, grandparents, siblings, relatives by marriage, spouses and ex-spouses, can not give evidence under oath without the agreement of the accused and the Prosecutor.[17] If either the Prosecutor or the accused do not agree to a relative of the accused giving evidence, then that person may still give evidence but not under oath.[18] Although the Transitional Rules of Criminal Procedure do state that certain relatives of the accused shall not be compelled to give evidence,[19] no exception is made for family members with regard to the oath if they do choose to give evidence. Section 36.2 provides:

> *Prior to testifying, a witness shall take the following oath or affirmation: "I solemnly swear or affirm that the testimony I shall give to this court in this trial shall be the truth, the whole truth and nothing but the truth". A witness may use the sacred texts of his or her faith to take the oath.*[20]

The Transitional Rules list three categories of person who are able to testify only with the consent of the accused. Family members are not included in the three categories.[21] Further, the Transitional Rules state that minors shall not take the oath before testifying, provided that the Court is satisfied that the minor understands his or her obligations to testify truthfully.[22] Therefore, the Transitional Rules address in what way family members as witnesses are different (that is, they can not be compelled to testify), what

[17] Section 168 and section 169(1) of the Indonesian Criminal Procedure Code.
[18] Section 169(2) of the Indonesian Criminal Procedure Code
[19] Section 35.2 UNTAET Regulation 2000/30 as amended by UNTAET Regulation 25/2001
[20] UNTAET Regulation 2000/30 as amended by UNTAET Regulation 2001/25.
[21] Section 35.3 UNTAET Regulation 2000/30 as amended by UNTAET Regulation 2001/25. The three categories are priests, lawyers and doctors to whom the accused has given information in the course of their professional work.
[22] Section 35.6 UNTAET Regulation 2000/30 as amended by UNTAET Regulation 2001/25

types of witnesses can only give evidence with the consent of the accused, and what type of witnesses do not need to take the oath before testifying. In that way, the UNTAET Regulation is clearly intended to replace the Indonesian Criminal Procedure Code provisions on the question of family members as witnesses.

(In the Indonesian Criminal Procedure Code, the evidence of witnesses not taken under oath can not be used to convict an accused, it can only be used to corroborate other evidence given under oath or other valid sources of evidence.[23] JSMP is not aware whether this rule of procedure is also currently adhered to in the Dili District Court.)

Rules of evidence vary greatly between jurisdictions and even between different types of courts within one jurisdiction. When a new Criminal Procedure Code is written for East Timor, it will be designed to accommodate East Timorese notions of justice and expectations of the justice system while complying with international standards on the rights of the accused, witnesses and victims. In the interim, the rules of evidence as set out in the Transitional Rules of Criminal Procedure must apply. It is important that the Court considers itself governed by these rules and does not simply adopt common practices or habits in line with old Indonesian procedures. According to law, those procedures no longer apply.

Recommendation 4: Further intensive training on the content and application of the rules of evidence currently applicable in East Timor is required. Court actors should not revert to the use of the Indonesian Criminal Procedure Code, which is not fully compliant with international standards. In particular, further training is required on the practical operation of the right to silence and the right against self incrimination and the need to focus on evidence relevant to proving the elements of the crime or civil action rather than extraneous and/or prejudicial evidence. The translation of judgments relating to evidentiary issues from other jurisdictions with similar rules of evidence may assist Judges to gain a better understanding of the purpose and operation of rules of evidence.

3.3 Section 29A – Guilty Plea Provisions

JSMP observed that the large majority of accused who appeared before the Dili District Court admitted their guilt. Section 29A of the Transitional Rules of Criminal Procedure, sets out the applicable procedures in relation to proceedings on admission of guilt. That section states that where an accused makes an admission of guilt at any stage of the proceedings before a final decision in the case, the Court must satisfy itself that the accused understands the nature and consequences of the admission; that the admission is made voluntarily and after sufficient consultation with his or her defence lawyer; and that the admission is supported by the facts of the case as accepted by the accused and contained in the indictment and other materials presented.[24] If the Court is satisfied of these matters, it may consider any additional evidence and then proceed to convict the accused.[25] If the Court is not satisfied that the admission is supported by the indictment

[23] Section 185(7) Indonesian Criminal Procedure Code.
[24] 29A.1 UNTAET Regulation 2000/30 as amended by UNTAET Regulation 2001/25
[25] 29A.2 UNTAET Regulation 2000/30 as amended by UNTAET Regulation 2001/25

and accompanying materials the Court must regard the admission as not having been made and must proceed to hear the case according to the ordinary trial procedures.[26]

The utility of the section 29A procedure is that it allows for cases where the accused pleads guilty to be dealt with more expeditiously, it avoids the need to unnecessarily call witnesses and it allows the Defence to focus on presenting a plea in mitigation.

Given the number of accused who plead guilty, many cases could be processed according to section 29A without the need for numerous hearings and the need to call witnesses. However, during the monitoring period section 29A was rarely employed in the way envisaged by the Transitional Rules of Criminal Procedure. Rather, the tendency was for cases to continue according to the ordinary trial procedure, sometimes extended over a period of months, and then for judgment to be delivered noting that the accused had accepted responsibility. In that way, Judges would often refer to section 29A, but would not systematically reason through the requirements of the section from the outset of the case.

Section 29A.4 provides that where an accused has made a guilty plea but,

> *…the Court is of the opinion that a more complete presentation of the facts of the case is required in the interests of justice, taking into account the interests of the victim, the Court may:*
>
> *a) request the Prosecutor to present additional evidence, including the testimony of witnesses; or*
>
> *b) order that the trial be continued under the ordinary trial procedures provided in this Regulation, in which event it shall consider the admission of guilt as not having been made.*

However, JSMP's observations suggest that the Court generally did not turn its mind to this subsection in making a decision to call witnesses. Instead, it appeared that the process just continued on as a normal trial, despite an admission of guilt or a desire to plead guilty, because the relevant court actors did not properly stop to consider the alternative procedure.

There are a number of deficiencies in this approach. First, the opportunity to finalise cases expeditiously is lost, which is particularly unfortunate when the accused is in the limbo of pre-trial detention. Secondly, witnesses are unnecessarily put through the inconvenience and, sometimes, trauma of giving evidence when it serves no obvious purpose. For example, JSMP observed two cases where young girls who had been allegedly raped by close relatives were called to give evidence before the Court even though in both cases their alleged attacker admitted his guilt from the outset.[27] Finally, by not hearing and deciding whether to accept or reject a guilty plea from the outset the focus of the Court's adjudicative process becomes confused. It is never clear whether a

[26] 29A.3 UNTAET Regulation 2000/30 as amended by UNTAET Regulation 2001/25

[27] Criminal Case 30 of 2002 Public Prosecutor v Nelson Dos Santos; Criminal Case 103 of 2002 Public Prosecutor v Domingos Soares

submission or evidence is being advanced to prove or deny the existence of a certain element of the crime or whether it is being raised in mitigation. For example, if the Defence raises evidence that the accused was very drunk when he assaulted someone, is that evidence raised to demonstrate that the accused was not capable of forming the requisite intent or is it raised to try to lessen the sentence that might be imposed? It is important that the two processes of deciding whether a charge has been proved and what sentence should be applied are not rolled into one process. The strategy of the Defence is (or should be) very different in circumstances where the aim is to contest a charge than it is in circumstances where the aim is to admit a charge but to argue for a lighter sentence.

At present, proceedings often appear to continue in an undirected way with a general underlying acknowledgment that the accused has admitted responsibility in some way (aided by the fact that the accused is asked to say whether he or she believes the evidence given by each witness to be true or false or partly true and partly false) and without any clear conception of what, if any, *relevant* matters are contested.

JSMP raised this issue with different Public Defenders and Public Prosecutors and asked in general why there was a need to call witnesses and proceed with the usual process if the accused had pleaded guilty. One Public Defender explained that it was necessary for the Court to satisfy itself that witnesses were telling the truth, particularly in the case of minors where they might have been influenced or pressured by someone. A Public Prosecutor explained that often, particularly in cases within the family, the accused person just admits that he or she has committed the offence. However, the Prosecutor said that it is often not apparent exactly what the accused person has done and the witnesses' statements themselves are not clear. The truth often does not emerge until the trial when everyone is questioned by the Judge. For example, she explained that in rape cases, the accused might admit "they are responsible" when in fact what has occurred was attempted rape or sexual assault. She explained that if some wrong has been perpetrated, especially within the family, then the person said to be responsible is inclined to admit that they have done something wrong rather than cause further trouble. She explained that this, however, does not bring the true facts to light and deliver justice. She explained that often the person who is subsequently punished continues to be resentful, even though they have confessed, because their story has not been properly heard. For these reasons, even though it would be easier and more efficient to rely on the guilty plea provisions in section 29A, she said she often felt compelled for conscience sake to take the matter through a fuller hearing.

These are valid concerns and JSMP acknowledges that a general lack of knowledge about the legal system amongst accused persons combined with a limited understanding of the right to silence, make it imperative that the accused has adequate legal advice before section 29A processes are invoked. Nonetheless, there are many safeguards within the section specifically designed to ensure that the accused understands the nature and consequences of any confession and has made the confession voluntarily and after receiving legal advice.

Recommendation 5: The procedures set out in section 29A of the Transitional Rules of Criminal Procedure should be employed to process guilty pleas so as to avoid unnecessary delays in the disposition of cases and so as to avoid calling witnesses in circumstances where their evidence is not required and there are no matters in issue. At present, the section is often referred to by court actors but the procedures set out therein are rarely followed.

Recommendation 6: Specific training for court actors is required on the application of section 29A procedures. A procedural manual is required which explains, step by step, how to proceed in cases where the accused wants to plead guilty. Examples of how actual cases where the accused has pleaded guilty have been processed by the Dili District Court should be used as training and discussion materials.

3.4 The Role of the Investigating Judge

The position of Investigating Judge was a position introduced into the East Timorese legal system by UNTAET Regulation.[28] The powers of the Investigating Judge are set out in section 9 of the Transitional Rules of Criminal Procedure. They include the power to issue arrest warrants, different types of search and seizure warrants, exhumation and autopsy orders and orders providing for the detention or continued detention of a suspect. The title "Investigating Judge" is somewhat misleading because the Investigating Judge is in no way charged with leading or directing criminal investigations.[29] The role of the Investigating Judge is to make orders which facilitate criminal investigations while simultaneously ensuring that the rights of suspects are respected.

JSMP has observed continuing confusion about the role of the Investigating Judge. This confusion is particularly evident in the conduct of Review Hearings. Contrary to the provisions of the Transitional Rules of Criminal Procedure, Review Hearings often take the form of a mini-trial where the emphasis is on gathering and testing evidence. In part, this is a result of misunderstanding about what matters an Investigating Judge must be satisfied of, according to law, before he or she may exercise the power to detain a suspect. Similarly, there is misunderstanding about in what circumstances restrictive measures may be ordered and whether or not such measures are intended to a have a punitive effect. In addition, there is uncertainty surrounding the approach to, and status of, admissions of guilt made in the course of a Review Hearing.

A further issue of concern is the extent to which timeframes set out in law for the conduct of Review Hearings are regarded as flexible depending on the prevailing circumstances.

[28] Section 13 of UNTAET Regulation 2000/11

[29] Section 9.6 of UNTAET Regulation 2000/30 provides that "the Investigating Judge shall not interfere with the responsibilities of the Public Prosecutor in directing criminal investigations, as defined in section 7 of the present regulation."

3.4.1 When can detention be ordered?

Section 20.1 of the Transitional Rules of Criminal Procedure provide that within 72 hours of arrest, the Investigating Judge *shall* hold a review hearing to review the lawfulness of arrest and detention. Section 20.6, 20.7 and 20.8 provide that:

> *20.6 At the conclusion of the hearing the Investigating Judge may:*
> *a) confirm the arrest and order the detention of the suspect;*
>
> *b) order substitutive restrictive measures instead of detention, as provided in Section 21 of the present Regulation; or*
> *c) order the release of the suspect.*
>
> *20.7 The Investigating Judge may confirm the release and order the detention of the suspect when:*
> *a) there are reasons to believe that a crime has been committed; **and***
> *b) there is sufficient evidence to support a reasonable belief that the suspect is the perpetrator; **and***
> *c) there are reasonable grounds to believe that such detention is necessary.*
>
> *20.8 Reasonable grounds for detention exist when:*
> *a) there are reasons to believe that the suspect will flee to avoid criminal proceedings;*
> *b) there is the risk that the evidence may be tainted, lost, destroyed or falsified; or*
> *c) there are reasons to believe that the witnesses or victims may be pressured, manipulated, or their safety endangered; or*
> *d) there are reasons to believe that the suspect will continue to commit offences or poses a danger to public safety or security.*
> [Emphasis Added]

These rules are clearly designed to limit the circumstances in which an accused may be held in pre-trial detention. This is consistent with Article 9(1) of the International Covenant on Civil and Political Rights which states that:

> *Everyone has the right to life, liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedures as are established by law.*

JSMP observed, however, that the Investigating Judge's discretion was not always exercised in accordance with the above provisions. Generally the focus of the Investigating Judge's inquiries was on the seriousness of the matter and the amount of evidence. If a matter was deemed serious and there was sufficient evidence, the Investigating Judge almost always ordered detention even though neither of those matters bear on whether there are reasonable grounds for detention as set out in section 20.8. Of

course the strength of the evidence is relevant (see 20.7(b)) but according to the Regulation as set out above, even in a serious case where there is a lot of evidence against the suspect, if further reasonable grounds for detention do not exist, the suspect *must* be released while the investigation continues.

Of course, there were detention orders made during November where strong arguments within the scope of section 20.8 clearly existed in favour of detention.[30] To mention two examples, detention was ordered in the case of suspected ex-militia from Oecussi who were arrested when they momentarily re-entered the jurisdiction or in the case of a man who, after already spending a period in detention for assaulting his wife, was alleged to have returned to his wife's house and to have slaughtered the animals on the property when he did not find her there.

However, there were other cases where, although there may have been reasonable grounds for detention within the scope of section 20.8, the focus of the Judge's decision making process lay elsewhere. For example, it was ordered that a minor involved in a car accident in Ermera, in which one (or possibly more) people were seriously injured, be detained for 30 days. The Judge explained that, although he would normally not order the detention of a minor, in circumstances where someone had been so seriously injured he did not have an alternative. JSMP also observed that when 9 members of the East Timorese army came before the Investigating Judge having been arrested on suspicion of assaulting members of the East Timorese police, ultimately the factor which determined who was conditionally released (4 suspects) and who was detained (5 suspects) was how much evidence there was against any particular suspect rather than any differentiation between the suspects with regard to the types of matters set out in 20.8. As noted, the level of evidence is relevant but should not conclude the inquiry. Were those that were detained more likely to be a flight risk, more likely to interfere with witnesses or more likely to re-offend? One would assume that given they are all members of the army, living together in army barracks under the same command orders, their circumstances would not be particularly different.

Section 20.9 of the Transitional Rules of Criminal Procedure provides that the detention of a suspect shall be reviewed every thirty days. Unfortunately there is not the scope in this report to review what occurs in practice after an initial 30 day detention order expires. This is a matter which warrants further attention. Except in the serious crimes jurisdiction, during the month of November there were no matters listed for a detention review hearing at the expiry of an earlier detention order. There were three cases in which applications for release were made by either the Prosecutor or Public Defender in respect of suspects whose detention order had expired before November. These cases suggest that in the ordinary crimes jurisdiction cases can become "lost" in the system in the period between an initial detention order and the filing of an indictment. That is, the detention of a suspect is not necessarily reviewed every thirty days and instead suspects may just remain in illegal detention without any charges against them.

[30] According to the information collected by JSMP, the Investigating Judges ordered the detention or continued detention of 27 of 93 suspects during the month of November.

In the first case, a man had been in detention for five months for what the Prosecutor described as a relatively minor assault on the suspect's brother. No indictment had been prepared and according to the Prosecutor was not close to being prepared. The Prosecutor approached the relevant Investigating Judge and a release order was made even without a hearing. The facts suggest that the man should have been released much earlier. This is particularly so given that according to the Transitional Rules of Criminal Procedure, if a crime carries a maximum sentence of five years or less - which assault does under the Indonesian Penal Code[31] - and the suspect is in detention, then the Public Prosecutor must file an indictment within 48 hours[32]. The other two applications for release were made in respect of minors. The applications were made by the Public Defender's Office on the basis of a letter from Social Services which was also sent directly to the Minister for Justice, the Public Prosecutor's Office and the Judge Administrator of the Dili District Court. The Investigating Judge ordered the conditional release of both minors in chambers without a hearing. One had been held in detention since 5 September 2002 for suspected involvement in a theft. The other had been held in detention on suspected involvement in theft and property damage since 23 April 2002. In neither case had an indictment been filed.

3.4.2 The Review Hearing as a Mini Trial

The discretion and power of the Investigating Judge as set out in section 20 to 22 of the Transitional Rules of Criminal Procedure is actually quite limited. However, because the focus of review hearings was rarely on whether or not there were reasonable grounds for detention and almost always on how much evidence existed (which included evidence given by the suspect and witnesses during the hearing), the proceedings before the Investigating Judge often became a kind of mini trial. The problem with this is that the Review Hearing is not supposed to be an evidence gathering exercise and what occurs is very prejudicial to the suspect who has had almost no opportunity to speak to a lawyer, generally has limited understanding of the right to silence and has usually been in detention away from familial support for 72 hours.

Section 20.5 of the Transitional Rules of Criminal Procedure provides that *if* a suspect makes a statement, the Investigating Judge, the Public Prosecutor and the legal representative of the suspect may ask pertinent questions to the suspect *with respect* to his or her statement. JSMP observed that at review hearings, suspects were not asked whether they would like to make a statement and then only questioned if they did and only questioned on the contents of that statement. Rather, suspects were extensively questioned by the Judge, Prosecutor and even the Public Defender on all matters that those Court actors deemed relevant. The process is best described as inquisitorial.

Allowing Review Hearings to become mini-trials also confuses the public about the function of the Investigating Judge and the procedures of the Court generally. JSMP's discussions with victims, families of victims and members of the public indicated that

[31] Section 351 of the Indonesian Penal Code
[32] Section 44.1 of the UNTAET Regulation 2000/30 as amended by UNTAET Regulation 2001/25

most people understood the proceedings before the Investigating Judge, at least in the case of ordinary crimes, to be either the commencement of the trial process or the entire trial.

3.4.3 Restrictive Measures as a Penalty

Section 21 of the Transitional Rules of Criminal Procedure provides that as an alternative to detention, the Investigating Judge may order substitutive restrictive measures *if he or she believes it is necessary to ensure the integrity of evidence related to the alleged crime or the safety or security of the victims, witnesses or other persons related to the proceedings.* Substitutive restrictive measures may include house detention, reporting obligations and restrictions on the movement of a suspect. An Investigating Judge may also order that a suspect post a monetary bond or other surety in order to guarantee the appearance of the suspect at all subsequent hearings.

JSMP observed that the obligation to report weekly or twice weekly to police was imposed on all suspects not detained, except in the case of 4 suspects where the Investigating Judge found there was no evidence. In total, according to JSMP's observations, 53 of the 86 suspects who came before the Investigating Judge in November were placed on weekly or twice weekly reporting obligations generally for a period ranging between one and three months.

JSMP was told by one Investigating Judge that reporting obligations functioned as a type of sanction and reminded suspects that the police were monitoring them and they should not re-offend. One Public Prosecutor told JSMP that the Prosecution did not have the capacity to take all matters to trial. Therefore, it was often regarded as sufficient in respect of lesser offences to bring suspects before the Investigating Judge and then have the suspect released on restrictive measures, such as weekly reporting. The Prosecutor explained that such measures often sufficed because the burden of reporting, especially for farmers and villagers, had a punitive effect and also demonstrated to others in the community that there was some consequence for the original infringement.

Reporting obligations may be an appropriate sentence for minor or first offences in many cases. However, the Investigating Judge does not have authority to impose punitive measures on people who have not been charged, let alone convicted. Although it is understandable that court actors might use the Investigating Judge as a method of quickly processing lesser offences, this is not sanctioned by the current rules which provide other mechanisms for the expeditious hearing of minor offences and which only allow the Investigating Judge to impose restrictive measures in order to ensure the integrity of evidence and the security of witness, victims and other related persons. Contraventions of the procedural rules ultimately serve to undermine the rule of law regardless of how reasonable the end sought to be achieved might appear.

3.4.4 Guilty Pleas before the Investigating Judge

Information received by JSMP from Prosecutors and Investigating Judges, suggested that many suspects admit their guilt during hearings before the Investigating Judge. Section 20.5 of the Transitional Rules of Criminal Procedure provides that if a suspect makes an admission of guilt during a Review Hearing, the Investigating Judge shall proceed as provided in section 29A, which is discussed above. Indeed, section 29A.1 commences "(w)here an accused makes an admission of guilt in any proceedings before an Investigating Judge, or before a different judge ….the Court or Judge must determine whether …. [and the factors which must be considered are listed]." During the month of November although admissions of guilt before the Investigating Judge were common place, no suspect's pleas were determined to finality one way or the other in accordance with section 29A.

This may be because the law on this point is unclear. For a Judge to reach a decision on whether to accept a guilty plea, he or she must be satisfied that "the admission of guilt is supported by the facts of the case that are contained in the charges as alleged in the indictment and admitted by the accused."[33] At the stage where proceedings are before the Investigating Judge, no indictment has been filed.[34] It is unclear whether, if the Prosecutor had an indictment prepared, although not filed, this could be used by the Investigating Judge in deciding whether to accept a guilty plea and convict and an accused.

Perhaps it was not intended that the Investigating Judges would hear a guilty plea to its conclusion but rather would determine: whether the accused understands the nature and consequences of the admission of guilt; whether the admission is made voluntarily; and whether the admission is made after sufficient consultation with a defence lawyer. The determination of those matters might allow the admission to be used in future proceedings. This is consistent with section 33.4 of the Transitional Rules of Criminal Procedure which provides that:

> *A statement or confession made by the accused before an Investigating Judge may be admitted as evidence, if the Court finds that any admission of guilt contained in such a statement was made in compliance with the provisions of section 29A.*

These provisions need clarification. If it is intended that the Investigating Judge is empowered to decide whether to accept a guilty plea and, potentially, to convict a person as part of a Review Hearing, that power could be utilised to dispose of lesser offences in a more satisfactory way than the current ad hoc method of simply misusing substitutive restrictive measures or pre-trial detention. However, this possibility requires certain safeguards. Suspects would need considerably more time to talk with their defence lawyer before Review Hearings. During this time a copy of the draft indictment would

[33] Section 29A.1(c)(i) UNTAET Regulation 2000/30 as amended by UNTAET Regulation 2001/25

[34] According to section 24.3 of UNTAET Regulation 2000/30 as amended by UNTAET Regulation 2001/25 once an indictment is filed the Investigating Judge no longer has power to issue arrest warrants or make orders in relation to detention.

have to be available for the suspect to discuss with his or her lawyer. Further, greater efforts would have to be made to explain to suspects the meaning of the right to silence. Knowledge of this concept is quite limited in East Timor. Although suspects are told they have this right, when questions are then immediately directed towards them, the concept that those questions do not have to be answered can be difficult to comprehend.

3.4.5 The 72 Hour limit

As noted above, Section 20.1 of the Transitional Rules of Criminal Procedure provide that within 72 hours of arrest, the Investigating Judge *shall* hold a review hearing to review the lawfulness of arrest and detention. Section 30(2) of the East Timorese Constitution provides:

> *No one shall be arrested or detained, except under the terms clearly provided for by the applicable law, and the order of arrest or detention should always be presented for consideration by the competent judge within the legal framework.*

Therefore, a Review Hearing before an Investigating Judge within 72 hours of arrest is mandatory. Nonetheless, in a small number of cases suspects were brought before the Investigating Judge outside of the 72 hour limit. This occurred when the 72 hour period expired over a weekend or holiday or when suspects were brought to the Court late on Friday afternoon and no Investigating Judge was willing to conduct the review hearing. JSMP was informed by one Investigating Judge that the situation was very difficult because the salary of Judges, Public Prosecutors and Public Defenders is reasonably low and there is no provision to be paid overtime. Therefore all of those involved have little incentive to work on weekends and holidays. The Investigating Judge with responsibility for Serious Crimes matters, however, did conduct one review hearing on a Saturday when it could not be held on a Friday as scheduled. The same Judge also heard an application for an arrest warrant on a weekend when police had travelled from Same to request it. From JSMP's observations over the month of November, it appeared that there was not enough work to keep three Investigating Judges (one for serious crimes and two for ordinary crimes) occupied on a full time basis from Monday to Friday. JSMP suggests therefore that the Judges should be scheduled on a rotating five day roster so that, there is always a Judge on duty over the weekend period.

JSMP often observed that, in the case of less serious offences, where it was not possible or convenient to bring a suspect before the Investigating Judge within 72 hour of arrest, the police would often release the suspect with the understanding that he or she would come to the Court at a later stage for a hearing before the Investigating Judge. This practice is in contravention of the Transitional Rules of Criminal Procedure.

First, if a suspect is arrested on an arrest warrant then only the Investigating Judge has the power to order his or her release.[35] The Prosecutor does not have the power to

[35] Section 19A.7 of UNTAET Regulation 2000/30 as amended by UNTAET Regulation 2001/25.

'temporarily' release the suspect. A review hearing must be held *within 72 hours of arrest*. The administrative and staffing arrangements must be in place for this to occur.

In circumstances where a suspect is arrested without an arrest warrant,[36] the Prosecutor has three choices. If the Prosecutor decides not to request the issuance of a corresponding warrant from the Investigating Judge, the Prosecutor has the power to release the suspect and continue the investigation or to release the suspect and dismiss the case.[37] In all cases, this must be done within 72 hours. Therefore, the Prosecutor does not require an order from an Investigating Judge to release a suspect who has been arrested without a warrant. However, once this decision is taken, the suspect is no longer under arrest and cannot be compelled to appear before the Investigating Judge at a later stage. It is irrelevant that the decision to release might have been motivated by a lack of other alternatives at the particular time.

If a suspect who is no longer under arrest is brought before the Investigating Judge, the Judge has no jurisdiction to deal with the matter. Indeed, it is difficult to envisage what orders an Investigating Judge could legitimately make in such circumstances, where the suspect has presumably already demonstrated that he or she is not a flight risk and is not going to interfere with witnesses, victims and the like.

What is revealed by this process of bringing already released suspects before the Investigating Judge is the extent to which proceedings before the Investigating Judge are used as a substitute for a trial in the case of minor matters. For example, on 7 November a man was brought before the Investigating Judge on suspicion of assault. The man had been arrested on 22 October 2002 but was released so that efforts could be made to resolve the matter at the village level. The alleged victim was a relative. When those attempts failed the man was brought before the Investigating Judge and 'released' on restrictive measures which included reporting twice weekly to Police. This is a misuse of the Investigating Judge's role. If the Public Prosecution wanted to pursue the matter, the expedited proceeding discussed below should have been utilised.

Recommendation 7: Regardless of the seriousness of the crime, detention of suspects should only be ordered where there is a flight risk, risk of interference with potential evidence or witnesses, risk of re-offence or risk to public safety AND where restrictive measures would not be sufficient to counter that risk. In each case where detention is ordered, the Investigating Judge should provide written reasons setting out why there is a need for detention according to the provisions of section 20.7 and 20.8 of the Transitional Rules of Criminal Procedure.

Recommendation 8: To ensure that suspects do not become "lost" in the system after an initial detention order is made, clear and detailed procedures are required to regulate what must be done when a detention order expires and is not extended. This may involve

[36] Section 19A.4 of UNTAET Regulation 2000/30 as amended by UNTAET Regulation 2001/25 sets out the circumstances where suspect may be arrested without an arrest warrant.
[37] Section 19A.6 of UNTAET Regulation 2000/30 as amended by UNTAET Regulation 2001/25

automatic release of a suspect by the prison even without further order of the Court. It may involve an obligation on Investigating Judges to diarise when detention orders are due to expire and, if no application for extension or other order is made before that time by the Prosecutor, automatically issuing a release order. The release of a suspect after the expiration of a detention order should not depend on the Prosecutor or Defence taking a pro-active step, although it is nonetheless remains their responsibility to take such steps.

Recommendation 9: If a person is suspected of a crime which carries a maximum sentence of five years or less and is in detention, the Prosecutor has an obligation to file an indictment and a request for an expedited hearing within 48 hours of detention. To encourage compliance with that obligation, the Investigating Judge should only be empowered to make 48 hour detention orders in such cases.

Recommendation 10: Review Hearings should not be misused as mini-trials. In particular, in accordance with the Transitional Rules of Criminal Procedure suspects should only be questioned by the Judge or Prosecutor at the Review Hearing if the suspect chooses to make a statement. Suspects should be told by the Judge that they do not have to make a statement, that if they choose not to make a statement they will not be questioned further and that no inference will be drawn from the choice not to make a statement. They should only be questioned on the contents of any statement given rather than questioned generally about the suspected offence.

Recommendation 11: Witnesses should only be called to Review Hearings in the rare circumstances where witness statements are not sufficient to allow the Investigating Judge to reach a decision on the matters set out in section 20.7 and 20.8 of the Transitional Rules of Criminal Procedure. This recommendation is subject to the right of the victim to be present and represented at any Review Hearing.

Recommendation 12: Restrictive Measures should only be imposed on suspects by the Investigating Judge where they are necessary to ensure the integrity of evidence and the safety and security of witnesses and victims. They should not be employed as an ad hoc mechanism for punishing suspects accused of lesser offences in circumstances where the suspect has neither been officially charged nor convicted. Instead the procedures for the expedited hearing of lesser offences set out in the Transitional Rules for Criminal Procedure should be utilised.

Recommendation 13: Clarification of the rules governing whether and how an Investigating Judge is able to process a guilty plea made during a Review Hearing is required. If Investigating Judges are empowered to hear and determine a guilty plea, greater safeguards are required to ensure that suspects have adequate time with their defence lawyer prior to Review Hearings and have a better understanding of the right to silence.

Recommendation 14: To avoid suspects being held in detention for more than seventy-two hours before being brought before the Court, Investigating Judges should be

scheduled on a rotating five day roster so that there is always a judge on duty over the weekend period. Similar administrative arrangements should be made for Public Prosecutors and Public Defenders.

Recommendation 15: In circumstances where a suspect is arrested without an arrest warrant and then subsequently released, for whatever reason, by the Prosecutor, the suspect must not be required to later appear before the Investigating Judge for a hearing. In such circumstances the Investigating Judge has no jurisdiction to conduct a review hearing.

3.5 Expedited Hearings

Section 44 of the Transitional Rules of Criminal Procedure provides:

> *44.1 Where the crime is one for which the maximum penalty does not include a period of imprisonment in excess of five years, the Public Prosecutor shall request an expedited trial to the competent District Court. In such cases, the Public Prosecutor shall indict the suspect and submit the case to the Court within 21 days of the suspect's arrest. Where the suspect is under detention, the request for an expedited trial shall be made within 48 hours of the detention*
>
> *44.2 Where the crime is one for which the maximum penalty does not include a period of imprisonment in excess of one year the police may bring the case directly before a Judge, and shall request an expedited trial. Where the suspect is under detention, the request for an expedited trial shall be made within 48 hours of the detention.*

Upon receiving the case, the Judge must take steps to notify the accused and summon him or her to a hearing within 21 days.

Except in the case of minor traffic infringements, JSMP observed that there were no expedited hearings of this type conducted in November 2002. This is despite the fact that the majority of assault and theft charges could be dealt with under these provisions. This may be a reflection of the pressure on the Public Prosecution Service which does not have the staffing levels to pursue many cases to trial. JSMP's observations suggest that it is also a result of the misuse of the role of the Investigating Judge. Proceedings before the Investigating Judge, which often take the form of a mini-trial, cause the impetus to take a matter to hearing quickly to be lost because the impression is given that, at least on one level, the case has already been dealt with.

Recommendation 16: Greater use must be made of the provisions designed to expedite the hearing of lesser offences. To that end, at least one additional Public Prosecutor must be hired for the Dili District Court and specifically designated to handle lesser offences in accordance with the requirements of the Transitional Rules of Criminal Procedure.

4 ROLE OF THE JUDICIARY

4.1 Independence of the Judiciary

It is the fundamental right of every accused to be tried before an independent and impartial tribunal. Article 14 (1) of the ICCPR states that:

> *...In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law...*

The requirement that the judiciary be both impartial and independent is affirmed in section 2 of UNTAET Regulation 2000/11.

During JSMP's period of monitoring at the Dili District Court there were no obvious manifestations of government interference. There was significant discussion about the formation of the Superior Council of the Judiciary and the impact that its structure and functions might have on the independence of the judiciary. These are matter on which JSMP has earlier commented.[38] JSMP's period of monitoring at the Dili District Court did not overlap with the controversy surrounding the so-called Border Control Case, although the impact of that case and surrounding events was apparent in discussions and comments from many Court actors.[39]

Judicial independence, however, involves more than just independence from the other institutions of government. It also requires that Judges be free from the influence or the perceived influence of members of the public and particularly parties appearing before them.

JSMP observed no evidence of actual bias or corruption in the Dili District Court. However, JSMP believes there is a risk of a perceived lack of independence. JSMP observed that the Judges of the Dili District Court often sat and socialised with members of the legal profession in the public waiting area of the Court. Judges would often greet and talk at length in a very familiar way with friends who might be about to appear or had just appeared before them in a case. Judges often walked in and out of the Public Defenders Office. On one occasion, JSMP observed a Judge personally come down stairs and shake the hand of an accused in a high profile case before informing him that

[38] See www.jsmp.minihub.org for: JSMP's comments on the Draft Judicial Magistrate's Law; JSMP press release of 5 September 2002 headed "New Judicial Magistrate's Law passed but concerns ignored" and for a copy of the law as passed (in Portuguese and English).

[39] For the background on the Border Control Case which led to a public war of words between the Government and Judiciary and prompted a general lawyers strike, see the East Timor Lawyers Association Petition and the Secretariat of State of the Council Of Ministers Communiqué dated 5 September 2002 both on the JSMP Website under "Other Resources".

his case had been adjourned. An outsider walking into this environment might get the impression that there exists a type of "club".

Judges must not only be independent but they must also project an appearance of independence, particularly in a work context. This is difficult in a small country like East Timor where many court actors are longstanding and close friends of the Judges. It is also difficult in a culture where if the Judges did not interact in a warm and familiar way with friends and acquaintances, it would be regarded as arrogant and rude. However, this is a problem in many jurisdictions where Judges are appointed to the bench after a long period as members of the legal profession and consequently have many close friends in the legal profession who continue to appear before them.

JSMP believes that in order to guard their independence Judges should maintain a degree of isolation in the Court building. This would be aided by conducting hearings to announce postponements rather than informally agreeing on such matters with one or both parties. It would also be aided by insisting that all communications from the parties in civil and criminal matters be in writing and come through the court clerks. Changes to the physical environment of the Court are also necessary. At present Judges enter through a public entrance and reach their offices through an often busy and crowded public waiting area where accused persons, witnesses, victims, plaintiffs and defendants are gathered. Some Judges do not have telephones in their chambers and therefore to ask court clerks whether a hearing is ready to commence, to view a file or to initiate any action by the Registry they have to come down stairs and again pass through the public waiting room. Anyone is free to go to the second level of the Court building and enter the Judges' chambers directly without having to register first with a third party.

All of these issues cast serious doubt on the personal security of Judges and also make it difficult for them to demonstrate their independence and impartiality in the context of a culture where people do not view Judges as necessarily removed from the social interactions of the courtroom but rather expect them to politely mix and socialise.

Recommendation 17: In order to safeguard the perception of independence and the security of the Judiciary, Judges' offices should not be openly accessible to the public or legal practitioners.

Recommendation 18: Any communication relating to a case, including requests for adjournments or hearings, should be made in writing through the Registry and a copy should be provided to other parties to the case.

Recommendation 19: Judges must maintain a degree of isolation within the court building and should not openly socialise with lawyers and others in the public waiting area. To help facilitate this each Judge should have an internal phone in his or her office so that they may communicate with the Registry without having to continually pass through the public waiting area crowded with accused, witnesses, victims, plaintiffs and defendants. Ideally Judges would have a separate parking area and a designated entrance and exit from the court building.

4.2 Sentencing

JSMP has observed that in many cases if an accused is found guilty and he or she has previously spent a period of time in pre-trial detention, the sentence the accused receives corresponds exactly with the time already spent in prison.[40] To the extent that, if an accused has spent 8 months 13 days in pre-trial detention, his or her sentence will be 8 months and 13 days.

There are two major problems with the approach. First, it casts serious doubt on whether the Judge has properly exercised his or her sentencing discretion. There are a multitude of factors which a judge must take into consideration in sentencing a person found guilty of committing an offence. It is a difficult exercise of discretion which involves weighing matters like the gravity and circumstances of the offence, the impact on the victim and any prior offences against the circumstances of the accused, the history of the accused, and the impact any sentence will have on the future of the accused and his or her family. To arrive at a sentence which corresponds exactly with the time already spent in prison suggests that the Judge has only exercised his or her discretion to consider whether the accused should spend any more time in prison. This is not the correct question for the Judge to consider.

This leads to the second problem with this sentencing approach. It serves to mask problems which exist at present with pre-trial detention. If a judge only considers whether the accused should spend further time in prison, rather than first considering whether a prison term is appropriate at all in the circumstances or what exact prison term would be appropriate, it is never revealed that some people have been detained in pre-trial detention for an unreasonable period.

For example, a minor charged with negligence causing death in relation to a car accident, was recently sentenced to 12 months and 17 days prison.[41] It was his first offence and, as the charge would suggest, what was proved on his part was carelessness. It might reasonably be expected that a possible sentence in such circumstances would be a good behaviour bond or community service, rather than a reasonably heavy prison sentence. However, alternatives were not explored. The Court approached the sentence given as a release order rather than a heavy penalty for a first offence committed without intent. The danger of detaining a minor for such a lengthy period on such a charge was never exposed.

Pre-trial detention is not intended to have any punitive force, given that it comes prior to conviction. The Investigating Judge is not intended to determine appropriate penalties

[40] For examples: Criminal Case 47 of 2002 Public Prosecutor v Marcos Da Conceção; Criminal Case 111 of 2002 Public Prosecutor v Julio De Jesus; Criminal Case No 13 of 2002 – Public Prosecutor v A Minor

[41] Criminal Case No 13 of 2002 – Public Prosecutor v A Minor (Although the accused person's name was not suppressed by the Court, according to the Transitional Rules of Criminal Procedure it must not be published)

for offences brought before him at the investigation stage. However by default, in deciding whether to detain a suspect or not, Investigating Judges in some cases are inadvertently determining the ultimate sentence an accused person will receive. Likewise delays in the time taken to hear a matter also, by default, may end up ultimately deciding the sentence given. This is a perversion of the system. To address this issue, Judges must approach sentencing as a fresh question and only have reference to time already spent in detention for the purposes of correspondingly reducing any prison term remaining to be served.

Recommendation 20: Sentences handed down after final judgment should be determined independent of whether and how much time has already been spent in detention. (Except, of course, to the extent that time already spent in detention must be deducted from any time remaining to be served.) For example, Judges must be prepared, where they consider it appropriate, to hand down a prison sentence which is shorter than the time already served in detention. Only when Judges are prepared to approach final sentences in this way will problems with lengthy and indiscriminate pre-trial detention be exposed.

5 ROLE OF THE PROSECUTOR

The duties and powers of Public Prosecutors are set out in UNTAET Regulation 2000/16 as amended by UNTAET Regulation 2001/26 and in Section 7 of the Transitional Rules of Criminal Procedure. The Public Prosecutor is responsible for directing all criminal investigation and in so doing must investigate incriminating and exonerating circumstances equally.[42] At the completion of a criminal investigation, the Public Prosecutor has exclusive authority to decide whether an indictment should be issued, except in the case of crimes which carry a maximum penalty of one year imprisonment. Such cases may be brought directly before the Court by the police.[43] Once an indictment is filed, the Public Prosecutor is responsible for calling witnesses and presenting the evidence gathered during the investigation at trial.

5.1 Staffing Issues

JSMP observed that the present staffing levels of the Dili District Public Prosecutor's Office are very low. During the month of November Mr Alcino Baris was appointed as Vice Minister for the Interior. As a result, by the end of November, there were only three Dili Prosecutors actually available to work on investigations and prosecutions and one Prosecutor from the Suai District available to assist some of the time. The Public Prosecutors are responsible for directing all criminal investigations, requesting warrants, preparing evidence to present at detention review hearings, preparing and filing indictments and materials in support and actually prosecuting cases in Court. If the Prosecutors do not have time to dedicate to all these endeavours, then the criminal process stalls. The time taken between the commission of a crime and the filing of an

[42] Section 7.2 UNTAET Regulation 2000/30 as amended by UNTAET Regulation 2001/25
[43] Section 7.1 UNTAET Regulation 2000/30 as amended by UNTAET Regulation 2001/25.

indictment is increased. So too is the time taken between the filing of the indictment and a verdict. The current staffing levels mean that the human resources of the Public Prosecutor's Office are extremely over-stretched. It is important that at least two new Prosecutors be appointed to the Dili District as a matter of urgency, one to replace the loss of Mr Baris and one additional Prosecutor.

Recommendation 21: There is an urgent need for the appointment of at least two new Public Prosecutors to the Dili District Court.

5.2 Prosecutor as Gatekeeper and Mediator

Under the Transitional Rules of Criminal Procedure, it is the Public Prosecutor who must decide whether or not to proceed with an investigation or to file an indictment.[44] Therefore, in respect of the criminal justice system, the Public Prosecutor performs a gatekeeper role by determining which cases should be brought to the Court for trial and which should not. However, from conversations with staff at the Public Prosecution Service it appears that the Prosecutor does not always make a strict decision to either proceed to indictment or alternatively to dismiss a case. A third option is sometimes pursued which involves the Prosecutor acting as mediator to help the parties reach a written agreement.

In an interview with Mr Alcino Baris, who was at that time the Head Prosecutor for Dili District, Mr Baris said that the Public Prosecution Service resolved a lot of matters without having to file an indictment. He said this was possible in minor matters where there had been a misunderstanding between the parties, where the parties were content to resolve the affair by consent or where there had been a dispute between a husband and wife and the wife no longer wanted to proceed with the complaint. In such circumstances the Public Prosecutor would often assist the parties to draw up and sign an agreement resolving the matter in issue by consent.

Mr Baris also explained that it was apparent, after further investigation, that some matters were not really criminal in nature. He offered as an example a rape case where five boys below the age of 15 had been suspected by the police of raping a girl, also under 15. He said that after investigating the matter further it became apparent that it was consensual and the girl had in fact invited the boys to have sexual relations with her. Mr Baris said that in those circumstances there was no point in continuing with the process. Rather he would simply call all the parents involved and lecture them about the need to better supervise their children and give them more guidance so that they do not do similar things in future.

JSMP also discussed this issue with another Public Prosecutor who explained that it was simply not possible to bring all matters to Court and therefore it was desirable that

[44] Section 7.1, 7,2, 19A.6 and 19A.7 UNTAET Regulation 2000/30 as amended by UNTAET Regulation 2001/25

smaller matters be resolved with the consent of both parties through drawing up an agreement.

JSMP acknowledges that it is not possible, or even desirable, to prosecute every infringement of the criminal law. JSMP agrees that the Public Prosecution Service should have discretion to decide against pursuing trivial or technical infringements of the law or cases for which the evidence is borderline or flimsy. Clearly, if there is no evidence or it is apparent that a matter is civil rather than criminal in nature then the Prosecutor should not proceed with the case. However, once a decision is taken not to proceed with a case, that should signal the end of the Public Prosecutor's involvement in the matter.[45] It is beyond the Public Prosecutor's powers to act as a mediator or arbitrator. That power is not given to the Public Prosecutor by UNTAET Regulation. For the Prosecutor to act in this capacity, including by assuming a quasi judicial role or by issuing what people consider binding agreements, is a misuse of the authority of the Public Prosecutor's Office and ultimately serves to undermine the credibility and legitimacy of the formal criminal justice system.

In one case a man was detained on suspicion of adultery. He was detained beyond the 72 hour period because his case was initially brought to the Court on a Friday afternoon and no Investigating Judge would hear the matter. On Monday, when the case did come before an Investigating Judge, the Judge ordered that the suspect be released without condition. He said that adultery was not a crime. The Prosecutor then alleged that the man was suspected of rape, the Judge found that no evidence at all had been presented. During the course of the day, however, the Prosecutor had ordered that the police go to the suspect's house and get his passport. The suspect was an Indonesian citizen. The woman's family wanted to resolve the matter by negotiation/mediation and it was understood that the purpose of getting the passport was to ensure that the "suspect" remained available for the meeting arranged at the Prosecutor's office. Clearly, the Prosecutor has no power to carry out such activities. Once it is apparent that there is no crime to be investigated or prosecuted, the Prosecutor should cease involvement in the case completely.

Nonetheless, the fact that people are seeking the Prosecutor's involvement in the resolution of their disputes, suggests that there is a need for alternatives to the formal justice system. To simply state that the Prosecutor should not be involved without acknowledging the reality that people are seeking the assistance of a qualified person to help resolve their disputes does not address the underlying community need. JSMP acknowledges that a mediated approach to many disputes – those which involve only minor or trivial infringements of the criminal law - may be capable of delivering more desirable outcomes. Although there is not the scope in this report to discuss mechanisms for providing mediation and dispute resolution services through formal state sponsored institutions, JSMP believes that the establishment of community justice centres/neighbourhood dispute centres, perhaps taking as a base traditional justice systems which are already operative, is a matter which warrants further consideration.

[45] subject to the rights an alleged victim has to request that the General Prosecutor review the dismissal of the case – see section 25 of UNTAET Regulation 2000/30 as amended by 2001/25.

Private lawyers or the Public Defender acting as a mediator in circumstances where they are retained by one of the two parties in a dispute is unsatisfactory.

Recommendation 22: Once the Public Prosecutor decides not to file an indictment in a particular case, that must signal the end of the Public Prosecutor's involvement in the matter. The Public Prosecutor should not act as a mediator or arbitrator between parties. The Public Prosecutor must not assume a quasi-judicial role in the resolution of disputes and should not use his or her position to help prepare documents which people view as binding agreements.

Recommendation 23: There is an urgent need for mediation facilities to which the Public Prosecution Service can refer people involved in disputes. Such a facility, which might take the form of a neighbourhood dispute centre, should be free and staffed by trained mediators. It should exist outside the formal justice system and participation should be voluntary. Private lawyers or Public Defenders acting as mediators in circumstances where they are hired by one of the two parties in the dispute is unsatisfactory.

5.3 Cooperation with Defence

JSMP observed that the level of communication between the Public Prosecution Service and the Public Defender's Office was less than optimal. Although, it is the Presiding Judge who controls proceedings, cooperation between the parties greatly assists the efficient progress of cases. For example, the witness statement of an uncontroversial witness can be admitted into evidence with the agreement of the Prosecutor, accused and his or her legal representative.[46] However there rarely appeared to be discussion before a case about what, if any, matters were in issue. JSMP believes this also contributed to the failure to use section 29A to process cases where the accused has pleaded guilty. Delays were also caused because the Prosecutor and Public Defender did not make written copies of submissions available to each other on an informal basis before hearings. On several occasions, after the Public Prosecutor read out his or her closing statement, the case would be adjourned for the Defence to prepare a response. If the closing statements were made available to the Defence informally before the hearing, the Defence would be in a position to respond immediately and thus avoid a further adjournment. Communication about suspects in custody and imminent review hearings also appeared to be minimal.

Of course, JSMP does not suggest that the Defence has any obligation to cooperate with the Prosecutor so as to assist the prompt conviction of the accused. However, to the extent that cooperation is possible, identifying and narrowing the factual and legal matters in issue would help focus the efforts of both the Prosecution and Defence as well as improve the quality of the evidence and submission presented.

Recommendation 24: Before the preliminary hearing, it should be standard practice for the Defence and Prosecution to hold an informal case conference where the factual and

[46] Section 36.3(b) UNTAET Regulation 2000/30 as amended by UNTAET Regulation 2001/25

legal matters in issue are discussed. This should be a chance for the two sides to discuss whether any witness statements may be admitted by consent, whether the accused intends to plead guilty to some or all of the charges, and to set out a timetable for preparing and hearing the case that could be submitted to the Court at the preliminary hearing. Neither party would be bound in any formal way by undertakings or agreements made at such a conference.

Recommendation 25: Copies of documents and submissions to be presented to the Court should be exchanged in advance of hearings on an informal basis so that the other side is in a position to respond immediately without the need for continued delays and adjournments.

6 ROLE OF THE DEFENCE

International fair trial standards dictate that everyone facing a criminal charge has the right to a lawyer at all stages of proceedings, including during the pre-trial period.[47] This right is confirmed in section 6.3(a) of the Transitional Rules of Criminal Procedure. Article 6 of the UN Basic Principles on the Role of Lawyers states that the lawyer should have experience and competence that corresponds with the seriousness of the offence allegedly committed by his or her client.

To help give effect to this right to legal representation, Public Defenders were appointed under UNTAET. The duties and responsibilities of Public Defenders are set out in UNTAET Regulation 2001/24. The Code of Conduct for the Public Defenders is set out in the Schedule to the Regulation. Their role is to provide legal assistance and representation to persons who are involved in criminal investigation and criminal and civil proceedings and who do not have adequate financial resources to pay for such representation. The role of the Public Defender is critical in an environment where many accused have a limited understanding of the rule of law and when the legal processes they are going through are to them and many others unclear.

6.1 Case Preparation and Work Practices

JSMP observed that the level of case preparation undertaken by Public Defenders was limited. In criminal cases monitored it was difficult to discern a Defence strategy. Generally Public Defenders arrived at the courtroom with little documentation and took few notes. As noted above, in the vast majority of cases monitored by JSMP the accused acknowledged his guilt in respect of all or some of the charges, either at the investigation stage, before the Investigating Judge and/or before the Court itself. As a result the Public Defender was rarely in a position of "mounting a defence". The Public Defender should still be active in vigilantly guarding the rights of the accused. The Public Defender should be involved in attempting to limit the admissible evidence to the greatest degree

[47] See the UN Basic Principles on the Role of Lawyers, Principle 1

possible so as to exclude highly prejudicial material.[48] The Public Defender should still be engaged in preparing a strong case in mitigation.[49] In some cases JSMP even observed that despite an apparent admission from the accused, there remained room to mount arguments as part of a genuine Defence case.

The Public Defenders in general gave the impression of being passive rather than providing what is referred to as "fearless, vigorous and effective defence" in section 1.2 of the Code of Conduct for Public Defenders. On the basis of the monitoring conducted, JSMP believes that there are several reasons for this. Firstly, to be fearless, vigorous and effective requires not only a thorough knowledge of the applicable law but the confidence and experience to use it creatively and assertively. At present there are no Public Defenders at the Dili District Court with more than two and a half years experience. While they have been working in the role now for some time they have no practical experience of a system where the Defence provides active, even dogged, legal representation. Secondly, because there is so little community knowledge about the formal legal system and particularly about the rights of the accused and the role of the Defence, suspects and accused generally do not seek, let alone demand, fearless, vigorous and effective defence. Instead, they pass through the system, unaware of what their rights are and what it means to be defended by a lawyer.

Public Defenders who spoke with JSMP spoke of onerous caseloads which made it impossible to dedicate the time need to any particular case. That the resources of the Public Defender's office are overstretched is most apparent in cases where one Public Defender had to represent multiple clients. In one case, a Public Defender was representing 25 accused who were jointly indicted for theft under section 368 of the Indonesian Penal Code.[50] The Public Defender was in the difficult position of having to make a conditional release application on behalf of the 21 members of this group who remained in detention. His submissions, which were ultimately successful, could only be put in the broadest possible terms.

A lack of resources may well be a contributing factor to the standard of legal representation currently provided. However, JSMP believes that more could be achieved with existing staffing levels. The need for ongoing training is very apparent. So too is the need for more accountability in terms of periodic evaluations and review of performance and case management measured against the Code of Conduct.

Recommendation 26: There is an acute and urgent need for more intensive and practical training of Public Defenders. While international mentors are one way to deliver such training, it is imperative that mentors who are appointed are able to communicate with the Public Defenders in a language they understand, have considerable experience as a

[48] In the course of one month, JSMP did not observe a Public Defender ever object to a question put to his or her client or another witness, even though many of the questions were leading and highly prejudicial.
[49] In one case, [Criminal Case 13 of 2002] where a minor was charged with negligence causing death because he was speeding when he hit a pedestrian, the only matter raised by his defence lawyer during closing statements was merely a simple statement of the fact that he was a minor. Admittedly, he was not the lawyer who had represented the minor during the rest of the case.
[50] Suai District Criminal Case 8 of 2002 – Public Prosecutor v Joaquim Dos Santos & 24 others.

defence lawyer and are familiar with the laws of East Timor (which at this stage include the Indonesian Criminal Code).

Recommendation 27: Public Defenders should be subject to periodic review of their performance and case management skills using the Public Defender Code of Conduct as a benchmark for performance evaluation.

6.2 Criminal matters / Civil Matters

According to UNTAET Regulation 2001/24, Public Defenders are mandated to represent persons in financial need in both criminal and civil cases. During the month of November there were a handful of cases where civil parties were represented by the Public Defenders Office. It is also understood that Public Defenders were involved in negotiations between parties to civil disputes. JSMP asked one Public Defender whether criminal cases took priority and was told that they did not. However, the Public Defender explained that the small private law firms, which purport to take on pro-bono work, preferred to take civil cases. This meant that the Public Defender's Office was often left with the bulk of the criminal cases.

JSMP believes that, as a matter of policy, the Public Defender's Office should not be involved in civil disputes, particularly in circumstances where clients have not exhausted all other options for securing legal representation. This recommendation is a consequence of the level of representation the Public Defender's Office is currently able to deliver to clients charged with serious criminal offences. While the subject of a civil dispute may go to the heart of a client's livelihood and lifestyle, those charged with serious criminal offences face the deprivation of their liberty for an extended period. Prioritisation of needs is an inevitable aspect of any free legal aid service. While it is unfortunate that all can not be assisted, such prioritisation ensures that at least those who do receive legal representation receive meaningful representation. Further it may assist the Public Defender's office to develop a more focussed expertise on criminal matters.

Recommendation 28: The Public Defender's Office should be exclusively concerned with providing advice and representation to those accused of criminal offences. Representation in proceedings or negotiations involving civil matters may be provided by other legal aid organisations.

7 COURT ADMINISTRATION

7.1 Public Availability of Information

Article 14(1) of the ICCPR guarantees the right to a public hearing[51] which means that an accused person has the right to be tried in public, and that the public has a right to attend criminal trials. This right is specifically recognised in the Transitional Rules of Criminal Procedure which state that trial hearings must be open to the public, except in circumstances where it might harm national security, where sexual offences are involved or where the interests or justice would be prejudiced.[52] The full realisation of this right requires that the public have access to information about when and where public hearings are to be held.[53]

7.1.1 Trial Schedule

At the Dili District Court there is a white board on public display where the daily hearing schedule is supposed to be posted. JSMP observed that the board was only sporadically updated with information. More often that not it remained blank or displayed old information. JSMP generally obtained information about what criminal matters were listed by reading the diary kept by the court clerks, which they made available each morning. For information about what civil matters were scheduled, JSMP inquired orally with the court clerks assigned to the civil division Registry.

The problem with this arrangement is that many visitors to the Court appear intimidated, or at least disorientated, by the court environment and would not know who to direct their inquiries to, even if they felt sufficiently confident to do so. Information about the daily schedule should be clearly displayed on the board provided so that visitors to the court, be they witnesses, accused persons, victims or other interested members of the public, can know immediately what cases are on and when they are scheduled to commence. Ideally, such information would be published in the newspaper on a daily basis so that a larger audience could be aware of what matters are scheduled to be before the Court on any particular day. Small steps such as these would help make the court more accessible and genuinely open to the public.

7.1.2 Case Documents

Public access to information about cases before the Court, including access to certain important case documents, is another aspect of public and transparent justice.

[51] See also Article 10 of the Universal Declaration of Human Rights; Article 6(1) of the European Convention on Human Rights; Articles 64(7) and 67(1) of the International Criminal Court Statute.
[52] Section 28 of Regulation 2000/30; these limited exceptions to the public nature of a trial are in accordance with the international standards mentioned above.
[53] *Van Meurs v the Netherlands* (215/1986) 13 July 1990, Report of the UN Human Rights Committee, at 60.

Indictments, for example, set out what charges a particular accused is facing and what facts are relied on to support the charges. Orders and judgements set out any exercise of the Court's power and, in the case of judgements, the basis and reason for that exercise of power.

In the criminal division Registry of the Dili District Court, there is a large white board drawn up so that information about each case can be recorded, including the case number, name of the accused, date filed and information about the progress of the case. It is blank and appears to have been blank since 2001. JSMP was informed that the case load is now of such a size that it is no longer practical to maintain the whiteboard. JSMP was given access by the court clerks to criminal court files on request, provided the files had not been removed temporarily to a Judge's office. Court files for criminal matters contain, amongst other documents, the indictment, statements taken by the police, detention records and the final judgement. The court clerks were very cooperative and endeavoured to answer all questions asked. Generally, Prosecutors and Defenders made information about cases available when asked by both JSMP and the media.

In summary, access to information on individual cases was available on request. This proved very helpful for the purposes of court monitoring. However, the shortcoming with the current system is that it appears ad hoc and not based on any apparent procedures. It was never clear whether files were provided as a right or were provided to JSMP as a special case in order to cooperate with court monitoring. One judge informed JSMP that according to the Indonesian procedures still in operation, the public, (including JSMP), should not be permitted to have access to court files until after judgment had been delivered. Section 17 of the Indonesian Law on the Courts in the Context of General and Supreme Court Judicial Proceedings[54] provides that the Prosecutor/plaintiff, accused/defendant and legal counsel may study case files held in the Registry and make excerpts as required within the hours set by the Head of the Court. Section 59(1) of the same law states that only Judges and Prosecutors are permitted to ask to take case files held in the Registry home to work on. Neither of these sections makes it clear what access the public may have to case files or particular documents such as indictments or judgments. JSMP is unaware of any UNTAET Regulation or East Timorese law governing these matters.

The assistance which JSMP received from both the Registry and court actors in providing information was greatly appreciated. However, clear guidelines on what information is, and should be, publicly available and on what terms and conditions, would provide greater certainty to members of the public in relation to what are their rights of access to information and how those rights may be exercised. Although conformity with such procedures might prove more cumbersome than the current informal system, it would eliminate the notion that information is made available by the "grace" of court actors and avert the risk that such cooperation might be withdrawn in circumstances where relationships with monitors or other members of the public become strained.

[54] Indonesian Law No 13 of 1965

There are compelling reasons why parts of a court file, such as police witness statements, would not be made public. However, indictments, court orders (including those relating to detention) and judgments form part of the public record. With the exception of some orders made in chambers, they are read aloud in open court. In JSMP's view a written copy should be available for inspection as part of the provision of transparent and public justice. This may be as simple a recommendation as keeping a copy of all indictments and judgments in separate folders which are available on request. Further, in the interest of promoting public awareness of and support for East Timor's new judicial system, judgments should not only be available for inspection but should, at least in the case of high profile matters, be available for distribution to the public and media.

7.1.3 Proceedings before the Investigating Judge

Proceedings before the Investigating Judge include applications for arrest warrants, exhumation orders and different varieties of search and seizure warrants. They also include detention review hearings held within 72 hours of arrest or after the expiry of an earlier order.[55] Requests for warrants and similar orders are generally made and granted in the Judges' offices. Detention review hearings are generally held in a court room but are closed to the public unless requested otherwise by the suspect and ordered by the Investigating Judge.[56] Records of proceedings before the Investigating Judges are not stored in the file room with other case records but are stored in the Investigating Judges' room. JSMP has observed that, as a result, it was difficult to collect information about matters handled by the Investigating Judges.

The only way to get information about what had occurred before the Investigating Judge each day was to ask each Judge separately whether they had made any orders and if so, what orders. JSMP was very grateful to the Investigating Judges for their patient cooperation. However, collecting information in this way is problematic. Asking Judges to talk to the public about proceedings which have come before them, even in very cursory, factual terms, places them in a difficult position. Likewise, persistent contact with Judges in this way increases the risk that the observer will be perceived as somehow seeking to influence proceedings before the Investigating Judge.

Unfortunately such cursory and factual information from other sources, (even with regard to how many suspects there were and what crime they were suspected to have committed), such as the police, was not always reliable. For example, when JSMP inquired why one man was being brought before the Investigating Judge, JSMP was told by the police involved that it was because he had two unofficial "wives". This information was confirmed by a Prosecutor. However, when JSMP asked the Investigating Judge what order had been made in the man's case, the Investigating Judge handling the case explained that the man was arrested because he had assaulted one of his "wives" and not because he had two of them.

[55] The powers of the investigating judge are set out in section 9 of UNTAET Regulations 2000/30 as amended by UNTAET Regulation 2001/ 25

[56] Section 20.2 UNTAET Regulation 2000/30 as amended by 2001/ 25

Accurate information on arrest warrants was particularly difficult to obtain. The police would invariably answer that every suspect had been arrested on a valid arrest warrant issued pre-arrest. However, JSMP inquired with the Investigating Judges each day whether they had issued any pre-arrest arrest warrants and according to their reply, except within the Serious Crimes jurisdiction, they rarely had.

Despite the assistance given by the Judges themselves, without access to written records of orders made, it is very difficult to get a genuinely complete, genuinely accurate picture of what occurs before the Investigating Judges.

It is important that statistical data be gathered about matters such as; How many suspects are arrested without an arrest warrant? How long on average are suspects held before they are brought before the Court? Are any suspects held beyond the 72 hour period? What is the basis for the delay? What is break down of the types of crimes the suspects are alleged to have committed?; What is the break down of release orders, conditional release orders, and detention orders made at 72 hour review hearings? In what types of cases are detention orders more likely to be made? How many cases brought before the Investigating Judge actually continue to trial? How often are detention orders extended beyond the 30 day, 60 day or 90 day period?

The Court ought to have its own record keeping and data on these matters stored in the general Registry and not kept separately with the Investigating Judges.[57] Issues involving arrest, pre-trial detention and the work of the Investigating Judge are extremely important and impact acutely on the rights of suspects and accused persons. At present, it is difficult to obtain detailed data about how the system is working in practice. Inferences must be drawn from anecdotal stories. This does not help to identify problem areas and formulate strategies for addressing them. The extent to which orders made by the Investigating Judge should be made public is a question that must be addressed by formal written procedures. JSMP recommends that, at the very least, orders which result in detention or the application of restrictive measures should be accessible to the public.

Recommendation 29: The noticeboard at the Dili District Court must be updated with the daily court schedule each morning as a matter of priority. Each afternoon the court schedule for the following day should be distributed to newspapers so that it may be published for a wider audience.

Recommendation 30: Formal written procedures are required to regulate public access to court documents. The procedures could be issued by the President of the Court of Appeal or take the form of legislation. The procedures should set out what documents may be viewed and/or copied by members of the public and on what basis. Such procedures should guarantee that the public has a right to access indictments, court

[57] According to section 7.7 of UNTAET Reg 2000/30 as amended by 2001/25 the Public Prosecutor is responsible for keeping the files of a case during the investigation period. The Public Prosecution Service has said that they do not have the capacity to provide this sort of statistical data.

orders, and judgements. The procedures should set out whether there will be costs involved for accessing or copying documents.

Recommendation 31: Records of orders made by the Investigating Judges should be held in the Registry with other court records. Written procedures should be formulated which regulate access to court documents related to proceedings before the Investigating Judges. At the very least, the public should have access to written orders which lead to the detention of a suspect or the application of other restrictive measures such as reporting requirements.

7.2 Delays

Article 14(3) (c) of the ICCPR guarantees the right to a trial "without undue delay". The UN Human Rights Committee has noted that:

> *This guarantee relates not only to the time by which a trial should commence, but also the time by which it should end and judgement be rendered: all stages must take place "without undue delay". To make this right effective, a procedure must be available in order to ensure that the trial will proceed "without undue delay", both in first instance and on appeal.*[58]

What may be considered "undue delay" will depend on the particular circumstances of the case.

The progress of cases through the Dili District Court is not uniform. JSMP observed that some cases from the later half of 2002 have already been tried to completion, while other cases from early 2001 involving charges of the same gravity have not yet been finalised. Generally this difference can not be attributed to the varying complexity of the cases. Delays are caused by recurring postponements which impact differently, and largely randomly, on different cases.

During the month of November, there were more hearings which were postponed than hearings which proceeded according to schedule. Of 131 scheduled civil and criminal hearings, 70 had to be adjourned. The reason for postponement was generally the absence of one or more key players. Often the Court did not convene to explain why a listed hearing had to be postponed. As a result, there was often no court record generated by a court clerk which noted, for the benefit of the case file, why a particular hearing did not proceed. JSMP often had to seek unofficial oral information about reasons for postponement from court clerks and other court actors.

One of the consequences of this failure to hold scheduled hearings demonstrates a lack of transparency and accountability. If a Prosecutor, Public Defender or private lawyer has failed to appear for a listed hearing and failed to send a replacement to provide an explanation and make an official request for an adjournment, that demonstrates a lack of

[58] UN Human Rights Committee General Comment 13, 13 April 1984, at paragraph 10.

respect for the Court. A failure to appear is a serious matter which impacts on the efficient running of the Court and may, in certain circumstances, represent a serious derogation of duty towards one's client. On several occasions accused who were in detention were brought to the Court for a hearing which did not take place because the defence lawyer was not present, thus contributing to further delays in the hearing of the accused's case. Such matters should not pass without notice or consequence. However, if no hearing is convened and no record created, the potential for accountability is seriously diminished. Moreover, a culture is created whereby legal practitioners consider that appearing before the Court at listed hearings is optional, depending on their other commitments. JSMP is aware that staff shortages are a factor in court actors failing to appear. However, it would be incorrect to attribute all the blame to staff shortages. The reason for delays is also attitudinal.

Eight of the seventy postponements were caused by the unavailability of Judges. On two occasions this was because some members of a panel of judges were not available or because a Judge was scheduled to be involved in two listed hearing at one time. On the morning of 25 November, the Judges held a meeting to elect their representative to the Superior Council of the Judiciary. While the importance of the meeting is clear, to hold the meeting at a time when there were hearings listed and people waiting at the Court suggests that the Judiciary themselves consider the court schedule flexible depending on their commitments. The meeting could have been held outside court hours. If the Judges were not willing to attend outside court hours, all hearings should have been adjourned *several days in advance*.

As a further example, on 22 November no listed criminal hearings proceeded because the Public Prosecutors were attending a conference on domestic violence and a meeting at Yayasan Hak. While it is appropriate that Public Prosecutors attend such forums, official requests for adjournment should be made in advance. That is, a letter should be sent to the Presiding Judge in each case requesting an adjournment and stating the grounds. If, after consideration of the grounds, an adjournment is granted, a letter should be sent by the Court to the Defence and accused advising them of the adjournment. In this circumstance, such a procedure was not followed and as a result, accused persons came to the Court and waited a period of hours for hearings that were never going to take place.

In the examples cited, both the Judges and Prosecutors were at least occupied with important work related activities, even if proper procedures for adjournment were not followed. On other occasions hearings were postponed in circumstances where a key actor's failure to appear was completely unexplained.

JSMP observed that accused persons also often failed to appear at scheduled hearings. Of seventy adjournments in November sixteen were attributed to the accused's failure to appear. It is generally a condition of pre-trial release that an accused must appear at all subsequent hearings in his or her case. Likewise, an Investigating Judge may order that a monetary bond or other surety be posted to guarantee the appearance of a suspect or accused at subsequent hearings.[59] Failure to appear at a scheduled hearing is grounds for

[59] Section 21.2 UNTAET Reg 2000/30 as amended by UNTAET Reg 2001/25

re-arrest in circumstances where there is an outstanding conditional release order which requires the accused to attend all hearings. Under section 5 of the Transitional Rules of Criminal Procedure, if an accused person has voluntarily absented himself or herself from a hearing, other than the preliminary hearing at which the accused must be present, the hearing may progress without the accused.

However, for the Court to effectively respond to an accused person's failure to appear, (by ordering, where appropriate, the re-arrest of the accused and/or by proceeding without the accused), a hearing must be convened so that it can be officially noted for the record whether the accused was notified of the hearing in accordance with procedure. Convening a hearing allows the Court to discuss with the Prosecutor and Defence what evidence exists to demonstrate that the accused has been notified of the hearing and allows both sides to raise any information they have relating to possible reasons for the accused person's absence. These matters must be dealt with and recorded in open court so that the Court can determine whether the accused is voluntarily absent. If in practice, as JSMP was informed by one Prosecutor, accused persons are to be given three chances to appear, it is even more important that each failure to appear is properly recorded in open court.

The Indonesian Criminal Procedure Code provides that if an accused does not appear at a hearing, the presiding judge must examine whether the accused has been properly called. If the accused has been properly called but has not appeared, the hearing cannot continue. The Judge must order that the accused be called again. The Indonesian Code provides that if the accused, for no valid reason, does not appear after being called the second time, the Court must takes steps to compel the accused to appear at the next hearing.[60] JSMP would suggest that this section of the Indonesian Criminal Procedure Code has been replaced by section 5 of the Transitional Rules of Criminal Procedure cited above. However even to the extent that the Court still follows, by default, the Indonesian Code, it is apparent that a scheduled hearing must be convened even when it is known that an accused has failed to appear.

Frequent postponements, (particularly publicly unexplained postponements), caused by the failure of other court actors to appear increase the difficulty of guaranteeing the attendance of the accused at scheduled hearings. It is difficult to decisively respond to a an accused person's failure to appear when they have been present at the Court in readiness for earlier scheduled hearings only to be told after a long wait that the hearing will not be able to proceed. The idea that appearance before the court at a listed hearing is discretionary is pervasive and it is not surprising that many accused persons decide for themselves whether they consider it worthwhile appearing on any particular day.

If the Court is to overcome the current situation where more hearings are postponed than proceed according to schedule, it is important that listed hearings are convened and that any failure to appear is recorded and followed up within the scope of the Court's power.

[60] Section 154(2), (4), and (6) of the Indonesian Criminal Procedure Code – Law 8 of 1981

Recommendation 32: Scheduled hearings should always be convened, even in circumstances where one of the court actors is not present, so that a record can be made about why the case is unable to proceed. Where there is a failure to appear by a court actor, witness or accused, the Court should ascertain in open court the reason for that failure and take appropriate steps to ensure that it does not reoccur. This may include compelling a person to appear or instigating disciplinary proceedings.

7.3 Timetabling

JSMP observed that there appears to be no division of the Court's timetable to make optimum use of the limited courtrooms and court actors available. Likewise, there appears to be no steps in place designed to dispose of matters with the minimum number of hearings possible. Both criminal and civil hearings were listed on every day of the week. Hearings were listed to commence at a variety of starting times in the morning and, less frequently, in the afternoon. JSMP observed that, as a result, there was often a small period of great activity at the Court where Prosecutors and Defenders rushed from room to room but that for the rest of the day, the court building was idle. It is possible that a more structured approach to timetabling may assist the Court to process a greater number of cases in a shorter timeframe without compromising the quality of the justice delivered.

For example, all preliminary hearings in criminal matters could be listed to commence at 9.00am. JSMP observed that during November, a preliminary hearing never extended beyond one hour. This would allow the same Judges and Prosecutors to be involved in other hearings from, at least, 10.30am. It would also help establish a routine, which at present is notably lacking. Scheduling preliminary hearings at a particular and discreet time might also serve to focus the attention of court actors on working through in a systematic way the steps which must be followed at preliminary hearings.[61] At present, the unstructured way that cases are scheduled mitigates against a focussed and professional approach to the task at hand by court actors.

Further, when criminal matters and civil matters are listed for trial they should be listed to commence at a standard time, for example 10.30am. If necessary they should be listed to run for the entire day, with a standard break for lunch. Currently, cases are listed for a variety of start times and often after a half morning session and evidence from one or a couple of witnesses the matter is adjourned for a period of a week, or weeks, for more witness testimony. After several, spread-out hearings for witness testimony, cases are often adjourned again for closing statements from the Prosecution, and often adjourned again for closing statement from the Defence.

This is a problem for a number of reasons. First, there is no continuity in the trial. Weeks, and even months, may pass between the testimony of different witnesses and again before closing statements. In circumstances where no transcript of proceedings is produced, it is impossible for court actors to properly test, evaluate and compare the

[61] Section 29 of UNTAET Regulation 2000/30 as amended by UNTAET Regulation 2001/25

evidence presented in any detailed way. Secondly, in circumstances where ensuring the appearance of all relevant court actors at hearings is a recurring problem, it is obviously better to limit the number of hearing days and therefore limit the possibility for postponement.

The preliminary hearing is the opportunity for the Court to determine how many witnesses or what other evidence is involved in a particular case.[62] At the preliminary hearing the Court should determine how many hearing days are necessary and list the matter to run for a whole day or a number of consecutive whole days in order that it may be completed in one block. This is not the Court's current approach. JSMP observed a number of cases which proceeded in a very fragmented way, with each hearing only taking the case incrementally forward.

A good example is case number 27/2002 Public Prosecutor v Antonio Rodrigues. The case involves a charge of attempted murder. The accused had been in detention since 20 July 2001.[63] On 29 November 2002, the matter was listed for hearing in the morning. The Prosecution had called three witnesses who were all present. The case commenced late morning and by the lunch time adjournment (at 12.15pm), only two witnesses had been examined. Nonetheless, the case was adjourned to a date in the future for the continuation of witness testimony. A new date could not be set because the Prosecutor is from Suai and has to juggle commitments between the District Court of Suai and Dili. The opportunity to complete, at the very least, the presentation of evidence by both sides while all the relevant players were present was lost. More importantly, the timeframe between arrest and judgement was extended even further.

Some Judges expressed the view that there were too many matters awaiting trial for a Judge to dedicate one whole day or a couple of days to a particular case. Indeed, on 29 November 2002, two of the Judges on the panel for the above mentioned case (case 27/2002) had other cases scheduled. Only one of those other matters, however, proceeded as scheduled. JSMP believes that this view represents a false efficiency. If cases were completed in a more concentrated and systematic way, the Court would be more efficient than at present where it is juggling all cases at once, unable to give any particular case the attention and time it requires to be properly and efficiently tried.

Recommendation 33: A more structured and standardised approach to timetabling is required. All preliminary hearings should be listed to commence at 9.00am so that Judges involved in preliminary hearings are not precluded from conducting hearings on the same day. When cases are to be listed for hearing, the Court should ascertain at the preliminary hearing how long the case requires and list it for an entire day or, if necessary, a number of consecutive days so that it can be disposed of in a confined space of time rather than progressing sporadically and incrementally in short, spread out half-day sessions.

[62] Section 29.2(e) UNTAET Regulation 2000/30 as amended by UNTAET Regulation 2001/25
[63] The accused was conditionally released by the Court at the hearing on 29 November 2002.

7.4 Transcript of Proceedings

At present no transcript is made of proceedings before the District Court. JSMP observed further that handwritten notes taken by court clerks were very cursory. Judges, Prosecutors and Public Defenders made some notes for their own purposes but by no means record all, or even a significant number, of questions and answers asked and answered during witness testimony. This is contrary to Section 26.1 of UNTAET Regulation 2000/11 which states that:

> *The court shall ensure that, in each hearing by a judge or panel of judges, written or recorded notes of the proceedings are taken and made available, on request, to all parties to the proceedings, including their legal counsel.*[64]

In addition this approach does not comply with the Transitional Rules of Criminal Procedure which state that:

> *The court shall make a record of all the proceedings. It shall contain:*
> *(a) the time, date and place of the hearing;*
> *(b) identity of judges, parties, witnesses, experts and interpreters, if any;*
> *(c) a shorthand, stenographic or audio recording of the proceedings. Recorded media shall be used as necessary during further proceedings to produce transcripts and otherwise facilitate the functions of reviewing authorities. Recorded media shall be preserved until the later of*
> > *(i) six months following the conclusion of all appeals or expiration of the time within which an appeal may be taken; or*
> > *(ii) six months following the full release of the accused from post-trial confinement;*
> *(d) any matter that the court so orders or the parties request to be recorded; and*
> *(e) the decision of the court and, in case of conviction, the penalties.*[65]

A transcript of proceedings is essential for the judges and parties to review the evidence and arguments presented at trial, both for the purposes of the trial itself and also for the purposes of any appeal. Without an accurate transcript the Court is unable to undertake any sophisticated or comprehensive evaluation of oral testimony. Instead the Court is forced to rely on general impressions or written statements included on the file but not actually admitted into evidence.[66] In addition, as JSMP has pointed out in previous

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[64] Section 26.1 of UNTAET Regulation 2000/11 as amended by Regulation 2001/25. Interestingly, the original version of this provision only made reference to transcripts. It seems to be no coincidence that the amendment takes into account the changed situation of the Special Panel, as well as perhaps reflecting a more realistic view of what is feasible for the entire court system.

[65] Section 31 of UNTAET Regulation 2000/30.

[66] Section 36.3 of UNTAET Regulation 2000/30 provides that witness statements may be admitted into evidence in certain specified circumstances, such as when the witness has died before trial. Section 36.4 provides that witness statements may be used to refresh the memory and where his or her memory cannot be refreshed prior statements cannot be used as substantive evidence. Outside these specific exceptions it appears that witness statement are not intended to have any evidentiary value.

reports,[67] an important safeguard of a fair trial is the right to appeal to ensure judicial scrutiny of a court's decision at a higher level. This is recognised in Article 14(5) of the ICCPR which states that "[e]veryone convicted of a crime shall have the right to his conviction and sentence being reviewed by a higher tribunal according to law".[68] If the reasoning or outcome in the decision of the court at first instance is challenged, an accurate transcript is often an important basis upon which the appeal court is able to assess the basis of the challenge.

The ability to record proceedings before the District Court so that a transcript may be produced is a pressing need which should be addressed as a priority. JSMP believes that the production of court transcripts would improve the quality and rigour of judicial reasoning.

Recommendation 34: Some method of recording proceedings so that a transcript may be produced on request should be provided together with the staff necessary to operate such a system.

8 MINORS

Section 45 and section 46 of the Transitional Rules of Criminal Procedure provide specific procedures for cases involving minors. JSMP observed that these provisions were more often breached than followed.

On several occasions during the course of November, minors came before the Court charged with, or suspected of committing, criminal offences. Of the three minors who came before the Investigating Judge, none were accompanied by a parent or guardian and no one from Social Services was present.[69] The minors were questioned by police without a parent/guardian or lawyer present. This is despite the fact that the Transitional Rules of Criminal Procedure provide that a minor can not waive his or her right to legal representation. Only the Court or Investigating Judge can order that a minor be allowed to be questioned without the presence of a legal representative.[70] There appeared to be no specific Public Defender allocated to deal with cases involving minors. Like everyone else brought before the Investigating Judge, minors had approximately ten minutes to speak to a Public Defender before their case was heard. There was no evidence that the Public Defenders were aware of the various matters which may affect the way minors present their version of events or which may place them in a special vulnerable category of suspect.

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[67] Right to Appeal in East Timor – JSMP Thematic Report 2, October 2002; Justice in Practice – JSMP Thematic Report 1, November 2001.

[68] See also Article 2 of Protocol 7 of the *European Convention on Human Rights*; Article 8(2) (h) of the *American Convention on Human Rights*.

[69] Section 45.8 of UNTAET Regulation 2000/30 as amended by 2001/25 provides that "the parents, guardian or closest relative of a minor who has been arrested are entitled to participate in any criminal proceedings and may, if necessary, be required by the Court to attend any criminal proceedings in the interests of the minor".

[70] Section 46 2 of UNTAET Regulation 2000/30 as amended by 2001/25.

In two of the cases which came before the Investigating Judge, the Judge ordered that the police find a suitable place for the suspect to stay rather than send the minor to prison. The Investigating Judge involved in both cases expressed frustration at the lack of options available for dealing with minors, in terms of institutions/facilities available in East Timor, particularly in the case of minors who have come before the Court on multiple occasions. This approach demonstrates some appreciation of the fact that minors are a particular category of suspect with special needs.

On the other hand, the same Investigating Judge ordered that a seventeen year old be detained for thirty days on the basis that his negligence was alleged to have caused a car accident in which a man was seriously injured. The Judge explained that in cases where serious injury has been caused, there is no alternative but to order imprisonment, whether the suspect is a minor or not. This view is disconcerting, particularly in the context of a case where the serious injury is alleged to have been caused by negligence rather than with any intent. The maximum penalty a minor faces for negligence causing serious injury is 5 years imprisonment[71] or possibly less, given that under the Indonesian Juvenile Code minors can only be sentenced to half the maximum sentence faced by adults for the same offence.[72] It is suggested that in many such cases, especially first offences, no prison term should be imposed particularly given that in cases involving minors the Court is obliged to consider alternatives to imprisonment such as care, guidance and supervision orders, counselling and probation.[73]

During November JSMP also monitored two cases involving minors which were before the Dili District Court for trial. In neither case was the minor's name suppressed even though section 45.5 of the Transitional Rules of Criminal Procedure provides that no information that might lead to the identification of a minor may be published.[74] In one case the minor was charged with negligence causing death. The charges arose out of a car accident. In the second case the minor was charged with assaulting his teacher. In both cases the minor had spent considerable periods in pre-trial detention. In the first case the minor was in pre-trial detention for 1 year and 27 days, which ultimately was the sentence he received on conviction. In the second case the minor was in pre-trial detention from 1 February 2002 to 26 August 2002 before he was conditionally released. In neither case was the accused's family present at the hearing. In respect of the first case, JSMP was informed by Social Services that the accused's family had originally attended the hearings but because of continued delays and postponements they had lost patience with the process.

These cases suggest that minors are not afforded the special protection which they are entitled according to section 45 and 46 of the Transitional Rules of Criminal Procedure. They are processed like other accused persons in a manner which does not recognise that

[71] Section 360(1) of the Indonesian Penal Code sets out the maximum sentence for negligence causing serious injury as 5 years.
[72] Section 26(1) of the Indonesian Law No3 of 1997
[73] Section 45.12 of UNTAET Regulation 2000/30 as amended by UNAET Regulation 2001/25
[74] Section 45.5 UNTAET Regulation 2000/30 as amended by UNAET Regulation 2001/25

their youth is something more than a mitigating factor to be considered in final sentencing.

It should be noted that Social Services is doing considerable work in this area and is at present lobbying for changes, including a designated Judge, Prosecutor and Defender to handle cases involving minors. This accords with section 45.15 of the Transitional Rules of Criminal Procedure. Furthermore it is understood that Social Services has organised training for all court actors with respect to the handling of cases involving minors. During the month of November, Social Services was also proactive in pushing for the release of minors already held in pre-trial detention. A letter was forwarded to the Minister for Justice, the Court, the Public Defender's Office and the Public Prosecutor's Office, setting out the details of minors currently in pre-trial detention and listing compelling grounds for their release. Attached to the letter were signed undertakings given by parents guaranteeing that if their children were released they would ensure their appearance at Court and containing other like guarantees relating to the care and supervision of their children. The letter formed the basis of written motions submitted by the Public Defender's Office to the Court seeking the release of at least two minors in pre-trial detention. The release applications were granted. JSMP supports the efforts of Social Services in this matter.

Recommendation 35: It is imperative that within the Public Prosecution Service, the Public Defenders Office and the Judiciary there are designated staff with expertise in dealing with cases involving minors. Further, a procedural manual dealing specifically with the issue of minors as suspects and accused should be created for the benefit of court actors to help alert them to issues arising in cases involving minors and provide guidance and instruction on options available.