



**JUDICIAL *SYSTEM* MONITORING PROGRAMME**  
**PROGRAM PEMANTAUAN *SISTEM* YUDISIAL**

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**Justice in the Districts**  
**2003**

Dili, East Timor  
December 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](http://www.jsmp.minihub.org)*

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

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## 1 EXECUTIVE SUMMARY

The establishment of a judicial system in East Timor from the ruins, in which it was left in 1999, especially in the Districts, is an achievement not to be underestimated. The District Courts<sup>1</sup> of Baucau, Oecusse and Suai have now been operating for approximately three years. Now at the end of 2003, with the 'rehabilitation' phase complete, it is timely to focus on the operation of the justice system itself in terms of qualitative outcomes and adherence to the law. It is further necessary to analyse whether the processes in place adhere to international standards.

This report aims to provide an evaluation of the functioning of these Courts including the performance of court actors, administration, facilities as well as the overall coordination and supervision of the courts. The Dili District Court, which also forms part of the District Court system, is not examined in this report but is the subject of its own report: "Dili District Court Final Report 2003" which should be read with this report for a complete picture of the courts of first instance in East Timor.<sup>2</sup>

As discussed in this report, although solid foundations have been laid, the District Courts are failing to reach their potential in some areas, and more serious problems exist in other areas which are threatening the ongoing sustainability and operations of the courts. Currently the greatest threats to the operation of the courts are delays and extended periods without scheduling of cases. Such delays are due to a variety of reasons including the departure of over half the East Timorese judges to Portugal for a one year training programme. The departure of the judges to Portugal and subsequent lack of planning, coordination and supervision resulted in the Oecusse court only having judges at the court for two days between July and December 2003. The judges and prosecutors from Baucau have also been absent from the Baucau court since September 2003, for different reasons including the lack of support from the central administration in providing furniture for their living quarters and training to Prosecutors. The stalling of the court processes in these Courts and the failure of these issues to be resolved over many months signals a significant problem in the support and coordination between the District Courts and the central administrative bodies such as the President of the Court of Appeal, the Superior Council of the Judiciary, the Ministry of Justice and the Offices of the Public Prosecutor and Defender.

The courts in the Districts face additional problems to those faced by the Dili District Court due to their isolation. A lack of resources including personnel, communication and transportation facilities as well as professional support and supervision are currently lacking which is seriously hampering the effectiveness of the courts. Not only are such services and facilities necessary for the day to day functioning of the courts, but they are

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<sup>1</sup> The term District Courts is used in this report to refer to the District Courts of Suai, Baucau and Oecusse. The Dili District Court will be referred to individually.

<sup>2</sup> The District Courts have jurisdiction to deal with ordinary crimes and civil matters. The Special Panel for Serious Crimes is part of the Dili District Court and has exclusive jurisdiction for Serious crimes committed in 1999 as well as specific International crimes. The operation of the Special Panel for Serious Crimes is not included in this report.

also needed so that court actors can identify themselves as a necessary and appreciated part of the larger court system. Aside from improving efficiency, a significant increase in resources and support, will reduce the feeling of isolation and thereby assist in integrating the District Courts into the national system. Due to this current lack of support, the need for the central administrative and supervisory bodies to engage with and actively supervise court actors from the Districts has been identified as an urgent need.

The conduct of trials in the Districts is examined in this report as are issues specifically related to each court actor. The general administration of the court and efficiency in conducting trials was usually performed well in the District Courts, however concerns arose regarding the protection of the accused's rights in relation to their right to silence and right to be brought before a judge within 72 hours. Other areas of concern were unlawful orders by investigating judges and prosecutors, and the trend across the Districts of poor pre-trial preparation of cases by public defenders.

The information and commentary contained in this report is based on monitoring of the courts made by Judicial System Monitoring Programme (JSMP) carried out in each of the District Courts of Baucau, Suai and Oecusse for two, two week periods between May and August 2003.<sup>3</sup> During the periods of monitoring, JSMP tracked and observed all cases, criminal and civil, which were held or were scheduled to be held in the Court during that two week period. JSMP also interviewed court actors, police, United Nations Human Rights officers, officers within the District Administration and members of community organizations about the Court. JSMP would like to thank all those who provided information for this report. Information obtained after the monitoring period was also included if relevant to an issue identified during the monitoring period. While all efforts have been made to try and ensure that the statistics provided are accurate, the difficulty in obtaining accurate figures as well as the delay in release of the report mean that the statistics should be taken as approximations.

This report is part of the ongoing core work of JSMP to monitor the Courts in East Timor. It aims to benefit the judicial system in a number of ways: to provide feedback to and facilitate discussion with court actors and to promote accountability within the justice system. To further this aim, JSMP intends to run a workshop in early 2004 to discuss the findings of this report and ways to remedy the issues identified. It is further hoped the report will be used to inform officers within the central administrative bodies who are responsible for the planning, training, resourcing and supervision of the justice sector. To that end a number of recommendations are attached to the report.

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<sup>3</sup> It should be noted that the Oecusse court did not hold any hearings in the monitoring period, hearings were only held for two days in November 2003. Although this period was not in the scheduled monitoring period, JSMP traveled to Oecusse and monitored cases during these two days and has included these observations in this report.

## 1.1 Summary of Recommendations

### Recommendations relating to the Judges

JSMP recommends that:

1. *A formal directive be issued requesting the assistance of Judges to assist in hearing cases of other Courts. This Directive should include rules on how the request is to be implemented and should be circulated to all court actors;*
2. *For the purposes of impartiality, the allocation of Oecusse cases to Suai court judges, or any other judges who may assist in Oecusse, be conducted following the procedure established by the Practical Directive 1/2001 of the President of the Court of Appeal;*
3. *Prior to sending a second group of judges to Portugal for training an assessment of the training be conducted including the consequences for the functioning of the District Courts in their absence;*
4. *A Directive be issued by the President of the Court of Appeal detailing the tasks that are required to be undertaken by District Courts' Judge Administrators, including guidelines on the type of information to be included in the monthly report; and*
5. *The supervision and support mechanisms for Judges in the districts be strengthened in addition to the capacity of the Judge Administrator and national bodies.*

### Recommendations relating to the Investigating Judges

JSMP recommends that:

1. *A plan be developed for the provision of Investigating Judges to each District Court and whose duties shall, where possible, not include sitting as a trial judge;*
2. *Measures be implemented to assist in the ease and timeliness of transporting suspects and other relevant parties to Dili for 72 hours review hearings, especially suspects and victims coming from the jurisdiction of Oecusse District Court;*

3. *Investigating Judges should pay greater attention to their roles in protecting the rights of the suspects , particularly by attempting to ensure the presence of a defence counsel in the 72h review hearing and give due regard to evidence presented by both parties during this hearing and in any request for extension of detention; and*
4. *A formal system of sharing information be implemented between the three prisons, Investigating Judges, the district Public Defenders, National Public Defenders Office, the district court Public Prosecutors and National Public Prosecutor's office with a view to ensuring that the timelines for review hearing are adhered to.*

#### Recommendations relating to the Public Prosecutor

JSMP recommends that:

1. *Sufficiently experienced prosecutor trainees be sworn in as prosecutors as an urgent measure to help alleviate the increasing workload of Office of the General Prosecutor. Additional prosecutors should be allocated to Suai and Baucau courts;*
2. *Supervision and support to the district prosecutor to be provided to ensure that unlawful orders of prosecutors are detected and appropriate measures taken to remedy the situation including sanctions;*
3. *Prosecutors carefully examine the criminal elements of charges under investigation to ensure that arrest warrants and detention orders are not granted in cases that are in reality are not criminal. Training regarding differences between criminal and civil matters to prosecutors should be provided;*
4. *An assessment of prosecutorial resources be undertaken;*
5. *Administrative support be appointed to all prosecutor offices as soon as possible with particular urgency to Suai court; and*
6. *An evaluation of training for prosecutors should be undertaken regularly and consideration given to the impact of the training on the operation of the courts.*



## Recommendations relating to the Defence in the Districts

JSMP recommends that:

- 1. The Ministry of Justice consider recruiting more Public Defenders in order to help minimize current caseloads in the Office of Public Defenders. A public defender for the Suai court should be appointed as soon as possible;*
- 2. Open dialogue should occur between the courts, public defenders and other lawyers operating in the district courts regarding referral of cases and delineation of work;*
- 3. Greater attention should be paid to pre- hearing preparation by public defenders;*
- 4. The Public Prosecutor should provide to defence counsels access to all statements of witnesses and accused made to the police and included in the Court file;*
- 5. Defence counsel should insist on receiving all official document from the prosecutor prior to the hearing to assist in their preparation of the case;*
- 6. The Public Defenders Office should centrally coordinate the Public Defenders working in the Districts, including developing a central case management system. This is especially relevant in assisting Public Defenders from the Districts in contacting and following-up matters with their clients who are detained in prisons outside the district where the public defender is located; and*
- 7. An adequate budget and transportation facilities should be allocated for Public Defenders to travel to the prisons and to the Districts in order to discharge their duties toward their clients and provide information to the communities.*

## Recommendations relating to Victims and Witness

JSMP recommends that:

- 1. Where ever possible victims and witness should be transported to the court separately;*
- 2. The Court should give consideration to allow support persons to attend closed hearings in cases where such attendance would protect the psychological well being of the witness or victim; and*
- 3. Court actors and police pay attention to the rights of victims or witness to try to ensure that they are not pressured or intimidated. If such conduct occurs the investigating judge should be informed. If conduct occurs by court actors, their respective supervising bodies should also be informed.*

## Recommendations relating to Interpreters

JSMP recommends that:

1. *A formal training system for Translation and Interpretation, including training on legal terminology, on the main local languages in East Timor is established. This initiative should start as soon as possible.*

## Recommendations relating to Conduct of Trials

JSMP recommends that:

1. *Judges should inform the accused of their right to remain silent before any questions are asked to the accused at each stage of the trial; and*
2. *Judges give greater consideration to using expedited proceedings in cases where the accused has pleaded guilty and the Judge is satisfied that, among other pre-requisites, the accused understands the consequences of the confession.*

## Recommendations relating to After Trial Considerations

JSMP recommends that:

1. *That consideration be given to the allocation of a budget to assist released prisoners to return home when they have been detained outside of their home district.*

## Recommendations relating to Court of Appeal

JSMP recommends that:

1. *Efforts should be made to develop the language skills of Court of Appeal judges so that all three judges have knowledge of a language commonly used at District Court level. Until that time, interpreting services should be made available at the hearings;*
2. *In every hearing, the Court should enquire about the language understood by the appellant/respondent. In cases where s/he does not understand the language used by the Court of Appeal, JSMP recommends that an interpretation be provided;*

3. *Translations be made of decisions of the Court of Appeal, which are not in a language commonly used by the District Courts, to a language that both parties can understand;*
4. *Decisions of the Court of Appeal be disseminated to the District Courts, after being translated;*
5. *Office of the Public Defenders and the Public Prosecutors develop a system of case management and coordination with the districts Public Defenders and Public Prosecutors in relation to cases that have been appealed against. This recommendation aims at guaranteeing that both Public Defenders and Public Prosecutors are represented before the Court of Appeal;*
6. *The President of the Court of Appeal to follow-up absences of Public Prosecutors and Public Defenders; and*
7. *The President of the Court of Appeal should analyse the possibility of changing the means of delivery of notification to the District Courts. A possibility identified by JSMP is to ensure that District Courts have fax facilities so notification can be faxed.*

#### Recommendations related to Court Administration

JSMP recommends that:

1. *Additional court registry staff be appointed as a matter of urgency to the Suai District Court. A duty of the additional staff member to update a daily trial schedule and caseboard;*
2. *Mechanisms be implemented to facilitate the accessibility of publicly available court documents, such as indictments, judgments and court orders;*
3. *A system of monitoring the operating hours and days of the district courts be implemented. If it has not already occurred, court actors, including Judges, Prosecutors return immediately to Baucau court;*
4. *A formal and regular roster system be implemented immediately for Judges to travel to Oecusse for hearings. A long- term plan of the appointment of an investigative and trial Judge for Oecusse is required. Such a plan should include the provision for two other judges to be assigned to Oecusse Court when a 3 judge panel is requested;*
5. *Phone and fax facilities be provided to the district courts as a matter of priority;*
6. *An evaluation of other facilities required by the courts be conducted;*

7. *Police be assigned to provide security to the Baucau court on a full time basis;*
8. *A strategic plan be developed for the provision and sharing of information between the district courts and national bodies including methods to provide timely updates on changes to the law; and*
9. *Individual courts should be provided with adequate finances and financial administration for incidental expenses relating to witness's and accused.*

#### Recommendations relating to Coordination between National and Districts Level

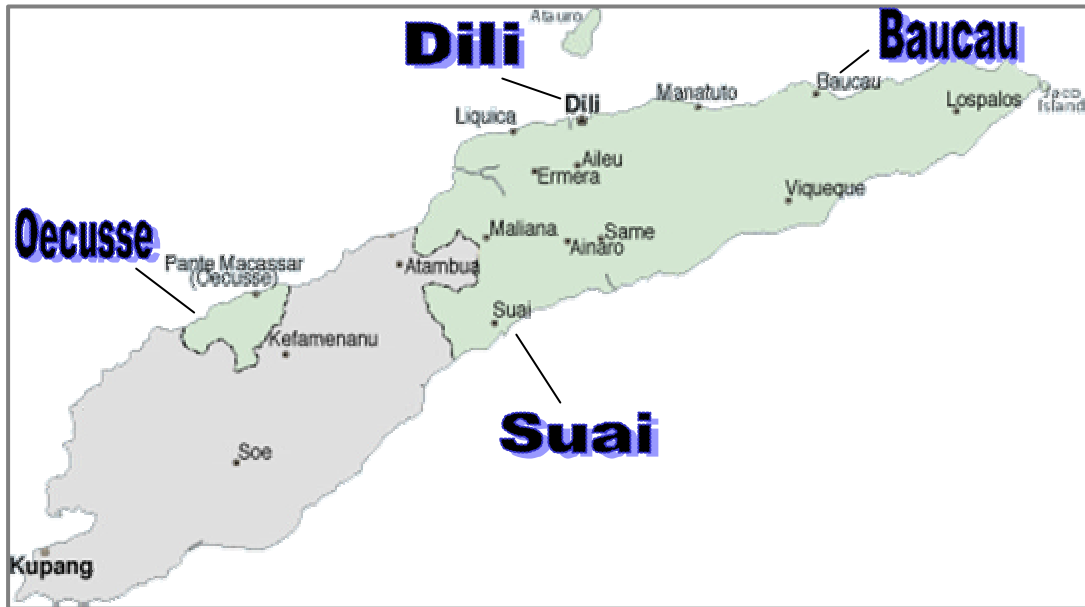
JSMP recommends that:

1. *The central bodies pay more attention to ensuring that the District Courts receive sufficient support. In addition, the national bodies attempt to establish a relationship where all court actors can be included;*
2. *The Consultative Council of the Ministry of Justice, during its monthly meetings, take the initiative of inviting other Court actors to participate in these meetings;*
3. *The National Direction of Judicial Assistance and Legislation of the Ministry of Justice develops a strategy to guarantee that information and materials are distributed to the District Courts;*
4. *The Ministry of Justice, together with other national institutions of the justice sector, develop a directive explaining the channels to be followed in trying to raise an issue to the attention of the Minister of Justice;*
5. *The 2004 budget allocation have regard to the needs of the District Courts. In the interim, as the Courts, Public Defenders and Public Prosecutors cannot independently manage their budget, a directive should be developed by the Ministry of Justice establishing the procedure that should be followed to ensure that these institutions have a clear and speedy process for accessing their allocated budget;*
6. *A Directive be issued by the President of the Court of Appeal, in consultation with the Superior Council of the Judiciary, identifying areas to be dealt with by the President of the Court of Appeal and which areas are to be dealt with by the Superior Council of the Judiciary;*
7. *A Directive be issued establishing the procedure which should be followed by Judges, Public Prosecutors, Public Defenders and Court Clerks in raising an issue to the President of the Court of Appeal regarding Court Administration;*
8. *Consideration be given to creating a position of a national Court Administrator. This position would be responsible for the supervision of the administration of the District Courts in East Timor thus reducing the workload of the President of the Court of Appeal;*

9. *Rules on Internal procedure be drafted for the Superior Council of the Judiciary. JSMP further recommends that this should include a procedure whereby Court actors can submit agenda items for the meetings and a procedure for bringing a complaint related to the work and performance of the Judges. Due consideration should be given to preserve, as far as possible, the anonymity of the person making the complaint;*
10. *Staff be recruited to the Secretariat of the Superior Council of the Judiciary, as provided by the Statute of the Judicial Magistrates Law; and*
11. *While the Government Gazette is not being printed and distributed, the Superior Council of the Judiciary should develop a mechanism by which the Judges of the District Courts can have access to the deliberations of the Superior Council of the Judiciary.*

## 2 DISTRICT COURTS IN EAST TIMOR

The three District Courts included in this report are Baucau, Oecusse and Suai Courts<sup>4</sup>.



The District Courts were established by UNTAET Regulation 2000/11. They are currently applying Indonesian civil and criminal law, subject to section 3 of UNTAET Regulation 1999/1. Rules of criminal procedure are regulated by UNTAET Regulation 2000/30 as amended by Regulation 2001/25.

<sup>4</sup> Dili District Court was covered in a separate report: JSMP Dili District Court Final Report, December 2003.

## 2.1 Baucau District Court

Baucau District Court<sup>6</sup> has been in operation since 15 September 2000. As examined in this report, since its establishment, Baucau court has experienced significant development and also periods of great challenges.

Challenges were faced when in July 2003, two of the four Baucau panel Judges departed to Portugal for training and the Investigative Judge (who also is the Judge Administrator) was on maternity leave for approximately four months during this year. In addition, during most of the year the Court operated with only one defence counsel – a Public Defender - and two Prosecutors.

In general, the functioning of the court actors during the monitoring period was impressive, including their willingness to identify and implement temporary solutions to solve problems related to the lack of support and supervision. The Court's good record changed dramatically after an autonomous decision by court actors not to hold trials in Baucau from September 2003.

Before September 2003, the Baucau court was holding hearings 3 days a week - from Tuesday to Thursday – using Mondays and Fridays for traveling to and from Dili. It was intended that on Mondays and Fridays the Court building should stay open to the public and the court administration should function normally.

Since the establishment of the court, Judges and Prosecutors, have faced problems in relation to accommodation. Houses for these court actors were rehabilitated through funding provided by USAID and were to be furnished with funds from the Ministry of Justice. When by the end of August 2003, the accommodation had not been ready for lack of furniture, Judges and Prosecutors decided not to return to Baucau. All trials in Baucau were postponed without prevision as to when trials would continue. According to the Prosecutors, the decision was a protest against the delays in providing furniture for the houses and an attempt to pressure the Ministry of Justice to act. By mid September, two of the Judges houses were furnished but furniture to the Prosecutors' house had not yet been provided. At the time of writing of this report, Judges and Prosecutors indicated they may return to Baucau in the first week of December.

In JSMP's opinion, there is nothing that can excuse or support the decision not to hold court hearings during 3 months in Baucau District Court. JSMP is aware that Courts have faced significant problems communicating with and obtaining a timely response from the Ministry of Justice on this issue. However, the duty of Judges and Prosecutors towards the judicial system, their responsibility to hold trials and to protect the rights of the accused and victims should not be jeopardized by a conflict with the Ministry of Justice.

### Baucau Court

#### Geographical Jurisdiction

✚ Baucau  
✚ Lautem<sup>5</sup>  
✚ Viqueque  
✚ Manatuto.

#### Current Court Actors

✚ 2 Panel Judges  
✚ 1 Investigative Judge/Judge Administrator  
✚ 2 Public Prosecutors  
1 Public Defender  
1 LBH lawyer (started Aug 2003)  
9 Registry Staff

#### Court Location

Baucau - Rehabilitated Court Building from period of Indonesian occupation

<sup>5</sup> The capital of district is Los Palos.

<sup>6</sup> Abbreviated in this report as BDC.

## 2.2 Suai District Court

Suai District Court<sup>10</sup> is currently operating in the of the Dili District Court complex. JSMP was informed that the Court in Suai could not operate from Suai because there are no Public Defenders in Suai, most of the suspects and accused are detained in Becora prison and, most recently, the judges from Suai are required to assist Dili and Oecusse District Courts.

The failure of the Suai District Court to function from Suai is the most serious impediment to the effective functioning of the court and its ultimate purpose to bring justice to the districts under its jurisdiction. In considering long term plans to relocate the Suai Court to Suai it is important to have regard to three issues. Firstly, the Suai court is currently making use of materials belonging to the Dili District Court, therefore in order to be able to move, it is necessary that further material resources be provided<sup>11</sup>. Secondly, currently cases from Suai are being shared amongst the Public Defenders in Dili, and therefore imperative to appoint a Public Defender to reside in Suai. Thirdly, if the training in Portugal continues and other groups of Judges depart to Portugal, Suai Court will remain with only one Judge.

JSMP believes that planning should commence as soon as possible and all these and any other important issues should be addressed.

### Suai Court

#### Geographical Jurisdiction

- ✚ Cova Lima<sup>7</sup>
- ✚ Bobonaro<sup>8</sup>
- ✚ Ainaro
- ✚ Manufahi<sup>9</sup>

#### Current Court Actors

- ✚ 2 panel Judges
- ✚ No Administrative Judge
- ✚ 1 Public Prosecutor
- ✚ 1 Trainee Public Prosecutor
- ✚ No Public Defender
- ✚ 1 Court Registry

#### Court Location

Dili District Court complex

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<sup>7</sup> The capital of the district is Suai.

<sup>8</sup> The capital of the district is Maliana.

<sup>9</sup> The capital of the district is Same.

<sup>10</sup> Abbreviated in this report as SDC.

<sup>11</sup> In contrast to Baucau court it is noted that the houses for the judges and Prosecutors in Suai were ready to be occupied at the time of writing.



## 2.3 Oecusse District Court

The Oecusse District Court<sup>13</sup> formally commenced operating on 31 May 2000. The jurisdiction of the Court in Oecusse covers the entire Oecusse enclave.

In comparing the establishment of the three district courts, Oecusse was the Court which faced the biggest challenges. Oecusse had consecutive long periods when Judges and other court actors were absent. These absences resulted in the Court only effectively working for one and half years since its establishment.

An international Judge was appointed to the Court in June 2000. As well as being appointed as a Panel Judge, the international Judge held the positions of Judicial Officer, Legal Officer and Land and Property Officer. However, from June 2000 until the Judge's departure in September 2001, no cases were heard as there was no Public Defender in Oecusse. A Public Prosecutor was then appointed in August 2001. With the departure of the international Judge in September 2001, a National Judge was appointed but did not effectively start working until early 2002. With the availability of only one Judge, the Judge accumulated the functions of Panel Judge and Investigative Judge. In July 2003, the only Judge went to Portugal to undertake one year training. The immediate result was that Oecusse court has since practically stopped functioning.

In August 2003, Judge Claudio Ximenes, President of the Court of Appeal and President of the Superior Council of the Judiciary, directed that Judges from all District Courts should assist other courts. In November 2003, in response to this direction, two Suai Judges, accompanied by Suai court clerk, went to Oecusse to hold hearings. Three *LBH*<sup>14</sup> lawyers also went to Oecusse to assist the Public Defender. The initial plan was for the Court to function for a period of two weeks. However, in reality, hearings were only heard during two days over the first week of November<sup>15</sup> and only 8 out of 25 cases which were ready for trial were heard in this period. JSMP was informed that the Judges planned to return to Oecusse in the first week of December; at the time of writing this had not occurred because of a lack of resources. The Judges indicated that they still hoped to be able to go to Oecusse before 2004.

### Oecusse Court

#### Geographical Jurisdiction

✚ Oecusse enclave

#### Current Court Actors

✚ No Judge currently in Oecusse

✚ 1 Prosecutor

✚ 1 Public Defender

✚ 1 Court Registry

#### Court Location

Oecusse

Interim location at former District Administrator's residence<sup>12</sup>

<sup>12</sup> The Court is to be located permanently in the large complex located in central Oecusse. After being destroyed in September 1999, by the end of 2001 the complex was completely rehabilitated. According to information gathered by JSMP, the main reason for Oecusse court not being able to move to its permanent facilities is the lack of furniture and office equipment. Although the current Court House is small, the Judge, Prosecutor and Public Defender have offices within the Court building.

<sup>13</sup> Abbreviated in this report as ODC.

<sup>14</sup> LBH is the abbreviation for Legal Aid Clinic in Indonesian. See Chapter 3.4 Defence in the Districts for discussion of LBHs.

<sup>15</sup> Judges arrived on 5 November and left on 7 November 2003.

### 3 COURT ACTORS

#### 3.1 Judges

Since their establishment, the District Courts have faced a shortage of Judges. However, the problem acute in July 2003 with the departure of 9 Judges, 5 from the District Courts (4 Panel Judges and 1 Investigative Judge), to attend training in Portugal for one year.

In an attempt to address some of the consequences of the departure of the Judges, all district courts were requested to assist each other<sup>16</sup>. The shortage of Judges also created practical difficulties in ensuring that three-judge panels could be established. The place of residence of Judges has also impacted in the overall functioning of the courts.

Another issue relating to the performance of the judges that is important to address is the distribution of cases. This is because different procedures are being adopted by individual District Courts irrespective of the existence of a national directive.

##### 3.1.1 'Sharing' of Judges between Courts

Currently all four district courts are facing difficulties due to the departure of Judges to Portugal for training. In response to this problem 'sharing' of Judges between courts was considered as a possible method of alleviating the shortage of Judges of individual Courts.

According to information obtained by JSMP, in August 2003, Judge Claudio Ximenes, President of the Court of Appeal and President of the Superior Council of the Judiciary, directed all Judges to provide assistance when needed to other district courts. Even though the direction targeted Judges of every district court, the reality dictated that most assistance would originate from **Suai** Court and Suai judges. This is due to the current location of the Suai court in Dili and its light caseload, compared to the **Dili** and **Baucau** courts.

In **Oecusse**, due to the total lack of Judges, the court requires the assistance of Judges from other courts to hear all cases. As previously mentioned, during the first week of November 2003 **Suai** Panel Judges travelled to Oecusse to hear some of the cases.

##### 3.1.2 Three-Judge Panel

Currently, **Oecusse**, **Baucau** and **Suai** district courts do not have sufficient Judges to hold hearings with a panel of three judges.

Sections 12.1 and 12.2 of UNTAET 2000/11, as amended, provides that a case can be heard by a three-judge panel, on the request of one of the parties, in cases where the sentence could amount to more than five years imprisonment or where the civil claim exceeds 1000 American dollars.

#### **Baucau**

- ✚ Currently 2 Panel Judges and one Investigative Judge
- ✚ 2 Panel Judges went to Portugal in July 2003
- ✚ 2 Panel Judges substituted, on a rotation basis, the Investigative Judge who was on maternity leave from May to Aug 2003
- ✚ Judges living in Dili and travelling to Baucau until Sept 2003
- ✚ Since Sept 2003 Judges stopped going to Baucau to hear cases

#### **Oecusse**

- ✚ No Judges since July 2003
- ✚ Only Judge went to Portugal in July 2003
- ✚ Suai Judges assisting in hearing cases from Oecusse

#### **Suai**

- ✚ Currently 2 Panel Judges
- ✚ 1 Panel Judge went to Portugal in July 2003
- ✚ Assisting Oecusse and Dili

<sup>16</sup> See further Chapter 4.4 Training of Judges, JSMP Dili District Court Final Report, December 2003.

Currently, due to the numbers of Judges, if three-panel judge hearings were required in **Baucau** and **Suai** Courts, they would need assistance from judges of other Courts<sup>17</sup>.

Despite the timely direction from the Judge Claudio Ximenes, that Judges should assist other courts, there is a shared scepticism between court actors as to the possibility of constituting three-judge panels even with the assistance of Judges from other Courts, because of the general shortage of Judges in every District Court. During the monitoring of the **Baucau** court, court actors admitted believing that any request for the assistance of another Judge would not be realised because of the practical difficulties. Judges from the Court also told JSMP that in 2002 a decision had been made that three-judge panels would not be constituted in the Baucau court<sup>18</sup>. JSMP is aware that since September 2002 no cases have been heard by a three-judge panel in Baucau court. One of the reasons is, of course, the lack of requests from the parties. However, JSMP is of the opinion that the Public Defender and Public Prosecutors were influenced by the Judges' decision not to hold cases with a full panel.

This situation is not isolated to **Baucau**. To JSMP's knowledge during the last six months there have been no requests for three-judge panels for **Suai** cases. An additional deterrent for requesting a panel is the fact that cases in which a panel was established in the past are now stalled due to the unavailability of judges.

A three-judge panel was requested for the case of Public Prosecutor v. Joaquin Santos and Others (also known as the Kolimau 2000 case) (Case Number 08/2002 SDC). In July one of the judges left to Portugal. The last hearing took place in 9 June 2003; no hearings have been held since then. Neither there have been attempts to allocate a third judge to complete the panel.

JSMP is concerned that the shortage of judges has resulted in practical inability for three-judge panel cases to progress efficiently and has curtailed requests for three-judge panels. These consequences need to be taken into account when considering the appointment of new judges or the continuation of the programme to send judges to Portugal for training<sup>19</sup>.

### 3.1.3 Distribution of Cases

In any court procedure the distribution of cases is an important safeguard for guaranteeing the impartiality of judges. The distribution must be based on an objective and fair procedure that does not allow Judges to choose their cases.

In East Timor the procedure for case distribution is determined by the Practical Directive 01/2001 of the President of the Court of Appeal. The procedure is based on a 'draw' of the incoming cases by the Judges of the court<sup>20</sup>.

In **Baucau** court there was a clear adherence to the directive on the allocation of cases. However the two other District Courts were not following the prescribed procedure.

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<sup>17</sup> See below Chapter 3.1.2 Three-Judge Panel.

<sup>18</sup> The reasons given to JSMP for taking this decision was the need to guarantee efficiency and to relieve the workload of Judges. It should be noted that Judges do not have the discretion in deciding not to hold a three-judge panel and consequently the decision as highlighted above is in breach of the law.

<sup>19</sup> For information on the Judge's selection criteria for the training in Portugal, see Chapter 4.4 Training of Judges, JSMP Dili District Court Final Report, December 2003.

<sup>20</sup> For more information see Chapter 4.1.1 Distribution of Cases in Dili District Court, JSMP Dili District Court Final Report 2003, November 2003.

In **Oecusse**, before July 2003, there was no need to distribute incoming cases as the court had only one Judge. With the departure of the Judge and the uncertainty of the situation, no case distribution was made between July and November 2003. In November, when **Suai** judges went to Oecusse, JSMP observed that the distribution of cases to Judges did not appear to be following any systematic procedure. Distribution appeared to follow a rotation between Judges where, in turns, they were given cases that were ready for the hearing after the presence of accused and witnesses had been confirmed.

According to information collected by JSMP, no draw normally takes place when distributing **Suai** cases. Cases are allocated following the alphabetical order of the first names of Judges.

JSMP is aware that the practical circumstances in **Oecusse** had, to some extent, prevented a distribution of cases following the established procedure. It is, however, important in the future that **Oecusse** court and **Suai** Judges and administrators plan the distribution of cases as the deviation from prescribed procedures by **Oecusse** and **Suai** courts not only undermines the perception of impartiality of the individual Judges but also detracts from uniformity between the different Courts.

#### 3.1.4 Judges Residence Outside Court Jurisdiction

In East Timor there is a concentration of legal professionals in the capital, Dili. Because of the difference between infrastructure and facilities available in Dili and in other districts, it is understandable that many people, including Judges, prefer to reside in Dili.

The importance of Judges' residence within the court's geographical jurisdiction should not be underestimated. There are many supporting arguments for requiring Judges to reside in the jurisdiction of the court, including the need to know the geographical area of the court and the need to be present for any emergency. It is also important for the smooth running of the court that Judges reside within the court area in order to decrease the possibility of delays in scheduling due to the absence of judges because of transportation problems.

The importance of Judges' residence within the courts' jurisdiction is highlighted in Section 38 of the Statute of Judicial Magistrates Law. This law provides that an exception to the rule of Judges residing in the court's jurisdiction can only be made with a previous permission of the Superior Council of Magistrates. JSMP is aware that the Statute for Judicial Magistrates does not necessarily apply to probationary judges<sup>21</sup>, however this rule is important for many reasons as highlighted above.

The main incentive for Judges to live in **Baucau** and **Suai** was the provision of houses for Judges and Prosecutors<sup>22</sup>.

Currently, none of the district Judges reside within the court's jurisdiction.

Prior to September 2003<sup>23</sup>, the Judges in Baucau would travel to and from Dili on Mondays and Fridays<sup>24</sup>. The location where judges happen to be during the weekend should not be necessarily

#### Baucau

All Judges are residing in Dili as at time of writing this report.

#### Oecusse

No judges are presently in Oecusse. Suai Judges, who reside in Dili are hearing Oecusse cases.

#### Suai

Judges are residing in Dili where the court is sitting.

<sup>21</sup> See JSMP Report Statutes of Judicial Magistrates, July 2003.

<sup>22</sup> On the status of the rehabilitation of the houses, see Chapter 2.

<sup>23</sup> As already discussed in this Report, after September Judges decided not to return to Baucau. See Chapter 2.1.

relevant, as long as it does not directly interfere with the functioning of the Court. Mondays and Fridays are court functioning days and, if needed, hearings should be scheduled in these days. It is then important that once the houses are ready to be occupied that Judges are present in Court during the entire Court functioning hours, i.e. Monday to Friday from 9 a.m. to 5 p.m.

### *3.1.5 Training*

In July 2003, one Judge from **Suai**, two from **Baucau** and one from **Oecusse** went to Portugal to undertake a one year training programme<sup>25</sup>.

The initial plan was to send one group of Judges for training in 2003 and then another group in 2004. JSMP recommends that the viability of the initial plan should be analysed, taking into account the possible consequences for the functioning of the district courts, before the second group of Judges departs for training in 2004<sup>26</sup>.

During this year, the International Development Law Organisation (IDLO) developed initiatives for the training of Judges. To date training of Judges had not taken place due to lack of approval by the Superior Council of the Judiciary.

The Government of East Timor, specifically the President of the Court of Appeal, the Prosecutor-General and Vice-Minister of Justice, are developing a national training policy for the justice sector. Within the programme, a Council of Coordination is to be established to oversee the elaboration and implementation of the programme<sup>27</sup>.

### *3.1.6 Supervision and Support*

Supervision of Judges, similar to the supervision of all court actors, is of the utmost importance taking into account the fact that Judges were appointed having little previous legal experience<sup>28</sup> and the isolation of the District Courts from Dili, where central administration is based. Both the Superior Council of the Judiciary and the President of the Court of Appeal are mandated to provide varying kinds of supervision and support to Judges and to the overall administration of the courts<sup>29</sup>.

Each Court has an appointed Judge Administrator who has the responsibility to deal with administrative matters of the District Court<sup>30</sup>. The Judge Administrator is not strictly speaking responsible for the supervision of Judges. However as Court administrative matters are directly connected to the conduct and work of Judges<sup>31</sup>, a certain degree of supervision is required by the Judge Administrator.

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<sup>24</sup> In reality during JSMP monitoring in August 2003 Judges and Prosecutors arrived from Dili only on Tuesday around midday and left to Dili around 15 hours on Thursday.

<sup>25</sup> For further information see Chapter 4.4 Training, JSMP Dili District Court Final Report, December 2003.

<sup>26</sup> For example, if the remaining Suai two panel Judges go to Portugal in 2004, Suai court would remain with only one Judge.

<sup>27</sup> Letter signed by Vice-Minister of Justice, president of the Superior Council of Judiciary and Prosecutor General on the National Training Policy for the Justice Sector, 14 October 2003.

<sup>28</sup> The issue of permanent appointment of probationary Judges was dealt in the DDC. See

<sup>29</sup> See below Chapter 9 Relationship between National and Districts Level.

<sup>30</sup> Section 6A.2 UNTAET Regulation 2000/11, as amended by 2001/25.

<sup>31</sup> Section 6A.2 UNTAET Regulation 2000/11, as amended by 2001/ 25.

The duties of the Judge Administrator include having to write monthly reports to the President of the Court of Appeal. JSMP is aware that these reports only provide a general view of the work of the court including basic statistics. In JSMP's opinion these reports should include substantive information on the performance of Judges as it relates to the administration of Court. Presently, the capacity of the Judge Administrator to fulfil his/her tasks is limited by competing duties as a Judge in the Court. In addition, the Judge Administrator has a similar level of experience and knowledge as others Judges of the court.

In JSMP's opinion, there is generally a lack of efficient and sufficient supervision of the daily work and performance of Judges by Superior Council of the Judiciary and the President of the Court of Appeal. It is then necessary to strengthen the supervision and support mechanisms of these bodies as well as the skills of Judges Administrators<sup>32</sup>.

*JSMP recommends that:*

- 1. A formal directive be issued requesting the assistance of Judges to assist in hearing cases of other Courts. This Directive should include rules on how the request is to be implemented and should be circulated to all court actors;*
- 2. For the purposes of impartiality, the dlocation of Oecusse cases to Suai court judges, or any other judges who may assist in Oecusse, be conducted following the procedure established by the Practical Directive 1/2001 of the President of the Court of Appeal;*
- 3. Prior to sending a second group of judges to Portugal for training an assessment of the training be conducted including the consequences for the functioning of the District Courts in their absence;*
- 4. A Directive be issued by the President of the Court of Appeal detailing the tasks that are required to be undertaken by District Courts' Judge Administrators, including guidelines on the type of information to be included in the monthly report; and*
- 5. The supervision and support mechanisms for Judges in the districts be strengthened in addition to the capacity of the Judge Administrator and national bodies.*

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<sup>32</sup> See below Chapter 8.

### 3.2 Investigative Judge

The authority of the Investigating Judge, as outlined by the Regulation<sup>34</sup>, includes the duty to guarantee the rights of persons subject to criminal investigations as well as victims of crimes. The Investigating Judge also has the power to issue various types of orders and warrants in relation to the investigation of criminal matters<sup>35</sup>.

Ideally the function of the Investigative Judge and panel Judge should be performed by different judges<sup>36</sup>. The separation of functions is primarily aimed at guaranteeing the impartiality of Judges<sup>37</sup>. However, in **Oecusse** and **Baucau** it has proved impossible to maintain the separation of the positions for the entire year.

In **Oecusse**, due to shortage of Judges, the panel Judge was appointed also as the Investigative Judge in late 2001<sup>38</sup>. In **Baucau**, between April and August 2003, the Investigative Judge was in maternity leave and the two panel Judges were then rotating as Investigative Judge.

One of the responsibilities of the Investigative Judges is to hold 72 hour detention review hearings. In analysing the conduct of these hearings, JSMP identified various shortfalls, including lack of attendance of defence counsel and problems with transportation of suspects and victims. JSMP also identified problems with the decisions on the continuation of detention and with the expiration of the pre-trial detention period.

#### 3.2.1 Initial Detention Hearings (72 hours Review Hearings)

Procedures associated with conducting initial detention review hearings are government by Section 20.1 of UNTAET Regulation 2000/30, as amended which states that:

Within 72 hours of arrest, the Investigating Judge shall hold a hearing to review the lawfulness of the arrest and detention of the suspect. At this hearing the suspect must be present, along with his or her legal representative, if such a legal representative has been retained or appointed.

The **three district courts** faced great challenges in holding review hearings as in accordance with the law. The main challenges related to transportation of suspects and the presence of defence counsel.

##### 3.2.1.1 Problems with Transportation

#### Baucau

- ✚ 1 Investigative Judge residing in Dili
- ✚ Investigative Judge in Maternity Leave from May to Aug 2003
- ✚ Two Panel Judges rotating as substitute
- ✚ 49 Pre-trial detainees in Becora Prison
- ✚ 23 Pre-trial detainees in Baucau Prison (Aug 03)
- ✚ Approximately 60 72h hearings conducted in Dili between middle Aug to middle Nov<sup>33</sup>

#### Oecusse

- ✚ No Investigative Judge from Sept 01 to Jan 02 and from July 02 to date
- ✚ around 5 72h hearings conducted in Dili between July 02 to date
- ✚ 6 Pre-trial detainees in Becora Prison

#### Suai

- ✚ 1 Investigative Judge residing in Dili without administrative staff

<sup>33</sup> This information was provided by the Baucau Prosecutor. In JSMP's view this figure is relatively high considering other monitoring periods.

<sup>34</sup> Section 9.1 of the UNTAET Regulation 2000/ 30 as amended by 2001/ 25.

<sup>35</sup> See for further information JSMP DDC Report, Chapter 5.

<sup>36</sup> Legally speaking, it is not *per se* prohibited the participation of the Investigative Judge as a trial Judge in terms of Section 10 UNTAET Regulation 2000/ 30, as amended by 2001/25.

<sup>37</sup> See Section 10 UNTAET Regulation 2000/30, as amended by 2001/ 2.

<sup>38</sup> Administrative Directive 2001/37, the President of the Court of Appeal, 10 December 2001.

Suspects coming from the districts often had to be brought to Dili to attend the 72 hour review hearings before the Investigative Judge.

All review hearings from **Suai** Court had to be heard in Dili, as the court has been functioning from Dili.

Until the court's recession in mid August 2003, suspects arrested in the jurisdiction of **Baucau** court had only to be transported to Baucau court between Tuesdays to Thursdays. If there was the need to hold any review hearing between Fridays and Mondays, the police had to transport suspects to Dili as the Judges would be in Dili. After middle August 2003, the situation changed and every suspect had to be transported to Dili as the Investigative Judge was no longer travelling to Baucau<sup>39</sup>.

Without a Judge in **Oecusse** since July 2003, any arrested person should have been brought to Dili for the initial detention review hearing.

**All three District Courts** needed to transport suspects to Dili regularly and all courts experienced transportation problems. However, it was **Oecusse** Court which faced the greatest challenges. Because of the geographic location of Oecusse it is very difficult to transport suspects overland. It is also not advisable to rely on the transport of suspects by ferry because of the travelling time and the schedule of the boat<sup>40</sup>. The most practical option is to bring suspects by air. The police in Oecusse do not have a helicopter or airplane and have to rely on United Nations' flights. However, the UN flights were often in high demand during the monitoring period and East Timorese court staff and suspects are not within the priority list of passengers. Difficulties in transporting suspects was further increased due to the fact that generally the suspect with two escort police officers, court actors and witnesses needed to be transported for the hearing. JSMP became aware of approximately 5 occasions when the Oecusse Court could use the UN flights when needed

**Oecusse**

✚ approximately 5 suspects were brought in UN flights to Dili  
✚ 39 suspects were initially arrest by the police

Difficulties will invariably increase as the downsizing of the United Nations presence in East Timor occurs and consequently the number of flights between Oecusse and Dili decreases. JSMP believes that there is an urgent need to consider the issue of transportation of suspects for review hearings between Oecusse and Dili until the return of Oecusse Judge in June 2004.

JSMP was informed that in order to overcome the difficulties in transporting suspects from **Oecusse** to Dili, suspects would often be released before the expiration of the 72 hour period. Sometimes they would be re-arrested again once the police had received authorization to transport the suspect in an UN flight. The second arrest would rarely be based on a warrant of arrest as there was no Investigative Judge in Oecusse and requests for warrant of arrests had to be sent to Dili. JSMP has also become aware of situations where the Public Prosecutor in **Oecusse** issued detention orders<sup>41</sup>.

JSMP understands how difficult it has been for the police and the court in **Oecusse** to transport suspects to Dili, however, JSMP strongly disapproves the mechanisms used to overcome the

<sup>39</sup> For the reasons, see Chapter 3.1.4 Judges Residence Outside Court Jurisdiction.

<sup>40</sup> Usually the ferry boat connects Oecusse to Dili only twice a week. The duration of the travel is between 12 to 15 hours.

<sup>41</sup> See Chapter 3.3 on Public Prosecutors.



problem. Any steps taken by the police and the Public Prosecutor should always be in accordance with the law. The Public Prosecutor has no power to issue orders for the detention of suspects as this is a power of Investigative Judges as provided in Section 20.6 of the Regulation. A procedure of arresting and re-arresting a suspect without a warrant of arrest is in clear violation of the right to personal freedom that is guaranteed in the Constitution<sup>42</sup>.

Police from the districts under the jurisdiction of **Suai** and **Baucau** courts also face transport difficulties due to a shortage of vehicles. For example, the police in Viqueque had only one vehicle and when it was needed to bring a suspect to Dili, the district police would remain without transport for daily policing work.

### *3.2.1.2 Lack of Presence of Defence Counsel*

JSMP identified **Baucau** District Court as the court that faced the greatest challenges in attempting to guarantee the presence of defence counsel at 72 hours review hearings.

For JSMP's knowledge, a great number of 72 hours review hearings between May and August 2003 were heard without the presence of the only Public Defender in Baucau. The main reason often stated by Judges, and the Public Defender himself, was the Public Defender's heavy workload. In most circumstances, the 72 hours review hearings were conducted while the Public Defender was busy in court with another case or while he was absent from court<sup>43</sup>.

However, JSMP believes that the difficulties in guaranteeing the presence of Baucau Public Defender in the 72 hours hearing was exacerbated by a lack of effective communication between the court, including the Investigative Judge, and the Public Defender. During JSMP monitoring in Baucau in July and August 2003, at least two review hearings were conducted in the absence of the Public Defender while he was physically in his office within the court premises. JSMP became aware that the Public Defender's absence in these two review hearings was due to him not knowing that the review hearings were taking place.

Since August 2002 a lawyer from *LBH* Timor-Leste has been working in Baucau<sup>44</sup>. It is hoped that with the presence of this lawyer in Baucau the absence of lawyers in the review hearings will decrease. However, it is still important to make all attempts to appoint another Public Defender to **Baucau**.

JSMP is of the view that the Investigative Judge, within its tasks to look after the rights of suspects, should always on a case-by-case basis ascertain whether the presence of a defence counsel can be guaranteed in the review hearing.

When the 72 hours review hearings of suspects from the jurisdiction of **Baucau** court had to take place in Dili, it was easier to guarantee the presence of a defence council.

The lack of legal representation in the 72 hours review hearings of suspects from **Suai** and **Oecusse** cannot be said to be of a systematic nature when compared to the problem in **Baucau** district court. The main reason is that in Dili it is slightly easy to call lawyers to attend review hearings of suspects from **Suai** or **Oecusse** courts.

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<sup>42</sup> See Sections 30.1 and 30.2 of the Constitution of RDTL.

<sup>43</sup> For further information on the caseload and resources of Baucau Public Defenders, see Chapter 3.4.3.

<sup>44</sup> See below Chapter 3.4 Defence in the Districts.

### 3.2.2 Detention Orders and Extensions

The grounds for pre-trial detention are provided in Section 20.7 and 20.8 of UNTAET Regulation 2000/30.

JSMP has observed that the situation in **Suai**, **Oecusse** and **Baucau** courts in relation to detention orders is similar to the situation in Dili District Court<sup>45</sup>.

From its monitoring, JSMP found that:

- Generally, the decision of the Investigative Judge cited the correct legal provisions applicable to pre-trial detention;
- Reasons for the continuation of the detention were not fully substantiated in the written decision;
- There was the general impression that arguments for the prosecution were more easily accepted when compared to arguments from the defence, and
- Most of the decisions were mainly based on the ground of seriousness of the suspected offence.

In **Baucau** court, JSMP observed that most of the written decisions from the Investigative Judge mentioned the seriousness of the crime as one of the reasons for ordering the detention of suspects<sup>46</sup>.

**Baucau** Judges and **Suai** and **Baucau** Public Prosecutors expressed, in interviews with JSMP, their view that persons suspected of crimes that could amount to more than 5 years imprisonment needed to be under pre-trial detention. This is clearly in breach of the Regulation as it provides an exhaustive list of factors to be considered in deciding to remain the suspect in pre-trial detention<sup>47</sup>; the list does not include the severity of possible sentence.

JSMP also observed that in the **three districts** the decision to extend the initial 30 day detention period was often based on the submission from the Prosecutor that investigations had not yet been finalized. No hearing was held in considering the extension of detention. In JSMP's experience the defence often was not given the opportunity to challenge the request for extension from the prosecution.

JSMP strongly believes that the decision to extend the detention has to include, to a certain extent, an analysis on the development of investigations. In addition, it is essential to provide the defence the opportunity to reply to the request for extension of the detention.

Pre-trial detainees of the **three District Courts** had in some occasions their detention period expired.

In the case of Public Prosecutor v. Francisco da Costa (Case Number 32/2003 SDC) on 11 September 2003, the detention order had already expired since the 10 August of 2003.

#### Statistics of Pre-Trial Detainees

##### Baucau

✚ an average of 80% of suspects/accused of crimes of more than 5 years imprisonment (July 03)

✚ 23 suspects/accused in Baucau Prison

✚ 49 suspects/accused in Becora Prison

##### Oecusse

✚ 6 suspects/accused in Becora Prison

##### Suai

✚ 27 suspects/accused in Becora Prison

<sup>45</sup> See Chapter 5.1 Initial Detention Hearing, JSMP Dili District Court Final report, December 2003.

<sup>46</sup> See for example, the decision of the Investigative Judge dated 19 March 2003 in a case where the suspect was alleged to have committed serious maltreatment.

<sup>47</sup> Section 20.7 and 20.8 UNTAET Regulation 2000/ 30 as amended by 2001/ 25.

JSMP has observed that the geographic distance between the Court in **Baucau** and the detainees held in Dili created obstacles in ensuring that detention periods would not expire. JSMP became aware of two cases where six suspects from the jurisdiction of Baucau court were detained in Becora prison since their initial arrest in March 2003 without having their detention formally extended. The suspects were already detained for more than six months and were only released after a request from an *LBH* lawyer working in Dili. Baucau Judges based their release decisions on the limits for pre-trial detention period as established by Section 20.10 of the Regulation.

These kinds of cases, in JSMP's opinion, are partially the result of poor communication between courts and prison authorities, as well as poor case management on the part of the Public Defenders.

In its monitoring JSMP has observed that in **Baucau**, the administration had a list of the number of suspects detained in Baucau and Becora prisons and the dates as to when their pre-trial detention has to be reviewed by the Investigative Judge. The list was constantly updated by the court administration. No similar list could be found in the **Suai** Court, allegedly due to shortage of staff.

The system of establishing a list with information on the date when detention periods are due to expire is commendable and should be motivated. However, even with this list, situations as the one described above still occurred. In JSMP's view it is important to guarantee that information is shared between the prison, Investigative Judges, district court Public Defenders, the National Public Defender's Office, the district court Public Prosecutors and the National Public Prosecutor's Office.

*JSMP recommends that:*

- 1. A plan be developed for the provision of Investigating Judges to each District Court and whose duties shall, where possible, not include sitting as a trial judge;*
- 2. Measures be implemented to assist in the ease and timeliness of transporting suspects and other relevant parties to Dili for 72 hours review hearings, especially suspects and victims coming from the jurisdiction of Oecusse District Court;*
- 3. Investigating Judges should pay greater attention to their roles in protecting the rights of the suspects, particularly by attempting to ensure the presence of a defence counsel in the 72h review hearing and give due regard to evidence presented by both parties during this hearing and in any request for extension of detention; and*
- 4. A formal system of sharing information be implemented between the three prisons, Investigating Judges, the district Public Defenders, National Public Defenders Office, the district court Public Prosecutors and National Public Prosecutor's office with a view to ensuring that the timelines for review hearing are adhered to.*

### 3.3 Prosecutor

#### 3.3.1 Legal Framework

The integrity and good conduct of the Office of the Public Prosecutor is integral to the overall functioning of the Court system in East Timor. It is imperative that the work of prosecutors is of a high standard as they represent the State and are vested with considerable discretion in leading criminal investigations and conducting criminal trials. In addition to having exclusive competence for the conduct of criminal investigations, Prosecutors also have the discretion whether to issue indictments, request arrest warrants and other orders<sup>48</sup>.

During the monitoring of the **Baucau**, **Oecusse** and **Suai** Courts, JSMP identified eight main areas of concern related to the work of Public Prosecutors. The shortage of Prosecutors and their invariably heavy caseload as well as the issuing of unlawful orders and inappropriate indictments were highlighted as problems. Other important issues which arose when considering the effectiveness of the Prosecutors was the lack of prosecutorial resources and the need for training, supervision and support.

Similar to the situation of the Public Defenders, the need for more Prosecutors for the District Courts is acute. Appointment of new Prosecutors is expected in the near future but so far it has taken a considerable amount of time<sup>49</sup>.

The proposed organic law for the Prosecutors is currently with the Council of Ministers and is not expected to be introduced to Parliament until August 2004<sup>50</sup>. This law is intended to include further guidelines on the functioning of the Prosecutors Office and appointment of Prosecutors.

#### **Baucau**

- ✚ 2 Prosecutors
- ✚ 1200 cases under investigation
- ✚ 26 cases indicted awaiting trial
- ✚ 72 people held in pre-trial detention
- ✚ approximately 121 cases finalized since 2000.

#### **Oecusse**

- ✚ 1 Prosecutor
- ✚ 25 cases ready for trial
- ✚ 96 indictments issued
- ✚ 15 cases finalised
- ✚ 6 people held in pre-trial detention

#### **Suai**

- ✚ 2 Prosecutors (one of them trainee from Serious Crimes Unit)
- ✚ 27 people in pre-trial detention
- ✚ 380 cases referred to the prosecutor since 2002

#### 3.3.2 Caseload

It is clear from the high numbers of cases under investigation and pre-trial detainees that greater attention needs to be paid to the Prosecutors office. Resources are urgently needed to reduce the backlog and associated delays. For example, **Suai** Prosecutors have no administrative support and, in addition to their workload, they are currently providing some assistance to Dili District Court. Managing such a high caseload, including leading police investigation and Court work, is extremely demanding and is currently stretching resources to such a degree that it invariably impacts on the quality of their work.

#### 3.3.3 Unlawful Orders

<sup>48</sup> For detailed information on the law relating to Prosecutors, see JSMP Report, Dili District Court Final Report, December 2003.

<sup>49</sup> There has been trainee Prosecutors since mid 2002. Two of the trainee Prosecutors work in Serious Crimes Unit and the other two have been transferred to Dili District Courts.

<sup>50</sup> It is expected that it will be presented to Parliament in August 2004.

As previously highlighted, Prosecutors have significant powers in criminal cases. With its wide powers, it is important that the Prosecution's authority be implemented strictly in compliance with the law.

The **Oecusse** Prosecutor is in an extremely difficult position due to the extended absence of a Judge and transportation difficulties<sup>51</sup>. Without a Judge's presence, the prosecutor is seen by some as the head of the Court and he is put in a position where he has to make difficult decisions in matters relating to detention of suspects.

JSMP had access to an order of the Public Prosecutor dated 30 September 2003 where the continued detention of a suspect was ordered until the time a hearing could be held<sup>52</sup>. Such an order is unlawful because the Prosecutor does not have the power to issue detention orders<sup>53</sup>. Irrespective of the order, it is illegal to detain a person in excess of 72 hours without a review hearing before an Investigating Judge<sup>54</sup>. The issuing of detention orders by the Prosecutor is a clear violation of law. Despite the intention of the Prosecutor and the difficulties he is currently facing, it is an abuse of power which damages the integrity of the Office of the Prosecutor and undermines the rights of suspects.

#### 3.3.4 *Inappropriate Indictments*

JSMP observed that there was a lack of a clear understanding of the differences between civil and criminal matters by some Prosecutors and other Court actors<sup>55</sup>. Also in certain circumstances Prosecutors issued indictments while other simpler and faster procedures could be used<sup>56</sup>.

In the case of Public Prosecutor v Matias Sicu<sup>57</sup> a charge of fraud and embezzlement was struck out by the Judge after deciding that the case was one of a civil instead of a criminal nature. The case concerned the first party renting a car to the second party. The second party understood the agreement to be that he would rent the car and the payments would go toward purchase of the car so that at the end of the payments he would own the car.

In another case, Public Prosecutor v Paul X<sup>58</sup> the accused was charged with dangerous driving pursuant to Section 10 of UNTAET Regulation 2001/08. The driver was charged because his *mikrolet* was overloaded with passengers and people were hanging outside the vehicle. The police had previously arrested the driver and fined him US\$ 25. The Prosecutor then proceeded to issue an indictment and brought the case to Court. Such offences can be dealt with summarily by the police or in an expedited manner. In this case, the Court confirmed the fine of US\$ 25.

<sup>51</sup> See above Chapter 3.2.1.1 Problems with Transportation.

<sup>52</sup> In this case the suspect was detained in excess of 72 hours. The police in reality did not comply with the order of the Prosecutor and released the suspect before a hearing was arranged. Another Court document issued by the prosecutor of Oecusse Court was used by UNPOL in arranging for the transfer of two East Timorese children to West Timor however this order was not sighted by JSMP.

<sup>53</sup> The power to review detention is vested in the Investigative Judge.

<sup>54</sup> See Section 20 of UNTAET Regulation 2000/30, as amended by 2001/ 25.

<sup>55</sup> Similar situation was found in the Dili District Court. See Chapter 7.1 Unlawful Arrests and Indictments, JSMP Dili District Court Final Report, December 2003.

<sup>56</sup> For example, summary or expedited proceedings in terms of Section 24 of UNTAET Regulation 2001/8 and Section 44.2 of UNTAET Regulation 2000/ 30, as amended by 2001/ 25.

<sup>57</sup> Case number not yet allocated.

<sup>58</sup> Case number not yet allocated.

### *3.3.5 Prosecutors and Mediation*

All Prosecutors from the district Courts informed JSMP that they did not engage in mediation of criminal cases because such conduct is not permitted.

JSMP did not monitor Prosecutors participating in mediation procedures. However, JSMP noted that in some cases Prosecutors referred cases to be mediated by the parties themselves.

The **Suai** prosecutor stated that he did not engage in mediation but he might tell the victim and the suspect to find a solution to a particular problem, especially in cases of domestic violence. An indication from the Prosecutor that the parties should attempt to solve the matter out of the Court is inappropriate if there are evidence to support that a criminal act has been committed. In these circumstances, an indictment should be prepared after an investigation.

### *3.3.6 Prosecutorial Resources*

In addition to the need for extra Prosecutors, most Prosecutors interviewed by JSMP declared a need for additional resources to assist them in accomplishing their tasks.

A major issue for the prosecutors in **Baucau** was the lack of furniture in the houses where Prosecutors were to reside. At the time of writing, Prosecutors have not returned to Baucau since the Court recess which was held during the last two weeks of August 2003. According to Prosecutors the decision not to return to Baucau was a protest against the delay of the Ministry of Justice in providing furniture to the houses. The lack of these resources is directly and significantly effecting the functioning of the Baucau Court.

In addition, JSMP was informed by Baucau Prosecutors that it would be useful for them to have a lap-top computer and printer so that they could travel to the sub-districts to take additional witnesses statements and follow through their investigations. Other needed resources identified were: a tape recorder for recording witness testimony, a camera to take photographs of crime scenes, an additional car for travelling to the districts and a radio for communications back to the office. Additional administrative assistance was also needed in the view of the Prosecutors.

The aforementioned list does not purport to be a comprehensive inventory of the needs of the Public Prosecutors; rather it illustrates to audit the resources to identify the Prosecutors' needs.

### *3.3.7 Training and Legal Information*

Training and provision of updated legal information to Prosecutors is fundamental to guaranteeing the continuing and sustainable development of their work.

All national Prosecutors, including the Prosecutor-General, are currently attending training conducted by the International Development Law Organisation (IDLO). The training commenced in October 2003 and is due to continue at least until October 2004. At the time of writing, three training sessions had been conducted. The training sessions are held on two consecutive days in a week per month over three months, to date totalling six sessions. The training was designed so that Prosecutors from the same Court did not have to attend the same training sessions in order to minimize the impact on the Court schedule.

The importance of training is undisputable. However it is worrying that some Court actors from the **Baucau** district Court are using the Prosecutors' training in Dili as a ground to justify their

extended absence from Baucau<sup>59</sup>. The time required for Prosecutors to be in Dili for training is minimal and could in no means be considered as a plausible reason for the two months absence from **Baucau** Court. At the time of writing, the first sessions of training had already been conducted. An evaluation of the training and required attendance of the prosecutors is encouraged to ensure that future disruptions to the functioning of the District Courts does not occur. JSMP has observed that the currently a system of providing updated legal information to Prosecutors in the districts does not exist.

In **Baucau** and **Oecusse**, Prosecutors indicated that it was difficult to get timely information about new developments in the law. In **Oecusse**, the Prosecutor indicated that he had a Compact Disc (a United Nations publication) with the laws updated until April 2003, but has not, since then, received any information on changes or development of new laws. Access to legal developments and training on their implementation is essential to the work of Prosecutors. The provision of access to these resources should be the responsibility of the Office of the Deputy General Prosecutor for Ordinary Crimes<sup>60</sup>.

### *3.3.8 Supervision and Discipline*

Supervision of Prosecutors' work is necessary to ensure the quality of the work and is also useful to identify the needs of Prosecutors and to provide support to them in performing their duties. Further importance is attached to the supervision of Prosecutors working outside Dili due to their isolation.

UNTAET Regulation 2000/16 provides that:

15.3 Under the General Prosecutor, the Deputy General Prosecutor for Ordinary Crimes shall be responsible for the overall management of the Offices of the District Prosecutors (...) and the supervision of the District Prosecutors, and shall be responsible for ensuring the due exercise of the functions vested in said officials; and

15.5 In exercising the supervisory, management and administrative functions of the office (...), the Deputy General Prosecutor for Ordinary Crimes may issue administrative instructions and operating guidelines to any Office of the District Prosecutors or to the public prosecutors and general staff attached to such offices.

Further, the Constitution states that:

It is incumbent upon the Office of the Prosecutor-General to appoint, assign, transfer and promote public prosecutors and exercise disciplinary actions.<sup>61</sup>

It is important that the Deputy General Prosecutor for Ordinary Crimes plays an active role in assessing the administrative needs and the performance of the district Public Prosecution offices. For example, when district Public Prosecutors are failing to appear in the Court that they are assigned to, in JSMP's opinion, it is necessary for the Deputy-General Prosecutor to be assertive in assessing the situation and taking steps to resolve the situation as soon as possible in order to

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<sup>59</sup> See above Chapter 2.

<sup>60</sup> See also below Chapter 9.

<sup>61</sup> Section 132 (5) of the Constitution of RDTL. It is noted that Section 134 of the Constitution of East Timor refers to the Superior Council of the Public Prosecution as an integral part of the Office of the General – Prosecutor. The Superior Council of the Public Prosecution is yet to be established.

ensure proper functioning of the courts. JSMP is not aware of the Prosecutors from **Baucau** receiving an administrative instruction or directive to return to Baucau. The Office of the Deputy General Prosecutor for Ordinary crimes should be adequately resourced to enable him to perform this supervisory role.

*JSMP recommends that:*

- 1. Sufficiently experienced prosecutor trainees be sworn in as prosecutors as an urgent measure to help alleviate the increasing workload of Office of the General Prosecutor. Additional prosecutors should be allocated to Suai and Baucau courts;*
- 2. Supervision and support to the district prosecutor to be provided to ensure that unlawful orders of prosecutors are detected and appropriate measures taken to remedy the situation including sanctions;*
- 3. Prosecutors carefully examine the criminal elements of charges under investigation to ensure that arrest warrants and detention orders are not granted in cases that are in reality are not criminal. Training regarding differences between criminal and civil matters to prosecutors should be provided;*
- 4. An assessment of prosecutorial resources be undertaken;*
- 5. Administrative support be appointed to all prosecutor offices as soon as possible with particular urgency to Suai court; and*
- 6. An evaluation of training for prosecutors should be undertaken regularly and consideration given to the impact of the training on the operation of the courts.*



### 3.4 Defence in the Districts

Although defence lawyers are essential for the development of any judicial system, the general lack of knowledge of and confidence in the judicial system makes the effective participation of defence counsels even more important in East Timor.

Currently in East Timor legal assistance can be provided by either Public Defenders or private lawyers.

Public Defenders are established at a national level with offices in Dili, **Oecusse** and **Baucau**. Public Defenders are funded by the Government. Their role is to provide legal assistance and representation to persons who are involved in criminal investigations and criminal and civil proceedings and who do not have adequate financial resources to pay for such representation<sup>62</sup>. The duties and responsibilities of Public Defenders are set out in UNTAET Regulation 2001/24. A Code of Conduct for Public Defenders is set out in the Schedule to this Regulation. JSMP is aware that in March 2003 a draft proposal of a law for the Public Defenders was sent for consideration to the Minister of Justice<sup>63</sup>.

The East Timorese legal profession is experiencing an increase in the number of private lawyers. Many private lawyers in East Timor are working in institutions called Legal Aid Clinics (*LBH* in Indonesian). *LBHs* in East Timor are not funded by Government and usually rely on funding from international donors. It is intended that *LBHs* should provide legal assistance free of charge to those without the means to pay for legal services. *LBHs* are heavily concentrated in Dili, but this year saw an attempt to provide legal assistance to persons living in the districts out of Dili.

Currently, there is no legislation governing the work of private lawyers. JSMP is aware that the Law of the Statute of Lawyers, which aims to regulate the East Timorese Bar Association, was presented to National Parliament Committee "A" in October 2003.

Both Public Defenders and *LBHs* are important in guaranteeing the rights of suspects and accused and the development of the legal system in East Timor. A further importance is attached to the role of the Public Defenders as they are funded by the Government and are of an institutional nature.

Similar to the situation facing Public Prosecutors, it is apparent that there are currently insufficient numbers of Public Defenders and private lawyers in East Timor.

**Suai** District Court is the only District Court that does not have a Public Defender. The lack of a Public Defender for Suai is an often stated as the reason for the inability of the Suai District Court

#### Statistics relating to Defence in the Districts

##### Baucau

- ✚ 1 Public Defender with no supporting staff
- ✚ Resources: motorbike, one computer and one printer
- ✚ 12 current cases with Public Defender (Aug 03)
- ✚ 1 LBH TL lawyer since Aug 03
- ✚ LBH TL lawyer with 4 criminal cases and 8 Civil cases (Nov 03)
- ✚ Both offices located in the Court Building

##### Oecusse

- ✚ 1 Public Defender with no supporting staff
- ✚ Resources: motorbike, computer and printer
- ✚ Public Defender office located in the Court Building
- ✚ 25 current cases with Public Defender (Nov 03)
- ✚ 2 *LBH* Liberta lawyers assisting in 11 cases (Nov 03)
- ✚ 1 *LBH* TL lawyer assisting in 7 cases (Nov 03)

##### Suai

- ✚ No appointed Public Defender

<sup>62</sup> See also section 135.2 of Constitution of RDTL.

<sup>63</sup> The proposal was supported by *Advocats Sans Frontières*.

to function from Suai. According to information gathered by JSMP, Suai cases are usually divided among different Public Defenders working in Dili.

### *3.4.1 Workload and Management*

Defence counsels should be actively involved at different stages of legal proceedings: at the police station once a person is arrested, before the Investigative Judge for review hearings, during trials and before the Court of Appeal if an appeal had been filed. Defence counsels should also ensure that proper preparation of cases is undertaken, which may entail the need to travel to the sub-districts. In addition it is important that defence counsels employ good systems of case management, have access to available resources and sufficient time to complete all necessary tasks.

According to JSMP's monitoring, neither the **Baucau** nor the **Oecusse** Public Defenders have provided assistance to suspects at police stations. When interviewing the police in **Baucau**, the police responded that it was of no use contacting the Public Defender as he would not have enough time to come to the police station. The Public Defender in **Oecusse** told JSMP monitors that he had never been called to the police station to provide assistance to any person in detention.

As previously highlighted, there was a general lack of attendance of the **Baucau** Public Defender at detention review hearings<sup>64</sup>.

JSMP has observed that criminal cases will often be dealt with by the Public Defenders only after the indictment has been prepared by the Prosecutor. The actual workload of the defence in cases before the Court consequently depends on the pace of the prosecution. An example can be drawn from **Baucau**. In August 2003, the Public Defender had only approximately 12 cases currently before the Court; compared to 1200 cases which were with the prosecution for investigation<sup>65</sup>.

In order to afford a proper defence, the preparation of the defence should not start only once the preliminary hearing has been scheduled. In JSMP's observation in most of the cases Public Defenders would start preparing the defence only at the time of, or just prior to, the preliminary hearing<sup>66</sup>.

Good case management also dictates that lawyers should maintain close contact with the Court administration and inform it if there are any impediments to attending scheduled hearings. In March 2003, JSMP observed that during an entire week the **Baucau** Public Defender was in Dili for training. Around six cases were scheduled and were consequently postponed due to the absence of the Public Defender. If proper case management and communication channels had been ensured, the Court schedule could have been previously modified, thus not requiring unnecessary transportation of the witnesses and accused to the Court.

During the hearings in November 2003, the Public Defender of **Oecusse** received assistance from **LBH Liberta** – two lawyers - and **LBH Timor-Leste** – one lawyer. The three **LBHs** lawyers took 18 out of 25 cases which were ready for preliminary hearing. JSMP was informed that the initiative to assist in these cases originated from **LBH Liberta** and **LBH Timor-Leste** once they became aware that hearings would be held in **Oecusse**.

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<sup>64</sup> See also Chapter 3.2.1.2 Lack of Presence of Defence Counsel.

<sup>65</sup> For more information on the work of the Prosecutors see Chapter 3.3.

<sup>66</sup> See also Chapter 3.4.2 Defence Conduct.

This arrangement is welcomed in an attempt to utilise the combined resources of different institutions to ensure that suspects and accused's rights are protected. JSMP commends the solidarity amongst members of the legal profession and hopes that this kind of initiative and assistance will continue in the future.

In Baucau measures have also been taken to assist in alleviating the difficulties which resulted from shortage of Public Defenders. Since August 2003 one lawyer from *LBH* Timor-Leste has been working with cases from the Baucau Court. An office space within the Court's complex was given to him for an initial six month period. To date, the positive impact of the extra defence lawyer has not been fully realised in Baucau as the lawyer has not yet taken many cases. This could largely be due to the fact that since mid August 2003 Judges and Prosecutors have not been present in the Baucau Court. However, JSMP was informed that there is also a general feeling among the Baucau Judges and Public Defender that the lawyer recently allocated to Baucau will not be able, or willing, to deal with many criminal cases. If this kind of feeling indeed exists, it is important to address it, by ensuring that an open discussion on this matter takes place between Baucau Court actors.

Lawyers' work and case management should not stop with the decision of the district Court. For example, if an appeal has been filed, defence lawyers should ensure that they are updated about the development of the appeal so they are aware and prepared for the appeal hearing<sup>67</sup>.

The management of cases of imprisoned clients is also important as prisoners have the right to request conditional release once two-thirds of the sentence has been served<sup>68</sup>.

#### 3.4.2 *Defence Conduct*

Any defence counsel is under a duty to representing his/her clients' interests<sup>69</sup>. This obligation includes the task of obtaining information from his/her clients to support their case. JSMP is aware that in East Timor the limited knowledge of the accused about the legal system sometimes creates an obstacle for an open and constructive relationship between a lawyer and his/her client.

In a case in Oecusse, the Oecusse Public Defender contacted the victim on three occasions to try to convince her to withdraw the complaint of rape and deal with the case outside the Court system. Even though it could be said that the withdrawal of the complaint would be in the interest of his client, Public Defenders do not have the power to mediate criminal cases that are already within the Court system.

When representing clients' interests, lawyers should ensure that their representation is conducted within the established legal boundaries and reflecting a proper conduct of a lawyer.

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<sup>67</sup> See further Chapter 7 Court of Appeal and the District Courts.

<sup>68</sup> Section 43 UNTAET Regulation 2000/30, as amended by 2001/ 25. See also below Chapter 6.

<sup>69</sup> Section 1.1 Code of Conduct for Public Defenders, UNTAET Regulation 2001/24.

In the case of Prosecutor v. Antonio F. Horta (Case Number 20/2003 BDC), the Public Defender stated that he agreed with the prosecution's case. In addition, prior to sentencing, mitigation arguments were not submitted by the Public Defender.

In the case of Public Prosecutor v. Matias Sicu<sup>70</sup>, during the questioning of the accused by the Prosecutor, the Public Defender did not take any notes. JSMP observed that the Public Defender appeared to be falling sleep.

JSMP is of the opinion that these cases go beyond a lack of preparation but in reality illustrate a basic lack of understanding of the role of a defence counsel.

Accused have the right to a defence as provided in Section 6.3(a) of the Regulation. This right extends to include an accused's entitlement to adequate time and facilities for the preparation of his or her defence<sup>71</sup>. Invariably, the implementation of these rights entails a corresponding duty on the defence lawyer to ensure that s/he can provide sufficient time to prepare the defence.

JSMP has observed that in the district Courts of **Oecusse**, **Baucau** and **Suai** there were many shortcomings in relation to the conduct of the defence which, in certain cases, resulted in a denial of the accused's right to a proper defence.

Firstly, JSMP observed that generally there was very poor case preparation on the part of the defence.

Defence lawyers, mainly Public Defenders, usually met with their clients for the first time just before the preliminary hearing. In addition, JSMP rarely saw Public Defenders in **Oecusse** and **Baucau** having an interview before the preliminary hearing that lasted longer than approximately 15 minutes.

JSMP observed that in the District Courts of **Oecusse** and **Baucau** the vast majority of the suspects – approximately 80% - confessed to the crime for which they were indicted. In such situations it is of utmost importance for defence counsels to consult with their client prior to preliminary hearing. This is essential so that the facts can be analysed in detail in order to identify any legal defence, for example self-defence or mental incapacity, and the consequences of a guilty plea can be fully explained.

In some circumstances in **Baucau** and **Oecusse** Courts, JSMP observed that once a suspect arrived in Court, often it would be the Prosecution, and not the Public Defender, who was the first to meet and speak with the suspect.

If defence lawyers do not have access to testimonies of witnesses given to the police, their case preparation invariably becomes more difficult<sup>72</sup>. JSMP observed that the Prosecutors from **Baucau** and **Oecusse** generally gave the defence access to any statement from the accused or witnesses taken by the police. On the other hand, the **Suai** Prosecutor informed JSMP that he often only provided the defence with a list of the witnesses.

In **Oecusse**, JSMP observed that the case preparation by the Public Defender was basically nonexistent. When the Public Defender transferred cases to other lawyers, no real preparation was

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<sup>70</sup> Case number not yet allocated.

<sup>71</sup> Section 6.3(d) of UNTAET Regulation 2000/30 as amended by 2001/ 25.

<sup>72</sup> The Regulation is silent as to whether there is a duty on the prosecution to provide access to statements taken by the police.

apparent: the case file had only the copy of the documents which were provided by the Prosecutor. In the context of Oecusse it should be noted that the Public Defender informed JSMP that he had a small caseload and in the last two years only 13 cases proceeded to trial.

Case preparation is important when transferring cases to other lawyers. Public Defenders should ensure that if cases are transferred just before the preliminary hearing takes place, all the preparation should be completed and documented. It is also important for the lawyers receiving the cases to ensure that they review the file in a timely manner and follow-up any outstanding matters.

The Public Defenders of **Baucau** and **Oecusse** often have problems following-up their cases if their clients are detained in Gleno or Becora prison. It is important to establish a system where the Public Defenders Office based in Dili can provide assistance to district Public Defenders when such problems arise. In order for the National Public Defender Office to provide this assistance a centralization of information relevant to case management needs to be developed.

JSMP has observed that it is very rare for the defence to call witnesses. In JSMP's opinion the lack of witnesses is a result of the interplay of many factors. Firstly, the defence counsel usually does not have substantial contact with the suspect prior to the preliminary hearing and consequently cannot obtain the information needed to identify possible witness and conduct any necessary interviews. The heavy caseload of some lawyers, especially Public Defenders, is also a relevant consideration. Difficulties in arranging transport facilities in the search for defence witness' can also prevent a thorough investigation of the case. JSMP believes that the lack of understanding of the real role of a defence counsel and a general shortcomings of investigative skills are additional obstacles in providing a proper defence.

#### *3.4.3 Resources*

The Public Defenders in the districts of **Oecusse** and **Baucau** are undoubtedly under-resourced. They have only one motorbike each and very basic office equipment. No telephone land lines are available to either of the Public Defenders.

Without proper means of transport it is difficult for Public Defenders to discharge their duty to cover a large geographic area in order to collect evidence and conduct interviews with prospective witnesses. In addition, the Public Defenders' lack of mobility means that their roles are not widely known within the community. It is imperative that Public Defenders have sufficient transport to facilitate their dual role of providing legal advice and information to the wider community.

JSMP is aware that the National Public Defenders' Office is currently facing difficulties in attempting to access to its budget<sup>73</sup> which affects the resources which are available for the Public Defenders.

#### *3.4.4 Training*

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<sup>73</sup> See below Chapter 9.

Currently, in East Timor no systematic training for Public Defenders or lawyers is in operation. The main training of Public Defenders is through the international mentoring programme<sup>74</sup>.

Up to the date of writing of this report, the international mentors programme had not yet extended to the districts of **Oecusse** and **Baucau**. Public Defenders dealing with **Suai** cases are to a large extent already taking advantage of the mentoring programme as they are working from the National Public Defenders' Office located in Dili.

According to information provided by international mentors, the extension of the programme to include mentoring of **Oecusse** and **Baucau** Public Defenders is currently under consideration.

Any future extension of the mentoring programme to the districts will need to be, in JSMP's opinion, adapted in order to take into account the geographical distance between district Public Defenders and Dili.

#### *3.4.5 Supervision and Support for Public Defenders*

One important area that should not be underestimated when analysing the work of Public Defenders in the districts is the need of supervision from the central office<sup>75</sup>.

JSMP has observed that neither the Public Defender from **Oecusse** nor **Baucau** receives constant and satisfactory supervision from the Public Defender's Office located in Dili. The Public Defenders from **Oecusse** and **Baucau**, as every Public Defender in East Timor, had little experience prior to being appointed. It is understandable that they might be unaware of what should be done in certain circumstances, and therefore close supervision and support is essential.

Supervision is also a good mechanism to identify any shortcomings in the Public Defenders' performance.

An essential area that should be supported by the Office of the Public Defenders is the provision of a replacement Public Defender in cases where a district Public Defender cannot attend a hearing being held in Dili due to time constraints and lack of transport.

*JSMP recommends that:*

- 1. The Ministry of Justice consider recruiting more Public Defenders in order to help minimize current caseloads in the Office of Public Defenders. A public defender for the Suai court should be appointed as soon as possible;*
- 2. Open dialogue should occur between the courts, public defenders and other lawyers operating in the district courts regarding referral of cases and delineation of work;*
- 3. Greater attention should be paid to pre-hearing preparation by public defenders;*

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<sup>74</sup> For further information see Chapter 8.3 Mentoring Programme, JSMP Dili District Court Final Report, December 2003.

<sup>75</sup> See also below Chapter 6.

4. *The Public Prosecutor should provide to defence counsels access to all statements of witnesses and accused made to the police and included in the Court file;*
5. *Defence counsel should insist on receiving all official document from the prosecutor prior to the hearing to assist in their preparation of the case;*
6. *The Public Defenders Office should centrally coordinate the Public Defenders working in the Districts, including developing a central case management system. This is especially relevant in assisting Public Defenders from the Districts in contacting and following-up matters with their clients who are detained in prisons outside the district where the public defender is located; and*
7. *An adequate budget and transportation facilities should be allocated for Public Defenders to travel to the prisons and to the Districts in order to discharge their duties toward their clients and provide information to the communities.*

## 4 OTHER ACTORS

### 4.1 Victims and Witnesses

In East Timor, the rights of witnesses, in particular victims, are afforded high priority both in the law and in practice. The Regulation provides for a wide range of rights for victims, including the right to receive notification about cases, to be represented by a lawyer, request the conduct of certain investigations and to be present at any stage of the trial<sup>76</sup>. It is the Court, including Judge and Public Prosecutor, who are responsible for to the protection of the rights of victims<sup>77</sup>.

In practice in all **three District Courts** the victim was often called to provide evidence at 72h detention review hearings and during the trial.

In almost all criminal cases observed, the victim would be called by the prosecution to give evidence irrespective whether the accused had pleaded guilty or not<sup>78</sup>.

After giving the testimony the Judge would often direct the victim to sit in the Courtroom for the remainder of the trial.

JSMP has observed that, in addition to using the evidence to support the decision on the guilt or innocence of the accused, the evidence of the victim was also taken into account in determining the sentence. The Regulation is silent as to the factors that can be admitted as mitigating or aggravating circumstances, but such an approach by the Courts demonstrates the deference of the Court to the experience of the victim.

In the case of Public Prosecutor v Jose Bareto (Case Number 31/2003 SDC) the accused was convicted of maltreatment. In sentencing one of the aggravating factors was the fact that the victim, due to the injuries sustained, was impaired in carrying out all the duties required by his workplace.

<sup>76</sup> See Sections 12.3, 12.6 and 12.5 of UNTAET Regulation 2000/ 30, as amended by 2001/ 25.

<sup>77</sup> See respectively Sections 9.1 ,7 and 36.8 UNTAET Regulation 2000/ 30, as amended by 2001/ 25.

<sup>78</sup> See for example, Public Prosecutor v. Constantino Soares (Case Number 07/03 ODC).

All the district Courts need to hold at least some hearings in Dili. Therefore, the attendance of victims or witnesses is sometimes dependent on transport. Problems in transporting witnesses were widely identified. For cases originating from **Oecusse**, it was often necessary to transport the victim or witness together with the suspect or accused<sup>79</sup>. In **Suai** some cases had to be postponed because the witnesses could not be transported to Dili because of prior commitments of the police<sup>80</sup>.

Further difficulties in transporting witnesses were also caused by the lack of funds for Courts to pay for transport, food and accommodation costs for witness<sup>81</sup>.

The Regulation provides that hearings can be closed to the public in order to protect the privacy of the persons in cases of sexual offences<sup>82</sup>. JSMP was unable to monitor cases which were closed to the public but did observe that in some cases where women or children were testifying as victims of sexual violence and all actors in the room were male, victims seemed to be unsettled. Persons who could provide moral support to the victims were also not permitted to enter the hearings despite the fact that the victims may have wanted those persons present in the hearing

In the case of Public Prosecutor v Quintino Amaro (Case Number 16/ 2003 SDC) all Court actors, for the exception of the translator, were male. Fokupers support person, who was a woman, was prevented in accompanying the young victim during the hearing.

In cases such as the one illustrated above the Court should ensure that a balance is made between the closed nature of the hearing and the right of the victim to have her psychological well-being protected by the Court<sup>83</sup>. JSMP believes that in some cases the balance will clearly be in favour of the victim. In these situations, the Court should allow certain persons to attend the hearing, provided the wishes of the victim are clear, in order to ensure that the interests of the victim are protected, including their psychological well being when providing often traumatic evidence.

The Regulation provides specific obligations on the Investigating Judge to consider the possibility of threats to the victim or witnesses when dealing with detention orders<sup>84</sup>. However, the Regulation is silent on the protection of witnesses and victims in order circumstances.

JSMP believes that fairness requires that victims and witnesses are protected from any kind of pressure or threat. Consequently, the Courts have to ensure that victims or witnesses are not intimidated, threatened or harmed by the accused, or others advocating for the accused, also outside the Courtroom.

In one case in **Oecusse** the victim was threatened with deportation by the police who were allegedly acting under the instructions of the accused. The victim was also approached on a number of occasions by the lawyer for the accused in attempt to persuade the victim to withdraw the complaint.

*JSMP recommends that:*

<sup>79</sup> See above Chapter 3.2.1.1 Problems with Transportation

<sup>80</sup> See for example Public Prosecutor v Jose da Costa Nunes (Case Number 18/ 2003 SDC) and Public Prosecutor v Abel Relvas Amaral (Case Number 34/ 2003 SDC).

<sup>81</sup> See below Chapter 8 Court Administration.

<sup>82</sup> Section 28.2 UNTAET Regulation 2000/30, as amended by 2001/ 25.

<sup>83</sup> See Section 36.8 UNTAET Regulation 2000/30, as amended by 2001/ 25.

<sup>84</sup> Section 20.8 (c).UNTAET Regulation 2000/ 30, as amended by 2001/ 25.



1. *Where ever possible victims and witness should be transported to the court separately;*
2. *The Court should give consideration to allow support persons to attend closed hearings in cases where such attendance would protect the psychological well being of the witness or victim; and*
3. *Court actors and police pay attention to the rights of victims or witness to try to ensure that they are not pressured or intimidated. If such conduct occurs the investigating judge should be informed. If conduct occurs by court actors, their respective supervising bodies should also be informed.*

## 4.2 Interpreters

The working languages of the Courts in East Timor are Tetum, Portuguese, Indonesian and English<sup>85</sup>. It is a common occurrence in every district Court in East Timor that the accused, as well as witnesses, speak a language other than the language used by the Court.

Every accused has the right to an interpreter if s/he does not understand the language spoken by the Court<sup>86</sup>. In order to implement this right, the Courts in East Timor are under the duty to provide translation and interpretation services<sup>87</sup>.

There is a total lack of interpreters in the Courts of **Baucau**, **Oecusse** and **Suai**. The need for interpretation must take into account the local languages spoken in the geographical area covered by each district Court.

JSMP observed that the **three district Courts** analysed in this report have taken the initiative of using Court Clerks as interpreters when the accused or witness are not able to speak or understand the language used in Court.

The use of Court clerks has proved to be a satisfactory method of ensuring that the accused understands the proceedings. However the lack of formal interpreting skills training is a factor that poses challenges to the accuracy of the interpretation.

### Languages Spoken

#### Baucau District Court Jurisdiction

Galóli  
Makasai  
Mau'oti  
Fatalúku  
Macalere  
Uaimoa  
Midiki  
Tétum  
Bunak

#### Suai District Court Jurisdiction

Tétum Teric  
Búnak  
Tétum  
Kémak  
Mambae

#### Oecusse District Court Jurisdiction

Baiqueno

In the case of Quintino Amaro (Case Number 16/03 SDC) the Court asked the assistance of a female Court officer to assist with the interpretation of a witness testimony.

In the case of Domingos Lelan (Case Number 12/2003 ODC) JSMP observed that the Oecusse Court clerk appointed as interpreter asked additional questions to the accused and witnesses in an attempt to clarify the answer given. These questions were not made by the Court or the parties.

JSMP acknowledges that the procedure used by the Courts in trying to solve the problem is an attempt to guarantee that accused's rights are adhered to. However, JSMP is of the opinion that this approach is not a sustainable procedure and will not, in the long run, solve this problem.

Firstly, Court clerks when requested to provide interpretation by the Court are taken away from their duties in the Court Registry. If this is to happen consistently it may have a negative impact on the administrative work usually undertaken by the clerks. Secondly, Court clerks do not necessarily represent the geographical jurisdiction of the district Courts. If the use of Court clerks as interpreters is formally recognised, Courts would only be able to recruit and to employ staff depending whether the main languages spoken in the area of the Court's jurisdiction could be represented.

<sup>85</sup> Section 35 of Regulation 2000/11 as amended by 2001/25.

<sup>86</sup> Section 6.3(c) of UNTAET Regulation 2000/30, as amended by 2001/25. This guarantee can also be found at international level in Article 14(3) ICCPR.

<sup>87</sup> See Section 23 UNTAET Regulation 2000/11 as amended by 2001/25.

JSMP is aware that any recommendation aiming at addressing the issue of local interpreters in district Courts will take a considerable amount of time to be implemented and cannot be expected in the near future. However, to guarantee accused's rights and to ensure that the District Courts in East Timor are developed in a sustainable manner, it is important to face this issue and analyse possible long term and permanent solutions.

*JSMP recommends that:*

- 1. A formal training system for Translation and Interpretation, including training on legal terminology, on the main local languages in East Timor is established. This initiative should start as soon as possible.*

## 5 CONDUCT OF TRIALS

In general, the conduct of trials is based on a similar format in all three district Courts.

A general description of the conduct of trials in most District Courts is illustrated below:

The initial hearing – preliminary hearing – usually consists of the reading of the indictment by the Prosecutor, followed questioning from the Judge whether the accused pleads guilty or not. If the accused makes any statement as his plea, s/he will then be questioned by the Judge on the statement, followed by questions from the prosecution and the defence. Any witnesses for the prosecution are then called; this practice appears to occur irrespective whether the accused has pleaded guilty. In the vast majority of cases monitored by JSMP, defence witnesses were not called. At the end of the presentation of evidence by each witness it was common for the Judge to ask the accused if s/he agreed with what had been stated by the witness. Each party was then provided an opportunity to provide closing statements and submissions on sentencing. The hearing would then usually be adjourned for a decision.

In general, cases in the districts, provided all parties were present, were conducted over a two to three hearings which included the pronouncement of sentence. Most of the hearings would not last for more than a few hours.

The short duration and small numbers of hearings is not *per se* a problem. However, JSMP identified that procedural safeguards, such as the accused being informed of the right to remain silent and swearing in of witness were regularly neglected during the hearings. In contrast the right of the accused to understand the proceedings was generally well respected by judges in the District Courts.

### 5.1 Rights of the Accused

The accused's ability to understand the proceedings before the Court is essential to guarantee fairness during a trial.

JSMP observed that Judges in **all district Courts** generally paid attention to the language spoken by the accused. JSMP observed that the Judges of **Baucau** Court would often provide a summary of the indictment in Tetum or, if possible, in the local language spoken by the accused as it is general practice in East Timor to draft and read indictments in Indonesian. In many circumstances, if the accused failed to respond to a question the Judges would often not proceed until the accused had verbally ascertained that he had understood what had been said to him<sup>88</sup>. Further, in some cases in **Oecusse**, Judges would inform the accused that if s/he was unsure as to any issue related to the trial s/he should contact his lawyer for clarification<sup>89</sup>. While regard for the rights of the accused is evident in these areas; other rights were seriously undermined, mainly the right of the accused to remain silent.

The right of the accused to remain silent is a fundamental right protected in the Regulation<sup>90</sup>. It derives directly from the presumption of innocence as guaranteed by the Constitution<sup>91</sup>.

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<sup>88</sup> For example Public Prosecutor v Antonio F. Hortta (Case Number 20/2003 BDC)

<sup>89</sup> For example, Public Prosecutor v. Domingos Lelan (Case Number 12/2003 ODC) and Public Prosecutor v. Henrique Ribeiro (Case Number 02/03 ODC).

<sup>90</sup> Section 6.3 (h) of UNTAET Regulation 2000/ 30 as amended by 2001/ 25.

<sup>91</sup> See sections 6.2 (a) and 6.3 (h) UNTAET Regulation 2000/ 30 as amended by 2001/ 25.

Usually Judges during the preliminary and trial hearings had not ensured that accused had been informed of his/her right to remain silent<sup>92</sup>. JSMP found that the conduct of and questioning by Judges appeared to pressure the accused to speak during the hearings.

In almost every case, no explanation of the accused's right to remain silent was provided by the Judge before the accused was asked to enter a plea. Also, after the close of the prosecution case, it was common practice that the accused would be told to sit in the chair in front of the Judge, who would then order the accused to describe what happened. JSMP did not observe any accused refusing to make the statement as requested by the Court nor a lawyer objecting to such a request.

Another practice observed regularly in all **three districts Court** was that at the end of the presentation of evidence by each witness the Judge would ask the accused whether what the witness had told in Court was true. The practice of asking questions directly to the accused without warning about the right to silence threatens the right to remain silent.

The law demands that accused should be informed of his/her rights at every stage of the proceedings<sup>93</sup>. Judges should be aware of the need to ensure that the accused's rights had been explained by the Prosecutor. Also defence lawyers should take pro-active measures in querying whether his/her clients were indeed informed of his/her rights.

## 5.2 Expedited Hearings<sup>94</sup>

Despite the fact that many accused pleaded guilty, it was rare for the Judge to conduct an expedited hearing in accordance with Section 29A of UNTAET Regulation 2000/30, as amended. In circumstances where the accused confesses his or her guilt, understands the nature and consequences of the confession and where the admission of guilt is supported by the facts in the indictment, the Judge, through the use of Section 29A procedure, may immediately convict the accused of the crime. The judge is also required to ask the accused whether s/he has received legal advice about the plea. The main objective of this expedited procedure is to prevent a long Court process.

JSMP observed that not only are expedited hearings procedures not generally used, but when the accused pleads guilty Judges, in the majority of cases, fail to ask whether the accused has understood the consequences of the plea.

The implementation of Section 29A demands that the Judge asks as many questions to the accused as necessary in order to clarify all the issues and the circumstances of the crime. JSMP has observed that generally the Judge does not go through a detailed questioning of the accused once a plea of guilty is entered. It is common that the Judge will continue conducting the hearing as if the accused had not pleaded guilty and will automatically give the prosecution the opportunity to call its witnesses.

In the case of Public Prosecutor v Abel Relbas Amaral (Case Number 34/ 2003 SDC) the accused pleaded guilty after the indictment was read. The accused was shortly questioned and then the case was adjourned for the prosecution to present its witnesses.

<sup>92</sup> UNTAET Regulation places the duty to inform the accused of the right to remain silent on the Prosecutor. See Section 6.3 UNTAET Regulation 2000/30, as amended by 2001/ 25.

<sup>93</sup> Section 6.3 UNTAET Regulation 2000/30, as amended by 2001/ 25.

<sup>94</sup> Section 29A proceeding are only one type of expedited proceedings. Another method of a more efficient process for cases less with a sentence of less than one year is referred to in the chapter on the Prosecution.

A greater use of Section 29A provisions is an important mechanism to deal with guilty pleas in an efficiently manner, thus saving considerable Court time as well as Public Defender and Prosecutor's preparation time. Most importantly, such a process would provide both the victim and the accused with a quick decision, saving the accused from indeterminate periods of pre-trial detention and uncertainty about the outcome of the legal process.

### 5.3 Oath Taking from Witnesses

JMSP observed that generally witnesses in the District Courts were not required to take oaths. JSMP is aware of the wide practice of not requiring oaths before providing oral evidence from family members, work colleagues and also victims<sup>95</sup>.

The Regulation provides that witnesses shall make an oath prior to testifying<sup>96</sup>. Uncertainty exists as to whether family members of the accused are exempted from taking an oath<sup>97</sup>. It seems that it is common practice in countries following the civil law system not to require an oath from family members.

It appears to JSMP that there is a failure to ask witnesses to take oaths, rather than a systematic approach in analysing who should be required to take an oath.

JSMP observed that rarely the Court would enquire whether witnesses, including victims, were related to the accused.

In the case of Public Prosecutor v. Luis Armando Pina (Case Number 62/03 ODC) the Judge questioned about any family relationship between the witness and the accused only half way through the oral testimony of the witness.

Determining whether a witness is related to the accused as well as the procedure in taking the oath are relatively fast and simple procedures and should be followed as outlined in the Regulation. In addition, it is important that the Judge is aware of any family relationship between the witness and the accused in order to evaluate the credibility of the witness' testimony.

*JSMP recommends that:*

1. *Judges should inform the accused of their right to remain silent before any questions are asked to the accused at each stage of the trial; and*
2. *Judges give greater consideration to using expedited proceedings in cases where the accused has pleaded guilty and the Judge is satisfied that, among other pre-requisites, the accused understands the consequences of the confession.*

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<sup>95</sup> See Chapter 3 Practice and Procedure, JSMP Dili District Court Final Report, December 2003.

<sup>96</sup> Section 36.2 of UNTAET Regulation 2000/30, as amended by 2001/ 25.

<sup>97</sup> Section 35.2 together with 36.2 of UNTAET Regulation 2000/30, as amended by 2001/ 25.

## 6 AFTER TRIAL CONSIDERATIONS

It is important that after sentencing the accused's rights are not sidelined. The Judge who pronounced the sentence has ultimate responsibility for the execution of the sentence<sup>98</sup>.

Defence counsel must ensure that any sentence is imposed correctly and that, where appropriate, review of the sentence is carried out when two-thirds of the sentence has been served. In practice, prison authorities should also be concerned with two-third sentence reviews.

JSMP observed that the database of Becora prison recorded the date when a prisoner is to have completed two-thirds of his or her sentence. The prison director informed JSMP that before the two-third period expired the prison will often write to the Public Defenders' Office requesting that an application for conditional release is made to the Court. According to the prison director, in the case that the Public Defenders could not represent a prisoner -which is not usually the case - the prisoner would receive assistance to write his or her own letter to the Court.

JSMP did not observe any Court hearings regarding such requests during its monitoring period; however commends the pro-active steps that are reportedly taken by the prison authorities.

On release from prison, prisoners sometimes face difficulties in returning home to the districts. Currently, the prison authorities are under no legal obligation to assist the accused in returning home; however in ensuring that prisoners can integrate in their community, regard should be given to ensure that ex-prisoners will be able to go back to their communities.

Some prisoners from **Oecusse** may have significant problems in finding accommodation in Dili and paying for the ferry to return home. The prison authorities in East Timor do not have a budget to pay for prisoners' transport home on release. In practice prison's authority told JSMP that if a prisoner originally from Oecusse faced difficulties in paying the return ticket the authorities would write a letter requesting the operators of the ferry boat to provide a ticket free of charge. JSMP also became aware that sometimes one of the prison staff houses and/or financially assists prisoners from Oecusse to return home.

While the actions of the authorities and prison staff are admirable, a budget and a more formal structure for the return of released prisoners to their home districts would be preferable.

*JSMP recommends that:*

1. *That consideration be given to the allocation of a budget to assist released prisoners to return home when they have been detained outside of their home district.*

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<sup>98</sup> Section 48 of UNTAET Regulation 2000/ 30, as amended by 2001/ 25.

## 7 COURT OF APPEAL AND THE DISTRICT COURTS

Between February 2001 and November 2003, 7 appeals were filed from decisions of the **Suai** and **Baucau** District Court. This is a small number when compared to the number of appeals filed by the Dili District Court<sup>99</sup>.

In JSMP's view, the distance between the districts, mainly **Oecusse** and **Baucau**, and Dili (where the Court of Appeal is located) and the lack of contact with the Court of Appeal<sup>100</sup> are factors that have contributed to the small number of applications.

The shortage of Public Prosecutors and Public Defenders is another factor impeding the right to appeal. Generally it is necessary for the Defender or Prosecutor to attend at least two hearings in Dili. The possibility of receiving assistance from the central offices of those bodies to attend the appeal hearing is practically non-existent. To date there has been poor communication, supervision and case management on the part of and between the Districts Public Defenders and Prosecutors and their National central offices. Transport problems and a heavy caseload have also decreased the motivation to lodge appeals.

The Court of Appeal currently has a significant backlog of cases due to its closure for approximately 18 months. However, most of the appeals from the district Courts have already been heard and decided.

### Appeals Filled

#### Baucau

5 Appeals since Feb 2001 – only one filed in 2003

4 decisions already given (all using Portuguese Law)

Public Prosecutor and Public Defender not present in any of the hearings

2 appeals related to request to change sentence on rape case

#### Oecusse

No appeals filed

#### Suai

2 Appeals filed since Feb 2001 – both filed in 2003

1 decision given (applied Portuguese Law)

### 7.1 Challenges to the Right of Appeal

From the monitoring of the Court of Appeal, the main issues to be dealt with in relation to appeals from the district Courts are:

- a) The lack of attendance of Prosecution and Public Defender;
- b) The difficulties for delivering notification of hearings;
- c) The languages used in Courts and in the decisions<sup>101</sup>, and
- d) The use of different laws by the district Courts and the Court of Appeal<sup>102</sup>.

Public Prosecutors and Public Defenders were absent in every appeal hearing conducted in Dili which originated from Baucau and Suai District Courts between July and December 2003.

The already identified reasons for the failure of the Prosecution from Dili District Court to attend hearings could also be observed in monitoring appeals from the districts<sup>103</sup>. Another factor that prevented the presence of the parties before the Court of Appeal was a constant failure in the delivering of notifications about the date of the appeal hearing.

<sup>99</sup> See Chapter 9 Court of Appeal and the Dili District Court, JSMP Dili District Court Final Report, December 2003.

<sup>100</sup> Some Court actors had commented to JSMP that they are never informed of the decisions of the Court of Appeal.

<sup>101</sup> See Chapter 9.3.3 Languages used in Court of Appeal, JSMP Dili District Court Final Report, December 2003.

<sup>102</sup> See Chapter 9.3.2 Lack of willingness by prosecution and defence to lodge appeals, JSMP Dili District Court Final Report, December 2003.

<sup>103</sup> Mainly they were: poor case management and great lapse of time from the filing of appeal and the hearing. See Chapter 9 Court of Appeal and Dili District Court, JSMP Dili District Court Final Report, December 2003.



In the appeal of Raimundo Soares (Appeal Number 14A/01 from BDC) the Court of Appeal attempted to notify the parties on two occasions – 03 September and 17 October 2003 on both occasions the Public Defender could not be notified as he was absent from Court.

JSMP has also monitored cases where the parties received notification about the date of the appeal hearing, but still failed to attend.

In the appeal of Zezinho Calisto (Appeal Number 30/03 from SDC) both the defence counsel and the Public Prosecutor received the notification about the hearing, but both failed to attend the appeal hearing.

Notifications of the date of hearings before the Court of Appeal are delivered by hand by the Court clerk from the Court of Appeal to the Prosecutor and the Public Defender of the District Court. This system dictates that the Court clerk has to travel to **Baucau** or **Oecusse** whenever a notification has to be delivered. If the Court clerk was to arrive in, for example, Baucau, after almost 3 hours of travel, and could not find one of the parties present in Court, the Court clerk would return to Dili, failing to deliver the notification.

JSMP was informed that attempts were made to request the police from Dili to deliver Court notifications to **Baucau**. However, JSMP is not aware of any successful delivery by the police.

In reality the problem of delivery of notifications could be easily solved by providing **Baucau** and Oecusse Courts with a fax. However, until Baucau and Oecusse Courts have access to a telephone landline, fax facilities cannot be provided.

Even when notifications could not be delivered, the scheduled hearing before the Court of Appeal usually went ahead. The appeal Court on some occasions explained in open Court that the parties were not present and scheduled another date for the hearing.

The presence of the parties during the Court of Appeal hearings is very important. Currently, the Court of Appeal is the only possible appeal level. It is important for an accused, who for example has been imprisoned and filed an appeal requesting his sentence be decreased, to have his lawyer with him when he is present in the Court of Appeal. It is important not only because the Court of Appeal usually fails to give due attention to an unrepresented accused, as it usually does not fully explain the proceedings or the decisions, but it is also important in order to give the accused confidence that all possible chances for changing his situation have been attempted.

*JSMP recommends that:*

- 1. Efforts should be made to develop the language skills of Court of Appeal judges so that all three judges have knowledge of a language commonly used at District Court level. Until that time, interpreting services should be made available at the hearings;*
- 2. In every hearing, the Court should enquire about the language understood by the appellant/respondent. In cases where s/he does not understand the language used by the Court of Appeal, JSMP recommends that an interpretation be provided;*

3. *Translations be made of decisions of the Court of Appeal, which are not in a language commonly used by the District Courts, to a language that both parties can understand;*
4. *Decisions of the Court of Appeal be disseminated to the District Courts, after being translated;*
5. *Office of the Public Defenders and the Public Prosecutors develop a system of case management and coordination with the districts Public Defenders and Public Prosecutors in relation to cases that have been appealed against. This recommendation aims at guaranteeing that both Public Defenders and Public Prosecutors are represented before the Court of Appeal;*
6. *The President of the Court of Appeal to follow-up absences of Public Prosecutors and Public Defenders; and*
7. *The President of the Court of Appeal should analyse the possibility of changing the means of delivery of notification to the District Courts. A possibility identified by JSMP is to ensure that District Courts have fax facilities so notification can be faxed.*

## 8 COURT ADMINISTRATION

The proper administration of a Court is essential to its functioning. The right of the accused to be tried by a fair and public hearing without undue delay<sup>104</sup> is dependent on good administration. In addition, public confidence in the justice system is also largely dependent on efficient and transparent administrative functions.

JSMP observed that generally the District Court administrative staff performed their functions in a very satisfactory manner considering the available resources. Although Court administration is reliant on the Court administrative staff, all Court actors must have regard to Court administration, especially matters such as scheduling of cases. JSMP identified delays and the failure to schedule cases for extended periods as the greatest threat to the smooth functioning of the District Courts. The issues of public access to information and lack of resources were identified as important issues in ensuring effective Court administration in the District Courts of East Timor.

The Court clerks<sup>105</sup> in all registries of the **three District Courts** consistently cooperated in providing information to JSMP monitors. In addition, generally clerks were well informed about the progress of cases through the system. Clerks generally worked efficiently in performing administrative tasks such as scheduling cases, writing and delivering notices as well as assisting Judges in their preparation for hearings and taking notes during the hearings.

The Court administration at the **Baucau District Court** was particularly impressive. The Registries were well ordered, staff were well informed and appeared to be interested in their work. JSMP was informed that a significant number of Court clerks were studying law at the University in Baucau, which can only assist them in their work and careers. It is commendable that the Court in Baucau promotes this kind of environment.

### Numbers of Court Administrative Officers

#### Baucau

9 Court administrative officers

#### Oecusse

One Court administrative officer.

#### Suai

One Court administrative officer

### 8.1 Public Availability of Information

The right to a public hearing is recognised by the Regulation<sup>106</sup> and international instruments<sup>107</sup>. Public notification of scheduling of cases and public access to Court documents are integral elements of any public hearing.

<sup>104</sup> Section 6.3(f) of UNTAET Regulation 2000/30, as amended by 2001/25.

<sup>105</sup> For discussion on different categories of Court staff see Chapter 10.4 The Registry and Court Clerks, JSMP Dili District Court Final Report, December 2003. It is noted that similar to Dili District Court the same staff are responsible for assisting the Judges and the general administration of the Court.

<sup>106</sup> section 28.2 of UNTAET Regulation 2000/30 as amended by UNTAET Regulation 2001/25.

<sup>107</sup> Article 14(1) International Covenant on Civil and Political Rights.

### 8.1.1 Trial Schedule

The attendance of the public in hearings can only be guaranteed if, first of all, the public is informed of the Court schedule. Case schedules are important not only for the smooth running of the Court but for the public confidence and understanding of the system.

In contrast to the other district Courts, including Dili, the **Baucau** Court not only listed all hearings for the day on a whiteboard at the front of the Court, but has a whiteboard in the criminal division office listing all current cases with detailed information. A look at the whiteboard in the criminal section in **Baucau** Court provided an immediate snapshot of the progress of the case through the system. Delays in particular cases could be easily identified. It would be useful to add information on the date when an accused was first detained as this information would provide an exact picture of how long the accused has been detained.

During JSMP monitoring, the **Suai** Court administration did not provide public trial schedule, nor was there a board in the registry which contained information on the active case. JSMP has observed that people travelling from Suai to Dili had difficulties in knowing the time and exact place where the cases were to be heard. Public information, especially the daily Court schedule, is very important for the Suai Court; especially while it is functioning in the Dili District Court, because its Court registry is not easily identifiable as it is located in a room in the second floor at the back of the Court complex. The Court administrator for Suai advised that he did not have time to maintain a public trial schedule or case information board because of his heavy workload. The Suai court registry officer is the only staff performing all the administrative tasks for Suai Court and also assists in the court administration of the Oecusse Court as required. JSMP supports the need for additional staff in the Suai Court administration.

The **Oecusse** Court, during the two days when hearings occurred, did not appear to have an organised case schedule. The scheduling of hearings was disorganised for a number of reasons including the delay of the judges in arriving in Oecusse. The schedule was basically decided by the Prosecutor as the cases progressed. The order of the cases was dependant on the attendance of the relevant parties. Consequently, no case schedule was posted outside the Court to inform parties when their case would be heard. At the end of the second hearing day in November, some 17 cases out of 25 had yet to be heard; parties from 6 cases were present outside the Court waiting for their trial. Such a system can lead to perceived unfairness in the processing of cases.

### 8.1.2 Public Access to Court Documents

In **Baucau**, **Suai** and **Oecusse** Courts JSMP was given access to Court documents, including indictments, judgements and detention decisions. Although internal procedures may be followed in individual Courts regarding access to Court documents by the public, a national policy and/or regulation should to be developed on the type of documents that can be made available to the public and the process for obtaining access to the documents<sup>108</sup>.

#### **Baucau Information Board Included the following information:**

- + case number
- + file reference
- + name of the accused
- + name of the Panel or individual judge

#### **And the following dates:**

- + filling of indictment
- + appointment of the judge to the case
- + detention review hearing
- + extension of pre-trial detention beyond six months
- + any adjournments
- + decision of appeal

<sup>108</sup> See Chapter 10.1 Public Access to Information, JSMP Dili District Court Final Report, December 2003.

In **Oecusse** it was noted that some active Court files were not kept in Oecusse, but held in Dili Court. Consequently Oecusse Court would encounter challenges in providing the public with access to requested documents from these cases.

Similarly to the situation in the Dili District Court, transcripts of Court proceedings were not taken by Court clerks. Court clerks present in the hearings would only record handwritten summary of the hearings. Judges, Prosecutors and Public Defenders usually made their own notes; but by no means had they recorded all, or even a significant number, of questions and answers during witnesses' testimonies.

Section 31 of the Regulation provides 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. (...)
- (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.

Transcript of the proceedings is essential for the judges and parties to review the evidence and arguments presented at trial. Transcripts are not only important for the purposes of the trial itself but also for the purpose of any appeal. Currently there are no resources including training staff to take court transcripts. In the interim, as suggested by **Baucau** administrative Court staff, recording devices could be provided to the Courts so that some record of the proceedings could be made.

### *8.1.3 Delays*

The right to be tried without undue delay is a fundamental right. Whilst the right is particularly important for persons in detention awaiting trial, it is an entitlement of every accused.

Delay is a significant problem in **Baucau** and **Oecusse** Courts. During JSMP's monitoring, the length of time for concluding cases was often extended for two reasons: 1) delays due to the absence of one or some of the parties and 2) non-scheduling of hearings for cases for periods up to a few months.

In the three weeks JSMP monitored **Baucau** Court, over half of the hearings scheduled were postponed. The main reasons for postponements were the Public Defender's failure to attend Court and the failure of the prison authorities to transport accused to Court<sup>109</sup>.

In **Baucau** Court during the monitoring period no hearings were scheduled for Mondays or Fridays as these days were used for Judges and Prosecutors' to travel to and from Baucau. In two of the three weeks monitored, there were no cases scheduled for an additional day of the week<sup>110</sup>. Although it was intended that the Court administration continued to function on Mondays and Fridays, JSMP believes that the example set by Judges in leaving Baucau during Court days diminishes the effectiveness and productivity of the work of the Court and provides a negative example for other Court staff<sup>111</sup>.

At the time of writing this report **Baucau** District Court has not been functioning since the end of the two-week Court recess on 30 August 2003. Since this date, Judges and Prosecutors have remained in Dili. The decision not to travel to Baucau was made by Baucau Judges and Prosecutors themselves. Initially the underlying reason was the lack of furniture of the recently rehabilitated Judges' houses in Baucau. Judges from Baucau also alleged that once the judges' houses had been completed in mid September 2003, they could not return to Baucau because the Prosecutors were in Dili attending training.

JSMP spoke with the organisation developing the training and was provided with the information that since beginning October only six training days took place<sup>112</sup>. Further, training schedules were arranged so as to minimize the impact of the absence of Prosecutors in the Courts. The two Prosecutors of **Baucau** attended training on different days so one Prosecutor could remain available in Baucau<sup>113</sup>. On 19 November 2003, **Baucau** Judges indicated that they may be returning the last week of November or first week of December.

In JSMP's view, the delays caused by the decision of the Court actors to not attend court in Baucau or hold hearings is not acceptable irrespective of the underlying reason.

#### Examples of Delays

##### Baucau

- ✚ All cases postponed in the week of 17 - 23 March 2003
- ✚ Eight out of eighteen cases postponed from 4-15<sup>th</sup> August 2003
- ✚ No cases scheduled for trials on Mondays or Fridays
- ✚ No cases scheduled for trial since August 14, 2003

##### Oecusse

- ✚ No cases Scheduled for trial since mid July until November 2003
- ✚ Two hearing days in November. Out of 25 ready for hearing only 8 cases were heard.

##### Suai

- ✚ Less than 1/3 of trial hearing were postponed

<sup>109</sup> The reason provided for the public defender not attending Court for the 4<sup>th</sup> week of March, which resulted in every trial being postponed, was the first week monitored in March 2003 the trials, which were only scheduled for two days during the week, was that he was attending training. JSMP was also informed that the police had difficulty bringing prisoners to Court because of transportation problems.

<sup>110</sup> No cases were scheduled for Tuesday 18 March and Thursday 14 August 2003.

<sup>111</sup> The reality is that in one of the weeks monitored, the Court building was closed on the Monday. When questioned by JSMP monitors, the Judge President simply replied that the Court should had been open.

<sup>112</sup> The organisation conducting the trainings is called IDLO – International Development Law Organisation. Prosecutors had to choose three sessions of two days each from 1-8 October, 23- 29 October and 5-12 November 2003.

<sup>113</sup> JSMP observed that Baucau Chief Prosecutor admitted that the training in Dili was not a reason for non-returning to Baucau. Rather the always underlying reason was the willingness of Prosecutors to protest the lack of provision of furniture for the prosecutor's house by the Ministry of Justice.

In contrast to the Baucau court, less than one third of **Suai** cases were postponed. Reasons for the postponement included non- appearance of the Prosecution and Judges. JSMP became aware that in one case the delay was caused by the inability of the police to transport the witnesses to Dili from Suai because of prior commitments. In the two weeks monitoring of **Suai** District Court, cases were scheduled every day of the week.

JSMP has observed an important attempt from the **Suai** Court to prevent further delays in cases due to transportation difficulties. During 2003 the Suai Court, which is based in Dili, went to Suai on approximately 5 to 6 occasions to hold hearings; on another two occasions the Court went to Same because transportation difficulties were preventing the cases continuing as scheduled. Such a pro-active response by the court provides a clear example to other courts in devising ways to alleviate delays.

Due to the absence of a judge in **Oecusse**, except for two days in November, no cases were scheduled from mid July to end of November 2003. Out of the 25 cases ready for hearing, approximately 8 cases proceeded during the November hearings, out of which only 2 were finalized. The extreme delay in processing cases in Oecusse is damaging the reputation of the formal justice system in Oecusse and deterring people from accessing the courts<sup>114</sup>.

It is important to publicly announce delays and postponement of hearings. In general the District Courts failed to hold a hearing when a case was to be postponed in order to inform the parties and the public of the reasons for postponement and the next scheduled date.

## 8.2 Facilities

### 8.2.1 *Computers, Telecommunications and Internet Access*

Although computers are generally available in the district Courts<sup>115</sup>, an adequate telecommunications system is lacking. **Baucau**, **Oecusse** and **Suai** Courts do not have telephone or fax facilities. Communications are usually made by personal mobile phones.

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<sup>114</sup> Based on communications with the District Administration in Oecusse and staff from non-governmental organisations.

<sup>115</sup> To allow Court clerks to take a transcript of the trial additional computers in the Court room are required. It is also noted that, unlike Dili District Court, there is a computer technician in Baucau, which is the ideal situation.

A good system of communication is particularly necessary between Dili and the district Courts in **Baucau**, **Oecusse** and **Suai**<sup>116</sup> in order to allow the Courts to operate quickly and effectively and have access to up-to-date information despite their relative isolation. A clear example of the impact of telecommunications for the District Court of **Baucau** is the fact that if the Court had a fax it would not be necessary for notifications from the Court of Appeal to be taken personally to Baucau by a Court clerk in Dili<sup>117</sup>.

Transportation of suspects, accused and witnesses is regularly required between Dili and the districts and vice versa; without effective communication coordination is very difficult, and regularly results in wasted time, expenses and delay in cases.

Both **Oecusse** and **Baucau** Courts indicated that they were often not aware of new laws or decisions in recent cases in a timely manner.

Internet connections to all District Courts are a desirable, but perhaps medium term goal. The benefits of the internet in linking remote Courts are obvious. Internet would allow for the instantaneous provision of up-to-date information and provide a useful legal research tool for Court actors. However, without access to phone or fax lines in the district Courts it is not realistic to expect that in the near future internet connection will be achievable.

Other methods for sharing information such as personal meetings, provision of information in hard copy or on discs should be used as an alternative for the difficulties and delays in establishing internet connection between the districts and central administration<sup>118</sup>.

### 8.3 Financial Resources

All **three district Courts** identified the need for greater ability to access funds for the purchase of equipment and the payment of incidental costs, especially food, transport and accommodation costs for witnesses, suspects and accused.

In **Oecusse**, the Prosecutor, Public Defender and a non-governmental organisation<sup>119</sup> told JSMP that they had to pay expenses when it was necessary to transport witness and accused to Dili. Expenses could include the fare for the ferry boat, which amounts to fourteen dollars and accommodation. One of the judges from **Suai** Court also used his own money to pay for expenses related to witnesses' attendance in Dili; these expenses had not been reimbursed irrespective that receipts were provided for the expenses incurred. The issue of incurring expenses for

#### Facilities Needed

##### Baucau

- ✚ phone and fax lines
- ✚ internet connection
- ✚ permanent Court security
- ✚ additional finances

##### Oecusse

- ✚ phone and fax lines
- ✚ internet connection
- ✚ general office supplies
- ✚ additional finances

##### Suai

- ✚ phone and fax lines
- ✚ internet connection
- ✚ general office supplies
- ✚ additional finances

<sup>116</sup> Currently Suai Court is using the facilities available at Dili District Court. However, telecommunications for Suai Court should be looked into now as it is in the future important once Suai Court returns to Suai.

<sup>117</sup> See also Chapter 9.

<sup>118</sup> See also Chapter 9.

<sup>119</sup> Centro Feto paid for transportation and food and organized accommodation of a victim who had to attend a hearing at Dili District Court.



transportation becomes more acute with geographical distance<sup>120</sup> and the ability to recover money paid is also hindered by the lack of regular contact with the central administration.

It is clear that the kind of situation highlighted above is unacceptable. Apart from the financial impact for individual Court actors, such a situation increases the feeling of isolation by the District Courts and reflects a lack of support. This situation may also deter Courts from organising the attendance of witness' living far from the Court location. The situation should be remedied as a matter of priority. In addition to providing individual Courts with adequate financial sources for basic administration expenses, consideration should be given to establishing accounts in places for accommodation, food and transport services which could be directly billed to the central administration<sup>121</sup>.

## 8.4 Security

The need for greater security at the **Baucau** Court has been raised on a number of occasions by various Court actors.

Police are often present at the Baucau Court due to their involvement in the transportation of persons to the Court. However, no police officers have been dedicated to providing permanent security to the Baucau Court. The need for security is particularly relevant in Baucau due to fear of threats to the safety of judges, especially taking into account the attack against a judge in 2000. The need for adequate security is essential for impartiality of the judiciary and a fundamental aspect of any workplace.

*JSMP recommends that:*

- 1. Additional court registry staff be appointed as a matter of urgency to the Suai District Court. A duty of the additional staff member to update a daily trial schedule and caseboard;*
- 2. Mechanisms be implemented to facilitate the accessibility of publicly available court documents, such as indictments, judgments and court orders;*
- 3. A system of monitoring the operating hours and days of the district courts be implemented. If it has not already occurred, court actors, including Judges, Prosecutors return immediately to Baucau court;*
- 4. A formal and regular roster system be implemented immediately for Judges to travel to Oecusse for hearings. A long- term plan of the appointment of an investigative and trial Judge for Oecusse is required. Such a plan should include the provision for two other judges to be assigned to Oecusse Court when a 3 judge panel is requested;*
- 5. Phone and fax facilities be provided to the district courts as a matter of priority;*

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<sup>120</sup> In reality, a Judge from Suai commented that the difficulties on receiving reimbursement for costs was one of the reasons for not be willing to return to Suai.

<sup>121</sup> See on this issue below on Chapter 9.1.1 Distribution of Funds.

6. *An evaluation of other facilities required by the courts be conducted;*
7. *Police be assigned to provide security to the Baucau court on a full time basis;*
8. *A strategic plan be developed for the provision and sharing of information between the district courts and national bodies including methods to provide timely updates on changes to the law; and*
9. *Individual courts should be provided with adequate finances and financial administration for incidental expenses relating to witness's and accused.*

## **9 RELATIONSHIP BETWEEN NATIONAL AND DISTRICTS LEVEL**

The Courts, the Office of the Public Prosecutor, the Office of the Public Defenders, together with the President of the Court of Appeal, the Superior Council of the Judiciary and the Ministry of Justice form a complex structure for the justice system. The successful operation of the judicial system depends on successful relationship between these bodies to ensure coordination.

In JSMP's view, during 2003, there was a lack of satisfactory coordination between the national bodies and the District Courts. Many of the challenges faced by the District Courts could have been prevented or remedied if a closer relationship had been established between the national structure and the District Courts.

Coordination was also lacking within the internal structure of the different institutions, for example the National Office of the Public Defenders and the Office of the Public Prosecutor<sup>122</sup>.

For the last two years, the Courts have been operating with limited supervision and support as the two main supervisory bodies – the Superior Council of the Judiciary and the President of the Court of Appeal – were not established until July 2003. For approximately two years, the main supervisory position was the Judge Administrator of each District Court<sup>123</sup>. JSMP acknowledges that Judge Administrators faced many challenges in providing supervision to District Courts<sup>124</sup>. Now the the Superior Council of the Judiciary and the position of the President of the Court of Appeal are functioning; they now have the responsibility to perform the work accumulated during this period. It is important from the outset that they utilize the experience of the other court actors who have been working within the system for over two years.

JSMP believes that coordination and support from national level institutions should be prioritized in 2004. It is important to analyse the role of the different bodies which are supporting, both technically and financially, the District Courts in order to evaluate their performance and to identify areas which need to be addressed in 2004.

### **9.1 Ministry of Justice**

The role of the Ministry of Justice is to develop, implement, coordinate and evaluate the approved policy in the areas of justice and law<sup>125</sup>.

The need to guarantee the Court's independence<sup>126</sup> demands that care should always be taken when considering the role played by the Ministry of Justice in the administration of the Courts.

JSMP acknowledges the challenges faced by the Ministry of Justice in coordinating the justice sector as there are different bodies and scarce resources. It is important that all Court actors are aware of the role of the Ministry of Justice.

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<sup>122</sup> See Chapter 3.3.8 Supervision and Discipline and 3.4.5 Supervision and Support for Public Defenders

<sup>123</sup> Directive 2001/05, Nomination of Judge Administrators, President of the Court of Appeal, October 2001.

<sup>124</sup> See above Chapter 3.1.6 Supervision and Support

<sup>125</sup> Preamble Decree 3/2003, Organic Statute of the Ministry of Justice, 29 October 2003.

<sup>126</sup> Section 119 Constitution of East Timor. See also Section 2 of UNTAET Regulation 2000/11, as amended by 2001/25.

JSMP observed a lack of clarity regarding the procedure and appropriate bodies for resolving a complaint from Baucau court actors. Judges and Prosecutors raised the issue of the delay on the provision of furniture to their houses in Baucau. JSMP was informed that, the Judges and the Prosecutors attempted to raise the issue, at different stages, with the Superior Council of the Judiciary, the Ministry of Justice and the Prosecutor-General.

During most of JSMP's monitoring period, the Ministry of Justice operated without an organic law. Due to the lack of a comprehensive legal foundation, it was difficult to know what should be expected from the Ministry of Justice and how Courts and other institutions should approach the Ministry.

In October 2003, the Council of Ministers passed the Organic Statute of the Ministry of Justice. This Statute establishes the main tasks and structure of the Ministry of Justice<sup>127</sup>. Some of the new bodies within the Ministry of Justice, to differing degrees, are important in establishing the coordination, relationship and support between the Ministry of Justice and the District Courts.

**Permanent Secretary**  
Its tasks include the implementation of systems of cooperation between bodies within the Ministry of Justice structure and others institutions in the area of Justice. (Article 5(1)(f))

**Consultative Council**  
Its primary task is to develop a periodic review of the Ministry's activities, including evaluative analysis. (Article 17(1)(c))

**National Direction of Judicial Assistance and Legislation**  
Its tasks include collecting and disseminating information and statistics in the area of Justice as well as establishing and maintaining a documentation centre. (Article 8(2)(F) and (i))

### 9.1.1 *Distribution of Funds*

The 2002-2003 budgets for the District Courts, Office for the Public Prosecutor and Public Defenders was allocated within the budget of the Ministry of Justice<sup>128</sup>. In accordance with the 2003-2003 budget approved by the Parliament together with the Law 3/2002, the total budget allocated to the Ministry of Justice is around two million and three hundred thousand American dollars<sup>129</sup>, of which approximately two hundred and twenty thousand American dollars has been allocated to the District Courts.

JSMP has identified a lack of resources in the District Courts<sup>130</sup>. In order to provide adequate resources to the Courts, in the future the Parliament may need to consider increasing the current budget which is to be shared between the four district courts. JSMP notes that by comparison to other bodies funded from the Ministry of Justice's budget, the allocated budget for the Studies Office (*Gabinete de Estudos*) is around 22% higher than the budget allocated to the four District Courts. Similarly, the budget for Services and Assets of the Office of the Minister of Justice is double the budget for Services and Assets of the four District Courts combined.

<sup>127</sup> The Statutes provides for the following bodies: Permanent Secretary, National Direction of Judicial Assistance and Legislation, National Direction for Citizenship Rights, National Direction for Registers and Notaries, National Direction of Prisons Services and Social Reintegration, National Direction of Land and Property, National Direction of Administrative, Financial and Personnel Services, Consultant Council and Coordination Council.

<sup>128</sup> See Law 3/2003, Annex on Budget of Expenses.

<sup>129</sup> More exactly US\$ 2 320 000.

<sup>130</sup> See Chapter 8.2 Facilities

Currently, it is the Ministry of Justice, through the National Direction for Services, Administration and Finances, who is in charge of managing the funds for the Courts, the Office of Public Prosecutor and the Office of Public Defenders. In the future, it is expected that the Ministry will transfer the responsibility of managing the Court's budget to a permanent council established by the Superior Council of Magistrates and similarly the budget for the Office of the Public Prosecutor to a permanent council established by the General Prosecutor.

JSMP did not have access to any administrative direction or similar instruction from the Ministry of Justice on the procedure to be followed by Courts, Public Defenders and Public Prosecutors in obtaining access to their allocated budget. In reality, JSMP observed that there seems to have a lack of clarity on the procedure to be followed.

JSMP is aware that the Office of the Public Defenders is having difficulties in accessing its budget for repairing its vehicle and for accessing money to undertake visits to the sub/districts. JSMP is aware that the Acting Director has written approximately three letters to the Minister of Justice requesting access to its budget.

Realistically the management of the budget allocated to the Courts, Public Prosecutors and Public Defenders will remain with the Ministry of Justice for at least the next year. It is, therefore, important to establish clear guidelines on the procedure for accessing budgets and to guarantee that these are understood and widely disseminated.

## 9.2 Superior Council of the Judiciary

The Superior Council of the Judiciary is established by the Law 8/2002. Its competencies include the appointment, assignment, promotion, dismissal and appreciation of professional merits of judicial magistrates.

Currently, the Superior Council of the Judiciary is composed by the President of the Court of Appeal (President), two other Judges, the Vice-Minister of Justice and a Public Prosecutor<sup>131</sup>.

According to its legislation, this Council should be supported by a secretariat headed by a Council of Secretary<sup>132</sup>. To date there is no staff support administrative dedicated to the Superior Council of the Judiciary.

The Superior Council of the Judiciary's tasks are primarily related to the Judges; their work and conduct. However in practice, Judges are the main actors in the District Courts and consequently some issues related to Judges are also directly relevant to the administration of the Courts, which is under the responsibility of the President of the Court of Appeal<sup>133</sup>. A clear example of issues of court administration and Judges' conduct overlapping is the decision of the Judges' decision not to return to **Baucau** in September 2003, a decision which had a direct impact on performance of judicial duties as well as the functioning of the court.

<sup>131</sup> Section 109 Statute of Judicial Magistrates Law, Law 08/2002. At the time of writing this report, the members were Judge Cirilo (Judge Dili District Court), Judge Maria Nartecia Gusmao (Judge of the Special Panel for Serious Crimes), Dr. Manuel Abrantes (Vice Justice Minister) and Prosecutor Domingos Barreto (Chief Prosecutor of Baucau District Court).

<sup>132</sup> Section 21 Statute of Judicial Magistrates Law, Law 08/2002.

<sup>133</sup> See below Chapter 9.3 President of the Court of Appeal

JSMP is unaware of the existence of any instructions or guidelines which delineates the different tasks of the Superior Council of Judiciary and the President of the Court of Appeal. The fact that the President of the Court of Appeal is also the President of the Superior Council of the Judiciary should, in theory, facilitate coordination between the District Courts, the Superior Council of the Judiciary and the President of the Court of Appeal. However, JSMP has observed that it has in reality resulted in confusion among court actors as to which body they should address an issue to and has, to some extent, prevented that some issues were dealt by either of these institutions.

The Superior Council of the Judiciary is a new body and with its limited resources needs the support of all Judges to successfully implement its tasks. Encouraging judges to raise issues to be discussed in meetings of the Superior Council of the Judiciary can assist in ensuring their support for the work of the Superior Council.

JSMP has observed the following two main obstacles which prevented an efficient support and coordination between the Superior Council of the Judiciary and court actors, especially the Judges:

a) Lack of Internal Rules of Procedure

The internal rules of procedure of the Superior Council of the Judiciary have not yet been drafted<sup>134</sup>. Without them, it remains unclear how the issues are dealt with during its meetings.

For example: Can a District Court Judge suggest issues to be discussed in meeting of the Superior Council of the Judiciary? If so, what procedures should be followed? If there is a complaint against a Judge how should it be brought to the attention of the Superior Council of the Judiciary?

In developing the internal rules, JSMP is of the opinion that all attempts should be made to establish a procedure whereby every Judge can feel they can access the process, even though they are not directly participating in the meetings and taking the decisions.

b) Lack of Dissemination of Deliberations of Superior Council of the Judiciary

Judges of the District Courts are often unaware of the decisions of the Superior Council of the Judiciary. JSMP has identified that generally Judges are unaware of whether a certain instruction originated from a decision of the Superior Council of the Judiciary or the President of the Court of Appeal. It is important to ensure that the deliberations of the Superior Council of the Judiciary are widely disseminated.

It is required that the deliberations of the Superior Council of the Judiciary are published in the Government Gazette<sup>135</sup>. This is an important provision in guaranteeing its transparency and accountability. However, no paper version of the Government Gazette is currently available and the Website of the Government of East Timor is, in the interim, the means for accessing the documents that should be published in the Government Gazette.

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<sup>134</sup> Section 15(1)(e) Statute of Judicial Magistrates Law, Law 8/2002.

<sup>135</sup> Section 17 Statute of Judicial Magistrates Law, Law 8/2002.

JSMP was informed that all the deliberations of the Superior Council of the Judiciary are already with the Government Gazette awaiting publication. But, as of November 2003, no deliberations of the Superior Council of the Judiciary had been posted on the Internet.

Due to the inability of the District Court Judges and other court actors to access the internet, posting the deliberations of the Superior Council of Judiciary to the web, will not ensure that they are disseminated widely. JSMP believes that the Superior Council of the Judiciary should discuss other means for disseminating their deliberations to the District Courts in upcoming meetings.

### **9.3 President of the Court of Appeal**

Within the East Timorese justice system, the President of the Court of Appeal has the responsibility for the overall administration of the Courts, including the supervision of their work<sup>136</sup>. In JSMP's view, the term 'overall administration' encapsulates the idea whether the Courts are properly functioning, for example, if Judges and Prosecutors are attending hearings as scheduled, if the courts are facing any challenges, including lack of material resources, that are preventing them from realising their work, etc.

UNTAET Regulation 2000/11, as amended, provides that the President of the Court of Appeal can issue directives in fulfilling his responsibility for the overall administration of the Courts. This Regulation is silent on other mechanisms that could be used. The President of the Court of Appeal has issued nine Directives, all in 2001<sup>137</sup>.

JSMP is of the opinion that since the appointment of the President of the Court of Appeal, a satisfactory cooperation with District Courts is lacking. It is early to make a conclusive evaluation of the discharge of tasks by the President of the Court of Appeal in relation to the overall administration of the District Courts as Judge Claudio Ximenes has been on this position for less than six months.

JSMP is aware that the President of the Court of Appeal is at the moment exercising three functions: Judge of the Court of Appeal, President of the Court of Appeal and President of the Superior Council of the Judiciary. It is extremely difficult for one person to perform these functions successfully without dedicated administrative support and limited resources. Additionally, the accumulation by one person of many functions related to the justice sector is not sustainable.

In many countries, the administration of the Courts is supervised by a Court Administrator who could be a retired Judge. This alternate structure would allow for one person to be solely dedicated to the duty of supervising the administration of the Courts.

Another obstacle identified by JSMP appeared to be the lack of a formal procedure as to when issues can be brought to the attention of the President of the Court of Appeal and the procedure to be followed. JSMP is unaware of a directive issued by the President of the Court of Appeal on

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<sup>136</sup> Section 17 of UNTAET Regulation 2000/11, as amended by 2001/25. The role of the President of the Court of Appeal was added with the amendment in 2001, UNTAET Regulation 2001/25. Before 2001, more powers and tasks were given to the Court Presidency of each District Court. See Sections 16 to 18 of UNTAET Regulation 2000/11 (not amended).

<sup>137</sup> The Court of Appeal did not recommence functioning, from a break of approximately 18 months, until June 2003, consequently there was no President of the Court of Appeal.

this issue. Without an established procedure, it cannot be expected that the Judge Administrator and Judges of the District Courts are aware of when and how they can bring an issue to the attention of the President of the Court of Appeal.

JSMP has observed that due to this lack of procedures confusion has arisen as to whether an issue was formally or informally brought to his attention. JSMP believes that any issue related to court administration which is brought to the attention of the President of the Court of Appeal should be evaluated and followed up if necessary.

The Courts were, until July 2003, operating under limited supervision<sup>138</sup> and the process of establishing effective supervision and cooperation take time. However, the building of a strong relationship between Court actors, staff and the President of the Court of Appeal is the basis for successful Court administration.

## **9.4 Prosecutor-General**

Issues related to supervision provided by the Office of the Prosecutor General to the district Prosecutors has been provided in Chapter 3.3.8 Supervision and Discipline.

For the future planning and integration of the Office into the overall supervisory structure it is important that the organic law for the prosecutors, which is currently under consideration, specifically provides for mechanisms for the cooperation between the Office and district Prosecutors as well as between the Office and the President of the Court of Appeal, as their duties may overlap when supervising the performance of the Prosecutors and administration of courts respectively. The law should also regulate the management of the budget allocated to the Office.

## **9.5 Public Defenders Office**

The Office of the Public Defender is established under the Ministry of Justice<sup>139</sup>. In addition to providing for the basic role of the Office of the Public Defender, the Decree establishes that an organic law should in the near future be enacted to regulate the work of the Public Defender's Office.

As previously highlighted, there were many shortcomings on the supervision from and support given by the Office of the Public Defender to the Public Defenders at the districts' level<sup>140</sup>.

JSMP is aware that the current Director of the Public Defender's Office is working in an acting capacity. JSMP believes that this makes it more difficult to ensure a comprehensive supervision of Public Defenders in Dili and in the districts; it is important to formally appoint a Director for the Office of Public Defenders.

JSMP recommends that:

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<sup>138</sup> For approximately 18 months the Court of Appeal was not functioning and consequently the duties to be discharged by the President of the Court of Appeal were not fulfilled.

<sup>139</sup> Article 15 Decree 3/2003.

<sup>140</sup> See Chapter 3.4.



1. *The central bodies pay more attention to ensuring that the District Courts receive sufficient support. In addition, the national bodies attempt to establish a relationship where all court actors can be included;*
2. *The Consultative Council of the Ministry of Justice, during its monthly meetings, take the initiative of inviting other Court actors to participate in these meetings;*
3. *The National Direction of Judicial Assistance and Legislation of the Ministry of Justice develops a strategy to guarantee that information and materials are distributed to the District Courts;*
4. *The Ministry of Justice, together with other national institutions of the justice sector, develop a directive explaining the channels to be followed in trying to raise an issue to the attention of the Minister of Justice;*
5. *The 2004 budget allocation have regard to the needs of the District Courts. In the interim, as the Courts, Public Defenders and Public Prosecutors cannot independently manage their budget, a directive should be developed by the Ministry of Justice establishing the procedure that should be followed to ensure that these institutions have a clear and speedy process for accessing their allocated budget;*
6. *A Directive be issued by the President of the Court of Appeal, in consultation with the Superior Council of the Judiciary, identifying areas to be dealt with by the President of the Court of Appeal and which areas are to be dealt with by the Superior Council of the Judiciary;*
7. *A Directive be issued establishing the procedure which should be followed by Judges, Public Prosecutors, Public Defenders and Court Clerks in raising an issue to the President of the Court of Appeal regarding Court Administration;*
8. *Consideration be given to creating a position of a national Court Administrator. This position would be responsible for the supervision of the administration of the District Courts in East Timor thus reducing the workload of the President of the Court of Appeal;*
9. *Rules on Internal procedure be drafted for the Superior Council of the Judiciary. JSMP further recommends that this should include a procedure whereby Court actors can submit agenda items for the meetings and a procedure for bringing a complaint related to the work and performance of the Judges. Due consideration should be given to preserve, as far as possible, the anonymity of the person making the complaint;*
10. *Staff be recruited to the Secretariat of the Superior Council of the Judiciary, as provided by the Statute of the Judicial Magistrates Law; and*
11. *While the Government Gazette is not being printed and distributed, the Superior Council of the Judiciary should develop a mechanism by which the Judges of the District Courts can have access to the deliberations of the Superior Council of the Judiciary.*