

# **THE JUSTICE SYSTEM OF TIMOR-LESTE**



## **AN INDEPENDENT COMPREHENSIVE NEEDS ASSESSMENT**

**Dili, Timor-Leste  
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**I. Acknowledgments**

The Independent Comprehensive Needs Assessment Team is grateful to the many people who contributed to this report. The assessment process benefited from the cooperation of all those who met with the team and supplied it with information and documentation. Although the team was deployed during the summer months, a period that presented numerous challenges to the scheduling of interviews, we were able to meet with over 140 individuals. They represented both a broad cross-section of national and international actors directly involved in the justice system as well as numerous other interested parties, including Timorese officials, civil society, international agencies, and the donor community. We thank them all for making themselves available as well as for their thoughtful input, candid commentary and constructive suggestions.

**II. List of Acronyms**

AATL	Association of Lawyers of Timor-Leste
CAVR	Commission for Truth, Reception and Reconciliation
CRC	Convention on the Rights of the Child
CRDTL	Constitution of the Democratic Republic of Timor-Leste
CTF	Commission for Truth and Friendship
DV	Domestic Violence
ICNA	Independent Comprehensive Needs Assessment
LTC	Legal Training Centre
MoJ	Ministry of Justice
MoSS	Ministry of Social Solidarity
OPD	Office of the Public Defender
OPG	Office of the Prosecutor-General
PNTL	National Police of Timor-Leste
SCIT	Serious Crimes Investigation Team
SGBV	Sexual and Gender Based Violence
SRSG	Special Representative of the Secretary-General
UNDP	United Nations Development Programme
UNICEF	United Nations Children’s Fund
UNMIT	United Nations Integrated Mission in Timor-Leste
UNPOL	United Nations Police

UNTAET United Nations Transitional Administration in East Timor

UNTL National University of Timor-Leste

USAID United States Agency for International Development

VPU Vulnerable Persons Unit

### III. Preface

The Independent Comprehensive Needs Assessment (ICNA) is a mission consisting of four judicial and legal experts selected to perform an assessment of the overall justice system of Timor-Leste.<sup>1</sup> The basic purpose of the ICNA is thus to determine the extent to which the country's justice system is meeting the needs of Timor-Leste and its people. The assessment is also to indicate accomplishments and challenges within that system as well as to identify existing needs and to make recommendations for improvement.

Following the 2006 crisis, the mandate of the ICNA was anticipated in the Report of the Secretary General (S/2006/628), which stated that “the challenges to the justice system [of Timor-Leste] are so considerable and of such critical importance that an independent, comprehensive review and analysis of the justice sector should be undertaken.” More recently, Security Council Resolution 1867 (2009) underscored the “importance of a coordinated approach to the justice sector reform, based on [a] needs assessment.”

At a point, Terms of Reference were prepared by UNMIT and members of the ICNA mission were recruited. Thereafter, the team arrived in Timor-Leste during the first week in August 2009. Although the ICNA was independent in all respects, pursuant to the Terms of Reference UNMIT supplied logistical and other support as requested, including transport and the services of an interpreter.

The work of the assessment mission, however, was subject to a number of constraints. The first related to the recruitment of the team of experts. The terms of reference contemplated that UNMIT would recruit a team of up to five members who would be in Timor-Leste for eight weeks, during which time they would perform the assessment. Only one of the four team members was able to comply with that provision, a fact known to UNMIT at the time of recruitment and prior to deployment. The remaining three team members were recruited although the understanding from the outset was that none of them could be present in Timor for the entire eight week period. Although they performed tasks relating to the assessment and written report from outside Timor-Leste, they were present in-country for time periods varying from four to six weeks.

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<sup>1</sup> The Terms of Reference of the Independent Comprehensive Needs Assessment refer both to the “justice sector” and to the “justice system” of Timor-Leste. We have chosen to use the latter term, broadly construed. As such, the term satisfies the requirement that the assessment be comprehensive. Moreover, the term emphasizes that the delivery of justice is a process in which the various elements are not only related, but also interconnected in a dynamic way.

The second constraint was that there was no Timorese member on the team. Although both the SRSG and the Team Leader were particularly motivated to recruit such a member, no such individual was ultimately designated by UNMIT.

Another constraint was that the team was deployed during August and September, a period that presented numerous challenges to the scheduling of interviews due to the vacation schedules of persons interviewed. Moreover, during a significant portion of the mission's tenure in Timor-Leste, the local courts were largely inactive, owing to the annual judicial holiday period.

Nonetheless, the team was able to meet with over 140 national and international stakeholders, including Timorese officials, civil society, international agencies, and the donor community. Additionally, team members visited numerous justice system locations throughout the country, including every district court and the Court of Appeal, installations of the Prosecutor General and the PNTL, Becora Prison, several universities, and numerous other public and private facilities.

The team also had the opportunity to meet with a considerable number of national figures such as José Ramos Horta, President of Timor-Leste; Xanana Gusmão, Prime Minister; Fernando Lasama de Araújo, President of the National Parliament; Cláudio Ximenes, President of the Court of Appeals; Lúcia Lobato, Minister of Justice; and Ana Pessoa, Prosecutor-General, all of whom made themselves available and were extremely generous with their time.

On 23 September 2009, the ICNA team hosted a meeting of national and international stakeholders to review both an executive summary of its report and its preliminary recommendations. Those in attendance provided helpful input and thoughtful commentary and their contributions have been considered in the drafting of this final report.



#### **IV. Introduction**

It could be said that the last thing the good people of Timor-Leste need is another report. After all, Timor-Leste, and its justice system in particular, have been the subject of numerous studies over the years. It was not difficult for the ICNA team to discern an initial fatigue on the part of many Timorese at the thought of yet one more report being added to the stack of those that preceded it.

The team was sensitive to that consideration and the corresponding view of some that little is likely to come from yet another round of recommendations for improvement in the country's justice system. Of equal concern was the perspective of a small number of international actors who regarded the prospect of an independent assessment as a potential challenge to their ongoing work.

Mindful of these perspectives, the team routinely communicated that its mission was not to stand in judgment of others. Rather, its purpose was to perform an independent and comprehensive needs assessment that would acknowledge the accomplishments in the justice system to date and identify the challenges that it continues to face, while setting out recommendations to help chart the way forward.

The overwhelming majority of those national and international stakeholders with whom the team met responded very positively to its mission and they were of great assistance in helping the ICNA fulfill its mandate. At every stage they shared their thoughts and concerns openly and made suggestions that were forward thinking and constructive.

The report that follows is not intended to serve as the final word on the development and strengthening of the justice system in Timor-Leste. But it does seek to promote a more candid conversation among all national and international stakeholders concerning what still needs to be done to see that Timor-Leste has a system that provides the means for doing justice and securing the rule of law.

## V. Executive Summary

### 1. An Overview

Progress has been made, especially over the last several years, within the justice system of Timor-Leste. Both the Timorese and those who have assisted them are to be commended for the significant steps that have been taken to date to see that the rule of law is made a reality in Asia's newest nation. Nonetheless, many challenges remain and it is the purpose of this report to assess the needs that continue to exist.

### 2. Completing the Legal Framework

As set forth in its Constitution, Timor-Leste is a democratic state based on the rule of law, the will of the people and respect for the dignity of the human person. Other than the Constitution, the sources of law in Timor-Leste are legislation enacted by Parliament and decree laws and other legal acts issued by the Government. In addition to domestic law, the Constitution also recognizes international law and provides that the country's legal system shall adopt the general or customary principles of international law as well as those rules provided for in conventions, treaties and agreements that apply in Timor-Leste.

Several noteworthy accomplishments have been achieved in the process of completing the country's legal framework. These include the adoption of the Penal Code, the Criminal Procedure Code, the Law on the Protection of Witnesses, the Civil Procedure Code and several others. Also underway are the Civil Code and a law addressing domestic violence.

There remain a number of areas in which additional progress must be achieved, including the development of a Children's Code and a law concerning young offenders. Similarly, both a Commercial Code and a Labour Code should be developed to completion.

The process of legislative drafting implicates a number of considerations, including the need for translation of all existing and proposed laws into both Portuguese and Tetum. Another issue is the need to avoid wholesale adoption of foreign statutory models as not always being consistent with Timorese reality. Moreover, laws must be harmonized with the resources available to implement them.

Finally, there is a need to enhance the training of national staff in legislative drafting skills, anticipating that point in time when the drafting of legislation will largely be their own responsibility. In this regard, an initiative should be launched to develop a standard “legal Tetum” either by appropriate translation or adaptation of terminology.

For complete text and recommendations, see pages 25 - 29

### **3. Strengthening the Judiciary: Courts and Judges**

The judicial structure of Timor-Leste is largely the same as that instituted by UNTAET and consists of a Court of Appeal and four District Courts. There are currently thirteen national judges serving in the judiciary, with a number of international judges also providing line functions.

There is a need for more judges rendering justice in more places in Timor-Leste. Thirteen judges, regardless of their merit and their commitment, simply cannot meet the justice needs of over a million people spread out across the country, often in remote areas. As progress continues at the Legal Training Centre additional judges will be brought on line, although the continued use of international judges will be necessary for a number of years. Thereafter, all line functions should be performed exclusively by Timorese judges, although continued access to international judges serving as advisors and trainers will be of assistance.

Consideration should be given to building on current efforts by the judiciary to use “mobile justice” as a means for bringing formal justice to areas of the country underserved by judicial institutions. At the same time, consideration should be given in the longer term to the establishment of additional district courts, mindful of the need to develop sufficient human resources to provide adequate judicial, administrative and clerical staffing. Moreover, there must be a parallel availability of prosecutors and public defenders in proximity to any new courts. Any future development in this regard must thus be approached in a balanced and coordinated manner.

The development of a uniform, reliable case tracking system should be a priority, not only for the purposes of transparency, but to develop efficiencies in case management. One can successfully manage only what one measures and case tracking is essential to that process. Case tracking systems attempted to date with international assistance have been well motivated but largely unsuccessful.

The Legal Training Centre is critical to the strengthening of the judiciary. In addition to training judges, prosecutors and public defenders, its role has expanded to include other justice system professionals as well. Consequently, the LTC plays an important and expanding role in the development of the justice system. The training made available for judges and others should be of a continuing nature, and not simply to qualify for entry into a particular profession. Continuing education is essential to maintaining a high level of professionalism over time.

For complete text and recommendations, see pages 30 - 34

#### **4. Supporting Law Enforcement: Prosecutors and Police**

##### **Prosecutors**

In Timor-Leste, public prosecutors and police are the two primary branches of the law enforcement authority of the State. Consequently, the Public Prosecution Service in the Office of the Prosecutor-General and the National Police of Timor-Leste (PNTL) play major roles within the justice system.

The Public Prosecution Service remains an undersized institution with a total of fourteen public prosecutors. Nonetheless, district offices have been established in proximity to each of the district courts, providing an appropriate base of operations with each judicial district. Challenges remain, however, in the number of cases under investigation, requiring greater coordination between prosecutors and the PNTL. Moreover, there is a significant need for a functioning case tracking system in order to manage the large inventory of cases still pending at the investigative stage.

For complete text and recommendations, see pages 35 - 38

##### **Police**

A number of challenges face the national police, who continue to collaborate with their international counterparts in UNPOL. The needs of the police include gaps in logistics, skills and training, as well as organization and management. Essential equipment and other support is lacking in the domain of communications and transportation. Moreover, specialized skills need to be developed in areas such as forensics, sexual assault, domestic violence as well as others. Overall, there is a demand for trained investigators and such a capacity should be developed and implemented. Finally, training is also required

concerning both the Penal Code and the Criminal Procedure Code. International police have struggled with language issues and the balance between performance of line functions and mentoring.

For complete text and recommendations, see pages 38 - 40

## **5. Providing Equality of Arms: Public Defenders and Private Lawyers**

### **Public Defenders**

The Office of the Public Defender (OPD) plays a key role in providing legal assistance and representation in Timor-Leste. The focus of that mission is challenged, however, by the fact that public defenders accept clients regardless of their financial need. In sum, a legal service intended for those who are indigent and without means is also made available to those who are able to pay for their legal representation. Another concern is the persistent suggestion that public defenders accept direct payment from private clients for legal services. Public defenders are paid salaries to serve the public. To receive payments from individual clients runs contrary to that purpose.

Although it is widely considered that the OPD includes some of the better attorneys in Timor-Leste, the geographical reach of their services is limited and should be expanded. Steps should be taken to ensure that those without means have access to legal representation throughout the national territory.

For complete text and recommendations, see pages 41 - 43

### **Private Lawyers**

Private lawyers provide the majority of legal services across the country and serve a diverse range of clients. One of their unique contributions is to offer the possibility for legal representation that is independent of the government. Because they are not state actors, they can also provide a check on the potential excesses of institutional actors.

Despite the importance of private lawyers, the development of the private legal profession has received comparatively little attention. Consequently, there is an urgent need to establish the basic elements of the private legal profession, including an independent, professional bar association. The transitional body for the regulation of private lawyers is not yet fully functional. Nonetheless, a 24-month training programme at the Legal Training Centre is under consideration,

although the lack of strong Portuguese language skills among private lawyers will need to be overcome.

Despite many practical challenges, private lawyers currently provide most of the formal legal services in the country. Moreover, a significant number provide services through legal aid programmes. The private lawyers of Timor-Leste will be a significant national asset over the coming years.

For complete text and recommendations, see pages 43 - 45

## **6. Securing and Rehabilitating: Prison Services and Corrections**

There are two prisons in Timor-Leste, one in Dili at Becora and the other in Gleno. Together, these facilities currently hold just over 200 prisoners, some being pre-trial detainees and the others serving prison sentences. Although physical conditions in the two prisons largely conform to international human rights standards, the corrections system nonetheless faces significant challenges.

These include a lack of separate facilities for women and young offenders and a failure to separate young offenders who are pre-trial detainees from those who are serving sentences. Moreover, there is a need to improve medical care and facilities within each institution. Similarly, there is no coherent social reinsertion plan for inmates once they have served their sentence. To the extent that prisoners receive some training in vocational skills, they lack appropriate certification or documentation, which should be provided.

There is a significant need to develop the capacity of prison staff, and training in a number of areas is required. At the same time, the staff is without basic resources relating to internal security, such as handcuffs and other basic means of control.

Finally, the two current prisons pose a geographical challenge to families of detainees and prisoners who may wish to visit. Similarly, the transportation of detainees from prison to court in either Oecusse or Suai can present serious difficulties. To the extent that challenges in the penal system can be mitigated by the use of alternative sanctions and other non-custodial measures, a national policy should be developed with a view toward their implementation.

For complete text and recommendations, see pages 46 - 48

## 7. Enhancing Coordination within the Justice System

An essential element of a well-functioning justice system is coordination. It is a fundamental need among institutions and actors of the justice system, and in key areas such as prosecutor-police relations, legal aid, anti-corruption efforts and international assistance.

First steps toward better coordination should begin at the leadership level. The Council of Coordination, a consultative body of the Ministry of Justice, should broaden its participation beyond the Minister, the President of the Court of Appeal and the Prosecutor General. The Council can do more to promote the coordination of policy throughout the justice system, although its role is largely to assist the Ministry in the elaboration of Government policy in the justice sector.

There is a continuing need for effective modes of coordination between prosecutors and police. Such efforts are often complicated by issues of translation, in part because of varying levels of fluency in Portuguese, Tetum and English among not only national but international actors as well. Various dispatches and police reports often require translation because, as of yet, the various elements in this sector do not always use a common language.

Legal aid would similarly benefit from greater coordination among the various entities providing such services. There is no official regulation of the quality and standards for private legal aid organizations, which likely provide the majority of such services in the country.

Similarly, at least four State institutions have a role in relation to the investigation of corruption and coordination is vital if this important task is to be accomplished. An effective working arrangement among these institutions needs to be established.

Finally, just as coordination among national actors is important, so too is coordination among international donors. The recent initiative of UNMIT to facilitate meetings at which donors can interact is commendable and should be continued.

For complete text and recommendations, see pages 49 - 52

## 8. Protecting Judicial Independence and Respecting the Separation of Powers

Judicial independence is a prerequisite to the rule of law. It is enshrined not only in international law, but also in the Constitution of Timor-Leste. Judicial independence must be observed in two ways. Not only must individual judges perform their judicial functions independent of outside influence or interference, but also the judicial branch as a whole must operate independently of the other, separate branches of government. Both the decisional independence of judges and the institutional independence of the judicial branch must thus be respected.

Judicial independence is not an end unto itself, but is a means to an end, ensuring that judicial decisions are made solely on the basis of the law applied to the facts of a particular case and not on the basis of outside influence or interference. Judicial independence is also grounded in the separation of powers, allowing judges to make decisions even when they run contrary to the preferences of another branch of government.

The current situation in Timor-Leste as it relates to judicial independence is problematic. Although the country's judges have consistently asserted their independence in the cases that have come before them, the institutional independence of the judiciary is still not fully recognized by other state actors.

This fact has been made evident most recently in the case of Maternus Bere, who is under indictment for crimes against humanity and other serious offenses allegedly committed in Suai in 1999. Bere appeared before a Timorese judge and ordered held in Becora Prison as a pre-trial detainee. Despite the fact that no further judicial proceeding was held and no additional judicial order issued, Bere was released at the direction of a high official in the Timorese government. This disregard for a judicial order and direct interference with the judicial system was a grave violation of judicial independence and the separation of powers.

It is the responsibility of all those who serve in the four organs of sovereignty, including those at the highest levels, to respect judicial independence and the separation of powers. It is imperative that a commitment be made to promote a culture of respect for the rule of law and to avoid those actions that would jeopardize it.

For complete text and recommendations, see pages 53 - 59



## 9. Promoting Professional Responsibility

Those who would administer justice in Timor-Leste must be held to the highest personal and professional standards. They must be encouraged to see their work not simply as a job, but as a career in a profession in which they can take pride. Developing a strong sense of commitment to one's career within a valued profession is an important step in reinforcing professional responsibility. The need to develop a culture of professional responsibility applies to all careers in the justice system. This includes not only judges, prosecutors, public defenders and private lawyers, but also court officials, police officers and prison officials.

An intrinsic part of professional responsibility is professional accountability. The key elements to ensuring accountability are supervision and oversight based on clearly stated standards of conduct. Accordingly, discipline should always be based on principle and not on personality.

In order to secure these values, each of the mentioned professional groups has, or should have, an applicable statute setting out the duties and rights of the members of the particular group involved. Each statute also establishes a Superior Council with responsibilities for the pertinent professional group. It is the function of the Superior Council of each group to support the professional development of those over whom they have responsibility and to ensure proper oversight as well as professional discipline. In each case discussed, steps have been or are being taken to accomplish these goals.

Training and education is also critical to professional development. In this respect, the Legal Training Centre is instrumental in facilitating the career paths of those it serves. Training should not only emphasize the basic requirements for entering the profession, but should maintain standards on a continuing basis. Moreover, ethical training is critical. Not only is it important to act according to ethical standards, but it is equally important to be perceived by the public as acting in an ethical way.

Finally, progress has been made with respect to the issue of adequate compensation for certain actors in the justice system. The amount of compensation for a particular position is widely viewed as a reflection of the value that society places on it. The recent action by parliament enhancing the salaries of judges, prosecutors and public defenders is thus a very positive step.

For complete text and recommendations, see pages 60 - 63

## **10. Bringing Justice Closer to the People**

Significant progress has been made towards strengthening the formal justice system. In spite of these improvements, efforts to ensure a more consistent presence of all legal actors in every district court must continue. Moreover, the four existing district courts are inadequate in number to serve the entire Timorese public. In an attempt to fill this gap, judges report that they have engaged in mobile justice, trying cases in several towns. These efforts should continue, and other alternatives should be considered. New district courts should also be created.

Presently, a large part of the population faces substantial obstacles in accessing the formal justice system. In addition to physical distance from courts, other obstacles to access to the formal justice system include barriers of awareness, cost, language and culture. Furthermore, in relation to criminal violations, police are not always accessible at the community level.

As a result, the majority of all disputes in the country are resolved through customary law processes and alternative dispute resolution mechanisms. Customary law processes are widely used because of practical and cultural advantages they hold in relation to the formal justice system. There are, however, serious shortcomings with respect to customary means of dispute resolution, including their failure to respect fundamental human rights, especially those of women, and their lack of safeguards against abusive practices or unjust decisions. Even where such processes achieve a resolution, they possess no formal enforcement mechanism, leading to unimplemented decisions and referral to the courts in some cases.

The Ministry of Justice has been conducting a nationwide public consultation in relation to the legal recognition of customary law processes, as envisioned under the Constitution. Any initiative recognizing customary law should harmonize with the formal justice system and not operate as a parallel or separate system of justice.

For complete text and recommendations, see pages 64 - 66

## **11. Ensuring Justice for All**

### **Gender**

While the Constitution provides for guaranteed access to justice for all citizens of Timor-Leste, certain groups, such as women, experience particular hardship in receiving fair, affordable and timely justice. A great amount of progress has been made toward equalising rights and integrating gender considerations in Timorese legislation. Nevertheless, significant challenges for women continue to exist, including prevalent gender-based violence, lack of legal knowledge and access to courts, increasing human trafficking, and lack of economic resources.

In cases of domestic violence and sexual assault, pressure is put on women to settle such cases with traditional authorities rather than report them to the police. In those cases where police undertake an investigation involving violence against a woman, their training is often lacking. Moreover, the police suffer a number of logistical challenges that impact their ability to investigate such crimes. Similarly, lack of forensic capacity to obtain, store and test physical samples in cases of domestic violence could easily compromise an otherwise promising investigation. Finally, the lack of means to protect victims when they proceed to court is a significant issue.

Although reportedly more cases of gender-based violence were processed in the courts in 2008 as compared to 2004, many of those cases resulted in acquittals. This may be explained, in part, by the fact that some victims choose to remain silent during trial and not supply evidence against their alleged assailant.

One of the positive developments in relation to SGBV cases is the establishment of the national referral network, which includes VPUs, the MoSS and several NGOs, which provide support, assistance, counselling and shelter to victims. These organisations, however, still face a substantial lack of infrastructure, human resources and logistical support.

For complete text and recommendations, see pages 67 - 69

### **Children**

A large percentage of the population of Timor-Leste is under the age of eighteen and is particularly afflicted by a number of social problems such as poverty, unemployment and illiteracy. Moreover, in the absence of a legal regime

directed toward children, they are without protection and their situation is even more precarious as a result.

There is a pressing need to create a legal framework that will deal with children and the issues that are specific to them such as parental responsibilities, adoption, guardianship and child protection. Similarly, priority should be given to legislative proposals dealing with juvenile offenders.

In addition to developing the law, there is a corresponding need to improve the skills of Timorese professionals who will be dealing with children. In this respect, it is important to enhance the skills of those tasked with identifying, reporting and dealing with child abuse. There should also be training of judges and other court actors with respect to any legislation enacted concerning children.

Currently, there is no judicial review of placement of children in alternative care and, overall, there is insufficient protection of the right of children to be heard, in accordance with their age and maturity, at any proceeding that may impact their rights. Due consideration should be given to basic principles involving the best interests of children and respect for their views.

Finally, considering the key role played by the Department of Protection and Social Assistance of Vulnerable Children, the government institution charged with the protection of children who are at risk and exposed to abuse, there is a need for greater coordination in matters concerning justice for children between this department, the courts and other related institutions, including the Public Prosecution Service, the police and the Office of the Public Defender.

For complete text and recommendations, see pages 70 - 72

### **Land and property disputes**

Disagreements over land and property are reported to be the most common category of disputes in Timor-Leste. To the extent that such matters are in fact settled, their resolution is largely accomplished outside the formal justice system as very few such cases are filed in court. There are reported, however, to be a large number of unresolved land contests throughout Timor-Leste. These, in turn, produce a level of tension among neighbours and within communities that can often lead to serious violence.

The issues pertaining to property and land ownership are complex as they have been subject to several different legal regimes over the last twenty-five

years. It is extremely difficult to evaluate claims to a piece of land based on competing rights asserted under Portuguese law, Indonesian law, or simply the actual occupation of the land in question. Moreover, on the practical level, many records identifying property ownership were burned as a result of violence occurring in both 1999 and 2006. Similarly, turmoil in the past caused social dislocation and people were often forced to flee their property, which was then occupied by others. One additional complicating factor is that although the right of women to own land is recognized by law, such ownership rights have not always been traditionally recognized.

With donor assistance, a project is currently underway to address several land issues, ranging from law to registration. A draft law on land ownership has been discussed in a series of public consultations hosted by the Ministry of Justice. The preparation of this law should continue to be a top priority, and once it is adopted, judges and other legal actors as well as all those offering mediation services should be trained on land issues, including the new legislation.

For complete text and recommendations, see pages 72 - 73

## **12. Preparing the Next Generation**

Preparing the next generation of legal professionals requires a multi-faceted approach involving educators, judges, prosecutors, public defenders, and lawyers as well as public and private support. The establishment of a legal studies programme at the National University of Timor-Leste (UNTL), the only accredited university in Timor-Leste with such a programme, has been a critical first step. A strategy is lacking, however, in relation to the broader educational effort required to supply the human resources of the justice system in the coming years. Moreover, no assessment of the long term human resource needs of the justice system has yet been undertaken.

Several other critical issues also remain unresolved. The two primary private universities that offer university-level degrees in law, the University of Dili and University of Peace, continue to lack government accreditation. Tetum could be a more accessible language for all students of law, but insufficient attention has been devoted to its development for legal purposes. No significant work has yet been done in relation to building a Timorese culture of legal scholarship in either Tetum or Portuguese. A self-sustaining domestic pool of professors and other instructors has yet to be developed. Women remain underrepresented among the professionals in the system, and an increase in the quality and size of the overall pool of potential law students is needed.

For complete text and recommendations, see pages 74 - 76

### **13. Speaking the Language of Justice**

A subtext running throughout the report is that of language. As provided in the Constitution of Timor-Leste, Tetum and Portuguese are the country's official languages. The latter has played a dominant role in the justice system, reflecting the extensive involvement of international staff from the Portuguese-speaking world. The corresponding influence of that language on legal drafting, training at the Legal Training Centre and the conduct of court proceedings have all made fluency in Portuguese a key element in the advancement of legal actors in the justice system. To that end, the Portuguese language capacity of many actors in the justice system has increased significantly over a relatively short time. Nonetheless, these gains have not eliminated the fact that language remains a challenge for most participants in the justice process, ranging from judges to litigants.

Consequently, two approaches are needed. One is to reinforce the educational campaign undertaken to date in relation to Portuguese language skills for both children and adults in order to begin to transform Timor-Leste into a more genuinely bilingual society. To that end, Portuguese language study should continue and be strengthened at the university level. Current initiatives at the level of primary and secondary education should also continue and be strengthened. The other approach, which is not inconsistent with the first, is to develop a "legal Tetum" sufficient to be utilized in relation to all aspects of the overall justice system. This will require an intensive and coordinated programme involving scholars, legal actors, linguists and translators.

For complete text and recommendations, see pages 77 - 78

### **14. Confronting Impunity and Requiring Accountability**

The judicial system of Timor-Leste, as currently constituted, is not actively engaged in the process of addressing the crimes of the past or holding accountable those who committed them. There is no question, however, that Article 160 of the Constitution contemplates prosecution for offenses occurring between 1974 and 1999 in either the national court system or before an international court. Similarly, Article 163.1 provides for a hybrid special panel of national and international judges with jurisdiction over serious crimes committed between 1 January and 25 October 1999. The preamble of the Decree-Law promulgating the Code of Criminal Procedure also acknowledges the existence of such panels and Article 3 of the Decree-Law confirms that the legal framework for the operation of the Special Panels remains in place, although they are not currently functioning.

Regardless of whether an international tribunal were to come into being as recommended by the Commission of Experts, there are still numerous domestic indictments and arrest warrants pending against hundreds of defendants charged with crimes against humanity and other serious offenses committed during 1999. To the extent that the leadership of Timor-Leste chooses not to support a domestic judicial process to ensure that those responsible for past serious crimes are held accountable, it should nonetheless be made clear by both the UN and other donors that, if requested, they are prepared to provide the necessary resources to support such a process.

In any event, in light of the possible return to Timor-Leste of defendants who are already under indictment, such as Maternus Bere, national judges, prosecutors and defence lawyers should be provided appropriate training through the Legal Training Centre to handle such cases.

The Serious Crimes Investigation Team should continue to function and be appropriately supported and resourced until it has concluded all investigations and has provided to the Office of the Prosecutor General all materials and documentation necessary to permit those cases to be prosecuted in the future. Moreover, proper facilities should be arranged so that forensic and other evidence required by the SCIT can not only be stored, but also properly conserved, considering the challenges presented by the local climate. Finally, the SCIT should also be supported to help develop the domestic capacity to prosecute those serious crimes investigated by the unit, whether they amount to violations of domestic or international law.

For complete text and recommendations, see pages 79 - 85

## **15. Conclusion**

As noted throughout this report, a significant amount of progress has been made in developing the overall justice system of Timor-Leste. Although a number of challenges and needs continue to exist, the Timorese with whom the team interacted demonstrated a high degree of dedication and commitment. Although there is no question that they foresee the need for continued advice and assistance from the international community, they are motivated by a vision of a justice system run by the Timorese for the Timorese. This is a goal worth striving for and is a cause that deserves the continued support of the international community.

## VI. An Overview

Before assessing the needs of the overall justice system of Timor-Leste, we must first answer a very basic question: What is the purpose of that system? The answer to that inquiry is essential if one is to determine whether the justice system is adequately equipped to meet the needs of the country it serves.

It goes without saying that the overall purpose of the system is to do justice and to help secure the rule of law. Although there are differences among legal systems around the world, the need to provide an institutional framework within which justice can be done is universally recognized. Similarly, the role of such systems in supporting the rule of law is fundamental to sustaining a culture in which democratic institutions can function.

Beyond those considerations, however, there exists a day-to-day reality that must be acknowledged: a justice system cannot be viewed as successful unless it is seen to do justice for the ordinary citizen. The average person's expectations of a justice system are simple: disputes must be resolved, wrongs must be corrected, rights must be vindicated, wrongdoers must be punished and those who have suffered at the hands of others should receive some measure of relief or compensation. Moreover, the process by which these things are accomplished should be credible, in that it must be transparent, effective, efficient, timely and fair. These are not extraordinary expectations for the people of Timor-Leste, or of any country, to have.

It is important to consider these expectations in order to develop a coherent vision of how the overall justice system of Timor-Leste should function. It is equally important to have them in mind if we are properly to assess the needs of that system as it endeavours to accomplish its mission.

In performing that task, the team notes the progress that has been made, especially over the last several years, within the justice system of Timor-Leste. Both the Timorese and those who have assisted them are to be commended for the significant steps that have been taken to date to see that the rule of law is made a reality in Asia's newest nation. Nonetheless, many challenges remain and it is the purpose of this report to assess the needs that continue to exist.



## VII. Completing the Legal Framework

As set forth in its Constitution, Timor-Leste is a democratic state based on the rule of law, the will of the people and respect for the dignity of the human person. No person is above the law, and the State itself is bound by the Constitution and the law.<sup>2</sup> Other than the Constitution, the sources of law in Timor-Leste are legislation enacted by Parliament and decree laws and other legal acts issued by the Government. In addition to domestic law<sup>3</sup>, the Constitution also recognizes international law and provides that the country's legal system shall adopt the general or customary principles of international law as well as those rules provided for in conventions, treaties and agreements that apply in Timor-Leste. In that regard, Timor-Leste has ratified a significant number of international human rights treaties and other conventions<sup>4</sup>. Doing so, however, often requires the enactment of companion legislation to put into effect such international agreements.

There are several areas in which the lawmaking process has achieved noteworthy results, including the adoption of the Penal Code, the Criminal Procedure Code, the Law on the Protection of Witnesses, the Civil Procedure Code and several others. The Civil Code was recently approved by the Council of Ministers and will soon come before the National Parliament.<sup>5</sup> Similarly, a law addressing domestic violence has received ministerial approval and will soon proceed to Parliament.

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<sup>2</sup> Articles 1.1 and 2.2 of the CRDTL.

<sup>3</sup> Also, according to Article 2.4 of the CRDTL, the State shall recognise and value the norms and customs of Timor-Leste that are not contrary to the Constitution and to any legislation dealing specifically with customary law.

<sup>4</sup> Timor-Leste has ratified the Covenant on Civil and Political Rights; the Covenant on Economic, Social and Cultural Rights, the Covenant on the Elimination of All Forms of Racial Discrimination; the Covenant Against Torture and other Cruel, Inhuman, or Degrading Treatment or Punishment; the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW); the Convention on the Rights of the Child (CRC); and the Convention against Corruption. The following optional Protocols were also ratified: Elimination of All Forms of Discrimination Against Women; the Rights of the Child on the Involvement in Armed Conflict; the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography; and the Second Optional Protocol Dealing with Civil and Political Rights. More recently, the following conventions of the International Labour Organization (ILO) were also ratified: forced labour (Convention No. 29), freedom of association and protection of the right to organize (Convention No. 87), the right to organize and collective bargaining (Convention No. 98), and the elimination of the worst forms of child labour (Convention No. 182).

<sup>5</sup> Due to its length and the complexity of some of the issues with which it deals, the proposed Civil Code is likely to engender extensive discussion and a potentially protracted legislative approval process.

Despite the significant progress that Timor-Leste has made with respect to the enactment of national legislation and the adoption of international agreements, there remain a number of areas in which the legal framework needs to be completed. We note first that there are currently no laws in place addressing issues involving children, although drafting initiatives are underway with respect to adoption, parental rights and obligations and guardianship. Also, an initiative to develop a comprehensive Children's Code was recently launched.

A law concerning juvenile offenders is in progress, but remains in draft form. With this in mind, we note the serious concern that in a country with such a youthful population as Timor-Leste there is no legal regime concerning juvenile offenders. When a minor under the age of sixteen is brought before the court the judge involved is left to resolve the matter as best he or she can, based on general principles of law. Such principles, however, are not specifically elaborated in the current statutory framework with respect to juveniles, a situation that must be addressed.

Moreover, there are no procedural rules governing administrative litigation, which falls into the jurisdiction of the district courts in the absence of administrative law courts. Similarly, a comprehensive code relating to court costs, especially with respect to legal aid, is lacking and there are no provisions exempting the indigent from certain court fees and costs.

Although a drafting process is underway, a Labour Code that replaces previous UNTAET legislation<sup>6</sup> is also a need that must be addressed. Moreover, it is important that there be a Commercial Code that envisages an efficient system for the enforcement of commercial contracts as well adequate legislation to deal with property issues. These elements are essential to provide a safe environment for investment in Timor-Leste, thereby promoting the development of business and the growth of the country's economy.<sup>7</sup>

In a representative form of government, the people's delegates are the ultimate lawmakers. Nonetheless, the lawmaking process has been strengthened by the use of public consultations as to certain legislation. If nothing else, public

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<sup>6</sup> UNTAET Regulation No. 2002/05, on the establishment of a labour code for East Timor.

<sup>7</sup> According to the World Bank's Report "Doing Business 2010: Reforming through Difficult Times", Timor-Leste is ranked 164 out of 183 economies around the world. This nation is placed last in two areas directly bearing on the state of the country's legal framework: "enforcing contracts" (183 out of 183) and "registering property" (183 out of 183). Other areas of concern included "closing a business" (183 out of 183) and "getting credit" (181 out of 183). The latter also relates to difficulties in "registering property," which affects the availability of collateral for the securing of business loans.

input can help legislative drafters align proposed laws with the “realidade timorese” (Timorese reality) and to help legislation better reflect the legitimate aspirations of the citizenry. Moreover, such a mechanism helps to promote the involvement of women, both directly and through representative groups, in processes normally closed to them. Popular consultations have been used with respect to a number of matters, such as the land law, a children’s code and issues regarding the use of customary law.

There are other particular concerns with respect to legislative drafting that are worthy of mention. The first is the need for translation of all draft laws throughout the process of both popular consultation and parliamentary consideration. Neither step can be effective if the proposal under review is not in a language accessible either to the public or their representatives. Although the Constitution recognizes both Tetum and Portuguese as the official languages in the country, it is basic to the rule of law that the people have meaningful access, if not an understanding, of the laws by which they are governed. For these reasons, all proposed and enacted laws should be available not solely in Portuguese, but also in Tetum<sup>8</sup>. Although this will be a considerable task and will require greater focus on the development of Tetum legal terminology, the task is essential. The text of the draft land law, for example, was translated from Portuguese to Tetum prior to the popular consultation and should serve as a model for future practice.

Another consideration is whether the wholesale adoption of foreign statutory models is always consistent with Timorese reality. Of special concern is the ability of the country’s legal system to incorporate and apply the sometimes elaborate statutory schemes to be found in other national models. Laws that are too complex or that do not sufficiently relate to the actual experience of the Timorese are unlikely to be implemented, either adequately or at all. Moreover, laws must be harmonized with the resources available to implement them.

Although international legal advisors have played a primary role in the drafting of national legislation, it is very important that national staff be trained in legal drafting, not only with the view of developing their technical skills, but also anticipating the point in time where the drafting of legislation will largely be their own responsibility. Moreover, they must learn to become legal advisors themselves to pass on their knowledge to those Timorese who come after them. It is thus commendable that the Legal Training Centre (LTC) is now offering such a training course for law graduates recruited by the Ministry of Justice. The

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<sup>8</sup> According to Article 3 of Law No. 1/2002 of 7 August, the Official Gazette (Jornal da República), for the publication of all legislation enacted in Timor-Leste, shall be published in both official languages.

first course for legal advisors began in May 2009, with the first of three phases of theoretical training to be followed by an internship at the Ministry.

There is a commendable effort on the part of drafters in the Ministry of Justice to coordinate the various legislative elements relevant to the country's justice sector. Nonetheless, there is still a degree of compartmentalization among different statutory proposals and there is a need to anticipate the extent to which various legislative initiatives interrelate with each other, thus ensuring greater harmonization within the legal framework. Similarly, as noted above, it is important that such legal provisions coordinate in a realistic way with available resources and the means of implementation.

### **Recommendations**

- There is a clear need to complete the basic legal framework of Timor-Leste, starting with three particular legislative initiatives, being the Civil Code, the law on domestic violence and the land law.
- Special attention should be given to the completion and submission of draft legislation that is currently underway on all matters relating to children, including guardianship, adoption, parental responsibilities and child protection. Similarly priority should be given to legislative proposals dealing with juvenile offenders.
- The development of both a Labour Code and a Commercial Code should be a legislative priority.
- All laws that have been enacted to date should be translated into both Portuguese and Tetum. All pending laws, especially those subject to popular consultation and those currently before the Parliament, should also be translated in a timely fashion into Portuguese and Tetum.
- An initiative should be launched to develop a standard “legal Tetum” either by appropriate translation or adaption of terminology. The project would include the preparation of a Tetum legal dictionary and other aids that could also be used in the course of legal education both at the Legal Training Centre and at law faculties.
- International legal drafters have been diligent in the performance of their tasks, but it is necessary to plan for the day when those tasks will be performed by Timorese nationals. Moreover, the lawmaking process, including the work of Parliament, will require training a corps of legal advisors to provide appropriate technical and other support. Accordingly,

a more focused effort must be made to provide national staff with the capacity to replace their international colleagues.

- Additional steps should be taken as the legal framework of Timor-Leste is completed to ensure that the laws are better harmonized and that they coordinate in a realistic way with the resources available to implement them.
- There should be developed a best practices manual for legislative drafting and lawmaking, available in both official languages. Appropriate steps should be taken to see that its provisions are effectively implemented, both in the Government and the National Parliament.

### **VIII. Strengthening the Judiciary: Courts and Judges**

The judicial structure in Timor-Leste is largely the same as that instituted by UNTAET in 2000<sup>9</sup> and consists of a Court of Appeal and four District Courts. None of the other courts called for by the Constitution, including the Supreme Court and the Court of Audit, have yet been instituted.

There are currently thirteen national judges and three international judges serving in the country's courts. Four additional Portuguese judges were recently sworn in and will serve in Timor-Leste over the next several months, replacing their Timorese counterparts who will be in Portugal for training. Similar judicial "exchanges" are contemplated thereafter, providing Timorese judges additional training as well as the opportunity to experience a fully operative court system. Although it should be a clear goal that eventually all judicial line functions in Timor-Leste will be performed exclusively by Timorese judges, that eventuality remains a number of years away.

There is a need for more judges rendering justice in more places in Timor-Leste. Thirteen judges, regardless of their merit and their commitment, simply cannot meet the justice needs of over a million people spread out across the country, often in remote areas. Similarly, four district courts, one of which (Baucau) has jurisdiction over approximately half the national territory, are inadequate in number to serve the entire Timorese public. Although this report addresses this consideration in the section entitled "Bringing Justice Closer to the People," it bears mention here as an important issue facing the judicial system. The judges of Timor-Leste have not sat idly by, however, and they have brought mobile justice to outlying districts by conducting proceedings in locations other than their home courts.

With respect to the four existing district courts, the physical plant of each court is generally good. Challenges vary from the reliability of electrical service to the availability of the internet, which provides a valuable means for communication among the far flung courts of the country. Although functioning computers, printers, fax machines and some copiers exist at each court installation, there are serious supply and maintenance problems. It cannot be said that the technological infrastructure of the courts is adequate.

The development of a uniform, reliable case tracking system should be a priority. Such information should be routinely available in a structured and easily accessible manner, not only for purposes of transparency, but also to

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<sup>9</sup> Regulation No. 2000/11, as amended by Regulation No. 2001/25. However, a drafting initiative relative to legislation on the organisation of courts has already been launched.

develop efficiencies in case management. One can successfully manage only what one measures, and case tracking is essential to that process. Moreover, the availability of such case information supplies an important basis for evaluating the performance of judicial actors. Reliable statistics thus also support professional accountability. Case tracking systems attempted to date with international assistance have been well motivated but largely unsuccessful.<sup>10</sup>

Based on the available information, the current caseload in the trial court is approximately 1800 cases, with approximately 1200 of those cases pending in the Dili District Court. There are also some 60 cases pending before the Court of Appeal, almost all of which were filed in the current court term. Although it has been difficult to determine the aging of cases at the district court level, there generally appear to be no significant delays in the processing of criminal cases.

The same cannot be said of civil cases, where delays are more routine. This is especially problematic in cases involving unresolved land disputes. Not only do such cases constitute a source of discord within communities, but also they are a major provocation to violence and criminal behaviour. Concerning civil cases generally, it can be said that they are relatively few in number compared to criminal cases, highlighting the fact that the district courts are significantly underutilized by the public in the resolution of civil disputes. The most recent available figures indicate an approximate number of 1500 criminal cases pending, compared to 300 civil cases.

Critical to the strengthening of the judiciary is the Legal Training Centre (Centro de Formação Jurídica), which was established in 2004. Its main role is to train judges, prosecutors and public defenders although that role has expanded to other justice system professionals as well.<sup>11</sup>

The course of training provided at the LTC for judges is mandatory and is in three phases. The first phase is divided in two parts and covers a period of one and a half years. The first year of that period is a general theoretical training conducted jointly for all trainees, with a subsequent six month period of theoretical instruction in which prospective judges, prosecutors and public defenders are trained separately. During the first year the trainees study Civil

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<sup>10</sup> See, *infra*, footnote 38.

<sup>11</sup> The LTC is also charged with training registrars and notaries, court and Public Prosecution Service clerks, officers of the National Directorate for Prison and Social Reinsertion Services. Moreover, it is responsible for providing professional training courses for other public servants in the area of justice and the law; supporting training activities for lawyers; promoting and developing legal studies, research activities and publication of scientific works; and promoting the development and management of a legal library.

Law and Civil Procedure, the Penal Code and Criminal Procedure. They also receive both Portuguese and Tetum language instruction. Professional ethics and deontology, human rights, children and women’s rights and administrative law are similarly part of the training program. At the end of the year, successful candidates are assigned to one of the separate six month programs for judges, prosecutors and public defenders, with courses appropriate to each function.

The third and final part of the training is a year-long period of probationary service in the candidate’s field. During that time, the trainees perform judicial, prosecutorial or public defence duties under the supervision of international mentors. The candidates also attend additional courses at the LTC during their one year probationary period. Recent experience with this training program is summarized in the chart below.

Training of Judges, Public Prosecutors and Public Defenders at LTC: An Overview

Courses	Admitted	Completed	Judges		Public Prosecutors		Public Defenders		
			M	F	M	F	M	F	
2005/2007	40	27	7	4	6	3	5	2	
2006/2009	15	10	2	0	2	2	3	1	
2008/2011	18	<i>14 continuing to second phase of training (4 expected to become judges, 5 public prosecutors and 5 public defenders)</i>							

The LTC plays an important and expanding role in the training and professional development of judges and other actors within the justice system. As such, the importance of the LTC cannot be overstated. The training made available for judges and others should be of a continuing nature, and not simply to qualify for entry into a particular profession. Continuing education is essential to maintaining a high level of professionalism over time. Moreover, such training should not simply relate to substantive or procedural law but should also deal with ethics and other matters bearing on the professional development of judges and others participating in the justice system.

An effective court system also needs a trained, competent court staff. To date, this has amounted to a significant challenge. Recent developments however, indicate that attention has been applied to this concern. For example, a law was recently enacted regarding clerks operating in the courts, Public Prosecution Service and the office of the public defender, providing a long-awaited legal definition of the responsibilities, tasks and salaries within each career group.<sup>12</sup>

<sup>12</sup> Decree-Law No. 26/2009 of 9 September (Regime jurídico dos funcionários de justiça e dos serviços das secretarias dos Tribunais, do Ministério Público e da Defensoria Pública).



This provision will allow court administrators to start the process of reorganizing assignments and positions of current clerks and hiring more staff, according to existing needs. In addition, it is expected that the LTC will soon start a training program for these professionals groups.<sup>13</sup>

### **Recommendations**

- Considering the importance of the Legal Training Centre both to judges and to other justice system actors, the capacity of the LTC must be reinforced and further developed in the form of increased human resources, enhanced technological support and a significantly expanded library.
- A project should be developed and implemented at the LTC for the collection and analysis of Timorese court decisions. A project should also be implemented for the development of treatises and annotated codes as well as legal journals.
- Complementing the training received at the Legal Training Centre, Timorese judges should also be able to participate in appropriate training programmes offered in other countries. Not only do such initiatives provide opportunities not available in Timor-Leste itself, but they provide a chance to experience fully operational justice systems from which relevant lessons and best practices may be drawn.
- Mindful of the applicable restraints, efforts should be concentrated on expanding the number of national judges in Timor-Leste and increasing the means by which sitting judges can expand the reach of judicial services to the public, with consideration given to both increasing the number of district courts and systematically developing a system of mobile justice throughout the country.
- Continue the use of international judges to provide judicial line functions within the Timorese court system until a date certain. Thereafter, international judges should be maintained as advisors to their Timorese counterparts, but without performing judicial line functions.
- The recruitment of international judges as advisors should be refined to include only those candidates with a demonstrated aptitude for training,

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<sup>13</sup> This law also provides for a permanent position of interpreter in each court, including two at the Court of Appeal and two at the Dili District Court.

mentoring and otherwise passing on knowledge and skills to professional colleagues.

- Such international advisors should also receive training before deployment concerning the needs of the judiciary in Timor and those issues bearing on the delivery of justice in the country. While in Timor-Leste, international judicial advisors should be required to have language training in Tetum to deepen their ability to communicate with their Timorese colleagues and to facilitate their own contribution to the development of legal Tetum during their tenure. Such advisors will be subject to periodic review and evaluation, in which process Timorese judges will have input.
- In light of recent legislative enactments, administrators should proceed with the recruitment and training of additional court clerks, thereby providing the means to enhance court efficiency.
- To the extent possible, new district courts should be contemplated and created, mindful of the additional demands that such an expansion will require especially with respect to the current number of judges and other personnel, as well as the availability of other necessary resources.
- Develop an adequate case tracking system, simple, reliable and efficient, based on the real needs of the Timorese court system and which is not solely an adapted version of an imported tool.

## **IX. Supporting Law Enforcement: Prosecutors and Police**

In Timor-Leste, public prosecutors and police are the two primary branches of the law enforcement authority of the State. The Constitution provides that public prosecutors, led by the Prosecutor-General, are responsible for representing the State and the public interest as well as prosecuting violations of the law.<sup>14</sup> The organic law of the Public Prosecution Service further specifies that public prosecutors are responsible to lead criminal investigations even when conducted by other entities.<sup>15</sup> Police, under the Constitution, have the responsibility for defending the rule of law and preventing crime.<sup>16</sup> The organic law of the National Police of Timor-Leste (PNTL) elaborates further that the responsibility for crime prevention includes the investigation of crimes under appropriate supervision in accordance with the Criminal Procedure Code.<sup>17</sup> This section assesses the needs of public prosecutors and police in relation to their law enforcement duties, primarily the investigation and prosecution of crimes.

### **Prosecutors**

The Public Prosecution Service remains an undersized institution with only fourteen public prosecutors (eleven national and three international). Prosecutors are assigned to district offices nearby the district courts in Baucau, Dili, Oecusse and Suai. The territory and population of each judicial district is large, and these disadvantages are compounded by poor roads and limited transportation. As a result, public prosecutors struggle to come face-to-face with the people they are meant to serve. These challenges can be best addressed by the steady expansion of the Public Prosecution Service in coordination with the courts, public defenders and private lawyers. At the same time, the Public Prosecution Service should address several needs related to its organization and management, human resources, skills development, investigative capacities and procedures, and logistics.

Within the constraints of the current size of the Public Prosecution Service, a matter of public concern has been the backlog of cases under investigation, which totalled 5210 pending cases as of June 2009.<sup>18</sup> The Public Prosecution Service has been attempting to address this issue, and from January to June 2009 has succeeded in reducing it by 364 cases.<sup>19</sup> The current inventory of cases is partly a symptom of unmet needs in relation to organizational needs. For

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<sup>14</sup> Article 132 of the CRDTL.

<sup>15</sup> Law No. 14/2005 of 16 September, Article 3.

<sup>16</sup> Article 147 of the CRDTL.

<sup>17</sup> Decree Law No. 9/2009 of 18 February, Article 2.

<sup>18</sup> Press Release of the Public Prosecution Service, Office of the Prosecutor-General, 7 July 2009.

<sup>19</sup> Ibid.

example, the Public Prosecution Service continues to lack an effective case tracking and management system. As a result, the Prosecutor-General does not have the data she needs to assess the work of the Public Prosecution Service and to develop an effective prosecution strategy. Significant challenges also exist in coordinating the efforts of prosecutors and the police in bringing pending investigations to a close.

National prosecutors lack regular mentoring because international prosecutors must focus on their line functions. Current training efforts at the Legal Training Centre must be reinforced and expanded programmatically. Such continuing legal education should be provided on a consistent basis. Moreover, the Public Prosecution Service should be provided a legal resource library not only for purposes of general education, but also to assist prosecutors on a daily basis in the performance of their functions. There is also a need to develop more specialized training with respect to the investigation and prosecution of cases involving financial fraud, corruption and gender-based violence.

The education and training needs of national clerks within the Public Prosecution Service are also significant and their professional capacity needs to be developed further. Until that occurs, they will be unable to function without international assistance.

Significant gaps remain as well in relation to fundamental aspects of the work of the Public Prosecution Service, including capacity for the effective protection of personnel, investigative capacity, and facilities and protocols for the storage and conservation of evidence.

Furthermore, the Public Prosecution Service has been burdened with administrative difficulties that have impeded the effectiveness of prosecutors and clerks, particularly in the districts outside of Dili. This has meant delays in the construction of functional offices and accommodation in the districts, poor communications among offices, and insufficient translation and interpretation services. To begin to address these concerns, the Prosecutor-General arranged for an external audit. Following this review, she determined that the administrative services of the office were inadequate, and is now in the process of restructuring these services and hiring new administrative staff.

### **Recommendations**

- An efficient and effective case tracking and management system should be developed and implemented within the Public Prosecution Service. It should include some form of linkage to the police.

- The Public Prosecution Service, in consultation with other justice institutions including the police, should develop and implement an overall prosecution strategy that sets priorities in relation to the investigation and prosecution of crimes and establishes measures to reduce the backlog of pending cases within the Public Prosecution Service.
- The Public Prosecution Service should continue in the short term with international prosecutors in line functions, increasing the focus of such prosecutors on specialized areas such as the crimes of 2006 and corruption. Thereafter, however, international prosecutors should be primarily tasked with advising and providing guidance to national prosecutors in a structured programme of regular consultation. To accomplish this at least 50 % of an international prosecutor's time should be free from dealing with individual caseloads. The Public Prosecution Service should also develop and implement a defined time line, with specific interim benchmarks, for the transition of line functions to national prosecutors.
- Continuous legal training should be developed and expanded programmatically and made available to all prosecutors on a consistent basis. It should include individual annual achievement requirements in terms of the hours and types of education completed.
- A library of legal resources (paper and electronic) should be established and made accessible to all personnel in the Public Prosecution Service. Judicial decisions related to the cases of the Public Prosecution Service should be collected, tracked and analysed. In cooperation with the police, an annotated Criminal Procedure Code, which includes practical case examples, should be prepared in English, Portuguese and Tetum.
- The Public Prosecution Service should develop and implement a programme of specialized training in relation to economic crimes, money laundering, public corruption, human trafficking, sexual assault and domestic violence.
- The Legal Training Centre should develop and implement a more structured programme for the training of national clerks within the Public Prosecution Service that includes specific benchmarks in relation to the demonstration of critical job skills.
- The Public Prosecution Service should assess the measures necessary to ensure the security of its personnel.

- A team of specialized investigators that includes members with forensic science capacity should be created under the direct supervision of the Public Prosecution Service.
- An assessment should be undertaken of the procedures for the handling of physical evidence, including its tracking and storage.
- Appropriate housing should be completed for prosecutors and clerks assigned to districts outside of Dili.
- Full communications links for the district offices of the Public Prosecution Service should be established, including internet connections for all offices.
- The interpretation and translation services of the Public Prosecution Service should be assessed and strengthened.

### **Police**

The first contact that a person has with the justice system in Timor-Leste is frequently through the police, who are the most numerous representatives of the State in defending the rule of law. Following the 2006 crisis, both national (PNTL) and international (UNPOL) police have been performing the tasks of policing. As of August 2009, there were approximately 2900 national police and 1600 international police. National police have resumed full operational responsibilities in Lautem, Oecusse and Manatuto districts.

In accomplishing their investigative mission, police regularly face challenges. There is no system of national identification in the country, and the absence of such a system is compounded by factors that are a product of the poverty of a significant part of the population. There are few fixed addresses and phone numbers, and people frequently change their residence. These daily challenges, while formidable themselves, are compounded by substantial unmet needs within the police.

For national police, these needs include gaps in logistics, skills and training, and organization and management. Essential equipment and logistical support is lacking, and adequate facilities for collection, storage and analysis of physical evidence do not exist. Training on the Criminal Procedure Code and Penal Code has not been sufficient, leading prosecutors to archive cases or send them back to the police for procedurally correct investigation. Police investigators need to develop specialized skills, particularly in areas such as forensics, sexual assault,

domestic violence, human trafficking, economic crimes, money laundering, and public corruption. Management is hampered by the lack of an effective case filing and tracking system.

International police have also struggled at times, particularly in trying to bridge the language divide and to balance their line functions with mentoring. A distinct challenge for international police is that they are part of an English-speaking UN mission, but the national legal framework in which they must conduct investigations operates in Portuguese and Tetum. Some international police still conduct investigations and produce reports to the Public Prosecution Service in English, creating procedural and translation problems for prosecutors who require materials in Portuguese or Tetum. In addition, there remains the need to prioritize the mentoring of national colleagues on investigations so that the handover of skills is maximized during the remaining time that UNPOL is present in the country. Such mentoring requires that international police are sufficiently familiar with the Timorese Criminal Procedure Code and Penal Code that they can advise their national counterparts in relation to the investigative framework that these laws have established.

### **Recommendations**

- The national police should conduct an assessment of their equipment and re-supply needs in the field of investigations, and then develop and implement a strategy for meeting these needs.
- The national police, in consultation with the Public Prosecution Service, should establish a forensic investigations unit and prepare a multi-year plan for the development of the infrastructure, human resources and training needed.
- Intensive and continual programmes of training of international and national police on the Criminal Procedure Code should be developed and implemented in consultation with the Public Prosecution Service. It is critically important that international police are an integral part of this programme so that they can provide appropriate on-the-job advice to their national counterparts.
- A pocket guide for police explaining basic requirements of the Criminal Procedure Code in relation to investigations should be prepared and distributed in Tetum in consultation with the Public Prosecution Service.
- In consultation with the Public Prosecution Service, a programme of specialized investigative training of national police should be developed

and implemented in relation to sexual assault, domestic violence, human trafficking, economic crimes, money laundering, and public corruption.

- An assessment should be performed of the record keeping and case filing needs of the police and a strategy should be developed for addressing those needs, including the creation of an effective case tracking and management system.
- The police should perform all record keeping functions in Tetum or Portuguese to the maximum extent possible. Accordingly, information received from suspects and witnesses (including victims) should be recorded in one of those two languages.
- The international police should develop and implement a more structured programme for the mentoring of national police on investigative procedures that includes specific benchmarks for the transfer of skills.
- The international police should increase the number of Portuguese-speaking officers working on investigations who can effectively mentor international and national colleagues on legal issues.
- An annotated Criminal Procedure Code, which includes practical case examples, should be prepared in English, Portuguese and Tetum, in consultation with the Public Prosecution Service.



## X. Providing Equality of Arms: Public Defenders and Private Lawyers

### Public Defenders

The Office of the Public Defender (OPD) plays a primary role in providing legal representation in Timor-Leste and is charged with giving free legal advice and assistance to the neediest citizens of the country. However, the focus of that mission is challenged by the interpretation given to Article 3 of the OPD statute<sup>20</sup>, which provides that the OPD shall not refuse to provide its services when they are requested. Under the now prevailing view within the OPD, Article 3 requires the agency to represent even non-indigent clients if “requested to do so.”

Read in this way, Article 3 essentially deprives Article 4 of any meaning. Article 4 clearly states that the legal services of the OPD should be given, free of charge, to those without the financial means to obtain legal representation. A more appropriate reading of Article 3 – one that is consistent with Article 4 – is that the former’s reference to not refusing legal services to anyone simply means that no one who is unable to pay for a lawyer will be denied legal representation for any reason.

Another concern is the persistent suggestion that public defenders within the OPD accept direct payment for legal services from private clients. Steps must be taken at the highest level of the OPD to make a strong, clear statement not only that the mission of the OPD is to represent people without means, but also that one is never required to pay for those services.

Nonetheless, public defenders occupy an important position in the justice system of Timor-Leste, and generally enjoy better technical preparation than private lawyers. This is largely due to the fact that they are subject to the same training programme at the Legal Training Centre as judges and public prosecutors, whereas private lawyers have not yet been provided such training. Instruction of that type reinforces the professional skills of those who participate and enables recent law graduates to perform their legal duties both in and out of court with higher level of proficiency than might otherwise be the case.

As a result, public defenders play a key role in providing legal assistance and representation in Timor-Leste. Until further resources are applied to the professional development of private lawyers, the latter group will remain in a secondary position. This deprives the system of an important balance between

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<sup>20</sup> Decree-Law No. 38/2008 of 29 October (Estatuto da Defensoria Pública).

public and private representation and limits the options of those requiring legal assistance.

Although it is widely considered that the OPD includes some of the better attorneys in Timor-Leste, their distribution throughout the country is limited, with most public defenders concentrated in Dili, and to a much lesser extent, in Baucau. Steps must be taken to increase the geographical reach of their services and to ensure that those without means have access to legal representation throughout the national territory. Moreover, efforts should be made by the OPD to boost the quality and efficiency of the assistance provided to clients, especially in criminal cases. One particular concern in such matters is that public defenders should not simply meet with their clients at court shortly before a judicial proceeding, but should meet with them beforehand, especially if they are held in pre-trial detention.

### **Recommendations**

- Public Defenders should provide services exclusively to low-income citizens, to privately held non-profit organizations and to those who are referred by the court, as envisaged by the applicable Statute.
- There should be developed a clear, consistent and geographically comprehensive “culture of Public Defence”- through awareness campaigns and workshops held at the community level, involving schools, local institutions, churches, and dissemination of information by media.
- The OPD should develop a mobile service for eligible populations in rural areas, assigning days to be in remote districts and sub-districts and thus make its services available at the community level.
- The role of OPD and the presence of the mobile service should be announced by radio broadcast using the cooperation of local community leaders.
- More human resources should be devoted to the OPD, including an increase in the number of public defenders in order to ensure better outreach in the community and, prospectively, to permit the full staffing of OPD by Timorese nationals.
- There should be continuing training provided at the Legal Training Centre for public defenders on key issues of civil law such as contracts, land and property issues, family law and administrative law.

- There should be a review and reorganization of some of the internal procedures of the OPD in order to increase productivity and to provide better service to clients. Such an initiative could include assigning the same public defender to assist a client at all stages of a criminal proceeding, from arrest to appeal, thereby avoiding the reassignment of cases within the OPD that often occurs. Services should be more client-centred in this respect.

### **Private Lawyers**

The Constitution provides that the primary role of lawyers is to contribute to the good administration of justice and uphold the rights and legitimate interests of citizens.<sup>21</sup> Indeed, private lawyers play key functions in the justice system and society as a whole. They provide the majority of legal services across the country and serve a diverse range of clients. One of their unique contributions is to offer the possibility for legal representation that is independent of the government. Because of their independence and freedom to challenge authority, they can also provide a check on the potential excesses of institutional actors.

Despite private lawyers' importance to the justice system, the development of the private legal profession has received comparatively little attention. The first steps towards the formal registration of lawyers have only recently taken place. It was not until July 2008 that the law regulating the private practise of law and the training of lawyers was promulgated.<sup>22</sup>

There is now an urgent need to establish the basic elements of the private legal profession. An independent professional bar association for the self-regulation of private lawyers does not yet exist. The transitional body for the regulation of private lawyers established by law, the Management and Discipline Council for the Practise of Law, is not yet fully functional.

The Association of Lawyers of Timor-Leste (AATL), which could grow into an independent profession bar association, has approximately ninety registered members, of whom at least eight are reported to be women, and is registering as a non-governmental organization. It has instituted a system of general assembly meetings and a dues paying structure, and has been developing internal statutes and a code of conduct for its members. It has dedicated leadership, but they have many commitments and are very busy with their practises. It also has a small, basically equipped office. To function properly as a professional bar association,

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<sup>21</sup> Article 135 of the CRDTL.

<sup>22</sup> Law No. 11/2008 of 30 July.

the AATL needs support to develop a strategic plan, organizational infrastructure and secretariat.

Existing private lawyers are permitted to continue practising during a four year transition period ending in 2012 if they have registered with the Management and Discipline Council for the Practise of Law. By the end of this period, lawyers are required to have met certain requirements including a law degree from an accredited university, fluency in one of the country's two official languages (Portuguese and Tetum), and successful completion of the training programme for private lawyers at the Legal Training Centre.

Applicants' law degrees are now in the process of being checked and applications for the required 24-month programme at the Legal Training Centre are under consideration. This programme consists of a 15-month phase of theoretical training and a 9-month phase of practical training. One looming question is how private lawyers, who generally lack strong Portuguese language skills, will fare in the initial phase that includes a substantial component of study in Portuguese. Another is what will be the effect of removing a significant number of private lawyers from fully-active legal practise during their fifteen months of classroom training.

Despite many practical challenges, private lawyers currently provide most of the formal legal services in the country. Moreover, a significant number of private lawyers provide services through legal aid programmes. Nonetheless, the private practice of law in Timor-Leste can be challenging, especially where few people understand the importance of a lawyer, and most people are too poor to afford one. In these circumstances, the operation of an independent, private legal practise has been an economically viable option for only a few lawyers.

Looking beyond the four-year transition period, one more crucial element of the profession requires attention. No steps have yet been taken to build a foundation of legal scholarship and continuing education upon which to base the future development of the profession of private lawyers.

### **Recommendations**

- The Management and Discipline Council for the Practise of Law should become a fully-functional body with a working secretariat.
- Assistance should be provided to the AATL so that it can develop and implement a strategic plan that will allow it to grow into a legally recognized bar association with the responsibilities for the regulation of the legal profession. Such a plan should include a process for the

preparation of the legislation required to recognize a framework in which private lawyers are self-regulating.

- In accordance with the AATL's strategic plan, assistance should be provided to the association to supplement the dues of its members in paying the costs of the administration of the AATL and developing a working secretariat.
- The effect on the provision of legal services of removing a significant number of lawyers from fully-active law practise in order to receive legal training at the Legal Training Centre should be assessed and steps should be considered and implemented to address this issue.
- A project should be developed and implemented for the collection and analysis of court decisions.
- A project should be developed and implemented for the development of treatises and annotated codes as well as legal journals.
- A regular programme of continuing legal training should be developed and implemented for all private lawyers. It should include individual annual achievement requirements in terms of the hours and types of training completed.

## **XI. Securing and Rehabilitating: Prison Services and Corrections**

The Timor-Leste Prisons Service currently comprises two prisons, one in Dili at Becora and another in Gleno. These facilities currently hold 223 prisoners in total with 199 at Becora and 24 at Gleno, the latter also holding women prisoners. Of the total number of prisoners, 95 are pre-trial detainees, 4 are women and 10 are young offenders (over the age of 16).<sup>23</sup> The majority of the prison population is comprised of offenders charged with homicide (62%), with the remainder facing charges involving sexual assault (11%) and robbery (27%).

Although the physical conditions of detention (except for women and young offenders) largely conform to international human rights standards, the corrections system still faces significant challenges, which can be summarised as follows:

(a) A lack of separate detention facilities for women and for young offenders. Although juveniles are separated from adults at night, they are integrated with the adult prison population during the day;

(b) No separation of young offenders who are pre-trial detainees from those serving a sentence following conviction;

(c) A lack of professionalism and discipline on the part of both management and staff;

(d) The need to provide continuous capacity-building and training for prison staff, especially concerning legal issues, human rights and international standards of imprisonment;

(e) Inadequate resources and infrastructure;

(f) The lack of adequate means to provide internal security (lack of hand-cuffs and other protection tools);

(g) A need for an improved medical care and facilities (there is no permanent medical doctor in prisons and examinations are performed by medical nurses);

(h) The need for a reinsertion plan for prisoners, including educational and vocational programming while in detention. To the extent that prisoners are

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<sup>23</sup> According to Article 20.2 of the Penal Code, the Code applies to young offenders between the ages of 16 and 21 for all purposes, except that provision can be made for special legislation regulating the sentencing of offenders in that age group.

trained in vocational skills, appropriate certification or documentation should be provided;

(i) The need to provide technical support for the activities of the council overseeing the reinsertion of inmates into society;

(j) The need for national legislation regulating the conditions of imprisonment and rules of conduct for prison staff;

(k) The lack of a policy concerning alternative sanctions and the use of non-custodial sanctions;

(l) The two current prisons pose a geographical challenge to families of detainees and prisoners who wish to visit. Similarly, the transportation of detainees from prison to court in either Oecusse or Suai can present serious difficulties.

### **Recommendations**

- A separate detention facility should be built for women and young offenders as a priority.
- Appropriate additional prison facilities should be built in those parts of the country that are under-served in that regard, allowing for the maintenance of pre-trial detainees and inmates closer to their home area.
- Internal policies, management and governance structures should be supported and strengthened.
- An updated code of conduct for prison staff should be adopted.
- The prison administration should receive management and leadership training.
- Prison legislation should be updated and a law on the status and career growth of prison guards should be adopted.
- Prison staff should receive more structured and continuous training with emphasis on legal procedures and human rights; the training needs of the staff should be monitored.
- Literacy training for prisoners; non-formal education training and vocational training should be properly administered in prisons; these

training programmes should be certified and accredited to ensure successful reintegration of prisoners.

- A programme for social reintegration services should be adopted and implemented, especially for young offenders and women.
- Basic equipment needs of correction facilities and of staff, including security and protection tools, should be prioritised.
- Medical facilities and care, including counselling for mentally ill prisoners, should be improved.
- Development of a national policy to increase the use of alternative and non-custodial measures should be supported.



## **XII. Enhancing Coordination within the Justice System**

An essential element of a well-functioning justice system is coordination. It is a fundamental need among institutions and actors of the justice system, and in key areas such as prosecutor-police relations, legal aid, anti-corruption efforts and international assistance.

### **Council of Coordination**

First steps towards better coordination should begin at the level of leadership and strategy among the core institutions of the justice system. The organic law of the Ministry of Justice establishes the Council of Coordination as a consultative body of the Ministry but limits formal membership on the Council to the Minister, the President of the Court of Appeal and the Prosecutor General.<sup>24</sup> This structure fails to include formally other potentially relevant actors of the justice system. The law provides, however, that the Minister may invite the participation of other entities whose involvement may be useful to the work of the Council. The Council otherwise lacks any formal mechanism for obtaining the data necessary to inform its strategic planning efforts. The Council can do more to promote the coordination of policy throughout the justice system, although its role is largely to assist the Ministry in the elaboration of Government policy in the justice sector.

### **Prosecutor-Police Relations**

Prosecutors and police continue to lack effective modes of regular communication. Prosecutors' dispatches, which are frequently written in Portuguese, often require translation by the police into Tetum (for national officers) or English (for international officers), delaying response times. Police also assert that prosecutors are unresponsive and particularly difficult to contact outside of office hours. On the other hand, investigative reports are often submitted to national prosecutors in English, reflecting the participation of international police officers serving in UNPOL.

To address some of these issues, a Prosecutor Support Unit within the National Investigation Division of the police was established in 2006. This unit is staffed mainly with Portuguese-speaking international police who are familiar with the Criminal Procedure Code and colleagues from the national police. Even though the Prosecutor Support Unit has helped improve coordination in cases in which it has acted, not all police and prosecutors appear to utilize this unit.

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<sup>24</sup> Decree-Law No. 12/2008 of 16 April.

### **Legal Aid**

There is no systematic approach to legal aid, which is provided not only by public defenders but also by private lawyers and paralegals. Fourteen public defenders provide free legal services to a range of clients through offices in Dili, Baucau, Oecusse and Suai. Many more private lawyers and paralegals provide free legal services through legal aid organizations or independently. This number includes approximately thirty-five private lawyers who provide legal aid services through five private legal aid organizations supported international assistance.<sup>25</sup>

There is also no official regulation of the quality and standards of private legal aid organizations, which likely provide the majority of legal aid services in the country. Moreover, almost all legal aid outside of the work of the public defenders is funded by international donors. Only recently has the Ministry of Justice begun to consider potential legislation in relation to issues of legal aid.

### **Anti-Corruption Efforts**

At least four State institutions have a role in relation to the investigation of corruption – the Office of the Provedor, the Public Prosecution Service, the police and now, the new Anti-Corruption Commission<sup>26</sup>. In light of the potential for conflicts among these institutions, coordination is essential. Some work has already been done to facilitate a memorandum of understanding between the Office of the Provedor and the Office of the Prosecutor-General, but much more needs to be accomplished in order to develop an effective working arrangement among all four institutions in relation to anti-corruption efforts.

### **International Assistance**

Just as coordination among national actors is important, so too is coordination among international donors. The recent initiative of UNMIT to facilitate meetings at which donors can interact is commendable and should be continued. Such gatherings, focused on coordinating donor efforts, can be of great value. The process encourages donors to think beyond the confines of their own projects and to develop an appreciation for how their efforts interact with the work being done by others.

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<sup>25</sup> Asia Foundation seminar presentation, Demand & Response: Legal Aid in Timor-Leste, delivered 10 September 2009.

<sup>26</sup> The Anti-Corruption Commission was established by Law No. 8/2009 of 15 July.

The justice system in Timor-Leste must advance in a measured way, with its component parts, such as the courts, prosecution and defence, developing in relative equilibrium. It is thus extremely important that international support for the justice system should not only be comprehensive, but also well-integrated. Regular donor meetings can thus go a long way to ensure that international efforts are better coordinated. Such an approach will produce a greater harmonization of results and help to maintain a balanced development of the country's justice system.

### **Recommendations**

- The Minister of Justice should expand the Council of Coordination on an operational basis to include other elements within the justice system such as the Defender-General.
- A mechanism should be developed for the Council of Coordination to obtain regularly the information it needs to consider strategic decisions effectively. This mechanism should provide the Council with not only information from inside the institutions of the justice system but also perspectives of individuals who are engaging with the system such as private lawyers, victims, civil litigants and witnesses.
- The Council of Coordination should continue its work towards finalizing a national strategic plan for the justice system that takes into account the views of all stakeholders in the system so that the plan is sustainable even if there is a change in government.
- A prosecutors-police task force should be established to address the backlog of cases with the two institutions and to promote regular communication on all files among prosecutors and police investigators.
- Prosecutors should be instructed to prepare their dispatches in Tetum, whenever possible. In that way, national police, who are increasingly assuming key roles in investigations, would not require a translation.
- The system by which prosecutors are to be available to cover all police shifts should be improved. Prosecutors should be instructed to make themselves available as promised for police inquiries during the assigned duty periods outside of office hours.
- The capacity of the Prosecutor Support Unit in the police should be increased as well as the awareness of this unit on the part of police, prosecutors and prosecutors' clerks.

- A coordinated structure for the provision of legal aid services in all districts should be developed based on a thorough analysis of the legal needs of the people of Timor-Leste, the existing legal aid structures, the pool of potential legal service providers (public defenders, private lawyers and paralegals), and the available funding. This structure should ensure that legal aid services meet minimal standards of quality and that such services reach those most in need by including means-testing standards and procedures.
- A working group or other mechanism should be established to coordinate the anti-corruption efforts of the Office of the Provedor, the Public Prosecution Service, the police and the new Anti-Corruption Commission.
- The regular meetings of international donors facilitated by UNMIT should continue and further efforts on the part of the participants to coordinate their work in aiding the Timorese justice system should be supported.

### **XIII. Protecting Judicial Independence and Respecting the Separation of Powers**

Judicial independence is a prerequisite to the rule of law. Indeed, the hallmarks of judicial integrity are independence, competence, impartiality and fairness.<sup>27</sup> The importance of these values does not vary from one legal system to another and they apply to every court in every country. Indeed, the Universal Declaration of Human Rights asserts: “Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal” (Article 10). Similarly, the International Covenant on Civil and Political Rights states that every person is entitled to a fair trial before a “competent, independent and impartial tribunal” (Article 14).

These same values are enshrined in the Constitution of Timor-Leste. Article 121.2 states that “[i]n performing their functions, judges are independent and owe obedience only to the Constitution, the law and to their own conscience.” Not only must individual judges be independent in their decision making, but the judicial branch itself must be independent of the other branches of government. Accordingly, Article 119 of the Constitution states that in Timor-Leste “[c]ourts are independent and subject only to the Constitution and the law.” In underscoring the importance of judicial independence, the Constitution reflects the fact that the courts are one of the four pillars of the Timorese state, and as such, are “organs of sovereignty” (Article 118.1).

Judicial independence must thus be observed in two ways. Not only must individual judges perform their judicial functions independent of outside influence or interference, but also the judicial branch as a whole must operate independently of the other, separate branches of government. This proposition is fundamental and is well established in international law. “The independence of the judiciary shall be guaranteed by the State and enshrined in the constitution or the law of the country. It is the duty of all governmental and other institutions to respect and observe the independence of the judiciary.”<sup>28</sup> The guarantee of judicial independence found in the Constitution of Timor-Leste is further reinforced by Article 2.3, which affirms that the law is the highest authority in society and that the State itself “shall be subject to the Constitution and to the law” (Article 2.2).

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<sup>27</sup> See, e.g. “The Bangalore Principles of Judicial Conduct” (2002).

<sup>28</sup> “Basic Principles on the Independence of the Judiciary” adopted by the Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders and endorsed by General Assembly resolutions 40/32 of 29 November 1985 and 40/146 of 13 December 1985.

Both the fundamental law of Timor-Leste and international standards thus respect the decisional independence of judges and the institutional independence of the judicial branch.

Judicial independence is not, however, an end unto itself. Rather, it is a means to an end, which underscores why both forms of independence must be protected. Judges are charged with the most important decisions that can be made in the lives of those who come before the court, including decisions involving their lives, freedoms, rights, duties and property. Judicial independence guarantees that such decisions will be made solely on the basis of the law applied to the facts of a particular case, and not on the basis of outside influence or interference. In this respect, judicial independence is crucial to ensuring that justice is done both impartially and fairly.

The institutional independence of the judiciary is grounded in the separation of powers, which is essential to the functioning of a democratic state. The executive and legislative branches share the difficult task of dealing with political and social problems within the societies that they govern. The courts, on the other hand, are called upon to announce the meaning of the law, adjudicate disputes and determine the rights and responsibilities of those who come before them. Judges are thus often called upon to make decisions in which the other branches of government may have an interest, if not a point of view.

Judicial independence allows judges to make decisions in such cases based solely on the law and the facts before them, even if the eventual result may run contrary to the wishes of the other branches of government. If judges were to decide cases under the influence of other state officials or based on their wishes, they would not be performing their duty as required by the Timorese Constitution, which states that “judges are independent and owe obedience only to the Constitution, the law and to their own conscience” (Article 121.2). Moreover, to the extent that other branches of government might seek to influence, interfere with or simply ignore the independence of the judiciary, doing so violates the “duty of all governmental institutions to respect and observe the independence of the judiciary.”<sup>29</sup>

The current situation in Timor-Leste as it relates to judicial independence is problematic. Although, with few exceptions, the country’s judges have consistently asserted their decisional independence in the cases that have come before them, the institutional independence of the judiciary is still not fully recognized by other state actors.

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<sup>29</sup> Ibid.

Two particular cases illustrate both the accomplishments and the challenges that exist in Timor-Leste concerning judicial independence.

In the first, the contract of an international judge serving on the Court of Appeal was not renewed by the Superior Council of the Judiciary on the same day that a panel over which he presided issued a decision declaring unconstitutional certain aspects of the law pertaining to the Economic Stabilization Fund (Law No. 12/2008 of 5 August).<sup>30</sup>

There is no question that the decision was a controversial one that ran counter to government policy. Consequently, the failure of the Superior Council to renew the contract of the judge who authored it was widely viewed as a reaction to his decision, especially where that body is dominated by non-judicial appointees. Following the action of the Superior Council, the international judge applied to the Court of Appeal for relief and his request was heard by a specially designated panel of three Timorese judges. Despite the clear disfavour evidenced by government officials toward the international judge, the Timorese panel ruled in his favour and suspended the decision of the Superior Council not to renew his contract and to begin the process for recruiting another international judge to replace him.<sup>31</sup>

The panel acknowledged that “no one can say that the applicant is entitled to see his contract being automatically renewed.” It ruled, however, that in the circumstances presented the failure to renew the applicant’s contract was without cause and that “the decision made is clearly an arbitrary one” and “not motivated by reasons of public interest.”

In reviewing the actions of the Superior Council of the Judiciary, the panel went on to invoke the principle of judicial independence, citing Article 121.2 of the Constitution, which provides that “judges are independent and owe obedience only to the Constitution, the law and to their own conscience.” Pointing out that the Constitution applied both to international and national judges serving in the country, the panel recognized that the functioning of the judicial system “relies necessarily on the independence and impartiality of the judges working in Timorese courts.”

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<sup>30</sup> In considering this case, we do not address whether it was correctly decided. Rather, we consider the matter simply as it bears on the issue of judicial independence.

<sup>31</sup> The decision of the panel is available online in an unofficial English translation from which the quotes in the text are taken. It can be found at <<http://www.unmit.org/legal/index-e.htm>> [Consult. 29 Aug. 2009].

This judicial decision is noteworthy not only for its content, but for the fact that it was written by a Timorese judge and issued by a panel of Timorese judges. It is questionable whether such a clear statement – and more importantly such a clear exercise – of judicial independence would have been possible just several years before. Despite its fragile beginnings, the judiciary in Timor has made significant strides. That is nowhere more evident than in its appreciation for the principle of judicial independence and the clear expression of its importance in the decision issued by the panel in this case.

The second case that we consider brings into focus even more vividly the relationship between judicial independence and the separation of powers.<sup>32</sup>

On or about 8 August 2009, PNTL officers arrested Maternus Bere in Suai, where he apparently entered Timor-Leste from West Timor to visit family members. Bere, who is alleged to have been a commander of the pro-autonomy Laksaur Militia in Suai, was charged in 2003 with crimes against humanity and other serious offenses. These charges related to allegations of widespread and systematic attacks on the civilian population in the district of Covalima, including what has come to be known as the Suai Church massacre that occurred on 6 September 1999. An indictment was filed by the Deputy Prosecutor General for Serious Crimes and a judge of the Special Panels of the Dili District Court issued a warrant for Bere’s arrest, with no further action being taken in his case until his apprehension in August, 2009.<sup>33</sup>

Following his arrest, Bere was brought before the Suai District Court, where a Timorese judge ordered that he be held in pre-trial detention pending the trial of his case. He was then transferred to Becora Prison in Dili to await further proceedings. On 28 August, the Office of the Public Defender submitted a petition to the court in Suai requesting that Bere be released and allowed to leave the country for medical treatment. The judge, in turn, attempted to obtain information concerning the defendant’s condition from the prison where he was held. The court clerk from Suai went to Becora prison on 3 September to determine the status of the defendant and was informed that he had been

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<sup>32</sup> As the case relates to other issues addressed in this report, it is also discussed in Section XIX, “Confronting Impunity and Requiring Accountability,” *infra*.

<sup>33</sup> Indictment No. 09-2003 filed with the Special Panels for Serious Crimes of the Dili District Court. All serious crimes indictments are available online on the website of the UCal Berkeley War Crimes Study Centre at <<http://socrates.berkeley.edu/~warcrime/ET-Docs/>> [Consult. 15 Aug. 2009].



released on 30 August. Who ordered the release of Bere has never been officially revealed.<sup>34</sup>

There was significant public reaction to the release of Bere, initially for the reason expressed by the UN High Commissioner for Human Rights, who stated that the decision to release him had “grave consequences for the prospects of accountability for the serious crimes that occurred in 1999.”<sup>35</sup> Thereafter, prominent members of civil society and others raised the issue of Bere’s release occurring entirely outside the judicial process. On 9 September the President of the Court of Appeal issued a statement that the release of Bere “was not a result of a court decision.”

He stated that “[a]ccording to Timor-Leste’s laws and Constitution, only a judge may order the detention, arrest or release from jail of any individual. No non-judicial authority has the power to release or to order the release from prison of anyone who was sent there by a court order.” He explained how the separation of powers mandates that result. “Our Constitution assigns a set of powers to each of the sovereign organs and does not allow any particular sovereign organ to make use of powers assigned to another sovereign organ.” He went on to say that “[n]o sovereign organ of a non-judicial nature has the power to release from prison an individual that has been sent to prison by a judicial order, not even for political reasons.” The President then indicated that the Superior Council had directed its Judicial Inspector to undertake an investigation into the matter. He concluded by saying that if that inquiry disclosed that Bere had been unlawfully released, “the competent authorities shall be duly informed of the fact so that they may start the corresponding penal and disciplinary proceedings.”

Although the exact mechanism for Bere’s release has not been disclosed, it has been widely reported in the media that his discharge from prison was at the instance of high ranking Timorese officials. Indeed, the Minister of Justice was publicly quoted at stating that the release was a “political decision.” An AFP release on 8 September quotes her as stating: “It is a political decision that must be taken by the government to resolve this issue because it is related to our country’s problems.” Acknowledging the reception that such a decision might be

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<sup>34</sup> It was widely reported that the release was timed to precede the public celebration of the tenth anniversary of the popular referendum in 1999. The team was reliably informed that a high government official privately urged a Timorese judge to authorize Bere’s release, but was rebuffed. Bere was released shortly thereafter without a judicial hearing and without a court order.

<sup>35</sup> Letter of Navanethem Pillay, UN High Commissioner for Human Rights, dated 2 September 2009.

given, she added “It’s the decision of the state and everyone has to obey the decision, although we realize that people sometimes might not agree or accept.”<sup>36</sup>

The policy of choosing forgiveness and reconciliation over prosecution has long been the preferred approach on the part of the leadership of Timor-Leste to the serious crimes of the past. That position, however, even when expressed as a policy of the national government, does not trump the Constitution and laws of Timor-Leste. Whatever may be the merits of that approach, it simply does not supply a basis for ignoring the legal requirement that a person who is held in pre-trial detention pursuant to a judicial order can only be released from custody by a judge.

It is clear that the separation of powers does not allow one branch of government to exercise the prerogatives of another. Not only does such an act contravene applicable constitutional and legal requirements, but it seriously undermines the rule of law. Moreover, it erodes the confidence of the public in the judicial process. It is inevitable that other former militia members who are under indictment will, like Bere, enter Timor-Leste to attend family events or for other similar purposes. In light of what transpired in Bere’s case, one is left to wonder how the local population will handle the appearance of such persons in their midst.

It is the responsibility of all those who serve in the four organs of sovereignty, including those at the highest levels, to respect the separation of powers between the different branches of government. It is imperative that a commitment be made to promote a culture of respect for the rule of law and to avoid those actions that would jeopardize it.

### **Recommendations**

- The tenure of judges must be secure and no judges should be subject to transfer, suspension, retirement or removal of office unless such action is provided for by law, supported by good cause and is subject to due process. (See Article 121.3 of the CRDTL)
- Judges should not be held liable for their judgments and decisions except as provided for by law. Any action taken in that regard by any authority

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<sup>36</sup> Although the quoted statements have been gleaned from media reports, they are consistent with remarks made by the Minister during a meeting with the ICNA team in which she questioned why the UN was so “obsessed” by Bere’s release.

must be supported by good cause and subject to the due process of law.  
(See Article 121.4 of the CRDTL)

- The career path of a judge should be clear and accessible to all based on merit and qualifications. The process of recruitment, training, promotion and discipline should be transparent and uniform for all judicial candidates and judges.
- Judges should receive continuing education at the Legal Training Centre in judicial independence and the separation of powers as well as all relevant constitutional and legal provisions and also pertinent international standards.
- Judges should continue to receive training in ethics at the Legal Training Centre to further guide them in the conduct of both their personal and professional lives.
- An independent Association of Timorese Judges should be established as a voluntary professional organization of judges to represent their interests. The organization will serve as a voice for its membership and will support them in their professional lives. The organization will also coordinate with similar organizations in other countries and around the world, such as the International Association of Judges, the Association of Portuguese Judges and the International Association of Women Judges.
- As Timorese judges increasingly fill all judicial positions in the country's court system, they should continue to have support from international judicial advisors, even when such judges are not performing line functions. The advisors should be selected based specifically on their ability to perform in an advisory capacity and to play a supportive role with fellow judges. They must thus be subject to a rigorous recruitment to reflect those particular functions. Moreover, guidelines should be elaborated with respect to their advisory services and they should be subject to periodic evaluations in which Timorese judges would also provide input.

#### **XIV. Promoting Professional Responsibility**

Those who would administer justice in Timor-Leste must be held to the highest personal and professional standards. They must be encouraged to see their work not simply as a job, but as a career in a profession in which they can take pride. Moreover, they must have a strong sense of public service, understanding that their position not only provides them with certain benefits, but also imposes significant responsibilities. Developing a strong sense of commitment to one's career within a valued profession is an important step in reinforcing professional responsibility.

The need to develop a culture of professional responsibility applies to all careers in the justice system. This includes not only judges, prosecutors, public defenders and private lawyers, but also court officials, police officers and prison officials.

An intrinsic part of professional responsibility is professional accountability. Such accountability is to be enforced not only with day-to-day supervision in the workplace, but also within the organizational structure of each career group. The key elements in ensuring accountability are supervision and oversight based on clearly stated standards of conduct. Accordingly discipline should always be based on principle and not on personality.

With respect to judges, prosecutors and public defenders in Timor-Leste, each of those professional groups has an applicable statute setting out the duties and rights of the members of the particular group involved.<sup>37</sup> Each statute also establishes a Superior Council with responsibilities for the pertinent professional group.

It is the function of the Superior Council of each group to support the professional development of those over whom they have responsibility and to ensure proper oversight as well as professional discipline. In that respect, provision is made for inspections to be made by an inspector appointed by the Superior Council to review both the professional work and conduct of the person under consideration. Both the Superior Council of the Judiciary and the Superior Council of the Public Prosecution Service have appointed inspectors who have begun their service. In each case the designated inspector is an international staff

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<sup>37</sup> Law No. 8/2008 of 20 September (Statute of Judicial Magistrates), amended by Law No. 11/2008 of 29 December (see also Article 128 of the CRDTL "Superior Council for the Judiciary"); Law No. 14/2005 of 16 September (Statute of the Public Prosecution Service) (see also Article 134 of the Constitution "Superior Council for the Public Prosecution"); and Decree-Law No. 38/2008 of 29 October (Public Defender's Office Statute).

member, with the Judge Inspector being a Portuguese judge and the Prosecutor Inspector being a prosecutor from Cape Verde.<sup>38</sup>

In the case of public defenders, although a decree law of a similar nature has been enacted, we were advised that at least one of the members of the council has not yet been appointed. As a result, the council is not yet in operation and there is no enforcement mechanism in place for disciplinary purposes. Once the council is fully organized, it will proceed to establish its internal rules and to accomplish its assigned tasks, including those relating to discipline.

Progress is also being made with respect to private lawyers, court officials and police officers. Concerning private lawyers, a law has been enacted dealing with access to legal training and procedures for lawyer certification.<sup>39</sup> It also contains a set of ethical duties in the profession. Moreover, it provides for a Legal Profession Management and Discipline Council that will initiate disciplinary proceedings and undertake other duties relating to the practice of law. The council is to operate until the formation of a bar association (*Ordem dos Advogados*) that will have regulatory and disciplinary responsibilities for the profession. This is projected to occur by 2012.

It is important to recognize, however, that private lawyers are not state actors. Consequently, any future plans for the regulation of private lawyers should retain an appropriate degree of autonomy for lawyers as a group, while providing an accountability mechanism for maintaining professional standards. Moreover, lawyers should be encouraged to take a leadership role in managing their profession.

Similar steps have been taken with respect to both court officials and police officers. In the case of the former, an organic law is pending before the Council of Ministers that would provide for a superior council and inspection service, similar to that employed with judges and prosecutors. Continued progress with respect to organizing the professional structure of court officials is essential in that a large proportion of such staff continue to serve as temporary employees until their status is regularized pursuant to the anticipated law. In the case of the police, a statute was enacted in 2009.

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<sup>38</sup> An important element in the inspection process is to consider the manner in which the person being inspected, whether a judge or prosecutor, has managed his or her caseload. The automated CERTO system designed for that purpose is widely described as unsuccessful, indicating that an alternate system must be designed and deployed.

<sup>39</sup> Law No. 11/2008 of 30 July - Law on the Juridical Regime Governing the Private Legal Profession and Lawyers Training.

Training and education is critical to professional development of all actors within the justice system. Consequently, the Legal Training Centre is instrumental in facilitating the career paths of those it serves. Moreover, the Centre plays a critical role in preparing its students to discharge their professional duties honorably and according to the highest standards. Ethics and deontology are thus part of the curriculum for judges, prosecutors and public defenders, although the number of course hours committed to these topics should be increased. Ethics training should be based not only on an analysis of legislation and international standards applicable to each professional group. It should also make use of case studies and practical examples illustrating situations that court actors are likely to encounter. Such training should focus not only on the requirement of ethical conduct, but also on the importance on maintaining the appearance of ethical behavior. It is not enough simply to act according to ethical standards. It is equally important to be seen by the public as acting in that way.

Finally, progress has been made with respect to the issue of adequate compensation for certain actors in the justice system. Parliament has approved a law, which was recently promulgated, that enhanced the salaries of judges, prosecutors and public defenders.<sup>40</sup> It is commonly said that “you get what you pay for” and the same is generally considered true in the matter of compensation. The amount of compensation for a particular position is widely viewed as a reflection of the value placed on the particular position. The recent action of Parliament in this regard is a very positive step.

In sum, all those employed in the overall justice system must have a clear view as to the career path that lies ahead of them, both with respect to its benefits and its duties. Those laws that are in place or which are in process should confirm the high standards expected of those who will handle matters of great importance not only to the public at large, but also to the specific members of the public who are directly affected. While providing sufficient space for all justice professionals to accomplish their career goals, the organization of the various career groups should ensure that professional responsibility is a foremost consideration and that the means for assuring accountability are provided.

### **Recommendations**

- Each professional group should have a transparent career path that is accessible to all based on merit and qualifications.

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<sup>40</sup> Law No. 10/2009 of 5 August – Statute Regarding the Compensation of Judges, Public Prosecutors and Public Defenders.

- There should exist a process of recruitment and promotion that is transparent and uniform for all.
- Recent steps to augment salaries should be brought to completion. Provision should be made on an ongoing basis to ensure that salaries remain adequate and commensurate with the duties and responsibilities of each position.
- The Legal Training Centre should become the primary provider of initial and continuing training and education at all stages of the career of professionals operating in the overall justice system, including instruction in the area of ethics and professional standards. The number of hours of training that relate to those topics should be increased.
- The several Superior Councils that are in operation (Judiciary and Public Prosecution Service) must be adequately staffed and provided with technical expertise to accomplish their respective missions, including: drafting and enforcing standards of professional responsibility; ensuring inspection services to monitor professional performance; and conducting disciplinary proceedings to maintain ethical behaviour and ethical standards.
- All appointments to the Council for the Public Defenders should be completed and the group should be put into operation, staffed and provided as indicated above in the case of the Superior Councils for both the Judiciary and the Public Prosecution Service.
- The interim mechanism relating to private lawyers, the Legal Profession Management and Discipline Council should be implemented. The formation of a bar association (*Ordem dos Advogados*) should proceed with all deliberate speed and preferably within three years as contemplated by the law regulating the private practice of law.
- The professional organization of the legal profession should provide an appropriate degree of autonomy for lawyers as a group, recognizing that lawyers are not state actors.
- The statute relative to court officials should proceed so as to provide for a Superior Council and inspection service, similar to that employed with judges and prosecutors.

## **XV. Bringing Justice Closer to the People**

Significant progress has been made towards strengthening the formal justice system. There has been a gradual increase in the number of national legal actors, and their presence outside of Dili has become more regular. All four district courts are holding regular hearings, which is a significant advance.

In spite of these improvements, efforts to ensure a more consistent presence of all legal actors in every district court must continue. Moreover, the four existing district courts are inadequate in number to serve the entire Timorese public. One of these courts – Baucau – has jurisdiction over approximately half the national territory and has the second largest caseload after Dili. In an attempt to fill this gap, judges report that they have engaged in mobile justice, trying cases in Laclubar, Los Palos, Vailili and Viqueque (Baucau), Same, Ainaro (Suai) and Liquiça (Dili). These proceedings have usually taken place on the premises of local police stations. Nonetheless, even with these efforts, the current situation is not tenable over the long term and consideration must be given to other alternatives. According to several judges, including the President of the Court of Appeal, the judiciary should be comprised of at least eight district courts: Baucau, Dili, Maliana, Manatuto, Oecusse, Same, Suai, and Viqueque.

A large part of the population faces substantial obstacles in accessing the formal justice system. In addition to physical distance from courts, other obstacles to access to the formal justice system can be summarized as follows: a) there is low public awareness of formal justice mechanisms and legal rights; b) transportation costs and court fees remain unaffordable for the majority of people; c) many people cannot communicate in Portuguese, the official language predominantly used in the formal justice system; d) cultural norms and local power dynamics impede access to the formal justice system, as victims are often discouraged to report formally cases of domestic or sexual and gender-based violence; and e) police are not always accessible at the community level.

As a result, the majority of all disputes in the country are resolved through customary law processes (such as mediation within one's family or with the help of elders, traditional leaders, chiefs or village councils) and alternative dispute resolution mechanisms (such as mediation by district or sub-district administrators, church representatives or others). These disputes may relate to land, theft, physical confrontations, domestic violence, rape, sexual harassment, murder, child custody, divorce and inheritance.

Customary law processes are widely used because they reflect traditional practices that are rooted in the culture and values of the community. Such processes have other advantages, including the fact that they generally are (a)



available close to where the parties live, (b) low in cost if not free, (c) expeditious in achieving a resolution, and (d) an accepted method for obtaining compensation and restitution. These processes also bring the element of community involvement into the mix and provide an element of reconciliation. This allows communities to bring closure to disputes that could disturb others beyond the particular individuals or families involved.

There are, however, serious shortcomings with respect to customary means of dispute resolution, including (a) their hierarchical and patriarchal nature, (b) their failure to respect certain fundamental human rights, especially those of women, (c) their grounding in unwritten procedures, which can lead to lack of accountability, transparency and potential abuse, and (d) their reliance on social pressure exerted on the parties, including women and victims of crime.

This latter point is especially troubling as the rights of individuals who have been harmed are often overshadowed by the claim of the victim’s family for compensation or restitution. The rights and interests of a woman is thus often overlooked as the proceeding focuses on her family’s request for compensation for the perceived shame or insult that it experienced in the circumstances.

On a more practical level, even where such processes achieve a resolution, they possess no formal enforcement mechanism. As a result, the process is often rendered ineffective and, in some cases, the underlying matter is referred to the courts.

The Ministry of Justice has been conducting a nationwide public consultation in relation to the legal recognition of customary law processes, as envisioned under the Constitution.<sup>41</sup> There is also an initiative under way to develop a draft law on mediation standards.

### **Recommendations**

- To the extent possible, new district courts should be created, mindful of the additional demand that may result with respect personnel and other necessary resources.
- The development of itinerary justice should continue to advance and the basic conditions for mobile courts to operate should be developed.

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<sup>41</sup> Article 2 (4) of the CRDTL: “The State shall recognise and value the norms and customs of East Timor that are not contrary to the Constitution and to any legislation dealing specifically with customary law.”

- As provided by law, judges and public prosecutors should reside in the judicial districts where the court to which they are assigned is located.
- “Community policing” should be applied throughout Timor-Leste so that police become a significant point of contact for the community. The concept of “community policing” should be included in training courses at the police academy.
- Public awareness of the formal justice system and legal rights should be raised by way of various forms of outreach to the community.
- Members of the public, and especially teachers and medical personnel, should receive training on how to identify and report crimes.
- Any law recognizing customary law processes at the community level should ensure that such processes comply with basic human rights standards and coordinate with the formal justice system.
- Any initiative recognizing customary law should harmonize with the formal justice system and not operate as a parallel or separate system of justice.
- All legal actors, including judges, prosecutors and police, should be sensitive to the desire of community members to see that justice is done, always mindful of the needs of victims and vulnerable persons and their legitimate expectations. To the extent that such matters come before the courts, they should be prioritized according to the nature of the case and the interests at stake.

## **XVI. Ensuring Justice for All**

### **Gender**

While the Constitution provides for guaranteed access to justice for all citizens of Timor-Leste, certain groups experience particular hardship in receiving fair, affordable and timely justice. These include vulnerable groups, such as women and children.

A great amount of progress has been made toward equalising rights and integrating gender considerations in Timorese legislation. Nevertheless, significant challenges for women continue to exist: (a) violence against women is prevalent, (b) women lack access to courts to obtain redress for the violation of their rights, (c) women lack knowledge of the law and the formal system due to the high rates of illiteracy, (d) trafficking of women continues to be a growing problem (victims are viewed as “prostitutes”, absence of counter-trafficking legislation, no prosecution of sexual trafficking cases so far), and (e) lack of economic resources and dependency on men restricts the ability of women to utilise courts and formal justice mechanisms, especially in domestic violence cases.

Cultural and social values that still predominate put pressure on women to settle domestic violence and sexual assault cases with traditional authorities rather than report them to the police.<sup>42</sup> Women who choose to report their cases, however, are often discouraged by the police themselves from doing so. As a result, police are often asked to mediate domestic violence cases, which is neither their function nor a role for which they are trained.

In those cases where police undertake an investigation involving violence against a woman, their training in that regard is often lacking. Moreover, the police suffer a number of logistical challenges that would impact their ability to investigate such crimes, including inadequate equipment as well as insufficient means for communication and transportation. Similarly, lack of forensic capacity to obtain, store and test physical samples in cases of domestic violence could easily compromise an otherwise promising investigation. Finally, the lack of means to protect victims when they proceed to court is a significant issue, even

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<sup>42</sup> Very often cases of domestic and sexual violence are kept within the family because the victim and her family feel ashamed to bring them to a formal justice process. Indeed, often the families of the victims of sexual violence do not support them and even blame them for their “behaviour”. The restorative aspects of traditional justice, in turn, focuses less on the victim and more on her family, which puts pressure on the victim to let the matter proceed in the customary fashion.

in those cases where an investigation has successfully resulted in criminal charges.

Although reportedly more cases of gender based violence were processed in the courts in 2008 as compared to 2004, many of those cases resulted in acquittals. This may be explained, in part, by the fact that some victims choose to remain silent during trial and not supply evidence against their alleged assailant. In this regard, Article 125 of the Criminal Procedure Code provides that a witness to a crime, who is married to, related to or lives with the defendant, may refuse to testify against him. Although such a provision is not uncommon in criminal procedure, the use of it increases when victims feel inadequately protected from their assailants or continue to feel at risk.

One of the positive developments in the procedure of dealing with SGBV cases is the establishment of the national referral network, which includes VPU, MoSS and several NGOs, who provide emotional, physiological and social support, medical and legal assistance, as well as counselling and a temporary shelter to the victims. These organisations, however, still face a substantial lack of infrastructure (safe houses and proper medical and forensic examination facilities in the districts), human resources and logistical support.

### **Recommendations**

- Domestic violence cases should be addressed in the formal justice system.
- The empowerment of women should be approached comprehensively and in a programmatic way.
- Victims of SGBV crimes should have access to immediate means of redress and protection, including protection orders, maintenance, legal aid and access to a sufficient number of safe and adequately funded shelters; legal assistance, support and counselling should be provided at every stage of investigation and trial.
- Communication and coordination between VPU, OPG, courts and organisations providing support to the victims, should be improved in order to keep the victim informed on the progress of her case at all stages.
- SGBV cases should be monitored throughout the formal justice process and a database of SGBV cases and court decisions should be established and maintained.

- To the extent that it is permitted by law, the confidentiality of proceedings in SGBV cases should be respected, however representatives of VPU or NGO support groups should be allowed to be present at trial to the extent that their presence is requested by a victim or witness.
- All legal actors, including police, public prosecutors, judges and public defenders, should receive training on SGBV cases, including on applicable legislation, on the effects of these cases on women and on how to prioritise these cases and process them more efficiently.
- Facilities as well as specialists should be trained to conduct proper forensic examination; training of medical personnel should be conducted on detecting SGBV cases and preserving medical evidence.
- The number of women working in VPU should be increased, if possible.
- Police officers, especially in remote rural localities, should stop engaging in mediation of public crimes, especially SGBV and DV, and refer victims to the VPU in their respective districts and sub-districts. Police officers should provide utmost protection to the victims and social workers engaged with providing support and counselling.
- An awareness campaign should be conducted at different levels of society, expressing zero tolerance regarding SGBV and the use of violence in intimate and family relationships.
- Gender awareness components should be included in the justice system programmes and activities; gender related subjects should be included in the school curriculum and institutions of higher education.
- Anti-trafficking legislation should be enacted, which should include the effective prosecution and punishment of traffickers.
- The final approval of the law against domestic violence should be a priority. Other legislative acts supporting its implementation should be passed as soon as possible.

## Children

Timor-Leste is a new country, but it is also a young one as reflected in the age of its population. A large per cent of the population is under the age of eighteen<sup>43</sup> and is particularly afflicted by a number of social problems such as poverty, unemployment and illiteracy. Moreover, in the absence of a legal regime directed toward children, they are without protection and their situation is even more precarious as a result.

According to UNICEF, in 2007 the number of children (aged 0-17) who were orphaned due to all causes was estimated at 48,000.<sup>44</sup> Available records from mid-2005 suggest that approximately 2,700 children were in institutional care, twice the number from the beginning of the decade (1,242 in late 2000).<sup>45</sup> More recent information provided by the Department of Protection and Social Assistance of Vulnerable Children, within the Ministry of Social Solidarity, indicates that nearly 3,483 children are in orphanages or with other organizations providing foster care assistance.

As indicated elsewhere in this report<sup>46</sup>, there is a pressing need to develop a legal framework that will deal with children and the issues that are particular to them such as parental responsibilities, adoption, guardianship and child protection. Similarly, priority should be given to legislative proposals dealing with juvenile offenders.<sup>47</sup>

Concerning the proposed legislation on parental responsibilities, we strongly suggest that the expression “paternal power”, used throughout the draft, which traditionally identified a concept of male parental predominance, should be

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<sup>43</sup> According to a Census 2004 projection, the child population in Timor-Leste reaches 573,690, which represents approximately 50 per cent of the total number of inhabitants, if not more. See <[http://www.unicef.org/har09/files/har09\\_TimorLeste\\_countrychapter.pdf](http://www.unicef.org/har09/files/har09_TimorLeste_countrychapter.pdf)> [Consult. 31 Aug. 2009].

<sup>44</sup> Available on line at <[http://www.unicef.org/infobycountry/Timorleste\\_statistics.html#60](http://www.unicef.org/infobycountry/Timorleste_statistics.html#60)> [Consult. 31 Aug. 2009].

<sup>45</sup> Committee on the Rights of the Child. 1 March 2007. Consideration of Reports Submitted by States Parties under Article 44 of the Convention. Initial report of States parties due in 2005: Timor-Leste. CRC/C/TLS/1. pp. 27-28.

<sup>46</sup> See Section VII, “Completing the Legal Framework.”

<sup>47</sup> The Committee on the Rights of the Child, in its *Concluding Observations: Timor-Leste*, 1 Feb 2008, urged the prompt adoption of all necessary legislation, such as Civil Code, Adoption Law, Custody Law, Children’s Code and Juvenile Justice Law.

replaced by the notion of “parental responsibilities,” which is more aligned with international standards of joint parenting and joint responsibility for the family.

In addition to developing the law, there is a corresponding need to improve the skills of Timorese professionals who will be dealing with children. In this respect, it is important to enhance the skills of those tasked with identifying, reporting and dealing with child abuse.

Currently, there is no judicial review of placement of children in alternative care and, overall, there is insufficient protection of the right of the child to be heard, in accordance with his or her age and maturity, at any proceeding that may impact his or her rights. Due consideration should be given, therefore, to the basic principles of the best interests of the child and the respect for his or her views, always bearing in mind the recognition that he or she is entitled to rights.

Finally, the Department of Protection and Social Assistance of Vulnerable Children is the government institution charged with the protection of children who are at risk and exposed to abuse. It is also the agency responsible for providing protection and assistance to children in conflict with the law as well as supporting orphans. It also provides support to child protection organisations, such as orphanages and foster care institutions, and is the agency responsible for assessment and assistance in all legal proceedings related to adoption.

Considering the key role played by this Department and other child protection agencies, there is a need for greater coordination in matters concerning justice for children between them, the courts and other related institutions, including the Public Prosecution Service, the Police and the Public Defence Service.

### **Recommendations**

- Special attention should be given to the completion and submission of draft legislation that is currently underway on all matters relating to children, including parental responsibilities, adoption, guardianship and child protection. Similarly, priority should be given to legislative initiatives dealing with juvenile offenders.
- There should be training of judges and other court actors with respect to any legislation enacted concerning children. International standards should be a reference point in such programmes, especially those envisaged on the CRC and always bearing in mind the recognition of the child as a subject having full rights.

- Judges should be trained in terms of interview techniques involving children so as to enhance their ability to perform judicial inquiries and to assure that the right of the child to be heard in a judicial proceeding should be fully realized.
- As cases involving children often draw on the expertise and involvement of numerous agencies and public entities, wherever appropriate, there should be joint training of judges, prosecutors, police, public defenders, lawyers and social services providers.
- More time should be allocated to children’s rights, family law and juvenile justice in the initial phase of the LTC training programme for judges, public prosecutors and public defenders.

### **Land and property disputes**

Disagreements over land and property are reported to be the most common category of disputes in Timor-Leste. To the extent that such matters are in fact settled, their resolution is largely accomplished outside the formal justice system as very few such cases are filed in court. There are reported, however, to be a large number of unresolved land contests throughout Timor-Leste. These, in turn, produce a level of tension among neighbours and within communities that can often lead to serious violence.

The issues pertaining to property and land ownership are complex as they have been subject to several different legal regimes over the last twenty-five years. It is extremely difficult to evaluate claims to a piece of land based on competing rights asserted under Portuguese law, Indonesian law, or simply the actual occupation of the land in question. Moreover, on a practical level, many records identifying property ownership were burned as a result of violence occurring in both 1999 and 2006. Similarly, turmoil in the past caused social dislocation and people were often forced to flee their property, which was then occupied by others. One additional complicating factor is that although the right of women to own land is recognized by law, such ownership rights have not been traditionally recognized.

With donor assistance, a project is currently underway to help (1) strengthen land policy, law and regulations; (2) assist with survey, registration and titling of land; (3) implement land administration and information system; (4) develop dispute resolution mechanisms; and (5) increase public awareness of land issues.



A draft law on land ownership has also been discussed in a series of public consultations hosted by the Ministry of Justice. The law provides for the resolution of disputes by a national directorate of land with offices located in every administrative district. It also includes an appeals process involving a cadastral commission composed of jurists and a professional with recognized expertise in land and property issues. The decision of the cadastral commission, in turn, is subject to judicial review on appeal.

As noted above, there are numerous destabilizing aspects to unresolved land disputes. Looking forward, however, it is also important to elaborate a process for settling such matters in order to provide a safe environment for investment and doing business in Timor-Leste. An inability to assert clear title to property affects a putative owner's ability to develop his land or to use it as a source of collateral. Considering the country's need for development and growth, addressing the issue of land and property disputes should be a top priority.

### **Recommendations**

- To the extent that there are currently land and property disputes pending before the courts, one or more of the international judges just arrived in Timor-Leste should be designated to assist judges with research and resolution of such matters.
- In addition, judicial awareness of the importance of resolving such pending disputes in a timely manner should be enhanced.
- The development of a new land law addressing the issue of land and property disputes should be a top priority.
- Once a new land law is adopted judges and other legal actors as well as all those offering mediation services should be trained in land issues and the new legislation.

## **XVII. Preparing the Next Generation**

Trained professionals are the most important resource in any justice system. Preparing the next generation of such professionals requires a multi-faceted approach involving educators, judges, prosecutors, public defenders, and lawyers as well as public and private support. The establishment of a legal studies programme at the National University of Timor-Leste (UNTL), the only accredited university in Timor-Leste with such a programme, has been a critical first step.<sup>48</sup> In 2010, this programme, which is conducted in Portuguese, is scheduled to graduate its first class.<sup>49</sup> A strategy is lacking, however, in relation to the broader educational effort required to supply the human resources of the justice system in the coming years. Moreover, no assessment of the long term human resource needs of the justice system has yet been undertaken.

Several other critical issues also remain unresolved. As of the writing of this report, the two primary private universities that offer university-level degrees in law, the University of Dili and University of Peace, continue to lack government accreditation. Examinations have nonetheless been offered to allow graduates of unaccredited institutions an opportunity to gain entry into the Legal Training Centre, but neither a remedial programme for those that fail to do so nor a long term solution to the underlying problem of accreditation has been developed. The dominant language of instruction of both private universities remains Bahasa Indonesian, and many Timorese students continue to attend legal studies programmes at Indonesian universities. Graduates of these universities may face significant difficulties in successfully gaining admission and completing required programmes at the Legal Training Centre, where instruction is predominantly in Portuguese. Tetum could be a more accessible language for all students of law, but insufficient attention has been devoted to its development for legal purposes, and few laws and judicial decisions are available in Tetum.

Overall, there is a need to begin establishing a culture of legal scholarship in Portuguese and Tetum. No significant work has yet been done in relation to collecting and analyzing judicial decisions, developing treatises and annotated codes, and publishing legal journals in either language.

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<sup>48</sup> UNTL, in partnership with the Foundation of Portuguese Universities, has been providing a university-level education in law since 2005. Modelled on legal studies programmes in Portugal, the legal studies programme at UNTL comprises an introductory year, focusing on language and introduction to law, followed by four years of legal studies.

<sup>49</sup> The class scheduled to graduate in 2010 currently has thirteen students. In each of the other years, there are approximately twenty students.

A self-sustaining domestic pool of professors and other instructors also has yet to be developed. Almost all members of the faculty of the legal studies programme at UNTL are foreigners. Many lecturers at the two primary private university programmes teach in addition to their regular jobs as judges, prosecutors and public defenders. A significant step towards the development of legal scholarship and a domestic pool of faculty would be the establishment of an accredited graduate-level programme in legal studies.

While several important actors in the justice system are women, it is generally the case that women are underrepresented among the professionals in the system, whether professors, judges, prosecutors, public defenders or lawyers.

At the other end of the educational spectrum, primary and secondary education needs to be strengthened in order to increase the quality and size of the pool of students who could successfully complete the legal studies programme at UNTL, or an accredited private university. Such strengthening includes a long term need to continue to promote the learning of Portuguese.<sup>50</sup>

### **Recommendations**

- A comprehensive assessment of the long term human resource needs of the justice system should be undertaken in order to inform ongoing recruitment and educational planning.
- A plan should be developed to promote the development of at least one accredited alternative in Timor-Leste to legal studies at UNTL.
- A transition programme should be developed and implemented to address the situation of law graduates who have degrees from non-accredited universities and have failed to pass the accreditation examination.
- A long term programme to construct a legal vocabulary in Tetum should be developed and implemented. Such a programme should also incorporate the translation of all laws into Tetum.
- Encouragement and funding should be given to legal scholarship (including the establishment of graduate-level programmes in law that

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<sup>50</sup> As set forth in Article 35.8 of Law No. 14/2008 of 29 October (Education System Framework Law), “the teaching and learning of the official languages should be structured so that all of the other curricular components of primary and secondary education contribute systematically towards the development of capacities at the level of comprehension and production of pronouncements, oral and written, in Portuguese and Tetum.”

could groom future professors), the collection and analysis of judicial decisions, the development of treatises and annotated codes, and the publication of legal journals.

- Initiatives to attract women to the study of law should be developed and implemented.
- Primary and secondary education should be strengthened so that students are offered greater opportunities to learn Portuguese as well as basic skills.

## **XVIII. Speaking the Language of Justice**

A subtext running throughout this report has been that of language. As provided in Article 13.1 of the Constitution of Timor-Leste, Tetum and Portuguese are the country's official languages. That simple assertion has an effect that cascades through both society in general and, for our purposes, the justice system as well.

Many have questioned that selection, but it is not an inquiry that we have posed. We have accepted as a "given" the language choice made in the fundamental law of Timor-Leste and have limited our consideration to assessing its impact in matters relating to the justice system.

Although Tetum is named first when the Constitution cites the two official languages, to date it is Portuguese that has played a dominant role in the justice system. This is the inverse of the situation in civil society where a relatively small proportion of the population speaks Portuguese, although over 87% of the public speaks Tetum.<sup>51</sup>

The dominance of Portuguese in the legal sector reflects the fact that Timorese government institutions across the board have largely adopted that language as their official means of communication and operation. In the justice system in particular the influence of the Portuguese language has been significant, also reflecting the extensive involvement of international staff from the Portuguese-speaking world. The corresponding influence of that language on legal drafting, training at the Legal Training Centre and the conduct of court proceedings has made fluency in Portuguese a key element in the advancement of legal actors in the justice system.

To that end, the Portuguese language capacity of actors in the justice system has increased significantly over a relatively short time. Nonetheless, these gains have not eliminated the fact that language remains a challenge for most participants in the justice process, ranging from judges to litigants. Although the Portuguese language provides the Timorese access to a range of legal literature

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<sup>51</sup> A 2007 survey of languages spoken in Timor-Leste indicates that 87.4% of the national population speaks Tetum, an increase from 81.7% in 2001. The percentage of the population speaking Portuguese in 2007, on the other hand, was 15.6%, up from 5.3% in 2001. See "Final Statistical Abstract: Timor-Leste Survey of Living Standards 2007" (Ministério de Finanças, Direcção Nacional de Estatística, 2008) pp. 22, 24. The increase in Portuguese language fluency during the relevant period suggests the possibility that the current level of facility in that language may be even higher. Such progress indicates some success to date in the efforts to increase Portuguese language fluency. Nonetheless current levels of proficiency in Portuguese underscore the significant continuing need for education and training in that language.

and other materials from Portugal and other countries in the Portuguese-speaking world, there remain as many burdens as benefits involved.

As a result, there are two approaches to resolving this dilemma. The first is to make good on the constitutional imperative found in Article 13.2 of the Constitution, which states, *inter alia*, that “Tetum . . . shall be valued and developed by the State.” There is no question that Tetum has not developed a legal vocabulary equal to that of Portuguese. Nonetheless, there is a need to develop a “legal Tetum” sufficient to be utilized in relation to all aspects of the overall justice system. The second approach is to reinforce the educational campaign undertaken to date in relation to Portuguese language skills for both children and adults in order to begin to transform Timor-Leste into a more genuinely bilingual society.

### **Recommendations**

- “Legal Tetum” should be developed through an intensive and coordinated programme of research and practise involving scholars, legal actors, linguists and translators.
- International legal actors should be encouraged to learn Tetum so that they can use Tetum, as appropriate, in performing their official functions and contribute to the development of “legal Tetum”.
- Portuguese language study should continue and be strengthened at the university level. Current initiatives at the level of primary and secondary education should also continue and be strengthened to offer greater opportunities for learning Portuguese.
- All legislation and other laws should be made available as soon as possible in both official languages.

## **XIX. Confronting Impunity and Requiring Accountability**

### **The framework for dealing with crimes of the past**

The judicial system of Timor-Leste, as currently constituted, is not actively engaged in the process of addressing the crimes of the past or holding accountable those who committed them. There is no question, however, that Article 160 of the Constitution (“Serious Crimes”) provides that “[a]cts committed between 25 April 1974 and 31 December 1999 that can be considered crimes against humanity of genocide or of war shall be liable to criminal proceedings with the national or international courts.” The Constitution does not resolve on its face, however, the issue of which forum is best suited to conduct such proceedings.<sup>52</sup> Nonetheless, it does contemplate prosecution for offenses occurring between 1974 and 1999 in one venue or the other.

Article 163.1 of the Constitution (“Transitional judicial organization”) does provide, however, for a judicial mechanism in the form of a hybrid panel of national and international judges with jurisdiction over those “serious crimes committed between 1 January and 25 October 1999.” It goes on to state that such a panel “shall remain operational for the time deemed strictly necessary to conclude the cases under investigation.” These provisions describe what was known as the Special Panels for Serious Crimes which existed within the Dili District Court until support for their continuation was withdrawn by the Security Council in May 2005. At the time the Special Panels were closed, trials had been completed with respect to all indicted serious crimes defendants known to be in Timor-Leste, all of them former members of pro-autonomy Timorese militia groups. Hundreds of arrest warrants for the remaining defendants under indictment are pending today, with those defendants presumably outside the national territory.<sup>53</sup>

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<sup>52</sup> There is some authority, however, for the proposition that states bear primary responsibility for exercising jurisdiction over serious crimes under international law. See, Principle 20 of the “Updated Set of Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity” as reported to the UN Commission on Human Rights (2005). It has been articulated as a matter of international law that states have the obligation to investigate violations of human rights and international humanitarian law and to take appropriate measures “by ensuring that those responsible for serious crimes under international law are prosecuted, tried and duly punished.” *Ibid.*, Principle 19.

<sup>53</sup> Maternus Bere, mentioned elsewhere in this report, is such a defendant for whom an arrest warrant had issued but who, until recently, was outside of Timor-Leste.

Although all indicted serious crimes defendants still located in Timor-Leste were brought to justice prior to the closure of the Special Panels, not all serious crimes committed during the 1999 time period were investigated to a conclusion. With the closing of the serious crimes process in 2005, including both the prosecutor’s office (Serious Crimes Unit) and the court (Special Panels for Serious Crimes) a question arose whether such action complied with Article 163.1 of the Constitution, which provided that the “collective judicial instance” then existing “shall remain operational for the time deemed strictly necessary to conclude the cases under investigation.”<sup>54</sup>

Following the termination of UNMISSET on 20 May 2005, the new mission, UNOTIL, was not provided a mandate to support the activities of the Special Panels or of the Serious Crimes Unit beyond the preservation of its records. In anticipation of that eventuality, the Secretary General appointed a Commission of Experts to make a report considering, among other matters, the serious crimes process in Timor-Leste.

The Commission issued a lengthy report on 26 May 2005, in which it found “an absence of political will and Government support in Timor-Leste for the continuation of the serious crimes process, which seriously impedes the process of bringing to justice those responsible for crimes against humanity in East Timor in 1999 through the available judicial mechanisms in Timor-Leste.”<sup>55</sup> The Commission also went on to conclude that the domestic law enforcement authorities in Timor-Leste were unlikely to have the requisite capacity to investigate and prosecute such serious crimes in accordance with international standards; that Timorese defence counsel did not have the requisite experience to conduct serious crimes cases; and that the Special Panels “do not, as yet, have the institutional capacity to hear and adjudicate serious crimes cases without an international component.”<sup>56</sup> Based on those considerations, and others, the Commission recommended that those responsible for the crimes of 1999 could

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<sup>54</sup> We note that the final report of the CAVR recommended that the mandate of the Serious Crimes Unit be renewed and its resources increased to allow the investigation and prosecution of pre-1999 crimes. See, *Chega! The Final Report of Timor-Leste’s Commission for Reception, Truth and Reconciliation (CAVR)*, October 2005, Recommendation 7.1.1-7.1.4. The CAVR and the CTF reports concerning the events of 1974-1999 are still pending before the National Parliament, which has not undertaken to discuss their findings and recommendations. Although there has been extensive dialogue within civil society about these documents, and some discussion by national leaders about them (including a National Consensus Dialogue in June 2009), the response to date has fallen significantly short of the mark.

<sup>55</sup> “Report to the Secretary-General of the Commission of Experts to Review the Prosecution of Serious Violations of Human Rights in Timor-Leste (the East Timor) in 1999” S/2005/458 (26 May 2005) at para. 364.

<sup>56</sup> *Id.* at paras. 365, 367 and 366.



only be brought to justice before an international criminal tribunal.<sup>57</sup> Such a proposal, whether applied solely to the events of 1999 or, more broadly, to crimes committed between 1974 and 1999, is vigorously opposed by the current leadership of Timor-Leste. This fact constitutes a significant impediment to its implementation.

After the issuance of the report of the Commission of Experts, an opening was created to the possibility of future domestic prosecution of at least the offenses of 1999. In November 2005, Decree-Law No. 13/2005 was promulgated approving the new Code of Criminal Procedure. The preamble of the Decree-Law acknowledges that in enacting the Code “attention is paid to the genesis and importance of the panels established by the United Nations Transitional Administration in East Timor (UNTAET) with prosecutorial jurisdiction over cases relating to serious crimes committed between 1 January and 25 October 1999, which are still operational.” Article 3 of the Decree-Law, in turn, provides that “All provisions regulating cases related to serious crimes committed between 1 January and 25 October 1999 remain in force,” specifying particular provisions of UNTAET Regulation No. 2000/11 and No. 2000/15, which established the Special Panels and described both their jurisdiction and the serious criminal offenses within their competence. Accordingly, although the Special Panels are not currently functioning, the legal framework for their operation thus remains in place.

### **Pending serious crimes indictments and arrest warrants**

Regardless of whether an international tribunal were to come into being, there are still domestic indictments and arrest warrants pending against hundreds of defendants charged with crimes against humanity and other serious offenses committed during 1999. These still-pending cases are problematic in the sense that, although the legal framework may exist for addressing these matters, there is no practical strategy for processing them if the defendants involved are apprehended in Timor-Leste.

There is a serious question concerning the capacity on the part of Timorese court actors to deal with such cases which, if nothing else, were brought under an entirely different legal framework (international criminal law) than the one in which they are trained. Although three current Timorese judges had experience

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<sup>57</sup> See, generally, paras. 407-491. Significantly, the Commission also recognized the responsibility of Indonesia to ensure accountability for past serious crimes and suggested a six month deadline for compliance with its recommendations. In the absence of corresponding steps by Indonesia and Timor-Leste, the Commission indicated that the Security Council should consider establishing an international criminal tribunal or using the International Criminal Court to try perpetrators of past serious crimes in Timor-Leste.

on the Special Panels and another sat on the Court of Appeals and heard serious crimes appeals, there is not a sufficient group of trained judges to hear such cases in any number. Of even greater concern, there are no national prosecutors or defence lawyers who have had previous experience in serious crimes prosecutions. Any domestic effort to reinvigorate the serious crimes process would require a substantial infusion of international support in the form of funding, human resources and technical assistance.

Even then, there would be a need to define the focus of such a process. One of the major considerations addressed by both the Commission and other commentators is that those alleged to be most responsible for the serious crimes of the past are outside both the territorial and legal jurisdiction of Timor-Leste. Absent an extradition treaty, which is necessarily beyond the power of the judicial branch to effect, it is questionable the extent to which a national process would be able to hold accountable those charged with such crimes.

Another challenge to the processing of serious crimes cases as they may arise is raised by the case of Maternus Bere. Whatever the motivation of those who made his release possible, Bere's discharge from prison had the practical effect of ensuring that he will not be prosecuted for the crimes with which he was charged. As such, his release interfered with an established judicial process focused on holding defendants accountable for crimes they allegedly committed in 1999. His release without judicial sanction thus completely frustrated the role of the courts in holding accountable people charged with the most serious of crimes. Moreover, it reinforced the view of many that there continues to exist impunity for such offenses, even when they have resulted in criminal charges. This is an issue of particular concern to the many victims of the serious crimes of the past who continue to feel that their voices have not been heard and that no credible judicial process exists to ensure that justice is done in such matters.<sup>58</sup> This frustration has had the further effect of significantly diminishing public confidence in the justice system generally.

### **Serious Crimes Investigation Team**

The Serious Crimes Investigation Team (SCIT) was established in accordance with a 2006 mandate of the Security Council.<sup>59</sup> The purpose of the SCIT is to

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<sup>58</sup> Concerns were also expressed to the team concerning the granting of pardons and commutations of sentences in two circumstances. The first related to serious crimes defendants convicted before the Special Panels, all of whom (but one) have been released by presidential order. The second concerned other criminal defendants who are often released by presidential order even though they have not served the minimum committed portion of their sentence.

<sup>59</sup> UN Security Council Resolution 1704 (2006), 25 August 2006, UN doc S/Res/1704 (2006).

finish all investigations relating to the numerous unsolved murders and other serious offenses of 1999. Moreover, it is to preserve relevant evidence for possible future use and to prepare whatever documentation might be required to allow cases to be prosecuted in the future should the national authorities choose to do so. The unit does not, however, have authority either to file criminal charges on its own or to prosecute them in court.

The SCIT operates within the legal framework of the Office of the Prosecutor General (OPG) with logistical support from UNMIT and is led by a former international prosecutor with the previous Serious Crimes Unit. Its work is supported by approximately 50 national and international staff members divided into five teams operating throughout the country with the assistance of forensic experts. The SCIT has also made strenuous efforts to perform outreach to explain its role both to the general public and to members of victims' families.

In order to fulfil its mandate, the SCIT must be adequately supported and resourced until it has concluded all investigations and has provided to the OPG all documentation necessary to permit future prosecutions. It should also be considered within the scope of the SCIT to help develop a domestic capacity to prosecute those serious crimes investigated by the unit, whether they amount to violations of domestic or international law.

### **The crisis of 2006**

Following the crisis of 2006, the UN Independent Commission of Inquiry proposed that there should be a judicial process in the national court system to hold accountable the persons responsible for those events. The Commission went on to cite the names of individuals whom it recommended for further investigation or prosecution. The progress of these matters has been slow, although some advances have been made recently. As of August 2009, two cases had resulted in final judgments and four cases had been archived due to a lack of evidence. Trials are underway in several other cases and fourteen investigations are in process. Shortly before the issuance of this report, two of the defendants on trial were convicted and sentenced to prison, one being Vicente “Rai Los” da Conceição, who was accused of leading a hit squad tasked with eliminating political opponents during the crisis.

### **Recommendations**

- To the extent that the leadership of Timor-Leste chooses not to support a domestic judicial process to ensure that those responsible for past serious crimes are held accountable, it should nonetheless be made clear by both

the UN and other donors that, if requested, they are prepared to provide the necessary resources to support such a process.

- There are hundreds of indicted defendants charged with crimes against humanity and other serious offenses arising out of the events of 1999, the large majority of them being Timorese who are presumably living outside the country. Consequently, a strategy should be developed for processing those cases in the event that defendants return to Timor-Leste, are taken into custody and are brought before the court.
- To the extent that the processing of those cases will involve national judges, prosecutors or defence lawyers, those court actors should be provided appropriate training through the Legal Training Centre.
- To the extent that the processing of those cases may require the use of international personnel as judges, prosecutors or defence lawyers, a roster of qualified, available individuals should be created in advance of any proceedings so as to expedite later recruitment.
- The case folders with respect to all serious crimes cases pending before the Dili District Court should be stored in a secure location accessible only to properly authorized individuals.
- The SCIT should continue to function and be appropriately supported and resourced until it has concluded all investigations and has provided to the Office of the Prosecutor General all materials and documentation necessary to permit those cases to be prosecuted.
- The SCIT should also be supported to help develop the domestic capacity to prosecute those serious crimes investigated by the unit, whether they amount to violations of domestic or international law.
- Proper facilities should be arranged so that forensic and other evidence acquired by the SCIT can not only be stored, but also properly conserved, considering the challenges presented by the local climate and weather.
- The reports of the Commission for Truth, Reception and Reconciliation (CAVR) and Commission for Truth and Friendship (CTF) are still pending before the National Parliament, which should undertake to discuss the findings and recommendations that they contain.
- Pursuant to Article 85 (i) of the Constitution, only the President of the Republic can grant pardons and commute sentences after consultation

with the Government. The process for granting pardons and commutations should be rendered transparent and the factors to be considered in such determinations should be announced in advance. Moreover, a process for obtaining input from other affected parties should be instituted.

- The Office of the Prosecutor General should have the opportunity to submit a written statement relative to the grant of a particular pardon or commutation. Similarly, victims and their families in pertinent cases should be notified in advance that a pardon or commutation is under consideration and be provided an opportunity to supply a statement concerning the matter.
- To the extent that the Office of the Prosecutor General has international staff assigned to the prosecution of cases from the crisis of 2006, every effort should be made to support those individuals in the performance of those duties. Additionally, other entities, such as the PNTL and UNPOL, should provide the maximum cooperation possible to the Office of the Prosecutor General to ensure that all remaining investigations in cases involving the crisis of 2006 are brought to a successful conclusion.

## **XX. Conclusion**

As noted throughout this report, a significant amount of progress has been made in developing the overall justice system of Timor-Leste. Although a number of challenges and needs continue to exist, the Timorese with whom the team interacted demonstrated a high degree of dedication and commitment. Although there is no question that they foresee the need for continued advice and assistance from the international community, they are motivated by a vision of a justice system run by the Timorese for the Timorese. This is a goal worth striving for and is a cause that deserves the continued support of the international community.

**Annexes**

**Annex A – ICNA Team Members**

The following individuals served on the team that performed the Independent Comprehensive Needs Assessment of the Justice System of Timor-Leste:

**Phillip Rapoza** – Chief Justice of the Appeals Court of Massachusetts (United States) and Team Leader

**Helena Bolieiro** – Judge and Instructor at the Centre for Judicial Studies (Portugal)

**Roza Salibekova** – Lawyer (Kazakhstan)

**John Stompor** – Lawyer (United States)

## **Annex B – List of Documents Consulted**

### **National Legislation, Documents and Materials – Timor-Leste**

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<sup>60</sup> All laws available in unofficial UN translation at <<http://www.unmit.org/legal/RDTL-Law/index-e.htm>> [Consult. 10 Aug. 2009]. Official version (Portuguese) available at <<http://www.jornal.gov.tl>> [Consult. 10 Aug. 2009].



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Law No. 3/2009 of 8 July – Community Leaders and Their Election (Lideranças Comunitárias e Sua Eleição) (Portuguese version only)

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Ministério Público, Conselho Superior do Ministério Público, Procuradoria Distrital de Suai, Inquéritos Acusados e Arquivados por Procurador da República 01 Janeiro a 30 de Junho de 2009, 30 de Junho de 2009

Ministério Público, Conselho Superior do Ministério Público, Procuradoria Distrital de Oecusse, Inquéritos Acusados e Arquivados por Procurador da República 01 Janeiro a 30 de Junho de 2009, 30 de Junho de 2009

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**Annex C – Sites Visited**

**Dili**

Becora Prison

Ita Nia Rai

Lawyers Association of Timor-Leste

PNTL-UNPOL National Investigation Division

PNTL-UNPOL Prosecutor Support Unit

PNTL-UNPOL Vulnerable Persons Unit

Pradet

National University of Timor-Leste

University of Dili

University of Peace

**Baucau**

District Court of Baucau

**Oecusse**

District Court of Oecusse

Office of the Public Prosecution Service in Oecusse

**Suai**

District Court of Suai

Office of Public Prosecution Service in Suai

**Annex D – List of Meetings and Persons Consulted**

**Timor-Leste**

José Manuel Ramos-Horta  
President  
Democratic Republic of Timor-Leste

Kay Rala Xanana Gusmão  
Prime Minister  
Democratic Republic of Timor-Leste

Fernando Lasama de Araújo  
President  
National Parliament of Timor-Leste

Cláudio Ximenes  
President  
Court of Appeals

(Alphabetically)

Mari Alkatiri  
Former Prime Minister  
Democratic Republic of Timor-Leste

José Maria Araújo  
Judge  
District Court of Suai

Constâncio Basmery  
Judge  
District Court of Dili

Fernanda Borges  
Deputy, Standing Committee A  
National Parliament of Timor-Leste

Vicente Fernandes e Brito  
Deputy Prosecutor-General  
Office of the Prosecutor-General

Francisco Cárceres  
Director  
Legal Training Centre

Afonso Carmona  
Judge  
District Court of Baucau

Lucas da Costa  
Rector  
University of Peace

Antónia Carmen da Cruz  
Director of Social Reinsertion  
Ministry of Social Solidarity

Laura Nascimento Duarte  
Legal Advisor  
Ministry of Justice

André Luís Fernandes  
Public Defender  
Office of the Public Defender

Bernardo Fernandes  
Instructor  
Legal Training Centre

José Luís da Goia  
Judge  
Court of Appeal

Helena Gomes  
National Director of Prisons  
Ministry of Justice

Antonino Gonçalves  
Judge  
District Court of Dili

Sérgio de Jesus Hornai  
Public Defender General  
Office of the Public Defender

Agapitu Kantu  
Chief  
Becora Prison

Vasco Kehi  
Court Officer  
District Court of Oecusse

Lúcia Lobato  
Minister  
Ministry of Justice

Afonso Lopes  
Assistant Prosecutor, Suai  
Office of the Prosecutor General

Ana Paula Fonseca Monteiro  
Judge  
District Court of Baucau

Longuinhos Monteiro  
Commander-General  
National Police of Timor-Leste

Johannes Naro  
Court Officer and Administrator  
Court of Appeal

Maria Natércia Gusmão Pereira  
Judge  
District Court of Dili

Ana Pessoa  
Prosecutor-General  
Office of the Prosecutor-General

Florencio Gonzaga Pina  
Chief, Department for the Protection of Children at Risk  
Ministry of Social Solidarity

Edite Palmira dos Reis  
Judge  
District Court of Baucau

João Ribeiro  
Judge  
District Court of Dili

Idelta Maria Rodrigues  
Secretary of State for Promotion of Equality

Angelico Pedro dos Santos  
Chief of Staff, Secretary of State for Promotion of Equality

Demetrio da C. X. dos Santos  
Technical Professional, Office of the National Director of Prisons  
Ministry of Justice

Deolindo dos Santos  
Judge  
District Court of Dili

José Gama Santos  
Lecturer, Law Faculty  
University of Peace

Marcelino Sarmento  
Court Officer and Administrator  
District Court of Suai

Arlindo Figueiredo e Silva  
Inspector to the Superior Council of the Prosecution  
Office of the Prosecutor-General

Francisco Amarc da Silva  
Lecturer, Law Faculty  
University of Peace

Guilhermino da Silva  
Judge  
District Court of Dili



Jorge Silva  
Major, GNR  
National Police of Timor-Leste

Moisés da Silva  
Chief, Department of Accreditation of Diplomas  
Ministry of Education

Dionísio da Costa Babo Soares  
Vice-Chairman  
Superior Council of the Judiciary

Duarte Tilman Soares  
Judge  
District Court of Dili

Vasco Soares  
Senior Legislative Drafter  
Ministry of Justice

Adérito Tilman  
Prosecutor  
Office of the Prosecutor-General

Alarico Tilman  
Dean of the Law Faculty  
University of Dili

Manuel Tilman  
Deputy, Economic Affairs, Finance & Anti-Corruption Committee  
National Parliament

Margarida Veloso  
Secretary Judge & Inspector  
Superior Council of the Judiciary

Vasco Viana  
National Qualification Officer  
Ministry of Education

Sebastião Dias Ximenes  
Ombudsman  
Office of the Ombudsman for Human Rights and Justice

**United Nations**

Atul Khare  
Special Representative of the Secretary-General  
UN Integrated Mission in Timor-Leste

Finn Reske-Nielsen  
Deputy Special Representative of the Secretary-General  
UN Integrated Mission in Timor-Leste

Takahisa Kawakami  
Deputy Special Representative of the Secretary-General  
UN Integrated Mission in Timor-Leste

(Alphabetically)

Marta Aguiar  
Project Officer, Access to Justice System Programme  
UN Development Programme

Maria del Mar Bermudez  
Senior Justice Advisor  
UN Development Programme

Luca Bruccheri  
Programme Officer  
UN Development Programme

Luís Carrilho  
Police Commissioner  
UN Integrated Mission in Timor-Leste

Vicenta M. Correia  
National Coordinator, Sexual and Gender-based Violence  
UN Development Fund for Women

Josée D'Aoust  
Legal Coordination Officer, Serious Crime Investigation Unit  
UN Integrated Mission in Timor-Leste

Carlos Dinis  
Head, Democratic Governance  
UN Development Programme

Mitch Dufresne  
Chief, Administration of Justice Support Unit  
UN Integrated Mission in Timor-Leste

Valeria Elefterie  
Investigation Officer, Vulnerable Persons Unit, UN Police  
UN Integrated Mission in Timor-Leste

Raquel Yrigoyen Fajardo  
International Legal Consultant on Access to Justice  
UN Development Programme

Louis James Gentile  
Chief, Human Rights and Transitional Justice Section  
Representative, UN High Commissioner for Human Rights  
UN Integrated Mission in Timor-Leste

Ken Inoue  
Director, Democratic Governance Support Unit  
UN Integrated Mission in Timor-Leste

Yvonne Lodico  
Senior Governance Adviser, Democratic Governance Support Unit  
UN Integrated Mission in Timor-Leste

Michael Lund  
Special Assistant to the Deputy Special Representative of the Secretary-  
General  
UN Integrated Mission in Timor-Leste

Erika Macedo  
Advisor to Director of Legal Training Centre  
UN Development Programme

Dominic McInerney  
Deputy Chief, National Investigation Division, UN Police  
UN Integrated Mission in Timor-Leste

Hélder Medeiros  
Team Leader, Prosecutor Support Unit, UN Police  
UN Integrated Mission in Timor-Leste

Franz Petutschnig  
Judicial Affairs Officer, Administration of Justice Support Unit  
UN Integrated Mission in Timor-Leste

Pilar Villanueva Sainz-Pardo  
Human Rights Officer, Human Rights and Transitional Justice Section  
UN Integrated Mission in Timor-Leste

Dulce Soares  
Child Protection Officer  
UNICEF

José António Pinto  
Human Rights Officer, Human Rights and Transitional Justice Section  
UN Integrated Mission in Timor-Leste

Claudia Sayago  
Judicial Affairs Officer, Administration of Justice Support Unit  
UN Integrated Mission in Timor-Leste

Nicole Smith  
Project Manager  
UN Population Fund

Ilona Stanley  
Human Rights Officer, Human Rights and Transitional Justice Section  
UN Integrated Mission in Timor-Leste

Pornchai Suchitta  
Representative  
UN Population Fund

Alan Swaine  
Crime Prevention & Criminal Justice Officer, AJSU  
UN Integrated Mission in Timor-Leste

Akbar Usmani  
Country Director  
UN Development Programme

Wenjun Zhan  
Investigation Officer, Vulnerable Persons Unit, UN Police  
UN Integrated Mission in Timor-Leste

**Embassies and Other International Organizations**

Ubalda Alves  
Gender Officer, Irish Aid  
Embassy of Ireland

Hans Peter Christophersen  
Head of Mission  
Royal Norwegian Embassy Section

Guglielmo Colombo  
Attaché – Programme Officer, Policy/Operations Section  
Delegation of the European Commission to Timor-Leste

Jane Curran  
Human Resources Management Advisor  
Justice Facility

Pamela Dale  
Team Leader, Justice for the Poor Program, Timor Leste  
World Bank

Eileen Derby  
Team Leader, Democracy and Governance Program  
U.S. Agency for International Development

Craig Ewers  
Facility Manager  
Justice Facility

Gerald Gahima  
Senior Justice Advisor  
Australian Agency for International Development

Ali Gillies  
Minister-Counsellor (Development Assistance)  
Australian Agency for International Development

Ana Lourenço da C. G. Guterres  
Project Management Specialist, Democracy and Governance Program  
U.S. Agency for International Development

Peter Heyward  
Ambassador of Australia to Timor-Leste  
Australian Embassy

Robert Hull  
Deputy Head of Mission  
Embassy of Ireland

Alison Marie Igoe  
Resident Legal Advisor  
Embassy of the United States of America

Michael Johnson  
Senior Management Advisor, Office of the Prosecutor General  
Justice Facility

Eva-Maria Jongen  
Team Leader, Transitional Justice Project  
GTZ – German Technical Cooperation

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