

ATTACKS ON JUSTICE – TIMOR LESTE (EAST TIMOR)

Highlights

Timor Leste’s judicial sector, including the legal system and the police service, remains fragile. It continues to be plagued by a lack of competent judicial actors, resources, training and management. There are long delays in getting matters before the courts and in getting hearings, doctors do not attend court to answer questions regarding medical reports, people are unlawfully held in custody as a result of court delays and the police either fail to understand or abuse their powers. There is an extensive backlog of cases, with figures showing that judges in the district courts that are operating, mainly the one in Dili, have handled approximately four cases per year.

BACKGROUND

In the popular consultation that took place on 30 August 1999, there was a turnout of 98.6 per cent of the 435,000 registered voters, 78.5 of whom opted for independence from Indonesia. As a result of the ensuing bloodshed, a UN peacekeeping force called INTERFET was dispatched to East Timor on 20 September 1999 at the request of Indonesia. A transitional administration, the United Nations Transitional Administration for East Timor (UNTAET), was established pursuant to Security Council Resolution 1272 of 25 October 1999. Its tasks were to keep the peace during the emergency phase and to rebuild – or, more accurately, build from scratch – the machinery of government.

From 20 September 1999 until 28 February 2000, when it handed over the command of military operations to UNTAET, INTERFET was in military control of the territory of East Timor. Its peacekeeping mandate was amended to give it the power to enforce the peace more robustly, following the large-scale destruction of up to 80 per cent of the infrastructure and the massive displacement of the population, with many people murdered or forced at gunpoint into Indonesia’s West Timor province, and fields and paddies destroyed. The legacy of that horror and destruction is still felt today.

There were two inquiries into the violence that followed the 1999 popular consultation. In its findings presented to the UN General Assembly on 31 January 2000, an International Commission of Inquiry (CIET), launched following a mandate from the UN Commission on Human Rights in September 1999, concluded that ‘ultimately the Indonesian Army was responsible for the intimidation, terror, killings and other acts of violence experienced by the people of East Timor before and after the popular consultation’. The report called for an international tribunal to prosecute those responsible.

A report by the Indonesian Commission to Investigate Human Rights Violations in East Timor (KPP-HAM), established by the Indonesian Government, concluded that the Indonesian military and civilian authorities, including the police, had cooperated with pro-Indonesian militias to create an atmosphere supportive of crimes against

humanity, including mass murder, mass deportation, kidnapping, rape and destruction of property. It listed the names of 33 suspects for further investigation and possible criminal charges. Six Indonesian Army generals, the then Governor of East Timor and several militia leaders were among the 33 named suspects. The CIET did not name names, but apportioned responsibility to the Indonesian Armed Forces.

According to *UNTAET Regulation 1*, 1999, East Timor was to follow Indonesian law insofar as it did not conflict with international human rights and the UNTAET mandate, together with subsequent legislation introduced by UNTAET and later the RDTL (Democratic Republic of East Timor). Although Indonesian law was not specifically mentioned, by political agreement it was understood to apply *de facto*: the Australian Section of the ICJ recommended at that time that further action was needed to make Indonesian law the applicable law. This matter came up again later when the President of the Court of Appeal issued a ruling along the same lines, resulting in the enactment of a law, with retrospective effect, to put beyond doubt that the legislation to be applied in East Timor consisted of all Indonesian legislation that was in force *de facto* prior to 25 October 1999.

Article 9 of the *Constitution* stipulates that international law, both substantive and customary, applies as of right and that any rules that are inconsistent with international law are not applicable. Once an international instrument is ratified by the appropriate organ, it applies as part of domestic law.

It is a matter of public record that, in the opinion of a number of Timor Leste ministers and the United Nations, including the Secretary-General and his Special Representative to East Timor who heads the UN Mission of Support for East Timor (UNMISSET), the judicial sector, along with the police service, is particularly fragile. It is over five years since the events of 1999 but, as yet, no credible prosecutions have been brought against the main perpetrators of the violence that took place at that time.

JUDICIARY

Establishment of the legal system

In 2000, with the aim of embedding the rule of law, the UN established a judicial system. (For a comprehensive account of this, see '*Comment: Post-Conflict Judicial System Reconstruction in East Timor*' by Hansjoerg Strohmeyer, UNTAET's Judicial Minister.) First of all, a Judicial Department was created, comprising the courts, prosecution, public defenders, logistics and prison service. The first judicial actors were appointed on 7 January 2000 by the Transitional Administrator, the late Sergio Viera de Mello, who, pursuant to *Security Council Resolution 1272*, exercised executive, legislative and judicial power. Probationary appointments were made following a process undertaken by the Transitional Judicial Services Commission, which consisted of both Timorese, and UN personnel, including the UNTAET Judicial Minister. When UNTAET handed over power to the first RDTL Government, the Parliament passed a law of general application, *Interpretation of Applicable Law 2/2002 on 19 May 2002*, which *inter alia* confirmed the *status quo* with respect to appointments, recognizing they were transitional until such time as laws had been passed to put a new appointments system into effect. The first president of the court

system subsequently became the Minister of Justice. No judges had any experience to speak of as judges, and very few as advocates or practicing lawyers. The judiciary was under-resourced, with no laws or legal resource material, desks, stationery, court registers, internet access or vehicles, despite the existence of a large number of UN vehicles. The judges complained that the judicial mentors assigned to them worked directly for UNTAET, to whom they were answerable.

There are currently four international judges from the CPLP (Community of Portuguese Speaking Countries) working in the district courts in Timor Leste. Their positions were established in the Statutes of Judicial Magistrates Law 2002 (see below). They are employed by UNMISSET and their contracts will end when the UNMISSET mandate ends on 20 May 2005.

The probationary judges initially underwent training in Darwin, Australia, and more training followed, but after the Judicial Minister left UNTAET, the training lost focus and a systematic approach was not adopted. All judges complained that the training was not particularly relevant, saying there was too much attention to theory and international instruments when what they required was training in how to approach making judicial decisions, how to define evidence, how to consider evidence for weight, how to read and interpret laws, how to interpret a number of laws simultaneously and how to manage case loads, court registers and so on. Importantly, they wanted a complete set of the laws they did not have. What they needed in terms of international legal training was to learn about the core international bill of rights instruments that had been incorporated into the law of the land and how to interpret them in the context of domestic legislation.

A typical example of the relationship between the UNTAET judiciary and the UNTAET executive was an occasion when an UNTAET officer at administrative level went to the court to advise the presiding judge that the executive did not like one of the judge's decisions and that it should be changed.

The resource situation is largely unchanged today but is set to improve with the new judicial regime and the systemic judicial training programme that the RDTL Government, supported by the UNDP and donors, has embarked on. Its success will best be gauged in ten years or so.

Court structure

The judiciary comprises the Supreme Court of Justice, the High Administrative Tax and Audit Court and other judicial courts established by law. These are not yet up and running. Currently established and in operation are the four district courts – in the capital Dili, Baucau, Suai and Oecussi – which function as courts of first instance and have jurisdiction to hear civil and criminal cases as well as to act as a court of appeal.

The *Statutes of Judicial Magistrates Law 2002* repeals laws that are incompatible with it, specifically *UNTAET Regulations 1/1999, 3/1999, 11/2000, 18/2000, 18/2001, 25/2001 and 26/2001*, to the extent of the applicable legal provisions. It constitutes the Organic Law for the Judiciary and covers the transitional judicial system, as well as the establishment of the necessary machinery for dealing with the selection, assignment, reassignment and removal of judges.

There is also a Special Panel for Serious Crimes (SPSC), which is serviced by a Special Crimes Unit (SCU). The SPSC's operations are due to cease on 20 May 2005 when the UNMISSET mandate expires (see below, under Special Panels for Serious Crimes).

Court of appeal

Under article 110 of the *Statutes of Judicial Magistrates Law*, there is a Court of Appeal that exercises its own jurisdiction as well as that of the Supreme Court of Justice, until such time as the latter is established. The Court of Appeal comprises three judges. The president of the court is His Honour Judge Claudio Ximenes, who is Timorese-born and a Portuguese citizen. The court began operating in July 2000 but then, due to a lack of qualified judges, did not operate for over 18 months. It recommenced operations in 2003, sitting continuously in 2004, and is currently the final court of review and the highest court in Timor Leste. Exercising Supreme Court jurisdiction, the Court of Appeal can notionally hear appeals from itself.

District courts

Of the four district courts, Suai Court entered into operation for the first time since it was established in 2000. Oecussi Court did not operate while its judge went to Portugal for judicial training; although it was agreed that judges would sit there on a rotational basis, this did not happen. A lack of fuel for travel and generators was reported to be a factor in preventing them from travelling outside Dili to other district courts. In Suai, the lack of a public defender had prevented any court activity. Baucau Court started work at the beginning of November, Suai at the end of November and Oecussi in December 2004. According to the Judicial System Monitoring Programme, many staffing and procedural obstacles will have to be overcome before Baucau, Suai and Oecussi courts can be fully operational. The four CPLP judges are helping out in these courts but many preliminary matters are dealt with in Dili. A new case distribution scheme was introduced, pursuant to *Directive 03/2004* (4 October 2004), entitled *New Rules for Distribution of Cases and Constitution of Panels*. The way it operates at Dili Court seems not to be understood by the clerks responsible for managing it. However, its strength lies in the fact that judicial actors cannot choose cases as they are now assigned randomly, by lottery.

Judicial administration

The court system is administered by the Ministry of Justice pursuant to *Decree Law 3/2003 on the Organic Structure of the Ministry of Justice*, together with the Superior Council of the Judiciary, as mandated in the Constitution and established under the Statutes of Judicial Magistrates Law of 2002. Its budget is approved by the Council of Ministers, which submits it to the Parliament for ratification. Financial control of the Court of Appeal was transferred from the Ministry of Justice to the court in late 2004.

Decree Law 1/2002 transferred responsibility for the judicial system to the RDTL Government, stating, *inter alia*, that the system in place would prevail until such time as it had been superseded. It envisaged a transitional phase, as further developed in subsequent laws, including the *Statutes of Judicial Magistrates Law 8/2002* (as

envisaged in article 128 of the Constitution), which established the **Superior Council of the Judiciary** to exercise managerial and disciplinary oversight of judicial officers, including judges, and of the *Electoral Act*.

The Superior Council of the Judiciary is composed of the President of the Supreme Court of Justice, one person nominated by the President of the Republic, one elected by the Parliament, one appointed by the government and one elected by his or her peers. Article 6 of *Law 8/2002*, entitled *Security of Tenure*, reads as follows: “Judicial Magistrates shall not be reassigned, suspended, promoted, made to retire or removed from office or otherwise have their situation changed, unless in cases provided for by these Statutes”. Article 15 defines the duties of the Council in general terms and article 17 stipulates that its deliberations have to be in the form of a resolution or instruction and published in the *Gazette*.

The same law establishes a system of judicial inspections, under which courts and judges are inspected and then given a rating. Only judges who have received a ‘very good’ rating can serve as judicial inspectors. Article 25 sets out the requirements for being appointed a judicial magistrate, laying down a probationary period of two to three years. A hierarchy of judges, with counsellor judges being the highest, is established (article 26). Article 45 states that a special legal instrument will set judicial pay but this has yet to be published. There is a comprehensive system of assessment that can lead to a series of penalties, including removal from office. It includes the right to be heard and a system of appeals for judges. It does not appear to be inconsistent with other civil law systems in which the position of judge is in essence a civil service career appointment, but is attributed important recognition as an organ of sovereignty.

Independence of the judiciary

The Constitution deliberately deals with courts and judges separately in order to establish their independence. The courts are designated as a sovereign organ (article 118) and specifically guaranteed independence (article 119). This is consistent with the separation of powers established in article 69. The latter also recognizes the interdependence of the organs of sovereignty. Under article 121, judges are accorded independence and tenure, unless otherwise provided by law. Article 4 of the *Statutes of Judicial Magistrates Law 8/2002*, which repealed all UNTAET laws relating to the judiciary, restates, in keeping with the Constitution, that the judiciary is independent. However, the overall operation of the law undermines such independence. Permanent judges are to be evaluated every three years.

Under the *Statutes of Judicial Magistrates Law 8/2002*, judges are forbidden to engage in political activity or to make statements of a political nature. The latter is not defined and is open to broad interpretation (article 35). Judges must swear an oath to God in order to be sworn in – there is no provision for an affirmation (article 32). Judges are not allowed to live outside the area of the court to which they are assigned (article 38). It is alleged that some probationary judges are active members of political parties, which has caused some consternation.

Probationary judges and judicial actors

For practical purposes, the *Statutes of Judicial Magistrates Law* established a transitional system for assessing current judges and appointing permanent ones, as envisaged in the UNTAET Law. All 23 judges (19 in district courts, three in the SPSC and one in the Court of Appeal) are probationary, having been nominated by the UNTAET Transitional Administrator in 2000. *Decree Law No. 1/2002* contains general provisions relating to judicial actors (judges, public prosecutors and public defenders) and states that, once relevant legislation has been approved and appraisals carried out, judicial actors shall enter their respective careers (see also *Decree Law 8/2002* as amended by *Decree Law 11/2004*). *Decree Laws 8 and 9* of 2004 provide rules for the evaluation of probationary public prosecutors and public defenders. Their scores are based on a written examination, carried out for some in May 2004 and for others in September 2004. However, the second stage of the evaluation, which was to include decision-making and performance during trials, did not go ahead. The Judicial System Monitoring Programme (JSMP; see www.jsmp.minihub.org) and other commentators wondered why, if the results were known as early as May and September 2004, it was not until 25 January 2005 that they were released. The probationary judges asked for their examination papers to be reviewed by the Superior Council of the Judiciary.

Since Timorese judges can no longer work in the district Courts, the future operation of these courts remains to be clarified.

As of December 2004, all judicial actors are required by law to have their competency assessed. *Decree Law 30/2004* allows those who pass the assessment to choose whether to be a judge, a public prosecutor or a public defender; they will then be required to undergo a specific internship that has two stages – one year of academic work followed by a six-month practical assignment. This training is carried out under the auspices of the Council of Coordination for the Development of the Judicial Sector, which comprises the Minister for Justice, the President of the Court of Appeal and the Prosecutor General. The examination to determine who is eligible to enter the internship programme was first held on 28 August 2004. No one passed it.

Special Panels for Serious Crimes

Special Panels for Serious Crimes were established pursuant to *UNTAET Regulation 2000/15*. They are courts with jurisdiction over serious crimes, namely murder and sexual offences committed between 1 January and 25 October 1999 and war crimes, crimes against humanity and genocide whenever they occurred. As of November 2004, when investigations stopped pursuant to *Security Council Resolution 1543/2004*, over 800 murders had been investigated. Some 400 cases were closed for lack of evidence and 237 arrest warrants had been requested from the special panels, of which 203 were issued; 40 arrest warrants were still pending.

No decision appears to have been made by the Timor Leste Government on what will happen to serious crimes and the like after May 2005 when the UNMISSET mandate expires. There have been two new developments, however. The UN Secretary-General announced the establishment of a commission of experts, whose mandate is, *inter alia*, “to determine whether full accountability has been achieved; and to recommend future actions as may be required to ensure accountability and promote reconciliation”. It will further assess the work of the Indonesian Ad Hoc Human

Rights Court on East Timor, together with the Serious Crimes Investigation Unit and the Special Panels for Serious Crimes in Timor Leste, and has the mandate to “(a) review the judicial processes of the two institutions, including the investigation, prosecution and trial proceedings in both their procedural and substantive aspects, to determine whether they meet international standards of justice and due process of law; (b) assess the effective functioning of the two institutions, identify obstacles and difficulties encountered, and evaluate the extent to which they have been able to achieve justice and accountability for the crimes committed in East Timor; (c) consider and recommend to the Secretary-General, as necessary and appropriate, legally sound and practically feasible measures and/or mechanisms so that those responsible for serious violations of international humanitarian law and human rights in East Timor in 1999 are held accountable, justice is secured for the victims and people of Timor-Leste, and reconciliation is promoted; (d) consider ways in which its analysis could be of assistance to the Commission of Truth and Friendship, which Indonesia and Timor-Leste agreed; and (e) to establish, and make appropriate recommendations to the Secretary-General”.

East Timor and Indonesia have agreed to establish a **Commission on Truth and Friendship** whose mandate includes examining the truth surrounding the events that took place in 1999 immediately before and after the 30 August popular consultation. Its mandate is as follows:

“...

- (a) Reveal the factual truth of the nature, causes and the extent of reported violations of human rights that occurred in the period leading up to and immediately following the popular consultation in Timor Leste in August 1999:
 - i. Review all the existing materials documented by the Indonesian National Commission of inquiry on human rights violations in Timor Leste in 1999 (KPP-HAM) and the *ad hoc* Human Rights Court on Timor Leste, as well as the special panels for serious crimes and the commission of reception, truth and reconciliation in Timor Leste.
 - ii. Examine and establish the truth concerning reported human rights violations including patterns of behaviour, documented by the relevant Indonesian institutions and the Special Panels for Serious Crimes (as contained in its indictment letters) with a view to recommending follow-up measures in the context of promoting reconciliation and friendship among peoples of the two countries.
- (b) Issue a report, to be made available to the public, in Bahasa Indonesia, Tetum and English, establishing the shared historical record of the reported human rights violations that took place in the period leading up to and immediately following the popular consultation in Timor Leste in August 1999.
- (c) Devise ways and means as well as recommend appropriate measures to heal the wounds of the past, to rehabilitate and restore human dignity, *inter alia*:
 - i. Recommend amnesty for those involved in human rights violations who cooperate fully in revealing the truth.
 - ii. Recommend rehabilitation measures for those wrongly accused of human rights violations.

- iii. Recommend ways to promote reconciliation between peoples based on customs and religious values.
- iv. Recommend innovative people-to-people contacts and cooperation to further enhance peace and stability.”

The legal profession

Articles 136 and 137 of the Constitution give some basic protection to lawyers, and clients, in that they state that lawyers can contact and see their clients while in detention or under arrest, whether in civil or military prisons; they also state that legislation will be introduced to establish the inviolability of documents related to legal proceedings. As yet no such law has been passed.

ACCESS TO JUSTICE

Access to the courts is guaranteed under article 26 of the Constitution and cannot be denied on economic grounds.

There are a number of key provisions in the Constitution that provide protection and, in some cases, defence for citizens, including the right to resist and disobey orders if they are illegal and/or affect their fundamental rights (see article 28) There have so far not been any cases in which this has been asserted by a citizen or his/her legal representative. The Constitution forbids life imprisonment and establishes the right to apply for a writ of *habeas corpus* (see articles 32 and 33 respectively). There are now a number of laws in existence that directly or *prima facie* contradict the Constitution, indicating a worrying trend with regard to rights and freedoms. The Immigration and Asylum Law, specifically articles 11 and 12, excludes foreigners from participating in a number of activities, including those of a political nature.

Office of the Ombudsman

The post of Ombudsman, as mandated under article 27 of the Constitution, remains unfilled after a parliamentary process to appoint one failed to secure the candidate favoured by the government.

Court information

There are no public information boards in courts that the public or lawyers can consult to find out which cases are listed for that day. While there is a court registry dealing with national judges, information about international judges can only be obtained from their international clerks. A reporter who recently went to Dili District Court on a weekday morning was unable to find any court officials, judges, court lists or anyone else able to supply information. It has been known for witnesses and defendants to turn up for a hearing and for the judges and/or prosecutors not to arrive.

Interpreters

The JSMP observer notes that there appears to be no permanent interpreter attached to district courts to assist national judges, which can only impede justice. In February

2005, the Superior Council of the Judiciary issued a directive stating that, seven months after its issuance, only the national languages could be used. All laws and directives are published in Portuguese, one of the two national languages, but with the majority of judicial actors not fluent in Portuguese, their knowledge of the law is patchy. The laws are not published in Tetum, which is spoken by about 60 per cent of the population and would have obvious advantages.

LEGAL REFORMS DURING THE PERIOD

- 19 May 2002:** *RDTL Interpretation of Applicable Law, 2/2002.*
- 2002:** *RDTL Decree Laws 1, 8, 9 and 11.*
- 2002:** *RDTL Statutes of Judicial Magistrates Law.*
- 7 August 2002:** *RDTL Interpretation of Section 1 of Applicable Law 2/2002.*
- 2003:** *Sources of Law, Decree Law 9/2003.*
- 2003:** *RDTL Immigration and Asylum Act.*
- 2003:** *RDTL Decree Law on the Organic Structure of the Ministry of Justice 3/2003.*
- 2004:** *Superior Council of the Judiciary Directive 03/2004.*
- 2004:** *RDTL Decree Law 30/2004.*