

Revised Report on relations between the Judiciary and the Government in Timor Leste following investigations in country between Sunday 16 November 2014 and Tuesday 18 November 2014.

Alistair Wyvill SC – Northern Territory Bar Association

I had arranged to spend these days in Timor Leste to assist Alex Wilks, Principal Programme Lawyer, International Bar Association's Human Rights Institute based in London, to investigate the support which might be given by the IBA to the establishment of an independent bar association in Timor Leste. However, recent events overwhelmed our original intentions and it quickly became clear that the more immediate concern was the independence of the judiciary.

Over these days, I spoke to as many people as possible in Dili about recent developments concerning the judiciary, including an advisor to Timor Leste's Prime Minister Xanana Gusmao, many local lawyers, the President of the Court of Appeal Guilhermino De Silva, another Timorese judge, the Timor Leste head of a major local NGO (whom I cannot identify), and representatives of the Judicial System Monitoring Programme (JSMP), a high-regarded local organisation monitoring the performance of the judicial system in Timor Leste.

The results of those inquiries are as follows:

On Friday 24 October 2014, Timor Leste's National Parliament passed a resolution (No.11/2014 – English Translation attached) in a closed session, immediately terminating the contracts of all international judges, prosecutors, defenders and other international advisors working in the judicial system and requiring an audit of the Timor Leste Justice system. The Government resolved on the same day (No.29/2014) to adopt the measures called for in the resolution from the National Parliament.

On 28 October 2014 the President of the Court of Appeal, Guilhermino De Silva (Timor Leste's most senior judge) issued a directive to all judicial administrators of all Timor Leste District Courts that, as the resolutions lacked lawful validity, the judges were to continue with their duties as normal (original attached). Under the Constitution and laws of Timor-Leste, I understand that judges can only be removed from office by the Superior Council of Magistrates and prosecutors by the Superior Council for the Public Prosecution.

In response to this directive, on 31 October 2014 the Government passed a resolution revoking the visas of five foreign judges, two foreign prosecutors and a foreign official in the Anti-Corruption Commission, giving them 48 hours' notice to leave Timor-Leste (English translation of the resolution attached). They were the following:

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2. Julio Gantes da Costa (Portugal)
3. Eduardo Neves (Portugal)
4. Pedro Miguel Figueiredo (Portugal)
5. Carlos Câmara (Portugal)

Attorneys General:

1. Luis Landim (Cape Verde)
2. Gloria Alvês (Portugal)

Anti-Corruption Commission:

1. José Brito (Portugal)

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The Government has sought to justify these moves by referring to the conduct by the judiciary of the resources tax cases brought by the Government against Conoco Philips and others. Apparently, the Prime Minister has gone on television holding up judgments which he claims evidence inappropriate “coping and pasting” by judges. There are a number of other complaints.

It is not clear to me that any of the expelled judges and lawyers listed above had any connection with the tax cases against the resources companies. In fact, it has been positively asserted to me that the expelled judges “had nothing to do with the \$30m case”. The President of the Court of Appeal also confirmed this to me. It is also difficult to see how a member of the Anti-Corruption Commission might have any role to play in a tax recovery case. Nor, in spite of request, has any material been provided to me which might justify the criticism of the judges that did have the conduct of these cases and, if criticism might be appropriate, why that could not have been pursued in an appeal.

Further, almost every “insider” to whom I have spoken who is independent of the Timor Leste Government (including the judges to whom I spoke) connects these events with the corruption cases against 8 members of the current government including the speaker (“president”) of Parliament and to other cases related to corruption which are presently proceeding through the courts.

This connection is supported by a case concerning the conviction of “CG” a former police commander of criminal investigations in Timor Leste (whose full name I understand is Calisto Gonzales) which is outlined in the attached JSMP report. His defence to a charge that he had assisted drug-traffickers in his custody to escape prosecution and leave the country was that he was following the instructions of his superiors. He appealed on the ground that they should have been called as witnesses by the prosecution. The CA accepted this submission and referred the matter back to the Dili District Court for a further hearing to call the nominated superiors (these matters were confirmed with me generally by the President of the CA). These superiors were - I am told by others – senior members in the Government. As the JSMP report shows, the judge who was to continue with this trial was Judge Julio Gantes - No.2 on the above list. As a result of the expulsions, it is uncertain as to whether, when and how the trial will ever proceed.

What is more concerning is that the PM might be engaged in a campaign against the judicial system of which this is only the beginning – this is not just my view, but a view of some of the senior Timor Leste individuals with whom I spoke. This campaign appears to include demeaning the reputation of local judges with the public. This appears to be having some effect: see the attached “declaration politica” signed by several war veterans which refers to the tax cases and the “copy/paste” complaint.

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court procedure and he was advised by the court to take the materials to prosecutors. It seems that this may have been just a further step in the PM's media campaign against the judges. No other possible rationale is apparent.

The conduct of this campaign would be particularly concerning if, as appears possible, the complaints about the tax cases are a ruse to deflect attention from the real object of the campaign – to prevent the judiciary from hearing and determining corruption cases against members of the Government.

In spite of the pressure being applied by the Government, it appears that the local judges are resolved to continue to discharge their duties including by bringing the corruption cases to trial. No question was left in my mind that that was the position of President de Silva and the judge with whom I spoke. This means that there is a serious risk of escalation over the coming months. As these committed and admirable judges continue to assert their independence, the PM and those behind him may "up the ante". It is not my intention to be overly dramatic, but from what I saw it is just not possible to rule out the risk of danger to the lives and wellbeing of these judges and their families as the current crisis develops.

The position of the judges in Timor Leste is made more problematic because, as far as I could see, they cannot rely upon the advocacy, support or protection of an organised and independent legal profession. JSMP appears to be almost the only local voice attempting to defend judicial independence and the rule of law in Timor Leste. Further, the expulsion of the Portuguese judges – part of whose function was to assist in the training of the local judges - has left the local judges even more isolated.

Finally, and understandably in these circumstances, the President of the Court of Appeal and the other judge with whom I spoke were unequivocal in their request for support from the international community and particularly judges and lawyers from other countries.

My suggestions for action, in line with the requests I received, are as follows:

1. resolutions should be passed and published as widely as possible expressing concern about recent developments in Timor Leste and calling upon the Government to declare its commitment to the rule of law, to the independence of the judiciary, and to support the personal safety and well-being of the members of the judiciary so they may continue to properly discharge their duties;
2. letters should be written to the Prime Minister and President of Timor Leste in the same terms, copied to the President of the Court of Appeal;
3. further investigations should be undertaken to ascertain the relevant facts including
 - a. the legality under Timor Leste law of the various resolutions which Parliament and Government have purported to pass;
 - b. whether there is any connection between the action of the expelled judges and lawyers and the tax cases;
 - c. whether there is any connection between the corruption cases and the Government's actions in relation to the judiciary;
 - d. whether there is any risk to the safety of Timor Leste judges;
 - e. how the justice system in Timor Leste might be better supported.

4. options for senior representatives of legal bodies to visit Timor Leste and show their support for judicial independence, the rule of law and the peaceful settlement of disputes should be considered. One possibility might be the convening of a regional conference in Dili to examine the role of independence in the administration of justice, both in respect of the courts and the legal profession. I have discussed this with Alex Wilks and it is possible that the IBA may be interested in co-operating with other professional bodies in convening such a conference.
5. It should be noted that this is a revision of a report dated 29 November 2014. The revision was made in the circumstances set out in the letter from Cuatrecasas, Goncalves Pereira, legal representatives for Mr Emilia Pires, the current Minister for Finance for Timor Leste to me dated 2 December 2014, my response dated 10 December 2014 and their letter of 18 December 2014.



Alistair Wyvill SC

22 December 2014

CUATRECASAS, GONÇALVES PEREIRA

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awyvill@williamforster.com
Address: GPO Box 4369, DARWIN NT
0801
Att: Mr. Alistair Wyvill SC

2 December 2014

By Fax, Email and Postal Mail

Subject: Report on relations between the Judiciary and the Government in Timor Leste following investigations in country between Sunday 16 November 2014 and Tuesday 18 November 2014

Dear Colleagues,

We write to you in our capacity as the lawyers of Ms. Emília Pires, the current Minister of Finance of the República Democrática de Timor-Leste.

In your “*Report on relations between the Judiciary and the Government in Timor Leste following investigations in country between Sunday 16 November 2014 and Tuesday 18 November 2014*” (hereinafter the “Report”), there are several errors and omissions that affect our client’s image and that we cannot passively accept.

Firstly, note that we find it troubling that our client’s name was included in the Report without, as far as we know, any attempt whatsoever to contact her and provide her with an opportunity to comment on the allegations that are conveyed in the Report.

We also draw your attention to the following two paragraphs of the Report:

“Further, almost every “insider” to whom I have spoken who is independent of the Timor Leste Government (including the judges to whom I spoke) connects these events with the corruption cases against 8 members of the current government including the speaker ('president') of Parliament and to other cases related to corruption which are presently proceeding through the courts.

This view is supported by the fact that the trial against the Minister for Finance, Emelia Pires, was due to start on Monday 27 October 2014, the next working day after the resolutions were passed. As a result of these resolutions, the trial did not proceed.”

Please note the following:

1. Corruption (*corrupção*) is a crime punishable pursuant to articles 292º, 293º and 294º of the Criminal Code of Timor-Leste. Contrary to what is suggested in your Report, the charges brought against our client by the public prosecutor are not corruption charges.
2. Contrary to what was emphatically stated in your Report, the trial of this case was not adjourned due to the resolutions adopted by the National Parliament and the Government on Friday 24 October 2014.
3. The trial was scheduled to start on Monday 27 October 2014.
4. We, on behalf of our client, had filed requests and appeals in which we denounced several nullities and irregularities in the investigation and in the indictment.
5. On Monday 27 October 2014, the file of the case was in the Court of Appeal pending a decision of that Court about some of our requests and appeals. Accordingly, the trial could not actually start because the Dili District Court did not have the physical file of the case.
6. On Tuesday 28 October 2014, the Court of Appeal issued a decision favorable to our client and revoked the order of the Dili District Court Judge that had accepted the indictment and scheduled the trial.
7. Thus, due to this decision of the Court of Appeal, the indictment is not yet even a definitive indictment.
8. Note that the decision issued on 28 October 2014 was unanimously issued by three judges: Guilhermino da Silva, Deolindo dos Santos e José Luis da Góia.
9. Guilhermino da Silva is the President of the Court of Appeal, referred to in your Report as “Timor Leste’s most senior judge” who, on 28 October 2014,

"issued a directive to all judicial administrators of all Timor Leste District Courts that, as the resolutions lacked lawful validity, the judges were to continue with their duties as normal". Deolindo dos Santos is a local judge and José Luis da Góia is an international judge.

Besides this, your Report includes several errors and omissions related with the Resolutions passed by the Parliament and Government, which contribute to create a very negative image of the Government and those who are a part of it, as is our client.

We understand that, being a public figure, our client is inevitably subject to the attention of the media and that the events of the past month in Timor-Leste may be distorted and used by political opponents and ill-informed commentators to unjustly attack her image and present her case as the reason for the resolutions adopted by the Parliament and Government.

However, we expect a Report drafted by an experienced lawyer on behalf of a Bar Association to follow a reasonably high standard, both from a procedural perspective as well as in what regards the accuracy of the information and conclusions provided.

The incorrect references to our client's case in your Report severely damage our client's reputation, both in Timor-Leste and abroad (particularly in Portugal and Australia, where it is receiving intense media coverage), by directly associating her with "corruption" cases and presenting her as the reason (or one of the main reasons) for an alleged attempt to manipulate and threaten the judiciary in Timor-Leste.

In light of the information provided above and in order to mitigate said damages, we hereby request you to urgently correct your Report and to eliminate the references to our client from it and any documents based on it. Since the Report has already been publicly disclosed, we also request that you immediately issue a new public final version of the Report without said references or that a public statement is issued in which you affirm that the

references to our client in the Report were based in inaccurate information and should not have been included in the Report.

On a final note, we would like to stress that we understand how confusing the local reality in Timor-Leste may sometimes be to an outsider (which we also are). Within the limitations imposed by attorney-client privilege and other possible restrictions, please be aware that if after the corrections requested above are performed other reports or similar initiatives about this subject are promoted by you, we are available to try to provide you in advance with accurate information about our client's case and we insist on being contacted prior to any reference to her name.

Kind Regards,

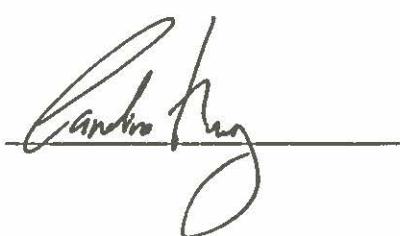
Paulo de Sá e Cunha



Frederico Bettencourt Ferreira



Carolina Mouraz





Messrs Paulo de Sá e Cunha and Frederico Bettencourt Ferreira and Ms
Carolina Mouraz
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Portugal

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10 December 2014

Dear Colleagues,

**EMILIA PIRES & REPORT ON RELATIONS BETWEEN THE JUDICIARY AND
THE GOVERNMENT IN TIMOR LESTE**

Thank-you for your letter of 2 December 2014.

As a result of the information you have provided, I have decided to revise my report. I attach a draft for your consideration and comment. I advise that the original report has been taken off our website. As paragraph 3 of my suggestions for action on page 3 of my report makes clear, the statements in my report were provisional and subject to further investigation to ascertain “whether there is any connection between the corruption cases and the Government’s actions in relation to the judiciary”. For reasons that are set out in this letter these changes are proposed without any admission that the terms of the original publication were, in the circumstances, inappropriate.

Subject to your comments, I propose publishing the revised report with your letter of 2 December 2014 and this response on our website. I note with appreciation your agreement to the publication of your letter as communicated to me by Mr Ferreira in his email of 3 December 2014. I will also circulate the revised report and attachments to those to whom I sent a copy of my original report.

I also note with appreciation your offer to assist in the provision of further information, insofar as you are able given your professional responsibilities. As an outsider, it is extremely difficult to know precisely what is happening in Timor Leste.

For that reason, I have also been asking for some time for material from the Prime Minister's office to substantiate the Government's position. At this stage, I have not received any information from the Government which satisfactorily answers in my view the concerns set out in my report. If you or your client was able to assist in this respect that would be greatly appreciated.

Particularly with respect to the matters you have raised, I would be grateful if you could provide the following further information and material:

- i. Details of the precise charges which have been brought against your client, ideally by providing a copy of the indictment to which you refer.
- ii. Details of the submissions you have made on behalf of your client in these proceedings and the court's rulings including a copy of the decision of the Court of Appeal of 28 October 2014.
- iii. Your assessment of the precise impact the recent departure of the Portuguese judges has had and is likely to have on the proceedings against your client. For example, who was the Judge before whom the case was listed on 27 October 2014? Was he one of the Judges listed in the annex to resolution 32/2014? Which first instance Judge is now dealing with the matter? What role if any did the "international advisors" the subject of resolution 32/2014 (Luis Landim, Gloria Alvês and José Brito) have in the case which was brought against your client?
- iv. Details of what you describe as "several errors and omissions" in my report with respect to the resolutions passed by the Parliament and the Government. The primary documents which demonstrate the existence of these errors and omissions will obviously assist us in our assessment.

In my report I addressed the possibilities that the Prime Minister might be engaged in "a campaign against the judicial system" and that "it is not possible to rule out the risk of danger to the lives and wellbeing of these judges and their families". In this respect, I should also advise that, at its annual general meeting held on 25 November 2014, this Association resolved to call upon the Government of Timor Leste:

1. to confirm its unconditional commitment to upholding the rule of law;
2. to refrain from any action or dealing with the judiciary or with the judges of Timor Leste which is not in accordance with the Constitution and laws of Timor Leste;

3. to ensure that any issues of concern which it may have with the actions of any judge are raised and dealt with according to law and with respect for the independence of judges and the judiciary;
4. to unconditionally guarantee the safety and welfare of Timorese judges and their families.

We are in the process of writing to the Prime Minister to this effect.

It is the strong desire of our Association to be reassured that the Prime Minister is in no way engaged in a campaign against the judicial system and that any risk of danger to the lives and wellbeing of these judges and their families is, in fact, ruled out. Your client as a member of the Government could provide that reassurance by publicly and categorically confirming that the Government of which she is a member:

- A. is unconditionally committed to upholding the rule of law in Timor Leste;
- B. has no intention or desire to undertake any action or dealing with the judiciary or with the judges of Timor Leste which is not in accordance with the Constitution and laws of Timor Leste;
- C. unconditionally guarantees the safety of Timor Leste judges and their families.

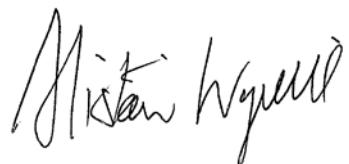
It was not my intention or the intention of this Association to “paint a very negative image of the Government” or of your client whether personally or as a member of the Government. We understand the challenges which Timor Leste faces in developing the rule of law and we have shown our commitment to supporting Timor Leste in this respect by the conference we ran in Dili in July this year. Further, as my report indicates, I was present on a pro bono basis and at my own expense in Dili to support an International Bar Association initiative to encourage the development of an independent legal profession in Timor Leste.

Our concern was that, whatever their motivation, the recent actions of the Government might tend to undermine rather than promote the rule of law in Timor Leste. If the information I have received is misleading and our concerns misplaced, please provide us with the documents and information which establishes this as soon as possible.

Finally, I would like to express our appreciation for your client and your firm making contact with this Association. We are prepared to do what we can to support the development of the rule of law in Timor Leste and recognise the advantages in this respect from establishing a constructive dialogue with your client and her Government and with members of the Portuguese legal profession who have an interest in Timor Leste.

I look forward to hearing from you. Perhaps if you respond first to indicate your client's views as to the proposed revision to my report before responding to the balance of the matters in this letter.

Yours sincerely,

A handwritten signature in black ink, appearing to read "Alistair Wyvill".

Alistair Wyvill SC
President

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Alistair Wyvill SC

December 20 November 2014

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Att: Alistair Wyvill SC

18 December 2014

By Fax, Email and Postal Mail

Subject: Report on relations between the Judiciary and the Government in Timor Leste following investigations in country between Sunday 16 November 2014 and Tuesday 18 November 2014 / Your letter dated 10 December 2014

Dear Colleague,

We appreciate the removal of our client's name from the Report and the removal of the Report from your website.

As mentioned before, we have no objection to our letter of 2 December 2014 being made available on your website.

As lawyers, we understand and appreciate attempts to encourage the development of an independent legal profession in Timor-Leste.

However, and as you certainly understand, our concern in this matter is only related with our client's image and our letter of 2 December 2014 was sent with that purpose alone.

We have to stress that we find it inappropriate for your Association to request our client to reassure you "publicly and categorically" that the Constitution and Laws of Timor-Leste are being complied with.

CUATRECASAS, GONÇALVES PEREIRA

At the moment, our understanding is that it would not be appropriate to provide third parties with documentation from the case, since that could be perceived as an attempt from our client to influence the judiciary through alternative means. Also, it is our understanding that, at this moment, the additional media coverage resulting from a public dialogue with your Association related with her case and the recent events in Timor-Leste could be prejudicial for our client's image.

It is our understanding that any further questions that you may have about the judiciary in Timor-Leste should probably be addressed to the Government of Timor-Leste through the appropriate channels.

Kind Regards,

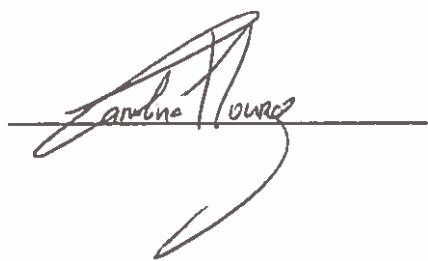
Paulo de Sá e Cunha

A handwritten signature in black ink, appearing to read "Paulo de Sá e Cunha".

Frederico Bettencourt Ferreira

A handwritten signature in black ink, appearing to read "Frederico Bettencourt Ferreira".

Carolina Mouraz

A handwritten signature in black ink, appearing to read "Carolina Mouraz".