



**JUDICIAL SYSTEM MONITORING PROGRAMME**

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**PROGRAM PEMANTAUAN SISTEM YUDISIAL**

**AN ANALYSIS OF A SEXUAL ASSAULT DECISION FROM  
DILI DISTRICT COURT**

DILI, EAST TIMOR  
JULY 2004

*The Judicial System Monitoring Programme (JSMP) was set up in early 2001 in Dili, East Timor. Through court monitoring, the provision of legal analysis and thematic reports on the development of the judicial system, JSMP aims to contribute to the ongoing evaluation and building of the justice system in East Timor. For further information see [www.jsmp.minihub.org](http://www.jsmp.minihub.org)*

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## 1 EXECUTIVE SUMMARY

In May 2004, a judge at Dili District Court delivered a conviction in a case involving sexual assault by an adult male against a girl child under the age of 15. In many justice sectors, such a statement would not merit further comment. However, in JSMP's monitoring of women-related cases, including sexual assault cases,<sup>1</sup> this is the first such decision to be rendered at Dili District Court.<sup>2</sup> This report analyzes the processing<sup>3</sup> and decision for this sexual assault and makes recommendations in order to provide feedback to Timorese judges, prosecutors, defense and police, as well as civil society, on how to improve the handling of future sexual assault cases.

Over-all, JSMP found that this serious sexual assault case was not investigated as rigorously, or as quickly, or punished as severely as it should have been.

First, a comparison of the case file documents with the decision in the case yields a host of plainly irreconcilable contradictions and unanswered questions. Central questions left unresolved include whether the simple facts of the case in fact involved one or both of vaginal or anal penetration by the accused.

Second, the facts show that the victim was a young child, it was a repeated attempt, the accused ejaculated on (if not inside) the victim, and a machete was used to threaten the victim. The maximum sentence provided in the Penal Code for the convicted offense was seven years, but the accused was sentenced to just two and a half years. JSMP believes that the accused should have been sentenced to a longer prison term.

Third, if penetration had occurred, the accused should have been indicted and convicted of rape, under Article 285 of KUHP<sup>4</sup> and as modified by international standards if necessary. Even if penetration did not occur, and only Article 290 of KUHP applied, as stated *supra*, the sentence delivered should have been longer, given the age of the victim, and the repeated attempts by the accused.

In conclusion, although the rendering of a decision by the Dili District Court in this sexual assault case is a welcome development for women in East Timor, the quality of the justice delivered to women needs to be improved.

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<sup>1</sup> JSMP's monitoring of sexual assault cases started between October and November 2003, recommenced in March 2004 and continues to date. Although sexual assault cases are usually closed to the public JSMP has received permission to monitor closed sexual assault proceedings from the President of the Court of Appeal. This permission is subject to the discretion of the judge in each case. JSMP has committed not to reveal any identifying details from these proceedings or cases.

<sup>2</sup> One additional decision in a sexual assault cases was rendered on 24 May 2004.

<sup>3</sup> The case file contains the central documents from the police's record of the case, the prosecutor's indictment, court records of transcript dates, and the transcripts of the case.

<sup>4</sup> The Indonesian Penal Code, "Kitab Undang Undang Hukum Pidana".

## **1.1 SUMMARY OF RECOMMENDATIONS**

### **Recommendations relating to the determination of whether rape has occurred**

JSMP recommends:

- 1. Police, investigating lawyers, trial lawyers and judges should use precise anatomical terminology to describe genital parts, in order to avoid confusion as to whether anal or vaginal penetration has occurred.*
- 2. Court clerks should be sensitized to the need to generate factually accurate and precise transcripts as the right to appeal provided in UNTAET Regulation No. 2000/30 is substantively impacted by the thoroughness and accuracy of the transcripts.*
- 3. Evidence in medical reports should not be relied upon to a greater extent than the evidence presented in victim and accused's statements, and trial testimony. Evidence must be reconciled. If medical reports are to be referred to during trial, they should be accompanied by witness statements at trial from the examining doctor.*
- 4. To ensure the accuracy of medical reports being relied on in court, medical examinations of sexual assault victims should be carried out as soon as possible after (preferably on the day of) the offence.*
- 5. In cases of sexual assault, due regard should be paid to the law as set out in the UNTAET Transitional Rules of Criminal Procedure (Regulation 25/2001) Section 34.3 (that is, no corroboration of the victim's testimony is required).*

### **Recommendations relating to the prosecution of anal rape**

JSMP recommends:

- 1. Application of international standards by prosecutors and judges in order to charge accused with rape for offences of forcible non-consensual vaginal, anal or oral penetration and marital rape.*
- 2. Adoption of a wider definition of rape in the draft East Timorese Penal Code and draft Domestic Violence legislation. Political acceptance and passage of the draft Domestic Violence legislation.*
- 3. Comprehensive legal representation for women victims of rape to ensure that their cases are prosecuted to the fullest extent of the law.*
- 4. Advocacy by women's groups to encourage implementation of international standards of fair treatment for women victims of crime in the formal justice sector.*

## **Recommendations relating to sentencing**

JSMP recommends:

1. *Aggravating factors, such as the use of weapons, should be considered by a Judge (in regard to the amount of force used) in the determination of sentences for crimes involving sexual assault. Such factors should be included in the sentencing provisions of the draft Penal Code.*
2. *Judges should consider applying the maximum sentence available in cases of assault against a child.*
3. *Drafters of the East Timorese Penal Code should ensure the new code complies with international standards, assigning strong penalties for cases of assault and rape against children.*

## 2 INTRODUCTION

### 2.1 ABOUT JSMP

The Judicial System Monitoring Programme (JSMP) was set up in early 2001 in Dili, East Timor. Through court monitoring, the provision of legal analysis and thematic reports on the development of the judicial system, JSMP aims to contribute to the ongoing evaluation and growth of the justice system in East Timor. JSMP's over-all objectives include, *inter alia*, promoting the development of a fair justice system in East Timor; prompting action to bring practices in line with international human rights standards; providing a physical monitoring presence at district court trials and hearings of the Court of Appeal; promptly reporting on selected trials, and their fairness; and promoting the role of a fair justice system in the related process of national reconciliation. JSMP is involved in a strategic review of the justice sector with a view to securing basic rights and particularly rights regarding access to justice.

JSMP undertakes a number of initiatives to achieve its objectives, including: building East Timorese capacity and networks in relation to the justice system; training East Timorese lawyers, activists and students in fair trial guarantees and trial observation; ensuring East Timorese participation and consultation in the justice system's development; facilitating cooperation between relevant East Timorese and international organizations through the exchange of legal observers, research, analysis and policy development on the rights to justice and basic rights that can be secured through the legal process or by justice actors, sharing and disseminating information; increasing public awareness of the internationally recognized elements of a fair justice system and the rule of law, both within East Timor and the region generally; informing the East Timorese Government, UNMISSET, the East Timorese public and the international community of possible irregularities in the justice system; identifying causes and suggesting possible reforms; and providing independent information on recent developments in the justice system in East Timor, including to local and international media and NGOs.

JSMP's Women's Justice Unit ("WJU") was initiated in April 2004 in response to tremendous support for JSMP's report, "*Women in the Formal Justice Sector: Dili District Court*" and requests for further information regarding women in the formal justice sector. The WJU is the only entity focusing exclusively on gender-related issues in the formal justice sector in East Timor. In addition to a number of other projects, the WJU continues monitoring women-related cases and decisions at Dili District Court with the goal of creating transparency regarding how women are treated in the formal justice sector.

Sexual assault cases are usually closed to the public according to Section 28.2<sup>5</sup> of the UNTAET Transitional Rules of Criminal Procedure (UNTAET Regulation 25/2001). In order to further the court monitoring work of the WJU and improve the value of its recommendations, JSMP has received permission to monitor closed sexual assault proceedings from the President of the Court of Appeal. This permission is subject to the discretion of the judge in each case. The judge also usually checks with the defence and prosecution that they are willing to have JSMP monitors present for the trial. The Prosecutor General has also granted permission for JSMP monitors to discuss these cases with Prosecutors. JSMP has committed not to reveal any identifying details from these proceedings or cases.

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<sup>5</sup> Section 28 – Public Character of Trials

28.2 The court may exclude the public from all or part of a hearing in circumstances where:

(b) It is necessary to protect the privacy of persons, as in cases of sexual offences or cases involving minors



## **2.2 EAST TIMOR AND THE JUSTICE SECTOR**

On 20 May 2002 East Timor became a sovereign nation, after a struggle for self-determination marked by decades of human rights abuses by the occupation force. Shortly after the 1999 referendum, in which the East Timorese implicitly voted for independence from Indonesia, the United Nations Transitional Administration in East Timor (UNTAET) took over administration of East Timor. The mandate of the mission was not merely to govern the territory in the time before independence, but more importantly to create structures and enhance capacity building in a way that would enable East Timorese self-governance. UNTAET administrators immediately prioritized establishing a functioning justice system.

However, after several years of a United Nations administered justice system and now under the Government of East Timor, the justice sector in East Timor is widely regarded as the weakest sector. The weakness of the justice sector in a post-conflict country such as East Timor translates into the present inability of women to access appropriate remedies in formal justice. Additionally it means that gender development efforts are hampered and the encouragement of economic development is extremely difficult.

The manifold difficulties experienced by actors in the justice sector include: the existence of only a small number of legally qualified East Timorese nationals, few of whom are women<sup>6</sup>; delays in the appointments of judges; long absences of judges while attending training in Portugal; more difficulty in making skills transfers from international advisers than had been expected; contracts of short duration for international judges; incomplete legislation; legislation that frequently does not correspond to the realities existing in East Timor, including the realities faced by women in East Timor; and a lack of administration skills and poor planning in the judicial sector.

## **2.3 SCOPE OF THIS RESEARCH**

This research does not include monitoring of what occurred at the two hearings in this case, because those hearings pre-date JSMP's access to otherwise closed sexual proceedings. Therefore, JSMP was forced to rely exclusively on the written transcripts, the case file, and interviews with the relevant justice sector actors for information about the case. With the exception of the interviews JSMP was able to conduct, JSMP reviews this case much as an appellate court would, based on the written record of what occurred at trial below.

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<sup>6</sup> In the Court of Appeal there is one female judge (out of three judges). In the Special Panel there are two female judges (out of a total of six judges). In Dili District Court there are two female judges and in Baucau District Court there are also two female judges. Of the fifteen prosecutors in East Timor, two are female. Of the seven Public Defenders, three are female. There are only two female private lawyers out of a total of at least twenty.

### **3 STATEMENT OF FACTS**

As discussed above, JSMP has been granted access to closed sexual assault cases but on the basis of strict confidentiality. JSMP has committed not to reveal any identifying details from the proceedings or cases. It is therefore not possible to discuss the facts in detail. JSMP's understanding of the facts are as follows:

The accused was an adult male and the victim was a girl child (under the age of 15). The accused and the victim knew one another and were distantly related. The accused had attempted to rape the victim once before, some months previously.

On the date of the incident the accused followed the victim, who was returning to her home, through a coffee plantation. The accused threatened the victim with a machete, threw her to the ground and pulled her pants and underpants to her knees. Both the victim and the accused claimed he raped her for two to three minutes and ejaculated. But no finding of fact was made as to whether the accused put his penis inside the victim's vagina, or anus, or did not enter her at all. The victim was screaming and crying and when the rape stopped ran and told her father what had happened. Her father took her to the police to report the rape.

#### **3.1 THE MEDICAL REPORT**

The medical examination of the victim was conducted 32 hours after the assault occurred. According to the report, the victim had not: showered, bathed, douched, urinated, defecated, or vomited since the assault. But she had: changed clothing, washed her mouth, cleaned her teeth, and had drink or food.

In general, the examination listed everything as normal. In the genital examination the vulva was listed as normal pre-pubertal, and the doctor recorded that there was no bruising to the anus or vagina, but that it was "normal". The doctor noted that the victim's hymen was still intact. The medical report notes say the accused entered his penis in the victim's anus. It is not known whether this information comes from the doctor's examination, the statement by the victim, or the police report.

#### **3.2 THE INDICTMENT**

The Prosecutor's original indictment charged the accused with offences under Articles 285, 290 (2) and 53 of the Indonesian Penal Code. The final indictment, which was submitted to the court after all the testimony had been heard, charged the accused with an offence under Article 290 (2) only. The text and substance of these laws is analyzed *infra* at Section 5.2

#### **3.3 LENGTH OF THE CASE**

According to the case file records, at least eight adjournments/postponements occurred in the case. The trial was postponed for six months for a statement from the doctor that was never to be produced and there was a period of five months in which nothing at all occurred in the case. In the space of one year, one month and two weeks, just two hearings proceeded in which evidence was heard. At every other turn, there were postponements or delays. Finally, over a year after the victim was sexually assaulted, a decision was rendered in this case.

## ISSUES PRESENTED

The first legal issue presented is what proof is required in East Timor to establish that rape (whether vaginal or anal) occurred? Or specifically applied to the facts of this case, if, as court transcripts reflect, both the victim and accused testified that vaginal penetration occurred, what weight should be given to the medical report?

The second legal issue presented by the instant case regards the current status of anal rape in East Timor. Assuming *arguendo*, that anal penetration had in fact occurred, could the act be prosecuted as rape in East Timor?

Finally, the third legal issue is what factors are appropriately considered in determining the sentence to be delivered?

### 4 ISSUE 1: WAS IT ANAL OR VAGINAL RAPE?

The first legal issue presented is what proof is required in East Timor to establish that rape (whether vaginal or anal) occurred? Or specifically applied to the facts of this case, if as court transcripts reflect, both the victim and accused testified that vaginal penetration occurred, what weight should be given to the medical report?

#### 4.1 POLICE STATEMENTS AND COURT TESTIMONY

In their statements to the police and in testimony at trial, both the victim and the accused said that penis-vagina penetration had occurred.

In the victim's statement to the police she clearly said that the accused "climbed on top of her" and "forced his penis inside her vagina". In the police interview with the victim, the police asked "When the accused entered his penis in your vagina was it for a long or short period?" to which the victim replied "it was quick, about 2 minutes because I was screaming". The police asked the victim "What did you feel when the accused entered his penis in your vagina?" to which the victim replied "my stomach hurt and my anus hurt, because he entered his penis in my anus".

In the police interview with the accused the police asked: "When you did sexual assault against the victim did you do it on her outside only or did you enter her "moris fatin"? The accused replied: "Yes, when I sexually assaulted her I entered my "moris fatin" into her "moris fatin". ("Moris fatin" is a tetum term meaning birthplace. While observing sexual assault trials, JSMP has heard the term used to describe penis and vagina.)

According to the court transcripts, in response to questioning at trial the victim said that the accused threw her to the ground, took down her pants and put his penis inside her vagina and raped her.<sup>7</sup>

According to the court transcripts, in response to questions from the Judge and the Prosecutor, the accused said "I grabbed her and forced her to take off her clothes and then raped her. I lay down with her on the side. I entered my penis in her vagina from behind and ejaculated. The victim

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<sup>7</sup> The transcript does not demonstrate that the judge asked further questions here.

screamed and cried.” In response to questions from the Defence, the accused said, “Yes, I forced her, but my penis did not enter her vagina because I entered her from behind.”<sup>8</sup>

#### **4.2 PROSECUTOR’S AND JUDGE’S RECOLLECTIONS OF COURT TESTIMONY**

However, these court transcripts do not coincide with either the Judge’s or Prosecutor’s recollection of the testimony given at trial (according to the interviews conducted with each on 11 May 2004). In an interview with JSMP, the judge adamantly maintained that no testimony had been given that the accused had entered his penis in the victim’s vagina or anus. The accused’s penis had merely been on the outside of the victim.<sup>9</sup> Although the accused ejaculated, it was just on the outside.

In an interview with JSMP, the prosecutor said that although the victim had told the court the accused had raped her, the accused had said he had entered his penis into the victim’s anus, not her vagina.

The prosecutor and judge both told JSMP that because the medical report stated the hymen was still in tact, the victim had clearly not been vaginally raped.

In neither the indictment nor the judgment is there evidence of any analysis by the prosecutor or the judge, despite the victim’s and accused’s statements to the police and at trial that rape had occurred, that the hymen can remain intact despite vaginal penetration.<sup>10</sup>

#### **4.3 THE MEDICAL REPORT**

In the interviews with the prosecutor and the judge, both told JSMP that they thought the evidence in the medical report was more persuasive than the other evidence presented during the trial.

The statement in the medical report said that the accused had entered his penis into the victim’s anus.<sup>11</sup> Since the hymen was still intact, the prosecutor thought this was probably what had happened. The defence on the other hand, argued that the statement in the medical report was merely copied from the police report.<sup>12</sup>

It is important to note that the prosecutor and the judge relied on the medical report over the evidence of the victim and the accused, despite the obvious technical errors in the medical report. For instance, according to the medical examination (which was not carried out until a full day and a half after the incident had occurred) the victim had not urinated, defecated, or washed since the incident had occurred. This hardly seems possible given the length of time that had elapsed.

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<sup>8</sup> There was no follow up questioning

<sup>9</sup> The judge recalls that the accused said he rubbed his penis between the crack of the victim’s backside (but did not enter the anus) until he ejaculated.

<sup>10</sup> Some women can engage in sexual intercourse without the hymen breaking.  
<http://encyclopedia.thefreedictionary.com/Hymen>

<sup>11</sup> It is important to note that the victim was accompanied to the medical examination by a Counsellor from Pradet, and it is possible that the statement in the medical report may have been based on what the Counsellor thought had happened, rather than actual questioning of the victim.

<sup>12</sup> JSMP read both the police report and the medical report, and the statements were clearly different.

In JSMP's opinion, there was also over reliance by the prosecutor and the judge on the medical report when no evidence was ever actually given by the doctor at trial (despite three trial postponements to allow for the doctor's evidence).<sup>13</sup>

The greater reliance on the medical report over the testimony of the accused would also appear to be in breach of the UNTAET Transitional Rules of Criminal Procedure (Regulation 25/2001) Section 34.3(a) of which states that "in cases of sexual assault no corroboration of the victim's testimony shall be required."<sup>14</sup>

#### 4.4 CONCLUSION

In JSMP's opinion, if more thorough questioning had been done at trial, and greater weight had been given to the victim's and accused's testimony (rather than the medical examination) it is likely the prosecutor would have charged the accused with rape under Article 285 of KUHP<sup>15</sup>.

#### 4.5 RECOMMENDATIONS

1. *Police, investigating lawyers, trial lawyers and judges should use precise anatomical terminology to describe genital parts, in order to avoid confusion as to whether anal or vaginal penetration has occurred.*<sup>16</sup>
2. *Court clerks should be sensitized to the need to generate factually accurate and precise transcripts as the right to appeal provided in UNTAET Regulation No. 25/2001 is substantively impacted by the thoroughness and accuracy of the transcripts.*
3. *Evidence in medical reports should not be relied upon to a greater extent than the evidence presented in victim and accused's statements, and trial testimony. Evidence must be reconciled. If medical reports are to be referred to during trial, they should be accompanied by witness statements at trial from the examining doctor.*

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<sup>13</sup> Both the prosecution and judges have noted it is extremely difficult to get the examining doctor to appear at trial.

<sup>14</sup> UNTAET Regulation 30/2000 25 September 2000  
Amended by 25/2001 14 September 2001

**Section 34.3** In cases of sexual assault:

- (a) no corroboration of the victim's testimony shall be required;
- (b) consent shall not be allowed as a defence if the victim:
  - (1) has been subjected to or threatened with or has had reason to fear violence, duress, detention or psychological oppression, or
  - (2) reasonably believed that if the victim did not submit, another person might be so subjected, threatened or put in fear;
- (c) before evidence of the victim's consent is admitted, the accused shall satisfy the court, in camera, that the evidence is relevant and credible.

<sup>15</sup> Please see section 5.1 of this report for a discussion of the differences between charges under Article 285 and 290 of KUHP.

<sup>16</sup> Clear terminology to describe genital parts must be employed and general, imprecise words such as "moris fatin" and "sasan lulik" should not be used to the exclusion of accurate and precise terms. Although the victim and accused may be embarrassed by such exact anatomical terminology, it is necessary for the court to clarify exactly what kind of sexual assault has occurred, especially as the KUHP definition of rape is so limited.

4. *To ensure the accuracy of medical reports being relied on in court, medical examinations of sexual assault victims should be carried out as soon as possible after (preferably on the day of) the offence.<sup>17</sup>*
5. *In cases of sexual assault, due regard should be paid to the law as set out in the UNTAET Transitional Rules of Criminal Procedure (Regulation 25/2001) Section 34.3 (that is, no corroboration of the victim's testimony is required).*

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<sup>17</sup> Accurate medical reports can only be obtained if the examination is carried out as soon as possible after the offence. In particular, in cases of sexual assault, the results of the assault, for example in terms of bruising, and DNA testing, will be much more apparent if the examination is carried out on the day of the offence.

## 5 ISSUE 2: CAN ANAL RAPE BE PROSECUTED AS RAPE IN EAST TIMOR

Assuming that anal penetration had in fact occurred in this case, could the act have been prosecuted as rape in East Timor?

### 5.1 THE INDONESIAN PENAL CODE: ARTICLES 285, 290

The prosecutor originally charged the accused with Articles 285 and 290 of the Indonesian Penal Code (KUHP).<sup>18</sup> The rape article (285) sets forth four elements essential to prove rape and provides for a maximum sentence of twelve years:

1. the offence occurred with violence or the threat of violence,
2. the offender was a man and committed the offence against a woman, without her consent,
3. the woman was not the offender's wife, and
4. the offence involved sexual intercourse.<sup>19</sup>

Sexual indecency under Article 290(2), provides a maximum sentence of seven years for a person who "commits obscene acts with someone who he knows or should reasonably presume that she has not yet reached the age of fifteen years or, it is not obvious from her age, not yet marriageable".

As discussed above (4.2) the prosecutor thought this was a case of anal rape. According to the prosecutor it is not possible to argue 285 in cases of anal rape.<sup>20</sup> This is because the KUHP is based on Dutch Law of 1912, according to which sexual intercourse was defined in terms of reproduction. Under the KUHP therefore, sexual intercourse only involves penis-vagina penetration.<sup>21</sup>

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<sup>18</sup> UNTAET Regulation No. 1/1999 establishes that Indonesian law applies unless and until either: 1) UNTAET or Timorese legislation exists or is drafted ; or 2) Indonesian law contradicts international legal standards.

UNTAET Regulation No. 1/1999 provides that until replaced by subsequent East Timorese legislation, the laws applied in East Timor prior to 25 October 1999 shall continue to apply. This includes the Indonesian Penal Code (which has not yet been replaced by a subsequent East Timorese Penal Code, although a draft is in the process of being prepared).

<sup>19</sup> Harkristuti Karkrisnowo (Universitas Indonesia), *Hukum Pidana dan Perspektif Kekerasan Terhadap Perempuan Indonesia (Criminal law and perspectives on its harshness against Indonesian Women)*, Jurnal Volume 10.2, <http://202.159.18.43/jsi/102harkristuti.htm>

<sup>20</sup> interview on 11 May 2004. The prosecutor has since told JSMP a judge could throw out a case such as this if the prosecution erroneously tried to argue 285 in a case of penis-anus penetration.

<sup>21</sup> "Failed Justice and Impunity: The Indonesian Judiciary's Track Record on Violence Against Women", *Report to the UN Special Rapporteur on Independence of the Judiciary Mission to Indonesia* Prepared by the National Commission on Violence Against Women with partner organizations (Komnas Perempuan), 22 July 2002, page 5

## 5.2 OTHER SOURCES OF APPLICABLE LAW

### 5.2.1 INTERNATIONAL LAW

In deciding whether to prosecute or convict the accused of rape, both the prosecutor and the judge should have had regard to international law<sup>22</sup> because Section Nine of the Constitution provides that if Timorese law contradicts international legal standards, international law should prevail.<sup>23</sup>

In international customary law, rape is forceful, threatened or non-consensual penetration of oral, anal or genitals of a victim with any object.<sup>24</sup> Additionally, international criminal procedure and evidentiary standards do not require corroborating evidence for the victim's testimony.

In determining international customary law, the law of international tribunals is instructive.<sup>25</sup> The jurisprudence of the International Criminal Tribunal for Rwanda (ICTR) and the International Criminal Tribunal for the Former Yugoslavia (ICTY) in the 1990s<sup>26</sup> broadened the scope of crimes of sexual violence that can be prosecuted as rape to include forced vaginal, oral, and anal sex.<sup>27</sup>

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<sup>22</sup> JSMP understands however, that it is difficult for the prosecution and judiciary to refer to international law, as they lack resources (such as text books on international law), and internet access to international treaties etc, as well as education about the international conventions East Timor has signed.

<sup>23</sup> **Section 9 (International law)**

1. The legal system of East Timor shall adopt the general or customary principles of international law.
2. Rules provided for in international conventions, treaties and agreements shall apply in the internal legal system of East Timor following their approval, ratification or accession by the respective competent organs and after publication in the official gazette.
3. All rules that are contrary to the provisions of international conventions, treaties and agreements applied in the internal legal system of East Timor shall be invalid.

<sup>24</sup> The customary international legal definition of rape also encompasses marital rape, or non-consensual sex between spouses.

<sup>25</sup> Although the laws concerning rape are generally applied to situations of crimes against humanity, these laws are the result of a comprehensive survey of laws internationally.

<sup>26</sup> The ICTR and ICTY dramatically contributed to the development of international jurisprudence on rape. First, the authorizing statutes of both tribunals invited rape prosecutions by explicitly identifying rape as a crime against humanity. Second, the ICTR and ICTY statutes empowered prosecutors to charge individuals, while the IACHR and the ECHR were limited to hearing complaints against member states. Third, the tribunals have reinforced the recognition of rape as a form of torture. Ultimately, the ICTR recognized rape as a form of genocide.

<sup>27</sup> In the *Furundzija* opinion, the ICTY drew on the basic definition of rape articulated by the ICTR in *Akayesu* and the definitions of rape set forth in various penal codes. The ICTY concluded that the elements of rape common to most legal systems are: "1) sexual penetration, however slight; a) of the vagina or anus of the victim by the penis of the perpetrator or any other object used by the perpetrator, or b) of the mouth of the victim by the penis of the perpetrator; 2) by coercion or force or threat of force against the victim or a third person."

Additionally, in *Aydın v. Turkey* (1997) the European Court on Human Rights explained that rape "leaves deep psychological scars on the victim which do not respond to the passage of time as quickly as other forms of physical and mental violence." The ECHR also stressed that a victim suffers "the acute physical pain of forced penetration, which [leaves] her feeling debased and violated both physically and emotionally."



The International Criminal Court's<sup>28</sup> governing statute<sup>29</sup> provides the first international definition of rape. East Timor has signed and ratified the ICC Statute.<sup>30</sup> According to Article 7(1)(g)-1 of the *Elements of Crimes Annex* to the ICC Statute there are two elements which must be satisfied in order to establish the offence of rape as a crime against humanity<sup>31</sup>:

1. "The perpetrator invaded the body of a person by conduct resulting in penetration, however slight, of any part of the body of the victim or of the perpetrator with a sexual organ, or of the anal or genital opening of the victim with any object or any other part of the body."
2. "The invasion was committed by force, or by threat of force or coercion, such as that caused by fear of violence, duress, detention, psychological oppression or abuse of power, against such person or another person, or by taking advantage of a coercive environment, or the invasion was committed against a person incapable of giving genuine consent."

### 5.2.2 DRAFT LEGISLATION

While draft legislation is clearly not binding law, it is useful to reference such legislation to demonstrate the reform efforts that are already underway in both Indonesian and Timorese law to recognise a broader definition of rape than that contained in KUHP.

The definition of rape under Section 6 of East Timor's draft domestic violence legislation<sup>32</sup> is compatible with that adopted by the ICC: it includes anal or oral penetration as well as marital rape.<sup>33</sup>

Article 152 of the Draft Penal Code of East Timor defines rape as oral, anal and vaginal non-consensual forced sex (including with an object other than the penis), and includes rape of a spouse.<sup>34</sup> Additionally, Article 153 provides that if the victim was under the age of 16, the

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<sup>28</sup> The ICC has not yet heard any cases and so there is no case law dealing with the issue of rape as a crime against humanity.

<sup>29</sup> *The Rome Statute of the International Criminal Court 1998, Elements of Crimes Annex.*

<sup>30</sup> East Timor acceded to the ICC Statute on 6 September 2002.

<sup>31</sup> Article 7(1)(g) of the Statute deems "rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization and other forms of sexual violence" to be crimes against humanity if committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack.

<sup>32</sup> East Timor's draft domestic violence legislation has been stalled at the Council of Ministers to await its synchronization with the draft Penal Code.

<sup>33</sup> *Chapter IV, Section 6 - Forms of Domestic Violence Offences*

6.3.1 Rape. Rape occurs when:

- a. The perpetrator invades the body of a person by conduct resulting in penetration, however, slight, of any part of the body of the victim or of the perpetrator with a sexual organ, or of the anal or genital opening of the victim with any object or any other part of the body.
- b. The invasion was committed by force, or by threat of force or coercion, such as that caused by fear of violence, duress, detention, psychological oppression or abuse of power, against such a person or another person, or by taking advantage of a coercive environment, or the invasion was committed against a person incapable of giving genuine consent.

<sup>34</sup> *Chapter IV – Against Sexual Freedom*

*Section 1 – Sexual Aggression*

*Article 152— Rape*

accused will be punished with a penalty of three to twelve years, rather than the two to ten years provided for otherwise.<sup>35</sup> Article 157 provides for a penalty of two to ten years if the sex with a minor was consensual.<sup>36</sup> Article 151<sup>37</sup> defines sexual coercion and sets forth a sentence of one to six years, which 153 extends to two to eight years in the event the victim is under the age of 16.

The draft new Indonesian Penal Code<sup>38</sup>, also defines rape as including oral and anal penetration and marital rape.<sup>39</sup>

### 5.3 CONCLUSION

Applying international customary legal standards, forcible, non-consensual anal penetration can be prosecuted as rape in East Timor, and should have been prosecuted as such in this case.

### 5.4 RECOMMENDATIONS

For the above stated reasons, JSMP recommends:

1. *Application of international standards by prosecutors and judges in order to charge accused with rape for offences of forcible non-consensual vaginal, anal or oral penetration and marital rape.*

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Who, through means referred to in the above article, attacks another person through the practice of vaginal sex, anal sex, or oral sex, or through introduction of another object into an orifice to practice sex, will be punished by imprisonment of 2 – 10 years.

<sup>35</sup> *Article 153—Aggravation*

1. If the sexual aggression was carried out:
  - c) With a victim under 16 years of age, the agent will be punished with a penal penalty of 2 – 8 years in the case of article 151 or 3 – 12 years in the case of article 152

<sup>36</sup> *Article 157— Sexual Abuse*

1. Whoever practices vaginal sex, anal sex, or oral sex with a minor under 16 years will be punished by imprisonment of 2 - 10 years.
2. Who practices other sexual acts with a minor under 16 years will be punished by imprisonment of 1- 8 years.
3. In the case of 16 year olds in the previous situation of lines a) and b) of no. 1 in article 153, the agent will be punished with imprisonment of 2 – 8 years or 1 – 6 years, respectively, in the situation of no. 1 or 2 of this article.

<sup>37</sup> *Article 151 – Sexual Coercion*

Who threatens against the sexual freedom of another person, through violent means, intimidation, grave threats, or after that, causes them to lose consciousness, or places a person in a situation where they will be unable to resist, will be punished by imprisonment of 1 – 6 years.

<sup>38</sup> Harkristuti Karkrisnowo (Universitas Indonesia), *Hukum Pidana dan Perspektif Kekerasan Terhadap Perempuan Indonesia (Criminal law and perspectives on its harshness against Indonesian Women)*, Jurnal Volume 10.2, <http://202.159.18.43/jsi/102harkristuti.htm>

<sup>39</sup> Specifically, it is necessary to prove the following elements for rape:

1. the act was between a man and a woman;
2. sex occurred;
  - a. includes the entering of the penis into the anus or woman's mouth
  - b. includes entering another object inside the woman's vagina or anus
3. the act was forced;
4. the act was carried out without the woman's consent;
5. the woman was threatened, or the man thought she was already married, or the woman is under the age of 14. Id.

2. *Adoption of a wider definition of rape in the draft East Timorese Penal Code and draft Domestic Violence legislation. Political acceptance and passage of the draft domestic violence legislation.*
3. *Comprehensive legal representation for women victims of rape to ensure that their cases are prosecuted to the fullest extent of the law.*
4. *Advocacy by women's groups to encourage implementation of international standards of fair treatment for women victims of crime in the formal justice sector.*

## **6 ISSUE 3: THE DECISION AND SENTENCE: SEVERITY OF THE OFFENSE**

The final legal issue is what factors are appropriately considered in determining the decision and sentence to be delivered?

### **6.1 THE DECISION**

According to the two and a half page decision issued by the judge, the accused admitted to the court the facts submitted in the Prosecutor's indictment. The judge thought that the following factors were important in sentencing the accused:

“Incriminating factors against the accused:

- The accused has done indecent acts with the threat of violence against a child under age
- The accused had already done this act two times against the same victim
- The accused's actions have caused continuous trauma to the victim and the family
- The accused's actions have disturbed the population

Alleviating factors are:

- The accused has not yet been convicted (of another offence)
- The accused has an honest attitude and has been polite in front of the court
- The accused regrets his actions and has promised not to repeat the above mentioned crime.”

The judge found that the accused, had “done a criminal act under Article 290(2) of the Indonesian Penal Code” and sentenced the accused to 2 years 6 months imprisonment, to be reduced by the time already spent in detention.

#### **6.1.2 LENGTH OF SENTENCE**

The judge sentenced the accused to 2.5 years imprisonment. The maximum sentence for rape under Article 285 is twelve years, and for sexual indecency under Article 290 is seven years. The short sentence delivered would not give the victim much faith in the formal justice system, or provide incentive for future victims to endure the difficulties associated with a trial in the formal justice system (see previous report, *Women in the Formal Justice Sector – Report on the Dili District Court*, 7 April 2004).

During the interview with the prosecutor on 11 May, JSMP asked why she had only requested a five year sentence in the final indictment when the maximum term was seven years. The prosecutor said that the accused appeared to truly repent of his crime and his mother had told her the family needed the accused to work the farm to support his parents. Such communication is probably not unusual between the accused's family and the Prosecutor, as in the Indonesian criminal justice system the Prosecutor must write a list of alleviating factors in the final indictment. In an interview with JSMP on 11 May 2004, the judge said the accused's family circumstances (his parents needed him to work the farm), his repentance, the fact he had not attempted to abuse any other children, nor (according to the judge) had he actually raped the victim, has also affected the judge's decision as to the length of the prison sentence.

## **6.2 AGGRAVATING FACTORS**

### **6.2.1 USE OF A WEAPON**

The prosecution claimed (and the accused admitted) that the accused used a machete to threaten to kill the victim to get her to stop running. “He showed me his machete and told me to stop running or he would cut me up and throw me away”.<sup>40</sup> This evidence does not appear to have been considered by the judge (although the judge did find the accused had threatened the victim) or relied upon by the prosecutor. The Defence argued the evidence of the machete was irrelevant.

### **6.2.2 EJACULATION**

Whether or not the accused entered his penis into the victim’s vagina, he admitted to ejaculating on her, an indication of the seriousness of the sexual assault. This would have also added the trauma of the victim, but this factor does not appear to have been considered by the judge or relied upon by the prosecutor in the list of incriminating factors in the indictment.

### **6.2.3 VICTIM WAS A CHILD**

Article 290 of the current Penal Code makes some attempt to recognize the seriousness of sexual assault against a child who has not yet reached the age of 15 years by providing a potential maximum sentence of seven years imprisonment. The judge thought the girl was clearly under the age of 15.<sup>41</sup>

### **6.2.4 PREVIOUS ATTEMPTS**

According to both the accused’s and the victim’s statements to the police and in court, the accused had already attempted to sexually assault the victim once before. The accused told the police and the court that he had sexually assaulted the victim because he loved her. He told the police that he wanted to marry her.<sup>42</sup> In JSMP’s interview with the judge on 11 May, the judge told JSMP the accused had said in testimony that he thought if he raped her she would be his, because she would be too afraid to tell anyone what had happened.

The prosecutor argued that the previous attempt should be considered an incriminating factor, and the judge also listed it as an incriminating factor in her decision. However, in the interview with

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<sup>40</sup> Victim’s statement to police.

<sup>41</sup> However, the defence argued in its final statement that the Prosecutor had not proved a crucial element of Article 290, namely that the victim was under the age of 15, because the Prosecution had failed to produce documentary evidence of the victim’s age. In an interview with the Prosecutor on 11 May 2004, the Prosecutor told us that the family had been unable to produce a baptismal certificate (the usual documentary evidence of a child’s date of birth in East Timor) because the victim had been baptized in a different part of East Timor, and the police had not had the resources to send someone to get a copy of the certificate. However, in our interview with the judge on 11 May 2004, the Judge said the Defence’s argument had had not effect on her decision, as the victim was clearly under the age of 15.

<sup>42</sup> The accused’s attitude towards the 12 year old victim is not uncommon in East Timor. JSMP has anecdotal evidence of similar such attitudes among a number of East Timorese males, including those in positions of authority. For instance, during human rights training of police in one district in East Timor, all of the police in attendance reportedly believed that a 12 year old girl was no longer a child if she got married. Marriage of older men to girl children under the age of 15 (including to girls as young as 12) also occurs on occasion. (Under Article 280 of the Indonesian Penal Code, and according to the Indonesian Civil Code, marriage is not permitted until the girl has reached the age of 15.)

the judge on 11 May 2004, when questioned as to why she had given such a lenient sentence, the judge said once reason was because the accused had had many opportunities to try to assault the girl in the intervening period since the first assault, but had not taken advantage of those opportunities. The judge also believed the accused when he promised in court not to assault the victim again.

### **6.3 CONCLUSION**

JSMP believes that the length of the sentence may be inappropriately short (two and a half years) for such a serious offence because the four aggravating factors described above (use of a weapon, ejaculation, victim was a child, and previous attempts) do not seem to have been considered by the judge.

### **6.4 RECOMMENDATIONS**

JSMP recommends that:

1. *Aggravating factors, such as the use of weapons, should be considered by a Judge (in regard to the amount of force used) in the determination of sentences for crimes involving sexual assault.<sup>43</sup> Such factors should be included in the sentencing provisions of the draft Penal Code..*
2. *Judges should consider applying the maximum sentence available for an offence in cases of assault against a child.<sup>44</sup>*
4. *Drafters of the East Timorese Penal Code should ensure the new code complies with international standards, assigning strong penalties for cases of assault and rape against children..*

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<sup>43</sup> Under the present Penal Code, the use of a weapon such as a machete would be considered “force or the threat of force”. The seriousness of the use of such force is reflected in the length of the maximum sentence.

<sup>44</sup> Article 290 of the current Penal Code makes some attempt to recognize the seriousness of sexual assault against a child who has not yet reached the age of 15 years by providing a potential maximum sentence of seven years imprisonment. In JSMP’s opinion, Judges should have regard to this maximum sentence and the intention of the Article to recognize the potential trauma that can be caused to a child by sexual assault. Articles 153 and 157 of the draft Penal Code go further in recognizing the seriousness of sexual assault and rape against a child under 16 years by providing for a maximum sentence of up to 10 years imprisonment.

## 7 CONCLUSION AND RECOMMENDATIONS

The rendering of a decision in this sexual assault case is a positive development for women in East Timor as it indicates progress in the delivery of justice for women by the courts.<sup>45</sup> However, the following problems were identified with the process and the decision rendered in this case:

- Consistent, unreasonable delays in the court process (in the space of more than 13 months, only two hearings proceeded in which evidence was heard).
- The lack of thorough questioning at all stages of the criminal and court process caused confusion in the minds of all the court actors as to what offence had actually occurred.
- The inappropriately high value placed on the medical evidence as opposed to the victim's and accused's testimony appears to have led the prosecutor and judge to charge and convict the accused with a lesser offence.
- Inadequate regard for Section 34.3 of the UNTAET Transitional Rules of Criminal Procedure (Regulation 25/2001).
- Failure to charge and convict the accused with rape because of the limitations of the Indonesian criminal code and lack of awareness of the definition of rape in international law.
- The inappropriately short sentence delivered did not reflect the seriousness of the crime.

In order to improve the quality of justice for women in East Timor, JSMP recommends the following:

### **Recommendations relating to the determination of whether rape has occurred**

JSMP recommends:

1. *Police, investigating lawyers, trial lawyers and judges should use precise anatomical terminology to describe genital parts, in order to avoid confusion as to whether anal or vaginal penetration has occurred.*
2. *Court clerks should be sensitized to the need to generate factually accurate and precise transcripts as the right to appeal provided in UNTAET Regulation No. 2000/30 is substantively impacted by the thoroughness and accuracy of the transcripts.*
3. *Evidence in medical reports should not be relied upon to a greater extent than the evidence presented in victim and accused's statements, and trial testimony. Evidence must be reconciled. If medical reports are to be referred to during trial, they should be accompanied by witness statements at trial from the examining doctor.*
4. *To ensure the accuracy of medical reports being relied on in court, medical examinations of sexual assault victims should be carried out as soon as possible after (preferably on the day of) the offence.*

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<sup>45</sup> During JSMP's monitoring period for the previous report "Women in the Formal Justice System", in the eighteen cases before the court involving women, not one final decision was rendered.

5. *In cases of sexual assault, due regard should be paid to the law as set out in the UNTAET Transitional Rules of Criminal Procedure (Regulation 30/2000) Section 34.3 (that is, no corroboration of the victim's testimony is required).*

### **Recommendations relating to the prosecution of anal rape**

JSMP recommends:

1. *Application of international standards by prosecutors and judges in order to charge accused with rape for offences of forcible non-consensual vaginal, anal or oral penetration and marital rape.*
2. *Adoption of a wider definition of rape in the draft East Timorese Penal Code and draft Domestic Violence legislation. Political acceptance and passage of the draft domestic violence legislation.*
3. *Comprehensive legal representation for women victims of rape to ensure that their cases are prosecuted to the fullest extent of the law.*
4. *Advocacy by women's groups to encourage implementation of international standards of fair treatment for women victims of crime in the formal justice sector..*

### **Recommendations relating to sentencing**

JSMP recommends:

1. *Aggravating factors, such as the use of weapons, should be considered by a Judge (in regard to the amount of force used) in the determination of sentences for crimes involving sexual assault. Such factors should be included in the sentencing provisions of the draft Penal Code.*
2. *Judges should consider applying the maximum sentence available in cases of assault against a child.*
4. *Drafters of the East Timorese Penal Code should ensure the new code complies with international standards, assigning strong penalties for cases of assault and rape against children.*