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PROGRAMA MONITORIZASAUN BA SISTEMA JUDICIAL

JSMP REPORT ANALYSING THE:

DRAFT PENAL CODE

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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

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TABLE OF CONTENTS

1.	<u>INTRODUCTION</u>	4
2.	<u>EXECUTIVE SUMMARY</u>	5
2.1	Defamation: Articles 172 - 177	5
2.2	Domestic Violence and Offences against Sexual Freedom (Articles 148 – 150, and 159 – 171)	6
2.3	Compliance with the Rome Statute	7
2.3.1	<i>Genocide: (Article 120)</i>	7
2.3.2	<i>Crimes Against Humanity: (Article 121)</i>	7
2.3.3	<i>War Crimes Articles (122 – 127)</i>	7
3.	<u>PROCEDURAL ISSUES</u>	8
4.	<u>DEFAMATION (ARTICLES 172 – 177)</u>	9
4.1	The defamation provisions should be removed from the Draft Penal Code and an appropriate civil defamation law should be drafted.	10
4.2	A good faith belief in the truth of the statement should be a defence to defamation	12
4.3	Any higher penalty for defamation of a public figure should be abolished	13
5.	<u>DOMESTIC VIOLENCE AND OFFENCES AGAINST SEXUAL FREEDOM (ARTICLES 148 - 150 AND 159 - 171)</u>	13
5.1	Domestic Violence	14
5.2	Chapter IV Section I – Sexual Aggression	15
5.3	Chapter IV Section II – Sexual Exploitation	17
5.4	Section IV – Common Provisions	18
6.	<u>COMPLIANCE WITH THE ROME STATUTE</u>	19
6.1	Draft Penal Code Definition of Genocide in Article 120	19
6.1.1	<i>That ‘mental harm’ be added to Article 120(1)(a)</i>	20
6.1.2	<i>That ‘by violent means’ in Article 120(c) be changed to ‘forcibly’ (P: ‘à força or ‘forçada’)</i>	20
6.1.3	<i>Aspects of Draft Penal Code definition of Genocide that are Broader than Rome Statute</i>	21
6.2	Draft Penal Code Definition of Crimes Against Humanity in Article 121	22
6.2.1	<i>That the definition of torture be amended so that it is not limited to official agents</i>	23
6.2.2	<i>That definitions of ‘attack directed against any civilian population’ and ‘enslavement’ be added</i>	23
6.2.3	<i>That the definition of ‘extermination’ be amended</i>	24
6.2.4	<i>That ‘with knowledge of the attack’ be added</i>	24
6.3	Draft Penal Code Definition of War Crimes (articles 122 – 127)	24

<i>6.3.1 That an equivalent sub-article to Article 8.2(d) and (f) of the Rome Statute be inserted</i>	24
<i>6.3.2 That the term “children” be clarified in Article 122.1(e)</i>	25
<i>6.3.3 That the terms “in large scale” and “goods of high value” be deleted from article 126(a)</i>	25
<i>6.3.4 Amend Article 123(h) to include the expression “belonging to the hostile nation”</i>	25

7. SUMMARY OF RECOMMENDATIONS **26**

1. INTRODUCTION

JSMP would like to submit for your consideration some comments relating to Timor Leste's draft Penal Code. This report is based on the November 2004 draft. We hope that these comments, and the recommendations for amendments to the draft Penal Code contained in this report, will be useful to the drafters, members of Government and the Parliament currently considering this important law.

JSMP's comments are limited to the draft Penal Code provisions on: defamation, domestic violence, offences against sexual freedom, crimes against humanity and war crimes. JSMP has chosen to reserve its comments to these particular areas which are pertinent to JSMP's current expertise. We hope that other institutions and members of civil society can provide comments on some of these other areas which will be useful to the drafters of the Penal Code.

JSMP is particularly concerned that on 19 January 2005, the Council of Ministers conducted a preliminary examination of a Bill on Legislative Authorisation for the future approval of the Penal Code.¹ The Parliament may give the government this authorization under Section 96² of the Constitution, but an NGO letter to the Parliament dated 3 December urged the Parliament to use its discretion not to give the government this authorization. As elaborated in this report, if the government were to authorise the Penal Code as a decree law, this would not only bypass the opportunity for public comment, but run the risk of being unconstitutional, being inconsistent with the provisions of s 95.2(e) which makes law on rights, freedoms and guarantees (which the Penal Code will undeniably affect) the exclusive domain of Parliament. The criminal legal system is so fundamental to society and public order that there is a strong need for the Penal Code to be passed in a manner that is open to public scrutiny and in accordance with Timor Leste's Constitution.

Justice is a community concept. It is important that the criminal law that is in place in Timor Leste is one which everyone respects, and understands, in order to ensure compliance with the law. The appropriate punishment for various crimes should also be decided upon with community consultation. The law must be made through public consultation for the Timorese people to feel that they have ownership of the law.

JSMP recommends that the nature of the Penal Law means that Parliament should not exercise its option to authorize Government to make the Penal Code, and that the Penal Code should instead be subject to vigorous Parliamentary debate and passed as a Parliamentary Law.

¹ Democratic Republic Of Timor-Leste Secretariat Of State For The Council Of Ministers 97th Meeting Of The Council Of Ministers Of The First Constitutional Government Press Communiqué Dili, Thursday, 19 January 2005, 02:30pm.

² **Section 96 (Legislative authorization)**

1. The National Parliament may authorize the Government to make laws on the following matters:
a) Definition of crimes, sentences, security measures and their respective prerequisites.

2. EXECUTIVE SUMMARY

2.1 Defamation: Articles 172 - 177

JSMP recommends deleting Articles 172 – 177 of the draft Penal Code and to protect individual’s reputations with appropriate civil defamation laws instead.

JSMP is very concerned that defamation is criminalized under the draft Penal Code. Freedom of opinion and expression are important to the development of a democratic society. In JSMP’s opinion, articles 172 – 177 of the draft Penal Code (which provide for one to two years imprisonment) place too strong a limit on individuals’ and institutions’ rights to freedom of expression. These articles could have the effect of stifling criticism of, and opposition to, the current and future Timor Leste governments. Criminal sanctions might dissuade journalists or individuals from reporting or discussing important issues for fear of prosecution and result in self-censorship by the media.

In JSMP’s view the criminalisation of defamation may be unconstitutional in Timor Leste because articles 172 – 177 of the draft Penal Code do not comply with Timor Leste’s obligations under article 19(3) of the ICCPR.

Although freedom of expression should not encroach on an individual’s right to reputation, this right to reputation can be sufficiently protected through civil defamation laws. Civil defamation laws can provide monetary compensation to victims where appropriate and the threat of civil action should be sufficient to deter defamatory acts.

Although many countries that are developed democracies have criminal defamation provisions (including Portugal), these are very rarely enforced and defamation is usually addressed by civil defamation laws. However, a mature judicial system is necessary to ensure that defamation cases are judged in court in a balanced manner. Timor Leste’s probationary judges recently all failed to pass their evaluations, and all the judges, prosecutors and public defenders are currently undergoing a full time training program. There therefore exists a serious risk in Timor Leste that criminal defamation provisions could be misapplied or interpreted too expansively, to the detriment of freedom of expression and it will likely be some time before the Timor Leste justice system is able to properly apply criminal defamation laws.

If the government does not accept JSMP’s recommendation to replace the criminal defamation law with a civil law, JSMP recommends at a minimum, that the following amendments be made:

A good faith belief in the truth of the statement should be a defence to defamation.

Any higher penalty for defamaton of a public figure should be abolished.

2.2 Domestic Violence and Offences against Sexual Freedom (Articles 148 – 150, and 159 – 171)

JSMP welcomes the recognition of the seriousness of crimes of domestic violence in articles 148 – 150 of the draft Penal Code. However, these articles should be expanded to include a wider variety of domestic relationships and types of violence. Further, in JSMP’s view, the drafters of the Penal Code should consider the original draft Domestic Violence Law which contained far more thorough definitions and guidelines to sentencing for decision makers.

JSMP welcomes the expansive definitions and relatively harsh penalties provided under articles 159 – 171 for crimes of sexual violence. In JSMP’s view, the penalties provided will have a deterrent effect on future perpetrators of these serious criminal offences, and provide a far more just outcome for victims of such offences than currently provided under the Indonesian Penal Code.

JSMP recommends the following major amendments to these articles.

Article 160 (Sexual Coercion) *should be amended to include: “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.”*

Article 161(Rape) *be amended to: “by the introduction of another object or any other part of the body into an orifice to practice sex”.*

*That the following sub-articles be added to **Article 162 (Aggravation)***

Article 162.1(d) *“at the time of, or immediately before or after, the commission of the offence, the alleged offender maliciously inflicts bodily harm on the alleged victim or any other person who is present or nearby.”*

Article 162.1(e) *“at the time of, or immediately before or after, the commission of the offence, the alleged offender threatens to inflict actual bodily harm on the alleged victim or any other person who is present or nearby by means of an offensive weapon or instrument.”*

Article 162.1(f) *“the perpetrator has deliberately passed any venereal, syphilitic or immune-deficiency syndrome to the victim.*

Article 164 (Child Prostitution) *should be reworded to make it clear it also applies to clients of the child prostitutes.*

*That the words “but the victim could choose to end the criminal procedure after it has started” be deleted from **Article 171.1 (Criminal Procedure)**.*

2.3 Compliance with the Rome Statute

The draft Penal Code also adapts Timor Leste criminal legislation to the *Rome Statute of the International Criminal Court (Rome Statute)*, defining conduct that constitutes crimes under international law as defined in the *Rome Statute*. As a party to the *Rome Statute*, Timor Leste must comply with its obligations under the Statute. Also, if a rule in the Penal Code is contrary to the *Rome Statute* it will be invalid pursuant to s9(3) of the Timor Leste Constitution (which states that rules contrary to international conventions are invalid).

It may be instructive for the drafters of the draft Penal Code to consult the Amnesty International *Checklist for Effective Implementation of the Rome Statute*, (see www.amnesty.org, AI Index: IOR 40/019/2003, July 2000), which is designed to assist states in fulfilling their obligations under the Rome Statute and other international law when drafting implementing legislation.

The customary law definitions of genocide, crimes against humanity and war crimes, which are the same as the *Rome Statute* definitions and have been replicated in *UNTAET Regulation 2000/15*, will continue to apply for prosecution of perpetrators of atrocities committed during 1999 or any time prior to the implementation of the draft Penal Code. This is due to the principle of *nullum crimen sine lege*, which is guaranteed in the *Constitution of East Timor* s 31(2) that “(n)o one shall be tried and convicted for an act that does not qualify in the law as a criminal offence at the moment it was committed” and s 31(5) that “(c)riminal law shall not be enforced retroactively, except if the new law is in favour of the accused.”

2.3.1 Genocide: (Article 120)

Article 120 adopts an identical intent element for genocide as in the Rome Statute “intent to destroy, in whole or in part, a national, ethnical, racial or religious group”. However, JSMP is concerned that some aspects of Article 120(1)(a)-(i) do not comply with the Rome Statute. To ensure that Timor Leste fulfils its obligations under the Rome Statute with respect to genocide, JSMP recommends the following amendments:

That “mental harm” be added to Article 120(1)(a).

That “by violent means” in Article 120(c) be changed to “forcibly”

2.3.2 Crimes Against Humanity: (Article 121)

The definition of Crimes Against Humanity in Article 121 must comply with the definition in Rome Statute Article 7. To ensure that Timor Leste fulfils its obligations under the Rome Statute with respect to Crimes Against Humanity, JSMP recommends that the following amendments be made:

That the definition of torture be amended so that it is not limited to official agents

That definitions of ‘attack directed against any civilian population’ and ‘enslavement’ be added

That the definition of ‘extermination’ be amended

That ‘with knowledge of the attack’ be added

2.3.3 War Crimes Articles (122 – 127)

The definition of War Crimes in *Draft Penal Code* articles 122 - 127 must comply with the definition in *Rome Statute* article 8. The penalties stated for war crimes in the draft Penal Code indicate unequivocally the weight and importance of the values protected by the provisions. Imprisonment penalties go from ten

to up to twenty or twenty-five years. However, JSMP is concerned that some of the definitions of crimes in these articles 122 – 127 are weaker than in the Rome Statute. To ensure that Timor Leste fulfils its obligations under the *Rome Statute* with respect to war crimes, JSMP recommends that the following amendments be made.

That an equivalent sub-article to Article 8.2(d) and (f) of the Rome Statute be inserted

That the term “children” be clarified in Article 122.1(e)

That the terms “in large scale” and “goods of high value” be deleted from Article 126(a)

Amend Article 123(h) to include the expression “belonging to the hostile nation”

3. PROCEDURAL ISSUES

JSMP notes that, like many new laws involving the justice system in Timor Leste (such as the draft law on Public Prosecutors and the draft Code of Criminal Procedure), most of the draft Penal Code is closely modelled from the equivalent Portuguese law (in this case the Portuguese Penal Code). However, there are some important omissions from the Timorese draft Penal Code which are contained within the Portuguese Penal Code. JSMP does not understand why certain important wording or articles have been omitted, but hopes these omissions will be adequately explained in the Explanatory Memorandum to the draft Penal Code.

Regrettably, the drafting of this bill by government of Timor Leste was not a transparent process and did not involve a broad consultation with civil society (despite repeated requests from NGOs for consultation).³ According to Ministry of Justice officials involved in the legal drafting team, various versions of the draft were distributed to all government Ministries, the President of the Court of Appeal, UNMISSET, the office of the Public Defenders, and CAVR. Many of JSMP’s concerns about the draft legislation could have been avoided if the government of Timor Leste had conducted a transparent process and consulted civil society from the start.

We hope that the government of Timor Leste and the Parliament will conduct a broad consultation with civil society before taking any final decision regarding the law so that all concerns can be addressed before the legislation is adopted.

JSMP notes that on 19 January 2005, the Council of Ministers conducted a preliminary examination of a Bill on Legislative Authorisation for the future approval of the Penal Code.⁴ The Parliament may give the government this authorization under Section 96⁵ of the Constitution, but an NGO letter to the Parliament dated 3 December urged the Parliament to use its discretion not to give the government this authorization.

This letter urged the Parliament to have regard to Section 95.2 (e) of the Constitution. According to this section, it is exclusively incumbent upon the Parliament to make laws on rights, freedoms and guarantees. The Penal Code will fundamentally affect a number of rights, including: the right to life, the right not to be subjected to torture, the right to a fair trial, and the right to freedom of expression, all protected by the

³ See letters to the government and the Parliament dated 28 September, 22 October and 3 December 2004

⁴ Democratic Republic Of Timor-Leste Secretariat Of State For The Council Of Ministers 97th Meeting Of The Council Of Ministers Of The First Constitutional Government Press Communiqué Dili, Thursday, 19 January 2005, 02:30pm.

⁵ **Section 96 (Legislative authorization)**

1. The National Parliament may authorize the Government to make laws on the following matters:

a) Definition of crimes, sentences, security measures and their respective prerequisites.

Constitution. It is therefore imperative that the National Parliament thoroughly debate the draft Penal Code, and make any amendments necessary to the draft law.

It is also very important that the Penal Code complies with Timor Leste's international law obligations, especially its obligations under the various human rights treaties, such as the *Universal Declaration of Human Rights*, *International Convention on Civil and Political Rights*, *International Convention on Economic, Social and Cultural Rights*, *Convention Against Torture*, *Convention on the Elimination of all forms of Discrimination Against Women*, *Convention on the Rights of the Child* and the Statute of Rome establishing the International Criminal Court. If any articles of the Penal Code do not comply with the provisions of these treaties (such as the articles on defamation) then, according to s 9.3 of the Constitution, these articles of the Penal Code will be invalid. It is therefore crucial that the National Parliament, through its Committee process of evaluation of the law, thoroughly check the draft Penal Code for compliance with Timor Leste's international treaty obligations.

NGOs have also written to the government to request translation of the draft law from Portuguese into a language that most East Timorese can understand – Tetum or Bahasa Indonesia.⁶ JSMP would again like to draw the government's attention to Articles 14.3 and 26 of the International Covenant on Civil and Political Rights⁷ (which Timor Leste ratified on 10 December 2002) which indicate that the government of Timor Leste has an obligation to translate the Criminal Code into a language which the Timorese people can understand (that is, Tetum or Bahasa Indonesia).

4. DEFAMATION (Articles 172 – 177)

JSMP is concerned that the defamation provisions in the draft Penal Code (Articles 172 – 177) could seriously threaten the development of Timor Leste as a democratic society. Democracy requires government to be representative of and accountable to the governed public.⁸ Accordingly, a procedural requirement of democracy is that all citizens have the right to vote in genuine periodic elections.⁹ For citizens to fully exercise this right in an informed manner, information about the government and state

⁶ According to Article 13.1 of the RDTL Constitution "Tetum and Portuguese shall be the official languages of the RDTL". According to Article 159 "Indonesian and English shall be working languages within civil service side by side with official languages as long as deemed necessary." There is therefore a constitutional basis to translate the draft Penal Code into Tetum and/or Bahasa Indonesia.

⁷ **Article 14.3**

In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality:

(a) to be informed promptly and in detail **in a language which he understands** of the nature and cause of the charge against him;

Article 26

All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In the respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, **language**, religion, political or other opinion, national or social origin, property, birth or other status.

⁸ See also Elena Yanchukova, 'Criminal Defamation and Insult Law: An Infringement on the Freedom of Expression in European and Post-Communist Jurisdictions' (2003) 41 *Columbia Journal of Transnational Law* 861, 865.

⁹ This right is guaranteed by *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 art 25 (entered into force 23 March 1976) ('*ICCPR*'): 'Every citizen shall have the right and the opportunity ... without unreasonable restrictions (a) To take part in the conduct of public affairs, directly or through freely chosen representatives; (b) To vote and to be elected at genuine periodic elections which shall be by universal and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the electors.'

must be publicly available. The dissemination of such information, when in good faith, must be possible without fear of retribution from individuals or government institutions. Such freedom of expression is a foundational principle of a democratic society because it enables the electorate to exercise informed choice in voting and keeps the government accountable by exposing them to public comment between elections. It is further recognised internationally as a fundamental human right in statutes such as the *Universal Declaration of Human Rights* and the *International Covenant on Civil and Political Rights*. Freedom of expression, however, should not go so far as to encroach on an individual's right to reputation. Defamation law can therefore be a legitimate restriction of freedom of expression. However, JSMP believes that the proposed defamation law in Articles 172-177 limits freedom of expression too much.

4.1 The defamation provisions should be removed from the Draft Penal Code and an appropriate civil defamation law should be drafted.

JSMP recommends that defamation should not be a criminal offence in Timor Leste. This would accord with international sentiment evidenced by countless appeals by NGOs for all nations to abolish criminal defamation laws, but is also necessary for purely domestic reasons.

Firstly, the criminalisation of defamation may be unconstitutional in Timor Leste. The *Constitution's* international law provisions in s 9(2) states that “[r]ules provided for in international conventions, treaties and agreements shall apply in the internal legal system of Timor Leste following their approval, ratification or accession by the respective competent organs and after publication in the official gazette.” In addition, according to s 9(3) “[a]ll rules that are contrary to the provisions of international conventions, treaties and agreements applied in the internal legal system of Timor Leste shall be invalid”.¹⁰

Since the government of Timor Leste has ratified the *International Covenant on Civil and Political Rights* (ICCPR), any law that is introduced in Timor Leste will be invalid pursuant to s 9(3) if it is contrary to the *ICCPR*. The *ICCPR* provisions covering freedom of expression state that this right ‘carries with it special duties and responsibilities’ and may therefore be subject to certain restrictions which are outlined in article 19(3).¹¹ Any restriction to freedom of expression must, first, be provided by law. Second, the purpose of the restriction must be either a) for respect of the rights or reputations of others, or b) for the protection of national security or of public order, or of public health or morals. Third, the restriction must be necessary to achieve this purpose. The requirement of necessity means that the restriction will only be permissible if there is no less intrusive means of protecting freedom of expression.¹²

JSMP believes that the defamation provisions in the draft Penal Code are not necessary to achieve the purpose of respect of the rights or reputations of others, and therefore do not comply with ICCPR Article 19(3). Civil defamation law is less severe than criminal prohibition of defamation, due to the negative community perception of those subject to criminal prosecution and the potential sanction of imprisonment. The individuals’ right to reputation can be sufficiently protected by civil defamation laws, which can provide monetary compensation to the victim where appropriate. The threat of civil action should be sufficient to deter defamatory action, making criminal defamation law excessive and therefore not necessary to protect the rights or reputations of others.

¹⁰ Constitution s9(3)

¹¹ 19(3): ‘The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary: (a) For respect of the rights or reputations of others; (b) For the protection of national security or of public order (ordre public), or of public health or morals.’

¹² Article 19, *Defining Defamation: Principles on Freedom of Expression and Protection of Reputation* (2000) Article 19 <<http://www.article19.org/docimages/714.htm>> at 10 January 2005>.

Furthermore, because civil damages compensate the defamed victim rather than just punishing the accused, civil defamation is a more suitable means of respecting the defamed person's right to reputation.

Second, the heavy social stigma attached to criminal liability and the possible punishment of imprisonment could have potentially detrimental consequences on the development of the media and democracy in Timor Leste. Criminal sanctions can have the effect of dissuading journalists or individuals from reporting or discussing important issues for fear of prosecution and this may result in self-censorship by the media. UN Special Rapporteur on the protection and promotion of the right to freedom of opinion and expression, Mr Abid Hussain, has recognized this. Stating in his 1999 report that "[s]anctions for defamation should not be so large as to exert a chilling effect on freedom of opinion and expression and the right to seek, receive and impart information; penal sanctions, in particular imprisonment, should never be applied."¹³

One particularly troubling aspect of the criminal sanctions under the draft Penal Code is that, although they strongly resemble the Portuguese Penal Code defamation provisions,¹⁴ the maximum length of prison sentences has been increased in the draft Penal Code. The maximum length of imprisonment for defamation of one year in draft Penal Code art 172 is double that of the equivalent Portuguese Penal Code provision.¹⁵ The maximum term of imprisonment where the defamed person performs state duties, religious duties or political duties under the equivalent provision in the Portuguese Penal Code is 9 months.¹⁶ It is disturbing that Timor Leste's draft Penal Code has increased this to 2 years.

Timor Leste's history of media control during Indonesian occupation and the relative inexperience of the media in Timor Leste increases the risk which criminal defamation could pose to the development of a healthy media.

Third, the role of the state and police in controlling criminal prosecution means that these groups could have an undesirable influence over prosecution for defamation. Criminal law action is brought by the state against the defendant. Unlike the civil law system where an action for defamation would be brought by one individual against another, the PNTL and Public Prosecutor are heavily involved in prosecuting criminal law offences. Some countries have argued that this feature of criminal prosecution provides justification for criminal defamation. The Portuguese government suggested in *Lopes Gomes Da Silva v Portugal*¹⁷ that the state has a duty to protect the right to respect personal honour and reputation and that criminal prosecution is the means by which the state can fulfil this duty. However, JSMP submits that state control over criminal defamation proceedings could be detrimental to freedom of expression. Prosecution by the state rather than civil action by individuals may deter certain complaints of defamation from being reported to police. As a hypothetical example, suppose that a member of government or of the PNTL made a defamatory comment about a member of an opposition party. The procedure of reporting the offence to the PNTL and of having the matter prosecuted by a Public Prosecutor could be a strong practical deterrent against reporting such an offence. Such a practice could skew public political opinion, because false statements against opposition members could go unpunished.

Fourth, while Timor Leste's draft Penal Code is heavily based on the Portuguese Penal Code, Timor Leste's judiciary is in a very different state to the Portuguese judiciary. Many countries that are developed

¹³ <http://www.unhcr.ch/Huridocda/Huridoca.nsf/0811fcbd0b9f6bd58025667300306dea/e59a28221a0895d08025674b005a32d2?OpenDocument#IIC> C 28

¹⁴ *Portuguese Penal Code* Art 180-189.

¹⁵ According to Art 180(1) *Portuguese Penal Code* the imprisonment penalty will be up to 6 months.

¹⁶ Art 184 *Portuguese Penal Code*.

¹⁷ Eur. Ct. H.R., Sept. 28, 2000, at <http://www.echr.coe.int/Eng/>

democracies have criminal defamation provisions, but these are very rarely enforced and defamation is usually addressed by civil defamation laws.¹⁸ In other democratic countries where criminal defamation laws are applied, they are usually interpreted very narrowly. There exists a serious risk in Timor Leste that criminal defamation provisions could be misapplied or interpreted too expansively, to the detriment of freedom of expression. Former Ministry of Justice adviser, João Nataf, speaking at the Media Law Conference in Dili on 26 August 2003 in support of criminal defamation, himself acknowledged that ‘clearly a mature judicial system is necessary to ensure that these cases are judged in court in a balanced manner’.¹⁹ However, Timor Leste’s judiciary is in a precarious position. The Transitional Working Group on the Justice Sector concluded in its Final Report that “the curtailment of the provision of high-levels of human resources to the Justice Sector would present a scenario whereby it would be very difficult to ensure the proper functioning of the legal system in Timor Leste”.²⁰ All national judges, prosecutors and defenders appointed by UNTAET were young graduates without any relevant experience,²¹ and all probationary judges failed their recent evaluations.²²

Admittedly, the judiciary would be responsible for interpreting a civil defamation law too. However, although the excessive application of civil defamation laws and damages would also be undesirable for Timor Leste, the greater stigma of being convicted of a criminal offence and the punishment of imprisonment means that misapplication of criminal defamation laws could have greater potential to discourage journalists from expressing opinions.

In addition to Portugal possessing a more qualified judiciary than Timor Leste, freedom of expression is granted additional protection in Portugal than in Timor Leste because the former is a party to the *European Convention of Human Rights* (ECHR). The *European Court of Human Rights* is an additional check on the judiciary in Portugal, because individuals may bring a complaint of a transgression of the right to freedom of expression to this Court. Timor Leste does not have this additional check on decisions of their judiciary and there is therefore a greater risk of defamation law being applied too broadly in Timor Leste without being remedied.

For these reasons, JSMP strongly urges the Timor Leste government to delete articles 172-177 of the *Draft Penal Code* and to protect individuals reputations by appropriate civil defamation laws instead. However, even if the government does not accept JSMP’s recommendation to replace the criminal defamation law with a civil law, at minimum, the following amendments below ought to be made to the current *Draft Penal Code*.

4.2 A good faith belief in the truth of the statement should be a defence to defamation

The only defence available to an accused under the *Draft Penal Code* is that the communicated facts were true.²³ This defence is significantly narrower under the *Draft Penal Code* than the *Portuguese Penal Code*, which also provides that it is a defence if “the accusation is motivated by a legitimate public interest or

¹⁸ Article 19 Press Release cites Austria, Bulgaria, Denmark, France, Germany, the Netherlands, Norway, Sweden, Australia, Canada, the UK and the US as examples.

¹⁹ Nataf, João, ‘Media in East Timor with Reference to the Rights of the Media in Portugal’ (Speech delivered at the Conference on Media Law, Dili, 28 August 2003) < [http://www.internews.tp/2-%20Konferensi%20UU%20media/Pidato-pidato%20dalam%20konferensi/Pidato%20Joao%20Nataf%20-%20Ing%20\(naskah%20terjemahan\).htm](http://www.internews.tp/2-%20Konferensi%20UU%20media/Pidato-pidato%20dalam%20konferensi/Pidato%20Joao%20Nataf%20-%20Ing%20(naskah%20terjemahan).htm)>

²⁰ Justice Sector, ‘Final Report- UNMISSET Transition Working Group, February 4 2005

²¹ Ibid 4.

²² See [http://www.jsmp.minihub.org/News/01_05/25jan05_jsmp_result%20of%20judges\(e\).htm](http://www.jsmp.minihub.org/News/01_05/25jan05_jsmp_result%20of%20judges(e).htm)

²³ Draft Penal Code Art 174.

other valid reason and ... has serious grounds for believing in good faith that [the comment] is true.”²⁴ This defence of a good faith belief in the truth of the comment is important because it avoids punishing journalists who have made an honest mistake.²⁵ Without this defence, journalists in Timor Leste will be unable to report events that are of public concern until they can verify for certain that the facts are true. This could result in the coverage of important events being delayed, to allow greater time for verifying facts, or events not being reported at all if facts cannot be verified conclusively. JSMP recommends that the government of Timor Leste should draft a civil defamation law which includes the defence of a good faith belief in the truth of the statement.

4.3 Any higher penalty for defamation of a public figure should be abolished

The maximum period of imprisonment is increased to 2 years if defamation or insult is aggravated because it was committed against anyone who performs, or performed, state duties, religious duties or political duties, exercising those duties or due to them.²⁶ A person who defames or insults a person who performs, or performed, state duties, religious duties or political duties and does so via the media may be imprisoned for up to 3 years.²⁷

Defamation should not be aggravated because it is committed against a person who performs/ed state duties, religious duties or political duties. Granting public officials greater protection of their reputation than other citizens is counter to one of the fundamental purposes of freedom of expression – the advancement of democracy and the equality of all before the law. Decisions of the *European Court of Human Rights* about defamation of a public figure are instructive. In *Ligens v Austria* the Court held that “the limits of acceptable criticism are ... wider as regards a politician as such than as regards a private individual” because politicians have knowingly laid themselves open to scrutiny. Articles 173 and 176(2) of the *Draft Penal Code*, which make defamation aggravated when committed against a public official, are therefore contrary to the sentiment of international jurisprudence and recommendations by non-government organisations.²⁸

5. DOMESTIC VIOLENCE AND OFFENCES AGAINST SEXUAL FREEDOM (Articles 148 - 150 and 159 - 171)

Articles 148, 149 and 150 of the draft Penal Code provide harsher penalties for assaults carried out within domestic relationships than those provided for ordinary assault. While JSMP welcomes the recognition of the seriousness of such crimes within the Penal Code, we believe the definitions in articles 148 and 149 should be expanded to include a wider variety of domestic relationships and types of violence.

²⁴ *Portuguese Penal Code* 180(2).

²⁵ Article 19, *Defining Defamation: Principles on Freedom of Expression and Protection of Reputation* (2000) Article 19 < <http://www.article19.org/docimages/714.htm>> at 10 January 2005>.

²⁵ <http://www.unhcr.ch/Huridocda/Huridoca.nsf/0811fcbd0b9f6bd58025667300306dea/e59a28221a0895d08025674b005a32d2?OpenDocument#IIC> C 28

²⁶ Art 173(1)(b): ‘b) Contra quem desempenhou ou desempenhar funções públicas, religiosas ou políticas, no exercício dessas funções e por causa delas.’

²⁷ Art 173(2): ‘Se ocorrerem cumulativamente as duas circunstâncias a pena será de até 3 anos de prisão ou multa.’

²⁸ eg Article 19, *Defining Defamation: Principles on Freedom of Expression and Protection of Reputation* (2000) Article 19 < <http://www.article19.org/docimages/714.htm>> at 10 January 2005> ‘Under no circumstances should defamation law provide any special protection for public officials, whatever their rank or status.’

Chapter IV of Title II (Crimes against Persons) of the draft Penal Code defines crimes of sexual violence and provides sentences for such crimes. In general, the criminalisation of the acts described in this Chapter of the draft Penal Code bring Timor Leste into compliance with its obligations under various international treaties and conventions regarding such crimes for example, the *Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography* and the *Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime*. In JSMP's view the definitions and sentences for such crimes provided in this chapter of the draft Penal Code are a welcome development to Timorese law, as they will provide far more just outcomes for the victims of such crimes than are currently provided under the Indonesian Penal Code (See JSMP report "An Analysis of a Sexual Assault Decision from Dili District Court" and JSMP Justice Update No. 2/2005).

In this part of the report on the draft Penal Code JSMP refers to the definitions provided in the Elements of a Crime Annex of the *Rome Statute*. Although we recognize that these definitions apply to sexual offences committed as crimes against humanity or war crimes, the elements of these offences have been agreed to by a large number of nations. It may be too early to say that the definitions contained within the ICC comprise part of international customary law, however, in JSMP's view, these definitions provide a useful guide to nations newly attempting to define these offences in domestic law.

5.1 Domestic Violence

JSMP welcomes the introduction of specific articles in the Draft Penal Code to deal with domestic violence (articles 148, 149 and 150). However, we note that far more thorough provisions defining domestic violence were contained in the original draft Domestic Violence Law.

JSMP notes that articles 148, 149 and 150 only refer to physical, psychological maltreatment or cruel treatment. JSMP assumes that sexual abuse in a domestic relationship would be dealt with under one of Article 159 to 161, and that the fact the abuse occurred in a domestic relationship would be considered an aggravating circumstance under article 162.1(a). However, JSMP notes that the articles do not refer to economic violence, and article 148 does not refer to child neglect. JSMP recommends that article 148 be amended to include the wording "*or neglect*" after "*cruel treatment*", and that article 149 be amended to include economic violence.

JSMP is concerned that article 149 only provides a harsher penalty for maltreatment occurring between married couples or those who have been living together for more than 3 years. In most jurisdictions, there are a variety of other domestic relationships which would be expected to be covered by an article such as article 149, in particular:

- Blood relationship – parent, child, grandparent, uncle, aunt, cousin etc
- Care or responsibility – child-minder, adopted parent, nanny

JSMP notes that some of these relationships could be covered by article 148. However, we also note that household employees are protected under article 152.3 of the Portuguese Penal Code. (Article 152 is the equivalent of articles 148, 149 and 150 of the draft Timor Leste Penal Code.)

Moreover, in many jurisdictions, including under article 152.2 of the Portuguese Penal Code, all relationships analogous to marriage are covered by the articles on Domestic Violence (ie it is not limited to marriage or cohabitation for more than three years).

JSMP therefore recommends that article 149 be amended as follows:

Article 149: Who inflicts on someone living within his/her household physical, psychological or economic maltreatment or any other cruel treatment or serious neglect, will be punished with imprisonment from 1 to 6 years, if any other legal provision does not state a heavier penalty.

5.2 Chapter IV Section I – Sexual Aggression

Article 159 – Sexual Perversion

JSMP welcomes the harshness of the penalty provided in Article 159 (10 to 20 years imprisonment) for those who conduct “sexual activity” with children aged under 8 years. Such offences can cause serious physical injury and psychological trauma to child victims and should be given the harsh penalty provided in article 159. As noted in JSMP’s Justice Update No. 14/2004, until now the lightness of the penalty given by some judges for such sexual offences has been subject to some criticism.

JSMP is concerned however, that article 159 does not provide any indication as to what kind of sexual activity should be punished at the lower and higher ends of the 10 – 20 year penalty range.

Article 160 – Sexual Coercion

In JSMP’s view article 160 should be rewritten to more closely reflect the definition provided in articles 7(1)(g) – 1.2 and 8(2)(b)(xxi) – 1.2, 8(2)(e)(vi) – 1.2, of the *Elements of the Crime Annex* to the ICC²⁹ Statute.³⁰ In particular, article 160 should be amended to include:

*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.”*³¹

Furthermore, although the wording in article 160 is similar to that in article 163 of the Portuguese Penal Code, it confusingly contains the term “threatens the sexual freedom of another person”. JSMP is not clear as to what this means and are of the opinion that it would perhaps be better to change the wording in article 160 with that used in article 163 of the Portuguese Penal Code (if the wording is not changed to reflect that in the ICC Statute).³² Also, according to article 160 the maximum sentence that can be handed

²⁹ 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.

³⁰ *The Rome Statute of the International Criminal Court 1998, Elements of Crimes Annex.*

³¹ See Articles 7(1)(g) – 1.2 and 8(2)(b)(xxi) – 1.2, 8(2)(e)(vi) – 1.2, of the Elements of the Crime Annex of the ICC statute

³² Art.163 Portuguese Penal Code

Coacção Sexual

1 - *Quem, por meio de violência, ameaça grave, ou depois de, para esse fim, a ter tornado inconsciente ou posto na impossibilidade de resistir, constranger outra pessoa a sofrer ou a praticar, consigo ou com outrem, acto sexual de relevo é punido com pena de prisão de 1 a 8 anos.*

2 - *Quem, abusando de autoridade resultante de uma relação de dependência hierárquica, económica ou de trabalho, constranger outra pessoa, por meio de ordem ou ameaça não compreendida no número anterior, a sofrer ou a praticar acto sexual de relevo, consigo ou com outrem, é punido com pena de prisão até 2 anos.*

Sexual Coercion

1- Whoever, using violence, serious threat, or after, pursuing that aim, making that person unconscious or unable to resist, forces another person to suffer or to practice, with the agent or another person, any relevant sexual act will be punished with a imprisonment penalty from 1 to 8 years.

down for such a crime is 6 years. In JSMP's view, the maximum of 8 years provided under article 163 of the Portuguese Criminal Code is preferable.

JSMP notes that article 160 also does not provide any guidance to judges as to how to sentence according to the level of the threat or violence used in such a crime. Given the difficulties judges have experienced to date in taking into account such aggravating factors (see JSMP's Justice Update No. 2/2005 and JSMP's report "An Analysis of a Sexual Assault Decision from Dili District Court") in JSMP's view this Article should provide some sentencing guidance.

Article 161 – Rape

JSMP welcomes the comprehensive definition of rape provided in this article. The definition includes vaginal, anal, or oral sex, and the introduction of "another object" into an orifice to practice sex, and brings Timor Leste law very closely into compliance with the definition of rape (as a Crime Against Humanity and War Crime) provided for in article 7(1)(g)-1.1 and 8(2)(b)(xxi) –1.1, 8(2)(e)(vi) –1.1 of the *Elements of Crimes Annex* to the ICC Statute:

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."

In JSMP's view however, it is not clear that "another object" as described in Article 161, could also include "any part of the body". JSMP therefore recommends that the wording in Article 161 should be amended to:

"by the introduction of another object or any other part of the body into an orifice to practice sex".

In JSMP's view the length of imprisonment provided under Article 161 are appropriate, although we note that in the Article 164 of the Portuguese Criminal Code the minimum sentence for this crime is 3 years (rather than 2 as provide in the current Timor Leste draft Penal Code).

Article 162 – Aggravation

JSMP welcomes the extension of sentences by one third for offences under Article 160 and 161 on the grounds of:

- (a) abuse of authority, in terms of the relationship of the perpetrator to the victim;
- (b) the place where the offence took place (eg. in a hospital, prison or educational institution);
- (c) where the offence was against a victim aged under 16.

Until now many judges (Timorese and international) do not seem to have taken these factors into account when sentencing (see JSMP's Justice Update No. 12/2004 and JSMP's report "An Analysis of a Sexual Assault Decision from Dili District Court"). With the specific mention of these factors as aggravating factors under Article 162, judges will now have to take them into account.

However, in JSMP's view, Article 162 should include an additional sub-article 1(d) where the perpetrator has inflicted bodily harm on the alleged victim (see JSMP Justice Update No.2/2005 for criticism of a

2- Whoever, abusing the authority which resulted from a hierarchal, economic, work dependency relationship with the victim, forces that person, using order or threat not stated in previous number, to suffer or practice any relevant sexual act with the agent or another person, will be punished with imprisonment to up to 2 years.

decision where the judge did not take the harm inflicted into account when sentencing). JSMP suggests the following wording (see also wording in Article 177.3 of Portuguese Penal Code):

*Article 162.1(d) “at the time of, or immediately before or after, the commission of the offence, the alleged offender maliciously inflicts bodily harm on the alleged victim or any other person who is present or nearby”.*³³

In JSMP’s view Article 162 should also include an additional sub-article 1(e) for where weapons have been used to threaten the victim. In many cases of sexual violence in Timor Leste to date, judges (Timorese and international) do not seem to take the fact that a weapon was used into account when sentencing (see JSMP’s Justice Update No. 2/2005 and JSMP’s report “An Analysis of a Sexual Assault Decision from Dili District Court”). In most jurisdictions the use of a weapon is considered to be an aggravating factor. JSMP suggests the following wording:

Article 162.1(e) “at the time of, or immediately before or after, the commission of the offence of the offence, the alleged offender threatens to inflict actual bodily harm on the alleged victim or any other person who is present or nearby by means of an offensive weapon or instrument.”

In JSMP’s view, Article 162 should also include an additional sub-article 1(f) for where the perpetrator has deliberately passed on a sexually transmitted disease (STD) to the victim through the offence of sexual aggression (eg. as in Article 170.1(b) of the Timorese draft Penal Code, see also Article 177.2 of the Portuguese Penal Code). In many jurisdictions the deliberate passing on of an STD is considered a separate criminal offence. JSMP suggests the following wording:

Article 162.1(f) “the perpetrator has deliberately passed any venereal, syphilitic or immune-deficiency syndrome to the victim” (similar to wording in Article 170.1(b)).

5.3 Chapter IV Section II – Sexual Exploitation

Article 163 – Sexual Exploitation

In JSMP’s opinion, the penalty for pimping provided under article 163.1 (maximum three years) should be increased to that corresponding to the penalty provided under Article 170.1 of the Portuguese Criminal Code (6 months to 5 years). If the penalty is left as a maximum of 3 years, JSMP hopes that such a penalty would provide a sufficient deterrent to address some of the problems with prostitution identified in the Alola Foundation’s report “Trafficking in East Timor – A Look into the Newest Nation’s Sex Industry 2004”.

JSMP welcomes the criminalisation of trafficking of persons to another country³⁴ for the purposes of prostitution as an offence under article 163.2(c),³⁵ although we note that in some other jurisdictions the penalty provided for such an offence is much harsher than the 2 – 10 years provided under article 163.2.³⁶

³³ See Section 61J(2)(a) New South Wales Crimes Act 1900 for similar wording

³⁴ We also welcome the criminalisation of trafficking in persons under Articles 131 and 155 of the draft Penal Code, and the harshness of the penalties provided under those Articles. The criminalisation of trafficking in persons under these articles bring Timor Leste into compliance with Article 5 of the *Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime (New York 15 November 2000)* (although Timor Leste has not yet acceded to the Protocol).

³⁵ This brings Timor Leste into compliance with paragraph 4 of UN General Assembly Resolution 55/67 (Traffic in women and girls) of 31 January 2001.

Article 164 – Child Prostitution

The criminalisation of child prostitution under article 164 brings Timor Leste into compliance with its obligations under article 3.1(a)(i)a. and (ii)b. of the *Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography*.³⁷

JSMP welcomes the harshness of the penalties provided, but believes it should be made clear that the harsher penalties described in article 159 should apply over article 164 for children aged under 8.

JSMP is also concerned that article 164 only appears to criminalize child prostitution for those involved in pimping. In JSMP's view article 164 should be reworded to make it clear it also applies to clients of the prostitutes.³⁸

Article 165 – Child Pornography

The criminalisation of child pornography under article 165 brings Timor Leste into compliance with its obligations under article 3.1(a)(ii)c. of the *Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography*.³⁹

JSMP welcomes the harshness of the penalties provided (2 – 10 years imprisonment), but believes it should be made clear that the harsher penalties described in Article 159 should apply over article 164 for children aged under 8. JSMP also notes that in some jurisdictions, the penalty for child pornography is somewhat harsher (for example, in New South Wales the maximum penalty is 14 years imprisonment).⁴⁰

Article 166 – Sexual Abuse

JSMP welcomes the setting of the age of consent at 16 (common to many jurisdictions). However, in JSMP's view, article 166.3 which provides for different sentences for acts carried out against victims aged 16, is very confusing and should probably be deleted.

JSMP welcomes the progressiveness of the penalties provided in **article 167 – Sexual Fraud**, **article 168 – Sexual Exposure**, and **article 169 – Homosexuality with minors**.

5.4 Section IV – Common Provisions

Article 170 – Aggravation

JSMP welcomes the provision for extension of the penalties listed in Chapter IV by a third of the maximum in cases of the aggravating factors listed in article 170. However, in JSMP's view, it should be

³⁶ For instance, in Australia the maximum penalty is 20 years, see Division 73.2 of the Crimes Legislation Amendment (People Smuggling, Firearms Trafficking and other measures) Act 2002 No. 141, 2002 – Schedule 1.

³⁷ Timor Leste acceded to this Optional Protocol on 16 April 2003.

³⁸ For an example of other appropriate wording see Victorian (Australia) Prostitution Control Act 1994, Section 5, Part 2 Offences Connected with Prostitution “Causing or inducing a child to take part in prostitution” Section 5: (1) A person must not cause or induce a child to take part in an act of prostitution, whether as the prostitute or as the client or in any other capacity, or to continue to take part in such acts.

Penalty: Level 5 imprisonment (10 years maximum).

³⁹ Timor Leste acceded to this Optional Protocol on 16 April 2003.

⁴⁰ Eg see Section 91G Crimes Amendment (Child Pornography) Act 2004 – Schedule 1 – Amendment of Crimes Act 1900

made clear that the reason article 170.1(a) refers to victims aged “more than 8 and less than 12 years of age” is because for victims aged less than 8 article 159 applies (see also comments on articles 164, and 165).

Article 171 – Criminal Procedure

JSMP is concerned that article 171.1 expressly allows victims over the age of 12 years (see article 171.2) to withdraw from the criminal procedure after it has started. As noted in JSMP’s reports “Police Treatment of Women in Timor Leste” and “Statistics on Cases of Violence Against Women in Timor Leste” there is currently a problem with processing cases of violence against women in the formal justice system because so many victims withdraw part way through the process. In JSMP’s view, if article 171.1 expressly allows victims to withdraw this will only increase the rate of withdrawals. This will lead to more perpetrators of violence remaining unpunished, and lead to a situation where it is assumed that such violence is acceptable. JSMP therefore recommends deleting the words “but the victim could choose to end the criminal procedure after it has started” and also deleting article 171.2.

6. COMPLIANCE WITH THE ROME STATUTE

As a party to the *Rome Statute of the International Criminal Court*,⁴¹ international law requires Timor Leste to comply with its obligations under the *Rome Statute*. In addition, the *Constitution of East Timor* s 9 states that:

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.

Therefore, if a rule in the *Penal Code* is contrary to the *Rome Statute* it will be invalid pursuant to s 9(3). In stating explicitly that rules contrary to international conventions are invalid, s 9(3) of the *Constitution of Timor Leste* is stronger than the equivalent ‘International Law’ provision in the *Portuguese Constitution* s 8.⁴² This is an important difference that the drafters of the Timor Leste Penal Code must consider when adopting provisions of the *Portuguese Penal Code* in the Timor Leste Penal Code, since the consequences of non-compliance with an international convention are greater in Timor Leste than in Portugal.

6.1 Draft Penal Code Definition of Genocide in Article 120

The *Rome Statute* defines genocide as ‘any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:

- (a) Killing members of the group;
- (b) Causing serious bodily or mental harm to members of the group;

⁴¹ [*The Rome Statute of the International Criminal Court*](#), deposited with the Secretary-General of the United Nations, entered into force on 1 July 2002, Timor Leste became a signatory on 6 September 2002 (‘Rome Statute’).

⁴² *Portuguese Constitution*, Article 8: ‘1. The rules and principles of general or customary international law are an integral part of Portuguese law. 2. Rules provided for in international conventions that have been duly ratified or approved, shall apply in national law, following their official publication, so long as they remain internationally binding with respect to the Portuguese State. 3. Rules made by the competent organs of international organisations to which Portugal belongs apply directly in national law to the extent that the constitutive treaty provides.’

- (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
- (d) Imposing measures intended to prevent births within the group;
- (e) Forcibly transferring children of the group to another group'.⁴³

This replicates the definition in article 2 of the *Genocide Convention*, which is widely recognised as a *jus cogens* norm of customary international law.⁴⁴ Therefore, international law and the East Timorese constitution both require the definition of genocide in the Timor Leste *Penal Code* to be no weaker than this definition.

It is encouraging that the *Draft Penal Code* adopts an identical intent element for genocide as the *Rome Statute*: 'intent to destroy, in whole or in part, a national, ethnical, racial or religious group'.⁴⁵ In addition, the Timorese *Draft Penal Code* includes additional acts of genocide to those proscribed in the *Rome Statute* definition above. However, JSMP is concerned that some aspects of the *Draft Penal Code* definition of acts constituting genocide in art.120(1)(a)-(i) do not comply with the *Rome Statute*. JSMP recommends that the Draft Penal Code be amended as follows:

6.1.1 That 'mental harm' be added to Article 120(1)(a)

The *Draft Penal Code* equivalent to *Rome Statute* s 6(b)⁴⁶ only prohibits causing serious physical harm, but does not mention serious mental harm. Amnesty International criticised Portugal for a similar omission in their Penal Code, emphasizing that 'The definition in the *Genocide Convention*, which the International Court of Justice declared more than a half century ago to reflect customary international law, should not be weakened in any way'.⁴⁷ Under the current Timorese *Draft Penal Code*, acts of rape, sexual violence or inhuman or degrading treatment⁴⁸ that cause serious mental harm will only be punishable as acts of genocide if they also cause serious bodily harm. To avoid impunity for such offences, JSMP recommends that article 120(1)(a) be amended to include serious mental harm.

6.1.2 That 'by violent means' in Article 120(c) be changed to 'forcibly' (P: 'à força or 'forçada')

The equivalent provision to *Rome Statute* article 6(e)⁴⁹ in the *Draft Penal Code* is art 120(c), which prohibits 'Transfers, by violent means, members of one group to another group'.⁵⁰ The *Draft Penal Code* replaces 'forcibly' with 'by violent means',⁵¹ which heightens the level of force required to satisfy the definition of genocide from that required by the *Rome Statute*. The *Elements of Crimes* elaborates that the meaning of 'forcibly' in the *Rome Statute* 'is not restricted to physical force, but may include threat of force or coercion, such as that caused by fear of violence, duress, detention, psychological oppression or

⁴³ *Rome Statute* art 6.

⁴⁴ Timothy McCormack and Sue Robertson, 'Jurisdictional Aspects of the Rome Statute for the New International Criminal Court' 23 *Melbourne University Law Review* 635.

⁴⁵ 'intenção de destruir, no todo ou em parte, grupo nacional, étnico, racial ou religioso': *Draft Penal Code*, Art120(1).

⁴⁶ Draft Penal Code Art 120(1)(a): 'causes serious physical harm to the members of the group' (P: 'ofensa à integridade física grave').

⁴⁷ 10/11/2003: Amnesty Letter critiquing amendments to Portuguese Law.

<<http://web.amnesty.org/library/Index/ENGEUR380052003?open&of=ENG-PRT>>.

⁴⁸ See *Elements of Crime*, n 3.

⁴⁹ ('Forcibly transferring children of the group to another group')

⁵⁰ P: 'Separação por meios violentos de elementos do grupo para outro grupo'.

⁵¹ 'por meios violentos'

abuse of power, against such person or persons or another person, or by taking advantage of a coercive environment'.⁵² To ensure that the Timor Leste provision is consistent with the Rome Statute, JSMP recommends that the term 'por meios violentos' ('by violent means') be replaced with 'à força' ('forcibly').

6.1.3 Aspects of Draft Penal Code definition of Genocide that are Broader than Rome Statute

Other than JSMP's two recommendations above to address elements of the Timorese definition of genocide that are weaker than the *Rome Statute*, other aspects of the *Draft Penal Code* definition of genocide are broader than the *Rome Statute*. Amnesty International, in their 2004 analysis of states' enactment of legislation implementing the *Rome Statute*, praised definitions that extend the definition of genocide beyond that of the *Genocide Convention* and *Rome Statute* as 'a positive development that may indicate the future emergence of a broader definition of genocide in customary international law'.⁵³

Elements of the *Draft Penal Code* that are broader than the *Rome Statute* are as follows.

- The *Draft Penal Code* equivalent of art 6(e) of the *Rome Statute* prohibits the transfer of 'members' of one group to another, rather than restricting this offence to the transfer of 'children' alone.
- The *Draft Penal Code* adds 'Subjects the group to ...cruel, degrading and inhuman treatment likely to cause partially or totally the group's destruction' to *Rome Statute* Article 6(c) and removes the restriction that destruction must be 'physical'. The Portuguese Penal Code has the same addition to their genocide provisions, which has been praised by Amnesty International.⁵⁴
- The *Draft Penal Code* adds 'spreads epidemic diseases likely to cause the death or serious physical injuries to members of the group' and 'Prohibits, stops or omits, by any means, humanitarian help (necessary to fight epidemic or serious food crises) to get to members of the group'. These acts would probably have been covered by *Rome Statute* Article 6(c) anyway, which prohibits 'deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part'.
- 'Forcibly prevents one group from settling in one geographic territory that historically or traditionally is theirs', 'confiscates or general apprehends the goods of the group' and 'prohibits the practice by one distinct group of certain commercial, industrial and professional activities' have all been added as acts of genocide. These provisions have no equivalent in the *Rome Statute*.

Australian Red Cross Professor of International Humanitarian Law, Professor Tim McCormack, commented to JSMP that Timor Leste is entitled to extend the definition of genocide for Timor Leste's domestic criminal legal system in this way, and he did not foresee any problems with these additional acts being prohibited as genocide in the *Draft Penal Code*.⁵⁵

⁵² Elements of Crimes, Article 6(e) fn5.

⁵³ Amnesty International, 'International Criminal Court: The failure of states to enact effective implementing legislation', 6 September 2004, <<http://www.amnestyusa.org/news/document.do?id=CD67D65F5D4EC5A580256EEC0052BDD5>>.

⁵⁴ Ibid.

⁵⁵ Email comments to JSMP 9 February 2005.

The customary law definition of genocide, which is the same as the *Rome Statute* definition and has been replicated in *UNTAET Regulation 2000/15* s4, will continue to apply for prosecution of perpetrators of atrocities committed during 1999 or any time prior to the implementation of the *Draft Penal Code*. This is due to the principle of *nullum crimen sine lege*, which is guaranteed in the *Constitution of East Timor* s31(2) that 'No one shall be tried and convicted for an act that does not qualify in the law as a criminal offence at the moment it was committed' and s31(5) that 'Criminal law shall not be enforced retroactively, except if the new law is in favour of the accused.' However, the broadened *Draft Penal Code* definition of genocide is desirable as a deterrent of future atrocities in Timor Leste.

6.2 Draft Penal Code Definition of Crimes Against Humanity in Article 121

The definition of Crimes Against Humanity in *Draft Penal Code* article 121 must comply with the definition in *Rome Statute* article 7.⁵⁶ To ensure that Timor Leste fulfils its obligations under the *Rome*

⁵⁶ 1. For the purpose of this Statute, "crime against humanity" means any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack:

- (a) Murder;
- (b) Extermination;
- (c) Enslavement;
- (d) Deportation or forcible transfer of population;
- (e) Imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law;
- (f) Torture;
- (g) Rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity;
- (h) Persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender as defined in paragraph 3, or other grounds that are universally recognized as impermissible under international law, in connection with any act referred to in this paragraph or any crime within the jurisdiction of the Court;
- (i) Enforced disappearance of persons;
- (j) The crime of apartheid;
- (k) Other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health.

2. For the purpose of paragraph 1:

- (a) "Attack directed against any civilian population" means a course of conduct involving the multiple commission of acts referred to in paragraph 1 against any civilian population, pursuant to or in furtherance of a State or organizational policy to commit such attack;
- (b) "Extermination" includes the intentional infliction of conditions of life, *inter alia* the deprivation of access to food and medicine, calculated to bring about the destruction of part of a population;
- (c) "Enslavement" means the exercise of any or all of the powers attaching to the right of ownership over a person and includes the exercise of such power in the course of trafficking in persons, in particular women and children;
- (d) "Deportation or forcible transfer of population" means forced displacement of the persons concerned by expulsion or other coercive acts from the area in which they are lawfully present, without grounds permitted under international law;
- (e) "Torture" means the intentional infliction of severe pain or suffering, whether physical or mental, upon a person in the custody or under the control of the accused; except that torture shall not include pain or suffering arising only from, inherent in or incidental to, lawful sanctions;
- (f) "Forced pregnancy" means the unlawful confinement of a woman forcibly made pregnant, with the intent of affecting the ethnic composition of any population or carrying out other grave violations of international law. This definition shall not in any way be interpreted as affecting national laws relating to pregnancy;
- (g) "Persecution" means the intentional and severe deprivation of fundamental rights contrary to international law by reason of the identity of the group or collectivity;
- (h) "The crime of apartheid" means inhumane acts of a character similar to those referred to in paragraph 1, committed in the context of an institutionalized regime of systematic oppression and domination by one racial group

Statute with respect to Crimes Against Humanity, JSMP recommends that the following amendments be made.

6.2.1 That the definition of torture be amended so that it is not limited to official agents

The *Draft Penal Code* defines torture as ‘the infliction of severe pain or suffering, mental or physical, on a person in confinement or under the control of *an official agent*.’⁵⁷ This is much more limited than the *Rome Statute*, which extends to anyone in the custody or under the control of the *accused*.⁵⁸ The *Draft Penal Code* definition is therefore like that of the *Torture Convention*, which required that the pain or suffering be ‘inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity.’⁵⁹ The exclusion of acts committed by anyone who was not acting in an official capacity in the *Torture Convention* definition had been subjected to sustained criticism.⁶⁰ The broadened definition in the *Rome Statute* has been welcomed as “an affirmation that the international community has rectified one major inadequacy of the Convention definition”.⁶¹ The *Draft Penal Code*’s regression from the *Rome Statute* definition is troubling, and should be amended to comply with the *Rome Statute*. Therefore, JSMP recommends that the phrase ‘an official agent’ (‘do agente’) be replaced with ‘the accused’.

6.2.2 That definitions of ‘attack directed against any civilian population’ and ‘enslavement’ be added

Acts which are Crimes Against Humanity must be ‘directed against any civilian population’. This phrase is defined in *Rome Statute* Article 7(2)(a) as ‘a course of conduct involving the multiple commission of acts referred to in paragraph 1, against any civilian population, pursuant to or in furtherance of a State or organizational policy to commit such attack’. The *Draft Penal Code* leaves out this definition.

Similarly, the definition of ‘enslavement’, in *Rome Statute* article 7(2)(c) as ‘the exercise of any or all of the powers attaching to the right of ownership over a person and includes the exercise of such power in the course of trafficking in persons, in particular women and children’, has been omitted from the *Draft Penal Code*.

To avoid confusion and to ensure that international standards are complied with, JSMP recommends that these definitions be added to the *Draft Penal Code*.

over any other racial group or groups and committed with the intention of maintaining that regime;

(i) "Enforced disappearance of persons" means the arrest, detention or abduction of persons by, or with the authorization, support or acquiescence of, a State or a political organization, followed by a refusal to acknowledge that deprivation of freedom or to give information on the fate or whereabouts of those persons, with the intention of removing them from the protection of the law for a prolonged period of time.

3. For the purpose of this Statute, it is understood that the term "gender" refers to the two sexes, male and female, within the context of society. The term "gender" does not indicate any meaning different from the above.

⁵⁷ Art 121(2)(f): ‘Tortura, entendida como o acto que consiste em infligir dor ou sofrimento, físico ou psicológico, grave, a pessoa privada da liberdade ou sob controlo *do agente*’. (emphasis added).

⁵⁸ Rome Statute Article 7(2)(e).

⁵⁹ *Convention Against Torture and Other Cruel Inhuman or Degrading Treatment or Punishment*, opened for signature 10 December 1984, 1465 UNTS 85, 23 ILM 1027 (1984) with changes at 24 ILM 535 (1985) (entered into force 26 June 1987) (‘*Torture Convention*’), article 1.

⁶⁰ See Timothy McCormack and Sue Robertson, ‘Jurisdictional Aspects of the Rome Statute for the New International Criminal Court’ 23 *Melbourne University Law Review* 635.

⁶¹ *Ibid*.

6.2.3 That the definition of ‘extermination’ be amended

The *Rome Statute* states that “‘extermination’ includes the intentional infliction of conditions of life, *inter alia* the deprivation of access to food and medicine, calculated to bring about the destruction of part of a population’.”⁶² The *Draft Penal Code* omits the words ‘includes’ and ‘inter alia’. As a consequence the *Draft Penal Code* definition reads as all-inclusive, suggesting that only inflicting adverse, living conditions, such as deprivation of food or medical supplies, likely to cause the death will amount to ‘extermination’. This is much narrower than the expansive *Rome Statute* definition, under which acts other than those mentioned could also amount to extermination. The word ‘includes’ should be added to article 121(1)(b) after ‘extermination’ to ensure that the broader international standard is adopted.

6.2.4 That ‘with knowledge of the attack’ be added

The *Rome Statute* requires that the act in article 7(a)-(b) be carried out with knowledge of the widespread of systematic attack directed against any civilian population. The *Draft Penal Code* has left out the words ‘with knowledge of the attack’ as is the wording of *Rome Statute* Article 7(1). JSMP recommends that these words be added to article 121 of the *Draft Penal Code* to be consistent with the *Rome Statute*.

6.3 Draft Penal Code Definition of War Crimes (articles 122 – 127)

The definition of War Crimes in *Draft Penal Code* articles 122 - 127 must comply with the definition in *Rome Statute* article 8. JSMP recognises that the drafters of *Draft Penal Code* articles 122 – 127 of Chapter II, Title I *Crimes Against Peace, Humanity and Peace* intended to comply with Timor Leste’s obligations as a party to the *Rome Statute*.

The penalties stated for war crimes in the draft Penal Code indicate unequivocally the weight and importance of the values protected by the provisions. Imprisonment penalties go from ten to up to twenty or twenty-five years (to up to twenty-five years of imprisonment penalty in *crimes against civilians*⁶³ or *crimes using prohibited means or prohibited methods*) and from five to ten years in *crimes against propriety*. Comparatively, these penalties are relatively heavier than penalties stated in current Portuguese Penal Code, for example⁶⁴. This is a positive feature of the Draft Timor Leste Penal Code.

However, JSMP is concerned that some of the definitions of crimes in these articles 122 – 127 are weaker than in the *Rome Statute*. To ensure that Timor Leste fulfils its obligations under the *Rome Statute* with respect to war crimes, JSMP recommends that the following amendments be made.

6.3.1 That an equivalent sub-article to Article 8.2(d) and (f) of the Rome Statute be inserted

The *Draft Penal Code* does not include a provision equivalent to article 8.2(d) and (f) of the *Rome Statute* specifying that the definitions of war crimes do “not apply to situations of internal disturbances and

⁶² *Rome Statute* Article 7(2)(b) (emphasis added) ‘Extermínio, entendido como a sujeição de toda ou de parte da população a condições de vida adversas, tais como a privação do acesso a alimentos ou medicamentos, idóneas a provocar a morte de uma ou mais pessoas.’

⁶³ This penalty will be enhanced with one fifth in respect *maximum* and *minimum*, if the crime is committed against personnel involved in humanitarian assistance (Article 122(2) draft Penal Code).

⁶⁴ According to the Portuguese Penal Code (Article 241(1)), the imprisonment penalty for “war crimes” go up to twenty years. This penalty will be enhanced with ¼ in respect *maximum* and *minimum*, if the crime is committed against personnel involved in humanitarian assistance (art.241 n2).

tensions, such as riots, isolated and sporadic acts of violence or other acts of a similar nature.” In JSMP’s opinion such provisions should be included in the Draft Penal Code.

6.3.2 That the term “children” be clarified in Article 122.1(e)

According to article 122.1(e) of the Draft Penal Code, “conscripting or enlisting children into national armed or military forces or into armed groups or using them to participate in hostilities will be considered a war crime.” Under the *Convention on the Rights of the Child* (CRC), a child is a person under the age of eighteen. Section 45.1 of UNTAET Regulation 30/2000 (as amended by 25/2001) states that minors are those aged under eighteen. However, in the majority of countries the age established for criminal accountability is even lower⁶⁵. In the Rome Statute, articles 8.2(b)(xxvi) and 8.3(c)(vii) include as a war crime “conscripting or enlisting children under the age of fifteen years into the national armed forces or using them to participate actively in hostilities”. Therefore, in order to avoid confusion in the interpretation of the term “children”, and to ensure consistency with the Rome Statute, JSMP recommends that the term “children” in article 122.1(e) be replaced with the expression “children under the age of fifteen years”.

6.3.3 That the terms “in large scale” and “goods of high value” be deleted from article 126(a)

We suggest that the terms “in large scale” (“em larga escala”) and “good of high value” (“bens de grande valor”) be deleted from article 126(a) of the Draft Penal Code as elements of the crime, because these elements will restrict the protection range of the criminal offence. Omitting these expressions, will ensure that a broader international standard (stated in Articles 8.2(b)(xiii) and (e)(xii) of the *Rome Statute*⁶⁶) are adopted.

6.3.4 Amend Article 123(h) to include the expression “belonging to the hostile nation”

Article 123(h) of the Draft Penal Code states that to “kill or wound treacherously individuals belonging to the hostile army” will be considered a war crime, but omits the expression “belonging to the hostile nation”. We suggest that those terms be added to Article 123(h) in order to make the article consistent with article 8.2(b)(xi) of the *Rome Statute*.

⁶⁵ In Portugal, for example, it is sixteen years old.

⁶⁶ “Destroying and seizing the enemy’s property unless such destruction or seizure be imperatively demanded by the necessities of war”.

7. SUMMARY OF RECOMMENDATIONS

JSMP recommends:

That Parliament should not authorize Government to pass the Penal Code as a decree law. The Penal Code should instead be subject to vigorous Parliamentary debate and passed as a Parliamentary Law.

Defamation: Articles 172 - 177

That the defamation provisions be removed from the draft Penal Code and that an appropriate civil defamation law be drafted.

That being motivated by a legitimate public interest or other valid reason and a good faith belief in the truth of the statement should be a defence to defamation.

Any higher penalty for defamation of a public figure should be abolished.

Domestic Violence and Offences Against Sexual Freedom: Articles 148 - 150 and 162 – 171

*That Article 148 be amended to include the wording “**or neglect**” after “cruel treatment”.*

*That Article 149 be amended as follows: Who inflicts on **someone living within his/her household** physical, psychological or **economic** maltreatment or any other cruel treatment **or serious neglect**, will be punished with imprisonment from 1 to 6 years, if any other legal provision does not state a heavier penalty.*

*Article 160 should be amended to include: “**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.**”*

Article 160: Change the maximum penalty of 6 years to 8 years.

*That the wording in Article 161 be amended to: “by the introduction of another object **or any other part of the body** into an orifice to practice sex”.*

That the following sub-articles be added to Article 162

Article 162.1(d) “at the time of, or immediately before or after, the commission of the offence, the alleged offender maliciously inflicts bodily harm on the alleged victim or any other person who is present or nearby.”

Article 162.1(e) “at the time of, or immediately before or after, the commission of the offence, the alleged offender threatens to inflict actual bodily harm on the alleged victim or any other person who is present or nearby by means of an offensive weapon or instrument.”

Article 162.1(f) “the perpetrator has deliberately passed any venereal, syphilitic or immune-deficiency syndrome to the victim”

The penalty for pimping provided under Article 163.1 (maximum three years) should be increased to that corresponding to the penalty provided under Article 170.1 of the Portuguese Criminal Code (6 months to 5 years).

Article 164 should be reworded to make it clear it also applies to clients of the child prostitutes.

Article 166.3 should be deleted.

That the words “but the victim could choose to end the criminal procedure after it has started” be deleted from Article 171.1.

That Article 171.2 be deleted.

Genocide: Article 120

*That “**mental harm**” be added to Article 120(1)(a).*

*That “by violent means” in Article 120(c) be changed to “**forcibly**”.*

Crimes Against Humanity: Article 121

That the definition of torture be amended so that it is not limited to official agents.

That definitions of “enslavement” and “attack directed against any civilian population” be added.

*That the definition of “extermination” be amended: the word “**includes**” should be added to Article 121 (1)(b).*

*That the wording “**with knowledge of the attack**” be added.*

War Crimes Articles: 122 – 127

That an equivalent sub-article to Article 8.2(d) and (f) of the Rome Statute be inserted.

That the terms “in large scale” and “goods of high value” be deleted from Article 126(a).

That the terms “in large scale” and “goods of high value” be deleted from Article 126(a).

*Amend Article 123(h) to include the expression “**belonging to the hostile nation**”.*