JUDICIAL SYSTEM MONITORING PROGRAMME
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JSMP REPORT ON THE INTERNAL SECURITY ACT (BILL)

Dili, East Timor
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1. Executive Summary

East Timor has had a bitter experience of internal security matters during the Indonesian occupation. Many East Timorese were subjected to arbitrary arrests and many others were kidnapped after they have been illegally searched in public areas. Under the Soeharto regime, many demonstrators were arrested and tortured and some were killed. The Indonesian Government attempted to legitimise these actions through the laws on Anti- subversion and other offences against the state.[1] It is essential to prevent the abuses of the past occurring again. Towards this aim, the type of situations in which the security forces and services can take action and what measures they can undertake must be well defined.

Internal Security laws have the difficult function of maintaining an appropriate balance between upholding law and order and, ensuring checks on undue interference with the rights and freedoms of the people. The preamble of the Internal Security Act (ISA) emphasizes the importance of maintaining this balance through the democratic system in East Timor. The central organ of democracy is Parliament and it is Parliament that is best positioned to protect the balance between the necessary powers of the state to maintain security and the freedoms of the people.

The ISA is confusing in that the power to make security policy is given to the Government and more specifically to the Council of Ministers, whereas the Constitution is clear that making laws on security policy is the exclusive competence of the Parliament. According to JSMP, the ISA delegates the power with regard to internal security policy to such an extent that it erodes the safeguards which Parliament can provide on possible excesses of power. JSMP is of the opinion that the delegation of powers by Parliament may be unconstitutional as laws on defence and security policy are the exclusive competency of Parliament[2]. In addition, Sections of the ISA establish procedures which are inconsistent with current laws and practices. These differences may cause practical problems in their implementation and threaten existing protections of human rights guarantees.

Further safeguards and reporting requirements are necessary to ensure the lawful and good functioning of the internal security apparatus in East Timor. An informed civil society is also essential to the democratic oversight of a state's security forces and services.

The ISA was passed by the Parliament on 30 July 2003 and was referred to the President on 26 August 2003. According to the Constitution the President has the option to promulgate, veto or refer the law to the Supreme Court of Justice for an opinion on its constitutionality.

This report does not seek to examine the political context of the current and proposed security bodies. Its scope is limited to a legal analysis of the ISA with regard to the Constitution, other laws currently applicable in East Timor and international standards.

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[1] The Anti-subversion law was repealed by section 3.2 of UNTAET Regulation 1999/1 because the Act did not comply with internationally recognized human rights standards. It is also of note that on 19 May 1999, Indonesia also repealed the Anti-Subversion law on the basis of its inconsistency with human rights principles. The Indonesian law which repealed the Act was law number 26/ 1999 and section A of the preamble of the Act gave reasons for the repeal.

[2] See Section 96.2 (o) of the Constitution of East Timor.

JSMP recommends that:

Recommendation 1.
The ISA be amended so as to ensure that Parliament retains the legislative and policy making functions with regard to internal security policy.

Recommendation 2.

The ISA clarifies the definition of terms, such as "security forces and services", in order to prevent uncertainty and misinterpretation.

Recommendation 3.

The relationship and the duties of the Inter-Ministerial Commission for Internal Security and the Office for Coordination of Internal Security should be clearly provided in the ISA so as to prevent overlap of mandates and to guarantee the smooth implementation of internal security policies.

Recommendation 4.

Parliament should enact further legislation on the PNTL, FDTL, the National Service of State Security and the Intelligence Services in a timely manner in order to prevent a legal gap on the basis for the conduct of the security forces and services in terms of any internal security policy.

Recommendation 5.

The ISA should include provision on the role of the President of the Republic aiming at guaranteeing that the President is involved in the decision making process of determining whether a situation is of an internal or external nature.

Recommendation 6.

Section 2.2 of the ISA should be amended to include the criterion of proportionality for the use of force by the police, reflecting the wording used in Section 9.3 of UNTAET Regulation 2001/22, to harmonise this provision with Constitutional human rights guarantees.

Recommendation 7.

Section 5 of the ISA should be amended to include provisions on the procedural requirements for requesting collaboration of a citizen to prevent the possibility of abuses of Constitutional human rights guarantees. In addition, JSMP recommends clarification is provided as to what is meant by the term "collaboration", "people holding management functions" and other as used in the ISA.
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Recommendation 8.

Section 15.2 (a) should be amended so as to require reasonable grounds in order for police to lawfully request identification of a person at a public place. JSMP believes that the wording used in Section 7.1 of UNTAET Regulation 2001/22 may provide a template for the amendment as it restricts the ability of the police to stop and question persons only when investigating the commission of a crime.

Recommendation 9.

Section 15.2 (d) should be deleted from the provisions of ISA. Any police powers to prevent entry of persons in East Timor should be referable to the Immigration and Asylum Law.

Recommendation 10.

Section 17.1 should be amended to provide that the Public Prosecutor should have the exclusive responsibility to request warrants from the Investigating Judge.

Recommendation 11.

The ISA should be amended to oblige the Government to report to the National Parliament at least three times a year on internal security issues and to give Parliament the power to provide comments and recommendations on the internal security policies as reported back by Government. The National Parliament should also have a multi-partisan 'Internal Security Committee' of its own (this could be an additional function of either the present Committees 'A' or 'B'), which would be empowered to conduct enquiries into the funding and activities of security forces and services, and alleged wrongdoing or abuse of human rights by their members.

Recommendation 12.

The ISA and/or the Act on the Ombudsman - *Provedor de Justiça* – (when passed) should be amended to include within the mandate of the Ombudsman the power to investigate complaints against both the security forces and services, including State Intelligence and the National Service for State Security. This structure would guarantee that the security forces and services are accountable to independent bodies and that a channel is given to redress any violations committed when implementing internal security measures.

2. Internal Security Act Bill

The Internal Security Act (Bill No 7/2003) was passed by the National Parliament on 30 July 2003 and forwarded to Parliamentary Commission 'A' and 'B' for its consideration and approval. On 26 August 2003, the Commission 'A' referred the Bill to the President of the Republic for its promulgation.

2.1 Framework of the Internal Security Act

The Internal Security Act Bill (hereinafter ISA) states that its aim is to guarantee the enforcement of public peace and order, the protection of people and property and the prevention of crime. Overall its stated aims include ensuring the normal functioning of democratic institutions, the exercise of citizen's fundamental rights and liberties and the respect for democratic legality[3]. To fully implement this Act, two new bodies are established: Inter-Ministerial Commission for Internal Security and the Office of Coordination of Internal Security. The National Parliament, the Government and Council of Ministers also have active roles in terms of the ISA.

In the coordination and implementation of internal security policies, the National Parliament, under this Act, mainly plays a monitoring role. The Act states that National Parliament can contribute to the internal security policy framework which includes examining the status of the country's internal security and the activity of security forces and services on an annual basis[4].

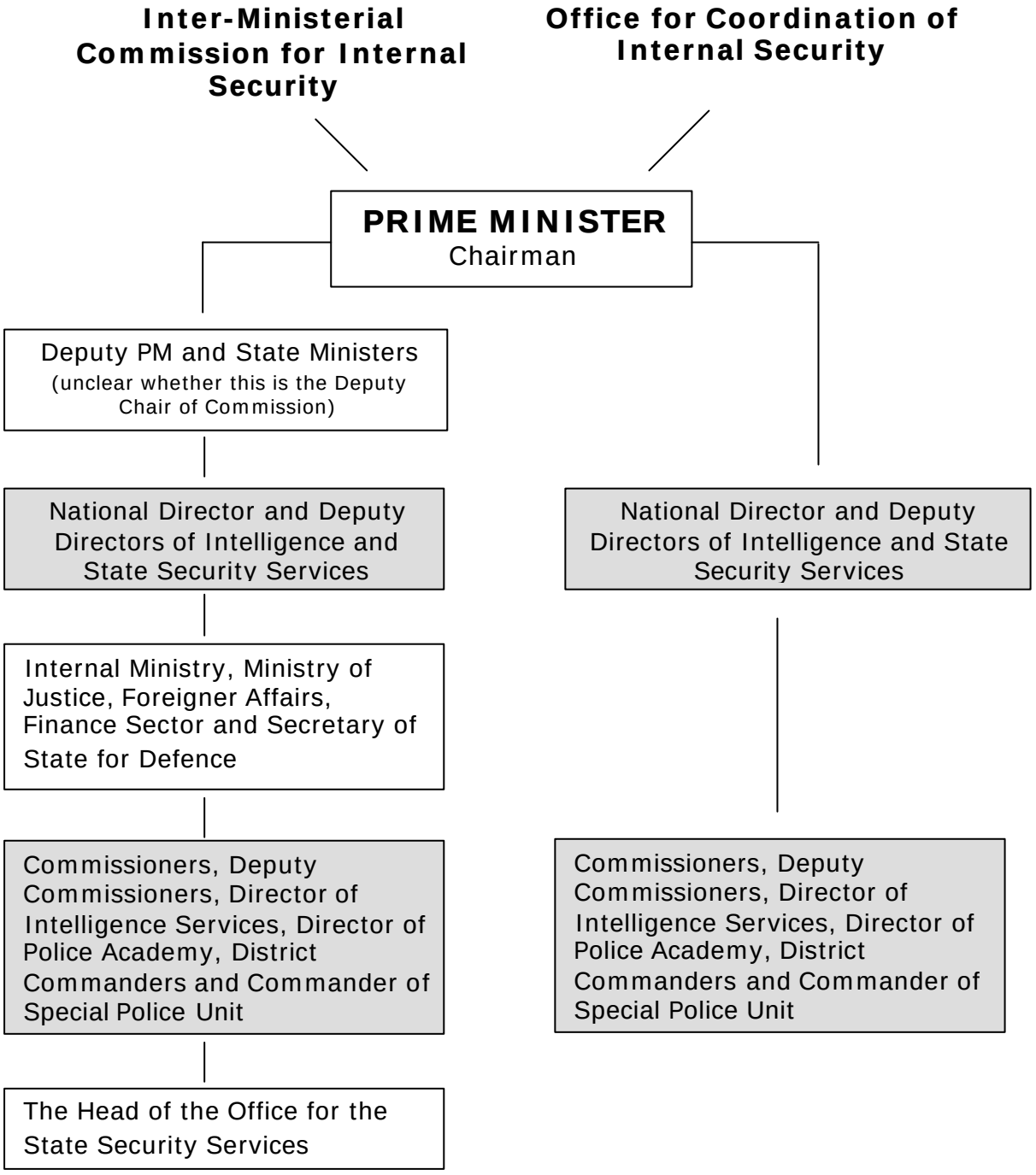
While the Government is to implement the internal security policy, it is also under the competence of Government, through its Council of Ministers, to define the outline of the government's internal security policy, which includes providing the means necessary for its implementation. Included in its role is the establishment of the rules for classification and control of the circulation of official documents and accreditation of people who can access these qualified documents[5].

Under the ISA Act the Inter-Ministerial Commission for Internal Security (hereinafter Inter-Ministerial Commission) and the Office of Coordination of Internal Security (hereinafter Office for Coordination) are designated as analytical, advisory and consultative bodies to the Prime Minister. Specifically, the Inter-Ministerial Commission has the competence to examine and comment on the definition of internal security policy guidelines as well as the general basis of organization, operation and discipline of security forces and services, which includes delimitation of their respective mandates and competencies. It is also the competence of this Commission to examine and comment on the draft laws and guidelines governing the functions of security forces and services. One of the Commission's most important roles is to provide assistance to the Prime Minister on the adoption of appropriate measures in situations of serious threat to internal security[6].

[3] Section 1.1 of ISA.
[4] Section 7 of ISA.
[5] Section 8 of ISA.
[6] Section 9.3 of ISA.

The Office for Coordination is mainly tasked to advise the government entities responsible for the execution of internal security policy including making proposals on technical and operational coordination to assist in the implementation of internal security policy[7].

Following is the composition of the Inter-Ministerial and Office of Coordination as established by the ISA:



[7] Section 12 of ISA.

Within the framework established by the Act, an important aspect of its successful implementation is the relationship between the different bodies. The ISA does not clearly identify the relationships among the bodies involved in the formulation and implementation of internal security policies.

There are great similarities between the duties of different bodies. For example, the Inter-Ministerial Commission is an advisory and consultative body to the Prime Minister in the area of internal security affairs, while the Office for Coordination is a specialized advisory and consultative body for technical and operational coordination carried out by security forces and services. JSMP understands the difference of wording between these two bodies, however JSMP believes that in practice conflicts could arise between the different bodies because of the similarity of their responsibilities.

Another issue to consider is the fact that the ISA does mention that internal security shall be discharged by the National Police and the Intelligence and State Security Services[8] but it fails to clarify the definition of 'security forces and services'. Given the current situation in East Timor, both the National Police of Timor Leste (PNTL) and the Civil Security and Defence Force of Timor Leste (FDTL) provide security services in the territory. Also, the term 'Security Forces' in many countries is commonly understood as armed or defence forces. In addition, it needs to be clear whether the Act applies to self-appointed or quasi-official security groups. Thus, further clarification is needed in order to avoid multiple interpretation and uncertainty.

JSMP Recommends that:

a) The ISA clarifies the definition of terms, such as "security forces and services", in order to prevent uncertainty and misinterpretation.

b) The relationship and the duties of the Inter-Ministerial Commission for Internal Security and the Office for Coordination of Internal Security be clearly provided in the ISA so as to prevent overlap of mandates and to guarantee the smooth implementation of internal security policies.

3. Ability of Parliament to Delegate its Law-Making Function

3.1 Defence and Security Policy

As the Constitution is the highest law of the Democratic Republic of East Timor (RDTL), every law made must be consistent with, and the law-making body must be duly authorised by, the Constitution.

The preamble of the ISA cites Section 95.2(o) as its Constitutional basis. Section 95.2(o) of the Constitution gives the *exclusive* power to Parliament to legislate on Defence and Security policy[9].

[8] See section 13 of ISA.
[9] Section 95.2 (o) provides that: "It is exclusively incumbent upon the National Parliament to make laws on: (o) The Defence and Security policy."

It is clear that Parliament is authorized by the Constitution to make laws about security pursuant to this section however JSMP believes that the ISA also purports to delegate law-making and policy functions in relation to internal security matters to the Government and Council of Ministers.

Although the ISA provides that Parliament can contribute to the framework of the internal security policy[10] it delegates numerous duties to the Council of Ministers, including the power to define the outline of the Government's internal security policy and its implementation[11]. The Constitution provides that one of the competencies of the Council of Ministers is to define the outline of the 'general guidelines of government policy as well as those for its implementation'[12]. However, the policy of internal security is not a policy within the jurisdiction of the government but one reserved exclusively for Parliament by the Constitution[13]. Although the Parliament is permitted by the Constitution to delegate power to the Government to make laws on general issues, including definition of crimes, sentences and security measures[14], in JSMP's view this power does not extend to the security *policy* as contemplated by the current ISA[15].

JSMP acknowledges that generally the Government has a central role in formulating the policies of the nation. The ISA is confusing in that the power to make security policy is given to the Government and more specifically to the Council of Ministers. However, the Constitution of East Timor explicitly states that the law on the defence and security policy is an exclusive competence of Parliament[16].

The powers that are delegated to the Council of Ministers in the ISA do not, on their face, include a provision to make laws about internal security policy. However, the duty to define the outline of the government's internal security policy and its implementation is central to any law on the national internal security policy.

If the power for the Council of Minister's to define the outline and implementation of the security policy were valid it would lead to the untenable position within East Timor's democratic structure that the policy outlined by the Council of Ministers would dictate the content of the laws relating to internal security passed by Parliament[17].

JSMP is of the opinion that the delegation of the duties relating to the policy of internal security to the Council of Ministers may not be authorized by the Constitution. Further, the transfer of responsibilities on matters of internal security from the Parliament to the Government, and more

[10] Section 7.1 of ISA.
[11] Section 8.2 (a) of ISA. The Council of Ministers also other powers, such as to issue decree laws on the rules governing the Office for the Coordination of Internal Security (Section 11.4), to implement the policy and report back to Parliament (Section 7.2).
[12] Section 116(a) Constitution of RDTL.
[13] With the exception of making laws on security measures, as discussed below.
[14] Section 96 (a) of Constitution of RDTL.
[15] Section 8.2 (a) of ISA.
[16] Section 95.2 (o) Constitution of RDTL. According to the Constitution there are only two policies for which only the Parliament can make laws about, namely, defence and security and taxation. This differentiation exhibits the importance of the role of Parliament within the area of internal security policy.
[17] See below Chapter 3.3 Future Legislation on Security Services and Forces.

specifically to the Council of Ministers, goes against democratic safeguards which are especially necessary in the area of internal security and are provided for in the East Timorese Constitution.

JSMP Recommends that:

The ISA be amended as to ensure that Parliament retains the legislative and policy making functions with regard to internal security policy.

3.2 Delegation of Law-Making Functions on "Security Measures"

In addition to the general power to define the outline of security policy the ISA also seeks to delegate specific law making functions to the Council of Ministers. Section 8.2(d) authorizes the Council of Ministers, to 'establish in law' the rules for classification and control of the circulation of official documents.

It is arguable that the function of deciding who has access to documents can be classified as a 'security measure' and therefore it is in within the law making areas that can be delegated to the Government by Parliament[18].

However, there is still the need for the Government to submit to the Parliament a proposed law of authorisation according to Article 116 of the Standing Orders of Parliament.

3.3 Future Legislation on Security Services and Forces

The ISA is the first piece of legislation on security matters passed by the East Timorese Parliament. JSMP understands that further legislation will be required to complete the internal security regime, such as legislation on the Intelligence Services and legislation passed by the National Parliament on the PNTL and FDTL to replace the current UNTAET Regulations. Section 13.3 of ISA states that the organization, functions and competencies of security forces and services shall be defined by their respective organic laws and other supplementary legislation.

The Constitution does not allow the delegation of making organic laws for security forces and services to the Government or Council of Ministers, but restricts this to laws on 'security measures, definition of crimes and sentences[19]. Because the ISA gives the Council of Minister the power to develop the internal security policies' framework, this may result in the policy outlined by the Council of Ministers dictating the content of the laws relating to internal security passed by Parliament. As a democratic institution, it is essential that, when making laws, Parliament retains its law-making power without restrictions imposed by previous internal security policies made by Government. Alternatively, the laws passed by Parliament may be at odds with the Government's policy which would be unacceptable in a democracy based on the rule of law.

[18] Section 96.1 Constitution of RDTL.
[19] Section 7.1 ISA.

JSMP is of the opinion that in order to guarantee the cohesive implementation of the security apparatus, it is important that further laws are passed by Parliament in a timely manner.

JSMP Recommends that:

Parliament should enact further legislation on the PNTL, FDTL and the National Service of State Security in a timely manner in order to prevent a legal gap on the basis for the conduct of the security forces and services in terms of any internal security policy.

3.4 The Role of President and FDTL in Internal Security

The ISA does not include reference to the President or the Defence Force of Timor Leste (FDTL).

The general rule is that FDTL's role is limited to the defence of East Timor[20], while the internal security is the domain of PNTL as established by the Constitution and UNTAET Regulation 2001/1, as amended by 2001/9.

JSMP supports the division of responsibilities between defence forces and the police. However, recent events show in future there may arise a situation where it will not be clear whether a situation is of an internal or external nature[21]. In order to guarantee that a clear line is drawn in relation to the division of duties between PNTL and FDTL, JSMP is of the opinion that the President of the Republic should be able to participate in the discussions and in the decision-making process in cases where there is the need to delimit the activities of the PNTL and FDTL.

JSMP Recommends that:

The ISA should include provision on the role of the President of the Republic aiming at guaranteeing that the President is involved in the decision making process of determining whether a situation is of an internal or external nature.

4. Violation of Constitutional Human Rights Guarantees by Sections of Internal Security Act

4.1 Limitation of Constitutional Guarantees

It is not unusual for security measures to limit individual basic rights such as the rights to privacy, to personal security, freedom of movement amongst others.

[20] Section 2.2 (b) UNTAET Regulation 2001/1 as amended by 2001/9.
[21] For example, the incidents in Ermera District in January 2003.

It is generally accepted that most of human rights are not absolute and their interrelation and interdependence often result in situations where a conflict arises with the enforcement of different human rights guarantees. In these circumstances a balance needs to be struck in order to identify the scope of any limitation.

The Constitution of East Timor provides for the limitation of Constitutional guarantees in Section 24. In interpreting the application of Section 24, the Court of Appeal was of the opinion that the following requirements need to be met[22]:

a) the limitation has to be imposed by a law;
b) the limitation should aim at safeguarding another protected right;
c) there must exist a clear constitutional direction pointing to the limitation;
d) the limiting law has to be of a general and abstract nature;
e) the limiting law cannot be applied retroactively and
f) the limiting law cannot limit the essential contents of the rights

4.2 Police and Intelligence Powers and Limitation of Constitutional Rights

JSMP is aware that the need to guarantee safety and security in East Timor is an important task for the government. JSMP acknowledges that sometimes the need to maintain internal security and public order might result in limitation of some of the recognized human rights, more specifically the rights to personal security and integrity, privacy, inviolability of correspondence and home and the freedom of movement[23].

However in any democratic society, police's powers should be limited, and safeguards should be imposed, in order to guarantee that the rights of individuals are not arbitrarily violated, and that any limitation is made in accordance with the laws and the Constitution.

4.2.1 Use of Force by the Police

Within the current legislative framework of PNTL - UNTAET Regulation 2001/22 – the police may use force only when the following criteria are met[24]:

a) proportionality test, i.e. the force to be used has to be proportional to the threat that the police is trying to avert;
b) necessity test, i.e. the police can use force only as long as it is absolutely necessary to overcome the resistance in those circumstances

Lethal force may only be used if the two tests above are met and if the use of other non-lethal means would be clearly inappropriate in the given circumstances[25].

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[22] See Court of Appeal decision No 2/2003 on 30 June 2003, on the opinion of the Constitutionality of the Draft Immigration and Asylum Law, p. 7 and 8.
[23] These rights are guaranteed respectively in Sections 30, 36, 37 and 44 of the Constitution RDTL.
[24] Section 9.3 states that: " The use of force shall be proportional to the threat and as absolutely necessary under the circumstances. Notwithstanding the generality of Section 9.2, Lethal Force should only be used when other non-lethal means would be clearly inappropriate in the given circumstances."
[25] Ibid.

The need to require both the test of proportionality and the issue of necessity aims at finding a balance between the two competing rights: the right to personal integrity of a criminal suspect and the right of the general population to a peaceful and secure society. This is also in line with international standards on police powers, such as the United Nations Basic Principles on the Use of Force and Firearms for Law Enforcement Officials[26].

Section 2.2 of the ISA states that the police cannot use force 'beyond [what is] strictly necessary'. The wording used does not include the criteria of proportionality.

The Constitution of East Timor, in Section 30, recognizes that every individual has the right to personal security and integrity. The right to life is also guaranteed.

When the police apply their power to use force the right to personal security and integrity and, in some occasions, the right to life can possibly be limited. It is, therefore, necessary to analyze the limitation clause under Section 24 as discussed above.

The principle of proportionality on the use of force by the police is directly linked with the balance between the two criteria found in Section 24 of the Constitution. With the lack of a proportionality criterion the ISA is in fact expanding the limitation allowed by the Constitution.

According to UNTAET Regulation 1999/1, UNTAET regulations remain in force until repealed or superseded by laws promulgated by the National Parliament[27]. This is confirmed by Article 1 of Law 2/2002 Interpretation of Applicable Law on 19 May 2002. Within this hierarchy of source of laws, it is possible that the criteria for the use of force by the police under ISA will take precedence over the criteria previously established by UNTAET Regulation. This would ultimately result in lowering the standards required to guarantee human rights.

JSMP Recommends that:

Section 2.2 of the ISA should be amended to include the criterion of proportionality for the use of force by the police, reflecting the wording used in Section 9.3 of UNTAET Regulation 2001/22, to harmonise this provision with Constitutional human rights guarantees.

4.2.2 Duty of citizens to Collaborate with Police and Intelligence Agents

Section 5 of the Draft ISA provides that:

> "1. The citizens are bound to collaborate with security forces' officials and agents, by obeying their lawful orders and mandates and by not obstructing the normal performance of their functions.

[26] Adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, Cuba, 27 August to 7 September 1990. See Principle 5.
[27] Section 4 UNTAET Regulation 1999/1.

2. The State officials and agents or collective public entities, as well as members of governing bodies of public companies, have the special duty to collaborate with the security forces and services, according to the law.
3. People holding management, supervision, inspection or monitoring functions have the duty to report quickly to the security forces and services facts that they have had knowledge about the exercise of their functions, or because of such functions, and that may constitute preparation, attempt or execution of espionage, sabotage or terrorist crimes.
4. The failure to observe the provisions of items no. 2 and 3 amounts to disciplinary and criminal liability, according to the law."

The first point to consider when analyzing this provision is the fact that there is no definition of the meaning of collaboration. Would collaboration mean that people have to give information to police and intelligence services about themselves or other people? Does collaboration extends to serving as an undercover agent actively assisting the police and intelligence services to obtain information or even to arrest a person?

JSMP believes that it is of utmost importance to consider the meaning of collaboration or at least to include a list of example as to what citizens may be required to do when ordered by the police and the intelligence forces. An important reason for the need to identify what collaboration means is the right of every person to non-incrimination and to remain silent, which are provided for by UNTAET Regulation[28]. The right to presumption of innocence, which is the basic right from which emanates the right to remain silent and to non-incrimination, is guaranteed by the Constitution[29].

It is also important to clarify other terms used in this provision, such as 'people holding management functions' and 'report quickly' under sub-section 3.

In requesting persons to collaborate it is important to provide for procedures where these rights are not arbitrarily limited.

The ISA is silent on the procedure necessary to be undertaken by security forces when requiring citizens' collaboration. The procedure is also not currently regulated by any other law in East Timor.

Therefore, JSMP believes that the lack of a provision on procedural steps that need to be taken when requesting collaboration in terms of Section 5 of ISA creates circumstances where human rights can be easily arbitrarily violated.

JSMP Recommends that:

Section 5 of the ISA should be amended to include provisions on the procedural requirements for requesting collaboration of a citizen to prevent the possibility of abuses of Constitutional human

[28] Respectively, Sections 35.4 and 6.2 (a).
[29] Section 34.1 Constitution RDTL.

rights guarantees. In addition, JSMP recommends clarification is provided as to what is meant by the term "collaboration", "people holding management functions" and other as used in the ISA.

4.2.3 Power of Police to Request Identification of Anyone in a Public Place

Section 15.2 (a) of the ISA provides that:

> "Police measures are those found enshrined in the constitution and in the laws, and amongst others:
> a) The requirement to request the identification of *any* person *located at or passing a public place* or subject to police surveillance;" (emphasis added)

The use of police power to request identification, without any justifiable legal reason, has been an important tool in many oppressive regimes, such as Apartheid in South Africa. The East Timorese also faced similar problems during the Indonesian occupation, when they were required to always carry an identification document. Historically, broad police powers to stop and request identification from by-standers and people passing public places has been used as a means of obtaining information about opposition members and civil society groups and to control their movement.

As it stands the ISA gives the police power to control the steps of people that are found in public places. The consequence of stopping, questioning and requesting identification has the effect of limiting a person's right to privacy and freedom of movement[30].

Any limitation, as highlighted above, has to be in accordance with Section 24 of the Constitution. JSMP strongly believes that without requiring any justifiable grounds from the police in order to request the identification of people at public places the limitation clause cannot be applied, as any other interest needing to be safeguarded cannot be identified.

According to Section 7(1) of UNTAET Regulation 2001/22, the police only have the power to stop and question persons when investigating the commission of a crime[31].

JSMP is of the opinion that, in reality, when the police is requesting the identification of a person this action amounts to stopping and questioning that person. Consequently, there is a clear conflict between ISA and the UNTAET Regulation. The provisions in the two regulations are sufficiently different that it is unclear whether the provision in ISA supercedes the one in the UNTAET regulation.

[30] See Section 36 and 44 of the Constitution. See also the International Covenant on Civil and Political Rights, articles 17 and 12.
[31] Section 7.1 reads: "When a *Police Officer* is investigating the commission of any crime he or she is authorized to stop and question any person when there are reasonable grounds to believe that information with respect to the crime can be obtained from that person."

Consequently, in providing a blanket power to the police to stop and request identification, JSMP believes that the limitation imposed on the right to privacy and freedom of movement of individuals that might be stopped by the police is unconstitutional.

JSMP Recommends that:

Section 15.2 (a) should be amended so as to require reasonable grounds in order for police to lawfully request identification of a person at a public place. JSMP believes that the wording used in Section 7.1 of UNTAET Regulation 2001/22 may provide a template for the amendment as it restricts the ability of the police to stop and question persons only when investigating the commission of a crime.

4.2.4 Power of Police to Prevent the Entry of 'Unpleasant' Foreigners

Under the ISA police can prevent a foreigner entering East Timor if s/he believes that the foreigner is an unpleasant person[32]. As worded, this section provides a wide and subjective discretion to a police officer.

JSMP strongly believes that there is the need to develop a proper mechanism to guarantee that this wide discretion will not be arbitrarily implemented and will not violate recognised human rights, such as the right to asylum and the right to freedom of movement.

It is also important to the East Timorese Parliament, when developing new laws, guarantee that these will be in harmony with other laws already drafted or recently passed. This provision would seem to be more properly dealt with under the Immigration and Asylum Law.

JSMP Recommends that:

Section 15.2 (d) should be deleted from the provisions of ISA. Any police powers to prevent entry of persons in East Timor should be referable to the Immigration and Asylum Law.

4.2.5 Control of Means of Communications under Section 17

Section 17 of the ISA provides a mechanism for obtaining warrants to monitor communication.

The Constitution specifically protects the rights of people to privacy of their correspondence and other means of private communication except as provided by law as a result of criminal proceedings.[33] The ISA limits the circumstances in which authorizations can be given to monitor communications to criminal cases[34] and therefore in JSMP's view it is on the face of it consistent

[32] Section 15.2 (d) of ISA
[33] Section 37.1 Constitution RDTL
[34] The Investigative Judge in a criminal case, at the request of the criminal investigation police, may authorize, in the terms of the law, the monitoring of communications.

with the Constitution. However JSMP wishes to emphasise that any limitation of rights must include adequate procedural safeguards to guarantee that the powers are not misused and that the restrictions are imposed only to the extent provided by law.

The UNTAET Regulation governing criminal procedures clearly stipulates that when obtaining a warrant, including those related to monitoring of communications, the request shall come from the Public Prosecutor to the Investigating Judge [35]. In contrast, Section 17 of the ISA excludes the role of the Public Prosecutor giving the police the power to request authorization for monitoring communications directly from the Investigating Judge. A practical consequence of this difference may result in a situation where different procedures are followed for obtaining warrants in different cases. For example a warrant to search premises would need to be requested by the Public Prosecutor to the Investigating Judge but a warrant to monitor communication would be requested by the police to the Investigating judge. This difference may lead to confusion or practical difficulties, especially for the Public Prosecutor if they are not kept informed.

The central role of the Public Prosecutor in criminal proceedings further supports the necessity of the Public Prosecutor to be responsible for requesting warrants. The role of the Public Prosecutor is outlined in the Constitution[36] and more specifically in UNTAET regulation.[37] The Public Prosecutor has the exclusive competence to conduct criminal investigations, including the duty to direct the criminal investigation, collect and examine evidence and the police shall act under the direction and supervision of the Public Prosecutor[38]. The Public Prosecutor has the added Constitutional duty to ensure democratic legality and enforcement of the law. These are important duties when protecting the right of individuals to privacy.

Although still subject to the Constitution, East Timorese laws are superior to UNTAET Regulations. However, JSMP is of the view that practical inconsistencies and difficulties may arise from the difference in procedures between the general criminal procedures included in UNTAET Regulations and the ISA. For consistency and the integrity of the process all requests for warrants and authorizations should be made by the Public Prosecutor to the Investigating Judge.

JSMP Recommends that:

Section 17.1 should be amended to provide that the Public Prosecutor should have the exclusive responsibility to request warrants from the Investigating Judge.

5. External Oversight and Scrutiny

Parliament is the main democratic body in East Timor. No institutions of the government should be exempt from parliamentary oversight. This includes security forces and services.

[35] Section 17 UNTAET Regulation 25/ 2001
[36] Section 132 Constitution RDTL.
[37] Section 7 UNTAET 25/ 2001.
[38] See Sections 7.2 and 7.4 of UNTAET Regulation 25/ 2001.

As a new democratic nation, JSMP would encourage the Government of East Timor to adopt world best practice in developing procedures and laws to ensure that security policies and their implementation by the police, intelligence and security services are drawn up and operate in a fair, transparent and professional manner with due regard for the protection of human rights and liberties.

Section 7 of the ISA provides that one of the roles of Parliament is to monitor the implementation of internal security policies[39]. In JSMP's opinion, the present provisions detailing the obligation of Government to report to the National Parliament concerning internal security matters is vague and unsatisfactory. Further, under the Bill the Government is only obliged to report to Parliament on internal security matters once a year and to keep political parties informed about the 'main issues' on 'a regular basis'[40]. The ISA does not define what are considered to be 'main issues', nor what period of time is 'a regular basis'. No formal mechanisms are spelled out for guaranteeing proper monitoring by Parliament. The Act, does not, for example, create any form of Parliamentary Committee which would provide a forum for input and monitoring. Further, the ISA only gives Parliament the opportunity to receive reports from Government on internal security issues. No active participation of Parliament is provided by the ISA.

JSMP is of the opinion that it is necessary to provide Parliament with adequate powers, resources and staff to guarantee its role in holding Government and security services and forces accountable for their policies and conduct. This includes full access to documents, regular reporting to Parliament by Government in order to guarantee that the democratically elected body can exercise a fundamental role in overseeing the implementation of policies made by the Government. In the area of internal security policy, JSMP is of the opinion that Parliament should have the power to provide recommendations and initiate changes where required.

In considering the implementation of internal security policies and the issue of transparency and accountability, it is also of utmost importance to consider the accountability of the PNTL and the Intelligence and State Security Services - as under the ISA, they are the institutions tasked to discharge the internal security functions[41].

At present, the Internal Security Act states that security forces and services shall be monitored by the Inter-Ministerial Commission[42]. However, this Commission is composed exclusively of members of the Government. There are no independent (i.e. non-government) representatives on this Commission, and this Commission has primarily an advisory function to the Prime Minister. Whilst the ISA provides that the Commission does have the power to 'provide comments on, inter alia, discipline of the security services', there is no mandate for Parliament to conduct its

[39] "Section 7: Competencies of the National Parliament:
1. In the exercise of its political and legislative competencies, the National Parliament can contribute to provide a framework for the internal security policy and to monitor its execution.
2. The political parties represented in the National Parliament will be informed on a regular basis by the Government about the development of the main issues regarding the security policy.
3. The Parliament will examine a yearly report on the status of internal security in the country, as well as the security forces and services activities, to be presented by the Government during the first quarter of each year."
[40] Section 7.2 of ISA
[41] Section 13 of ISA states that:
[42] Section 9.2 states that: "It is the role of the Commission to appreciate and provide comments on: (b) the general basis of organization, functions and discipline of the security forces and services, and delimitation of their respective missions and competencies."

own investigations or enquiries in regards to activities of security services and complaints against their members of the security services.

The accountability of security services and forces in many democracies are guaranteed through the establishment of oversight bodies and mechanisms. In many countries Parliament also plays a role in this area and has the possibility of holding enquires on the performance of the police[43]. Many governments have established oversight boards or committees within the Parliament to oversee the implementation of their nation's internal security policies and the activities of police, security and intelligence services. These committees have responsibility to act as a watchdog to review the performance of these services in terms of efficiency, effectiveness and legality.

Currently in East Timor no adequate and independent means for supervision and scrutiny of security forces' activities does not exist; consequently, the state security agencies may be allowed to operate without being properly accountable to Parliament, and through them, to the citizens of East Timor. It is important to guarantee that an independent non-government watchdog has the ability to investigate complaints against police, internal security and intelligence agency activities, to refer them for consideration of prosecution and to report to the Government and Parliament (or Parliamentary Committees) on the conduct and findings of its investigations.

JSMP acknowledges that internal security, counter-terrorism and state intelligence are unquestionably important, and are valid activities for government to involve itself. Parliamentary oversight of these activities contributes to the proper role and functioning of security sector agencies, and is essential to continued public trust and confidence in the integrity of these services.

JSMP Recommends that:

a) The ISA should be amended to oblige the Government to report, in writing, to the National Parliament at least three times a year on internal security issues and to give Parliament the power to provide comments and recommendations on the internal security policies as reported back by Government. The National Parliament should also have a multi-partisan ´Internal Security Committee´ of its own (this could be an additional function of either the present Committees 'A' or 'B'), which would be empowered to conduct enquiries into the funding and activities of security forces and services, and alleged wrongdoing or abuse of human rights by their members.

b) The ISA and/or the Act on the Ombudsman - Provedor de Justiça - should be amended to include within the mandate of the Ombudsman the power to investigate complaints against both the security forces and services, including State Intelligence and the National Service for State Security. This structure would guarantee that the security forces and services are accountable to independent bodies and that a channel is given to redress any violations committed when implementing internal security measures.

[43] For example, Britain, Canada, Australia and New Zealand. Also in Mozambique, the Parliament has the power to hold an enquiry on the conduct of the police in certain situations. In 2000, Mozambican Parliament held an enquiry into the happenings in Montepuez in 1999 where some 80 people died while under police custody.