JUDICIAL SYSTEM MONITORING PROGRAMME

PROGRAM PEMANTAUAN SISTEM YUDISIAL

Report on the Immigration and Asylum Law (Short Version)

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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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Judicial System Monitoring Programme
St. Antonio No 86, Motael, Dili – East Timor
Postal address: PO Box 275, Dili, East Timor
Tel/Fax: (670) 390 323 883
Mobile: +670 7233711
Email: info@jsmp.minihub.org

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1. Executive Summary

The JSMP Report on the Immigration and Asylum Law (Short Version) focuses on only a number of the provisions of the law. It focuses on issues of constitutionality and human rights of foreigners, asylum and refugee provisions and deportation. This is in no way an exhaustive analysis of the legislation.

This report aims to offer constructive comments on the current immigration legislation and to contribute to public debate and policy and law reform. It is not the intention of JSMP to comment on the immigration policy adopted by the Government – which is a matter for the Government – but to assess the legislation with respect to basic legal principles, its adherence to international standards and the Timor Leste Constitution and its practical implementation.

Over the last year, the Timor Leste Parliament passed two critically important pieces of legislation namely the Citizenship Law and the Immigration and Asylum Law (Immigration Law). The Citizenship Law determines who has original Timor Leste citizenship and which persons can become citizens by marriage or by naturalisation. The Immigration Law regulates the entry, exit and status of foreigners in Timor Leste. The Immigration Law applies to all persons who do not have Timor Leste citizenship including visitors, foreign workers, temporary residents, asylum seekers and refugees, spouses of Timor Leste nationals and foreigners who have been in Timor Leste for considerable periods of time including non-Timorese priests, nuns, doctors and activists. Together the Acts regulate the delicate issue of nationality and immigration status for Timorese and foreigners in Timor Leste.

The Citizenship Law was passed by the Timor Leste Parliament on 2 October 2002 and took effect on 30 October 2002. The Immigration Law was passed by the Parliament on 30 April 2003 and has now been referred by the President to the Court of Appeal for a review of its constitutionality.

As the Immigration Law has not yet been signed by the President, as required by Section 85 of the Constitution, it is not yet in effect. For this reason it is of some concern that the Immigration Act is currently being applied as if it were the law at airports and at border crossing points. Visa fees are being levied and decisions are being taken in accordance with a law which has not yet entered into effect. JSMP urges the government to make it clear to all immigration officials across the country that the Immigration Law does not take effect until it is promulgated by the President. Decisions taken in accordance with a law that has not yet entered effect are null and void.

Both Laws have far reaching implications for foreigners and for East Timorese alike. Particular groups affected by the laws include long-term residents of Timor Leste, foreigners married to Timorese or with family in Timor Leste (including many Indonesians) and refugees in Timor Leste. The absence of a mechanism for some

spouses and residents to conveniently maintain lawful status in Timor Leste is likely to cause problems for many people. The need for returnees to prove their citizenship at the border will obstruct the right of return and may result in deportation of citizens contrary to the Constitution.

The passage of the laws has particular symbolic significance. After over 500 years of foreign colonisation and occupation and governance by Portugal, Indonesia and the United Nations, the Laws mark the first time the Timorese people themselves - through their elected representatives - have been able to exercise control over the presence of foreigners in their country. Considering the impact that immigration - including Portuguese colonial migration and Indonesian transmigration – has had in the history of Timor Leste, this fact cannot be overstated. It is commendable that these Laws have been placed high on the Government's busy legislative agenda.

The Laws are notable for addressing a legal and policy confusion. Over the last three years the immigration and refugee jurisdiction has been a confusing area of inconsistent and ambiguous laws and conflicting and arbitrary practices at border crossing points. It is hoped that the new Laws will lead to greater certainty and consistency in the management and enforcement of immigration laws.

Timor Leste's geographic relationship with Indonesia and more particularly the social, cultural and economic relations with West Timor demand an immigration law that preserves border security whilst effectively facilitating and encouraging trade and communal relations between the two countries. Simple and workable laws are more practically implemented, provide certainty of treatment and allow for the re-establishment of familial and economic ties between the two countries. Overly bureaucratic and complex laws requiring expensive visas discourage investment and encourage cross-border smuggling and attempts to bypass the borders.

Whilst the structural framework of the legislation is sound and there are many progressive provisions, JSMP is concerned about aspects of the legislation that breach basic international standards and may be unconstitutional. The Parliament appears to have misunderstood the limitations on its powers to remove basic rights such as freedom of expression, assembly, association and privacy. The adoption of a summary admissibility process for asylum applications breaches the Refugees Convention. The procedures for deciding asylum applications lack robust safeguards and unrealistic timeframes may threaten the quality of decision making. Some grounds for cessation, character requirements, deportation and exclusion from refugee status go beyond those permissible in the Refugees Convention. The status and rights of recognised refugees are not clear and fall short of those required by the Refugees Convention in some aspects. Visa, residence, asylum and deportation provisions should include consideration of the interests of affected children. An explicit safeguard should be included to prevent persons from being expelled to countries where they are at risk of torture. Consideration should be given to the inclusion of humanitarian categories for those facing serious human rights violations but fall outside of the definition of a refugee.

Some aspects of the legislation are overcomplicated and may be difficult to comply with in a practical sense, particularly timelines. Some provisions lack powers of delegation, requiring the exercise of personal decision making within very short time frames by Ministers. JSMP has some concerns about immigration and refugee decisions being made by police rather than civil servants, confusing the line between criminal and administrative proceedings. Detailed guidelines should be produced to instruct decision makers in interpreting and implementing procedures and law to encourage consistency and quality. Decision making processes in some instances lack procedural fairness such as the right to written reasons, a hearing, the opportunity to comment on adverse information and certainty with regard to review and appeal rights. The Law makes no provision for legal representation or the provision of interpreting/translating services to applicants including asylum seekers. There are some aspects of the Law that require further clarification, in particular the relationship between visas and residence authorisation, and medium term status mechanisms for those residents who do not meet the permanent residence criteria.

It is apparent that large parts of the Immigration and Asylum Law are based on equivalent Portuguese legislation. It makes good sense for a country with a developing legal system such as Timor Leste to adopt laws from a country with an established legal system, especially one that is subject to scrutiny by a body such as the European Court of Human Rights. Presumably Timorese jurists will be able to learn from Portuguese jurisprudence on immigration and asylum law. However, it is also important that a legal system be tailored to the particular circumstances of the country. JSMP is concerned that some parts of the immigration legislation which have been adopted wholesale may not be adapted to Timor Leste's particular situation.

National security issues are a particular focus of the Law. This is understandable considering the painful history of Timor Leste and, more recently, issues of international terrorism and apparent militia incursions from Indonesia. However, it is important that issues of national security are kept in proportion and do not provide a blanket cover for arbitrary decision making and suspension of a person's basic human rights. This should be particularly apparent bearing in mind the historical misuse of 'national security' issues by Indonesia in restricting movement in and out of Timor Leste and abusing the human rights of Timorese people for 'national security' related reasons. JSMP urges the clarification of a number of aspects of the legislation that provide a 'national security' discretion and the insertion of safeguards to protect against abuse.

JSMP also believes it is critical for the Government to set up a comprehensive training program for those officials who will be administering the laws and to organise a large public awareness campaign for both Timorese and foreigners alike to make them aware of their rights and responsibilities.

2. Recommendations

Recommendations on Constitutionality and Human Rights Protections for Foreigners

Recommendation 1. Article 11 (e) – (h) should be repealed in its entirety.

Recommendation 2. Article 11 (a) and (g) should be repealed. Article 9 should be amended to specifically permit the participation of foreigners in political, trade union or professional organisations.

Recommendation 3. Article 12 should be repealed.

Recommendation 4. Where national security or public interest considerations are invoked in order to prohibit a certain association, person or event in Timor Leste, a declaration to this effect should be submitted to the National Parliament for their scrutiny.

Recommendation 5. Any legislation containing a 'national security', 'public interest' or 'international relations' discretion should define with some particularity what matters are considered to pose a risk to these interests.

Recommendation 6. Detailed guidelines should be prepared for immigration officials setting out what matters can and cannot be taken into account when making decisions based on 'national security', 'public order' or 'international relations' criteria.

Recommendation 7. A number of relatively minor changes should be made to certain sections of the Law to ensure its adherence to the right to personal privacy and freedom from arbitrary interference. Article 6 should be amended to define the 'authority' and 'agent of the authority' that are entitled to require foreigners to identify themselves. The Article should also be amended to allow the production of the substantiating identification document within a reasonable period of time. Article 7 should be amended to require updated information about marital status and profession only to the extent it is relevant to a person's visa status. The requirement contained in Article 9 for detailed membership lists of associations to be submitted to the government should be removed. Article 62(2) should be amended to require only commercial enterprises receiving payment for lodging to keep a record of registration information, and only for the purposes of maintaining commercial records. Any penalty for failure to comply with this requirement should be levied from the hosts who have the obligation, not from the foreigners.

Recommendation 8. A mechanism in addition to asylum should be included to provide protection against return, deportation or extradition in cases where there is a strong humanitarian need for protection outside of the terms of the Refugees Convention, and/or risk that the person will face torture or other inhuman or cruel treatment or punishment for any reason, in the country to which they will return.

Recommendation 9. All of the admissibility screening provisions should be removed for both in-country and border applications so that the substantive merits of each asylum claim can be carefully examined. Should screening provisions be retained, they should not distinguish between applications made in-country and those at the border and all time frames for decision making should be reviewed to ensure they provide time for considered and lawful decisions. .

Recommendation 10. Regarding provisions for in-country applicants, should an appeal be made to the Minister, the applicant should have a right to be informed of the decision and appeal rights. The time frame for an appeal to the court should be specified. Regarding provisions for border applicants, a timeframe within which the applicant and UNHCR should be informed of the admissibility decision, and appeal rights against a decision of the Minister, and timeframe for an appeal, need to be included.

Recommendation 11. The applicant should have the right to legal representation and professional interpreting services throughout the process.

Recommendation 12. The applicant should have the right to a hearing, in the form of an interview with the decision maker, attended by the applicant's legal representative UNHCR and a qualified interpreter if necessary.

Recommendation 13. All timeframes throughout the process should be reviewed to ensure that they are sufficient for considered and lawful decision making, and reasonable periods for applicants and their lawyers to prepare supportive material.

Recommendations on Asylum and Refugee Provisions

Recommendation 14. The applicant should have the right to written reasons for the decision which includes a summary of evidence considered, findings of relevant facts and application of applicable law as well as the final decision.

Recommendation 15. It should be clarified whether the timeframe for appeal runs from the time of decision or time of notification.

Recommendation 16. Article 1F of the Refugees Convention exhaustively defines the permissible grounds for exclusion from protection under the Convention; hence the Law should adopt the wording of those provisions and remove all others.

Recommendation 17. The Refugees Convention uses "serious, non-political crime" as its standard for exclusion. The current provision catches a much broader range of crimes than that sanctioned by the Convention. It is suggested that if Timor Leste does still wish to impose character requirements beyond those permissible under the Convention, (which could later be challenged as unconstitutional) the wording should at least be changed to require that the offence be a serious non-political crime committed outside the country of refuge. In addition consideration could be given to basing exclusion on the actual

sentences served and not the maximum penalty, and placing a time limit on the effect of the conviction to prevent exclusion in all such cases indefinitely.

Recommendation 18. The grounds for cessation of refugee status should be amended to reflect the Refugees Convention which defines this area exhaustively.

Recommendation 19. The provisions relating to the effect of loss of right to asylum are confusing, complicated and unnecessary. They should be removed. If retained, it should be clarified that the prohibition on deportation of a person where they may face persecution prevails over other provisions

Recommendation 20. The Law should be amended to grant asylum seekers full work rights, interpreting services, legal representation and access to the available public health care and education system for the duration of the application process. The Law should be amended to ensure that these rights endure if the person has the status of a refugee.

Recommendation 21. A provision should be inserted clarifying that refugees and asylum seekers are not subject to the general deportation provisions and setting out special grounds of deportation for asylum seekers and refugees to reflect the wording of Article 32 of the Refugees Convention which exhaustively provides for the permissible grounds of expulsion of a refugee.

Recommendation 22. If refugees and asylum seekers remain subject to the general deportation provisions, two new provisions should be inserted. One should clarify that the ground of illegal entry or presence does not apply to a person who has lodged an asylum claim.[1] *A second provision extending the bar on deportation of refugees to a country where his or her freedom is at risk*[2] *to all refugees whether they face expulsion under the general deportation grounds, or due to cessation of refugee status.*[3]

Recommendation 23. A mechanism should be established to ensure that prior to deportation of an unsuccessful asylum seeker or refugee who has lost their status, any humanitarian circumstances are considered including non-Convention related claims, and that an assessment is conducted as to whether the person is at risk of torture in the receiving country for any reason.

Recommendation 24. A mechanism should be established to ensure that the impact on any children affected by a deportation decision is examined and that the paramount

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[1] That Article 68 prevails over the general deportation grounds.

[2] See Article 109

[3] At present this safety net provided by s 109 applies only to those refugees who have lost their refugee status due to the cessation clauses, and does not include those facing expulsion under the general deportation grounds.

interest considered is the best interests of the child[4]*, and the right of the child not to be separated from either of his or parents*[5]*.*

Recommendation 25. Some grounds for deportation should be further defined so that they meet the tests for purposiveness and proportionality. The ground relating to prohibited activities for foreigners should be removed on the basis that it is most likely unconstitutional and involves a penalty for exercising fundamental human rights.

Recommendations on Deportation

Recommendation 26. The authority responsible for the "fact finding" and recommendation aspect of the process should be clarified.

Recommendation 27. The stay or postponement on execution of a deportation order should be brought in line with the appeal period (i.e. extended to 10 days). An appeal of a deportation order to a higher court should stay all and not just some deportation orders.

Recommendation 28. The decision maker and criteria for determining the length of a re-entry ban should be specified, and whether there is a right of appeal in relation to this decision.

Recommendation 29. Courts should not be empowered to impose deportation as part of a criminal sentence. Deportation on character grounds should be a separate administrative process.

Recommendation 30. The criteria for deportation on character grounds should be re-examined to ensure that those who have been sentenced under laws in countries which do not meet international standards are not excluded. Additionally the criteria for deportation should be based on actual custodial sentences received, not maximums for a particular offence. Further, consideration should be given to considering only criminal convictions within a particular timeframe

3. Constitutionality and Human Rights Protections for Foreigners

3.1 Permissible restrictions on civil and political rights

Perhaps the Chapter that has generated the most discussion and controversy in the Immigration and Asylum Law is Chapter II which covers 'Foreigners Rights and Duties'. Some of the provisions within this Chapter attempt to restrict certain basic rights of foreigners in Timor Leste including the right to freedom of expression and association. Indeed the entire legislation demonstrates the intention of the government to control the presence and activities of foreigners in Timor Leste to a high degree.

Whilst the restrictions on the rights of foreigners in the legislation are contained in only a few sections of the Immigration Law, they deserve careful consideration for a number of

[4] Article 3(1) Convention on the Rights of the Child
[5] Article 9(1) Convention on the Rights of the Child

reasons. First and foremost the restrictions affect not just peripheral rights but internationally recognised fundamental human rights – namely the right to freedom of expression, the right to assembly and the right to freedom of association. This is one area where it is impermissible to discriminate between citizens and non-citizens.[6]

Secondly, the legislative restrictions conflict with international standards, with the Constitution and with other provisions within the Law. Thirdly, it is unclear why the restrictions are contained in an immigration law as compared with other legislation which more appropriately addresses issues of apparent concern such as a foreign investment laws, national security laws or criminal laws which apply equally to citizens and non-citizens. Finally, the restrictions underscore the need to enact laws which legitimately target specific areas of concern rather than being overly general and prohibiting legitimate as well as illegitimate activity.

It is entirely understandable that after centuries of colonialisation, occupation and governance by Portugal, Indonesia and the United Nations, the Government would wish to limit the level of foreign political 'interference' in Timor Leste. It is further understandable that in a nascent democracy such as Timor Leste with internal and external tensions and threats to security and public order, that a premium is placed on border control and national security issues. However, a State's ability to legislate to control the activities of foreigners in its territory is not absolute. It is subject to compliance with international human rights standards and with the provisions of the State's own Constitution.

Additionally, any such legislation must be scrutinised according to a 'purposive test' and the dual principles of legitimacy and proportionality. Does the legislation legitimately regulate a particular activity? Are any restrictive measures proportionate to what they are intended to achieve or do they go beyond what is strictly necessary? For example, is a law restricting all political activity by foreigners proportionate to the need to protect the national security of the country and to guard against terrorist threats? Are other measures available which are more targeted, more effective and which do not impermissibly trespass on fundamental human rights protections? This guiding principle is contained in the Universal Declaration on Human Rights which states that:

> In the exercise of his rights and freedoms, everyone shall be subject only to such limitations as are determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic country.[7]

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[6] See for example Articles 19 and 20 of the Universal Declaration of Human Rights and Articles 19 and 21 of the International Covenant on Civil and Political Rights.

[7] Article 29(2) Universal Declaration of Human Rights

Section 25 of the Timor Leste Constitution is even more specific. It states that:

> Suspension of the exercise of fundamental rights, freedoms and guarantees shall only take place if a state of siege or state of emergency has been declared provided for by the Constitution.

3.2 Constitutionality and human rights protections

The National Parliament's competence to make laws on immigration and asylum issues derives from Section 95 of the Constitution (Competence of the National Parliament) which authorise it to make law on basic issues of the country's domestic and foreign policy. Section 3.4 of the Constitution gives the Parliament specific power to regulate the acquisition, loss and re-acquisition of citizenship.

International law is expressly incorporated into the Constitution and into the domestic law of Timor Leste through Section 9 (International Law) of the Constitution. This section states that:

1. The legal system of Timor Leste 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 Timor Leste 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 Timor Leste shall be invalid.

Through this section Timor Leste has adopted a so-called 'monist' system of law that automatically incorporates international law into domestic law. Once the Timor Leste Parliament ratifies a Treaty that is subsequently published in the Official Gazette, the Treaty becomes law in Timor Leste and overrides any contrary domestic law. Even if a Treaty has not been signed, the Constitution makes it clear that general or customary principles of international law shall be adopted as law in Timor Leste.[8]

The Timor Leste Constitution thus requires any domestic law to comply with generally accepted international human rights standards. The Supreme Court of Justice[9] has jurisdiction to rule on the constitutionality of any provisions of any domestic laws.[10] This must be done by reference to international standards and by interpretation of those standards.

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[8] Section 9(1) of the Constitution

[9] Or prior to the establishment of the Supreme Court of Justice, the 'highest judicial instance of the judicial organisation existing in Timor Leste, section 164)

[10] Section 124 of the Constitution

The Parliament of Timor Leste has already signed a number of international human rights treaties and conventions and others are under consideration[11].

Whilst the International Covenant on Civil and Political Rights (ICCPR) has not yet been signed by the President it arguably has considerable weight as a codification of certain principles of customary international law. The Universal Declaration of Human Rights contains principles of customary international law and is effectively incorporated into Timorese law by Section 23 of the Constitution which states that:

> Fundamental rights enshrined in the Constitution shall not exclude any other rights provided for by the law and shall be interpreted in accordance with the Universal Declaration of Human Rights.

Other international treaties also relevant to the Immigration Law include the International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families, the Declaration of the Human Rights of Individuals Who are not Nationals of the Country in which They Live, the Convention relating to the Status of Refugees and the Optional Protocol relating to the Status of Refugees.

It is against these and other international human rights standards that the provisions of the Immigration Law must be measured.

3.3 The right to freedom of expression

Article 11 of the Act curtails some of the most democratic and fundamental human rights for foreigners including the right to freedom of expression and assembly. It states that foreigners cannot:

(e) Engage in activities of a political nature or participate, directly or indirectly, in affairs of State

(f) Organise or participate in demonstrations, processions, rallies and meetings of a political nature

(g) Organise, create or maintain an association or any other entity which is political in nature, even if solely to disseminate and broadcast political ideas, programs or political action of the country of origin amongst co-nationals

(h) Influence co-nationals or third parties to follow ideas, programs or action programs of political parties or factions from any country.

[11] These include the International Covenant on Economic, Social and Cultural Rights, International Convention on the Elimination of all Forms of Racial Discrimination, Convention on the Elimination of all Forms of Discrimination Against Women, Optional Protocol to the Convention on the Elimination of All Forms of Discrimination Against Women, Convention on the Rights of the Child, Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography However these Treaties are not yet in force in Timor Leste as they have not been published in the Oficial Gazette

A number of amendments were made to Article 11 in the Parliament on 28 April 2003. Article 11.2 now states that:

> The restrictions stated in the previous number do not include:
>
> (a) Activities of a strictly academic nature
> (b) Foreign technical assistance contracted by State institutions
> (c) Activities of liberation movements recognised by the Government, in fulfilment of the Constitutional duty of solidarity
> (d) Bi and multilateral assistance programs aimed at training and strengthening of democratic institutions that are constitutional and regulated by law.

Whilst any amendments that narrow the scope of Article 11 are welcome, the amendments do not go far enough. They exempt certain donor aid assistance and academic projects from the above restrictions but continue to impermissibly restrict a large range of legitimate political activity by foreign nationals. The insertion of a provision permitting the activities of recognised liberation movements was presumably designed to address the criticism that had this legislation been in place in countries such as Portugal, Mozambique and Australia, Timorese political leaders and activists would have been prohibited from lobbying for independence for Timor from the Diaspora over the years.

To fully appreciate the nature of the restrictions contained in Article 11 it is necessary to consider how many activities can be considered to be of a 'political nature'. Nowhere in the legislation is this phrase defined and so it must be considered according to its common meaning. The expression of opinions on a wide range of topics from social reform to comments on the government or the opposition can be considered to be 'of a political nature'. It is apparent that activities ranging from writing a letter to the editor to raising funds for a local NGO with a socio-political agenda could be considered to constitute an 'activity of a political nature'. A broad interpretation of this phrase by the Courts could result in an alarming degree of censorship of foreigners by the Government.

Fundamentally, however, Article 11 breaches a number of basic international human rights standards on the right to freedom of expression, including Article 19 of the Universal Declaration of Human Rights which states that:

> Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers.

Other protections on the right to freedom of expression and assembly are contained in Article 20 of the Universal Declaration of Human Rights, Articles 19 and 21 of the ICCPR and Article 13 of the International Convention on the Protection of Migrant Workers and Members of Their Families.

Furthermore, Article 11 is inconsistent with a number of provisions of the Timor Leste Constitution codifying basic human rights, including Section 25 of the Constitution (State of Exception), Section 40 of the Constitution (Freedom of speech and information) and Section 42 of the Constitution (Freedom to assemble and demonstrate). Article 25 clearly states that the suspension of fundamental rights can only occur if a state of siege or emergency has been formally declared as provided for under the Constitution.

Finally, Article 11 appears to contradict provisions contained within the Immigration Law itself, namely Article 5 which declares that:

> Foreigners residing in the Democratic Republic of Timor-Leste shall enjoy the rights and be subject to the duties enshrined under the Constitution and the laws.

Political discourse and activity is fundamental to a civic society and essential for the maintenance of democracy. Foreigners are entitled to the right to political expression, assembly and expression in the country in which they are temporarily residing, subject to the limits expressed in the Universal Declaration of Human Rights[12], namely that the rights shall be subject only to such limitations as are determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare of a democratic society. It is difficult to see how Article 11 can be said to satisfy that purposive test.

The restrictions on political expression have particular consequences for asylum seekers and refugees. It is highly ironic that many refugees are granted refugee status precisely because the expression of their political opinions has or may lead to persecution in their country of origin. It is indeed a sad turn that neither will Timor Leste, their country of asylum, tolerate the expression of their views or participation in political events. More ominously, if a refugee does breach this Law's restrictions on foreigners, this forms a ground for the cancellation of refugee status[13], likely leading to the deportation of that person to their home country where they may face persecution. It is also ironic that East Timor, formerly a clear beneficiary of refugee status around the world, should place a limit on freedom of expression and political opinion in receiving other countries' refugees. Already this has become an issue even prior to the commencement of this law when the Minister for Foreign Affairs and Co-operation Jose Ramos Horta recently publicly chastised Acehnese asylum seekers for protesting against the deployment of 50,000 TNI troops to Aceh following the breakdown of the peace process.[14] Had the protest occurred after the commencement of the law, the asylum seekers could be subject to deportation, irrespective of the merit of their refugee applications, and hence potentially putting Timor Leste in breach of its obligations under the Refugees Convention.

[12] Article 29(2)
[13] Article 107(b)
[14] Timor Post "Refugees Should Not Demonstrate-Horta", 22 May 2003

JSMP contends that Article 11 breaches clear Constitutional provisions and should be repealed. The amendments to Section 11(2) exempting certain activities by foreigners are too narrow and continue to impermissibly limit the right to freedom of expression of many foreigners and foreign organisations for reasons which cannot be justified on domestic policy or national security reasons. The addition of any further exemptions to Article 11(2) would be no more than window dressing and could still render the law unconstitutional.

Whilst in practice the provisions of Article 11 may not be strictly enforced by Timor Leste authorities, this is not the point. The fact is that they seek to prohibit legitimate political activity and could be enforced at any time and in an arbitrary and selective manner.

Recommendation 1. Article 11 (e) – (h) should be repealed in its entirety.

Case Study

By way of illustration, Article 11 would appear to prohibit the following:

- Foreign politicians from visiting Timor Leste to discuss matters of mutual interest with their Timor Leste counterparts. Arguably they would be participating in meetings of a 'political nature'.
- Foreign political journalists or writers from reporting from Timor Leste or having their articles printed in newspapers or magazines in Timor Leste as they would be engaging in activities of a 'political nature' (ie providing political commentary) even if their articles concerned news from overseas.
- International organisations such as Amnesty International, Human Rights Watch and other NGOs from visiting Timor Leste because their work could be characterised as being inherently of a 'political nature'.
- Foreigners from participating in many public events in Timor Leste, including Independence Day celebrations or anti-war demonstrations for fear that they could be characterised as 'political demonstrations'. Even a peace demonstration at the time of the war with Iraq could have been considered a political demonstration.
- Foreigners from establishing political representative offices in Timor Leste unless the government designated them to be 'liberation movements'. Had this law been in force in other countries prior to Timor Leste becoming independent, it would have prevented Timorese political activists overseas from drawing attention to the widespread human rights violations by the Indonesian army in Timor Leste. This would presumably have been labelled 'political activity'.
- Foreign aid that is not contracted by State institutions or does not come through a bi or multilateral assistance program and is for an activity that could be considered 'political' would be prohibited. This could include funding for public education and information projects discussing topics as varied as gender violence or civic education, or even for staffing or material costs to Timorese organisations who intended to engage in such projects. All of these projects involving topical social issues could be said to have a 'political' aspect. The prohibition would

affect organisations and individuals as diverse as Catholic welfare organisations, international humanitarian organisations, or even private donations from foreign philanthropists.

- Foreigners from engaging in political discussions in restaurants with other people for fear that they may be said to be trying to be 'politically influence' their dinner companions.

The examples listed above are not far-fetched or fanciful but follow from a direct reading of the legislation.

3.4 The right to participate in certain associations

The right to organise, create, maintain and participate in associations is another manifestation of the right to freedom of expression. Whilst Article 9 of the Act gives foreigners the right to associate or affiliate with cultural, religious, recreational, sports, charitable or assistance organizations, Article 11 prohibits foreigners from certain types of involvement in political, professional or trade union organisations. Article 11(a) prohibits foreigners from participating in the administration of a union, corporation or professional organisation, or in agencies that monitor paid activities, whilst Article 11(g) prohibits foreigners from organising, creating or maintaining an association or other entity which is political in nature.

Once again, these provisions appear to breach the Timor Leste Constitution as well as basic international human rights standards. Article 43 of the Constitution guarantees freedom of association provided that the association is not intended to promote violence and is in accordance with the law.

Article 22 of the ICCPR states that:

> Everyone shall have the right to freedom of association with others, including the right to form and join trade unions for the protection of his or her interests.

Other relevant protections are contained in Article 8 of the International Covenant on Economic, Social and Cultural Rights, Article 3 of the Convention Concerning the Freedom of Association and Protection of the Right to Organise and Article 40 of the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families.

Whilst participation in any 'political' association or indeed in any 'activities of a political nature' is banned, it is only participation in the 'administration' of unions, corporations or professional organisations which is banned. However it is difficult to see any justification for prohibiting a certain level of administrative involvement. Any foreign worker has the right to join a trade union in another country. That person also has the right to be involved in the administration of the union if he or she so wishes and if it is permissible according to the rules of the union. The prohibition on foreigners being involved in the administration of an 'agency that monitors paid activities' appears

particularly vague. This prohibition would presumably apply to foreign staff at aid agencies (unless the programs they were administering fell within the Article 11(2) exemptions) as many aid agencies arguably 'monitor paid activities' – namely the activities they are funding.

Further, Article 22 of the ICCPR defines the limits that may be placed on this right:

> No restrictions may be placed on the exercise of this right other then those which are prescribed by law and which are necessary in a democratic society in the interests of national security or public safety, public order (ordre public), the protection of public health or morals or the protection of the rights and freedoms of others.

Again, it is difficult to see how the restriction of participation in political, trade union or professional organisations can be justified on the grounds of national security, public safety, public order, public health or morals or the protection of the rights and freedoms of others. Rather it is suggested that denial of the right to participation in associations undermines the overall protection of rights and freedoms.

JSMP considers that Article 11 (a) and (g) breach Constitutional protections and international standards. They also impermissibly discriminate against foreigners for unspecified reasons.

Recommendation 2. Article 11 (a) and (g) should be repealed. Article 9 should be amended to specifically permit the participation of foreigners in political, trade union or professional organisations.

3.5 National security considerations

National security considerations underpin many aspects of a country's immigration and asylum laws. States have a legitimate interest in managing the inflow of foreigners and in ensuring territorial integrity and peace from external security threats. However any laws restricting basic rights for national security concerns must be legitimate, targeted and proportionate. National security considerations cannot be used as an overall blanket to cloak interference with basic rights or breach of procedures.

The ICCPR states in Article 4 that:

> In times of public emergency which threatens the life of the nation and the existence of which is officially proclaimed, the State Parties to the present Covenant may take measures derogating from their obligations under the present Covenant to the extent strictly required by the exigencies of the situation provide that such measures are not inconsistent with their other obligations under international law and do not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin.

This protection is reflected in Section 25 of the Constitution.

Article 12 of the Immigration Law attempts to limit the right to freedom of expression and assembly by reference to the 'national interest', but does so in a general way that allows scope for abuse. Article 12 states that:

> The Ministry of the Interior can, on good legal grounds, prohibit foreigners from organising conferences, congresses, artistic or cultural demonstrations, whenever these may threaten the Nation's relevant interests or international relations.

There is no definition of what the 'Nations relevant interests' are and this Article seems to conflict with the Constitutional guarantee on the freedom of peaceful assembly and right to demonstrate contained in Sections 25 and 42 which do not qualify these rights according to the 'Nations relevant interests'. There is no basis for distinguishing between the rights of foreigners or nationals of Timor Leste to exercise their right to peaceful freedom of expression and assembly.

Whilst fundamental human rights such as the right to freedom of expression and assembly can only be restricted when a State of Emergency is officially proclaimed, it is permissible for the State to restrict certain other rights for 'national security' or 'public order' grounds in certain situations. Article 5(2) of the Declaration on the Human Rights of Individuals Who are not Nationals of the Country in which They Live states that certain human rights of foreigners are subject to:

> Such restrictions as are prescribed by law and which are necessary in a democratic society to protect national security, public safety, public order, public health or morals or the rights and freedoms of others.

However in all circumstances, the national security or public order justification must be capable of objective quantification and the restriction must be proportionate to the threat posed. This is not to say that national security considerations or the 'Nation's relevant interests' should be exhaustively defined in the legislation - although in some circumstances it would be preferable to include detailed objective criteria. However there should be some mechanism for ensuring that decisions to prohibit activities on account of the 'national interest' are capable of review or scrutiny. This could take the form of a declaration by the Minister of the Interior to the National Parliament in the individual case where the declaration could be subjected to scrutiny to ensure its validity and legality without requiring the Government to disclose any classified security information. Such a process would hopefully minimise the arbitrary and unfettered use of the 'national security' discretion. Bearing in mind the severe curtailment of the civic and political rights for 'national security' reasons during the Indonesian occupation, it may be particularly desirable to have such a system of checks and balances.

In JSMP's view, Article 43 of the Constitution best gives effect to the need to balance national security and public order considerations with respect for basic human rights. This states that:

> 1. Everyone is guaranteed freedom of association provided that the association is not intended to promote violence and is in accordance with the law.
>
> …
>
> 3. The establishment of armed, military or paramilitary associations, including organisations or a racist of xenophobic nature, or that promote terrorism, shall be prohibited.

Finally, to the extent that there are valid national security or public order reasons for prohibiting certain types of activity, JSMP believes that domestic criminal legislation is the appropriate forum for penalising activities which may affect the national interest - not sweeping provisions in an immigration law. Equivalent security crimes in other jurisdictions include the crimes of treason and espionage, unlawful possession of weapons charges and other targeted security offences. This maintains basic rights whilst criminalizing dangerous activity in a way that does not discriminate between Timorese and non-Timorese nationals.

Until a new Penal Code is drafted for Timor Leste, a combination of Timor Leste, UN and Indonesian law together with international standards is applicable. It is submitted that these laws include scope for addressing any legitimate security concerns of the government.

There are further examples of the use of 'national security considerations' throughout the Immigration Law. Articles 15 (Denial of Entry) and Articles 29 (Refusal of Entry) are other provisions where entry to Timor Leste is refused to foreigners who:

> constitute a risk or a serious threat to health, public law and order or to the international relations of the Democratic Republic of Timor Leste.

Whilst the provisions provide the Government with a broad discretion to deny entry, these provisions are permissible as the Government has the prerogative to admit to Timor Leste whomsoever it choses.[15] However the inclusion of such 'public interest' discretion imposes an obligation on the Government to ensure that the discretion is used properly and for good legal reasons based on solid evidence. Significantly, a right to appeal a denial of entry is provided for in Article 27 (Appeals).

Recommendation 3. Article 12 should be repealed.

Recommendation 4. Where national security or public interest considerations are invoked in order to prohibit a certain association, person or event in Timor Leste, a

[15] With the exception of asylum seekers and refugees who have a right to apply for asylum pursuant to the Universal Declaration of Human Rights.

declaration to this effect should be submitted to the National Parliament for their scrutiny.

Recommendation 5. Any legislation containing a 'national security', 'public interest' or 'international relations' discretion should define with some particularity what matters are considered to pose a risk to these interests.

Recommendation 6. Detailed guidelines should be prepared for immigration officials setting out what matters can and cannot be taken into account when making decisions based on 'national security', 'public order' or 'international relations' criteria.

3.6 Impermissible interference with privacy

Another area of concern with the Immigration Law is in the extent it attempts to collect private information from foreigners. Certainly the collection of some information (such as that required to issue visas or to register associations) is relevant and necessary to the regulation of the entry, exit and status of foreigners and enforcement of normal domestic laws. However there are provisions in the Act which attempt to collect private and personal information for reasons extraneous to the operation of the visa regime and which arguably interfere with some aspects of the right to personal privacy. Some of these provisions appear to be intended primarily to monitor the activities of foreigners rather than merely to obtain sufficient information for the enforcement of immigration controls. Other provisions are worded in overly prescriptive way which may allow some room for abuse.

Clearly there is a degree of subjectivity in determining what information is sufficient for the purposes of immigration control. However once again, a purposive test should be applied. In each instance it is relevant to ask whether the information is strictly necessary for the operation of the immigration laws, or whether the collection of the information impermissibly infringes the right to personal privacy.

The right to privacy is a fundamental human right recognised in a host of international instruments.[16] The Universal Declaration of Human Rights states at Article 12 that:

> No one shall be subjected to arbitrary interference with his privacy, family home or correspondence…

The Constitutional protection of the right to privacy is contained in Section 36.

However there are a number of provisions within the Law which arguably infringe aspects of this basic right to a greater or lesser degree.

One instance of an overly prescriptive law is the requirement, contained in Article 6, that foreigners must carry the document that substantiates their identification and legal status in the National Territory *at all times.* Would a person be committing an immigration

[16] See for example Article 17 of the ICCPR

offence if they did not have their identification document whilst at the beach? The provision could be amended by requiring foreigners to produce their identification document within a reasonable period of time.

Article 6(2) states that the identification document must be presented by the foreigner whenever asked to do so by an authority or agent of the authority. However there is no definition of who the 'authority' or 'agent of the authority' is. Is it only police who can require a foreigner to present identification or can any government employee or village authority do so? The ambiguous wording of this provision leaves scope for some abuse.

Article 7 imposes a continuing duty on foreigners to notify the Migration Department of any changes in their marital status, profession, domicile or nationality without reference to whether this information is relevant to their visa status. Whilst a person's nationality or domicile may be, the others are not. This provision should be amended to require only the provision of information relevant to a person's visa status.

Article 9 regulates the establishment and registration of foreign associations. The government has the right and the duty to make laws concerning the registration requirements for associations and most of the requirements for registration of associations are standard. However the need to submit a detailed membership list is not. Individuals have a right to privacy concerning the associations they chose to become members of. There is no justifiable basis for requiring this information.

Another article which arguably breaches aspects of the right to privacy is Article 62.2 which requires all persons who provide lodging to foreigners to keep a record of that information including the name, date of birth, details of the expiration document, nationality and date of entry and departure from the lodging.

This may be a legitimate requirement for hotels, guesthouses or other commercial undertakings who charge rates or rents for lodgings. The government has a right to collect revenue, including income taxation, and to require commercial enterprises to lodge periodic financial statements. However it is difficult to see why foreigners who are staying with friends, relatives or for free with other organisations (eg the Church) should be subject to a system for monitoring of their movements. It is notable that Indonesian authorities maintained a similar system for the registration of foreigners during the occupation of Timor Leste.

A related problem area - although not one related to the right to privacy - concerns the penalty for non-observance of the registration requirement. The penalty does not fall upon the person obliged to notify of the registration, but upon the foreigner. Article 122 imposes of fine of between USD25 and USD200 for the non-observance of the requirement for lodging registration.

It is questionable how a foreigner can be held liable for the potential omission of his host in failing to keep a record of lodging registration. As the obligation to provide registration information falls on the Timorese host, the penalty for non-compliance

should fall on the same person. Otherwise there is no incentive for the host to comply. As it currently stands there is potential for widespread abuse of this provision. Foreigners may be informed at any time that their registration details are not up to date and that they are subsequently liable for a substantial fine of up to USD200. Such a result would be neither fair nor encourage visitors to Timor Leste.

Whilst many of the infractions referred to above are in themselves minor, viewed cumulatively together with the restrictions on freedom for expression for foreigners, they present a picture of an over-intrusive state.

Recommendation 7. A number of relatively minor changes should be made to certain sections of the Law to ensure its adherence to the right to personal privacy and freedom from arbitrary interference. Article 6 should be amended to define the 'authority' and 'agent of the authority' that are entitled to require foreigners to identify themselves. The Article should also be amended to allow the production of the substantiating identification document within a reasonable period of time. Article 7 should be amended to require updated information about marital status and profession only to the extent that it is relevant to a person's visa status. The requirement contained in Article 9 for detailed membership lists of associations to be submitted to the government should be removed. Article 62(2) should be amended to require only persons receiving payment for lodging to keep a record of registration information, and only for the purposes of maintaining commercial records. Any penalty for failure to comply with this requirement should be levied from the hosts who have the obligation, not from the foreigners.

4. Asylum and Refugee Provisions

4.1 Refugees Convention and humanitarian protection.

On Human Rights Day, 10 December 2002 the President of Timor Leste signed the instruments of accession to the Convention on the Status of Refugees and its Optional Protocol[17] ('the Refugees Convention') The operation of Section 9 of the Timor Leste Constitution automatically incorporates the protections provided for under the Refugees Convention into domestic law and invalidates any provisions contrary to the Convention. Hence the Government of Timor Leste has undertaken to guarantee all the rights provided for under the Refugees Convention, most importantly the right to seek asylum, the determination of asylum claims according to law and the protection of those recognized as meeting the Convention definition of a refugee against "refoulement" or expulsion to a country where they may face persecution due to their political opinions, religious beliefs, race, nationality or membership of a particular social group.

[17] As of the date of writing, the instruments of accession had been deposited with the UN inNew York. The only step remaining to be taken before the Convention enters into force, is its publication in the Official Gazette.

The Constitution also provides that all rights will be interpreted in accordance with the Universal Declaration of Human Rights.[18] Article 14 of the Universal Declaration of Human Rights provides that "Everyone has the right to seek and to enjoy in other countries, asylum from persecution."

In addition to Timor Leste's international obligations arising from ratification of the Refugees Convention and incorporation of the Universal Declaration of Human Rights, the Timor Leste Constitution provides a further Constitutional basis to the right to seek asylum and refugee protection. Section 10 states that:

> The Democratic Republic of East Timor shall grant political asylum, in accordance with the law, to foreigners persecuted as a result of their struggle for national and social liberation, defence of human rights, democracy and peace.

According to the Constitution the rights of people to seek asylum in accordance with the Refugees Convention are protected and any breach of these provisions is arguably unlawful. However there are also vulnerable people who may have fled their countries of origin and although they do not fit the definition of a refugee as defined by the Refugees Convention they are in need of protection.

The Immigration Law provisions are heavily based on Portuguese asylum law, with the notable exceptions of the Portuguese "residence permit for humanitarian reasons" (5 years) for where a person falls short of the more exacting "refugee" definition but nonetheless fears return to their home country due to "armed conflict or repeated outrage of human rights" in their home country, and "temporary protection" (2 years) for large scale movements of persons fleeing from armed conflicts.[19]

Consideration should be given to the re-insertion of these important provisions, or alternative mechanisms for addressing humanitarian cases or crisis. An asylum process alone is an insufficient means of providing protection to all those who Timor Leste is obliged to protect, those in need of protection or in situations where there is a sudden influx of persons seeking protection. For example, a person who has fled from a situation of civil war, where they may face death or serious harm but not necessarily individualized persecution for one of the reasons in the Refugees Convention (i.e. race, religious belief, nationality, membership of a particular social group or political opinion), but may nonetheless have a genuine need for protection. Likewise, there may be persons who have fled from a country where they have faced persecution in the past, but where the risk of persecution in the future is slim, but have strong humanitarian reasons on the basis of post traumatic stress disorder or other conditions arising from that prior persecution, for

[18] Constitution of the Democratic Republic of East Timor, section 23. Whilst the Refugees Convention does not explicitly state the right to seek asylum, it is implicit in the obligation upon a state not to "refoul" or expel person to a country where they may face persecution due to their political opinions, religious beliefs, race/ethnicity, nationality or membership of a particular social group.

[19] Portuguese Law No 15/98 of March 26, New Legal Framework in matters regarding asylum and refugees, Articles 8 and 9.

not returning to the home country. At present there is no mechanism for providing humanitarian protection in such cases.

The Timor Leste Constitution prohibits the extradition of a person to a country where they may be subject to the death penalty, life imprisonment or torture and inhuman, degrading and cruel treatment[20]. However neither this Law nor any other provides any legal mechanism for ensuring this protection, except for those who already meet the Refugee Convention definition.[21] Footnote because Constitution already in line with CAT.

Recommendation 8. A mechanism in addition to asylum should be included to provide protection against return, deportation or extradition in cases where there is a strong humanitarian need for protection outside of the terms of the Refugees Convention, and/or risk that the person will face torture or other inhuman or cruel treatment or punishment for any reason, in the country to which they will return.

4.2 Applying for Asylum inside Timor Leste and at the border

The Immigration Law provides the mechanism by which asylum applications can be received, processed, and decided, including the consequences which flow from that decision, to grant refugee status or to deport. Any foreigner can seek asylum either from within Timor Leste or at the border.

4.2.1 Applications made within Timor Leste

If the claimant is already within Timor Leste, the applicant must submit a claim within 72 hours of arriving in Timor Leste.[22] In situations where a foreigner already in Timor Leste for some time, becomes aware of circumstances in their home country which may give rise to a claim for asylum, they must submit a claim for asylum within 72 hours of becoming aware of these new circumstances.[23]

The request is made by submitting a request to any police authority orally or in writing.[24] The asylum seeker must submit identification documents and those of any family members included in the request, a statement of the circumstances or facts that constitute the basis for the asylum request and a list of all the evidence to be relied upon. There is not a right for the asylum seeker to lodge further information in support of their

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[20] Section 35(3) of the Constitution

[21] In addition, Timor Leste will hopefully become a signatory to the Convention Against Torture (CAT) in the near future. Article 3 of CAT prohibits a state from expelling, returning or extraditing a person to another State where there are substantial grounds for believing that they would be in danger of being subjected to torture[21].

[22] Article 92(1)

[23] Article 92(2). For example, a coup occurs in the home country and the claimant is a Minister for the ousted government

[24] Article 92(1)

application. UNHCR is informed that an asylum request has been made.[25] Those requests more than 72 hours after entry are not admissible.[26] There are no provisions for the appeal, extension or waiver of this provision, irrespective of the reason for late lodgement.[27]

JSMP is extremely concerned that the imposition of the 72 hours time limitation could result in Timor Leste being in breach of its international obligations owed under the Convention, specifically to protect against refoulement. The Convention does not sanction such a time frame and many countries do not impose any time requirement on the lodgement of asylum applications and claims. It is questionable why a timeframe, let alone such a narrow and rigid one, is necessary in Timor Leste.[28] The imposition of this requirement could result in a genuine refugee having failed to lodge within 72 hours, having no opportunity to even have their claims considered and could result in them being returned to a country where they may be killed or face other serious human rights violations.

Asylum seekers are often not aware that they have a right to seek asylum. Even if they are, they are usually not aware of the particular requirements of the host country's asylum regime upon their arrival and may not have the means, through lack of local knowledge, language barriers or fail to find out within time, what is required and to meet those requirements. Nor may they have time to find someone who is able to assist them with their request. The Law does not provide right to legal representation and assistance in preparing a claim. Even if the law was amended for a right to legal representation, the preparation of a detailed statement for the basis of an asylum claim may take in excess of 20 hours and several weeks or months to prepare supporting evidence which may have to come from overseas.

4.2.2 Applications made at the border

It is positive that asylum requests can be made at the border. However the Law is silent as to what constitutes an asylum request at the border. The law needs to state clearly what can constitute a request. In order to prevent possible expulsion of a genuine refugee presenting at the border, a broad provision of what constitutes an initial claim for asylum should be included in the Law. It is also necessary for PNTL immigration officials to be extremely well trained in identifying potential asylum seekers and implementing the special beneficial laws applying to them.

Article 21 of the Law provides that children will not be allowed entry into the country if they are not accompanied by the person who has parental custody. Unaccompanied asylum seeker minors may fall foul of this provision. Although there may be scope within

[25] Article 92(4)
[26] Article 92(1) read together with Article 94(d) concerning inadmissible requests.
[27] Although Article 94(d) does provide some possibility of arguing for the admissibility of a claim made after 72 hours by stating that the claim is inadmissible where "the request is presented, **unjustifiably** beyond the deadline….." No indication of a "justifiable" grounds for a request out of time is provided.
[28] The Portuguese law upon which these provisions are modelled has an 8 day submission period, which we would submit is not sufficient, but clearly preferable to 72 hours.

Article 21.2 for exceptional cases to be allowed entry into the country it should be clearly stated that minors seeking asylum will be permitted into the country.

4.3 Admissibility Test

4.3.1 Summary screening process

Aside from the unduly restrictive time frames for lodging asylum requests, a second matter of concern is the imposition of a summary screening process applicable to claims submitted in-country and at the border, purportedly to "screen out" at a preliminary level, certain cases. Again JSMP is concerned that such procedure may lead to Timor Leste being in breach of its international obligations owed under the Convention. The law provides that people can be "screened out" if any of the following apply:

- Their claim is considered to be unmeritorious, fraudulent or abusive;
- Where the applicant may have a right to protection in another country;
- Where the applicant may have committed a war crime, crime against the peace, a serious non-political crime outside of Timor Leste;
- Where the applicant has been sentenced to three years or more in prison in Timor Leste; and
- Where the applicant is subject to deportation from Timor Leste.[29]

Screening processes put Timor Leste at risk of expelling genuine refugees as such processes prevent individual consideration of the applicant's claims.

4.3.2 Objections to admissibility test

The Law sets out "clear indications" that the request is fraudulent or constitutes an abuse of the asylum process which include the use of counterfeit or falsified documents,[30] destruction of identity documents,[31] provision of false testimony concerning the purpose of the request,[32] or failure to declare a prior asylum application in another country.[33]

Whilst these matters are all relevant to the assessment of an asylum claim, and should be included as part of the substantive assessment of the claim, none of them should constitute an initial admissibility threshold test. The application of this admissibility threshold test could well result in Timor Leste being in breach of its fundamental obligation to guarantee against expulsion where a genuine refugee is not identified because they were inappropriately excluded at this preliminary stage.

Genuine refugees frequently are forced to use false documents, destroy their documents or even have no documents when they flee their country of origin. Refugees are often under the control of people smugglers who frequently advise people to destroy their

[29] Article 94(1) (a)-(e)
[30] Article 94(2)(a)
[31] Article 94(2)(a)
[32] Article 92(2)(a)
[33] Article 92(2)(b)

travel documents or confiscate their documents before arriving in their country of asylum. A political activist from Burma may be denied a travel document by the Burmese authorities as part of the persecutory conduct they suffer in Burma. Alternatively in Somalia there is no recognised state authority to issue travel documents and therefore refugees have no option but to use false documents or no documents to flee. The use of false documents or destruction of identity documents is not a valid or relevant means of distinguishing genuine from non-genuine refugee cases.

The law also seeks to define situations, "safe countries" and "third countries of shelter" where a person may have prior protection in that other country, and hence is excluded from the refugee determination process at this admissibility stage. Issues of prior protection that may be available to an asylum seeker in another country, are amongst the most complex and difficult to determine and should not be part of a summary decision making process to determine admissibility.

The Law defines a "safe country" as a "country from which one can safely say, in an objective and verifiable way, does not generate any refugees or a country from which one can say that the causes that could have previously justified the protection of the 1951 Geneva Convention have ceased to exist."[34] In essence, this supports the creation of a list of countries against which no asylum claims can be entertained in any circumstances. Whilst there may be a handful of countries in the world where it could be reasonably safely said would not at the present time generate asylum claims, there is always a risk of refoulement where the individual merits of a claim have not been examined.

The law also defines "Third countries of shelter" as other countries where the asylum seeker is not at risk and has received protection, lodged a claim for asylum, been admitted and protected against exclusion to the home country. [35] Whilst it is the case that refugee protection is reserved only for those who have no alternative status in any other country, a high level of knowledge of the level of protection and right of re-entry afforded by that third country would be required to make any valid assessment as to whether an asylum seeker should be excluded on this ground.[36] It is implausible that the Timor Leste immigration authorities will be equipped with the substantive knowledge of other countries' visas and systems of protection in order to carry out lawful summary admissibility determinations under this provision.

4.3.3 Procedure for admissibility test

For those applying from within Timor Leste, the National Director of the PNTL must decide on the admissibility of the request within 20 days. [37] Failure to decide within this period results in the request being automatically admitted[38]. The asylum seeker is to be

[34] Article 94(3)(a)
[35] Article 94(3)(b)
[36] For example, if a person from Iran has been issued with a "temporary protection" visa by the Australian authorities, a Timor Leste immigration officer is unlikely to know that person has no right to re-enter Australia and thus refusal to entertain their asylum claim could result in them being returned to Iran and tortured.
[37] Article 95(1)
[38] Ibid

notified of any decision to refuse admissibility within 24 hours, and warned that they must leave Timor Leste within 10 days or face deportation.[39] UNHCR must also be informed of the decision.[40] There is a right to appeal the decision within 5 days to the Minister of the Interior[41] and a right to be informed of the appeal right.[42]The Minister must personally decide the appeal within 48 hours.[43] The Minister's decision can be appealed to a court within 8 days.[44] Further, it is not clear how an applicant could exercise the right to appeal, as there is no requirement that she or he be notified of the Minister's decision, nor the right of appeal to the court or the timeframe.

For those seeking asylum at the border, the claimant remains at the international area of the border while awaiting the decision on admissibility.[45] This will necessitate that Timor Leste constructs facilities for persons waiting in the international area in order to comply with Article 111 of the Law which guarantees asylum seekers humane respectful treatment during the decision making process. The decision on the admissibility of the request is the same as above, but in an even shorter timeframe.

UNHCR is to be informed of the asylum request and has 48 hours to interview the claimant.[46] The National Director of PNTL must decide the request between 2 and 5 days.[47] Should no decision be made within this timeframe, the claimant is automatically admitted to Timor Leste.[48] Both the claimant and UNHCR must be informed of the decision[49] but no timeframe for notice is provided for. The claimant can appeal a decision to refuse admissibility of the claim to the Minister within 24 hours of notification of the decision.[50] UNHCR has 24 hours within which it can provide written comment on the National Director's decision.[51] The Minister then has 24 hours in which to make a final decision.[52] There are no appeal rights to a court in relation to the admissibility decision. These timelines are extremely confusing and will undoubtedly lead to breaches of the requisite timeframes.

Recommendation 9. All of the admissibility screening provisions should be removed for both in-country and border applications so that the substantive merits of each asylum claim can be carefully examined. Should screening provisions be retained, they should not distinguish between applications made in-country and those at the border and all time frames for decision making should be reviewed to ensure they provide time for considered and lawful decisions.

[39] Article 96(1)
[40] Article 95(2)
[41] Article 97(1)
[42] Article 96(2)
[43] Article 97(2)
[44] Article 97(2)
[45] Article 101(1)
[46] Article 99(1)
[47] Article 99(3)
[48] Article 101(3)
[49] Article 99(4)
[50] Article 100
[51] Article 100(2)
[52] Article 100(1)

Recommendation 10. On occasions when in-country applicants make an appeal to the Minister, the applicant should have a right to be informed of the decision and appeal rights. The time frame for an appeal to the court should be specified. Regarding provisions for border applicants, a timeframe within which the applicant and UNHCR should be informed of the admissibility decision, and appeal rights against a decision of the Minister, and timeframe for an appeal, need to be included.

4.4 Substantive decision making process

This is by far the most important phase of the decision making process, when it must be determined whether an asylum seeker has a well founded fear of persecution for reason of their political opinion, race, religion, nationality or membership of a particular social group and does not have protection in any other country.[53] A deadline of 60 days, renewable for a further period of 60 days, is set for the investigation and fact finding process by the PNTL Migration Department.[54] JSMP is concerned about the lack of natural justice provisions contained in the law. The applicant does not have a right to a hearing. UNHCR, but not the applicant, has an opportunity to have input into and to request information during the fact finding process.[55] It is noted that the applicant and UNHCR are provided with a copy of the proposal which is sent from the PNTL to the Minister for the Interior and can comment on the proposal within five days. However, there is no requirement that reasons for the decision is provided.

The applicant and UNHCR are notified of the Minister's decision,[56] including the right to appeal to the Court of Appeal[57] which must be lodged within 20 days.[58] The Law does not specify grounds of appeal, or if time runs from the time of decision, or time of notification. Unsuccessful asylum seekers, who do not appeal, are granted a 30 day grace period to leave the country[59] after which time if they have not secured another visa, deportation proceedings will commence.

Legal representation or assistance to the asylum seeker is not provided for under the Law. As UNHCR has its own mandate and will in essence be conducting its own assessment of the claim, it does not act as a representative for the applicant. As most asylum seekers have very few financial resources, it is very important that they be eligible for Legal Aid, and that Legal Aid lawyers receive specialist training in preparing asylum claims and supporting claimants throughout the process. Given that the process does not entitle asylum seekers to be heard at a face to face interview or hearing, the quality of written submissions will be all the more important.

Free professional interpreting is another essential element in ensuring that the asylum seeker is able to communicate with their lawyer, UNHCR, and decision makers.

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[53] Refugees Convention, Article 1A(2) and Optional Protocol, Article 1(2)
[54] Article 103(2)
[55] Article 103(3)
[56] Article 104(2)
[57] Article 104(1) and (2)
[58] Article 104(1)
[59] Article 105(1)

Translation of essential correspondence such as decisions and information concerning appeal rights should be provided, or at minimum read to the applicant in a language they understand.

Given the high stakes in ensuring the proper identification of refugees, the law must ensure a high quality of decision making and a high standard of procedural fairness. It remains to be seen to what degree the PNTL Migration Department are capable of undertaking relevant investigations and inquiries, country research and analysis of relevant principles and decisions of refugee law necessary to make quality recommendations. The Minister is unlikely to have at his or her disposal resources to check or further investigate matters not explored in full by the PNTL. Moreover the Minister would not have time to conduct such checks given that he or she has only 8 days in which to reach a final decision.

It is a major shortcoming of the Law, that the asylum applicant has no right to receive written reasons for the decision.[60] Without reasons, decision makers are totally unaccountable for their decisions and such a lack of transparency will not encourage high quality decision making. Moreover it will be impossible for the Courts, who are responsible for overseeing the decisions of the PNTL and Minister for the Interior, to determine whether decisions were made in accordance with law or not. In addition, it will be impossible for applicants to file relevant appeal grounds as they can only guess what might have been the grounds for their rejection.

Article 87 of the law allows the spouse and minor children to benefit from any granting of asylum. It is important in ensuring that the Law recognizes to the right to family unification, and for a child not to be separated from both parents.[61] The law currently fails to make provision for the circumstance where it is the child in the family who is determined to be a refugee and may therefore be in breach of the Convention on the Rights of the Child. The law does not allow for the parents of a child or the child siblings of a child to also obtain the benefit of the granting of asylum. Such a situation may lead to the break-up of a family unit and possibly leave a refugee child in Timor Leste without his or her immediate family. It may also be useful to widen the definition of those who can obtain the benefits of the provision to those who are dependent on the family unit such as grandparents or other relatives that are financially, emotionally or physically dependent on a member of the family unit.

Recommendation 11. The applicant should have the right to legal representation and professional interpreting services throughout the process.

[60] Article 104 provides only an obligation to notify of the decision, not the reasons for the decision.
[61] Article 9(1) of the Convention of the Rights of the Child relates to the fact that children should not be separated from his or her parents. The Preamble, Articles 5, 10 and 18 of the same Convention relate to the family unit being the fundamental unit of society which should be protected by the State.

Recommendation 12. The applicant should have the right to a hearing, in the form of an interview with the decision maker, attended by the applicant's legal representative, UNHCR and a qualified interpreter if necessary.

Recommendation 13. All timeframes throughout the process should be reviewed to ensure that they are sufficient for considered and lawful decision making, and reasonable periods for applicants and their lawyers to prepare supportive material.

Recommendation 14. The applicant should have the right to written reasons for the decision which includes a summary of evidence considered, findings of relevant facts and application of applicable law as well as the final decision.

Recommendation 15. It should be clarified whether the timeframe for appeal runs from the time of decision or time of notification.

4.5 Character requirements for refugee status

The imposition of requirements, in addition to establishing a well-founded fear of persecution, should be carefully examined as they may have the consequence of denying that person protection, hence resulting in them being sent to a country where they face persecution.

Article 86 prohibits the grant of refugee status to certain categories of person.

- *Those who have committed acts that go against the basic interests or the sovereignty of RDTL.* This provision does not reflect the lawful limits on the grant of asylum imposed by the Refugees Convention. Additionally, it is unduly vague and could easily be manipulated for inappropriate reasons should an asylum seeker's presence or claims be inconvenient to the Government or other persons.
- *Those who have committed crimes against peace, war crimes, or crimes against humanity, those who have committed acts that are contrary to the goals and principles of the United Nations. Where there is a proven risk or justified threat to internal or external security or to public order.*[62] These provisions are more or less consistent with Articles 1F (a), Article 1F(c) and Article 32 of the Refugees Convention respectively.
- *Those who have committed offences punishable by imprisonment of more than 3 years.* This provision could lead to refugees being inappropriately excluded from protection. Many refugee producing countries persecute their citizens on the basis of their political opinions, religion etc, including under laws which do not meet international standards and which result in imprisonment. For example, under this law, an East Timorese political (Xanana is not a good example) fleeing from persecution by Indonesia would be excluded because he had been convicted of offences punishable by imprisonment of more than 3 years under Indonesian law. Or less controversial, a peace activist or gay person imprisoned due to their political opinion or sexuality in the persecuting country, would be excluded under

[62] Article 86 a -d.

this Law. In addition, the Law takes no account of the actual sentence received by a person. For example, the maximum penalty for an offence may be 3 years but a person sentenced to only 6 months. Such a person would still be excluded. Finally, this provision is outside of the permissible exclusions provided for by the Refugees Convention which allows status to be refused only where a person has committed a "serious non-political crime outside the country of refuge prior to his admissions to that country", and not excluded on the basis of offences committed within the host country. Despite this, many countries do impose additional character requirements on refugees in contravention of the Refugees Convention, hence common state practice is not a good example in this regard.

Recommendation 16. Article 1F of the Refugees Convention exhaustively defines the permissible grounds for exclusion from protection under the Convention, hence the Law should adopt the wording of those provisions and remove all others.

Recommendation 17. The Refugees Convention uses "serious, non-political crime" as its standard for exclusion. The current provision catches a much broader range of crimes than that sanctioned by the Convention. It is suggested that if Timor Leste does still wish to impose character requirements beyond those permissible under the Convention, (which could be later challenged as unconstitutional) the wording should at least be changed to require that the offence be a serious non-political crime committed outside the country of refuge. In addition consideration could be given to basing exclusion on the actual sentences served and not the maximum penalty, and placing a time limit on the effect of the conviction to prevent exclusion in all such cases indefinitely.

4.5 Cessation of Refugee Status

4.5.1 Grounds

Given the very serious consequences which could potentially flow from an incorrect decision to cancel refugee status, it is essential that appropriate criteria for cessation and adequate procedural safeguards are in place, to ensure that incorrect decisions are not made, which place Timor Leste in breach of its obligations to refugees. The Law provides for 10 grounds for cancellation of refugee status, some controversial and some not as they reflect the standards of the Refugees Convention. Although relevant to most aspects of the implementation of asylum law, the primacy of Articles 109 and 68 which prohibit the deportation of a person "to a country where he/she may suffer life threatening persecution for ethnic or religious reasons, nationality, social group or political ideas"[63] or "where his or her freedom is at risk for any of the causes which may constitute basis to grant asylum"[64] are essential when considering the implementation of cessation.

4.5.2 Procedure

A fundamental weakness with this law is the lack of procedural safeguards in place for decisions relating to the cessation of refugee status. As mentioned above, the decision to

[63] Article 68

[64] Article 109

cancel refugee status is a very grave and weighty one which may carry life or death consequences for the refugee. A high standard of procedural fairness will protect against incorrect decisions. Clear procedural omissions in the current law are:

- the absence of notice provisions so that a refugee knows that their status is under review. The right for the refugee to respond or comment on adverse information being considered by a decision maker within a reasonable time frame. Whilst the law does provide a right for UNHCR to be informed and to comment within 5 days,[65] the refugee his or herself has no such right.
- the right to a written decision containing a summary of the facts as found, and reasons for the decision within the terms of the law.
- a right to be informed of appeal rights and timeframe. There is a right to appeal to the Court of Appeal within 20 days of the decision and has the effect of a stay.[66] (it is not clear if time runs from the time of the decision itself or from notification of the decision)

Recommendation 18. The grounds for cessation of refugee status should be amended to reflect the Refugees Convention which defines this area exhaustively.

4.5.3 Effect of loss of right to asylum

Article 108 rather confusingly outlines the effects of the loss of right of asylum. For those who have lost their status due to engaging in prohibited acts or activities under this Law, loss of status results in the harshest result: deportation without the person being able to remain on an existing visa or to apply for any other visa or residence status they may be eligible for. One presumes that this provision must be tempered by prohibition on deportation of any person to a country where he/she may suffer life threatening persecution for ethnic or religious reasons, nationality, social group or political ideas[67]however this should be explicitly stated.

Recommendation 19. The provisions relating to the effect of loss of right to asylum are confusing, complicated and unnecessary. They should be removed. If retained, it should be clarified that the prohibition on deportation of a person where they may face persecution prevails over other provisions

4.6 Social Support for asylum seekers and refugees

Asylum seekers often arrive in a country of refuge without means to support themselves, hence the right to support or the right to work are often as crucial as the right to make an application for asylum or have access to a due process. Under the Refugees Convention refugees and asylum seekers are entitled to the same treatment with respect to public relief and assistance and access primary school as is accorded to nationals.[68]

[65] Article 110(2)
[66] Article 110(3)
[67] Article 68
[68] Articles 22 and 23 of the Refugees Convention

With regard to work rights, the Refugees Convention requires that host countries provide to refugees and asylum seekers "the most favourable treatment accorded to nationals of a foreign country in the same circumstances"[69] and shall give "sympathetic consideration" to attributing to them the same work rights as nationals.[70]

The Law does not provide asylum seekers with the right to work. Without social security or the right to work, asylum seekers may in effect be denied the means of survival whilst awaiting the outcome of their application. This may also be in breach of the Convention.

As highlighted elsewhere, an additional important omission in the Law is the absence of the right to professional interpreting services throughout the process, and the right to legal representation including the appointment of counsel where the asylum does not have the means to pay.

A major omission in the Law is its failure to make any provision for the social rights of those who have been granted the status of refugees beyond the "same rights as foreign residents" in RDTL,[71] which are not elucidated in the Law.

Recommendation 20. The Law should be amended to grant asylum seekers full work rights, interpreting services, legal representation and access to the available public health care and education system for the duration of the application process. The Law should be amended to ensure that these rights endure if the person has the status of a refugee.

5. Deportation

5.1 Grounds for Deportation

A decision to deport carries with it very serious consequences often completely uprooting a person's family, social and working life, and prohibiting that person from re-entering the country indefinitely or for long periods. A deportation decision can also affect the rights of others aside from the deportee, including their family, most especially any spouse and children. International standards apply where the deportee is an asylum seeker or refugee where the stakes of the decision are considerably heightened. For these reasons it is necessary to examine the deportation provisions of the Law in some detail to determine whether it provides sufficient safeguards including clear, necessary, and lawful grounds for deportation, procedural fairness to decrease the risk of an incorrect decision being made and adequate appeal rights to ensure oversight of the power.

The grounds for deportation provided for under the law, relate to foreigners who:

- Enter or remain illegally in the national territory;
- Commit acts against national security, public order or good morals;
- Constitute a threat to the interests and dignity of the DRTL or its citizens;

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[69] Refugees Convention, Article 17(1)
[70] Refugees Convention Article 17(3)
[71] Article 89

- Interfere in an abusive manner in the exercise of the right of political participation reserved for the citizens of DRTL or are responsible by commission or omission or acts prohibited to foreigners under this law;
- Have committed acts that, if known to the authorities of the RDTL, would have prevented their entrance into the national territory.[72]

In addition, JSMP understands that a number of citizens who have returned but been unable to prove their citizenship at the relevant time, have already been deported back to West Timor contrary to Section 35 of the Timor Leste Constitution which prohibits the expulsion of its citizens.

5.2 Commentary on grounds as they relate to asylum seekers, refugees and "ordinary" foreigners

There are particular concerns held for refugees and asylum seekers who are subject to these general grounds of deportation, due to the risk of serious harm that they may face if deported. Deportation of an asylum seeker or refugee back to the country against which they have secured or are seeking asylum constitutes a breach of Article 33 of the Refugee Convention, "prohibition on expulsion" of a refugee or asylum seeker "to any frontier where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion." The only exceptions to this prohibition are where the refugee or asylum seeker jeopardizes national security and public order[73] or having "been convicted by final judgement of a particularly serious crime, constitutes a danger to the community of that country."[74] In these situations, the refugee or asylum seeker should be given the opportunity to seek legal admission to another country.[75]

Some of those grounds conflict with other provisions for refugees and asylum seekers under the law, hence it is very important that the law be amended to reflect precedence given to the protective provisions for asylum seekers. Failure to do so may render those provisions unconstitutional.

- *Enter or remain illegally in the national territory.* This provision conflicts with the protection for asylum seekers that any proceeding for illegal entry is suspended when they submit a request for asylum.[76] It should be made clear that this beneficial provision prevails over the general deportation ground. These concerns do not apply in relation to "ordinary foreigners", as a sovereign state clearly has the right to deport those who enter or remain illegally in the national territory, providing there is procedural fairness and independent review.
- *Commit acts against national security, public order or good morals and*

[72] Article 63(a)-(e)
[73] Refugees Convention Article 32(1)
[74] Refugees Convention Article 33(2)
[75] Refugees Convention Article 33(3)
[76] Article 93(1)

- *Constitute a threat to the interests and dignity of the DRTL or its citizens.* These "public order" and "national interest" style grounds have been addressed in section 3.5 of this report. The same concerns apply here.
- *Interfere in an abusive manner in the exercise of the right of political participation reserved for the citizens of DRTL or are responsible by commission or omission or acts prohibited to foreigners under this law.* As has been argued elsewhere, many of the prohibitions on foreigners are unconstitutional and should be removed. Likewise, they should not be grounds for deportation for refugees, asylum seekers or "ordinary foreigners."

- *Have committed acts that, if known to the authorities of the DRTL, would have prevented their entrance into the national territory.* Whilst this is permissible in relation to "ordinary" foreigners, providing there is procedural fairness and adequate appeal rights, it does present difficulties in relation to refugees and asylum seekers. Under the Refugees Convention, the only permissible character grounds for the deportation of a refugee or asylum seeker is the commission of a "particularly serious crime, which continues to place the community at risk[77] or on grounds of national security and public order[78]. Some grounds for refusal of entry contained in Article 29 are far broader than this, such as previous expulsion

from the territory or having been sentenced to at least one years imprisonment, and therefore are impermissible.

Recommendation 21. A provision should be inserted clarifying that refugees and asylum seekers are not subject to the general deportation provisions and setting out special grounds of deportation for asylum seekers and refugees to reflect the wording of Article 32 of the Refugee Convention which exhaustively provides for the permissible grounds of expulsion of a refugee.

Recommendation 22. If refugees and asylum seekers remain subject to the general deportation provisions, two new provisions should be inserted. One clarifying that the ground of illegal entry or presence does not apply to a person who has lodged an asylum claim.[79] A second provision extending the bar on deportation of refugees to a country where his or her freedom is at risk[80] to all refugees whether they face expulsion under the general deportation grounds, or due to cessation of refugee status.[81]

Recommendation 23. A mechanism should be established to ensure that prior to deportation of an unsuccessful asylum seeker or refugee who has lost their status, any

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[77] Refugees Convention Article 33(2)
[78] Refugees Convention Article 32
79 That Article 68 prevails over the general deportation grounds.
[80] See Article 109
[81] At present this safety net provided by s 109 applies only to those refugees who have lost their refugee status due to the cessation clauses, and does not include those facing expulsion under the general deportation grounds.

humanitarian circumstances are considered including non-Convention related claims, and that an assessment is conducted as to whether the person is at risk of torture in the receiving country for any reason.

Recommendation 24. A mechanism should be established to ensure that the impact on any children affected by a deportation decision is examined and that the paramount interest considered is the best interests of the child,[82] and the right of the child not to be separated from either of his or parents.[83]

Recommendation 25. Some grounds for deportation should be further defined so that they meet the tests for purposiveness and proportionality. The ground relating to prohibited activities for foreigners should be removed on the basis that it is most likely unconstitutional and involves a penalty for exercising fundamental human rights.

5.3 Process and procedural fairness of deportation provisions

Before deportation procedures are commenced, foreigners who have fallen foul of the grounds in Article 63 can, by the National Director of PNTL or his/her delegate[84], be ordered to leave the territory[85] between 24 hours and up to 10 days.[86] Failure to comply with this order sets in motion deportation proceedings, and the coercive measures provided for in the Law in order to effect deportation.[87]

5.3.1 Fact finding process and decision

The Law authorizes a range of decision makers to be involved in the deportation process. The Head of the Migration Department of PNTL has the authority to commence deportation decisions. The National Director of PNTL has the authority to dismiss deportation proceedings (however on what grounds is not stated), the Ministry of the Interior is authorized to make the deportation decision, and the Migration Department of the PNTL has the authority to enforce deportation decisions. Despite this plethora of actors, it is not clear who is responsible for conducting the fact finding process or making the all-crucial initial recommendation regarding deportation. These responsibilities need to be clarified and are a key aspect of "due process" which is guaranteed under Article 71(2).

It is commendable that Article 73 provides a foreigner subject to the deportation process with a right to a hearing during the fact finding stage and "enjoyment of all guarantees to his or her defence." The Law does not however specify the nature of the hearing, the right to be provided with and comment on adverse information, nor go so far as to provide a right to legal representation by a public defender if the foreigner has insufficient means to

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[82] Article 3(1) Convention on the Rights of the Child
[83] Article 9(1) Convention on the Rights of the Child
[84] Article 64(3)
[85] Article 64(1)
[86] Article 64(4)
[87] Article 64(2)

engage counsel privately. Article 73(2) implies that the foreigner can suggest to the decision maker that certain inquiries be made, but that there is no obligation for the decision maker to carry these out "when the alleged facts are sufficiently proved."

As mentioned above, the deportation decision itself rests with the Ministry of the Interior.[88] If the decision is to deport, a deportation order is issued to the deportee and must include a statement of facts,[89] the deportee's legal obligations,[90] the deportee's right to appeal and timeframe,[91] the document used for entry to Timor Leste with indication of duration of the stay[92] and an indication of the country to which the deportee is to be sent.[93] This provision is commendable and necessary so that a deportee can if necessary effect their rights under Article 68 to put a claim that they may face persecution if deported to that country.

5.3.2 Appeal, stay rights and re-entry bans

The deportee has a right to appeal the decision within 10 days from the date of notification, to the Court of Appeal. However Article 77 guarantees that the deportation order will only be stayed or postponed for 48 hours, extendable up to 96 hours, (ie the deportation order can be effected anytime after the expiration of this period) hence an appeal should be made within 48 hours to guarantee that the deportee remains within the jurisdiction and hence is capable of lodging an appeal. A person should not be deported before the exhaustion and non-exercise of their appeal rights, hence the stay period should be extended to 10 days.

Even if an appeal is lodged, this does not necessarily guarantee a stay of the deportation order. Article 76(2) provides for a stay of the deportation order only to cases of foreigners who have entered and remained legally in Timor Leste or are permanent residents.[94] This means that a person falling outside of these categories (ie a temporary resident or person on a student, business or tourist visa, or a person whose visa status may have lapsed at some time) can be deported despite having appealed the deportation decision to the Court of Appeal. The limited utility of the stay provision may render it unconstitutional as it impacts upon the jurisdiction of the Court of Appeal and may therefore breach the separation of powers. In addition, deporting a person who has appealed that decision to a court, may constitute a contempt of that court. The stay provision should apply to all appeals of deportation decisions and this article should be amended accordingly.

Deportees are subject to a re-entry ban of between 3 and 10 years.[95] The Law does not stipulate who is authorized to decide the length of the re-entry ban, or the criteria upon

[88] Article 74(1)
[89] Article 74(2)(a)
[90] Article 74(2)(b)
[91] Article75
[92] Article 74(2)(c)
[93] Article 74(2)(d)
[94] Article 76(2)
[95] Article 69

which this decision should be based. Nor does the Law state whether the decision relating to the re-entry ban period can be appealed. These deficiencies should be remedied. Breach of a re-entry ban is a criminal offence and punishable by a prison term of up to 2 years and mandatory deportation must be ordered by the Court.[96]

5.3.3 Deportation as criminal punishment

A significant extension to this notion of deportation being imposed as part of a penalty for a crime can be found in Article 65 under which a Court has the power to order deportation as part of a criminal penalty in certain circumstances, taking the deportation order outside of the "due process" requirements imposed by the Law. A court is empowered to (on a discretionary basis) order deportation in addition to the "normal" criminal penalty where the foreigner is convicted of a crime carrying a prison sentence of 6 months or more. [97]

There are a number of concerns relating to these provisions. Firstly, deportation is an administrative process and should not be teamed or confused with criminal proceedings and imposed as a penalty by the judge considering the criminal matter. Criminal proceedings should be completed by the judge in the same way whether the suspect is a national or a foreigner, and then deportation proceedings commenced as an administrative procedure once the sentence has been completed, should the foreigner fall foul of the character requirements.

Even prior to the commencement of this law, District Courts have regularly made unlawful deportation decisions as currently they have no jurisdiction relating to deportation. Some deportation order have been made despite the foreigners being pre-trial, eroding the presumption of innocence. To date even Prosecutors have been known to make deportation decisions, a power clearly beyond their authority. Criminal proceedings and the administrative proceedings for deportation should be clearly separated to avoid such abuses.

Secondly, as there may be a significant discrepancy between any custodial sentence actually imposed and the sentence provided for under the law, the wording should be amended to reflect the actual sentence, such as "is convicted of a crime and sentenced to imprisonment for 6 months or more."

Recommendation 26. The authority responsible for the "fact finding" and recommendation aspect of the process should be clarified.

Recommendation 27. The stay or postponement on execution of a deportation order should be brought in line with the appeal period (ie extended to 10 days). An appeal of

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[96] Article 78

[97] Article 65(a). Article 65(b) and (c) increase the permissible length of sentence for residents depending upon the length of their residence. If less than 4 years, the maximum penalty permissible is 1 year imprisonment, if the person has been a resident for more than 4 years, the permissible sentence is 3 years imprisonment.

a deportation order to a higher court should stay all and not just some deportation orders.

Recommendation 28. The decision maker and criteria for determining the length of a re-entry ban should be specified, and whether there is a right of appeal in relation to this decision.

Recommendation 29. Courts should not be empowered to impose deportation as part of a criminal sentence. Deportation on character grounds should be a separate administrative process.

Recommendation 30. The criteria for deportation on character grounds should be re-examined to ensure that those who have been sentenced under laws in countries which do not meet international standards are not excluded. Additionally the criteria for deportation should be based on actual custodial sentences received, not maximums for a particular offence. Further, consideration should be given to considering only criminal convictions within a particular timeframe.

5.3.4 Restrictive measures applied during deportation process

Foreigners who enter or remain illegally in Timor Leste can be detained by the police and must be brought before a court within 48 hours.[98] This is an excellent and essential safeguard ensuring that any detention, whether it is criminal or administrative, is subject to the jurisdiction of the Court.[99] The Court is empowered to validate their detention or release the foreigner and impose regular reporting requirements to the police.[100] Those foreigners subject to immigration detention must be separated from other inmates.[101] This positive provision reflects the requirement of Principle 8 of the Basic Principles for the Treatment of Prisoners and Rule 94 of the Standard Minimum Rules for the Treatment of Prisoners. Immigration detention cannot exceed the time needed to execute the deportation order, and cannot exceed 90 days.[102] This is a significant protection, especially given the experience of some other countries where deportees are detained indefinitely even where deportation is not practicable in the foreseeable future. The Migration Department of the PNTL is to be notified of the court's decision so that they can make deportation arrangements[103] and if detention is not ordered the foreigner can be given notice to appear before the Migration Department.[104] The Law does not give the Migration Department the power to impose regular reporting or other restrictive conditions.

[98] Article 72(1)
[99] It is consistent with Article 9(4) of the ICCPR and Principle 4 of the Protection of All Persons Under Any Form of Detention
[100] Articles 72(1) and 70(1)(a)
[101] Article 70(1)(b)
[102] Article 72(2)
[103] Article 72(2)
[104] Article 72(4)

Appendix 1 Table of Constitutional Issues

No.	Provision of Immigration and Asylum Law	Possible Constitutional Provisions breached	Comments
1.	Art 6	Sec. 36 and 38	Requirement that foreigners be able to produce substantiating documentation at all times, may breach right to privacy and freedom from arbitrary interference
2.	Art 7	Sec 36 and 38	Requirement that foreigners notify certain information includ ing marital status and profession may breach the right to privacy
3.	Art 9	Sec 38 and 43	Article 9 restricts the right of foreigners to associate or to participate in certain types of associations (ie cultural, religious, recreational, sports, charitable, etc) The obligation to provide a detailed membership list may breach the protection of personal data (Section 38(3))
4.	Art 11	Secs 9, 24, 25, 40, 41, 42, 51, 52	Art 11(c) breaches the right to freedom of association (Sec 43) and the right to join trade unions (s 52) Art 11(e) breaches the right to freedom of speech and information (Sec 40(1)(2)), the right to freedom of the press and mass media (Sec 41(1)(2)), freedom to assemble and demonstrate (Sec 42(1)), the right to strike (Sec 51) and the right to join a trade union (s 52) Art 11(f) breaches the right to freedom to assemble and demonstrate (Sec 42(1)), the right to strike (s 51) and the right to join a trade union (Sec 52) Art 11(g) breaches the right to freedom of association (Sec 43(1)) and the right to freedom of the press and mass media (Sec 41(1)(2)) Art 11(h) breaches the right to freedom of speech and information (Sec 40(1)(2)) and the right to freedom of the press and mass media (Sec 41(1)(2)(4)) Section 25 states that fundamental rights shall only be suspended in the event of an officially declared Siege and State of Emergency
5.	Art 12	Sec 42	Art 12 may breach the right to freedom to assemble and demonstrate (Sec

			42(1) and the right to freedom of association (Sec 43(1))6.
6.	Art 14	Sec 35(4)	Art 14 together with Sec 23 of the Citizenship Law could potentially breach Sec 35(4) of the Constitution. Art 14 permits entry to an ET citizen only if they can prove ET citizenship and Sec 23 of the Citizenship Law limits the ways a person can prove citizenship. This provides no guarantee against deportation for ET citizens who cannot prove their citizenship through the prescribed documentation for reasons beyond their control (eg their documents have been destroyed) Sec 35(4) of the Constitution does not permit restriction of the ways in which citizenship can be proved.
7.	Art 62	Sec 36 and 38	The requirement that certain information (including date of birth, expiration number of passport, date of entry and departure from lodging) may be valid requirements for commercial accommodation but not for persons staying with friends or family. Arguably this breaches the right to privacy.
8.	Art 63	Sec 9, 10(2), 24, 40, 41, 42, 43, 51, 52	Art 63(d) allows the deportation of persons for acts prohibited to foreigners under this law even if those acts are the manifestation of the right to freedom of expression, freedom of press, the right to demonstrate and to associate. Art 63 does not state that refugees and asylum seekers are exempt from the general deportation provisions which is in breach of the provisions of the Refugees Convention which is incorporated into the Constitution through Sec 9 and Sec 10(2). Arts 63(a), (c), (d) and (e) are extraneous to the exclusion and expulsion provisions under the Refugees Convention.
9.	Art 68	Sec 9, 30(4)	Art 68 prevents the deportation of persons who will be persecuted for Refugees Convention grounds but not for those persons who face torture or cruel, inhuman or degrading treatment as required under the Convention Against Torture which is incorporated into the Timorese law through Sections 9 and 30(4) of the Constitution.
10.	Art 73	Sec 9, 39	Art 73 allows the fact finder in a deportation case to reject any preparatory inquiries requested by the potential deportee, even where is further information that the decision maker must take into consideration in the case including the rights of any affected children (Sec 39 of the Constitution and CROC)

10.	Art 86	Sec 9	Art 86(a) and (c) are extraneous to the permissible reasons for the expulsion of refugees under the Refugees Convention.
11.	Art 89	Sec 9	The Refugees Convention (incorporated into the Constitution through Sec 9) provides refugee with certain other rights including social rights and the right to a Convention Travel Document.
12.	Art 90	Secs 9, 24, 25, 40, 41, 4, 51, 52	Art 90(a) (b) prevents asylum applicants from expressing their right to freedom of expression, association, to demonstrate and the freedom of the press in similar terms to Art 11. Art 90(b) prohibits asylum applicants from any acts which may harm relations with other states, which breaches the provisions of the Refugees Convention.
13.	Art 92(1)(2)	Sec 9, 10	Arts 92(1) and (2) breach the Refugees Convention because if people are prevented from lodging asylum applications, the State cannot know that the protection against non-refoulment contained in Secs 9 and 10 of the Constitution is being respected.
14.	Art 94	Sec 9, 10	Art 94 breaches the Refugees Convention because if people are prevented from lodging asylum applications, the State cannot know that the protection against non-refoulment contained in Secs 9 and 10 of the Constitution is being respected
15.	Art 100	Sec 9	Art 100 provides only 24 hours for the lodging of an appeal thus breaching the right to a fair hearing contained in Art 14 of the ICCPR as incorporated into the Constitution through Sec 9
16.	Art 107	Sec 9	Art 107(b) punishes asylum applicants for expressing their right to freedom of expression, association, to demonstrate and the freedom of the press in similar terms to Art 11. Art 107 (c)(i) is extraneous to the permissible grounds in the Convention.
17.	Art 112	Sec 9, 57, 58	Art 112 does not guarantee asylum seekers and refugees basic social rights as such as the right to primary school education (under the Refugees Convention), health care and housing (under the Refugees Convention and the Constitution).Nor does it guarantee the rights provided for under the Constitution in s 57 and 58.