JUDICIAL SYSTEM MONITORING PROGRAMME

PROGRAM PEMANTAUAN SISTEM YUDISIAL

ANALYSIS OF DECISIONS IN CASES INVOLVING WOMEN AND CHILDREN VICTIMS: JUNE 2004 – MARCH 2005

DILI, TIMOR LESTE
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The Judicial System Monitoring Programme (JSMP) was set up in early 2001 in Dili, Timor Leste. 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 Timor Leste. For further information see www.jsmp.minihub.org

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Judicial System Monitoring Programme
Rua Setubal, Dili
Postal address: PO Box 275, Dili, Timor Leste
Tel/Fax: (670)3323883
Email: info@jsmp.minihub.org

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1. INTRODUCTION

This report analyses decisions from cases involving women and girl children victims issued by the district courts of Timor Leste from June 2004 – March 2005, and one interlocutory decision from the Court of Appeal involving a girl child victim issued in July 2004. We have attempted to analyse every decision which has been issued by these courts since the Women's Justice Unit began monitoring cases involving women in September 2003.

Eight of the eleven decisions discussed in this report involve sexual assault of minors, and two of the victims were only three years old. All but one of the cases discussed in this report are sexual assault cases (the exception is a murder case). All of the violence perpetrated in these cases was by someone known to the victim: four were sexual assaults by neighbours, one a sexual assault by a half brother against his sister, four were sexual assaults by fathers against their daughters, one sexual assault by a man against his mother, and one murder of a woman by her husband.

JSMP decided to write this report analyzing all the available decisions which have been issued to date involving women and girl children victims because we were concerned about:

- the apparently endemic lack of gender sensitivity displayed by judges in these cases;
- the apparent lack of sensitivity or knowledge of children's rights displayed by judges in these cases;
- the apparent lack of reasoning and consideration of the facts of the case displayed by many judges when arriving at decisions; and
- the consistent pattern of inappropriately short sentences being delivered which do not reflect the seriousness of the crimes. In particular, the consistent lack of consideration of aggravating factors, especially the age of the victim when the victim is a minor and the accused's relationship to the victims.

Over all, it appears that sexual assault crimes are not being punished as severely as they should be. This has ramifications for all women and children victims in Timor Leste. As it is, only a small proportion of cases of violence against women or children are reported to the police, a smaller proportion ever make it to trial, and an even smaller proportion of cases ever reach a final decision.[1] If in those cases which do manage to reach a final decision in the court, a decision is rendered which does not reflect the seriousness of the crime (for example, a one a half year penalty delivered for a case of rape of a three year old – see Decision 9) then victims will have little incentive to bother to report their crime to the police or pursue their case through the courts. The short sentences being delivered in these cases would not give the victims much faith in the formal justice system, or provide incentive for future victims to endure the difficulties associated with a trial in the formal justice system.

Therefore, although the rendering of decisions by the district courts in these cases is a welcome development for women and children in Timor Leste, the quality of the justice delivered to women and children victims needs to be greatly improved.

[1] For more on this issue please see JSMP's reports "Police Treatment of Women in Timor Leste" and "Statistics of Cases of Violence Against Women in Timor Leste".

2. METHODOLOGY

The WJU wrote a report on the first decision involving a woman victim to be rendered at Dili District Court (in May 2004), titled *"An Analysis of a Sexual Assault Decision from Dili District Court"*. This report analyzed the processing[2] and decision for this sexual assault case. Over-all, JSMP found that this serious sexual assault case was not investigated as rigorously, or as quickly, or punished as severely as it should have been. Unfortunately, many of the problems identified in that decision continue to appear in the decisions presented in this report.

In JSMP's report *"An Analysis of a Sexual Assault Decision from Dili District Court"*, we interviewed the judge and the prosecutor and read the case file in detail. In this current report however, we only analyse the written decisions (that is no other documents in the case file have been consulted, nor have we discussed any of the cases presented with the judges or the prosecutors).

The report considers decisions from the East Timorese judges and the international judges working in the district courts from June 2004 – March 2005. International judges (from the Community of Portuguese Speaking (CPLP) countries) started working in the district courts of Timor Leste in September 2004, at the same time the East Timorese judges commenced the preparatory training stage of the Judicial Training Centre (JTC) training program. At that time the East Timorese judges were working in the courts part time and attending half-day classes at the JTC. The international judges took on 80% of the district courts' workload.[3] On 25 January, the President of the Court of Appeal announced that all twenty two of the East Timorese judges had failed their evaluations and would no longer be able to work as judges in the courts of Timor Leste. From 26 January, the international judges took on 100% of the work load of the district courts.

Although we have tried to obtain a copy of every decision issued by the district courts since May 2004 (after the first decision which we already analysed) we are aware that there is at least one decision by an international judge, issued in February 2005, of which we have not been able to gain a copy. This is in part because of the initial confusion created by Court of Appeal Directive 6/2005 (regarding public availability of court files) which unfortunately was not explained to the court clerks in the district courts (who had to rely on the JSMP translation of the Directive to Bahasa Indonesia before they could understand its contents).[4] It is also because for some reason, some of the international judges in the district courts have not been giving a copy of their decisions to the East Timorese court clerks. The court records are therefore incomplete. JSMP wrote to the President of the Court of Appeal in February 2005, requesting him to instruct the international judges to submit a copy of their decisions to the court administration sections of the district courts. Unfortunately, the President of the Court of Appeal has not acted on this request, and JSMP was informed by his staff on 8 April 2005 that he has been too busy to do so.

The report tries to protect the anonymity of victims (as most of these cases were closed cases). It therefore does not refer to case number, defendant or victim name, or the date or place of the crime. In order to allow for useful analysis of the development of the jurisprudence of the district courts, the report does, however, refer to the date of the decision, and the court in which it was issued.

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[2] The case file contains the central documents from the police's record of the case, the prosecutor's indictment, court records of transcript dates, and the transcripts of the case.

[3] See JSMP Justice Update 7/2004

[4] See JSMP Justice Update 3/2005

3. SUMMARY AND ANALYSIS OF CASE DECISIONS AND SENTENCES

3.1 DECISION NO. 1 (DILI DISTRICT COURT) (EAST TIMORESE JUDGE)

Decision issued 21 July 2004. The defendant allegedly attempted to have sexual intercourse with the victim on several occasions.

The judge found that, based on the evidence presented, namely testimony provided by the victim, witnesses, and the defendant, and the medical report, that the elements of Article 289[5] of the Indonesian Penal Code were established. That is, the judge found the defendant guilty of committing the criminal act of obscene acts accompanied by force/threat of force. The defendant was sentenced to one year imprisonment.

Analysis of Decision

The three page decision issued by the court did not detail the facts revealed during the trial, and also did not mention the age of the victim. There was little legal analysis in the decision. It is therefore difficult to know for sure if the actions of the defendant constituted the crime of obscene acts accompanied by force under Article 289 of the KUHP[6] (Indonesian Penal Code) as found by the judge.

A person is found guilty under Article 289 of the Indonesian Penal Code when:

- Any person who, by using force or threat of force
- Forces someone
- To commit or tolerate obscene acts[7]

The decision stated that the actions of the defendant had fulfilled these elements.

Sentence

As the decision contained little legal reasoning it is difficult to determine if the sentence applied by the judge was appropriate. We only note that the maximum sentence for a crime under Article 289 is nine years, and the Prosecutor in this case requested a sentence of three years.

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[5] **Article 289**: Any person who by using force or threat of force forces someone to commit or tolerate obscene acts shall, being guilty of factual assault of the chastity, be punished by a maximum imprisonment of nine years.

[6] Kitab Undang-Undang Hukum Pidana

[7] What is meant by obscene acts are: any act that violates the chastity (decency) or degrading acts, which are performed in the context of sexual lust, for example: kissing, rubbing of the genitals, rubbing of the breasts. Intercourse is also considered an obscene act, however this is covered by its own provision. *R.Soesilo, KUHP*

3.2 DECISION NO. 2 (DILI DISTRICT COURT) (EAST TIMORESE JUDGE)

Decision issued 5 November 2004. The defendant was alleged to have committed obscene acts with the victim in July 2003. The victim was aged three and a half years old, the defendant is in his early twenties. They were neighbours.

The defendant was watching an Indian film and two small children came to the house and started watching the film with the defendant. The defendant took the victim by the hand and led her into a room. The defendant closed the door, and lay the victim down on the bed, then removed the pants of the victim and took off his own pants. Then the defendant tried to place his penis into the vagina of the victim, but was unable to, so the defendant placed his penis outside the vagina of the victim until he ejaculated. At that time the mother of the victim entered and saw what the defendant was doing, she grabbed the victim and carried her out of the room. Not long after the police captured the defendant and started their investigation.

The Prosecutor charged the defendant with committing obscene acts against a minor pursuant to Article 290(2e)[8] of the KUHP.

The judge found that the defendant had committed the criminal acts set out in Article 290(2e), based on the testimony of witnesses, the medical report, and the admission of the defendant. The judge sentenced the defendant to one year and six months imprisonment.

Analysis of Decision

The decision describes in detail the facts of the case. The judge said it was proven that the defendant was guilty under Article 290 (2e) because the defendant tried to put his penis into the vagina of the victim, but was unable to do so, therefore the defendant only placed his penis on the outside of the victim's vagina. The judge categorized this act as fulfilling the elements of Article 290 (2e), namely:

1. Commission of obscene acts (the defendant placed his penis on the vagina of the victim).
2. Against someone who he knows or reasonably should presume to be a minor (the victim was 3 years old)

The judge's decision in this case was well reasoned and based on a variety of evidence: the testimony of witnesses, the medical report and the admission of the defendant.

Sentencing

JSMP notes that the maximum sentence for a crime under Article 290 (2e) of KUHP is seven years.

In this case the defendant rubbed his penis on the outside of the vagina of the victim until he ejaculated. In JSMP's view, this is a fairly serious "obscene act". This would have also added the trauma of the victim, but this factor does not appear to have been considered by the judge. Moreover, the victim was only aged three years old, and was clearly a very young minor.

Although we understand that KUHP does not contain sentencing guidelines, we believe that judges should use their common sense when making sentencing decisions, and consider the seriousness of the offence and the age of the victim, and the lasting psychological trauma it could cause the victim.

[8] "**Article 290 (2e)** By a maximum of seven years shall be punished any person who commits obscene acts with someone who he knows or reasonably should presume that he has not yet reached the age of fifteen years or, if it is not obvious from her age, not yet marriageable."

The short sentence delivered would not give the victim much faith in the formal justice system, or provide incentive for future victims to endure the difficulties associated with a trial in the formal justice system.[9]

3.3 DECISION NO. 3 (DILI DISTRICT COURT) (EAST TIMORESE JUDGE) [10]

Decision issued 10 November 2004. The defendant (aged 45) had sexual intercourse with the victim – his half sister from 1995 (when the victim was aged 12) until 2001 (when the victim was aged 17), when the victim became pregnant to the defendant. The victim had lived with the accused's family since the death of her father in 1995. The victim said that on the date of the first rape (when she was 12) the defendant took her to a coffee plantation and threatened her with a machete and forced her to have sexual intercourse. After that he repeatedly forced the victim to have sexual intercourse with him, and threatened to kill the victim if she told anyone about his actions. These acts continued until 2001 when the victim became pregnant to the defendant. There were efforts to settle this problem through traditional justice but the victim was not satisfied with the result and had taken her case to the formal justice system.

The prosecutor charged the defendant with Article 285[11] of the KUHP, as well as Article 287[12] (statutory rape) and 294.1[13] as subsidiary charges.

The judge decided that the defendant was guilty of statutory rape under Article 287 of the Indonesian Penal Code. He sentenced the defendant to 7 years imprisonment.

Analysis of Decision
The judge did not give any reason for not finding the accused guilty of rape under Article 285, when, in the first incident in 1995, he threatened the victim with a machete an forced her to have sex with him.

The judge found the defendant was guilty under Article 287 of the KUHP based on the testimonies of the victim and the accused (the accused had confessed to most of the crime except to threatening the victim).

Sentencing
JSMP notes that the maximum sentence for a crime under Article 287 is nine years. The maximum sentence for a crime under Article 285 is twelve years.

In this case the judge took into account as aggravating factors: the fact that the actions were committed by an older sibling towards his sister who was under his guardianship[14], that the sexual assaults had caused

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[9] See JSMP reports, *Women in the Formal Justice Sector – Report on the Dili District Court*, and *"An Analysis of a Sexual Assault Decision in Dili District Court"*.
[10] See Justice Update 13/2004- period 15-19 November 2004
[11] "**Article 285**: Any person who by using force or threat of force forces a woman to have sexual intercourse with him out of marriage shall, being guilty of rape be punished by a maximum imprisonment of twelve years."
[12] "**Article 287 (1)** Any person who out of marriage has carnal knowledge of a woman who he knows or reasonably should presume that she has not yet reached the age of fifteen years or, if it is not obvious from her age that she is not yet marriageable, shall be punished by a maximum imprisonment of nine years.
(2) A prosecution shall be instituted only by complaint, unless the woman has not yet reached the age of twelve years or one of the cases of articles 291 and 294 is present."
[13] "**Article 294.1**: Any person who commits any obscene act with his under age child, step child or foster child, his pupil; a minor entrusted to his care, education or vigilance or his under age servant or subordinate, shall be punished by a maximum imprisonment of seven years."
[14] **Article 19** of the CRC (Convention on the Rights of the Child) states that :

long term psychological damage to the victim, and the fact that the offences were committed repeatedly over a five year period.

These aggravating factors appear to account for the judge's decision to sentence the accused to seven years imprisonment – a long penalty compared to other sexual assault judgements, and compared to other extremely serious offences such as murder.[15]

JSMP welcomes this decision and believes the length of the sentence would have had a deterrent effect and sent a clear message out to the public that domestic violence and sexual assault are crimes and will receive punitive prison terms.

3.4 DECISION NO. 4 (DILI DISTRICT COURT) (EAST TIMORESE JUDGE)[16]

Decision issued on 4 November 2004. This was the first decision handed down in a domestic violence case which did not involve sexual assault since JSMP commenced its monitoring of the Dili District Court. The judge decided that the defendant was guilty of the crime of murder under Article 340[17] and Article 338.[18] The defendant was sentenced to ten years imprisonment.

Based on testimony presented during the trial, it was established that in April 2002 at 10am, the defendant saw a man leaving his house. When he asked who the man was his wife did not respond, and this made the defendant angry and they started to argue. His wife ran out of their house and headed for the main road and the defendant struck her with a cable. They both ran into a kiosk and they both grabbed a knife each. The defendant stabbed his knife three times into the stomach of his wife until she fell to the ground where she died. The defendant admitted these facts and the stabbing was seen by a witness.

The judge decided that all of the elements of the crime of murder under Article 338 and Article 340 had been established. This decision referred to the cause of death as described in the autopsy report. Medical documents and photos of the body match the facts presented in the testimony of the defendant and the witnesses. The judge found that the defendant did not have a plan to murder his wife. He always kept that knife in his shop and stabbed his wife because he was angry.

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1. States Parties shall take all appropriate legislative, administrative, social and educational measures to protect the child from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse, while in the care of parent(s), legal guardian(s) or any other person who has the care of the child.
2. Such protective measures should, as appropriate, include effective procedures for the establishment of social programmes to provide necessary support for the child and for those who have the care of the child, as well as for other forms of prevention and for identification, reporting, referral, investigation, treatment and follow-up of instances of child maltreatment described heretofore, and, as appropriate, for judicial involvement.

[15] For example, in Case No. 13/2004 issued on 15 March 2005, the judge in the Oecussi District Court delivered a sentence of five years for an accused found guilty of murder.

[16] See JSMP Justice Update No. 13/2004, 15-19 November 2004

[17] "**Article 340**: The person who with deliberate intent and with premeditation takes the life of another person shall, being guilty of murder, be punished by capital punishment of life imprisonment or a maximum imprisonment of twenty years."

[18] "**Article 338**: The person who with deliberate intent takes the life of another person, shall, being guilty of manslaughter, be punished by a maximum imprisonment of fifteen years."

Analysis of Decision
In his written decision the judge undertook a fairly thorough reasoning process – referring to the cause of death as described in the autopsy report, medical documents and photos of the body, and the testimony of the defendant and the witnesses. It was established that the accused had killed his wife. The judge then discussed the *mens rea* [19]for the offence and decided that it was not planned, the accused always kept that knife in his shop and stabbed his wife because he was angry.

Sentencing
Before sentencing the defendant to ten years imprisonment, the judge took into account the public interest in imprisoning a murderer. The judge also referred to the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW). Although his reference to CEDAW was not perhaps appropriate in this instance (since the murder of a woman by her husband should be unacceptable in Timor Leste, whether or not Timor Leste is a signatory to CEDAW), it is encouraging that the judge was at least aware of this international human rights treaty relating specifically to women's rights.

The maximum penalty for murder under Article 338 is fifteen years, and under Article 340 it is twenty years. Compared to sentences in other cases in Timor Leste, including for murder, and including for murder cases in the Special Panels for Serious Crimes, the ten year penalty is very long. It is encouraging that the judge saw fit to apply such a long penalty in this case of domestic violence as such a sentence was appropriate in the circumstances of this case.

3.5 DECISION NO. 5 (SUAI DISTRICT COURT) (INTERNATIONAL JUDGE)

Decision issued on 29 November 2004. The Prosecutor alleged in the indictment that in May 2004 the defendant raped the victim (his daughter), and that on two occasions in June 2004, the defendant threatened the victim with a machete and covered the mouth of the victim and had sexual intercourse with her. On the final occasion the victim had run to her uncle's house to hide. The judgement does not mention the age of the victim.

The indictment charged the defendant with rape under Article 285 of the Indonesian Penal Code, and with Article 294.1 as a subsidiary charge.

At first the defendant denied the charges. At trial the victim spoke clearly and in detail about the circumstances of the case. The uncle of the defendant said that when the victim came to her uncle's house, the victim appeared to be really afraid and was in tears. The victim told him that her father, the defendant, had raped her and threatened her with a machete. The defendant confessed to the crime when he was at the police station, however, the judge stated that this was not the only piece of evidence and would only complement the evidence provided by the victim.

Medical evidence showed that the victim had been raped.

The judge referred to Section 34.3 of UNTAET Regulation 30/2000 as amended by 25/2001 (the non-corroboration rule in sexual assault cases).[20]

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[19] In a case of murder under Article 340 the *mens rea* is the planned intention to kill.
[20] According to **Section 34.3** in cases of sexual assault:
a. no corroboration of the victim's testimony shall be required
b. consent shall not be allowed as a defence if the victim:

The judge stated that the testimony of the victim and other witnesses indicated that the defendant had: threatened the victim, out of marriage, and had used a machete and covered the mouth of the victim with his hand, and had sex with her three times. The judge therefore found the defendant guilty of rape Article 285 of the KUHP.

In deciding on sentencing, the judge considered the following facts:

- The victim was the child of the defendant, and the defendant as her father was supposed to provide protection, however, the defendant forced the victim to have sexual intercourse with him.
- The victim was living together with the defendant as the mother of the victim had died
- The defendant had sexual intercourse with the victim on three occasions, through the use of threats, including the use of a machete, causing the victim to feel afraid, and causing her to suffer trauma.

The judge therefore sentenced the defendant to 7 years imprisonment.

Analysis of Decision
In her written decision the judge undertook a fairly thorough reasoning process – she referred to the victim's testimony, and that of her uncle, and the medical report. She decided that this evidence outweighed the defendant's denial that he had committed the offence. She also considered all the factors of the offence under Article 285: that the defendant had used a machete to threaten the victim (threat of force), had covered the mouth of the victim with his hand and had sex with the victim three times (non-consensual sex by force).

Sentencing
JSMP welcomes the harsh penalty delivered by the judge in this serious case of sexual assault: seven years for a sexual assault offence is the harshest penalty JSMP has seen delivered to date. We also welcome the judge's thorough analysis of the aggravating factors she considered in sentencing, in particular that: the victim was the child of the defendant; that the victim was living together with the defendant as her mother had died; that the defendant had sexual intercourse with the victim on three occasions, through the use of threats, including the use of a machete, causing the victim to feel afraid; that the defendant's actions caused the victim to suffer trauma.

3.6 DECISION NO. 6 (SUAI DISTRICT COURT) (INTERNATIONAL JUDGE)

Decision issued 29 November 2004. The public prosecutor charged the defendant with Article 294.1 (obscene acts against a minor) of the KUHP. The defendant admitted his acts, namely that the defendant kissed the cheek of the victim (his twelve year old child) twice. The defendant ripped the clothing of the victim and the victim was afraid because the defendant threatened her with a machete. The father of the victim (the defendant) did not wish to allow the victim to marry another man.

Based on the evidence the judge decided that the defendant intended to rape the victim. These acts can be categorized as obscene acts, because, apart from kissing the cheek of the victim, the defendant ripped the clothing of the victim and forcefully held the arm(s) of the victim. The defendant made the victim feel afraid, and the mother of the victim said that the actions of the defendant could have lead to sexual intercourse.

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i. has been subjected to or threatened with or has had reason to fear violence duress, detention or psychological oppression, or
ii. reasonably believed that if the victim did not submit, another person might be so subjected, threatened or put in fear

The judge decided that the defendant was guilty of committing obscene acts under Articles 294.1 and 53.1e and 2[21] (attempt) of the KUHP. The judge took into consideration indications that after the events of 1999 the defendant was suffering from a mental illness.

The judge handed down a sentence of two years and three months (the maximum punishment available under Articles 53 and 294 was four years and eight months). The judge then reduced the sentence by six months to one year and nine months because the defendant admitted to his actions.

The judge decided that it would not be appropriate to grant conditional release to the defendant in this case.

Analysis of Decisions
The judge seems to have given reasonably thorough consideration to all the facts in this case, and has explained in a logical manner how she arrived at the decision that the accused was guilty of attempting (Article 53) to commit obscene acts with his under age child (Article 294.1).

Sentencing
In sentencing, the judge considered that the accused was a good father and worker, and the indications that after 1999 the accused was suffering from a mental illness. The judge also considered that the accused's actions had caused psychological trauma to the victim, and that the victim would be scared if the accused was let out of jail. The original penalty of two years and three months seems appropriate for the crime committed in the circumstances of the case.

3.7 DECISION NO. 7 (DILI DISTRICT COURT) (INTERNATIONAL JUDGE)[22]

Decision issued 10 January 2005. This case involved the rape of a minor by her father. The victim stated that her father threatened her with a machete, hit her with an electrical cable, covered her mouth and raped her three times in April 2004. The defendant denied all the charges. However medical evidence stated that the victim had been raped. Also injuries that had been caused by being struck with the electrical cable were visible on the victim's body.

The judge applied Section 34.3 of UNTAET Regulation 30/2000, as amended by UNTAET Regulation 25/2001 (the non-corroboration rule in sexual assault cases).

However, the judge also referred to medical evidence and decided that rape was not committed because the hymen of the victim was not completely torn. Therefore, the judge decided that the defendant was guilty of attempted rape (Article 53 and Article 285 of the KUHP), and the maximum penalty of 12 years for rape was reduced by one third (pursuant to Article 53) to 8 years.

[21] "**Article 53 (1)** Attempt to commit a crime is punishable if the intention of the offender has revealed itself by a commencement of the performance and the performance is not completed only because of circumstances independent of his will.
(2) The maximum of the basic punishments imposed on the crime in case of attempt shall be mitigated by one third.
[22] See Justice Update 1/2005 - period 10-14 January 2005

Analysis of Decision

JSMP is concerned that this decision is not in accordance with the medical evidence that some women can have sexual intercourse without the hymen breaking. This is also not in line with the definition of rape in Article 285 of the KUHP[23], which requires only penis-vagina penetration. [24]

In deciding whether to convict the accused of rape, the judge should have had regard to international law because section Nine of the Constitution provides that if East Timorese law contradicts international legal standards, international law should prevail.[25] In international customary law, rape is forceful, threatened or non-consensual penetration of oral, anal or genitals of a victim with any object. [26]

In determining international customary law, the law of international tribunals is instructive.[27] The jurisprudence of the International Criminal Tribunal for Rwanda (ICTR) and the International Criminal Tribunal for the Former Yugoslavia (ICTY) in the 1990s[28] broadened the scope of crimes of sexual violence that can be prosecuted as rape to include forced vaginal, oral, and anal sex.[29]

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[23] The article covering rape in the Indonesian Penal Code (285) sets out four elements that need to be established to prove rape, namely:

1. The acts are committed with force or threat of force;
2. The perpetrator is a man who is committing the act against a woman
3. That women is not his wife
4. They have intercourse (have sexual relations) .

[24] In the *Furundzija* opinion, the ICTY drew on the basic definition of rape articulated by the ICTR in *Akayesu* and the definitions of rape set forth in various penal codes. The ICTY concluded that the elements of rape common to most legal systems are: "1) sexual penetration, however slight; a) of the vagina or anus of the victim by the penis of the perpetrator or any other object used by the perpetrator, or b) of the mouth of the victim by the penis of the perpetrator; 2) by coercion or force or threat of force against the victim or a third person." For more detail see "Report on an analysis of a sexual assault decision from Dili District Court."

[25] **Section 9 (International law)**

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

[26] The customary international legal definition of rape also encompasses marital rape, or non-consensual sex between spouses.

[27] Although the laws concerning rape are generally applied to situations of crimes against humanity, these laws are the result of a comprehensive survey of laws internationally.

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

[29] In the *Furundzija* opinion, the ICTY drew on the basic definition of rape articulated by the ICTR in *Akayesu* and the definitions of rape set forth in various penal codes. The ICTY concluded that the elements of rape common to most legal systems are: "1) sexual penetration, however slight; a) of the vagina or anus of the victim by the penis of the perpetrator or any other object used by the perpetrator, or b) of the mouth of the victim by the penis of the perpetrator; 2) by coercion or force or threat of force against the victim or a third person."
Additionally, in *Aydín v. Turkey* (1997) the European Court on Human Rights explained that rape "leaves deep psychological scars on the victim which do not respond to the passage of time as quickly as other forms of physical and mental violence." The ECHR also stressed that a victim suffers "the acute physical pain of forced penetration, which [leaves] her feeling debased and violated both physically and emotionally."

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

Moreover, this decision is not in compliance with the international law definition of rape as provided in Article 7(1)(g)-1 of *Elements of Crimes Annex* to the *Rome Statute of the International Criminal Court (Rome Statute)*. According to the aforementioned Article two elements must be established to prove that rape has been committed:

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

Therefore, JSMP respectfully feels that the defendant should have been found guilty of rape and not of attempted rape, and the maximum sentence of twelve years under Article 285 of the KUHP could have been considered.

Sentencing

When deciding on sentencing the judge mentioned the relationship between the defendant and the victim (the defendant was the father of the victim), the fact that the defendant threatened the victim with a machete and caused physical injuries to her with an electrical cable, and the fact that the defendant raped the victim three times. The judge failed to mention that the victim was a minor.

Although the judge mentioned all of these factors, she did not give any reason for only deciding on a sentence of four years, when the maximum penalty, even if she only found the defendant guilty of attempted rape, was eight years.

In JSMP's view, given the seriousness of the offence, in the circumstances of the case a longer sentence would have been appropriate.

We also note that this decision in regard to sentencing is inconsistent with Decision 5 issued by the same judge on 29 November 2004 (see above). The facts of that case were very similar to the facts in this case, and the aggravating factors were almost identical: the accused was the victim's father, the offence was committed three times, the victim is a minor, and the accused threatened the victim with a machete. In the present case however, there was a further aggravating factor: the accused had also whipped the victim with an electrical cable and caused lesions over her body. JSMP is therefore confused as to how the same judge could have sentenced the accused to seven years imprisonment in Decision 5 but the accused in Decision 7 to only four years imprisonment.

3.8 DECISION NO. 8 (SUAI DISTRICT COURT) (INTERNATIONAL JUDGE)

Decision issued on 10 March 2005. The first defendant was alleged to have raped the victim (a minor), who was sick and helpless at the time (and could not resist) on three occasions in September 2004. On the third occasion, the second defendant rubbed oil on the vagina of the victim (his daughter), so that the victim would not fall pregnant.

The prosecutor charged the defendants with rape under Article 285, and with the secondary charge of Articles 286[30] (sex with a women who is unconscious or helpless) and 290(1)[31] (obscene acts with a women who is unconscious or helpless) of the KUHP.

The first defendant admitted that he did have sexual intercourse with the victim because he loved the victim and wanted to marry her. The second defendant said that he did not know that the first defendant had had sexual intercourse with the victim until the day after the second incident, so he rubbed oil on the vagina of the victim to get rid of any sperm. The second defendant then went to the police to report the problem.

The judge referred to Section 34.3 (the non-corroboration rule in sexual assault cases) of UNTAET Regulation 30/2000 as amended by 25/2001.

The testimony of the victim and the testimony of the mother of the victim were considered as strong evidence that the criminal act of rape had occurred.

The medical report indicated that the vagina of the victim had been irritated by a particular object. The judge found that therefore the medical report also proved that a rape had occurred.

The judge found that the first defendant had had sexual intercourse with the victim and the victim was unable to resist because she was ill. However this did not constitute rape under Article 285 because there was no force or serious threat in order to have sex, and no force was used to have sex. The judge therefore decided that the defendant was guilty of an offence under Article 286 of the KUHP because the victim was ill and weak (helpless), although the victim was not unconscious, because she knew that the defendant had taken off her clothes and had sex with her.

The judge decided that the second defendant's actions of rubbing oil on the vagina of the victim to remove sperm did not constitute rape because he had no intention of having sexual intercourse with the victim. The judge found the defendant guilty of an offence under Article 299[32] (causing an abortion) of the KUHP.

In sentencing the judge considered the facts that: the first defendant had had sex with the victim on more than one occasion while she was ill; that the second defendant, as her father, was supposed to protect her; and that the victim was traumatized, and the victim could not go to school as a result of the offences committed against her.

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[30] "**Article 286**: Any person who out of marriage has carnal knowledge of a woman of whom he knows that she is unconscious or helpless, shall be punished by a maximum imprisonment of nine years."
[31] "**Article 290(1)** By a maximum imprisonment of seven years shall be punished: any person who commits obscene acts with someone who he knows that he is unconscious or helpless."
[32] "**Article 299(1)** Any person who with deliberate intent gives treatment to a woman or causes her to undergo a treatment, giving her to understand or raising the expectation that thereby pregnancy may be curbed, shall be punished by a maximum imprisonment of four years or a maximum fine of three thousand rupiahs."

Pursuant to these considerations, the judge decided to sentence the first defendant to imprisonment for three years and six months with a reduction of one year because the victim was not completely unconscious. The judge reduced the sentence because the victim was ill but not completely unconscious and therefore the victim was unable to fully resist.

The second defendant was sentenced to one year and six months imprisonment.

Analysis
JSMP respectfully disagrees with the judge's decision in this case that she could not find the first defendant guilty of rape under Article 285 of KUHP because his actions did not fulfill the elements of this article, in particular, because there was no force or threat of force used by the first defendant to have sex with the victim. The judge seems to presume that because the accused did not use a weapon to threaten the victim, that force or the threat of force was not used. In JSMP's view however, the fact that the defendant forced himself upon the victim without her consent should be sufficient to establish that the crime of rape (Article 285) occurred.

JSMP also believes that the judge convicted the second defendant of the wrong offence. In our view the second defendant should have been found guilty of Article 294.1 of the KUHP for committing an obscene act with the victim (by rubbing oil on the vagina of the victim), not of Article 299 (carrying out an abortion). Although the second defendant said he rubbed the oil on the victim's vagina to prevent her getting pregnant, he clearly intended this action to work as a contraceptive method, as he thought it would remove the sperm. Using contraception is not a crime under the KUHP. At any rate, rubbing oil on the victim's vagina would not actually work as a contraceptive and it would certainly not cause an abortion. In JSMP's opinion therefore, the judge erred in convicting the accused of a crime under Article 299.

Sentencing
If we are to accept that the first defendant was guilty of a crime under Aricle 286 rather than Article 285, we respectively submit that the judge erred in reducing the sentence for this crime by one year because the victim was not completely unconscious. JSMP wishes to point out that Article 286 says "unconscious OR helpless" not "unconscious AND helpless". In our view therefore, it should have been sufficient for the judge to find that the victim was helpless (because she was ill and weak) and to sentence the accused appropriately as a result.

In JSMP's view, the sentences for the first and second defendant are disproportionate to the crime each was found to have committed. The first defendant was found guilty of a crime under Article 286 which carries a maximum sentence of nine years, but the judge sentenced him to two years and six months. The second defendant should have been found guilty of an offence under Article 294.1, which carries a maximum sentence of seven years, but was instead found guilty of an offence under Article 299.1 which carries a maximum penalty of four years. The judge sentenced the second defendant to one year and six months jail. The first defendant had unconsensual sex with the victim twice. The second defendant put oil on the victim's vagina. The first defendant seems to have committed a far more serious crime than the second defendant, however, this is not reflected in the one year difference in sentences.

3.9 DECISION NO. 9 (DILI DISTRICT COURT) (INTERNATIONAL JUDGE)

Decision issued on 14 March 2005. According to the indictment, in April 2004, the victim (aged three years old) went to the home of the defendant to ask for water to drink. The defendant spread the thighs of the victim and licked the genitals (vagina) of the victim. The defendant admitted and regretted his actions.

The parents of the victim said that the defendant lived with them or shared the same house. The parents of the victim said the victim told them that the defendant had done this to her.

The judge said that the statements of the parents and the admission of the defendant proved that this criminal act had occurred. The judge found the defendant guilty of obscene acts with a minor under Article 290(2) of the KUHP.

The judge sentenced the defendant to two years and six months imprisonment, but reduced the sentence by one year to one year and six months because the defendant confessed to the crime.

The judge then went on to apply Article 14 of the KUHP – which authorizes suspension of sentence and conditional release: the defendant must report to police station at least once a month, if the defendant moves address then he must inform the police. And he must not interact with the victim or the victim's family.

Analysis
As the defendant admitted to the crime in court the judge could conduct a simple analysis of the facts and apply the law appropriately.

The rape article (285) sets forth four elements essential to prove rape and provides for a maximum sentence of twelve years:

1. the offence occurred with violence or the threat of violence,
2. the offender was a man and committed the offence against a woman, without her consent,
3. the woman was not the offender's wife, and
4. the offence involved sexual intercourse.[33]

The KUHP is based on Dutch Law of 1912, according to which sexual intercourse was defined in terms of reproduction. Under the KUHP therefore, sexual intercourse only involves penis-vagina penetration.[34]

However, as discussed in Decision 7 above, according to Section 9 of the Constitution, the judge ought to have considered international standards. As discussed in Decision 7 above, applying the international law definition of rape, as described in Article 7(1)(g)-1 of the *Elements of a Crime Annex* to the *Rome Statute*, the judge could have found the accused guilty of the crime of rape, as he had oral sex with the victim. JSMP submits that the judge should have therefore applied Article 285.

It was also not incorrect for the judge to apply Article 290(2) of the KUHP in this case. Article 294.1 would also have been a possibility.

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

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

Sentencing
JSMP respectively submits that given the circumstances of this case the judge should have sentenced the accused to a longer penalty (the maximum penalty for a crime under Article 290(2) is seven years. In her sentencing decision the judge did not refer to the long lasting psychological trauma the accused's actions may have had on the victim who was only aged three at the time of the offence.

JSMP is also concerned by the judge's decision to apply Article 14 of the KUHP (suspension of sentence and conditional release). When an accused is convicted of serious sexual assault (such as in this case, where the accused had oral sex with a three year old child) the defendant should never be given a suspended sentence. A suspended sentence for a crime such as this will cause the victim and her family, and the general community to lose faith in the ability of the formal justice system to appropriately deal with sexual offenders.

3.10 DECISION NO. 10 (OECUSSI DISTRICT COURT) (INTERNATIONAL JUDGE)

Decision issued 16 March 2005. The Public Prosecutor charged the defendant with rape under Article 285 of KUHP. In May 2001, the defendant is alleged to have forced the victim (his adopted mother)[35], with violence and threats, to have sexual relations with him.

The victim said she was asleep in the house (it was dark) when she was awoken. She thought it was her husband, but then she called the name of the accused, and he responded. He started to rip off the clothes of the victim, and threatened to stab her with a knife if she rejected him. Then he had sex with her against her will.

The defendant admitted to his actions. After three months in pre-trial detention, with the agreement of the family, he returned to live with his family, including the victim.

The victim said she was very sad and would like the accused to go to jail, even though the family wanted to resolve it with a traditional justice agreement.

The judge said the evidence proved that the facts alleged occurred. The judge found that the accused had made grave threats to the victim and had sexual relations with the victim and was therefore guilty of rape under Article 285 of the KUHP. For this reason it was not necessary to apply Article 289 (the subsidiary charge).

The judge referred to Article 34.3 (the non-corroboration rule) of UNTAET Regulation 30/2000 as amended by 25/2001.

The accused was sentenced to four years in prison, but the penalty was reduced to three years because the accused confessed to his crime.

Analysis
The judge found that all the elements of the crime of rape under Article 285 were proved and convicted the accused accordingly.

[35] Only in the third last paragraph of the decision did the judge refer to the relationship between the defendant and the victim.

Sentencing
JSMP respectfully submits that in sentencing the judge did not take into adequate consideration the aggravating factor that the accused was the adopted son of the victim. The judge only referred to the defendant's relationship to the victim once (in the third last paragraph) of the decision. In sentencing, the judge also does not refer to the fact that the accused threatened the victim with a knife. In JSMP's view, the short sentence delivered by the judge in this decision does not reflect the seriousness of the crime committed, and could have the effect of lowering public faith in the formal justice system's ability to deal with serious sexual offences.

3.11 DECISION NO. 11 (COURT OF APPEAL) (PANEL DECISION, TWO INTERNATIONAL JUDGES, ONE EAST TIMORESE JUDGE) (INTERLOCUTORY APPEAL)

Decision issued on 15 June 2004.

The lawyer for the defendant lodged an appeal against the decision of the investigating judge ordering pre-trial detention. The defendant requested the Court of Appeal to review the decision of the investigating judge and release the defendant from pre-trial detention. The defendant claimed that there were no grounds to state that he had committed a criminal act as was stated by the investigating judge.

The Prosecutor had charged the defendant with offences under Article 289 and 290 of the KUHP (offences which carry maxim imprisonment terms of nine and seven years respectively). The defendant was alleged to have come upon the victim (female, aged 9) from behind, placed one hand over her mouth, and placed his finger in her anus. The defendant had allegedly performed such acts on three occasions.

The investigating judge decided to put the accused in pre-trial detention because he said there was sufficient evidence that the accused had committed the crime alleged. He based this pre-trial detention decision on testimony provided by the victim and a medical report, including a forensic examination of the victim.

The appellant (defendant) claimed

a) there was no proof that the accused had committed the crime
b) the investigating judge indirectly applied Section 34.3 of UNTAET Regulation 30/2000 as amended by 25/2001 "about proof in sexual violence", which violates the Constitution
c) when the accused gave his declaration to the police he did not have a lawyer to defend him
d) there were not reasonable grounds for pre-trial detention under Sections 20.7 and 20.8[36] of UNTAET Regulation 30/2000 as amended by 25/2001.

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[36] **Section 20 – Review Hearing**
20.7 The Investigating Judge may confirm the arrest and order the detention of the suspect when:
(a) there are reasons to believe that a crime has been committed; and
(b) there is sufficient evidence to support a reasonable belief that the suspect was the perpetrator; and
(c) there are reasonable grounds to believe that such detention is necessary

20.8 Reasonable ground for detention exist when:
(a) there are reasons to believe that the suspect will flee to avoid criminal proceedings; or
(b) there is the risk that evidence may be tainted, lost destroyed or falsified; or
(c) there are reasons to believe that witnesses or victims may be pressured, manipulated or their safety endangered; or
(d) there are reasons to believe that the suspect will continue to commit offences or poses a danger to public safety or security.

In answer to the arguments, the court found

a) there was sufficient evidence for the investigating judge to have found that the defendant committed the crime alleged.

b) the investigating judge did not write in his decision that he only based the decision on the victim's declaration, he wrote that he also based it on the hospital documents. The Court of Appeal clarified that despite its decision in 11/2002 (23 July 2003) that Section 34.3 of UNTAET Regulation 2000/30 as amended by 25/2001 violated the constitution, that often the judge has a reason to believe the declaration of a victim of sexual violence, and such belief does not violate the constitution.

c) the defendant did not explain how the police did not give him a chance to use his right to defend himself.

d) there was no proof that it was necessary to put the accused in pre-trial detention because none of the reasonable grounds for detention contained in Sections 20.7 and 20.8 of UNTAET Regulation 30/2000 as amended by 25/2001 existed. The Court said that the investigating judge did not have a basis to think the accused would repeat his actions because the police had already caught him and taken him to court and "therefore the accused already knows that these actions can put him in jail". The Court said that the investigating judge's decision to put the accused in pre-trial detention was not based on law or the facts.

The Court of Appeal decided:

1. to annul the decision of the investigating judge
2. to order that the defendant be released from pre-trial detention.

Analysis

JSMP is confused by the Court's decision in this case. On the one hand, in parts (a) and (b) of the decision, the Court appears to accept the facts as found by the investigating judge: that is, that the accused committed the obscene acts (using force or threat of force to place his finger in the anus of the victim, a nine year old) based on the victim's testimony and the medical evidence. The court's decisions in (a) and (b) would appear to establish Section 20.7. Then in point (d) the court says the investigating judge did not have facts on which to make his decision to put the accused in pre-trial detention. The Court does not explain whether it comes to this conclusion because it thinks Section 20.7 has not been established or because it thinks reasonable ground for pre-trial detention under Section 20.8 have not been established.

Unfortunately the Court of Appeal's reasoning on this matter is not as thorough as might be expected by an appeal court (the court only wrote one short paragraph). The court's decision is based on the erroneous assumption that if someone has been caught by the police and taken to court and knows that their actions could put them in jail, that they will not re-offend. In JSMP's view, such a conclusion is illogical and ridiculous, and if the Court were to apply such reasoning to everyone accused and found guilty of a criminal offence, then there would be no need to imprison anybody, including murderers and serious repeat offenders, because after a short pre-trial detention period everyone would learn the errors of their ways and never repeat crimes.

In this case, the consequences of such illogical reasoning for the victim and other children may have been dreadful, especially given the fact that the accused made his living by selling candy outside the victim's

school.[37] In JSMP's view, given that the accused had already committed this crime of child abuse three times, it is not unlikely that he may have offended again.

In JSMP's view, the court would have been wise to pay greater regard to Article 20.8(c) and (d) which makes it clear there are grounds for pre-trial detention when there is reason to believe the victim's safety may be endangered or there are reasons to believe that the accused will continue to commit offences or could become a danger to public safety or security. At no stage does the court seem to reflect on the purpose of incarceration – which is to remove an offender from society and prevent him from causing further danger to society.

JSMP is disappointed by the Court of Appeal's lack of gender sensitivity, and apparently complete lack of awareness of the dangers of repeat offences by paedophiles.

This case highlights the urgent need for gender training and training on children's rights to the judges on the Court of Appeal.

4. ANALYSIS OF DECISIONS AND SENTENCING

Eight of the eleven decisions discussed in this report involve sexual assault of minors, and two of the victims were only three years old. All but one of the cases discussed in this report are sexual assault cases (the exception is a murder case). All of the violence perpetrated in these cases was by someone known to the victim, and often by a close family member: four were sexual assaults by neighbours, one a sexual assault by a half brother against his sister, four were sexual assaults by fathers against their daughters, one sexual assault by a man against his mother, and one murder of a woman by her husband.

JSMP welcomes the decisions in all these cases as a step forward in recognizing and punishing crimes of violence against women. It is particularly encouraging that there have been over ten decisions in cases of violence against women issued by the district courts of Timor Leste in the ten months from June 2004 to March 2005. This is a positive improvement from the district courts' performance in previous years, where, as noted in JSMP's July 2004 report "An Analysis of a Sexual Assault Decision from Dili District Court", no, or very few decisions were issued.

The written decisions in these eleven cases are, on average, three pages long. This is certainly not as long as would be expected in most jurisdictions in decisions for serious sexual assault cases, especially where the victims are children. In most jurisdictions, decisions in such cases involve a significant level of reasoned analysis about the facts of the case and the relevant law to be applied, and of the aggravating factors to be considered, including the victim's age, and the perpetrators relationship to the victim. As a result, most written decisions in such cases would be considerably longer than three pages. In JSMP's view, the decisions examined in this report indicate that there is not a sufficient level of reasoned analysis, formerly, by the East Timorese judges, and currently, by the international judges in these serious sexual assault and domestic violence cases.

Most of the sentences handed down in these cases of violence against women did not reflect the seriousness of the crime committed (ie. the sentences were disproportionately low), especially considering the permanent physical and psychological harm such acts of sexual and domestic violence can have on the victims, particularly when the victims are minors and the perpetrator is a family member. For a comparison of the sentences issued in these cases please see the Appendix.

[37] As far as we are aware, this case has never actually gone to trial, so we do not know if the defendant has reoffended.

In many jurisdictions these days, the youth of the victim is regarded as aggravating a crime of violence because of the vulnerability of young people. They are more impressionable and their personality and character is still developing. As noted above, as a signatory to the Convention of the Rights of the Child, under Article 19 of the CRC, Timor Leste should take all appropriate protective measures to protect children from all forms of physical and mental violence, including sexual abuse.

In JSMP's view, the decisions involving sexual violence carried out by a close family member or someone well known to the victim, also did not adequately discuss the gross breach of trust (which the victim had placed in the perpetrator) involved in such crimes. Moreover, in no case did the judge consider that when granting such short sentences, or a suspended sentence, the victim could have occasion to fear revenge from the offender (for reporting the offence) it being likely that either she would be recognized or her whereabouts could be discovered.

The sentences also usually did not bear any relation to the maximum penalty available for such offences under the KUHP. The short sentences handed down in almost all cases (except Decisions 3, 4 and 5) will not give the victims faith in the formal justice system, nor will these sentences encourage victims to utilize the formal justice system as the appropriate means of obtaining justice. It is also unlikely that these short sentences will provide much of a deterrent to the defendants and future perpetrators, from committing such crimes again in the future. The reasons provided in these decisions and the sentences delivered seem to indicate that judges in Timor Leste do not take violence against women and children in Timor Leste seriously.

The judges also rarely or never used international standards when handing down sentences against defendants. Recourse to such standards is particularly important in Timor Leste where domestic law currently provides such little protection to the rights of women and children.

One of the international judges usually processed hearings quicker than the East Timorese judges. She usually completed the examination of the witnesses, the victim and defendant, the reading out of the indictment/charges and delivered the decision in one day. In JSMP's view, such fast processing of cases, although commendable in terms of judicial efficiency, is not advisable. This is because, we have observed that this judge usually makes a decision (and types it out) within 15 to 20 minutes, and we do not believe this provides sufficient time to the judge to properly consider all the facts of the case, especially the aggravating factors, and the effect the crime can have on the victim's physical and psychological health.

We are also concerned that in one of the decisions the international judge converted the prison sentence to a suspended sentences (Decision 9). In JSMP's view, a suspended sentence is never appropriate in a serious sexual assault case, especially if the victim is a child.

5. RECOMMENDATIONS

Prosecutors and judges apply international standards in indicting/charging and sentencing defendants. International standards should be applied in order to charge accused with rape for offences of forcible non-consensual vaginal, anal or oral penetration and marital rape.

Aggravating circumstances, such as the use of a weapon, should be considered by the judge when determining a sentence for sexual crimes. [38]

The draft Penal Code should be amended to include additional sub-articles for where the perpetrator has inflict bodily harm on the victim, for where weapons have been used to threaten the victim, and for where the perpetrator has deliberately passed on a sexual transmitted infection to the victim through the offence of sexual aggression[39] *(see JSMP's report "Analysis of the Draft Penal Code" for further information).*

Judges should consider applying the maximum sentence available for an offence in cases of assault against a child.[40]

Judges should give adequate consideration to the relationship of the accused to the victim and consider applying extended sentences where there has been a clear abuse of authority by the perpetrator.[41]

Suspended sentences should not be given for crimes of serious sexual assault, especially if the victim is a child.

A wider definition of rape should be adopted in the draft Penal Code.[42]

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[38] Based on the applicable criminal code, the use of a weapon such as a machete is considered to be "force or threat of force". The seriousness of this use of force is reflected by the length of the maximum sentence provided.

[39] JSMP has recommended that the following sub-articles be added to **Article 162 (Aggravation)** of the draft Penal Code:
Article 162.1(d) "at the time of, or immediately before or after, the commission of the offence, the alleged offender maliciously inflicts bodily harm on the alleged victim or any other person who is present or nearby."
Article 162.1(e) "at the time of, or immediately before or after, the commission of the offence, the alleged offender threatens to inflict actual bodily harm on the alleged victim or any other person who is present or nearby by means of an offensive weapon or instrument."
Article 162.1(f) "the perpetrator has deliberately passed any venereal, syphilitic or immune-deficiency syndrome to the victim.

[40] Article 290 of the current Penal Code makes some attempt to recognize the seriousness of sexual assault against a child who has not yet reached the age of 15 years by providing a potential maximum sentence of seven years imprisonment. In JSMP's opinion, judges should have regard to this maximum sentence and the intention of the Article to recognize the potential trauma that can be caused to a child by sexual assault.
JSMP welcomes Articles 159, 162, 170 of the draft Penal Code which provide for extension of sentences where the victim is a minor.

[41] We note that Article 162.1 of the draft Penal Code provides for extension of sentences by one third for offences under Articles 160 (Sexual Coercion) and 161 (Rape) on the ground of abuse of authority, in terms of the relationship of the perpetrator to the victim. This is a positive development in East Timorese law.

[42] JSMP welcomes the comprehensive definition of rape provided in **Article 161** of the draft Penal Code The definition includes vaginal, anal, or oral sex, and the introduction of "another object" into an orifice to practice sex, and brings Timor Leste law very closely into compliance with the definition of rape (as a Crime Against Humanity and War Crime) provided for in article 7(1)(g)-1.1 and 8(2)(b)(xxi) –1.1, 8(2)(e)(vi) –1.1 of the *Elements of Crimes Annex* to the ICC Statute:

Comprehensive legal representation for women victims of rape to ensure that their cases are prosecuted to the fullest extent of the law.

Advocacy by women's groups to encourage implementation of international standards of fair treatment for women victims of crime in the formal justice sector.

Implementation of counselling for perpetrators of violence against women and children.

Comprehensive training for all judges (East Timorese and international) in the district courts and Court of Appeal in women's and children's rights.

6. CONCLUSION

The decisions handed down in these eleven cases of violence against women and girl children are a positive step forward for women in Timor Leste. The fact that these cases have even reached a final decision is an improvement in the level of justice provided to women by the courts, as previously when JSMP has monitored the courts, there had never been any decisions handed down in cases of violence against women. The improvements in the efficiency of processing of these cases is therefore commendable.

However, the decisions handed down by judges in the eleven cases of violence against women examined in this report indicate a number of continuing deficiencies:

- Sentences for crimes of violence against women are too short and do not reflect the seriousness of the crimes committed;
- Judges do not apply international standards in their decisions;
- Judge do not apply an appropriately high level of reasoning to cases involving serious sexual violence;
- Judges do not display gender sensitivity or awareness of children's rights;

The decisions analysed in this report indicate that Timor Leste needs a new Penal Code which will provide better direction to prosecutors and judges in charging, convicting, and sentencing perpetrators of serious sexual offences and domestic violence. It is important that this new Penal Code provides in particular for longer sentences in aggravating circumstances of offences against minors, especially very young minors, and offences where there is a serious abuse of authority or a relationship of trust.

Women's and children's rights need special protection because in Timor Leste, as in most societies, women and children are in a position of disadvantage and this disadvantage is based on structural injustice. The decisions analysed in this report highlight the need for training of all judges at the district and appeal level how they can work to better protect the rights of women and children.

"The perpetrator invaded the body of a person by conduct resulting in penetration, however slight, of any part of the body of the victim or of the perpetrator with a sexual organ, or of the anal or genital opening of the victim with any object or any other part of the body."
In JSMP's view however, it is not clear that "another object" as described in Article 161, could also include "any part of the body". JSMP therefore recommends that the wording in Article 161 should be amended to:
"*by the introduction of another object* ***or any other part of the body*** *into an orifice to practice sex".*
For further information see JSMP's report: "Analysis of the draft Penal Code"

7. APPENDIX

Perpetrator No.	Age of victim	Relationship of perpetrator to victim	Offence	Sentence
1	?	?	289 -Forceful obscene acts	1.5 years
2	3.5 years old	Neighbour	290(2e) – Obscene acts with a minor	1.5 years
3	12 years old	Half-brother, and guardian	287 – statutory rape	7 years
4	adult	Husband	340 and 338 - murder	10 years
5	? (but minor)	Father	285 - rape	7 years
6	12 years old	Father	294.1 and 53 – obscene acts with his underage child	1.9 years
7	? (but minor)	Father	285 and 53 – attempted rape	4 years
8	? (but minor)	Neighbour	286 – sex with a women who is unconscious or helpless	2.5 years
9	? (but minor)	Father	299 – causing an abortion	1.5 years
10	3 years	Neighbour	290(2e) – Obscene acts with a minor	Suspended sentence
11	Adult	Son	285 - rape	3 years