JUDICIAL SYSTEM MONITORING PROGRAMME

PROGRAMA DE MONITORIZAÇÃO DO SISTEMA JUDICIAL

Progress to Date in the Cases of Rogerio Lobato and Mari Alkatiri

JSMP Report

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1. INTRODUCTION

In recent months much attention has focused on the arrest of former Interior Minister Rogerio Tiago Lobato and the investigations underway by the Timorese Public Prosecution Service into the possible criminal liability of both Lobato and former Prime Minister Mari Alkatiri.

However limited information has been available to the public about these cases and there has been significant misinformation published in both the local and international media. In this report, JSMP hopes to clarify the processes that are underway in these cases and to provide some legal commentary on the conduct of the proceedings to date by the Office of the Prosecutor-General and the Dili District Court.

2. FACTUAL BACKGROUND

In early June of this year, allegations were made through the international media that senior political figures in the Timorese government had provided guns to a civilian militia group with instructions to carry out the murder of their political opponents. These allegations were made by Vicente "Railos" da Conceição, a former of Falintil member and a participant in the 2006 Fretilin national congress. Railos stated that he and a group of men under his de facto command had been armed on the instructions of the then Interior Minister, Rogerio Lobato, in collaboration with the then Prime Minister, Mari Alkatiri. He claimed that the objective of the arrangement was to kill opponents of the Government and members of opposing factions within the Fretilin party.

Soon thereafter the Office of the Prosecutor-General indicated that an investigation was being initiated into crimes allegedly committed by Lobato. Subsequently an investigation was also commenced by prosecutors into the alleged involvement of Alkatiri.

3. PROCEEDINGS IN THE LOBATO CASE

3.1. The arrest and first judicial questioning

On 22 June 2006, following the statement of Railos, the Public Prosecution Service sought and received a judicial warrant for the arrest of Rogerio

Lobato.[1] On the same day Lobato was arrested by two prosecutors and taken to the Dili District Court for judicial questioning.[2]

3.1.1. The conduct of the questioning

During the first questioning Lobato was represented by an international public defender and the Office of the Prosecutor-General was represented by two international prosecutors. The questioning was conducted by Judge Silvestre. All court actors involved at this stage of the case were internationals.

The first judicial questioning in this case was closed to the public. JSMP sought to negotiate access to the questioning but was told by the judge and prosecutors handling the case that the questioning would be closed to the public because the suspect himself had requested this. This closed nature of the questioning was in line with what has become standard practice in the Timor-Leste criminal justice system. It reflects a common interpretation of article 75(1) of the Criminal Procedure Code which states that "a criminal proceeding is open to the public from the time the indictment is presented" and which therefore implies that up until the presentation of an indictment proceedings may be closed to the public. While article 131 of the Timor-Leste Constitution requires that all court hearings must be public unless a judicial ruling to the contrary is made on one of certain specified grounds, the meaning of "hearing" is not clear in this context and seems unlikely to be applicable to questionings during the pre-trial or investigatory phase of proceedings. The drawing of a distinction between pre-trial court sessions and hearings at trial in determining whether to allow public access is consistent with international human rights law, which requires that trial hearings in which a criminal charge is determined must be open to the public but which imposes no such requirement in respect of pre-trial sessions.[3]

During the judicial questioning, Lobato's status as a defendant was declared as required under the Criminal Procedure Code.[4] This defendant status lasts for the duration of the entire proceeding[5] and has the consequence that

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[1] Article 220 of the Criminal Procedure Code provides that other than in cases of *flagrante delicto* (a crime that is in the process of being committed or that has just been committed, according to the definition in article 219) and certain narrowly defined emergency circumstances, arrests may only be carried out following the issue of an arrest warrant by a judge.

[2] Article 63(1) of the Criminal Procedure Code requires that the police authority which carries out an arrest of a person in *flagrante delicto* must present that person for the first judicial questioning as soon as possible, but no more than seventy-two hours from the time of the arrest. Articles 63(2) and (3) provide further detail regarding the purpose of and participants in the questioning. Although article 63 refers to arrests of persons in *flagrante delicto*, it has been treated as applicable more generally and this approach is consistent with the right granted under article 60(a) to all defendants who are under arrest to be presented to the judge for the first judicial questioning within seventy-two hours of the arrest.

[3] See article 14(1) International Covenant on Civil and Political Rights and *Kavanagh v Ireland* HRC Communication No. 819/98, 21 April 2001, UN Doc no. CCPR/C/71/D/819/1998, para. 10.4.

[4] Under article 59(2) the status of defendant must be declared as soon as, *inter alia*, as suspect is arrested or an investigation gets underway against a particular person and the latter makes a statement before any judicial authority or police entity.

[5] Article 59(5) Criminal Procedure Code.

certain rights are granted to, and some duties imposed upon, the person in question.[6]

3.1.2. The imposition of restrictive measures

During the initial questioning a judicial ruling was made that Lobato be placed under house arrest.

The Criminal Procedure Code permits the imposition of restrictive measures on defendants where there is a reasonable fear that the defendant might escape, or that the investigation or trial might be disrupted through interference with evidence, or that further crimes or disruptions to public order might occur.[7] One form of restrictive measure which may be imposed is a "prohibition against quitting residence" (commonly referred to as "house arrest"). This may be imposed "where there are strong indications that a criminal offence punishable by imprisonment exceeding three years has been committed".[8]

The Criminal Procedure Code provides that a prohibition on quitting residence may last up to two years without the presentation of an indictment or four years without a conviction at first instance.[9] However restrictive measures, including "house arrests", are ended immediately in certain circumstances, including if a case is dismissed for lack of indictment.[10] This may happen after the completion of the inquiry, for example if insufficient evidence has been gathered.[11]

JSMP believes that Lobato is the first defendant to be subjected to a house arrest under the new Criminal Procedure Code. Although JSMP did not attend the hearing at which this order was imposed, subsequent enquiries revealed that the reason for the house arrest was a belief that the defendant's safety could not be guaranteed in Becora Prison. This may be in part because the Becora prison does not have single cells, and because of Lobato's former position as the Minister responsible for the PNTL, who were responsible for the arrest of most inmates at Becora Prison.

JSMP considers that the order for "house arrest" in Lobato's case was for the most part a positive development. It has only two reservations:

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[6] The rights of defendants are set out in article 60 of the Criminal Procedure Code. Some duties of the defendant are set out in article 61. Further obligations falling on persons declared defendants are included in article 186. See further below at 4.1.1

[7] Article 183 Criminal Procedure Code.

[8] Article 193 Criminal Procedure Code.

[9] Article 195(4) of the Criminal Procedure Code provides that restrictive measures under article 193 shall lapse after the expiration of twice as much time as is permitted by article 195(1) in respect of pre-trial detention. Article 195(1) permits pre-trial detention for one year without the presentation of an indictment, two years without a first-instance conviction, three years where an appeal on non-constitutional grounds has been filed, and three and a half years where an appeal on constitutional grounds has been filed.

[10] Article 203 Criminal Procedure Code.

[11] Article 235(1) Criminal Procedure Code.

- First, there is a danger of a public perception that Lobato has avoided pre-trial detention in Becora as a result of special treatment based on his political standing and influence. While JSMP considers that such a perception would be unfounded, it may be that the Office of the Prosecutor-General needs to improve the provision of information to the public to address this danger.

- Secondly, it is concerning that the approach of the prosecution and the Court appears[12] to have been one of assuming that where restrictive measures were required, pre-trial detention should always be imposed unless there was a reason not to do so. That approach is in direct contradiction to the scheme established by the Criminal Procedure Code, which requires that pre-trial detention should only ever be imposed where it is possible to positively establish the "inadequacy or insufficiently of any other restrictive measure provided by the law."[13] This scheme conforms to international human rights law, according to which pre-trial detention must be treated as an exception rather than the rule.[14]

However, with these small qualifications aside, JSMP welcomes the attention given in this case by both the Office of the Prosecutor-General and the District Court to restrictive measures less intrusive than pre-trial detention, and hopes that such measures will in future be used more widely.[15]

3.2. Further judicial involvement

3.2.1. Subsequent sessions before the Dili District Court

JSMP has been informed that a second session before Judge Silvestre of the Dili District Court was held on 29 June.[16] The session was apparently held at the instigation of the Court in response to concerns about the defendant's safety in his home. However ultimately there was no change to the order for restrictive measures.

During the second court session Lobato requested a further appearance before a judge. A third court session was therefore held on Saturday 1 July at the Dili District Court. JSMP understands that this was because, having received advice from his privately retained foreign lawyers,[17] Lobato wished to have a further session with the judge for two purposes:

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[12] JSMP wishes to emphasize that since it was not granted access to the court sessions in this case, its information about the position advocated by the prosecution and the reasoning used by the Judge was passed on in general terms by court actors after the sessions.

[13] Article 194(1)(b) Criminal Procedure Code.

[14] Article 9(3) International Covenant on Civil and Political Rights.

[15] JSMP recognizes that some restrictive measures, such as prohibitions on quitting residence, may be difficult to enforce from a practical viewpoint in Timor, however to the extent that it is feasible to utilize these measures this should be attempted.

[16] JSMP was not made aware of this session in advance and for this reason did not attempt to gain access to it.

[17] The right of a defendant to be represented by a lawyer is guaranteed by article 60(d) of the Criminal Procedure Code. Section 34(2) of the Timor-Leste Constitution gives defendants the right to select and be assisted by a lawyer at all stages of a criminal proceeding. Lobato is represented by three private lawyers: two from Macau and one from Portugal. Timor-Leste

(1) to request that the prohibition on quitting his residence be lifted; and
(2) to provide a further statement or a clarification of his earlier statement regarding the substance of the case against him.

This third court session was also closed to the public.[18] JSMP made enquiries following the hearing and was told that there was no change to the order for Lobato's house arrest.

3.2.2. Lawfulness of the subsequent sessions

JSMP is concerned about the compliance of this process with the new Criminal Procedure Code. It is necessary to consider the extent to which the Criminal Procedure Code permits judicial involvement in the questioning of defendants during the pre-trial period. JSMP is specifically concerned that in Lobato's case, an additional session before a judge was held in part for the purpose of allowing Lobato to provide a statement as to the substance of the case against him.

JSMP was informed by the Prosecutor's Office that the purported legislative basis for this is articles 60(c) and 61(b) of the Criminal Procedure Code. JSMP does not agree that these provisions permit the holding of multiple judicial questioning sessions during the investigation phase of a criminal proceeding.
Article 60 is concerned with the rights of the defendant. Article 60(c) reads as follows:

> *"In addition to other rights enshrined in the law, the defendant enjoys the following rights:*
> *…*
> *(c) to freely decide to make or not to make statements and to do it, even at his or her own request, at any stage of the investigation or of the trial hearing, except as provided in paragraph 61(a);*
> *…"*

This is designed to ensure that statements made by a defendant are made on the basis of the defendant's free will. The most important aspect of this is to guarantee the defendant's right to silence – that is, his or her right to *refuse* to provide information. This is a fundamental right of the defendant that is guaranteed under international law.[19] However article 60(c) does appear to go beyond simply guaranteeing the right of the defendant to *refuse* to make a statement, and also provides that a defendant may "freely decide to make… statements and to do it, even at his or her own request, at any stage of the investigation…". In JSMP's view, this provision means that during the investigation the defendant may never be prevented from making a statement. However article 60(c) does not state which authority is competent to receive such a statement. It does certainly does not indicate that a statement made by a defendant during the investigation should be heard by a judge.

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does not yet have a law regulating the formal requirements for private legal practice, including any requirements for cross-jurisdictional recognition.
[18] JSMP attempted to gain access to the session but this was refused.
[19] Article 14(3)(g) International Covenant on Civil and Political Rights.

Article 61, regarding the duties of the defendant, includes article 61(b) as follows:

> *"In addition to those duties provided in the law, the defendant is subject to the following duties:*
> *…*
> *(b) to appear before the competent authorities, when summoned regularly;*
> *…"*

In JSMP's view, the effect of this provision is only to require that when an authority, acting within its competency and following correct procedures as set out in the Criminal Procedure Code, requires a defendant to appear before it, the defendant must do so. JSMP cannot see any part of this provision which permits a defendant to request the holding of an additional pre-trial judicial questioning session. Nor does the provision set out the circumstances in which authorities (including judges or prosecutors) may summon a defendant to appear before them. Rather it only states that when they do so in accordance with the proper procedures set out elsewhere in the Code, the defendant is obliged to comply.[20]

JSMP believes that the more relevant provisions of the Criminal Procedure Code are articles 63 and 64 and articles 226 to 228.

Where a defendant is arrested, article 63 requires that the arresting authority must present that person for first judicial questioning as soon as possible, but not more than seventy-two hours from the time of arrest.[21] The judge has exclusive competence to conduct the first questioning after the defendant's arrest, the purpose of the questioning being, among other thing, to consider the lawfulness of the arrest in an adversarial fashion.[22] The questioning is to be attended by the judge, the public prosecutor, the defender, an interpreter, an official tasked with taking a written record of statements made, and if necessary a security official.[23]

Article 64(1) states:

> *"Any further questioning is undertaken by the entity with competence to conduct the procedural phase in which it occurs, or by a person with delegated competence to undertake it."*

The plain meaning of this, particularly in the context of article 63 which it follows, is that any questioning of the defendant after the initial judicial questioning is to be undertaken by the entity that is responsible under the Criminal Procedure Code for conducting the phase in which that questioning occurs. It is therefore necessary to inquire as to which entity has the

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[20] See further below at 4.1.2.

[21] Although article 63(1) appears to apply this requirement to arrests in *flagrante delicto*, it has been applied more generally and this approach is supported by article 60(a) which provides that all defendants under arrest have a right to be presented to a judge for first judicial questioning within seventy two hours of their arrest.

[22] Article 63(2) Criminal Procedure Code.

[23] Article 63(3) Criminal Procedure Code.

competence to conduct the investigation phase of a proceeding. The Criminal Procedure Code divides a proceeding into four main phases: investigation, trial, appeal and execution. The investigation (or inquiry) phase extends from the report of a crime up until the issue of an indictment and referral to trial. The phase is stated to be for the purpose of collecting evidence and taking any other action that is necessary in order to demonstrate that a crime has been committed, to hold its perpetrators liable, and to assess compensation.[24] Three provisions of the Criminal Procedure Code set out the respective responsibilities of the judiciary, prosecution and police in respect of this phase:

- Article 226 enumerates a list of specific acts which are under the exclusive jurisdiction of the relevant judge and which are to be performed by that judge at the request of the public prosecutor.[25] This list includes conducting the first questioning of an arrested defendant; conducting the committal of statements to writing for future use; ordering the search of certain items, institutions or person; authorizing phone taps and the seizure of mail and records; and carrying out any other functions as may be assigned by the law. While it may seem that the power "to conduct the committal of statements to writing for future use"[26] may be relevant to the present question, JSMP considers that this power refers only to the committal of statements that are taken under article 230, which is titled "statements for future use". This article does not cover statements made by the defendant, but rather only those statements made by a witness who may not be available at trial. The policy justification for establishing an adversarial procedure overseen by a judge for the taking of such statements is clear – namely the protection of the defendant against the potentially adverse consequences of using a witness statement at trial when the witness is not available for cross-examination. This policy justification would not apply so as to necessitate the presence of a judge during the taking of other types of statements during the investigation phase.

- Article 227 provides that the public prosecutor assumes a leadership role in the inquiry in respect of any acts not carried out by it directly, and states that the prosecution may perform or authorize any acts reserved to it by the law.

- Article 228(1) states that any other procedural acts to be done in the course of the inquiry are to be carried out by the police.

JSMP believes that the scheme established by these provisions intends that aside from functions specifically granted to the judiciary, all other acts during the investigation or inquiry phase of a proceeding are to be carried out under the competence of the prosecution or police.

[24] Article 225 Criminal Procedure Code. An exception to this is cases which are tried by way of expedited proceeding: see articles 346 to 350.
[25] Articles 226(1) and (2).
[26] Article 226(1)(b).

JSMP notes that Article 226(1) does not specifically mention the reviewing of non-custodial pre-trial restrictive measures as a function for judges, however JSMP believes that this is a function otherwise assigned by the law and therefore falls within article 226 (1)(f).[27] This is because:

- Article 184(2) of the Criminal Procedure Code provides that during the course of the investigation restrictive measures[28] (other than those relating to the provision of identity and residence information) may only be imposed by a judge. If only a judge is able to impose such measures, it should follow that only a judge has the power to modify them.

- Where pre-trial detention (one type of restrictive measure) has been ordered, such detention may be reviewed, over-ridden, suspended or substituted for another measure, and these steps are required to be undertaken by a judge.[29]

- In respect of restrictive measures amounting to a form of arrest or detention, a right exists under the Timor-Leste Constitution and under international human rights law to access a court to challenge the lawfulness of those measures.[30] This right is therefore a part of Timorese law,[31] although it is not expressly included in the Criminal Procedure Code.

However, while JSMP believes that it is important for defendants to have access to judges for the purposes of reviewing the lawfulness of restrictive measures imposed on them (and that they are entitled to be represented for this purpose by a lawyer of their choice[32]), this entitlement does not extend to

[27] Article 266(1)(f) Criminal Procedure Code states that judges shall also perform other such acts as may be assigned by law.

[28] Restrictive measures under Part I, Title IV, Chapter II of the Criminal Procedure Code include bail, obligations to appear periodically before a competent authority, prohibitions on travel, prohibitions against quitting residence, and pre-trial detention.

[29] Articles 196 to 199 Criminal Procedure Code.

[30] Section 33 of the Timor-Leste Constitution states that anyone who illegally loses his or her freedom has the right to apply for *habeas corpus*. JSMP considers that this right actually pertains to any person who loses his or her freedom, since it is not possible to say whether that situation is illegal until a *habeas corpus* application is made. Such an interpretation is also consistent with international law. Article 9(4) of the International Covenant on Civil and Political Rights, which has the force of law in Timor-Leste under section 9 of the Timor-Leste Constitution, provides that anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that that court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful. Although a prohibition on quitting residence is not equivalent to pre-trial detention in the terms of the Criminal Procedure Code, it is sufficient to amount to a deprivation of liberty within the meaning of article 9 of the International Covenant on Civil and Political Rights: see for example Human Rights Committee decision in *Gorji-Dinka v Cameroon*, Communication No. 1134/2002, 10/5/05, para.5.4.

[31] In addition to the effect of section 33 of the Constitution, the right is also imported into Timorese law by section 9 of the Constitution which incorporates the text of international conventions into local law. As explained in footnote 30, the right to apply for *habeas corpus* is protected by article 9(4) of the International Convention on Civil and Political Rights.

[32] Section 34(2) Timor-Leste Constitution provides that accused persons have the right to select and be assisted by a lawyer at all stages of the proceedings. Article 60(d) of the

being able to call a judicial audience at any time during the investigation phase of proceedings for any purpose. JSMP is concerned that there appears to be a level of confusion regarding the respective roles of the judiciary and prosecution during the pre-trial phase of proceedings.

JSMP is concerned that prosecutors and judges apparently remain unfamiliar with the procedures contained in the new Criminal Procedure Code. This is to some extent caused by ambiguities in the Code itself which are the result of poor drafting and inadequate consultation prior to the Code's enactment. More efforts need to be made to familiarize court actors with the Code.

3.3. The defendant's application for the dismissal of the case

Following the earlier proceedings, an application was made by Lobato's lawyers to the Dili District Court to have all acts carried out in the course of the investigation nullified. This was on the basis that the Prosecutor-General had not been duly appointed in accordance with the law and that therefore all acts carried out by the Office of the General-Prosecutor were without legal effect.

Under the Timor-Leste Constitution the Office of the Prosecutor-General is the highest authority in the public prosecution, the composition and competencies of which are to be defined by law.[33] The Office is headed by the Prosecutor-General,[34] who is appointed by the President of Timor-Leste for a term of office of four years.[35] The Constitution provides that in the absence of the Prosecutor-General or where he or she is unable to act, he or she must be replaced according to law.[36] The Constitution therefore does not anticipate a situation in which there is not a Prosecutor-General validly holding office. The Prosecutor-General, Longuinhos Monteiro, was formally sworn in on 17 July 2006, some time after the expiry of his previous term of office, and therefore was not properly appointed during approximately one month of the investigation in the Lobato case.

However JSMP has been informed that the application by Lobato's lawyers was dismissed on the basis that the status of the Prosecutor-General was not relevant, since all acts carried out in the Lobato case had been done not by Monteiro, but by international prosecutors working in the Office of the Prosecutor-General.

JSMP believes that this was the correct outcome in the light of the law regulating the Public Prosecution Service,[37] which establishes the structure and powers of the institution. It provides that the Prosecution Service is a

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Criminal Procedure Code provides that defendants in criminal proceedings have the right to be assisted by a defender.

[33] Section 133(1) Timor-Leste Constitution.

[34] Section 133(2) Timor-Leste Constitution.

[35] Section 133(3) Timor-Leste Constitution; section 86(k) Timor-Leste Constitution. See also section 12 RDTL Law 14/2005 Statute of the Public Prosecution Service.

[36] Section 133(2) Timor-Leste Constitution.

[37] As required by section 133(1) of the Timor-Leste Constitution.

hierarchically organized magistracy under the Prosecutor-General.[38] The competencies of the Prosecution Service as a whole are set out, including the leading of criminal investigations,[39] and persons who may act as agents of the Prosecution Service are listed, including public prosecutors[40]. It is significant that the organisation's powers are vested in the Prosecution Service as a whole, not specifically in the Prosecutor-General. This is in contrast to the previous regime for the Prosecution Service, under UNTAET Regulation 2000/16 (and as subsequently amended by UNTAET Regulation 2001/26), which vested prosecutorial powers exclusively in the Prosecutor-General, who was also given the ability to delegate those powers to public prosecutors under his authority[41]. In JSMP's view the effect of the new regime is that even where the Prosecutor-General is not duly appointed, other prosecutors nonetheless retain the power to exercise the functions of the Prosecution Service.

3.4. The indictment in the Lobato case

3.4.1. The issue of an indictment

On 21 September the Office of the Prosecutor-General announced that it had completed its investigation in the Lobato case and that on the previous day (20 September) it had presented an indictment to the Dili District Court.

This step was taken in accordance with the Criminal Procedure Code, which requires that if, at the conclusion of an inquiry, the Prosecutor-General considers that there is sufficient evidence, a writ of indictment must be issued within fifteen days.[42]

Information issued by the Prosecutor-General's Office indicates that the indictment includes charges of the following crimes: misappropriation of public property, murder, and the unauthorised importation or use of firearms to disrupt public order.[43]

3.4.2. Public access to the indictment

JSMP has made enquiries with the Office of the Prosecutor-General to establish whether any other crimes are charged in the indictment. JSMP was informed that this information was not public and could not be disclosed by the Office of the Prosecutor-General.[44]

JSMP also made a written request to the Dili District Court for a copy of the indictment but at the date of this report's completion had still not been supplied with a copy of the indictment. The reason given by the Court was that the decision to provide the indictment to JSMP had to be taken by the

[38] Section 2(1) RDTL Law 14/2005 Statute of the Public Prosecution Service.
[39] Section 3(1) RDTL Law 14/2005 Statute of the Public Prosecution Service.
[40] Article 7 RDTL Law 14/2005 Statute of the Public Prosecution Service.
[41] Sections 3, 12.2 and 12.5 of UNTAET Regulations 2000/16 and 2001/26.
[42] Article 236(1) Criminal Procedure Code.
[43] Notice issued by the Office of the Prosecutor-General 21 September 2006.
[44] Discussions between the Deputy Prosecutor-General and JSMP staff on 25 September 2006.

responsible judge, who holds the documents, and that she was outside of Dili to hear a case in her capacity as Baucau District Court.

JSMP notes that according to the Criminal Procedure Code, a criminal proceeding is open to the public from the time the indictment is presented.[45] This is explained as entitling the media and general public to attend the proceedings.[46]

However the Criminal Procedure Code does not provide that the indictment on which a prosecution is based must also be publicly available. It states that access to records of a proceeding may only be freely accessed by the public prosecutors, suspects, defendants, and aggrieved person.[47] Other persons seeking access to records must produce proof of a legitimate interest in the proceeding and receive prior authorisation from the judicial authority in charge of the relevant phase of the proceedings.[48] However the Code does not define "records" for this purpose and it is not clear whether the indictment forms a part of these records.

For this reason, JSMP is concerned that at the present time the law is insufficiently clear on the subject of public access to indictments. JSMP believes that indictments should be publicly accessible. Allowing the public to attend sessions but without access to the indictment on which a court proceeding is based is insufficient to allow public understanding and therefore scrutiny of criminal cases. For this reason JSMP believes that public access to indictments should be ensured under the law.

4. PROCEEDINGS IN THE ALKATIRI CASE

4.1. Questioning of the defendant and related issues

Following Alkatiri's resignation from his position as Prime Minister on 26 June 2006, prosecutors required him to appear for questioning on 30 June. However before the questioning session Alkatiri wrote to prosecutors requesting that the questioning be postponed since he was still awaiting the arrival of his lawyers from overseas. A new request was made on 7 July for Alkatiri to attend questioning on 20 July.

On 20 July Alkatiri attended a questioning carried out by an international public prosecutor. His lawyers were also in attendance.[49] The questioning was closed to the public.[50]

[45] Article 75(1) Criminal Procedure Code.
[46] Article 75(2)(a) Criminal Procedure Code.
[47] Article 77(1) Criminal Procedure Code.
[48] Article 77(3) Criminal Procedure Code.
[49] During the questioning Alkatiri was represented by five lawyers: two from Timor-Leste, two from Portugal and one from Indonesia.
[50] JSMP was not permitted to monitor this questioning. The Criminal Procedure Code does not require that prosecutorial questionings be accessible to members of the public or monitoring organisations.

4.1.1. Status of defendant

Under the Criminal Procedure Code wherever there is circumstantial evidence that a person has committed, has taken part in, or is preparing to take part in a criminal offence, that person is a “suspect”.[51]

However a suspect does not acquire the status of “defendant” until one of several possible further steps occurs. Article 59 provides that the status of defendant must be granted to a person when:

(a) an indictment is presented in respect of that person;[52]

(b) an investigation is underway against that person and he or she makes a statement before a judicial or police entity;[53]

(c) a restrictive or property-guarantee measure has to be imposed on that person;[54]

(d) that person is arrested;[55] or when

(e) a report is prepared stating that that person has committed a crime and he or she is notified of the report.[56]

In the present case, since an investigation was underway against Alkatiri, and he provided a statement to a public prosecutor, he was required to be declared a defendant.

The status of defendant is significant because it entails certain rights and duties,[57] as well as enabling certain procedural steps under the Criminal Procedure Code.[58] For example, the rights of a person declared a defendant include, *inter alia*, the rights to be informed of acts alleged against him or her and of his or her rights when being asked to make a statement,[59] to be assisted by a lawyer if he or she so requires,[60] and to have a public defender appointed by the court for representation in certain processes.[61] A defendant’s duties include, among other things, to appear before competent authorities when summoned,[62] to subject him or herself to lawful searches for evidence,[63] and to provide proof of identity and residence.[64]

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[51] Article 58 Criminal Procedure Code.

[52] Article 59(1) Criminal Procedure Code.

[53] Article 59(2)(a) Criminal Procedure Code.

[54] Article 59(2)(b) Criminal Procedure Code. Note the difficulty associated with this provision in the context of article 181(1) of the Code: see footnote 58 below.

[55] Article 59(2)(c) Criminal Procedure Code.

[56] Article 59(2)(d) Criminal Procedure Code.

[57] Rights of a defendant are set out in article 60 Criminal Procedure Code, basic duties are set out in article 61 Criminal Procedure Code.

[58] For example, pre-trial restrictive or property-guarantee measures may only be imposed on a person who has the status of defendant: article 181(1) Criminal Procedure Code. However JSMP notes that this rule is effectively made redundant by article 59(2)(b) which states that the status of defendant must be declared as soon as a restrictive or property-guarantee measure has to be imposed on any person. This appears to allow the granting of defendant status in any case in which property-guarantee or restrictive measures are sought.

[59] Article 60(b) Criminal Procedure Code.

[60] Article 60(d) Criminal Procedure Code.

[61] Article 60(e) Criminal Procedure Code.

[62] Article 61(b) Criminal Procedure Code.

[63] Article 61(c) Criminal Procedure Code.

[64] Article 61(d) Criminal Procedure Code.

A person who acquires the status of defendant must be given notice of this fact (orally or in writing) by a judicial or police entity, and must be provided with an explanation of the rights and duties entailed in this status, as well as information regarding the case file and any public defender that has been appointed.[65] If such notice and information is not provided statements made by the defendant may not subsequently be used against him or her.[66]

JSMP notes an apparently anomaly in the Criminal Procedure Code in respect of this issue. The law states that a suspect who is being investigated but who is not arrested does not acquire the status of defendant until "the latter makes a statement before any judicial authority or police entity."[67] This appears to suggest that the status of defendant is not conferred until a person has finished or at least started giving a statement to judicial or police authorities. However this would mean that the person does not obtain the right to legal representation[68] or to be informed of the allegations made against him or her until *after* a statement has been given. JSMP considers that this result would be in contradiction to the clear purpose of the legislation, which seeks to implement human rights standards and to ensure that statements made by accused persons can only be used against them if such statements were made following a reading of the accused's rights and in the presence of a lawyer (if so requested). For these reasons JSMP believes that the Criminal Procedure Code should be interpreted as requiring that the status of defendant be conferred immediately before any statement is taken from a person under investigation, and that notice of that status and accompanying rights and duties should be given before any statement is taken.

JSMP was informed by the public prosecutor who conducted the questioning of Alkatiri that the latter was duly informed of his status as a defendant.[69] However since JSMP was not able to monitor the questioning it cannot confirm whether or not such notice complied with the requirements of the Criminal Procedure Code or at what point in the questioning it was given.

4.1.2. Summonsing of defendant for questioning

JSMP notes that the calling of Alkatiri to a prosecutorial questioning was in accordance with the requirements of the Criminal Procedure Code. Article 231 states that when an inquiry against a particular person gets underway, it is compulsory for that person to be questioned.[70]

JSMP notes however that the power of prosecutors to compel a suspect or defendant to attend at the Office of the Prosecutor-General for questioning is unclear. As mentioned above, the Criminal Procedure Code imposes a duty

[65] Article 59(3) Criminal Procedure Code.
[66] Article 59(4) Criminal Procedure Code.
[67] Article 59(2)(a) Criminal Procedure Code.
[68] JSMP also notes in this context that article 34(2) the Timor-Leste Constitution confers the right to select and be assisted by a lawyer on "an accused person". However it is unclear from what point a person can be considered "an accused person" for this purpose: that is, whether such a status commences from the issue of an indictment or earlier.
[69] Interview with Prosecutor Luis Mota Carmo conducted by JSMP on 21 July 2006.
[70] Article 231(1) Criminal Procedure Code.

on defendants to appear before the competent authorities when summoned regularly.[71] However as explained above, a suspect who is under investigation but has not yet been arrested does not have the status of defendant until that person attends to provide a statement to prosecutors or police.[72] It therefore appears that where no arrest has been made police are not able to compel a suspect to attend for questioning. For this reason, although Alkatiri cooperated with prosecutors in attending for questioning, JSMP believes that he was not required by law to do so. For this reason, to the extent that some media reports insinuated that Alkatiri's failure to attend questioning on 30 June 2006 was unlawful, such reports were misleading

JSMP believes that the law requires some clarifications in this area:

1. At the present time it remains unclear what steps should be taken by prosecutors if a suspect who has not attained the status of defendant (and therefore cannot be compelled to respond to a summons) refuses to appear for questioning. Article 231 of the Criminal Procedure Code requires that a suspect under investigation must be questioned. It is unclear whether the mere making of a request for the suspect to attend questioning is sufficient to meet the requirements of article 231, or whether the prosecution must undertake other steps to ensure that an actual questioning occurs. If the latter position is correct, it would seem that it is necessary for prosecutors to obtain a judicial warrant for the arrest of a suspect in order to undertake his or her questioning if the suspect will not voluntarily undertake such questioning.

2. JSMP is concerned that the obligation on defendants to appear before authorities when summoned is not sufficiently clear under the Criminal Procedure Code. This is because the law does not define who are the "competent authorities" which may issue summonses, nor what is required for a summons to be "regular". Neither does the law explain clearly what the result is if a defendant fails to comply with the obligation.[73]

4.2. Issues relating to immunity

During the early stages of the Alkatiri investigation, there was much speculation regarding Alkatiri's possible immunity. JSMP considers that there are several discrete issues in this case relating to immunity.

[71] Article 61(b) Criminal Procedure Code.

[72] See article 59(2)(a) Criminal Procedure Code and the discussion above under heading 4.1.1.

[73] However see article 186(2)(d) which appears to impose severe measures on a defendant for failure to comply with a notification from a competent authority to remain at the latter's disposal, including, on one possible interpretation, trial *in absentia* (although this interpretation would render the provision inconsistent with international law, particularly article 14(3) of the International Covenant on Civil and Political Rights, and therefore invalid according to article 9(3) of the Timor-Leste Constitution.)

4.2.1. Immunity as a member of the Government

Article 114 of the Timor-Leste Constitution provides that no member of the Government[74] may be detained or imprisoned without the permission of the National Parliament, except for a felonious crime punishable with a maximum sentence of imprisonment for more than two years and in *flagrante delicto*.

This provision gives rise to some difficulties when considered in the context of the applicable penal laws (the Indonesian Penal Code and certain UNTAET Regulations) given that these do not draw a distinction between felonies and other crimes.[75] In addition, if the provision is interpreted as providing an immunity not only from pre-trial detention but also from judicially imposed imprisonment, JSMP considers that the provision constitutes a troubling interference with the independence of the judiciary and an unnecessary derogation from the principle that all persons must be equal before the law.

It is clear that while the offences alleged against Alkatiri could carry a penalty of more than two years, they were not in *flagrante delicto*. This means that if the provision is applicable to Alkatiri the detention or imprisonment of Alkatiri would require the permission of the National Parliament.

However, a question arises as to whether the protection provided under this provision can be enjoyed by a person who is no longer a member of the Government, though he was at the time of his alleged offence. The section does not talk about the commission of crimes by members of Government, but rather about the latter's arrest or imprisonment. This seems to indicate that the section applies to those who are members of Government at the time of their attempted arrest or imprisonment, rather than at the time of the alleged crime. In addition the purpose of the provision appears to be the protection of members of Government from the threat of detention or imprisonment which might interfere with their independence. For this reason it seems likely that the immunity is lost as soon as a person ceases to be a member of the Government.

For this reason this type of immunity is not enjoyed by Alkatiri (or, for that matter, by Lobato), since he is no longer a member of the Government.

4.2.2. Immunity as a Member of Parliament

In addition to serving as Prime Minister, Alkatiri also held (and continues to hold) the position of Member of Parliament. Although the Constitution does not provide that the Prime Minister will necessarily be a Member of Parliament, it likewise does not prohibit the holding of these two posts by a single individual.[76] Nor does any other piece of legislation.[77]

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[74] Under section 104(1) of the Constitution the Government comprises the Prime Minister, the Ministers and the Secretaries of State.

[75] The current draft Penal Code also does not draw such a distinction.

[76] Incompatible positions are set out in articles 68 and 78 of the Constitution. Article 68(2) also provides that the law shall define other incompatibilities.

[77] Article 13 of Law 5/2004 on the Status of Members of Parliament sets out positions which are incompatible with the position of Member of Parliament. These do not include the position of Prime Minister or member of the Government.

Parliamentary immunity is covered by article 94(1) of the Constitution. However it extends only to immunity from civil or criminal liability for votes and opinions expressed by parliamentarians while performing their functions.[78]

Law 5/2004 on the Status of Members of Parliament provides a wider protection from legal processes to Members of Parliament. Article 11(1) states that:

> *"No member of Parliament shall be arrested or placed in pre-trial custody, except for felony punishable with a prison sentence exceeding five years following authorization from the National Parliament."*

This provision appears to provide that even where the crime being investigated can attract a prison sentence of more than five years, arrest and pre-trial detention of a suspect who is a Member of Parliament nonetheless requires the authorization of the National Parliament. Accordingly, unless the above provision is unconstitutional, as long as Alkatiri remains a Member of Parliament, his arrest or pre-detention is not permissible without the permission of the National Parliament.

However JSMP wishes to emphasise that this provision does not protect Alkatiri (or any other Member of Parliament) from criminal liability and sentencing to imprisonment by a Court. It only provides immunity from arrest and pre-trial detention. There is therefore no impediment arising from a statutory immunity to Alkatiri being investigated and, should there be sufficient evidence, indicted and convicted of criminal activities.

Furthermore, the provision does not appear to prevent the imposition of pre-trial restrictive measures other than pre-trial detention. Such measures can only be imposed by a judge,[79] but it does not appear they require the arrest of the defendant. Where feasible and advisable, a hearing of the defendant should occur before the imposition of restrictive measures, however this is not required in every case.[80] For this reason it seems that even if Alkatiri has immunity from arrest and pre-trial detention it remains possible for other forms of pre-trial restrictive measure to be imposed on him if necessary.

One problem could conceivably arise if it became necessary to arrest Alkatiri in order to question him. As explained above,[81] if a suspect under investigation does not voluntarily submit to questioning by prosecutors it may be necessary for an arrest to be made for this purpose. It is unclear what would happen in such a case where the suspect is entitled to immunity from arrest. In the present case such a question did not arise, since Alkatiri was willing to submit to questioning voluntarily.

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[78] This rule is mirrored in article 10 of Law 5/2004 on the Status of Members of Parliament.
[79] Article 184(2) Criminal Procedure Code.
[80] Article 184(3) Criminal Procedure Code.
[81] See above at 4.1.2

4.3. The absence of pre-trial restrictive measures

A noticeable feature of the Alkatiri case, when contrasted with the concurrent investigation into Lobato, is the lack of pre-trial restrictive measures. That is, unlike Lobato, Alkatiri has not been arrested, placed under house arrest or subjected to other form of judicially imposed restrictive measure.

Under the Criminal Procedure Code, restrictive measures may be imposed on a defendant[82] by a judge[83] if one of three requirements are met. There must be a reasonable fear that:

- the defendant might escape; or
- the investigation or trial might be disrupted through interference with evidence; or that
- criminal activity might be pursued or public order disrupted (given the nature of the offence, the circumstances and the defendant's personality).[84]

JSMP was informed by the public prosecutor involved in this case that none of these requirements was satisfied in respect of Alkatiri. That is, the prosecution does not consider that there are any reasonable grounds for suspecting that Alkatiri might escape, interfere with evidence, pursue criminal activities, or cause a disruption to public order.[85] For these reasons no request was made by the prosecution to a judge to impose such measures on Alkatiri.

Similarly, because Alkatiri willingly submitted to questioning by a public prosecutor, and because there was no request made by prosecutors to a judge to impose restrictive measures on him, prosecutors did not need to arrest Alkatiri.[86] Indeed owing to Alkaitiri's possible entitlement to immunity as a Member of Parliament, it is questionable whether his arrest is permissible (see section 4.2.2 above).

However if circumstances change and prosecutors believe that there are reasonable grounds for suspecting that Alkatiri might escape, interfere with evidence, pursue criminal activities or disrupt public order, they may seek the imposition of restrictive measures. As explained above (see section 4.2.2) JSMP does not believe that the immunity preventing arrest or pre-trial detention provides a bar to the imposition of other types of restrictive measure under the Criminal Procedure Code. Possible types of restrictive measure falling short of pre-trial detention include bail, obligations to appear periodically before a competent authority, and prohibitions on travel or quitting residence.[87]

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[82] However note the effect of article 59(2)(b) (discussed above in footnote 58) which effectively means that a restrictive measure could be imposed on any suspect.

[83] Article 184(2) Criminal Procedure Code.

[84] Article 183 Criminal Procedure Code.

[85] Interview with Prosecutor Luis Mota Carmo conducted by JSMP on 21 July 2006.

[86] According to article 217(1)(a) of the Criminal Procedure Code one purpose of arrests and subsequent detention is to bring a person before a judge for the imposition of restrictive measures.

[87] Articles 187 – 193 Criminal Procedure Code.

Finally in this context, although no judicially imposed restrictive measures have been involved in the Alkatiri case, certain conditions must be met by all persons who have the status of defendant. The Criminal Procedure Code requires that such persons must provide proof of their identity and residence.[88] In addition, if the defendant changes residence or is absent from his or her residence for more than fifteen days, this fact must be notified to the relevant authorities.[89] These measures are imposed on all defendants and do not require the involvement of a judge.[90]

5. RELEVANT CRIMINAL OFFENCES

It is only following the conclusion of an inquiry that an assessment is made as to whether the evidence is sufficient to support the presentation of an indictment.[91] The Alkatiri case remains under investigation and therefore no indictment has yet been presented in that case. As a result it remains unclear which criminal offences might be included in any possible future indictment.[92]

In respect of the Lobato case, although an indictment was recently issued by the Prosecutor-General's Office and presented to the Dili District Court, as explained above (see 3.4.2) JSMP has not yet been able to access this indictment. Information issued by the Prosecutor-General's Office indicates that the indictment includes allegations of the following crimes: misuse of public funds, homicide, and the unauthorised importation or use of firearms to disturb public order.[93] However at the time of publication JSMP has been unable to ascertain whether other crimes are also included in the Lobato indictment.

JSMP is aware of reporting in the local and international media that certain criminal offences have been considered by prosecutors and may form the basis of a future indictment. Those that have been mentioned include:

- article 4.7 of UNTAET Regulation 2001/5; and
- article 107, 108 and 110 of the Indonesian Penal Code.

JSMP believes that there may be some difficulties with successfully prosecuting Lobato and/or Alkatiri under these provisions. Clearly, JSMP is not aware of all the evidence which has been gathered by prosecutors. It may

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[88] Article 186(1) Criminal Procedure Code. This provision does not explain to whom such proof must be provided, but JSMP considers that the most likely intention was that such proof be provided to prosecutors or police, since they are the authority competent under the law to undertake most procedural acts during the investigation phase, and because article 184(1) provides independently that "The public prosecutor or police entity responsible for conducting an investigation may, in the course of such investigation, require the provision of proof of identity and residence."

[89] Article 186(2)(c) Criminal Procedure Code.

[90] See articles 186(1) and 184(1) and (2) Criminal Procedure Code.

[91] Under article 236(1) where there is sufficient circumstantial evidence at the completion of an inquiry an indictment must be issued within fifteen days.

[92] When an indictment is issued, article 236(3)(c) of the Criminal Procedure Code requires that it must mention, *inter alia*, the relevant substantive provisions.

[93] Notice issued by the Office of the Prosecutor-General 21 September 2006.

be that media reporting does not accurately reflect either the prosecution's views concerning which criminal offenses might have been committed, or the evidence which has been found. For this reason JSMP is not in a position to state with certainty which crimes will be alleged or can be proven in this case, however it will give some comments on potential difficulties with those criminal offences which have been mentioned in the media.

5.1. Weapons Offences

UNTAET Regulation 2001/5 is the Law on Firearms, Ammunition, Explosives and Other Offensive Weapons in East Timor. It establishes a regime for regulating ownership of and dealings with weapons. Section 4 creates certain criminal offences, including that in section 4.7:

> *"Any person who without lawful authority imports into East Timor any firearm, ammunition or explosive with the intent to disrupt public order, or who uses any firearm, ammunition or explosive in the disruption of public order is guilty of a criminal offence and shall be punished by a fine not to exceed fifty thousand U.S. dollars (USD 50,000) or a term of imprisonment not to exceed twenty years, or both."*

Questions arise as to whether this provision can be successfully applied in a case where the alleged conduct is ordering that weapons already in Timor-Leste be distributed to others. Even though it does seem that the conduct as alleged was for the purpose of disrupting public order, it seems unlikely that it would constitute "importing".[94] Whether distributing weapons to others for specified purposes could constitute "using" presents a more difficult question which JSMP considers remains unclear under the law.

5.2. Offences related to subversive activities

Articles 107 and 110 of the Indonesian Penal Code originally related to the crime of "makar". This is translated in the official English version as "revolution" but is understood in Bahasa as meaning an attack or an act of subversion directed against the government. While this crime is not clearly defined in the Indonesian Penal Code, JSMP considers that it must be constituted by attacks that are directed against the government or members of the government, and not *by* members of the government against *opponents* of the government, as is the alleged case here. Similarly, article 108 of the Indonesian Penal Code refers to the crime of "rebellion" which is defined as taking up arms against the Government or joining a group which takes up arms against the government, with the intent to rebel against the Government. In any event, JSMP would be concerned by any reliance on these articles by the Office of the Prosecutor-General. As JSMP has previously pointed out,[95] these provisions should not be considered valid law in Timor-Leste. Articles 104 to 110 of the Indonesian Penal Code were repealed by Law 11 of 1963 on Anti-Subversion, which was in turn repealed in May 1999 by Indonesian

[94] "Import" is defined under section 1 of the Regulations as meaning "to move or cause the movement of any object or thing into the territory of East Timor from any location outside the territory of East Timor."
[95] "Judge Applies Invalid Law", JSMP Press Release, 25 April 2005.

Law 26 of 1999. Law 27 of 1999 was then passed to create a new anti-subversion provision in article 107 of the Penal Code.

Section 3.2 of UNTAET Regulation 1999/1 revoked, among other laws, the "Law on Anti-Subversion". Given that the 1963 Law on Anti-Subversion had already been repealed, JSMP believes that the intent of the UNTAET Regulation must have been to nullify those provisions in the Indonesian Law criminalizing anti-subversion which remained in force. This includes article 107 of the Indonesian Penal Code as it existed in 1999, following the enactment of Indonesian Law 27 of 1999. This interpretation is also consistency the purpose of UNTAET Regulation 1999/1 section 3, which was to invalidate those parts of the Indonesian law which were inconsistent with international human rights standards, including provisions like article 107 of the Penal Code which was designed and used to repress political opposition to the Indonesian Government. For this reason these provisions would in any event have been rendered invalid by UNTAET Regulation 1999/1 for their inconsistency with the enumerated international human rights standards.[96] The law in force in Timor-Leste today continues to be that as defined by UNTAET Regulation 1/1999, namely the law current in Timor-Leste on the 25 October 1999 subject to subsequent UNTAET Regulations and valid laws passed in accordance with the Timor-Leste Constitution. For these reasons JSMP believes that any reliance on article 107, or associated provisions of the Indonesian Penal Code by the prosecution would be without legal foundation.

5.3. Other offences

For the above reasons JSMP believes that the criminal offences which have been mentioned in the media are in fact inappropriate bases for the indictment of Lobato and/or Alkatiri. A more appropriate type of charge in respect of the facts as they have been reported in the media might be a charge of some form of participation in the crimes of murder[97] or the illegal use of a firearm.[98] JSMP is not aware of whether evidence has been gathered by the prosecution indicating that the crimes (including murder and the illegal use of firearms) that were allegedly planned and incited by Lobato and/or Alkatiri were eventually actually carried out. If a murder or murders did occur, it seems likely that the defendants could be charged as principles in the commission of that crime, since it is alleged that they caused others to perpetrate the crime[99] or at least intentionally provoked the execution of the crime by providing an opportunity, means and/or information.[100]

Even if there is no evidence that crimes resulted from the instructions and support that is alleged to have been given by Lobato and/or Alkatiri to Railos and his men, it is possible that some form of inchoate liability (incitement or

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[96] See UNTAET Regulation 1999/1, section 1.

[97] Murder is penalized under 340 of the Indonesian Penal Code. Manslaughter and manslaughter occurring in the course of a criminal offense are penalized under articles 338 and 339.

[98] Section 4.3 of UNTAET Regulation 2001/5 Penalizes the use of firearms in the commission of a crime.

[99] Article 55(1) Indonesian Penal Code.

[100] Article 55(2) Indonesian Penal Code.

conspiracy) might attach to their conduct. Although the Indonesian Penal Code refers to and defines conspiracy[101] it does not clearly indicate whether a conspiracy amounts to a crime even when the planned crime does not eventuate. One alternative avenue for this form of liability is article 169 which prohibits, *inter alia*, participation in an association which has an intent to commit crimes.[102]

Finally, JSMP draws attention the fact that under the Indonesian Penal Code, when a crime is committed by an official in violation of a special duty or using the power, opportunity or means conferred on him or her by public office, the maximum sentences which may be imposed in respect of such crimes are increased by a third.[103] Officials include persons who are elected and persons who are members of legislative or governmental bodies.[104]

5.4. Crimes against humanity

Finally, JSMP raises the possibility that the alleged acts may amount to crimes against humanity. A crime against humanity occurs where a person commits a murder (or any of several other specified crimes) as part of a widespread or systematic attack directed against any civilian population with knowledge of the attack.[105] In the present case, if there is evidence that a murder or murders occurred, it may be possible to argue that these crimes occurred in the context of a systematic attack against a civilian population and therefore constituted a crime against humanity. JSMP notes that in respect of such crimes, a person is criminally liable if he or she orders, solicits or induces the commission of the crime which in fact occurs or is attempted.[106] However JSMP emphasizes that it is not in a position to assess whether sufficient evidence exists that a systematic attack was carried out, or that murders actually occurred as part of such an attack, and therefore cannot say whether it will be possible to issue indictments in respect of crimes against humanity.

If there was sufficient evidence to allege such crimes in an indictment, any trial would have to occur before a Special Panel of the Dili District Court, since these panels retain exclusive jurisdiction in respect of crimes against humanity.[107] Alternatively, since Timor-Leste is a party to the Rome Statute of

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[101] Article 88: An agreement between two or more persons to commit a crime.

[102] Article 169(1) Indonesian Penal Code.

[103] Article 52 Indonesian Penal Code.

[104] Article 92(1) Indonesian Penal Code.

[105] Section 5.1(a) UNTAET Regulation 2000/15 on the Establishment of Panels with Exclusive Jurisdiction over Serious Criminal Offences. Note that despite otherwise following closely the definition contained in article 7 of the Rome Statute of the International Criminal Court, UNTAET Regulation 2000/15 does not contain the definition of “attack directed against any civilian population” which appears in article 7(2)(a) of the Rome Statute and which imports additional requirements into the definition of a crime against humanity.

[106] Section 14.3(b) UNTAET Regulation 2000/15 on the Establishment of Panels with Exclusive Jurisdiction over Serious Criminal Offences.

[107] Sections 1.1 and 1.3 UNTAET Regulation 2000/15 on the Establishment of Panels with Exclusive Jurisdiction over Serious Criminal Offences. Under article 22.1 such panels must be composed of two international judges and one East Timorese judge. Although the Serious Crimes Unit was disbanded in May 2005, the UNTAET legislation establishing the jurisdiction

the International Criminal Court,[108] it is able to refer a case of a suspected crime against humanity to the International Criminal Court for investigation.[109] Indeed, if there is no referral but Timor-Leste is unwilling or unable to prosecute the crime the International Criminal Court may exercise its jurisdiction.[110]

However JSMP emphasizes that without knowledge of what evidence exists as to the commission and extent of the alleged crimes it is not possible to reach a conclusion as to whether any person may be charged with the commission of a crime against humanity.

6. THE FUTURE COURSE OF THE PROCEEDINGS

6.1. Future course of the Lobato case

In the Lobato case an indictment has now been presented to the Dili District Court. According to the Criminal Procedure Code, once the Court has received the records in the case from the Office of the Prosecutor-General, it must make an assessment of the case, including in respect of the Court's jurisdiction and other matters which might affect the case.[111] The Court must then decide whether to issue a rejection order (if the indictment is clearly groundless) or admit the indictment and set a trial date.[112]

6.2. Future course of the Alkatiri investigation

In the Alkatiri case, the process established by the Criminal Procedure Code now requires that the prosecution and police carry on with their inquiries in order to collect evidence and take other actions necessary in order to demonstrate that a crime was committed for which Alkatiri should be held liable.[113]

So long as the defendant is not placed in pre-trial detention, this inquiry is permitted to last up to one year from the time of its commencement,[114] or two years if the public prosecutor determines that this is necessary to deal with the complexity of the case.[115] At the conclusion of the inquiry the Office of the

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of the Special Panels within the Dili District Court has never been repealed or amended. JSMP notes that article 160 of the Timor-Leste Constitution provides that "[a]cts committed between the 25th of April 1974 and the 31st of December 1999 that can be considered crimes against humanity or genocide or of war shall be liable to criminal proceedings with the national or international courts", although the intended effect of this provision is not clear.

[108] Timor-Leste ratified the Rome Statute by National Parliament Resolution 13/2002.

[109] Article 14 Rome Statute of the International Criminal Court.

[110] Article 17 Rome Statute of the International Criminal Court.

[111] Article 239(1)(a) Criminal Procedure Code.

[112] Article 239(1)(b) and (c) Criminal Procedure Code.

[113] Article 225 Criminal Procedure Code

[114] Article 224 of the Criminal Procedure Code states that an inquiry starts when the report of the crime reaches the entity responsible for conducting the inquiry.

[115] These time limits are found in article 232 of the Criminal Procedure Code. The time limits applicable are those under article 232(3) because the restrictive measure imposed on Lobato under article 193 does not amount to pre-trial detention.

Prosecutor-General will consider the case, and he may issue an indictment within fifteen days,[116] or dismiss the case (for example if insufficient evidence has been found to prove that a crime was committed[117]). If an indictment is issued, the next phase of proceedings will begin, involving the preparation for and holding of a public trial.

If a case is dismissed no trial will occur, although the investigation could be reopened in the future if new evidence came to light.[118]

JSMP notes that if an indictment is issued, the competent judge may address a request to the National Parliament that Alkatiri be suspended from parliamentary office.[119] If this occurs the National Parliament is required to decide whether such a suspension should be imposed.[120]

6.3. The need for further investigations

Finally, JSMP wishes to emphasize the urgent need for further investigations to be commenced in respect of the crimes alleged against Alkatiri, Lobato and their associates.

In particular, JSMP is concerned by the apparent failure of the Office of the Prosecutor-General to commence an investigation into the possible criminal liability of Vicente "Railos" da Conceição and his associates. JSMP has made enquiries with the Office of the Prosecutor-General as to whether such an investigation has been commenced but was informed that such information could not be provided.[121] However if an investigation had begun into the criminal responsibility of Railos it would be expected that the latter would have been questioned by prosecutors as required by the Criminal Procedure Code.[122] As far as JSMP is aware, this has not occurred.

This apparent failure to commence an investigation is despite Railos' public statements indicating that he received (and possessed) firearms and agreed with others to use them for the purpose of carrying out assassinations. Such public statements amount to strong evidence of the commission of serious crimes by Railos and those working with him. JSMP believes that in such circumstances it is incumbent upon the Office of the Prosecutor-General to commence an investigation. This is required by the Timor-Leste Constitution, which provides that prosecutors have the responsibility for promoting the enforcement of the law and that this must be done with legality, objectivity and impartiality.[123]

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[116] Article 236(1) Criminal Procedure Code.
[117] Article 235 Criminal Procedure Code.
[118] Article 235(3) Criminal Procedure Code.
[119] Article 11(3) Law on the Status of Members of Parliament.
[120] Article 11(2) Law on the Status of Members of Parliament.
[121] Interview with Prosecutor Luis Mota Carmo conducted by JSMP on 21 July 2006.
[122] Article 231(1) requires that once an inquiry against a particular person is begun, the questioning of that person is compulsory.
[123] Section 132(1) and (3) RDTL Constitution.

JSMP understands that there is significant public sympathy towards Railos and his followers. It also believes that there is a public perception that because Railos made the public statements indicating his involvement in criminal activities voluntarily and in the interests of exposing governmental misconduct, he should be treated with leniency. However JSMP emphasizes that such factors may be relevant in sentencing, but do not effect the question of criminal liability and should not prevent the commencement of criminal proceedings in a case involving crimes of this magnitude.

JSMP has previously drawn attention[124] to the fundamental need, as part of the rule of law, for the Prosecution Service to remain independent and impartial in the face of political pressure, and for the population to have confidence that this is the case. It is particularly important in times when the population is politically divided that prosecutors are seen to be equally rigorous in commencing prosecutions of persons on both sides of the political divide. JSMP therefore calls on the Office of the Prosecutor-General to immediately commence investigations against all persons who, on an assessment of the available evidence, may have been involved in the alleged crimes said to have been instigated by Lobato and/or Alkatiri.

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[124] See JSMP Justice Update 8/2006 on the Case of Alfredo Reinado (July 2006), pp8-9.