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Viewing cable 06DIL135, RESPONSE TO CRIMINALIZATION OF DEFACTION IN NEW PENAL CO

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Reference ID	Created	Released	Classification
06DIL135	2006-01-20 08:50	2011-08-30 01:44	UNCLASSIFIED//FOR OFFICIAL USE ONLY

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UNCLAS SECTION 01 OF 04 DILI 000035

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SENSITIVE
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DEPT FOR EAP/MTS AND DRL

E.O. 12958: N/A
TAGS: PHUM PGOV KPAO TT
SUBJECT: RESPONSE TO CRIMINALIZATION OF DEFACTION IN NEW PENAL CODE

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Summary

¶1. (U) Last month the Council of Ministers announced their approval of a new penal code for East Timor. The law is now in the hands of the President either to promulgate or to veto. Although no official copies of the law are available, leaked copies have been circulated among civil society organizations and the diplomatic community. No other issue addressed in the new law has received as much attention in recent weeks as its inclusion of provisions criminalizing defamation. Members of the media as well as other civil society organizations have expressed their opposition publicly and a number are organizing to lobby for its abolition from the final penal code. Embassy sources indicate that criminalization of defamation is one of a few key issues that President Xanana Gusmao is reviewing in deciding whether or not to promulgate the law in its current form. Ambassador Rees expressed concerns about the criminal defamation provisions in a conversation with President Gusmao this week. Although the next step --- expressions of concern to the Government and/or members of Parliament --- should await the President's decision on whether to sign or veto the bill, the Embassy includes draft talking points which, unless directed otherwise, we will use in private conversations on an if-asked basis pending further developments. These talking points might also provide useful background for a proposed January 24 meeting between the Secretary and President Gusmao. The draft talking points are set forth in paragraph 11. End summary.

Proposed code

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¶2. (U) On December 6, 2005 the Council of Ministers announced their approval of a new penal code for East Timor. Parliament had in July 2005 authorized the Government to draft the penal code as a decree law, thus bypassing the Parliamentary debate and negotiation involved in the normal legislative process. The new penal code is intended to replace the Indonesian Penal Code that has continued to apply to date, albeit with some modifications by UNTAET (United Nations Transitional Administration in East Timor) regulations. The new law still requires the President's signature in order to be promulgated and the Constitution stipulates that he has 40 days from receipt to either sign or veto the law. According to Embassy sources he officially received it on December 27. The text of the law is not publicly available and official Embassy requests to the Council of Ministers for a copy have to date been denied. However, the Embassy was able to obtain a copy of the Portuguese-language document that was apparently leaked from the Council of Ministers and has been circulated among civil society organizations and the diplomatic community.

¶3. (U) The new penal code includes several provisions criminalizing defamation and providing for punishment in the form of prison sentences or fines. Defamation is broadly defined as any expression (written, gesture, image or other means) that is directed to a third person offending the victim's "honor". Of particular concern is that the most severe punishments are reserved for expressions concerning public figures in the media. While the basic crime of defamation is punishable by up to one year imprisonment, the same offense when committed "by means of the media" and against persons "performing public, religious or political duties" is punishable by up to three years imprisonment. The law appears to allow for no mitigating factors. In contrast to the Portuguese penal code, on which it is purportedly modeled, it does not make allowances for statements made in the public interest or in good faith.

Response

¶4. (U) Response to the Penal Code's criminal defamation provisions has been almost universally negative among journalists and other members of civil society. The vast majority of journalists see the criminalization of defamation as a tangible setback in East Timor's democratic development, describing it as a law written primarily to protect political leaders from criticism. Discouragingly, there is a general consensus among journalists here that the promulgation of this law would result in a significant increase in self-censorship. Many journalists already admit to practicing some measure of self-censorship in their reporting on political issues and comment that, with criminal defamation enshrined in national law, they will have to go the "easy route" if faced with the

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prospect of imprisonment. In contrast, a number of the more experienced journalists, while expressing concern that self-censorship will come to pervade East Timor's media, state that the law will not affect their own reporting. This group primarily comprises those who started their journalistic careers as independence activists and therefore were imprisoned at some point or at least lived with the constant risk of imprisonment. One such journalist noted with irony that his two and a half year prison term in Indonesia was based on criminal defamation charges under the Indonesian Penal Code for his participation in student demonstrations following the Santa Cruz massacre.

Government reaction

¶5. (U) Government representatives, especially Prime Minister Mari Alkatiri who has been pushing publicly for its immediate promulgation, have defended the defamation law as necessary to protect people's "good names", noting that journalists and others should not be concerned about the law as long as they are reporting the truth. However, many observers among media, civil society and international organizations believe that the law is primarily intended as a political tool. They note the complete lack of public consultation by the Government in preparing the

law as well as the timing of introducing such a law in the year before a potentially bitterly contested national election.

¶6. (U) The application of criminal defamation charges to date appear to support this view. Although East Timor's own penal code is not yet in effect, the defamation and subversion provisions of the Indonesian Penal Code have been used on several occasions to arrest private citizens for criticism of government officials or statements. To date, these have been few in number and resulted in only short detentions followed by dismissals. However, this week, the Prime Minister declared that he is charging the head of the Democratic Party (PD) with criminal defamation for statements made last week accusing the Prime Minister of corruption.

Journalists concerned

¶7. (U) Although the Government's plans to criminalize defamation have been common knowledge for quite some time, the media community has until now done little as far as promoting public discussion or mobilizing opposition. Some Embassy sources note with regret that prior to the Council of Ministers' announcement, the media community did not take the possibility of criminalization very seriously. Moreover, the East Timorese news media lack a sense of community and have to date been unable to mobilize effectively around issues of common interest.

¶8. (U) However, it appears that the Council of Ministers' announcement has served as something of a catalyst for East Timor's journalistic community and a significant number are now concentrating their energies on campaigning against the promulgation of the law. On December 20, the Timor Leste Journalist Association (TLJA), with support from the Timor Leste Media Development Center (TLMDC) and the Southeast Asian Press Association (SEAPA), held a workshop to address the issue. The workshop was reportedly attended by almost all of TLJA's members as well as most members of the competing press association, Sindicato. Many attendees stayed only for the high-profile speeches, by Father Martino Gusmao representing civil society's opposition to the law and Minister of the Presidency of the Council of Ministers Antoninho Bianco, representing the Government's position. However, a core group of about 15 journalists remained behind to form a working group to campaign against the criminalization of defamation. The journalist working group plans a press conference this coming Tuesday, January 24 at which they will issue a joint declaration and will request a meeting with President Gusmao on his return from his current travel in the U.S.

¶9. (U) In addition, all four of East Timor's daily papers have published articles either directly criticizing the law or reporting on criticism of the law from opposition Members of Parliament and civil society organizations. A weekly paper, Vox Populi, has dedicated its last two issues to the criminalization of defamation. Despite this apparent unity, there are still some cracks apparent in the media community. For example, Suara Timor Lorosae (STL), East Timor's oldest paper which takes a consistent anti-Government line, has had a long-standing split with TLJA and so far has not joined the working group to oppose the law, despite STL's own opposition to it.

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President could veto

¶10. (SBU) During a January 16 meeting in anticipation of his trip to the United States, President Gusmao mentioned to Ambassador Rees that he was now considering whether to sign or veto the penal code. Ambassador Rees responded by expressing serious concerns about the criminal defamation provisions. President Gusmao responded that he had similar concerns, but that Prime Minister Alkatiri had insisted that criminal defamation laws do not violate the principle of free speech, pointing to the fact that many democratic countries have such laws. Ambassador Rees responded that if President Gusmao were to veto the bill on constitutional grounds, it would trigger a constitutional review by the Court of Appeals, which is

currently dominated by international judges from Portugal and might well uphold the law as constitutional. Ambassador added, however, that if the President were to veto the law on policy grounds, it would then be up to Parliament to decide by a simple majority whether to accept or reject the offending provisions. In this case it is conceivable, although not likely, that a unified opposition plus a few independent-minded Fretilin members could unite to uphold the veto, and in any event the President would have made a powerful statement in favor of freedom and democracy.

¶11. (SBU). In an earlier conversation with Emboff, the President's Chief of Staff Agio Pereira relayed that Gusmao is looking closely at the law with special attention to the defamation issue. Pereira said that the President may consider vetoing the law on either constitutional or political grounds. According to Pereira, the Office of the President is relying on a number of legal sources for analysis of the law. In particular he reported that it has been forwarded to a trusted Portuguese constitutional lawyer for review. In addition, he said, they will solicit the advice of two UNOTIL (UN Office for East Timor) legal advisors due to begin working in the Office of the President at the end of January.

Draft talking points

¶12. (U) Unless directed otherwise, Emboffs will use the following talking points in private conversations if asked whether the United States has a position on criminal defamation. These might also form the basis of statements to members of the Government and/or Parliament after the President makes his decision about whether to sign or veto the law, and/or for a public statement if that were to become appropriate at some future stage in the process. These points might also provide useful background for a proposed January 24 meeting between Secretary Rice and President Gusmao. (Note: Foreign Minister

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Jose Ramos-Horta, an appointed member of the Prime Minister's cabinet who has often been an advocate within the cabinet for forward-looking policies, would also be present at the proposed meeting.) Suggested talking points follow:

-- The USG is seriously concerned that the penal code recently passed by the Council of Ministers and pending promulgation criminalizes defamation.

-- We believe criminalizing defamation would be a step backwards in the development of democracy in East Timor because it is likely to have a chilling effect on freedom of speech and public discourse.

-- This law could have a detrimental effect on legitimate journalistic endeavor and the existence of a free press. A free press is a central pillar of any functioning democracy - this law would undermine this fundamental democratic freedom and risks stunting the development of a free press at a critical time in its history.

-- We are very concerned that the law as written particularly targets the freedom of the press to scrutinize, report on, and criticize public figures. Its most severe penalties are reserved for speech that concerns public figures, the very people about whom the public needs to be most informed.

-- Last November it was our great pleasure to share the good news that East Timor had been selected as eligible for a Millennium Challenge Account (MCA) compact. One of the key criteria for this selection was East Timor's demonstration of a commitment to good governance. The defamation law, on the other

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hand, goes against the principles of democratic participation and transparency that are the core of good governance.

-- We hope that these provisions will be deleted from the penal code before it is promulgated. We encourage the Government of East Timor (GOET) to enter into constructive dialogue with the

news media regarding the role of a free and responsible press in East Timor's democracy.

-- East Timor has made great strides as a democracy in a very short time. It would be very disappointing indeed if its leaders were now to choose to take such a backward step. Adopting this law would send the message both to the people of East Timor and to the international community that East Timor's commitment to democracy and freedom has weakened. We hope that instead the Government will send the message that this commitment will be redoubled as the country moves towards national elections next year.

WHARTON