



JUSTICE UPDATE

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Continued Trial of Serious Crimes Suspects

In early August 2005 Manuel Maia, indicted for crimes against humanity by the Serious Crimes Unit, crossed the border from West Timor into Timor-Leste and was subsequently detained by police. This was followed by the arrest and detention of three persons who entered Oecussi from West Timor on August 2005. JSMP has been informed by a prosecutor that the Oecussi suspects have since been charged with the murder of a pro-independence supporter in 1999.

The Special Panels for Serious Crimes (“SPSC”) have exclusive jurisdiction with respect to the trial of persons alleged to have committed ‘serious crimes’¹ in 1999, however, they were adjourned² in May 2005. The arrival of these persons now compels the national judicial system to address the important but thorny question of how to try serious crimes suspects.

JSMP has been informed by several judicial officers, including judges, that Maia will be tried before a panel of 2 international judges and 1 national judge at the Dili District Court. It is their view that this is consistent with current laws pertaining to the trial of serious crimes suspects. At the date of publication JSMP is aware that Manuel Maia has already been brought to court for the initial 72-hour detention review hearing. It is, however, proving extremely difficult to obtain any additional information through official channels as to the progress and schedule of this case.

Aside from the lessons for future transfer of functions from the UN to a post-conflict sovereign state and the broader political repercussions – and the implications are potentially huge for Timor Leste’s security, stability and relationship with Indonesia –

¹ According to UNTAET Regulation 2000/11, serious crimes are defined as

“9.1 ...

- (a) Genocide
- (b) War crimes
- (c) Crimes against humanity
- (d) Murder
- (e) Sexual offences
- (f) Torture

9.2 With regard to the criminal offences listed in Section 9.1 (d) – (f) of the present regulation, the District Court in Dili shall have exclusive jurisdiction only insofar as the offence was committed in the period between 1 January 1999 and 25 October 1999”.

² The SPSC have not been terminated but have been *adjourned sine die* thereby allowing for their immediate resumption whenever required. An adjournment sine die is defined as the postponement or suspension of the hearing of a case “for an indefinite time”: L.B. Curzon, *The Dictionary of Law* (6th ed.), Longman, 2002, Harlow, at 8.

there are a number of important legal issues raised by the recent arrival of serious crimes suspects in Timor Leste. These issues can be reduced to two fundamental questions: What are the current legal requirements governing trial of serious crimes suspects?; Are the courts of East Timor, as presently constituted, competent to try serious crimes suspects in a manner consistent with these legal requirements?

The question of whether or not the courts of Timor Leste, *since the suspension of the SPSC and in their current form and composition*, are competent to try suspects accused of serious crimes is not expressly addressed in UNTAET Regulations, RDTL Laws or the Constitution of Timor Leste.

The Constitution

The Constitution provides the starting point for analysis. According to section 163.1:

“The collective judicial instance existing in East Timor, composed of national and international judges with competencies to judge serious crimes committed between the 1st of January and the 25th of October 1999, *shall remain operational for the time deemed strictly necessary to conclude the cases under investigation*” (emphasis added).

The scope of the provision is not entirely clear, particularly, being a ‘transitional provision’, as to the period for which it is to remain in force.³ It would appear that “the collective judicial instance” refers to the UNTAET regulatory regime which established the SPSC and determined their composition. According to section 163.1, then, this regime should remain in force “[f]or the time deemed strictly necessary to conclude the cases under investigation”.

It might be that the suspension of the SPSC meant that the time thought necessary to conclude cases was deemed to have expired so that the requirements imposed by UNTAET regulations are no longer in effect. On the other hand it is very clear, particularly with the recent arrival of suspects in Timor Leste and the likely return of others, that more time is required to conclude cases under investigation. This would appear to be the view taken by both the courts and the authorities.

In the case of *Francisco Perreira* the Court recognised the ambiguity in section 163.1. The Majority indicated that it could be that the SPSC were only competent to try cases under investigation as at 20 May 2002 (the date on which the Constitution entered into force). Alternatively – and this was the construction adopted by the majority – section 163.1 authorised the SPSC to continue to try cases whose investigation commenced after independence and the replacement of UNTAET as the sovereign power in Timor Leste i.e. it was “a technicality...to confirm the legality of the system”.⁴

Judge Rapoza issued a separate opinion in which he agreed with the Majority’s conclusion but for different reasons. He indicated that the commencement date of

³ It has been said that the section “is not jurisdictional in nature, meaning that it does not define the cases that are within the competency of the Special Panels. Rather it merely establishes a timeframe beyond which the Special Panels are not intended to function...[that is, “the time deemed strictly necessary”]”: *27 April 2004, Separate Opinion, Francisco Perreira 34/2003, at 2.*

⁴ *27 April 2004, Judgement, Francisco Perreira 34/2003, at 9.*

case investigation, whether before or after 20 May 2002, was irrelevant. The fact that the SPSC needed to remain in operation to try *other cases* then under investigation meant that it continued to operate and have jurisdiction with respect to the extant case.

It would seem, therefore, that it is necessary for the SPSC to remain operational provided there are other cases under investigation. The question then is what is meant by “cases under investigation”. It was not necessary for either the Majority or Judge Rapoza to address this issue directly. In JSMP’s view, however, it would at least encompass cases for which an indictment had been filed (but would probably not extend to investigated but un-indicted cases).⁵ On that basis, it is arguable that the SPSC regime would continue to apply – subject of course to repeal – for as long as there are indicted cases which remain untried or incomplete.

Consequently, in JSMP’s opinion, and in the absence of contrary national laws, **returned indictees can only be investigated and prosecuted by a special panel of judges properly constituted in accordance with UNTAET regulations.**

UNTAET Regulations

Section 9.1 of UNTAET Regulation 2000/11 defines serious crimes and vests exclusive jurisdiction over their trial with the Dili District Court.

In short, the combined effect of UNTAET Regulations 2000/11 and 2000/15 is to require trial of serious crimes:

- At the Dili District Court;
- By a ‘special panel’ comprised of 2 international judges and 1 national judge; and
- Before judges who have been properly appointed in accordance with UNTAET Regulations.⁶

Prima facie, a panel of 2 international judges and 1 national judge, properly qualified and appointed, and sitting at the Dili District Court is competent to try serious crimes indictees such as Manual Maia. There is, however, a question as to whether there are any international or national judges in Timor Leste at present who are qualified or appointed according to law.

In JSMP’s view **it is clear that there are at present no judges, whether national or international, who have been appointed in accordance with UNTAET**

⁵ The Majority appeared to have adopted an even broader interpretation i.e. cases under investigation are those “in relation to which the investigation has begun before the same date but the indictment has not yet been filed...”: *Judgement, Francisco Perreira*, at 5-6

⁶ According to section 23.1 of UNTAET Regulation 2000/15, judges must be “...selected and appointed in accordance with UNTAET Regulation No 1999/3, Section 10.3 of UNTAET Regulation 2000/11 and Sections 22 and 23 of the present regulation”. Under section 23.2 “[t]he judges shall be persons of high moral character, impartiality and integrity who possess the qualifications required in their respective countries for appointment to judicial offices. In the overall composition of the panels due account shall be taken of the experience of the judges in criminal law, international law, including international humanitarian law and human rights law”.

regulations.⁷ Nevertheless, it is also clear that the regime governing judicial appointments has now been replaced by subsequent national laws.

Judicial Magistrates Law

The Judicial Magistrates Law (“JML”) replaced, amongst other things, the UNTAET regime for judicial appointment. According to s 111.1 of the JML:

“The provisions of this law shall apply on a transitional basis, and with the necessary adaptations, to international judges engaged to exercise functions in East Timor pursuant to item 1, Section 163 of the Constitution”.

This ensures that judges will be competent to preside over trials of serious crimes suspects provided they are appointed in accordance with the JML. Nevertheless, although the precise criteria and procedural aspects of appointment are specified, the JML does not address the issue of substantive ‘qualifications’ specific to serious crimes cases in the manner that section 23.2 of UNTAET Regulation 2000/15 does. In JSMP’s view this is not a hollow, surplus requirement. It is essential that judges presiding over trials of persons alleged to have committed major international crimes have some expertise in international criminal law. It is consequently arguable that section 23.2 is a general overarching requirement which is not addressed, and therefore not repealed, by the JML.

Presumably the international judges currently hearing cases at the District Courts have been properly appointed pursuant to the JML’s requirements and are sufficiently expert in international and criminal law. On that basis the international judges currently hearing cases in Timor Leste would, on the face of it, be competent to hear serious crimes cases. It is also necessary, however, to ascertain whether or not there are any national judges currently qualified to preside in serious crimes trials.

All national judges failed their prescribed evaluations (as announced in January 2005) and were thus disqualified from hearing cases in the courts of Timor Leste. On 13 January 2005, however, the Superior Council of the Judiciary (“SCJ”) issued a resolution authorising four judges to continue hearing cases before the SPSC and the Court of Appeal. According to Article 25.3 of the Law on the Superior Council of Judicial Magistrates (Law No.8/2002 as amended by Law No. 11/2004):

“The Superior Council for the Judiciary may appoint as probationary judges, to exercise jurisdictional functions, those probationers [estagiário] who reveal themselves prepared to do so.

Although the meaning of ‘estagiário’ is unclear, this would appear to grant to the SCJ power to appoint trainee judges to hear cases. Further, as a subsequent national law it would revoke, to the extent of any inconsistency, the criteria provided for in section 23.2 of UNTAET Regulation 2000/15 i.e. that SPSC judges must “possess the qualifications required in their respective countries for appointment to judicial offices”.

⁷ For example, there are no longer judges who were appointed by the UNTAET Transitional Administrator, as stipulated in section 11 of 1999/03.

For these reasons any one of the four judges who were given special exemption by the SCJ would, prima facie, be competent to hear serious crimes cases⁸.

On that basis **it would appear that the courts of Timor Leste are at present competent to try suspects accused of serious crimes.** Over and above legal competence, however, it is essential to ensure that trials are conducted expeditiously, transparently and with due regard to the defendants' fair trial rights. Among other things, this will require judges with the necessary experience in the field of international and criminal law, competent, qualified prosecutors and defence lawyers and the availability of adequate court resources such as skilled interpreters. JSMP urges the Government and the international community to pay heed to these requirements in trying the case of Manuel Maia and other persons suspected of committing serious crimes.

The purpose of this Justice Update is to attempt to clarify some of the complex legal issues arising from serious crimes trials, and which go to the heart of national peace and reconciliation in Timor Leste. In doing so JSMP respectfully acknowledges the policy and decisions of the authorities on this subject. The intention is merely to shed more light on and, if appropriate, offer alternative views to that policy.

⁸ Nevertheless, it should be pointed out that JSMP has been unable to obtain a copy of the SCJ deliberations or to meet with any of its members to discuss the implications. For that reason, the present discussion of the SCJ decision is limited and should, without more, be treated with caution.