



JSMP Press Release
25 April 2005

Judge Applies Invalid Law

On 18 April 2005 the Suai District Court conducted a 72-hr hearing in relation to the arrest and detention of 4 defendants suspected of being involved in threats to national security. The incident took place on 9 April at Fatuberliu, in the District of Manufahi, where the suspects declared the birth of a new nation, that is, the Republic of Timor Tasi Mane ("RTTM"). The hearing took place at the Dili District Court. An international judge presided over the hearing, beginning with an examination of each suspect. The hearing took place initially as an open hearing because one of the suspects had requested it, however, the detention review was subsequently closed, as sought by the 3 remaining defendants.

According to the prosecutor the suspects held a ceremony outlining the objectives of the state and declared the birth of that state by raising the flag of RTTM, writing a letter to governmental institutions, parliament and the church together with UNMISSET, and distributed pamphlets to all journalists. These actions were deemed by the prosecutor to conflict with section 4.3 of the Constitution according to which "the State shall not alienate any part of the East Timorese territory or the rights of sovereignty over the land, without prejudice to rectification of borders".

In reaching his decision, the judge expressed the view that the suspects had carried out acts in violation of national security and produced a political manifesto openly against the state which together constituted subversive acts in the manner provided for in sections 106 and 107 of the Indonesian Penal Code. On that basis the judge ordered that the suspects be detained in pre-trial detention for a further 6 months. That detention would then make it possible for the prosecution to carry out further investigations.

The only issue which JSMP raises in this case is in relation to the application of Indonesian law. As provided for in section 165 of the Constitution, legislation and regulations in force in Timor Leste will continue to apply unless in conflict with the Constitution or the principles contained therein. The applicable laws are clearly identified in RDTL Law no 10/2003 and UNTAET Regulation no 1/1999 and include Indonesian laws.

Nevertheless, in applying Indonesian legislation there are two issues which must be addressed. First, there is the exception contained in section 3.2 of UNTAET Regulation 1999/1 which asserts that several specific Indonesian laws are invalid, one of which is the Law on Anti-Subversion ("subversion law"). Secondly, validity of legislation also depends on adherence to the general principles and international standards which have to be observed in accordance with s 9.1 and s 3 Constitution, together with section 2 of UNTAET Regulation 1999/1.

According to JSMP the application of the anti-subversion ('makar') sections of the Indonesian Penal Code by the judge is clearly incorrect and infringes the above provisions, pertaining to the applicable law in Timor Leste, on three grounds:

1. Sections 106 and 107 of the Indonesian Penal Code were repealed by the 1963 Law on Anti-Subversion. This Law was itself then repealed in May 1999 by Law No 26/1999.
2. Since 25 October 1999 Law No 26/1999 was automatically repealed by way of UNTAET Regulation 1999/1.
3. Sections 106 and 107 on subversion in the Indonesian Penal Code violate international human rights standards such as the right to freedom of expression and freedom of association, as provided for in the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights
4. The express repeal of the subversion law, by UNTAET Regulation no 1/1999, by implication repeals sections 106 and 107 of the Indonesian Penal Code. The scope of the subversion law encompasses sections 106 and 107 of the Indonesian Penal Code, and it is therefore arguable that the intention of the drafter was to not only preclude that particular law from application in Timor Leste but also any other Indonesian legislative provision which criminalizes 'subversive' activities.

JSMP hopes that in the future the judge will ensure that the application of legislation is consistent with international standards. Judges occupy a position which requires them to interpret legislation without ignoring valid legal norms and to properly explain these to norms to other interested parties.