

CERTIFICATION OF THE 2007 PARLIAMENTARY AND PRESIDENTIAL ELECTIONS IN TIMOR-LESTE

SECOND REPORT OF THE CERTIFICATION TEAM

Introduction

1. This Report follows upon the First Report of the Certification Team, dated 2 November 2006. In preparation for the issuing of this Report, the Team convened in Dili from 10 to 20 December 2006.

Publication of Reports

2. In order to expedite and clarify the process for the publication of this and future Reports, and to clarify mechanisms for consultation with UNMIT and with UN Headquarters in New York, the Team agreed to a protocol with those bodies on those matters.

Finalisation of benchmarks

3. In its First Report, the Team listed, at Annex 5 to the Report, a series of benchmarks to be used for the purposes of the Team's work. In relation to them, the Team made the following observations at paragraph 25 of the Report:

“The Concept Paper [prepared by the UN Secretariat and set out at Annex 2 to the First Report] notes that benchmarks are to be developed by the Team “in consultation with the UN Secretariat and the Timorese electoral authorities”. At the time of the Team's first meetings in Dili, the independent electoral supervisory organ contemplated by article 65, no. 6 of the Constitution of Timor-Leste had not been appointed, and therefore could not be consulted. In the absence of such an organ, the Team has written to the existing “electoral authorities”, and also to the UN focal point on elections, requesting their views on the benchmarks set out at Annex 5, which the Team envisages will be finalised before or during its next series of meetings. In the meantime, the Team will be using the benchmarks set out at Annex 5, on the basis that they are, though provisional at this stage, still illuminating.”

4. On 16 December 2006, the Team, was informed by the Director, Electoral Assistance Division, Department of Political Affairs, United Nations, that the Under-Secretary-General for Political Affairs, who is the designated “focal point” for electoral assistance matters within the UN system, had formally approved the benchmarks set out at Annex 5 to the Team's First Report. Correspondence with the Director, STAE, relating to the benchmarks, including an English translation prepared by UNMIT of a letter received by the Team from the Director, is set out at Annex 1. The Team has noted that in Annex 5 to its First Report, there were typographical errors in benchmarks 1.4, 2.1, 3.7 and 4.7; these will be corrected in the future use of those benchmarks, with the word “candidate” being inserted before “registration” in benchmark 4.7.

Observations on the benchmarks at this stage

5. The key issues on which this Report focusses, and the benchmarks which relate to them, are as follows:

- (i) the Draft Law on *Autonomization of the Juridical Regime of CNE and STAE*, to which benchmarks 1.1, 2.1, 2.3, 2.4 and 9.1 are presently relevant;
- (ii) the establishment of an independent electoral supervisory organ, to which benchmark 2.1 is presently relevant;
- (iii) the development of other elements of the legal framework for the elections, to which benchmarks 1.1, 1.5, 6.2, 6.7, 7.2 and 9.1 are presently relevant;
- (iv) political party registration, to which benchmarks 4.1, 4.2, 4.3, and 4.4 are presently relevant;
- (v) voter registration, to which benchmarks 3.1, 3.2, 3.6, 3.7 and 9.1 are presently relevant; and
- (vi) the security situation, to which benchmarks 5.1, 5.2 and 9.2 are presently relevant.

These issues are discussed individually below. The benchmarks not mentioned earlier in this paragraph relate to aspects of the electoral process which are still to unfold, and the Team is therefore not in a position to make observations on them at present. Text relating to matters which in the opinion of the Team are problematical in terms of the benchmarks is **emboldened** (thus) at paragraphs 17, 20, 26, 27, 30, 31, 33, 36, 37, 38, 40, 43, 51, 52, 53 and 58 below.

Draft law on *Autonomization of the Juridical Regime of CNE and STAE*

6. During the Team's second mission to Timor-Leste, the Parliament continued consideration of a draft law on *Autonomização do regime jurídico da CNE e do STAE* (*Autonomization of the Juridical Regime of CNE and STAE*), hereinafter referred to as the "draft CNE/STAE law". A copy of the draft (in the authoritative Portuguese text¹), bearing the heading *Projecto de Lei n.º 26/I/4*,^a was supplied to the Team by UNMIT's Electoral Unit on 12 December 2006, and is set out at Annex 2. According to the information available to the Team, as at 19 December 2006 the text of the draft law had been adopted by the Parliament in plenary session, but the draft law had not been signed by the President, and therefore had not come into force. Given the stage of development which the draft law has reached, the Team has thought it appropriate to make some observations upon it in this Report, but as the draft law's provisions have not yet come into force, those observations are provisional.

7. It has been put to the Team that although paragraph 9 of Security Council resolution 1704 (2006) of 25 August 2006:

¹ An official English translation of the text was not available to the Team.

“Further encourages Timor-Leste to enact a set of electoral legislation which provides for the 2007 elections to be supervised, organized, administered and conducted in a free, fair and transparent manner, with due respect to the need to establish an independent mechanism, and reflects general consensus within Timor-Leste regarding the appropriate modalities for the 2007 electoral process;”,

the text of the draft CNE/STAE law was not adopted by the Parliament with the support of all the political parties represented therein. The Team is of the view that since the existence of a general consensus in support of the law is not an element of any of the benchmarks set out at Annex 5 to its First Report, it would not be appropriate for it to offer any observations on that aspect of the parliamentary process in question.

8. Benchmarks 1.1, 2.1 and 9.1 are expressed as follows.

“1.1 Does the legal framework make prescription, in a clear, unambiguous and transparent way, for all significant aspects of the electoral process?

2.1 Has the electoral supervisory organ contemplated by subsection 65(6) of the Constitution of Timor-Leste been established:

(i) in time;

(ii) with resources; and

(iii) with institutional neutrality and independence,

to enable it to perform its functions properly, in a manner which shows respect for the law, is non-partisan and neutral, is transparent, is accurate, and provides an effective service to the voters?

9.1 Is there compliance with all constitutional requirements relating to the elections?”.

9. The reference to “constitutional requirements” in benchmark 9.1 highlights the need for those requirements to be identified, and for the Team’s view of them to be spelt out. Fundamentally, article 65, no. 6 of the *Constitution*² states that:

“A supervisão do recenseamento e dos actos eleitorais cabe a um órgão independente, cujas competências, composição, organização e funcionamento são fixados por lei.”.

10. The key question is the meaning which is to be given to the term “supervisão” in article 65. The Team understands that that article has not to date been subject to interpretation by the Court of Appeal. The online *Dicionário da Língua Portuguesa da Porto Editora* defines “supervisão” as:

- “1. acto ou efeito de supervisionar, coordenar ou inspeccionar;
2. função de supervisor;”,

² The text of the *Constitution* is available in English at <http://www.unotil.org/legal/RDTL-Law/RDTL-Constitution.pdf>.

defines “supervisionar” as:

- “1. dirigir; orientar; coordenar;
2. exercer a função de supervisor (num filme)”;

relevantly defines “coordenar” as:

- “1. dispor obedecendo a determinadas relações com vista a um determinado fim;
2. organizar e orientar (um projecto ou actividade de grupo);
3. arranjar ou dispor de uma forma harmoniosa; combinar;”;

defines “inspeccionar” as:

- “1. fazer inspecção a; vistoriar;
2. examinar;
3. revistar;”;

defines “dirigir” as:

- “1. dar direcção a; orientar;
2. encaminhar;
3. enviar para um dado lugar;
4. enviar; endereçar;
5. ter a direcção de; administrar; governar;
6. dizer; proferir;
7. dar orientação a; ser responsável por (músicos, actores, etc.);
8. guiar;
9. voltar; virar;
10. *Brasil* conduzir;”.

These definitions encompass concepts of supervision which range from immediate direction to general oversight and observation. Faced with this, the Team has taken account of a number of principles in deriving its view of the implications of the relevant constitutional requirement.

11. First, while article 65, no. 6 of the *Constitution* provides for the competences, composition, organisation and functioning of the “independent organ” to be fixed by law, normal principles of statutory interpretation imply that the law-making power in question cannot be read so widely as to enable a law to be enacted which would deprive the activities of the independent organ of substance. In other words, a law which purported to define the competences of the “independent organ”, but which in effect deprived it of the capacity to perform its supervisory function, would be inconsistent with the clear intention of the *Constitution*.

12. Secondly, in its First Report, the Team noted (at paragraph 15) that:

“It is also, of course, a fundamental requirement that the process meet any relevant requirements set out in the Constitution of Timor-Leste. A complexity in using the Constitution as an element of the certification process arises from the fact that few if any of the provisions of the Constitution relating to elections have been elucidated by judicial interpretation. Faced with this, the Team has concluded that it is appropriate to seek to apply the relevant provisions of the Constitution in a manner which gives

the fullest effect to international electoral standards, in keeping with the sentiment expressed in the following manner in the Preamble to the Constitution:

“Plenamente conscientes da necessidade de se erigir uma cultura democrática e institucional própria de um Estado de Direito onde o respeito pela Constituição, pelas leis e pelas instituições democraticamente eleitas sejam a sua base inquestionável”.

13. A number of source documents highlight the existence of international standards in relation to the structure of election management.

- (i) It was noted at paragraph 18 of the Team’s First Report that the *Declaration on Criteria for Free and Fair Elections* which was unanimously adopted by the Inter-Parliamentary Council of the Inter-Parliamentary Union in Paris on 26 March 1994 was being used by the Team as the starting point for the benchmarks to be used in the certification process. Paragraph 4(2) of that *Declaration* states, among other things, that:

“In addition, States should take the necessary policy and institutional steps to ensure the progressive achievement and consolidation of democratic goals, including through the establishment of a neutral, impartial or balanced mechanism for the management of elections”. [emphasis added]

- (ii) In a similar vein, the United Nations Human Rights Committee, in its *General comment No. 25* of 12 July 1996 (set out in United Nations document HRI/GEN/1/Rev.7, 12 May 2004) relating to article 25 of the *International Covenant on Civil and Political Rights* (to which Timor-Leste acceded on 18 September 2003), stated (at paragraph 20 of the comment) that:

“An independent electoral authority should be established to supervise the electoral process and to ensure that it is conducted fairly, impartially and in accordance with established laws which are compatible with the Covenant.”. [emphasis added]

14. The Team also noted at paragraph 22 of its First Report that:

“In applying benchmarks, the Team will be looking to substance as well as to form. In assessing, for example, whether a particular institution is “independent” or “transparent”, the Team will consider not just whether the institution is described as, holds itself out to be, or is legally obliged to be, “independent” or “transparent”, but whether it can be objectively judged to have behaved in a manner which is “independent” or “transparent”.”.

15. Taken together, the principles set out at paragraphs 13 and 14 above clearly imply that a supervisory body must be neutral, impartial or balanced, and must at the minimum have sufficient power and authority to “ensure” the fair, impartial and legal conduct of elections.

16. In particular, for supervision to be effective, two necessary (though not sufficient) conditions must be met. First, the supervisory body must be able to obtain, within a reasonable time, from the organisations and individuals which come under its supervision, all information required (in its own judgement) by the supervisory body.

Secondly, the supervisory body must, at the very least, have the capacity to ensure that the bodies and individuals which come under its supervision comply with all applicable laws and regulations.

17. **On this basis, the Team concludes that for the proposed CNE to be able to undertake a supervisory function in a manner which meets the requirement of article 65, no. 6 of the *Constitution*, and which therefore satisfies benchmark 9.1, the CNE would need to be explicitly empowered by law:**

- (i) to view, at the request of the CNE, the original of any document held by STAE, or by any other governmental body (other than a Court) which has functions to perform in connection with the management of the elections;**
- (ii) to obtain a copy of any such document;**
- (iii) to have access to and obtain copies of any information held in electronic form by STAE, including voter registration data;**
- (iv) to obtain statements, either orally or in writing (at CNE's discretion) from any officer of STAE, or from any officer of any other governmental body (other than a Court) which has functions to perform in connection with the management of the elections; and**
- (v) to approach the Courts at any time to seek court orders requiring any organisation or individual upon which or upon whom any law relating to the elections places obligations, to comply with those obligations.**

18. The Team has a number of observations to make on individual provisions of the draft CNE/STAE law.

19. Article 1 of the draft law is expressed as follows:

“Órgãos da administração eleitoral

São órgãos da administração eleitoral:

- a) A Comissão Nacional de Eleições, adiante designada por CNE;
- b) O Secretariado Técnico da Administração Eleitoral, doravante designado por STAE;
- c) Os centros de votação e estações de voto;
- d) As assembleias de apuramento.”.

The Team notes that while this article identifies the organs of electoral administration for the purposes of the draft law, benchmarks 2.3 and 2.4 have a broader scope, being worded as follows:

- “2.3 Have all other bodies which have functions to perform in connection with the management of the elections performed those functions in a manner which shows respect for the law, is non-partisan and neutral, is transparent, is accurate, and provides an effective services to the voters?
- 2.4 Has there been any interference, of a type which is inconsistent with international electoral standards, with the work of the electoral supervisory body, or of the other bodies which have functions to perform in connection with the management of the elections?”.

The Team will therefore not be limiting its focus to the bodies listed in article 1, but will also, for example, take account of the actions of any other bodies (such as, for example, District Administrations) which are tasked to perform functions in connection with the management of the elections.

20. Article 4 of the draft law is expressed as follows:

“Definição e funções

1. É criada a Comissão Nacional das Eleições, à qual compete a supervisão dos actos eleitorais a que aludem a presente lei e os regulamentos que executem as leis eleitorais ou referendárias.
2. A CNE é independente de quaisquer órgãos do poder político, central ou local e goza de autonomia financeira, administrativa e organizativa.”.

Unless the term “supervisão” used here is clarified in such a manner as to meet, at least, the requirements set out at paragraph 17 above, the Team would be unable to certify compliance with benchmark 9.1.

21. Article 5 of the draft law is expressed as follows:

“Composição

1. A CNE é composta por quinze membros, sendo:
 - a) Três nomeados pelo Presidente da República;
 - b) Três eleitos pelo Parlamento Nacional;
 - c) Três nomeados pelo Governo;
 - d) Um magistrado judicial, eleito pelos seus pares;
 - e) Um magistrado do Ministério Público, eleito pelos seus pares;
 - f) Um defensor público, eleito pelos seus pares;
 - g) Três representantes da sociedade civil, dos quais:
 - i. Um indicado pela Igreja Católica;
 - ii. Um indicado pelas restantes confissões religiosas;

- iii. Um representante das organizações representativas das mulheres.
2. Os órgãos referidos nas alíneas a) a c) do número anterior devem indicar, pelo menos, uma mulher.
3. Os órgãos mencionados nas alíneas a) a g) do n.º 1 nomeiam, indicam ou elegem, no mesmo acto, pelo menos um suplente.
4. Só podem ser nomeados ou eleitos para a CNE cidadãos de reputada idoneidade de carácter que não tenham responsabilidades de direcção em partido político ou em candidaturas eleitorais.
5. O prazo para a nomeação ou eleição dos membros da CNE é fixado por aviso do Parlamento Nacional publicado no Jornal da República, sem prejuízo do disposto no artigo 14.º.”.

The processes by which three members are elected by the National Parliament, three members are nominated by the Government, and the members referred to in article 5, no. 1, sub-paragraphs d), e), f) and g) are elected or designated, are unclear. In particular, no provision is made for a situation in which there might be disagreement among civil society organisations in relation to a choice of nominee. Article 5, no. 2 is ambiguous, and is capable of being read, in relation to the nine CNE members in total chosen pursuant to article 5, no. 1, sub-paragraphs a), b), and c), as requiring either that at least one must be a woman, or that at least three must be women. Article 5, no. 4 specifies certain requirements which must be satisfied by candidates for CNE membership. The draft law, however, contains no specific provision for the enforcement of the requirements.

22. Article 6 of the draft law is expressed as follows:

“Estatuto

1. Os membros da CNE são inamovíveis e independentes no exercício do mandato, acumulando-o com as funções profissionais que exerçam.
2. Os membros da CNE têm direito a receber um subsídio diário por cada reunião ou sessão de trabalho em que participem, de valor a fixar por decreto-lei.
3. Durante o desempenho efectivo de funções, os membros da CNE têm direito a dispensa do exercício das suas funções profissionais, públicas ou privadas, sem perda de quaisquer direitos inerentes à relação jurídica de emprego.
4. Em caso de vacatura, os membros da CNE são substituídos, no prazo de trinta dias a contar da ocorrência daquela, pelo respectivo suplente ou, na falta deste, nos termos em que foi indicado o membro a substituir.
5. Os membros da CNE têm ainda direito a cartão de identificação, de modelo a aprovar pela CNE.

6. Os membros da CNE perdem o seu mandato no caso de se candidatarem a quaisquer eleições para os órgãos de soberania ou do poder local.”.

Article 6, no. 4 refers to vacancies in the CNE membership, but does not indicate how they arise. In particular, no provision appears to have been made for a CNE member to resign his or her position. Article 6, no. 6, provides for a CNE member who becomes a candidate to forfeit his or her position. This is consistent with the fact that article 5, no. 4 prohibits candidates from becoming CNE members in the first place. However article 5, no. 4 also prohibits persons with leadership responsibility in a political party from becoming CNE members, but article 6, no. 6 makes no provision for CNE members to forfeit their positions if they take on such leadership positions.

23. Article 7 of the draft law is expressed as follows:

“Mandato

1. Os membros da CNE exercem um mandato de seis anos, podendo ser reconduzidos apenas uma vez.
2. Os membros da CNE tomam posse perante o Presidente da Parlamento Nacional nos trinta dias posteriores à data da sua designação.
3. Os membros da CNE mantêm-se em funções até à posse de nova CNE.”.

Article 7 makes no provision for situations in which a CNE member becomes permanently incapacitated, or behaves in a way which would reasonably justify forfeiture of his or her office.

24. Article 8 of the draft law is expressed as follows:

“Competência

A CNE tem as seguintes competências:

- a) Supervisionar o processo eleitoral;
- b) Zelar pela aplicação das disposições constitucionais e legais relativas ao processo eleitoral;
- c) Aprovar os regulamentos de execução previstos na presente lei e nas restantes leis eleitorais, bem como os códigos de conduta para candidatos, observadores, fiscais e profissionais dos órgãos de comunicação social;
- d) Promover o esclarecimento objectivo dos cidadãos acerca do acto eleitoral através dos meios de comunicação social;
- e) Assegurar a igualdade de tratamento dos cidadãos em todos os actos de recenseamento e operações eleitorais;
- f) Assegurar a igualdade de oportunidades e a liberdade de propaganda das candidaturas durante a campanha eleitoral;

- g) Apreciar e certificar as coligações partidárias para fins eleitorais e as listas de candidatos independentes;
- h) Participar ao Ministério Público quaisquer actos susceptíveis de configurar ilícito eleitoral de que tome conhecimento;
- i) Elaborar e remeter ao STJ a acta provisória com os resultados nacionais, a fim de poder ser validado e proclamado o resultado definitivo das eleições gerais;
- j) Desempenhar as demais funções que lhe sejam atribuídas por lei.”.

Sub-paragraphs e) and f) of article 8 confer specific and substantial responsibilities upon the CNE, but it is doubtful whether the law gives the CNE sufficient specific powers to enable it to meet those responsibilities. It would appear that CNE’s powers do not extend to giving instructions to STAE or to the other electoral administration bodies named in article 1 regarding the performance of their functions. Its powers, explicit or implicit, to implement its responsibilities in other ways are unclear.

25. It might be thought that CNE could make regulations under sub-article c) in order to compel persons or organisations involved with the electoral process to take certain specific actions, but in the Team’s opinion the correct interpretation of that regulation-making power is that it would apply only in relation to regulations specifically required or contemplated by another provision of the draft law or of another law relating to the elections. In relation to sub-paragraph f), it is unclear what powers CNE could exercise to “ensure equality of opportunities and freedom of propaganda” for candidates. There would appear to be nothing in the law which would empower CNE to order media outlets to provide such equal opportunities (unless it be thought that such a power is implied by sub-paragraph f)). It is also not clear whether CNE would have standing to request a court to issue such an order. In any case, such an order would normally only be able to be issued by a Court if there were a clear legal basis for it, and the practicability and timeliness of such an enforcement mechanism would seem questionable. All of these issues raised in relation to sub-paragraph f) are also relevant to sub-paragraph e).

26. Unless the powers of the CNE are clarified in such a manner as to meet, at least, the requirements set out at paragraph 17 above, the Team would be unable to certify compliance with benchmark 9.1.

27. Article 10 of the draft law is expressed as follows:

“Dever de colaboração

- 1. No exercício das suas competências, a CNE deve receber dos órgãos e funcionários da Administração Pública todo o apoio necessário ao cumprimento das suas funções.
- 2. Para efeitos do disposto no número anterior, o STAE presta à CNE o apoio e a colaboração que esta lhe solicitar.”.

Article 10 seeks to clarify the relationship between the CNE and the STAE, but the CNE’s powers in relation to other governmental bodies which have functions to

perform in connection with the management of the elections are not stated. **Unless the powers of the CNE in relation to such bodies are clarified in such a manner as to meet, at least, the requirements set out at paragraph 17 above, the Team would be unable to certify compliance with benchmark 9.1.**

The establishment of an independent electoral supervisory organ

28. As the draft CNE/STAE law has not been signed by the President, and as the law has consequently not been published in the *Jornal da República (Official Gazette)*, the deadline for the appointment, designation or election of members of the CNE, which flows from the date of publication in the *Official Gazette*, has therefore also not been determined. The date of the first meeting of the CNE, at which its members will be “inaugurated”, is therefore also undetermined at this time.

29. The Team, in its First Report, made the following statement at paragraph 30:

“Considering that:

- (i) after the relevant law has been passed by the Parliament, it needs to be promulgated by the President;
- (ii) once the law has come into force, there may be a time lag before members of the supervisory organ are appointed; and
- (iii) there is likely to be a significant time lag between the appointment of members and the time when the supervisory organ has agreed upon its procedures and work plan, built up a staffing structure, and become fully operational,

it appears highly likely that if the relevant law has not come into force by the end of November 2006, significant elements of the electoral process will have to be delayed, with implications for the meeting of the relevant constitutional deadlines for the conduct of elections.”

30. **The Team wishes to emphasise that the longer the delays in bringing the CNE into existence, the greater will be the likelihood of adverse effects on the electoral process. In particular, the Team reiterates the point made at paragraph 29 of its First Report that:**

“in the light of article 65, no. 6 of the Constitution, all aspects of the voter registration, and of the administration of the elections, must be undertaken under the supervision of the independent supervisory body. The Team would be unable to certify a process which had not met that requirement.”.

31. **To the extent that delays in bringing the CNE into existence may lessen the effectiveness of the CNE’s work, they will have to be taken into account by the Team when a final assessment is made of whether benchmark 2.1 (quoted at paragraph 8 above) has been met.**

32. The Team also notes that other things being equal, the longer the creation of the CNE is delayed, the greater will be the resources it will need in order to perform its functions in relation to the 2007 elections effectively.

Development of other elements of the legal framework for the elections

33. Benchmarks 1.1 and 9.1, both quoted at paragraph 8 above, highlight the importance of having a legal framework for the elections. **They have not yet been met, as the legal framework for the elections remains incomplete.** As at 19 December 2006, the *Constitution*, and Law No. 3/2004 *On Political Parties* were in force, and contained provisions explicitly relevant to the elections.

34. As most of the operational planning and future preparation for the elections ultimately depends on the content of the laws, further delays in the finalisation of the legal framework will impact directly on preparations for the election. In particular, the Team reiterates the point made at paragraph 28 of its First Report that:

“Article 65, no. 5 of the Constitution states that “O processo eleitoral é regulado por lei.” In the Team’s view, the expression “processo eleitoral” must in this context be given the broadest interpretation, encompassing, among other things, any actions relating to voter registration which will ultimately have the effect of enabling and entitling a person to cast a vote. It would appear that in the absence of legal provisions providing for them, activities which form part of the electoral process, including actions which effect the registration of individual voters, cannot constitutionally proceed.”.

35. While the Team was in Dili, the Parliament continued its consideration of draft laws relating to the parliamentary and presidential elections. On 19 December 2006, the Team was provided with a copy of the law on the parliamentary elections, as approved by the Parliament, entitled *Projecto de Lei N.º 26/I/4.^a - Texto Global Aprovado em Votação Final Global - Lei Eleitoral para o Parlamento Nacional*. That text, which is set out at Annex 3, came to the Team too late in its mission to enable the Team to analyse it in detail.³ However, the Team wishes, without prejudice to a subsequent analysis of the text, to draw attention to four specific concerns, to which benchmarks 1.5, 6.2, 6.7 and 7.2 are applicable. Those benchmarks are worded as follows:

- “1.5 Does the legal framework specify clearly and unambiguously a formula for converting votes into legislative seats which complies with the relevant constitutional requirement?
- 6.2 Is it the case that people qualified to vote, and only people so qualified, are able to do so?
- 6.7 Are measures put in place and implemented to ensure that nobody votes more than once?
- 7.2 Are votes counted and tabulated accurately and transparently, without any fraudulent interference?”.

³ An official English translation of the text was not available to the Team.

36. The first concern relates to the drafting of the formula for the application of a threshold of votes which a political party must reach in order to be entitled to any representation in the Parliament. Article 13, no. 2 in the text states that:

“As listas que obtiverem menos de 3% (três por cento) do total dos votos não têm direito à atribuição de mandatos.”.

In the Team’s view, a provision so expressed gives rise to an uncertainty as to whether the threshold is to be calculated as a percentage of the total number of valid votes cast (which is the approach normally taken), or as a percentage of the total number of votes cast (valid plus invalid). **In order to ensure compliance with benchmark 1.5, the provision needs to be clarified.**

37. The second concern relates to the requirements for voting. Article 40, no. 3 in the text states that:

“Caso o eleitor não disponha de cartão de eleitor actualizado no dia da eleição, pode exercer o direito de voto apresentando o cartão de eleitor antigo ou outro documento oficial com fotografia recente.”.

This provision gives rise to several issues. First, it is not immediately clear what would be encompassed by the expression “documento oficial”, nor does the expression “fotografia recente” lend itself to objective application. More importantly, however, a provision of this type would on the face of it permit a person to vote on presenting a photographic document which had nothing to do with voter registration. Such a document might be thought sufficient to establish the person’s identity, but it would not of itself establish the person’s qualification to vote. **The postulated procedure would accordingly be in conflict with benchmark 6.2.**

38. The third concern relates to article 41, which states that:

“O cidadão eleitor pode votar em qualquer centro de votação ou estação de voto.”.

On the face of it, provisions of this type have the potential to create opportunities for multiple voting, and the overall polling scheme to be adopted will therefore need to be examined critically to ensure that it complies with benchmark 6.7.

39. The fourth concern relates to article 46, which is worded as follows:

“Artigo 46.º - Contagem dos votos e apuramento inicial

1. A contagem dos votos inicia-se imediatamente após o encerramento do centro de votação ou estação de voto e análise das dúvidas, reclamações e protestos e é no mesmo local efectuada pelos oficiais eleitorais, na presença dos fiscais das candidaturas e, quando existam, dos observadores, nacionais ou internacionais, e dos profissionais dos órgãos da comunicação social.
2. Após a contagem dos votos ou no decurso dela, podem os fiscais das candidaturas apresentar reclamações, que são analisadas e decididas nos termos dos n.ºs 2 e 3 do artigo anterior.

3. Se, decorrida mais de uma hora sobre o início da contagem, esta não tiver terminado, as urnas, uma vez nelas reinseridos todos os boletins de voto entrados, são seladas, identificadas e transportadas para a assembleia de apuramento distrital.
4. Concluídas as operações previstas no n.º 1, analisadas as dúvidas e protestos apresentados e decididas as reclamações deduzidas ou verificada a circunstância a que alude o n.º 3, é elaborada acta com o relato de todas as ocorrências pertinentes, que é de imediato remetida à assembleia de apuramento distrital.”.

40. The proposition in article 46, no. 3 that counting should, if not completed after one hour, be closed, with the materials thereafter being transferred to a district counting centre, is, in the Team’s judgement, inconsistent with benchmark 7.2, as the transparency of the process would in such circumstances almost undoubtedly be perceived to have been compromised.

Political party registration

41. The following benchmarks are presently relevant to political party registration.

- “4.1 Are the procedures for the registration of political parties and candidates clearly, unambiguously and transparently stated in appropriate laws and regulations?
- 4.2 Are the procedures effective, impartial and non-discriminatory, and are they implemented in an impartial, non-discriminatory and transparent manner?
- 4.3 Are the qualifications and disqualifications for registration based on objectively verifiable criteria prescribed by law?
- 4.4 Is there a process through which a party or candidate which or who is denied registration may appeal to a jurisdiction competent to review such decisions and to correct errors promptly and effectively?”.

42. Provision is made for political party registration by Law No. 3/2004 *On Political Parties*.⁴ Specifically, articles 13, 14 and 15 provide as follows:

“Artigo 13.º - Formalismo da inscrição

1. A inscrição de um partido político tem de ser requerida por, pelo menos mil e quinhentos cidadãos (1.500) maiores de 17 anos, no pleno gozo dos seus direitos civis e políticos e distribuído proporcionalmente pelo país.
2. O pedido de inscrição é subscrito pelos requerentes e dirigido ao Ministro da Justiça acompanhado da relação nominal dos requerentes, dos documentos comprovativos da identidade dos mesmos, bem como do projecto de estatutos, programa, denominação, sigla, bandeira, emblema e hino do partido.

⁴ The text of the law is available in English at <http://www.unotil.org/legal/RDTL-Law/RDTL-Laws/Law-2004-3.pdf>.

3. Para os efeitos da presente lei, a comprovação da identidade dos requerentes faz-se através da junção de fotocópias autenticadas de BI, ou de passaporte nacional, ou da certidão de nascimento, ou da cédula pessoal, ou da certidão de baptismo, ou da certidão de casamento.
4. A autenticação das fotocópias, bem como o reconhecimento das assinaturas e das impressões digitais dos requerentes que não saibam ou possam assinar é feita pelo funcionário competente do registo civil.

Artigo 14.º - Indeferimento do pedido de registo

1. No caso de indeferimento do pedido de registo do partido, cópia do despacho de indeferimento deve ser transmitida com as explicações das razões do indeferimento.
2. Face ao indeferimento, os requerentes poderão introduzir as correcções, quando solicitadas, ou recorrer ao Tribunal competente para reapreciação do pedido.

Artigo 15.º - Publicidade da inscrição

1. A decisão que ordena a inscrição provisória do partido político cabe ao Presidente do Tribunal competente e deve ser tomada no prazo de cinco (5) dias, contados da entrada dos documentos, referidos no artigo anterior, no Tribunal competente.
 2. A decisão que ordene ou rejeite a inscrição provisória é dada a conhecer durante dois (2) dias consecutivos, na rádio nacional.
 3. Da decisão que ordene ou rejeite a inscrição provisória cabe recurso para o Plenário do Tribunal competente, a ser interposto pelos partidos políticos interessados ou pelo Ministério Público, no prazo de cinco (5) dias a contar do último dia da sua divulgação feita na emissora nacional.
 4. O recurso é decidido em cinco (5) dias.
 5. Se a inscrição tiver sido recusada por incumprimento do disposto no n.º1 e 2 do artigo 5.º e o partido político proceder à substituição, no prazo de quarenta e oito horas, de forma a vir a ser ordenada a sua inscrição, esta considerar-se-á feita na data da decisão inicial que recusou a inscrição.
 6. A decisão sobre a alteração ou substituição de propostas deve ser tomada pelo Presidente do Tribunal competente no prazo de quarenta e oito horas.
 7. A decisão final é publicada no Jornal da República e divulgada durante três dias consecutivos na rádio nacional.”.
43. The Team has a number of observations to make on these provisions.
- (i) It is unclear, in article 13, no. 1, whether the 1500 citizens required for the registration of a political party must be members of the party, or supporters of

the party, or applicants for the registration of the party. **This puts Law No. 3/2004 in a position of failing to satisfy benchmark 4.1.**

- (ii) The meaning of the requirement in article 13, no. 1 that the 1500 citizens in question be distributed “proporcionalmente” throughout the country is also unclear. **This puts Law No. 3/2004 in a position of failing to satisfy benchmark 4.1.**
- (iii) Article 13, no. 2 requires requests for registration to be addressed to the Minister of Justice, and article 14 provides for cases in which the Minister dismisses a request. However:
 - (a) the law sets no explicit limit on the time which the civil registration services can take to authenticate photocopies, signature and fingerprints pursuant to article 13, no. 4;
 - (b) the law sets no explicit limit on the time which the Minister can take in deciding whether or not to dismiss a request, in contrast to the clear time limits imposed by article 15 on decision-making by the “competent Court”; and
 - (c) none of the provisions of the law explicitly obliges the Minister to transfer to the competent Court a request which is not dismissed.

These, taken together, put Law No. 3/2004 in a position of failing to satisfy benchmarks 4.1 and 4.2: the provisions of the relevant articles are not, in terms of benchmark 4.1, “clear” and “unambiguous”, nor are they, in terms of benchmark 4.2, “effective”.

44. The Team has received correspondence from Dra Fernanda Borges relating to an application she has sought to make for the registration of a political party under the name *Partido Nacional*. In keeping with the approach discussed at paragraph 7(iii) of its First Report, the correspondence, which was addressed individually to each member of the Team, is set out at Annex 4 to this Report. The correspondence raises a number of allegations regarding the manner in which the application is claimed by Dra Borges to have been handled by the responsible Minister and officials. She notes in the correspondence that “It appears that we do not have another option but to make an application to the *Tribunal de Recursos* to decide on our application.” In the Team’s view, the correspondence from Dra Borges gives rise, in effect, to two separate issues.

45. The first is whether the *Partido Nacional* will be registered. That is a matter the resolution of which plainly falls within the jurisdiction of the relevant Timor-Leste authorities. To the extent that the manner in which that jurisdiction is exercised depends on the interpretation of the law *On Political Parties*, it is in the Team’s view appropriate that such questions of interpretation be dealt with by the Court of Appeal.

46. The second is whether the provisions of Law No. 3/2004 have, in terms of benchmark 4.2, been implemented “in an impartial, non-discriminatory and transparent manner”. On that, the Team notes that while it has had put to it the views

of the matter held by Dra Borges, the views of the matter held by the responsible Minister and officials would also need to be fully elaborated before any opinion could be reached by the Team. Such views would appear likely to be expressed as part of the litigation process foreshadowed by Dra Borges, and for that reason the Team has deferred any consideration of issues raised by the correspondence at Annex 4 until after there has been an opportunity for the litigation in question to be resolved. The Team will keep in view the extent to which the legal process reflects compliance with benchmark 4.4.

Voter registration

47. Benchmarks which appear to be presently relevant to the analysis of voter registration are 9.1 (quoted at paragraph 8 above), and 3.1, 3.2, 3.6 and 3.7, which are worded as follows:

- “3.1 Are the procedures for the registration of voters clearly, unambiguously and transparently stated in laws and regulations?
- 3.2 Does every adult citizen within Timor-Leste have access to an effective, impartial and non-discriminatory procedure for the registration of voters?
- 3.6 Is all registration data accurately maintained?
- 3.7 Is there provision for the register of voters to be displayed publicly to allow eligible voters to verify and/or challenge the existence of names of voters and the accuracy of the data on the list? If not, is there an alternative mechanism for ensuring the transparency of the register?”.

48. As there is no independent body in place to supervise voter registration, the registration process is not proceeding at present. The Team notes that the final process and plan for registration will be dependent on the provisions of the relevant law. Notwithstanding the current break in activity, the Team is of the view that it would be useful at this time to state its views on several matters regarding the application of the relevant benchmarks relating to voter registration.

49. The voter registration conducted in advance of the Suco elections of 2004-5 was governed by Law No. 3/2004 *on the Election of Suco Chiefs and Suco Councils* (hereinafter referred to as the “Suco election law”)⁵. The preambular text in that Law includes the following text:

“Entretanto e porque a Constituição determina no artigo 65.º que o recenseamento eleitoral é obrigatório, oficioso, único e universal e uma vez que não foi anteriormente feito nenhum recenseamento a presente lei estabelece princípios gerais que permitirão a sua realização sem prejuízo de lei posterior, que trate esta matéria de forma autónoma.”.

Articles 26 to 28 of the Suco election law are worded as follows:

⁵ The text of the law is available in English at <http://www.unotil.org/legal/RDTL-Law/RDTL-Laws/Law-2004-2.pdf>.

“Artigo 26.º - Recenseamento

1. O recenseamento eleitoral é obrigatório, oficioso, único e universal, sendo actualizado para cada eleição.
2. A realização do recenseamento é feito pelo STAE, competindo à CNE a sua supervisão.
3. O STAE determina e divulga os procedimentos técnicos para a realização do recenseamento.
4. São recenseados todos os jovens com mais de 16 anos, sem prejuízo do disposto no artigo 7.º da presente lei.

Artigo 27.º - Cartão do eleitor

1. Cada cidadão eleitor receberá do STAE o respectivo cartão que o habilita a votar.
2. O cartão de eleitor tem de ser apresentado nos centros de votação para o exercício do direito de voto.

Artigo 28.º - Cadernos eleitorais

1. O STAE elabora os cadernos eleitorais de acordo com a informação resultante do recenseamento.
2. O STAE apresenta uma primeira versão dos cadernos eleitorais que é exibida à população, num período a fixar pela CNE, para corrigir qualquer erro ou omissão.
3. Os cadernos eleitorais definitivos devem ser entregues aos centros de votação no mínimo 24 horas antes do início do processo eleitoral.
4. Para o exercício do voto é requisito estar inscrito no caderno eleitoral.”.

50. Further details regarding the manner in which the registration was to be conducted were set out in the *Regulamento sobre os Procedimentos Técnicos Para a Realização do Recenseamento Eleitoral na República Democrática de Timor-Leste* (cited as *Reg. No: /21/STAE/2004*) approved on 5 April 2004 by the CNE then in existence. That document was expressed to have been made pursuant to article 26 of the Suco election law, and to constitute “technical procedures” (“*procedimentos técnicos*”). In the light of the fact that article 95 of the *Constitution* states that the making of “A lei eleitoral e o regime do referendo” is within the exclusive competence of the Parliament, the Team is of the view that on the face of it the *Regulamento* lacks the force of law.

51. Benchmark 3.1 sets out a requirement that procedures for the registration of voters be clearly, unambiguously and transparently stated in laws and regulations. In keeping with the requirement in article 65 of the *Constitution* that the electoral process must be regulated by law, the Team views benchmark

3.1 as requiring that registration procedures be specified either in laws made by the Parliament, or in subordinate laws made pursuant to an explicit law-making power delegated by the Parliament to another body, for example the CNE. The specification of registration processes through instruments lacking the force of law will be insufficient to achieve compliance with benchmark 3.1, even if those instruments go under the title of “Regulation”.

52. The Team understands from a number of discussions, including with STAE, that STAE sees it as desirable to issue as many voters as possible with a new and relatively durable photographic voter registration card, of the type used during the STAE pilot project mentioned at paragraph 31 of the Team’s First Report. The Team notes that in order for registrations effected during the pilot project to be able to be used validly during polling, the process of effecting the registrations would have had to have been validly supervised by an independent supervisory organ. Furthermore, the Team notes that the process of issuing such cards will be a technically challenging one. **Any deficiencies in the registration process flowing from difficulties in meeting the challenges will have to be addressed by the Team when it considers whether benchmark 3.2 has been met.**

53. **Provision will need to be made, in line with benchmark 3.7, for “the register of voters to be displayed publicly to allow eligible voters to verify and or challenge the existence of names of voters and the accuracy of the data on the list”, or for “an alternative mechanism for ensuring the transparency of the register”.** The Team wishes to emphasise that the wording of this benchmark requires a process for ensuring the transparency of the entire register, not just of entries which have been added since the registration undertaken in preparation for the Suco elections. Such a mechanism is of particular importance for providing an opportunity for errors in the register – arising, for example, from the retention of deceased voters – to be corrected. It also provides a mechanism for complying with article 38, no. 1 of the *Constitution*, which is worded as follows:

“Todos os cidadãos têm o direito de acesso aos dados pessoais informatizados ou constantes de registos mecanográficos e manuais que lhes digam respeito, podendo exigir a sua rectificação e actualização, e o direito de conhecer a finalidade a que se destinam.”.

54. One concern which has been put to the Team is that the display of such lists could impinge on the privacy of registered voters. In relation to that, however, the Team notes that article 28, no. 2 of the Suco election law made provision for such public display of “a preliminary version of the electoral rolls”, and that provision would appear still to be in force.

The security situation

55. The following benchmarks are presently relevant to the security situation in Timor-Leste:

“5.1 Is there an open, neutral and secure political environment where contending views can be safely expressed in the election campaign?

- 5.2 If so, was such an environment in place for a sufficient period prior to the commencement of the campaign to permit all political parties to organise effectively throughout the country, and to permit all voters to participate with confidence in the campaign and the election?
- 9.2 Do conditions exist for all electoral stakeholders (including voters, political contestants, agents and observers) to exercise their human rights, including their rights to freedom of expression, freedom of assembly, freedom of movement, and access to information, in accordance with the Constitution of Timor-Leste and any relevant laws and codes of conduct?”.
56. In its First Report, the Team made the following observations at paragraph 33:
- “It was clear to the Team, on the basis of its own observations of the situation in Dili, that an open political environment of the type which is essential for the conduct of credible, legitimate, free and fair elections is not in place there. If the situation does not improve significantly between now and the elections, the Team would have great difficulty in certifying that aspect of the electoral process as having been satisfactorily met.”.
57. As at 19 December 2006, the security situation in Dili remains a major concern for the Team. The period since the Team’s First Report was issued has been marked by a number of developments, some positive and some negative. The following list does not purport to be exhaustive.
- (i) Sporadic clashes continued to occur in Dili and elsewhere between youths said to be members of “martial arts” groups. These clashes resulted in a number of deaths and injuries.
 - (ii) A citizen of Timor-Leste employed as an interpreter by the United Nations was attacked, and fatally wounded.
 - (iii) A citizen of Brazil, working in Timor-Leste as a missionary, was killed.
 - (iv) There were a number of incidents in Dili involving small improvised explosive devices.
 - (v) Significant numbers of internally displaced persons continued to live in camps in and around Dili, in difficult circumstances.
 - (vi) Outside Dili, at least one armed irregular group continued to operate relatively openly.
 - (vii) The Prime Minister of Timor-Leste met with a number of leaders of “martial arts” groups, as a result of which the groups expressed certain understandings intended to provide a mechanism for controlling outbreaks of violence.
 - (viii) A Police Supplemental Arrangement was concluded between UNMIT and the Government of Timor-Leste, under which it was determined that the United Nations Police would constitute the police force of Timor-Leste.

(ix) The number of United Nations Police in the country continued to increase.

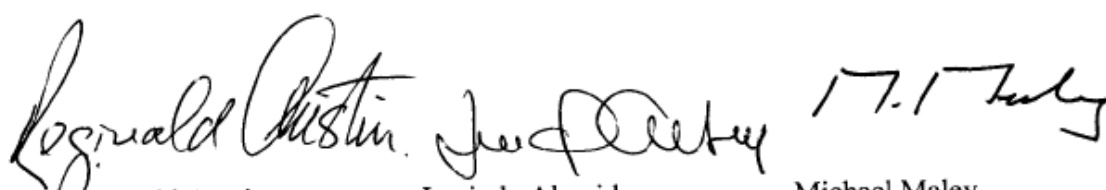
58. Taken together, these developments have not been such as to enable the Team to revise the adverse judgement of the security situation in Dili expressed in its First Report.

59. The Team wishes to emphasise that public concerns about future security, and the possibility of a deterioration of security in the runup to the elections, will inevitably tend to suppress political activity. The need for an open political environment goes beyond being a requirement that a relatively short formal campaign not be marred by open and substantial violence: it encompasses the existence of an environment in which each voter is able to feel confident that there will be no adverse consequences of any kind visited upon him or her as a result of his or her vote, and no adverse consequences visited upon his or her community as a result of how that community voted.

60. It also needs to be emphasised that an open political environment is important not only for voters, but also for political party activists, and for those involved in independent monitoring of the electoral process. If monitoring organisations are operating in a climate of fear, then the likelihood that they will feel able openly to raise concerns, particularly serious concerns, about the quality of the election process will be greatly reduced.

61. Finally, the Team wishes to emphasise that:

- (i) it is incumbent upon all political parties to ensure that the rights of all other political parties are respected, and indeed protected; and
- (ii) the creation of an open political environment is something for which all people and organisations in Timor-Leste share responsibility.


Reginald Austin Lucinda Almeida Michael Maley

Dili, Timor-Leste

19 December 2006