



JUDICIAL SYSTEM MONITORING PROGRAMME
PROGRAMA DE MONITORIZAÇÃO DO SISTEMA JUDICIAL

JUSTICE UPDATE

Period: July
Issue: 8/2006

THE CASE OF ALFREDO REINADO

In this Justice Update JSMP discusses the arrest and detention last week of Alfredo Reinado and a group of his followers.¹

Alfredo Reinado served as Commander of the Military Police, within the Timorese defence force or Falintil-FDTL. In early May he left his barracks along with a number of fellow officers. This group allegedly took weapons and vehicles with them. He later cited a number of reasons for leaving². They included the sacking of 591 members of the Falintil-FDTL (known as the 'petitioners') following their strike action over discrimination claims; government mismanagement of the above case; and claims that a large number of the 'petitioners' has been killed by the Falintil-FDTL following demonstrations on 28 April. Reinado became known as the leader of a group which included these military police and, allegedly, other unknown persons.

Facts of the case

On Wednesday 26 July a complaint was received by the Portuguese National Republican Guard (GNR) from a person stating that his house, in the Lanud area of Dili, was being forcibly occupied by a group of men. On attending the scene the GNR and Australian Defence Force (ADF) found that Reinado and a group of his followers were using a house there and had also occupied the houses on either side.

A search of the houses revealed 9 handguns, a large quantity of ammunition, 35 loaded M16 magazines and a practice grenade.³ The ADF determined that there was a security threat and that arrests needed to be made. They arrested Reinado along with 20 others. Some, but not all, of those arrested were former military personnel. All of those arrested were taken to the Joint Task Force (JTF) detention centre in Caicoli.

¹ The information contained in this Justice Update was received through discussions with prosecutors, judges, defence lawyers, and members of the Australian Defence Force.

² Toohey, P. 2005. East Timor Rebel Leader Speaks Out. *Bulletin*.

³ This item did not contain any explosives. It is used for training only – by allowing a person to familiarize him or herself with the weight and size of a grenade.

JSMP has been informed that the arrest was not initiated by the prosecutor's office but was carried out independently by the JTF.

As required by the Criminal Procedure Code,⁴ within 72 hours all persons arrested were brought before a judge for questioning. One hearing was held on 26 July, and the remainder on 27 July, all before the same international judge. Seven persons were freed at that point, all civilians. Reinado and 13 others were ordered to be held in pre-trial detention.

Prosecutors indicated that they intended to carry out an investigation into certain alleged crimes including, *inter alia*, murder and/or attempted murder⁵ (in connection with the incident in Fatuahi on 23 May in which shooting between Reinado's group and the FDTL occurred), and theft⁶ and/or illegal appropriation⁷ (in connection with Reinado's acquisition of FDTL weapons). It also appears that since the initial arrests were carried out on the basis of suspected violations of the UNTAET Weapons Regulations,⁸ the investigation may also consider those crimes.

JSMP has been informed that members of Reinado's group chose to rely on their right to remain silent and refused to give a statement. They stated that they would only give a statement if told to do so by Reinado. Orders for pre-trial detention under the Criminal Procedure Code⁹ were imposed on all members of the group. JSMP has also been informed that the judge was concerned that security problems might arise if the group were housed in Becora along with other detainees, and that as a result a request was made to the President and Government to make arrangements for an alternative place of detention. In the meantime the group will be detained at the JTF detention centre in Caicoli.

During his questioning by the judge, Reinado stated that he didn't recognize the legitimacy of the international judge. His lawyers argued that the arrests were carried out unlawfully because they were carried out without a warrant. The judge rejected this argument, stating that there was a basis for arrest without a warrant.

The defendants stated that they did not accept this decision, and based on this they all refused to sign the record of the minutes of the session. JSMP has been

⁴ Articles 63,1) and 60(a) Criminal Procedure Code Decree Law 13/2005.

⁵ Man's daughter is covered by article 338 of the Indonesian Penal Code and murder is covered by article 340. Liability for attempted commission of crimes is set out in article 53 of the Indonesian Penal Code.

⁶ Article 362 Indonesian Penal Code.

⁷ Article 372 Indonesian Penal Code.

⁸ UNTAET Regulation 2001/5 on Firearms, Ammunition, Explosives and Other Offensive Weapons in East Timor. Section 4.1 states that any person who without authority under the regulations "possesses... any firearm, ammunition or explosive... is guilty of a criminal offence and shall be punished by a fine not to exceed fifty thousand U.S. dollars (USD 10,000), or a term of imprisonment not to exceed five years, or both." In addition, section 4.3 criminalizes the *use* of a firearm, firearm imitation, ammunition or explosive in the commission of a crime.

⁹ Article 194 Criminal Procedure Code.

informed by defence lawyers acting for the detainees that an appeal is being prepared.

Legal Analysis

JSMP considers that this case involves a number of interesting legal issues which are worthy of some further comment and analysis.

Military or civilian status

At the outset it is interesting to consider the argument made by the detainees that they remain members of the military. For this reason, it is claimed, their possession of weapons could not have constituted a crime, and their arrest on the basis of weapons possession was therefore unlawful. It has also apparently been argued that because of this alleged military status, members of the group are entitled to trial by a military court.

JSMP doubts whether the military or civilian status of Reinado and his group affects the question of whether their possession of weapons constitutes a criminal offence. Under both the UNTAET Firearms Regulations and the government decree law on the structure of the Falintil-FDTL, members of the defence forces are only authorised to keep or use weapons for military purposes and in accordance with instructions.¹⁰

In respect of the question of judicial jurisdiction to try the defendants, JSMP notes that the Timor-Leste Constitution provides for the establishment of military courts,¹¹ and states that it is "incumbent upon military courts to judge in first instance crimes of military nature."¹² The competence, organization, composition and functioning of such courts is to be established by law.¹³ However to date, no law establishing military courts has been passed and no such courts exist.

However the Constitution further provides that that notwithstanding its provisions relating to the court system of Timor-Leste, "[t]he judicial Organization existing in East Timor on the day the present Constitution enters into force shall remain operational until such a time as the new judicial system is established and starts its functions."¹⁴

JSMP believes that the effect of this provision is to put on hold the full effect of the Constitutional provisions dealing with the Timorese court structure until legislation realising those provisions is passed. Until that time it therefore seems

¹⁰ Section 2.1(b) UNTAET Regulation 2001/5 on Firearms, Ammunition Explosives and Other Offensive Weapons in East Timor; article 6 RDTL Decree Law 7/2004 on the Organic Structure of the Falintil-East Timor Defence Force (FDTL).

¹¹ Section 123(1) Timor-Leste Constitution.

¹² Section 130(1) Timor-Leste Constitution.

¹³ Sections 123(4) and 130(2) Timor-Leste Constitution.

¹⁴ Section 163(2) Timor-Leste Constitution.

that the court system and jurisdictions established by UNTAET Regulation,¹⁵ which do not provide for military courts or tribunals, continue to apply. Therefore, it appears that even if Reinado and his followers were able to demonstrate that they had retained military status, their trial by the Dili District Court would be constitutionally permissible.

Lawfulness of arrest without warrant

JSMP has been told that all the arrests in this case were carried out by the ADF. The powers of the ADF to carry out arrests are covered by the Status of Forces agreement in effect between Timor-Leste and Australia. That document provides that ADF personnel may exercise any powers that may be exercised by Timor-Leste Police (the PNTL).¹⁶

The powers of the PNTL to carry out arrests are set out in the Criminal Procedure Code. The general rule is that arrests may only be carried out following the issue of a warrant by a judge, but there are two exceptions to this rule:¹⁷

- (1) Cases of *flagrante delicto*,¹⁸ meaning situations where the crime is in the process of being committed or has just been committed, including cases where immediately following the commission of a crime the suspect is found with items or signs clearly showing that he or she has just taken part in the commission of the crime.¹⁹ Where a crime is ongoing, the state of *flagrante delicto* lasts as long as there are signs showing that the crime is in the process of being committed and the perpetrator is participating in it;²⁰ and
- (2) Cases where the following three requirements are all met: the suspected commission of a crime for which pre-trial detention might be available²¹ (therefore a crime punishable with imprisonment exceeding three years²²); strong indications that the suspect is preparing to escape legal action;²³ and

¹⁵ UNTAET Regulation 2000/11 on the Organization of Courts in East Timor; UNTAET Regulation 2001/18 on the amendment of UNTAET Regulation No. 2000/11 on the organization of the Courts in East Timor; and UNTAET Regulation 2001/25 On the amendment of UNTAET Regulation No.2000/11 on the organization of courts in East Timor and UNTAET Regulation No.2000/30 on the transitional rules of criminal procedure.

¹⁶ Article 4 Status of Forces Agreement between Timor-Leste and Australia.

¹⁷ Article 220 Criminal Procedure Code.

¹⁸ Articles 220(1) and 221(1) of the Criminal Procedure Code provides that no warrant is required for an arrest in such cases. Article 218 states that arrests in cases of *flagrante delicto* may be carried out by any police authority, or in the absence of such an authority, by any person who witnesses the offence.

¹⁹ Article 219(1) and (2) Criminal Procedure Code.

²⁰ Article 219(3) Criminal Procedure Code.

²¹ Article 220(2)(a) Criminal Procedure Code.

²² This is a requirement for the imposition of pre-trial detention under article 194(1) Criminal Procedure Code.

²³ Article 220(2)(b) Criminal Procedure Code.

an emergency or dangerous situation such that the arrest cannot wait for the issue of a judicial warrant.²⁴

It is not clear in the case of Reinado and his group which of these two exceptions was relied on by the judge in her conclusion that the arrests had been carried out lawfully despite the lack of a warrant.

However, JSMP believes that either exception could validly apply: The case involved a crime *in flagrante delicto* because the possession of weapons was continuing at the time of the arrival of the ADF. Furthermore, this is a crime punishable by imprisonment for more than three years with strong evidence of its commission, and the ADF may have believed that the suspects were seeking to avoid legal action and that this together with the presence of guns justified a sense of urgency meaning that there was no time to request a warrant. For this reason JSMP believes that the judge's decision that the arrests were lawful appears to be well founded.

Appropriateness of the order for detention

The Criminal Procedure Code allows a judge to impose pre-trial restrictive measures on defendants where there is a fear that a defendant might escape, or might damage or interfere with evidence, or might pursue criminal activities or disrupt public order.²⁵ In the present case JSMP has been informed that the judge had concerns that public order might be disrupted by the defendants, and that there was a possibility that evidence might be destroyed.

Even where restrictive measures are permitted, pre-trial detention is only to be imposed where two additional criteria are met: there must be strong indications of the commission of a crime punishable by more than three years imprisonment, and other restrictive measures (such as bail; or prohibitions on travel or quitting residence) must be inadequate in the circumstances.²⁶

If the judge found that all these requirements were met in the case of Reinado and his group, she was correct in imposing pre-trial detention.

Place of pre-trial detention

JSMP is concerned by the apparent difficulties in housing Reinado and his followers in existing prison facilities. Aside from the PNTL detention facility at Caicoli (which has a maximum capacity of only 40 and has been used largely for short periods of detention between arrest and judicial questioning) the only prison facility in Dili is the Becora Prison. JSMP believes there is a need to consider

²⁴ Article 220(2)(c) Criminal Procedure Code.

²⁵ Article 183 Criminal Procedure Code.

²⁶ Article 194 Criminal Procedure Code.

expanding or renovating that facility, or supplementing it with another, in order to better provide for circumstances in which higher levels of security are required.

The question also arises as to whether the law permits the pre-trial detention of defendants in a place other than an established prison. The Criminal Procedure Code does not expressly limit the places in which defendants may be held in pre-trial (or final) detention.²⁷ UNTAET Regulations establish a prison system, including recognition of Becora, Fatukero (Gleno) and Baucau Prisons as official penal institutions, and requirements for the official notification of new penal institutions.²⁸ The clear intention of this legislation is to establish a system for the effective management of places of detention in order to ensure that those facilities are properly run and meet international standards. It is therefore unfortunate that there appears presently to be no requirement that judicially ordered detention (whether pre-trial or the result of a conviction) only take place within properly created official penal institutions.

For these reasons JSMP believes that there is no legal impediment at the present time to the housing of Reinado and his followers in an alternative *ad hoc* detention centre in Dili, however JSMP calls for any such facility to be managed in accordance with international standards. It also calls for the government to address the inadequacies in the prison system and to initiate legislative amendments requiring that detention only occur within the prison system established by regulation.

Provisions relating to judicial records

JSMP is troubled by the refusal of Reinado and his lawyers to sign the records of the questioning sessions. It believes that some explanation of the purpose of this process is necessary.

Under the new Criminal Procedure Code, unless a specific exception is provided, all procedures performed orally must be documented by a written record.²⁹

²⁷ While Part II, Title IV, Chapter II dealing with the execution of sentences of imprisonment does refer to "prisons", it does not expressly state that such sentences must be served in prisons, nor does it explain what constitutes a prison for these purposes.

²⁸ UNTAET Regulations 2001/23 on the Establishment of a Prison Service in East Timor, especially section 3. Pursuant to RDTL Parliamentary Law 2/2002 UNTAET regulations in force at independence continue to apply *mutatis mutandis* unless and until repealed or replaced by RDTL legislation.

²⁹ Article 86(1) Criminal Procedure Code. Note that the Criminal Procedure Code also sets out which procedural acts are to be performed orally and which in writing: see articles 84 and 85. The code does not specifically state what form a question session should take (although it does specify that statements are to be given orally). While article 84 states that unless otherwise specified acts must be done in writing, JSMP considers that the scheme set out in article 63 for the first judicial questioning of a defendant – which must be adversarial in nature and attended by, *inter alia*, a person entrusted with putting the statements in writing – makes clear that such questionings are to be done orally and a record must therefore be created in writing.

Records of oral acts are to be prepared by a court clerk or police officer under the direction of the person conducting the act,³⁰ with the latter person responsible for ensuring that the record faithfully reflects what has transpired orally.³¹ The record may be challenged forthwith on the basis of an inconsistency between the proceedings and the record, and if this occurs, a decision is taken by the person conducting the act (in this case the judge) following consultation with any parties concerned.³² If necessary the record should be supplemented with the position of each of the parties on the disputed matter.³³

At the end of a procedural act, such as a judicial questioning, the record must be signed by the person conducting the act (in this case the judge), by the official who created the written record, and by the person whose statements are documented in the record (in this case the defendants).³⁴ Where a person who is required to sign is unable or refuses to do so, the record must state this fact and the grounds given for it.³⁵

JSMP is concerned that the Criminal Procedure Code is not sufficiently clear in respect of:

- What exactly the defendant certifies by signing the record; and
- The effect that not signing has on the validity of the record and the uses to which it may subsequently be put.

JSMP believes that the purpose of the certification procedure (requiring that the record be signed by participants in the procedural act) is merely to demonstrate the agreement of those present that the record accurately reflects the proceedings. For this reason, a defendant might only be justified in refusing to sign the record of a proceeding when he or she believes that the record does not correctly describe what has actually been said in the proceeding.

A defendant should not usually refuse to certify the record of a proceeding merely because he or she disagrees with the correctness of an order made by a judge or a statement made by another participant in the process. In almost every adversarial proceeding a participant will disagree with the correctness of what is said by some other participant; however the Criminal Procedure Code suggests that records of such proceedings should always be certified by all participants.

JSMP therefore does not believe that the certification process is intended in any way to indicate a person's agreement with the correctness of a judge's decision in a case. Signing the record of a proceeding can not therefore have the result of

³⁰ Article 86(2) Criminal Procedure Code.

³¹ Article 86(3) Criminal Procedure Code.

³² Article 86(4) Criminal Procedure Code.

³³ Article 86(4) Criminal Procedure Code.

³⁴ Article 88(1) Criminal Procedure Code.

³⁵ Article 88(2) Criminal Procedure Code.

interfering with rights to appeal. Rather, one of the purposes of maintaining records of a proceeding in which a decision is made is to enable the effective appeal of that decision. For this reason it is in the interests of a participant who wishes to appeal to ensure that the records are certified.

Rights to appeal

The Criminal Procedure Code generally permits appeals against court orders, sentences and decisions.³⁶ This includes judicial determinations at an interlocutory stage of the proceeding (such as decisions on pre-trial detention), which are categorized as orders under the Criminal Procedure Code.³⁷ Appeals must be lodged within fifteen days of the notification of the decision appealed from.³⁸

Delays in the commencement of prosecutorial investigations

JSMP is concerned that no action was taken earlier in this case by the Office of the Prosecutor-General (OPG). The OPG has now stated its intention to investigate Reinado and his followers not only in relation to the *flagrante delicto* crime of unlawfully possessing firearms, but also in relation to several earlier incidents dating back to at least May. JSMP is not aware of whether an official investigation by the OPG into these alleged crimes was already underway before the arrests of 26 July.

If an investigation had begun, JSMP does not understand why the questioning of Reinado and his followers by prosecutors had not yet occurred as is required by the Criminal Procedure Code.³⁹ In addition, if an investigation into Reinado and his followers had begun, and if the prosecution believed that restrictive measures were required (for example for the reasons which have now been enunciated by the court), it should have sought a judicial arrest warrant⁴⁰ to enable such measures to be imposed. JSMP has been informed that the OPG had no role in instigating the arrests on 26 July by the ADF.

JSMP believes that the failure to take these procedural steps, and the lack of any public statement concerning an investigation, indicate that the OPG had not begun investigating Reinado prior to his arrest on 26 July.

³⁶ Article 287 Criminal Procedure Code. Some exceptions (ie cases in which no appeal is permitted) are set out in the Code, including in article 288.

³⁷ Article 89(1)(b) Criminal Procedure Code.

³⁸ Article 300 Criminal Procedure Code.

³⁹ Article 231(1) of the Criminal Procedure Code states that after an inquiry against a particular person gets underway, the questioning of that person becomes compulsory. Exceptions are provided in article 231(2) for cases where the defendant resides overseas, or in an area under the jurisdiction other than the one where the inquiry takes place, or where the defendant cannot be found for notification purposes.

⁴⁰ Article 221 Criminal Procedure Code.

JSMP is concerned by this lack of action by the OPG. This concern is further heightened by the prosecution's concurrent apparent failure to date to initiate an investigation into Vicente "Railos" da Conceição.⁴¹

JSMP considers that delays in initiating prosecutions in high profile cases might be interpreted as indicating that the OPG is unduly vulnerable to external political pressure, whether from the population or other organs of sovereignty.

The rule of law requires not only the existence of a prosecution service that is formally and practically independent from the government, but also that this is seen and understood to be the case by the population in order to ensure faith in and respect for the legal system. JSMP therefore calls on the OPG to ensure that the constitutional principle of equality before the law⁴² is always seen to be adhered to, through the equally prompt prosecution of all persons suspected of having committed crimes, regardless of their political status.

⁴¹ "Railos" made statements to the media indicating that he was recruited and supplied with weapons by former Interior Minister Rogerio Lobato for the purpose of forming a "hit squad" to kill certain opponents of the government. On the basis of these statements, criminal investigations into Lobato and former Prime Minister Mari Alkatiri have begun. However no investigation into Railos himself appears to have been initiated.

⁴² Section 16(1) Timor-Leste Constitution; article 26 International Covenant on Civil and Political Rights.