



JUDICIAL SYSTEM MONITORING PROGRAMME
PROGRAMA DE MONITORIZAÇÃO DO SISTEMA JUDICIAL

JUSTICE UPDATE

Period: July
Issue: 7/2006

Detention and Trials during the Recent Unrest

The recent outbreaks of civil unrest in Dili have affected, and continue to affect, the functioning and development of the judicial system in Timor-Leste. Members of the international Joint Task Force (JTF)¹ are now carrying out police activities within Dili, including arrest and detention. Thefts and insecurity have impeded processes and appeals both in Dili and in/from the other district courts.

This Justice Update aims to provide an overview of the impact of the recent crises on the judicial system in Timor-Leste. Some of the issues raised warrant further analysis and comment and will be covered in more detail in future JSMP publications.

1. ARREST AND DETENTION BY THE JTF IN DILI

Since the arrival of foreign troops and police forces in East Timor, the PNTL² has not operated in the district of Dili, where the JTF has instead maintained law and order. As of 11 July, the JTF has detained 278 persons.

Following arrest or other form of detention³, suspects are held at the Dili PNTL Headquarters in Caicoli, currently run by the JTF. According to the JTF and the Prosecutor's Office, every attempt is made to follow processes under Timorese law regarding this detention. Within 72 hours of their arrest⁴, suspects are either released⁵ or brought before a judge for first questioning. Access to legal assistance is provided, as required by the Constitution and the Criminal

¹ The JTF comprises military and/or police from Australia, Portugal, Malaysia, and New Zealand.

² Timor-Leste National Police.

³ Articles 217 to 223 of the *Provedor (CPC)* cover the powers of the police in relation to arrests and detention carried out for the purpose of initiating judicial processes, whether under warrant or in other specified circumstances. In addition, article 53 of the *CPC* permits the police to take a person to a police station and hold them there for up to twelve hours for the purpose of establishing that person's identity when there is a suspicion that the person is preparing to commit or has committed or taken part in a criminal offence.

⁴ This is required by article 63(1) of the *CPC*.

⁵ Under article 223(1) of the *CPC*, arrested persons must be released immediately where it becomes evident that an arrest was carried out in a situation of mistaken identity or in circumstances not provided for under the law, or where continued detention has become unnecessary.

Procedure Code (CPC)⁶, for those suspects who are to be questioned by a judge.

Initially, first questioning hearings under article 63 of the CPC⁷ occurred not at the Dili District Court, as would be the usual procedure, but at the detention unit in Cailcoli. A District Court Judge also informed JSMP that earlier, out of security concerns, some hearings were held in the Dili 2001 Hotel, which initially served as the Portuguese National Republican Guard (GNR) base. However, since the beginning of July hearings have returned to the Dili District Court.

a) Powers of the JTF regarding arrest and detention

The Status of Forces Agreements in effect between Timor-Leste and JTF member nations limit the scope of the powers of the JTF⁸. The agreement provides *inter alia* that:

- *“The military and police members of the Visiting Personnel may use such force as is reasonably necessary to achieve the purposes of the Deployment.”*
- *“Persons detained ... by Visiting Personnel will be dealt with by the Force Commander and the Timor-Leste authorities in a manner consistent with international law and as may be mutually arranged between the Government of Australia and the Government of Timor-Leste.”*
- *“Military and Police members of the Visiting Personnel may exercise any powers that may be exercised by East Timor Police (PNTL) for the purposes of these Arrangements.”*

It therefore appears that in effecting arrests and detention the JTF have the powers normally exercised by the PNTL (under the Timorese CPC and other legislation) and must act in accordance with international law.

b) Concerns regarding arrest and detention

JSMP is aware that for the most part the JTF is attempting to comply with Timorese and international law in respect to arrest and detention. The Office of the Provedor for Human Rights and Justice (the Provedor's Office) has provided a briefing on relevant provisions of Timorese law to the JTF detention unit management. JSMP welcomes the willingness of the members of the JTF to

⁶ Article 30(3) of the Constitution provides that every individual who loses his or her freedom shall be allowed to contact a lawyer, directly or through a relative or trusted person. Article 60(d) of the CPC grants persons who have been given the status of defendant (under article 59) the right to be assisted by a defender if that person so requires.

⁷ These hearings are sometimes referred to as “72 hour hearings”.

⁸ The Status of Forces Agreement quoted here is the one in effect between Timor-Leste and Australia. To JSMP's knowledge, Malaysian and New Zealand forces are also operating under these provisions. The Portuguese GNR will be separate from the rest of the JTF. However, as a result of informal agreement, suspects detained by the GNR are transferred to the JTF detention facility which is operated by the Australian Defence Force.

familiarise themselves with relevant local laws and to comply with these laws and international standards.

Nonetheless, JSMP does have some concerns regarding arrests and detentions carried out by the JTF to date.

Concerns relating to the transparency of the process

JSMP is concerned that the basic documents demonstrating the JTF's powers and policies in the area of arrest and detention are not freely available to the public in Timor-Leste.

- Although the Status of Forces Agreement is said to be a public document, it has not been freely distributed and has been very difficult to acquire even for civil society organisations; and
- The Detention Policy, under which JTF members are operating, is a confidential document.

JSMP is concerned that these documents, which are governing all arrests and detentions carried out in Dili at the present time, are not freely available to the public.

Concerns relating to the accessibility of the JTF

The failure to make specific documents publicly accessible compounds a more general problem relating to the lack of public information about the role and powers of the JTF in policing and judicial processes. A particular problem is the lack of information about methods for reporting crimes or seeking assistance from the JTF. Although posters with a contact telephone number are displayed around Dili, this does not provide adequate access for those who are without the financial means necessary to access a mobile telephone and sufficient credit. This represents a significant number of people concentrated in the most marginalised groups.

JSMP believes that the establishment of a well-publicised and readily accessible office would best promote the accessibility of the JTF's policing functions. Such an office must be accessible not only physically, but also from a cultural and language perspective.

Concerns relating to the rights of suspects, family members and victims

JSMP has also been made aware that despite the attempts of the JTF to fully comply with Timorese and international laws, these attempts have in some respects been hampered by the JTF's lack of local and language knowledge. For example:

- The JTF has not always been able to inform the family members of detained persons of their arrest and detention as required by article 60(g) of the CPC because of difficulties in locating these family members;
- For the same reason the JTF has not always been able to inform victims or complainants of the arrest, detention or release of suspects⁹; and
- During the early stages of the JTF presence, there were some limitations on its ability to provide detainees with substantial access to lawyers, due to the JTF's lack of knowledge of the local legal sector. However, contact details of local legal practitioners have now been made available to the JTF by the Provedor's Office.

Local NGO Yayasan HAK has provided some assistance with these tasks, particularly in contacting family members of detained persons. JSMP believes that this assistance should be complemented by seeking out contact with Suco (village) heads or other local authorities who are best placed to contact individuals in the community.¹⁰

2. TRIALS AND APPEALS

There has been an even greater impact on trials outside Dili and appeals in the Court of Appeal since the conflict broke out on 28 April 2006.

a) Office of the Prosecutor

On 25 May 2006, unknown persons looted the office facilities of the General Prosecutor, including tables, chairs and 138 computers. The looted items included registry files and forensic evidence. Consequently, the administration of the Prosecutor's Office has not been functioning normally since that time.

Additionally, although it has not affected current prosecutions, the theft of evidence and files relating to atrocities committed in 1999 is a matter of serious concern.

A further problem that has arisen during the recent unrest relates to staffing. Four international prosecutors are currently working in Timor-Leste. While this number

⁹ The CPC does not contain a specific provision requiring police to notify victims or complainants of progress in a case. However contact with and the provision of information to these persons is necessary in practice to comply with many of the provisions of the CPC relating to "aggrieved persons" (defined under article 71 of the CPC as including victims and complainants). Examples include article 72 which requires the Prosecutor to provide information to aggrieved persons concerning their rights to compensation, articles 237 and 240 which require that aggrieved persons be provided with certain notices including those of indictment, dismissal and trial dates, and article 348(3) which requires that when an expedited trial is used the police must notify the aggrieved person to appear at the hearing. The importance of keeping victims notified of the progress and disposition of their case is recognised by article 6(a) of the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power (UN General Assembly Resolution 40/34, 29 November 1985) which, although not binding in Timor-Leste, provides a benchmark for best practices in dealing with victims of crime.

¹⁰ JSMP is aware that some such persons have become displaced persons during the unrest and may be difficult to contact. However as security improves more reliance should be placed on local networks.

appeared to be sufficient prior to May, the workload of the Prosecution has increased dramatically since that time and it is now clear that more prosecutors are needed. Although 9 Timorese probationary prosecutors were appointed in June, they are only permitted to assist international prosecutors and not to act alone.

b) Dili District Court

Prior to 28 April, the Dili District Court was the only court that functioned most days. However, trials were completely disrupted when the civil unrest began. The Court only resumed hearing full trials on 12 July.¹¹

Recently in the Dili District Court, the JTF and Prosecution began utilising the procedure for expedited trial set out in articles 346 to 350 of the CPC. This procedure allows a summary trial to be initiated within 72 hours in cases involving arrests in *flagrante delicto* in respect of crimes punishable by up to five years imprisonment. The first two such expedited trials were held in the Dili District Court on Saturday 8 July.

c) Baucau District Court

Logistical difficulties such as fuel shortages remain a major problem for all the courts of Timor-Leste, particularly those outside Dili. This problem existed before the current crisis but has been exacerbated recently in Baucau District where security concerns have prevented the transport of essential supplies such as fuel. As a result, government fuel supplies, which are used by police and court administrators for transport and electricity generation, have at times been completely exhausted.

During the present turmoil trials have often been postponed, for example, where fuel shortages have prevented police from providing an escort to victims, suspects and witnesses. JSMP has been informed that some judges have used personal funds to overcome these problems and facilitate the holding of trials. These problems have directly affected the trial process.

JSMP believes these problems need to be addressed in order to ensure the smooth functioning of the court and to decrease the backlog of the cases. The Court Clerk has informed JSMP that several cases have been pending for two to three years.

Conversely, JSMP is also aware that some positive developments have occurred in the Baucau District Court, including the use of recently sworn in Timorese judges in court panels to allow continued functioning of the Court.

¹¹ Prior to that date the Court did carry out first judicial questionings under article 63 of the Civil Procedure Code, as explained above, and on 8 July heard two expedited trials as explained below.

d) Suai District Court

Prior to the conflict, the Suai District Court held trials once a month, administered from Dili. JSMP has obtained information from the judge that during the crisis the Suai District Court continued functioning. However, there have been no trials held. This is because of the theft of evidence from the Prosecutor's office and because of transport and logistical problems caused by the unrest. The PNTL, which is responsible for escorting victims and witnesses to the Court from Suai, Bobonaro, Manufahi and Ainaro, is no longer consistently in operation.¹² The prison officers who would normally escort suspects to the Suai Court from Becora Prison in Dili have also not been working as a result of the conflict.

e) Oecusse District Court

The conflict has had less of an impact on the Oecusse District Court. The Court administration continued functioning, but the holding of trials was hampered because the judge usually allocated to hearing trials in this district has now been involved in hearings across all four District Courts. During the crisis the need to have judges and other court actors available for holding first questioning hearings in Dili has de-prioritised the scheduling of cases in Oecusse. However, the Oecusse District Court has now resumed functioning. It held one trial at the end of June and will hold another this month.

f) Court of Appeal

The security issue has been a significant problem for the Court of Appeal. Most of its staff members are still concerned about their personal security, so have not been working. Consequently, the court administration has not been functioning well. In addition, some of the facilities necessary for the trial process were stolen.

These missing items include 15 computer monitors, 25 computers and 7 laptops, simultaneous translation facilities, one motorbike and one car. Two other cars and some office windows were damaged. The theft of the abovementioned items and the ongoing security situation are preventing the Court of Appeal from resuming its activities and will likely continue to do so for the near future.

g) Concerns regarding trial and appeal processes

JSMP is concerned that as a result of the aforementioned problems, additional delays are occurring in the justice system, even beyond those reported prior to the recent unrest. These delays are exacerbating the current backlog of cases and worsening associated problems such as delays in victims' access to justice.

¹² One way of overcoming this problem is for the Court to hold trials outside of Suai, as has sometimes occurred in the past. JSMP has been informed that one such trial will be held in Maliana, Bobonaro District, on 18 July.

In addition, delays in the holding of court hearings outside Dili can in some cases lead to a failure to comply with article 63 of the CPC, which requires an initial judicial questioning within seventy-two hours of arrest.

3. RECOMMENDATIONS

In the light of the above problems, JSMP recommends that:

1. The Government address logistical problems that are hindering judicial processes in the districts. Transport for judges, victims, witnesses and defendants must be assured, including during periods of instability. If necessary, the Government should seek funding from international donors to assist in addressing these problems;
2. The Government take steps to replace essential items stolen or damaged during the unrest, if necessary through seeking assistance from international donors and the United Nations;
3. The Government takes steps as soon as possible to ensure the effective use of the 11 Timorese judges who were inducted in May 2006. These judges should be allocated to panels for hearing cases and most importantly, sufficient security must be provided to ensure that they are willing and able to work;
4. The Government ensure that all documents relating to the JTF's powers and policy of arrest and detention, including the Status of Forces Agreements and Detention Policy, are made public;
5. The Government, in collaboration with the JTF, undertake an information campaign to raise public awareness of the functioning of the JTF, including its powers and functions, and how and in what circumstances it can be contacted by the public;
6. The JTF investigate ways to enhance its ability to communicate with the local population and locate individuals (particularly victims and family members of detainees). This could be done, for example, by enhancing contacts with local NGOs and Suco heads or other local authorities who would be in a position to communicate information or assist in the location of individuals; and
7. The JTF establish a physical office in Dili where members of the public are able to make complaints, place inquiries and report crimes. Such an office must be well publicised and designed to be unthreatening and accessible.