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REPÚBLICA DEMOCRÁTICA DE TIMOR-LESTE

RDTL

DILI DISTRICT COURT

THE SPECIAL PANELS FOR SERIOUS CRIMES

Before:
Judge Phillip Rapoza

CASE NO. 01/2004

THE DEPUTY GENERAL PROSECUTOR

-AGAINST-

SISTO BARROS aka XISTO BARROS
CESAR MENDONCA and
JOSEP NAHAK

DECISION ON PROSECUTOR'S REQUEST FOR PRETRIAL DETENTION

For the Deputy General Prosecutor:
Ms. Shyamala Alagendra

For the Defendant:
Ms. Maria Rocheteau
Ms. Chithra Subramoni

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I. PROCEDURAL BACKGROUND

1. On or about 8 March 2004, the investigating judge of the Dili District Court issued arrest warrants for Sisto Barros, Cesar Mendonca and Josep Nahak for crimes against humanity.

2. On or about 9 March 2004, an arrest team of the Serious Crimes Unit took Sisto Barros and Cesar Mendonca into custody in the village of Suai in the District of Covalima pursuant to the arrest warrants issued by the Investigating Judge.

3. On or about 10 March 2004, the same team arrested Josep Nahak in Dacolo village also in the District of Covalima pursuant to a warrant for his arrest issued by the Investigating Judge.

4. On 12 March 2004, the three suspects were brought before the Investigating Judge to determine whether they should be held, released subject to substitute restrictive measures, or released without condition.

5. The investigating judge ordered that the three defendants be released subject to the substitute restrictive measures that each one:

   (a) report to the nearest police station to their residence;

   (b) refrain from contacting or intimidating the victims or their families;

   (c) remain in East Timor; and

   (d) be present at all judicial proceedings.

6. On 15 March 2004, the Public Prosecutor filed an indictment against the three defendants which alleges as follows:

   (a) The three defendants are charged with crimes against humanity for murder in Counts 1 and 2 and for attempted murder in Count 3.

   (b) Defendants Barros and Mendonca are each charged with a crime against humanity for persecution in Count 4.

   (c) Defendant Nahak is charged with a crime against humanity for persecution in Count 5.

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7. Also on 15 March 2004, the Public Prosecutor filed a written Request for Pre-Trial Detention of the three defendants.

8. On 16 March 2004, this Court held a hearing on the Public Prosecutor's Request for Pre-Trial Detention of the defendants. The Public Prosecutor came before the Court in support of her request for the pre-trial detention of the defendants. The defendants, all represented by counsel, came before the Court in opposition to the Public Prosecutor's request. The defendants also filed a written response to the Public Prosecutor's Request for Pre-Trial Detention.

9. After hearing counsel, the Court took the matter under advisement and continued the hearing to 17 March 2004 for decision.

II. FINDINGS OF FACT

10. Defendant Barros is married and has three children. He lives with his family in Suai in the District of Covalima. He is a farmer. Barros was previously arrested as a suspect on 25 January 2001 and was held in detention until 23 November 2001. Charges were never brought against him. Following his release he returned to Suai to live with his family and has lived there ever since.

11. Defendant Mendonca is married but has no children. He and his wife live in Suai in the District of Covalima, where he is a farmer. Mendonca periodically travels to Dili where he works as a mechanic to earn money to support his family. When in Dili, he stays with his brother.

12. Defendant Nahak, who also identifies himself as Jose Mendonca, lives in Dacolo, in the District of Covalima. He is married and has one daughter, but his family lives in West Timor. He has a farm approximately five kilometers from the village in which he lives. In or about 1999 he went to West Timor, but he later returned. In the year 2000 Nahak was severely beaten by the other villagers in his area because of his involvement in militia activities. He was given medical assistance by PKF personnel and was returned to West Timor. In 2001, Nahak and others returned from West Timor with UN assistance and returned to their villages. Since then Nahak has continued to live in Dacolo.

13. At the time of the initial hearing before the Investigating Judge in the Dili District Court, the representative of the Public Prosecutor indicated that an indictment charging the three defendants would be presented to the Court within thirty days.

14. Following the initial hearing, the Investigating Judge ordered that the suspects be released subject to substitute restrictive measures requiring that they:

(a) report to the nearest police station to their residence;

(b) refrain from contacting or intimidating the victims or their families;

(c) remain in East Timor; and

(d) be present at all judicial proceedings.

15. After the suspects were released on Friday, 12 March 2004, they remained in Dili until Wednesday, 17 March 2004, the date of this decision.

16. The filing on 15 March 2004 of the indictment charging the defendants with crimes against humanity was done in good faith and pursuant to the statement of the representative of the Public Prosecutor to the Investigating Judge that charges would be filed within thirty days.

17. The defendants appeared before this Court on Tuesday, 16 March 2004, for the hearing on the Public Prosecutor's Request for Pre-Trial Detention. The Court took the mid-day recess at 1:00PM and resumed at 2:30PM. The defendants returned for the afternoon session. The Court recessed the hearing until 17 March 2004 at 9:00AM.

18. On Wednesday, 17 March 2004, the defendants again appeared before the Court for the continuation of the hearing to determine if they should be detained in prison awaiting trial.

III. RULINGS OF LAW

19. The Investigating Judge is authorized to order the arrest and detention of a suspect pursuant to Section 9.3(b) (hereinafter "Sec.") of UNTAET Regulation (hereinafter "Transitional Rules of Criminal Procedure" or "TRCP") No. 2001/25, as amended.

20. Within 72 hours of a suspect's arrest, the Investigating Judge shall hold a hearing to review the lawfulness of the arrest and the detention of the suspect pursuant to TRCP Sec. 20.1.

21. At the conclusion of the hearing the Investigating Judge may (a) confirm the arrest and order the detention of the suspect; (b) order substitute restrictive measures instead of detention, or (c) order the release of the suspect, all pursuant to TRCP Sec. 20.6.

22. Pursuant to TRCP Sec. 24.3, when an indictment is presented to the Court, the powers of the Investigating Judge terminate as to the defendants named in the

indictment for all purposes set out in TRCP Sec. 9.3(a) and Sec. 9.3(b), namely the arrest, detention or continued detention of the defendants.

23. After an indictment is submitted to the Court and processed through the Registry, the case file shall be forwarded by the Registry to a panel of judges or to an individual judge pursuant to TRCP Sec. 26.1.

24. Pursuant to TRCP Sec. 20.11, in a case where an indictment has been submitted to the Court involving a crime calling for imprisonment for five years or more, and the defendant is already in custody, the judge to whom the matter has been referred may, at the request of the public prosecutor, and if the interest of justice so requires, and based on compelling grounds, extend the maximum period of pre-trial detention beyond six months, as provided in TRCP Sec. 20.10, but not for more than an additional three months.

25. Similarly, pursuant to TRCP Sec. 20.12, in a case where an indictment has been presented to the Court involving a crime calling for imprisonment for ten years or more, and the defendant is already in custody, the judge to whom the matter has been referred may, at the request of the Public Prosecutor and if the interest of justice so requires, extend the maximum period of pre-trial detention from six months for an unspecified period, so long as the length of the pre-trial detention is reasonable in the circumstances, and having due regard to international standards for a fair trial.

26. Pursuant to TRCP Sec. 29.5, which regulates the preliminary hearing, a panel of judges or an individual judge may, on their own motion, assess the necessity of the detention of the accused in accordance with TRCP Sec. 20 and may order any measure consistent with those provided in TRCP Sec. 20.6

27. Pursuant to TRCP Sec. 20.8, reasonable grounds for detention exist when (a) there is reason to believe the suspect will flee to avoid criminal proceedings; or (b) there is a risk that evidence may be tainted, lost, destroyed or falsified; or (c) there are reasons to believe that witnesses or victims may be pressured, manipulated or their safety endangered; or (d) there are reasons to believe that the suspect will continue to commit offences or poses a danger to public safety or security.

28. As an alternative to an order for detention, the Investigating Judge may order one or more substitute restrictive measures which, pursuant to TRCP Sec. 21.1, may include (a) house detention, (b) submission of the suspect to the care and supervision of another person or an institution, (c) periodic visits by the suspect to an agency or authority designated by the judge, (d) prohibition of the suspect from leaving an area designated by the judge, and (e) prohibition of the suspect from appearing at identified places or meeting a named individual.

29. Pursuant to TRCP Sec. 27.2, after the case is assigned to a panel or to an individual judge, any party may at any time lodge a motion with the court for appropriate relief.

IV. DECISION

Based on the foregoing procedural background, findings of fact and rulings of law, this Court decides as follows:

A. Competence of the Court

30. When the Public Prosecutor submitted to the Court the present indictment charging the three defendants with crimes against humanity, the powers of the Investigating Judge of the Dili District Court as to any future detention of the defendants terminated pursuant to TRCP Sec. 24.3. This provision states that when an indictment is presented to the Court, the powers of the Investigating Judge terminate as to the defendants named in the indictment for all purposes set out in TRCP Sec. 9.3(a) and Sec. 9.3(b), namely the arrest, detention or continued detention of the defendants.

31. The Transitional Rules of Criminal Procedure do not specifically state which judicial entity shall have the power to enforce substitute restrictive measures imposed by the Investigating Judge on a defendant who is later indicted. Nor do the Rules state which judicial entity shall have the power to order the detention of such a defendant following his indictment but prior to the preliminary hearing.

32. The fact that the Investigating Judge is now without the power to issue any further order concerning the detention of the defendants as a result of the filing of the indictment does not impair the continuing validity of the original order of the judge to subject the defendants to certain substitute restrictive measures described in Paragraph 14.

33. Accordingly, the defendants continue to be subject to the order of the Investigating Judge imposing substitute restrictive measures described in Paragraph 14.

34. To remain effective and to operate as intended by the Transitional Rules of Criminal Procedure, the order imposing substitute restrictive measures on the defendants must, of necessity, be subject to the continued supervision and enforcement of the Court, especially with respect to any alleged violations of such substitute restrictive measures.

35. As the Court has the inherent authority to supervise and enforce its own orders, the judicial power to enforce the Investigating Judge's order imposing substitute

restrictive measures does not lapse merely because certain prerogatives of the Investigating Judge terminate pursuant to TRCP Sec. 24.3.

36. Similarly the authority of the Court, exercised by the Investigating Judge, to order the detention or continued detention of a suspect does not lapse between the filing of an indictment and the preliminary hearing at which the Court may consider, pursuant to TRCP Sec. 29.5, whether the detention of the defendant is necessary.

37. This Court concludes that, when the powers of the Investigating Judge with respect to the detention or continued detention of a suspect terminate pursuant to TRCP Sec. 24.3 by reason of the suspect's indictment, those powers vest in the individual judge or the panel of judges to whom the indictment has been forwarded pursuant to TRCP Sec. 26.2. This is so whether the defendant remains at liberty or is in detention at the time of indictment.

38. There are numerous instances in the Transitional Rules of Criminal Procedure in which the authority of the individual judge or the panel of judges to determine the detention status of a defendant is asserted. See TRCP Sec. 20.11, TRCP Sec. 20.12, and TRCP Sec. 29.5.

39. It is hardly likely that the drafters of the Transitional Rules of Criminal Procedure intended to give the individual judge or a panel of judges the power to determine that a defendant who has been indicted may be detained at every stage of the proceedings and in all circumstances, except in the case of a defendant who is not already in custody at the time of indictment.

40. The provisions of the Transitional Rules of Criminal Procedure, taken together, constitute a regulatory framework in which the judicial authority over a defendant does not lapse merely because the powers of the Investigating Judge terminate. The powers of the Investigating Judge may end, but the authority that he exercises is inherent in the Court and a fair reading of the Rules indicates an intention that this authority continue to be exercised by the individual judge or panel of judges to whom the case is assigned following indictment. This is so whether the defendant remains at liberty or is in detention at the time of indictment.

41. Even if this Court were to conclude otherwise, the Public Prosecutor could nonetheless request the detention of a defendant who is at liberty at the time of indictment pursuant to the provisions of TRCP Sec. 27.2 which states that any party may at any time file a motion with the Court for appropriate relief

42. Accordingly, this Court is competent to consider and rule upon the Public Prosecutor's request that the defendants be detained in prison pending their trial.

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B. Pre-trial detention of the defendants

43. Having concluded that this Court is competent to consider and rule upon the Public Prosecutor's request for pre-trial detention of the defendants, the Court turns to the grounds upon which such detention may be ordered.

44. There is a basic presumption, recognized in international law and in all societies governed by the rule of law, that a defendant is entitled to be at liberty unless "there are reasonable grounds to believe that . . . detention is necessary." See TRCP Sec. 20.7(c). As stated in TRCP Sec. 2.3, "No person shall be deprived of his or her liberty except on such grounds and in accordance with such procedures as prescribed in the present regulation and other applicable UNTAET Regulations."

45. Under the Transitional Rules of Criminal Procedure, reasonable grounds for detention exist when (a) there is reason to believe the suspect will flee to avoid criminal proceedings; or (b) there is a risk that evidence may be tainted, lost, destroyed or falsified; or (c) there are reasons to believe that witnesses or victims may be pressured, manipulated or their safety endangered; or (d) there are reasons to believe that the suspect will continue to commit offences or poses a danger to public safety or security. See TRCP Sec. 20.8

46. In weighing these factors, the Court may consider the seriousness of the offenses with which the defendant is charged. There is no question that in the present matter the three defendants have been charged with very serious offenses.

47. The first issue before the Court is whether the seriousness of the charges, along with other factors, provides reason to believe that the defendants will flee to avoid the criminal proceedings against them.

48. The Public Prosecutor raises many good reasons why a person in the position of the defendants would fail to come to Court, if not flee. Nonetheless, the Court must recognize that the defendants have appeared before this Court, knowing that serious charges are pending and knowing that, at any moment, this Court could order their detention in prison. The Court must also consider that by coming to Court the defendants have complied with one of the substitute restrictive measures imposed upon them by the Investigating Judge. Consequently, this Court concludes that, at the present time, the Public Prosecutor has failed to demonstrate that there is reason to believe that the defendants will flee or fail to attend criminal proceedings before this Court.

49. As to the second factor, at the present time, there is no evidence before this Court that there is a risk that evidence will be tainted, lost, destroyed or falsified by the defendants.

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50. As to the third and fourth factors that pertain to interfering with witnesses or victims and posing a threat to public safety, the evidence cited by the Public Prosecutor is, at this time, insufficient to satisfy the heavy burden that must be met before a defendant can be deprived of his liberty. The fact that victims or witnesses may apprehend a risk to themselves because they have provided information to the Public Prosecutor may be considered on the question of the defendants' detention only to the extent that such apprehension is based on the conduct of the defendant. In the present matter the described concerns derive from the proximity of the residences of the defendants to those of the victims and witnesses in the case. The Court notes that defendants Barros and Mendonca have lived in the same locations since 2001 without incident or interference. As to defendant Nahak, he was severely beaten by the villagers in his area in retaliation of his participation in the militia. He has since lived without incident in the community. Finally, possible actions by third parties, such as former militia members in West Timor, may be considered on the issue of whether the defendants should be detained only if it has been demonstrated that the defendants are implicated in such actions. At this time, there is no such evidence before the Court.

51. The Court has evaluated whether or not the defendants should be detained in prison pending their trial according to the grounds for detention cited in TRCP Sec. 20.8. Nonetheless, the Court is mindful that the Public Prosecutor's written request for Pre-Trial Detention is based on the provisions of TRCP Sec. 20.12. The Court has not applied that section of the Transitional Rules of Criminal Procedure based on its conclusion, set out in Paragraph 26, above, that TRCP Sec. 20.12 applies in circumstances where a suspect or defendant is already being held in custody and the issue presented is, in the words of the provision, his "continued detention."

V. CONCLUSION

52. As the Public Prosecutor has not demonstrated that reasonable grounds exist at the present time for the detention of the defendants, the Request for Pre-Trial Detention must be denied.

53. The only matter upon which this Court has been asked to rule is the Public Prosecutor's Request for Pre-Trial Detention. In denying that request and in declining to order the detention of the defendants, the Court leaves in place the previous order of the Investigating Judge providing substitute restrictive measures with which the defendants must comply.

54. Nothing in this decision shall prevent the Public Prosecutor from requesting the detention of one or more of the defendants in the future should new circumstances warrant such a request.

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55. In the event that any of the defendants should violate the restrictive measures imposed by the Investigating Judge to which they remain subject, the violation shall constitute a new circumstance warranting reconsideration of their status and possible detention in prison pending trial.

ORDER

Accordingly, this Court ORDERS that the Public Prosecutor's Request for Pre-Trial Detention be DENIED.

Judge Phillip Rapoza
Special Panels for Serious Crimes

Date: 17 March 2004