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REPÚBLICA DEMOCRÁTICA DE TIMOR-LESTE

RDTL

TRIBUNAL DISTRITAL de DILI
SECÇÃO CRIMES GRAVES

Before:
Judge Sylver Ntukamazina

Case No. 18/2003

The Public Prosecutor
Versus
Aprecio Mali Dao

Decision on the application for initial detention of the accused Aprecio Mali Dao

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For the Prosecutor:
Lyne DECARIE

For the defense:
Pamela REUSCH

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Procedural background

1 On 27 April 2004 the Prosecutor presented before the Court an application for initial detention of Aprecio Mali Dao.

2 The Court decided to hold a hearing to review the lawfulness of the arrest and detention of the accused on the same day.

3 The indictment against Aprecio Mali Dao was filed on 10 July 2003 where the accused was charged for murder as a crime against humanity of a number of civilians, on or about 9 September 1999 at the Malau area in Maliana District, including Carlos Maia, Manuel Megalhaes, Lamberto De Sa Benevides, Abilio Marques Vicente, Augustino Dos Santos Marques, Pedro Luis, Jose Barreto, Paul Da Silva, Ernesto Da Coli, Lucas de Santos, Luis Soares, Geronimo aka Jeroni Lopes and Domingos Titi Mau.

4 During the detention review hearing, the defense objected to the prosecution application and applied for the immediate release of her client or, in the alternative, the imposition of substitute restrictive measures under Section 21 of the rules.

Submissions of the parties

5 **The prosecution**, in the written document submitted on 27 April 2004 before the court and oral submissions during the detention review hearing, described the reasons to believe that a crime has been committed and that there is sufficient evidence to support a reasonable belief that Aprecio Mali Dao was the perpetrator. She also advanced that there are reasons to believe that the accused may flee the jurisdiction, and the reasons to believe that witnesses or victims may be pressured.

6 According to the prosecution, the accused Apricio was first arrested for ordinary crimes by the Border Control Unit on Wednesday 21 April 2004. Aprecio was on the East Timor side by 15 meters from the border. He was selling kerosene and had no identification papers on him. He was later on that day handed over to the PNTL in Maliana for the offence of illegally crossing the

border. At that moment police officers in Maliana did not know that Apricio was actually an indicted person by the Serious Crimes Unit and he was detained by the PNTL only concerning illegal crossing. They called the Serious Crimes Unit only on Thursday saying that they had someone there indicted for Serious Crimes.

7 The prosecution pointed out that the accused is referred to in the indictment as Aprecio Mali Dao (number 55 on the list of accused persons). When he was arrested for the ordinary crime he was using the name Aprecio Guterres. According to the prosecution, on Friday, a witness from the 1999 incidents was brought to the Maliana police station and made a statement before the police confirming in front of 3 PNTL and 2 interpreters that Aprecio Gutterez and Aprecio Mali Dao were the same person. The prosecution later asked and received by email (not signed), a statement from this interpreter to confirm that this is the person he was referring to. The prosecution advanced not having yet a document signed because this person is in Maliana and only confirmed to the prosecution by phone saying that he was present at the time.

8 Also, in the statement of the witness Joao Amaral, on page 46, the witness described the militia that took part in the mortal attack (question 227) and at the number 7th, the witness says *"Aprecio , his full name is Mali Dao, but he does not use that surname now, his father's name is Cipriano, he is from Malobo"*. This statement was given in October 20002.

9 Moreover, on the statement given by Aprecio in Bahasa, taken on April 22 by the PNTL, on the first page regarding the identification questions (name, father's name etc.) it is written Aprecio Guterez Mau Buti.

10 It is therefore the prosecution submissions that the present person who told the court that his name is Aprecio Guterrez, is the person named in the indictment by the name of Aprecio Mali Dao. His father's name has been confirmed. And also the suspect confirmed the place of birth. Malobo. Moreover, a witness statement taken in 2002 confirms that Aprecio Mali Dao not always used this surname.

11 The prosecution underlined also that on the 2nd day after Aprico Mali Dao's capture, Friday 23 April 2004, Armando dos Santos went to witness Joao Amaral house, to get him and brought him at Maliana Police station at 12h15. Joao Amaràl at once recognized Aprecio Mau Buti as the same person who was in Mulau area when the incident happened. Joao Amaral also said that he was the same person running after the victim Carlos Maia together with Luis Mali Dao. Present people at the police station were, as follows: Jacinto Deobao, chief of investigation unit, Ularia Perereira, PNTL officer, Jacinto Celestino, PNTL officer, Apolinario Maya, Serious Crimes interpreter and Joao Amaral, witness. The same witness had given the statement in October 2002, he was present in 1999 and saw the incident. He is also the same person who said in October 2002 that Mali Dao was not the only surname used by Aprecio.

12 The prosecution advanced that an investigator from Serious Crimes was sent to Maliana and on Saturday April 24th at 11.46 in the morning arrested Aprecio for the 1999 charges.

13 The accused was first scheduled to appear in court on Monday morning at 10 o'clock. The Prosecution asked the Special Panels for the hearing over the weekend and was told that there were no hearings on the weekends and it was scheduled on Monday. The prosecution specified "*Before my learned colleague was assigned to the case which was on Monday morning, I had already had someone from the Defence Unit who is Maria Rocheteau saying that she had another case in the court, saying that she will find a lawyer to represent the accused. On that point, on Monday morning the adjournment was asked by my colleague because she did not understand the case or have the documents and then it was scheduled for today*".

14 With respect to the substantial grounds, the prosecution believes that there is reasonable ground to believe that the suspect may flee the jurisdiction of this court for certain amount of reasons. The first is the fact that he is living in West Timor. The prosecution has information that the suspect told the PNTL that he lives in Kabuna village, in West Timor, Indonesia. The prosecution told

the court that the accused is married to Ola Obrea (although the accused says he is not married). They have a one-month child called Joni Brea Gutterez, all living in West Timor. He works in West Timor as a farmer. When he was found to be in East Timor he was only crossing into East Timor without any identification papers. Now the accused knows that he is indicted for serious crimes, which carries serious penalty.

15 According to the prosecution, the accused person is the direct perpetrator of the murder of Carlos Maia, but he is also charged with other murders, as a participant in a joint enterprise.

16 Therefore the prosecution requested the detention of the accused for an initial period of 30 days.

17 The defense thinks that her client has identified himself as Aprecio Guterrez and that his name is not Aprecio Mali Dao. She strongly objected the presentation by the prosecution of some kind of statement that is not signed, to identify her client as the person who is accused in the indictment.

18 The defense also strongly objects the allegations made by the prosecutor on the ground that none of the allegations are supported by proper evidence: there has not been produced any investigation report or report from the police regarding the illegal crossing of the border, although since 21 April the Prosecution had 7 days to produce it; there is no evidence the arrest that took place was last Wednesday or the 21st April was legal, the written statement obtained on 22nd April written in Bahasa to support the allegation that the accused was arrested for illegal crossing does not contain any questioning pertaining to illegal crossing or illegal entry.

19 According to the defense, the regulations are quite clear about the detention review. Section 20 of the UNTAET Regulation 2000/30 states very clear that within 72 hour of the arrest the Court should hold a review hearing to review the lawfulness of the arrest and detention. If the accused was arrested on Wednesday these 72 hours had expired latest on Saturday. The Prosecution took Aprecio from Maliana to Dili without any arrest warrant kept him until the hearing, seven days without any decision from a judge.

The arrest was illegal and is illegal, in violation of fundamental human rights and in violation of the ICCPR.

20 The Defence also expressed her surprise that since the indictment was filed more than 10 months ago the Prosecution has never attempted to get arrest warrant in that case.

21 Finally the defense expressed that even in the case the Court considered the arrest legal, there is no reason for detention. The accused is a Timorese citizen with family in Dili, including a brother and a cousin who is a PNTL officer, willing to accommodate the accused.

22 The possibility of a flight risk could be minimized by conditions that could be imposed by the Court, for example the accused would be ready to report everyday to the police station, to sign an undertaking that he will stay under the jurisdiction of East Timor and to stay. So as an alternative the Defense asked for a conditional release on substitute restrictive measures imposed by the Court.

Applicable law

23 UNTAET Regulation 2000/30, regarding the arrest warrants states the following:

19A.4 The police may arrest a suspect without a warrant when, in the course of ordinary law enforcement activities,

(a) the suspect is found in the act of committing a crime; or

(b) there are reasonable grounds to believe that the suspect has committed a crime and that there is an immediate likelihood that before a warrant could be obtained the suspect will flee or destroy, falsify or taint evidence, or endanger public safety or the integrity of the victims or witnesses; or

(c) the police are in hot pursuit of a suspect immediately after commission of a crime and evidence of the suspect's participation in the crime is found in the suspect's possession.

19.1.5 In cases defined in Section 19.4 of the present regulation, the police shall immediately inform the public prosecutor of all circumstances and the restrictive measures applied, and shall submit the report to the public prosecutor without undue delay.

19.1.6 Upon receipt of the report pursuant to Section 19.5 of the present regulation, the public prosecutor may:

(a) request the issuance of the corresponding warrants from the Investigating Judge, in accordance with the rules provided in the present regulation; or
(b) continue the investigation, but order the suspect to be released from custody; or
(c) dismiss the case and order the suspect to be released from custody.

24 Regarding the hearings to review the detentions the same Regulation states the following:

20.1 Within 72 hours of arrest, the Investigating Judge shall hold a hearing to review the lawfulness of the arrest and detention of the suspect. At this hearing the suspect must be present, along with his or her legal representative, if such a legal representative has been retained or appointed.

20.2 The review hearing shall be closed to the public, unless requested otherwise by the suspect and ordered by the Investigating Judge.

20.3 Pursuant to Section 6 of the present regulation, the Investigating Judge shall inform the suspect of the rights to which he or she is entitled during the investigations, including the right to legal representation.

20.4 The suspect may raise objections before the Investigating Judge concerning any allegation of ill treatment or violations of his or her human rights by police officers or other authorities, or the unlawfulness of his or her detention.

20.5 If the suspect makes a statement, the Investigating Judge, the public prosecutor and the legal representative of the suspect may ask pertinent questions to the suspect with respect to his or her statement. If the suspect makes a statement which includes an admission of guilt, the Investigating Judge shall proceed as provided in Section 29A of the present regulation.

20.6 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, as provided in Section 21 of the present regulation; or

(c) order the release of the suspect.

20.7 The Investigating Judge may confirm the arrest and order the detention of the suspect when:

(a) there are reasons to believe that a crime has been committed;

(b) there is sufficient evidence to support a reasonable belief that the suspect was the perpetrator; and

(c) there are reasonable grounds to believe that such detention is necessary.

20.8 Reasonable grounds for detention exist when:

(a) there are reasons to believe that the suspect will flee to avoid criminal proceedings;

(b) there is the risk that evidence may be tainted, lost, destroyed or falsified;

(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.

Identification of the accused

25 The indictment on the file provides that the name of the accused is Aprecio Mali Dao aka Cipriano, born in East Timor, approximately 30 years old, male, East Timorese, believed to be in West Timor, Republic of Indonesia and alleged member of the Dadurus Merah Putih militia.

26 The arrest report signed by the UNPOL Lloyd MacCormack mentions the arrest of a person called Aprecio Mali Dao Aka Cipriano also known by the name of Aprecio Guterres Aka Mau Buti.

27 During the court hearing, the accused identified himself as Aprecio Guterres. His father's name is Cipriano Bello Guterres, his mother's name Cipriana Sisinda. He does not know exactly his date of birth, but was born in 1979, approximately 24 years old, born in Marobo, District of Bobonaro. He also told the court that he is not yet married but has one child whose name is Joni Bria. The mother of the child is Ona Bria. The child and his mother reside in Atambua in West Timor (Indonesia). Before the arrest himself was also living in Atambua in West Timor, in Indonesia. He is a farmer.

28 The court cannot take into account the prosecution submissions that "*a witness from the 1999 incidents was brought to the Maliana police station and made a statement before the police confirming in front of 3 PNTL and 2 interpreters that Aprecio Gutterez and Aprecio Mali Dao were the same person*". There is no evidence to support the prosecution submissions and the court cannot accept as evidence the statement not signed by the said witness nor the interpreter phone call to the prosecution by the interpreter confirming that Aprecio is the person he was referring to. Also, the court cannot consider what the prosecution has been told by the police officer or interpreters as a testimony. It is true, as underlined by the prosecution, that hearsay evidence is admissible. However, the prosecutor cannot be considered as a witness in this case. Her submissions are considered as allegations of a party in the proceedings and not as testimony of a witness under oath.

29 From the document on the file and especially the statement of Amaral Joao made in October 2002, it is clearly mentioned that:

Q-Which militia members did you recognized in the group?
R- All the DMP militia group from Ritabou
(...)
7. Aprecio(LNU), his birth name is Mali Dao, but he does not use this surname now, his father's name is Cipriano, he is from Marobo.

30 Also on the statement given by Aprecio in Bahasa taken on April 22 by the PNTL, it is mentioned on the first page the name of Aprecio Guterez Maubuti.

31 It is not disputed that Aprecio is the name of the person brought before the court and that his father's name is Cypriano Bello Guterres, his mother's name Cypriana Sisinda, was born in Marobo, District of Bobonaro, has one child whose name is Joni Bria, that the mother of the child is Ona Bria and that the child and his mother reside in Atambua in West Timor (Indonesia), where the arrested person was also living before his arrest. All the parties also agree that the arrested person is a farmer.

32 What has to be verified are the other names of the arrested person, his age and his civil status. Without any ID card from the arrested person, it is not easy to determine at this stage those issues.

33 With respect to the age, the indictment on the file provides that Aprecio is approximately 30 years old while the arrested person says that he is approximately 24 years old. The court is satisfied at his stage not withstanding further investigations that the arrested person age may be between 24 and 30.

34 With respect to the civil status the court also considers at this stage that the arrested person has a child whose mother is a person called Ona Bria. Whether or not Aprecio is single or married to Ona Bria could be determined later for purpose of collecting all the relevant details of the arrested person.

35 With respect to the other names of Aprecio, it is also clear that he has been refereed to as Aprecio Mali Dao, Aprecio Guteres, Aprecio Mau Buti.

36 Apart from Aprecio, all those other names have to be later clarified by the prosecution together with any other relevant issue relating to the indictment before the preliminary hearing.

37 What is relevant at this stage is for the court to know whether or not Aprecio is the person suspected of having committed the crime

in the indictment. From the document on the file and especially the statement of Amaral Joao in October 2002, it is clearly mentioned the name of *Aprecio (LNU), his birth name is Mali Dao, but he does not use this surname now, his father's name is Cipriano, he is from Marobo.* The accused himself admitted that he is Aprecio from Marobo, and son of Cipriano.

38 Without calling the witnesses underlined by the prosecution for further identification, the court is convinced at this stage that whatever other name of Aprecio, the person under custody is the one suspected of having committed the crime of murder alleged.

39 Other details of the accused could be clarified later during the preliminary hearing, together with any other defect in the indictment. Whether or not this Aprecio is the one who committed the alleged crime will be decided on with the consideration of the merit of the case.

Alleged illegal arrest and detention

40 The court does not have any evidence relating to the initial detention by the PNTL for the offence of illegal crossing the border. The prosecution did not submit any document showing that Aprecio was first arrested for ordinary crimes by the Border Control Unit on Wednesday 21 April 2004. From the elements on the file, we cannot say whether the first arrest was legal or not. Probably the police should have brought the accused before a judge within 72 hours and the judge could have decided on the issue of arrest for illegal crossing the border.

41 With respect to the arrest by the Serious Crimes Unit, it is true, as underlined by the defense that the accused has been arrested without any warrant of arrest. However, Section 19A.4 b) of UNTAET Regulation 2000/30 says that the police may arrest a suspect without a warrant when there are reasonable grounds to believe that the suspect has committed a crime (and in our case the Indictment justifies this presumption) and that there is an immediate likelihood that before a warrant could be obtained the suspect will flee (also possible in our case considering that the

accused was arrested a few meters from the border, where he could have escaped from the jurisdiction of East Timor).

42 With respect to the obligation to bring the suspect within 72 hours, and from the arrest report submitted on the file, the court considers that the arrest of Aprecio for serious crimes occurred on the 24th April 2004 at 11h46 AM. According to the elements on the file and the report made by one of the judges of the Special Panels available at that moment, the matter was brought before the judge on 24 April in the evening, and the case was scheduled for hearing on 26 April 2004. Therefore the court realizes that the Prosecution tried twice to have a hearing within 72 hours, on the weekend and on Monday morning.

43 With respect to the issue of arresting Aprecio while he was already arrested for another offense, the court does not find any problem of arresting for a murder someone already arrested for crossing the border once it comes out during the investigation that the person arrested is also accused of other crimes. Once the information is confirmed the police investigator can arrest him for the new crime.

Substantial grounds and necessity for detention

44 From the evidence in support of the indictment there are reasons to believe that Aprecio was a member of the Dadarus Merah Putih Militia and that he was involved in the murder of a number of people, especially in the attack on the Mulau area. There are allegations that the accused caught one of the victims named Carlos Maia who attempted to escape and stabbed him to death.

45 Aprecio may be suspected of other crimes underlined by the prosecutor during the hearing. However, the court considers at that stage that Aprecio is only charged for the murder of a number of civilians mentioned in count 8 of the indictment.

46 There are reasons to believe that Aprecio may flee the jurisdiction of the court once released.

47 First of all, the accused resides in West Timor and was caught across the border in East Timor and without any ID card.

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48 The penalty for the crime with which Aprecio is charged is up to 25 years. The accused is now aware of what he faces if convicted.

49 Furthermore, the fact that he has already lived in West Timor where he can keep useful contacts, and that all his other 56 co-accused are supposed to be in West Timor increases the risk of flight.

Substitute restrictive measures

50 The defense proposed that, should the Court consider that there were reasonable grounds for detention under Section 20.8, it should deal with the case under Section 21 UNTAET Regulation 2001/25, which provides substitute restrictive measures as an alternative to an order of detention.

51 In this case, the Court considers that the grounds for detention exist.

Period of detention

52 The prosecution requested for an initial period of detention of 30 days, referring may be to Section 20.9 of the rules which says: "*The Investigating judge shall review the detention of a suspect every 30 days and issue orders for the further detention, substitute measures or for the release of the suspect*"

53 That obligation to review the detention every 30 days is valid to the suspects. With respect to the accused persons whose indictments are before the court, that obligation ceases. The accused is in the hands of the court which can assess at any moment the necessity of detention at his own motion or at the request of the defense, according to Section 29.5 which says: "*At their own motion or at the request of the accused or his or her legal representative, the panel of judges or the competent judge, shall assess the necessity of the detention of the accused in accordance with Section 20 of the present regulation and may*

order any measure consistent with Section 20.6 of the present regulation".

54 The court therefore deems it suitable to order the detention of the accused until the date of the preliminary hearing which has to be scheduled very soon pursuant to Section 29.1 of UNTAET Regulation 2000/30. For that reasons it is necessary for the court to order the prosecution to clarify all the pending issues relating to the other names, the civil status and the age of the accused within one week together with any other relevant issue relating to the indictment.

55 It will be therefore possible for the defense to file with the Court the response to the indictment, if any, as soon as possible in order to hold the preliminary hearing soon after.

Therefore, the Court:

56 Confirms the arrest of the accused person.

57 Orders the detention of the accused until the date of the preliminary hearing.

58 Orders the prosecution to clarify the issue of the other names of the accused and of his civil status within one week (by 6 May 2004).

59 Asks the defense to file with the Court the response to the indictment, if any, as soon as possible for the preliminary hearing to be held soon after.

Dili, 29 April 2004

Judge Sylver Ntukamazina