

261 ~~257~~ 257



**REPÚBLICA DEMOCRÁTICA DE TIMOR-LESTE**  
**RDTL**  
**TRIBUNAL DISTRIITAL de DILI**  
**SECÇÃO CRIMES GRAVES**

Before:

Judge Sylver Ntukamazina, Presiding  
Judge Siegfried Blunk  
Judge Maria Natercia Gusmao Pereira

**Case No.12/2003**

**The Public Prosecutor**  
**Versus**  
**Domingos Amati**  
**Fransisco Matos**

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**Decision on the Defense Motion to Dismiss Count 1 of the Indictment  
for Failure to Establish a Prima Facie case.**

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**For the Prosecutor:**

Mr. Charles Nsabimana

**For the Defense:**

Mr. Alan Michael Gutman

Ms. Beatriz Sanchez

## Background

1. On the 28 February 2003 the Deputy General Prosecutor for Serious Crimes filed with the District Court of Dili an indictment against Domingos Amati and Francisco Matos. The indictment charged both Accused with one count of murder of Antonio Pinto Soares, which was alleged to have occurred on or about 5 September 1999 in the town of Hera, District of Dili.
2. On 24 June 2003 the Defence filed with the Court the "Defence Motion to Dismiss Count I of the Indictment for Failure to Establish a Prima Facie Case". The Defence submitted that the indictment alleges insufficient facts to constitute the *mens rea* and *actus reus* of the charge contained in Count I of the indictment (which is the only Count contained in the indictment).
3. On 27 June 2003 the Prosecutor filed with the Court the "Prosecution Response to Defence Motion to Dismiss Count 1 of the Indictment". The Prosecution submitted that the Defence motion was lodged outside the statutory time limits and that, even so, the indictment establishes the elements necessary for murder pursuant to Article 340 of the Indonesian Penal Code.
4. On 1 July 2003 the Defence filed with the Court the "Defence Rebuttal to Prosecutor's Response to Motion to Dismiss."
5. The Presiding Judge in the case referred to a panel of judges composed of Judge Sylver Ntukamazina, presiding, Judge Siegfried Blunk and Judge Maria Natercia Gusmao Pereira, to decide in chamber with respect to the request of the Defense to dismiss the indictment.

## Lodgement of Preliminary Motions

- 4 The Prosecutor raised a preliminary objection to the Defence motion, namely that it was submitted out of time. The Prosecutor submits that, in accordance with Section 26.2 of UNTAET Regulation 2000/30 (upheld by Section 165

Timerese constitution, as all other following quoted UNTAET Regulations), the Defence has an opportunity to respond to the indictment within forty-five days of the receipt of the indictment.

5 Section 26.3 of that Regulation states that

*The response, if any, shall be filed at the Court and may include legal and factual observations of the accused with respect to the indictment, any preliminary motions the accused wishes to raise and a list of the evidence and witnesses to be presented by the defence during the trial.*

6 The Prosecutor submits that as the indictment was filed with the Court on 28 February 2003, the period in which the Defence response should have been filed expired on 15 April 2003. As noted above, the Defence motion was filed on the 24 June 2003.

7 However, it is noted by this Court that the Defense motion is a motion pursuant to Section 27.1 (that is, a preliminary motion). The motion is of a nature specified in Section 27.1 (a), which provides for preliminary motions that "allege defects in the form of the indictment". The Court also notes that preliminary motions, as clearly provided for by Section 27.1, may be filed at any time "prior to the commencement of the trial."

8 Section 27.1 provides that:

*"27.1 Preliminary motions may be raised prior to the commencement of the trial. Such motions: (a) allege defects in the form of the indictment;*

*(b) seek severance of counts joined in one indictment or separate trials in cases of co-accused; or*

*(d) raise objections based upon refusal of a request for assignment of counsel"*

139  
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9 Therefore, because the Prosecutor has mischaracterized the Defense motion as submitted under Section 26.2 of UNTAET Regulation 2000/30 as amended by UNTAET Regulation 2001/25 (that is to say, a response to the indictment), and because the Defence motion is actually filed under Section 27.1 of UNTAET Regulation 2000/30 as amended (that is, a preliminary motion), this argument of the Prosecutor fails.

### The Sufficiency of the Indictment

10 Article 340 of the Indonesian Penal Code states:

*The person who with deliberate intent and with premeditation takes the life of another person, shall, being guilty of murder, be punished ...*

11 Thus, the *mens rea* required by the definition of murder under Article 340 requires both the deliberate intent to kill the victim and premeditation. This 'first degree' murder carries a maximum sentence of twenty years.

12 In its Motion, the Defense submits that the indictment alleges insufficient facts to constitute the *mens rea* and *actus reus* of murder as defined under Article 340. In particular, the Defence submits that the indictment outlines a situation best described as mutual combat in which the victim strikes the first blow, and that the injury to the victim was serious but not fatal. The Defence contends that the factual situation is best characterised as a crime in Chapter XX of the Indonesian Penal Code.

13 The Prosecutor responds that the indictment is sufficient to satisfy the elements of Article 340. The Prosecutor submits that both of the Accused acted with deliberate attempt to kill the victim, in that they followed the victim from the militia

post to the beach where they stabbed the victim in the head and in the chest with machetes.

- 14 The Prosecutor also submits that the indictment makes it clear that the attack was premeditated. Further, it is contended that premeditation can be formed in a very short time. On the facts of the case the Prosecutor submits that the premeditation was formed- at the very latest- when the Accused took their machetes and followed the victim to the water.
- 15 In its Rebuttal, the Defence reiterates that the indictment fails to establish a *prima facie* case for malice aforethought murder under Article 340. It adds that it would not be permissible to find the Accused of a lesser-included offence to murder (such as manslaughter, negligent homicide and other lesser crimes) because this would expand the subject matter jurisdiction of the Special Panel in a manner not included in the enabling legislation of the Special Panel.

### The Power to Conduct a *Prima Facie* Review of the Sufficiency of the Indictment

- 16 As a preliminary matter, this Court notes that at this stage of proceedings, the full merits of the case against the Accused are not yet before the Court. This Court does not enter into a consideration of the evidence that supports the indictment, because this is an issue for trial. Therefore, the Court wishes to emphasise that it will not consider the merits of the case against the Accused. Rather, this Court is involved in a preliminary review of whether the indictment is sufficient to form a *prima facie* case against the Accused.
- 17 As a related matter, this Court wishes to take this opportunity to clarify a secondary issue that was raised by the parties in the course of their submissions. The Prosecution has, pursuant to Article 24.2 of UNTAET Regulation 2000/30 (as amended) the obligation to “present

268 ~~1~~ 36  
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to the Court a list describing the evidence that supports the indictment.”

18 In the indictment against Domingos Amati and Francisco Matos, Annex A – a list of evidence – has been appended to the Indictment. This Court wishes to clarify that these documents do not form part of the Indictment. The indictment has to be sufficient itself. As it was decided in ICTY in the case the prosecutor v. Dragoljub Kunarac and Radomir Kovac<sup>1</sup>, neither the supporting material nor the witness statements can be used to fill in any gaps in the indictment.

19 The ability for the Special Panel for Serious Crimes to review the prima facie sufficiency of the indictment derives from the provision in Section 27.1 of UNTAET Regulation 2000/30 (as amended), which provides for preliminary motions that may allege defects in the indictment. As this Article expressly provides for preliminary motions, this forms the basis of an initial consideration of whether the indictment can be considered sufficient. When performing this review, this Court notes the requirements of the indictment established by Section 24.1 of UNTAET Regulation 2000/30.

20 Section 24.1 specifies that the indictment shall include:

- (a) the name and particulars of the accused;*
- (b) a complete and accurate description of the crime imputed to the accused;*
- (c) a concise statement of the facts upon which the accusation is made;*
- (d) a statement identifying the provisions of law alleged to have been violated by the accused;*
- (e) the identification of the victims, unless measures to protect the identity of the victims are being sought; and*
- (f) a request for the trial of the accused.*

<sup>1</sup> ICTY, Case No. IT-96-23-PT, the Prosecutor v. Dragoljub Kunarac and Radomir Kovac, Decision on the form of the indictment, decision of 4 November 1999.

- 21 These Sections find their equivalent provisions in Rule 72 of the Rules of Evidence and Procedure of the International Criminal Tribunal for the ex-Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR). Rule 72 provides for, *inter alia*, pre-trial motions that challenge jurisdiction and allege defects in the form of the indictment.
- 22 As has been held by the ICTY in relation to the interpretation of pre-trial motions exercising the right to object to the form of an indictment, “A *prima facie* case on any particular charge exists in this situation where the material facts pleaded in the indictment constitute a credible case which would (if not contradicted by the accused) be a sufficient basis to convict him of that charge.”<sup>2</sup>
- 23 The possibility of dismissing a case before the trial can be found in Section 27.3 of UNTAET Regulation 2000/30 (as amended), which states:

*“Decisions on motions, except as provided in Sections 23 and 27.4 of the present regulation, are not subject to interlocutory appeal. The granting of a motion to dismiss the case for any reason shall be deemed a final decision in the case and shall be subject to appeal as provided in Part VII of the present regulation.”*

### **The Indictment Against Domingos Amati & Francisco Matos**

- 24 The provisions of Section 24.1 of UNTAET Regulation 2000/30 make it clear that it is not enough for an indictment to provide a concise statement of the facts upon which the accusation is formed. “A concise statement of the facts”, as held by the ICTY, has been taken to mean “a brief statement of facts but comprehensive in expression”.<sup>3</sup> It must also

<sup>2</sup> *Prosecutor v. Kordic*, Case IT-95-14-I, Decision on the Review of Indictment, 10 Nov 1995, at 95.

<sup>3</sup> Decision on the Defence Motion for the Amendment of the Indictment, Withdrawal of Certain Charges and Protective Measures for Witnesses, *Prosecutor v. Nsabimana*, Case No. ICTR-97-29A-T, 24 September 1998.

268 ✓  
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provide "a complete and accurate description of the crime imputed to the accused." According to Section 24.1 (b) of UNTAET Regulation 2000/30, in addition to such a statement of the material facts on which the accusation in the indictment is formed, the indictment must also include "a complete and accurate description of the crime imputed to the accused." In order to be "complete and accurate, such a description of the crime would have to include both the *mens rea* and *actus reus* that form the basis of the offence.

- 25 On the facts related in the indictment of the case under discussion, as it currently stands, the Court notes the substantial concerns raised by the Defence that the facts alleged in the indictment do not establish the requisite *mens rea* for the crime of murder as defined by Article 340 of the Indonesian Penal Code.
- 26 As noted above, the *mens rea* required by the definition of murder under Article 340 requires both the deliberate intent to kill the victim and premeditation.
- 27 This Court considers that the facts pleaded in the indictment do not constitute a credible case, which would (if not contradicted by the accused) be a sufficient basis to convict him of that charge. In particular, the Court wishes to express its grave doubts on the basis on which the Prosecutor would prove the requisite *mens rea* for murder. It is therefore clear, as submitted by the Defense, that the Prosecutor's characterization of the gravity of the offence (murder) does not establish a *prima facie* case for murder under Article 340 of the Indonesian Penal Code.
- 28 Indeed in paragraph 2 of the indictment, the Prosecutor describes a situation of mutual combat between the victim and one of the accused persons, in which the victim first throws his knife at the accused. The facts alleged show that the Domingos Amati and Antonio Pinto had an argument. Such facts do not give rise to a credible basis on which the Prosecutor could show that the Accuseds' killing was premeditated.



*Domingos Amati then threatened Antonio Pinto Soares with a knife. Antonio Pinto Soares took out his own knife and threw it at Domingos Amati, hitting him in the forehead.*

- 29 In paragraphs 9 and 10 of the indictment, it is shown that the Accused persons seriously injured the victim, but they did not kill him. Further, he then remained a number of hours at the militia post. Such facts do not give rise to a credible basis on which the Prosecutor could prove that the Accused intended to kill the victim.

*...Antonio Pinto Soares fell to the ground. ... Some time later Antonio Pinto Soares managed to stagger back up to the militia post. He remained at the militia post, seriously injured and bleeding from his wounds, for a number of hours.*

- 30 It is therefore not possible to go ahead with the trial when the facts alleged against the accused do not form credible grounds on which to establish the charge in the indictment.
- 31 The Court notes that, pursuant to Section 32.4, “a lesser included offense of an offense which is stated in the indictment shall be deemed to be included in the indictment.” However, such a provision cannot be permitted to allow the Prosecutor to indict people for crimes that fall outside the subject matter jurisdiction of the Special Panels for Serious Crimes (according to Section 1.3 Regulation 2000/15) The inclusion in an indictment of “a lesser included offence” must not infringe upon Section 12.1 UNTAET Regulation 2000/15 (*nullum crimen sine lege*), which is underlined by Section 12.2 which states:

*The definition of a crime shall be strictly construed and shall not be extended by analogy. In the case of ambiguity, the definition shall be interpreted in favour of the person being investigated, prosecuted or convicted.*

- 32 For these reasons murder according to Section 8 Regulation 2000/15 cannot include manslaughter and maltreatment

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resulting in death (Articles 338 and 351 Indonesian Penal Code), which could be prosecuted before an ordinary panel of Dili District Court or within the jurisdiction of a competent District Court (Section 8.1 UNTAET Regulation 2000/11 as amended by Regulation 2001/25).

- 33 The dismissal of the indictment will end any order of detention of the Accused.

**The Court:**

- 34 For the reasons given above, dismisses the charge in the indictment.
- 35 Orders the release of the Accused Domingos Amati and Fransisco Matos.

Dili, 11 July 2003

Judge Sylver Ntukamazina, Presiding  
Judge Siegfried Blunk  
Judge Maria Natercia Gusmao Pereira

