

APPEALS COURT

Before the Council of Judges of the High Court:

Judge Claudio de Jesus Ximenes President
Judge Jose Maria Calvario Antunes Member
Judge Jacinta Correia da Costa Member

Criminal Offence No 3/2002

In the name of

The Appellant Agostinho da Costa

V

The Prosecutor General

A Dissenting Opinion concerning the law as applied in this case: by Jacinto C. da Costa

1. In this decision, I dissent from the opinion of the majority of the panel in that I do not agree with the way the law has been applied in this case, namely with the interpretation of Article 3.1 of UNTAET Regulation No. 1/1999 stating that the law applicable before 25 October 1999 was Portuguese law and not Indonesian law. In my opinion¹, if Article 3.1 is interpreted in isolation then a dualistic interpretation is possible. That is, on the one hand, that Portuguese law was the applicable law and, on the other hand, that Indonesian law was the applicable law.
2. But in principle, in interpreting any law or provision from an Article, one must also look at the other provisions in the same Article; (*the relationships*) between one clause and another. In this regard, Article 3 of UNTAET Regulation No. 1/1999 contains 3 clauses, and any interpretation must also take into account the other clauses in the same Article. So it should be the case that this Article be interpreted as a whole in the sense that it be interpreted conjointly; Article 3

¹ An interpretation of Article 3.1 in isolation can mean that either Portuguese law or Indonesian law is the applicable law.

Portuguese law because the provisions of Article 3.1 of Regulation 1/1999 state that the applicable law before 25 October 1999 was Portuguese law because Indonesia's de jure presence in Timor-Leste conflicted with international law, generated many forms of violations of the human rights of the people of Timor-Leste, such that the people fought to gain their independence. At that time, Timor-Leste was recognised as a non self-governing territory under the Portuguese Government administration.

Clause 1 with Article 3 Clause 2 and Article 3 Clause 3. Thus, in a whole interpretation of this Article, according to the provisions of Article 3.1, what is meant by the law applicable before 25 October 1999 refers more to Indonesian law.

3. It is known that previous laws were enacted based on Article 165 of the Constitution of the Democratic Republic of Timor-Leste, which states that laws and regulations in force in Timor-Leste are to apply to all matters except to the extent that they are in conflict with the Constitution or the principles contained therein. Thus, if we look backwards we can see that UNTAET Regulation No. 1/1999, in particular Article 3 in its entirety from Article 3.1, 3.2 and 3.3, formed the basis for the re-application of Indonesian laws in Timor-Leste.

Article 3 Clause 1 of this Regulation states that until replaced by UNTAET regulations or subsequent legislation of democratically established institutions of Timor-Leste, the laws applied in Timor-Leste prior to 25 October 1999 shall apply in Timor-Leste insofar as they do not conflict with the standards referred to in Section 2, the fulfillment of the mandate given to UNTAET under UN Security Council Resolution 1272 (1999), or the present or any other regulation and directive issued by the Transitional Administrator.

Article 3.2 Without prejudice to the review of other legislation, the following laws, which do not comply with the standards referred to in Sections 2 and 3 of the present regulation, as well as any subsequent amendments to the laws and their administrative regulations, shall no longer be applied in East Timor.

- *Law on Anti-Subversion;*
- *Law on Social Organisations;*
- *Law on National Security;*
- *Law on Mobilisation and Demobilisation;*
- *Law on Defence and Security*

Article 3.3 Capital punishment is abolished.

4. UNTAET Regulation No. 11/2000, amended by UNTAET Regulation No. 14/2000, further amended by Regulation 18/2001 and further amended by UNTAET Regulation No. 25/2001, Article 5 Clause 1, states that *In exercising their jurisdiction, the courts in Timor-Leste shall apply the law of Timor-Leste as promulgated by Section 3 of UNTAET to Regulation No. 1999/1.*
5. The Courts have an obligation to implement the law, so as a Judge in this case I interpret Article 3.1 in terms of its connection with Articles 3.2 and 3.3 such that in my opinion Article 3.1 refers to Indonesian law and not to Portuguese law, as proposed by the majority in this panel. The presence of Indonesia in Timor-Leste was not recognised de jure but rather de facto and after Portugal left Timor

Lorosa'e in 1975, Indonesia (*entered*) with its laws, which were then applied in Timor Lorosa'e. It cannot be denied that the people of Timor Lorosa'e struggled for their freedom and sacrificed themselves and their property for a long time against colonial powers. The international community know de facto that Indonesia was in Timor Lorosa'e. This can be seen in a concrete way in the 5 May 1999 agreement between Indonesia and Portugal under the auspices of the UN, the purpose of which was to arrange a referendum in Timor-Leste to determine if (*the people*) wanted the wide ranging autonomy offered by Indonesia to become a part of the Unitary Republic of Indonesia or to refuse the broad autonomy, which would mean freedom and having our own country. From all these facts, it can be concluded that although Indonesia's presence was not recognised de jure, Indonesia's de facto presence in Timor Lorosa'e and the application of Indonesia's laws until 25 October 1999 cannot be denied.

6. To further support (*the argument*) that Article 3.1 UNTAET Regulation No. 1/1999 (*refers to*) Indonesian Law is the fact that on 25 October 1999 the laws referred to in Article 3.2 and Article 3.3 were no longer applicable in Portugal but were still applicable in Indonesia. By way of comparison, we can look at the applicable laws in both of those countries on 25 October 1999. For example, in Article 3.3 concerning the abolishment of capital punishment, as already abolished in Article 3 Regulation No. 1/2000*. At that time, (*the death penalty*) was still applicable in Indonesia but had been already abolished in Portugal.

For the purpose of clarity, I will spell out the Articles in the Indonesian Criminal Code and the Portuguese Criminal Code.

I². Portuguese Criminal Code

Topic III concerns sentences and Chapter I, from Article 40 – 64 is about basic sentences while Article 65 – 70 is about additional sentences, of the Portuguese Penal Code. In the kinds of basic sentences, the maximum sentence is 20 years and in special circumstances a maximum term of 25 years can be given, as explained in Article 40 of the Portuguese Criminal Code.

It is clear that In Article 40 of the Portuguese Criminal Code the length of sentences given is:

1. A jail sentence has a minimum length of 1 month and a maximum of 20 years.
2. The exception is prison cases free days not specified in Articles 189.1, 190.2 and 289*.
3. In special cases a maximum prison term of 25 years can be applied.

² 'The Penal Code and Other Penal Legislation' by Jorge de Figueredo Dias : latest edition, 1993

* There seems to be something wrong with these two sentences. The first seems to be out of sequence. The second is fundamentally incomprehensible – I have noted the key words.

From the provisions in the Portuguese Criminal Code, particularly those about basic sentences, there are no provisions for the death sentence to be applied in Portugal. What is explained in the Portuguese Criminal Code and the Portuguese Penal Code concerns only jail sentences and other sentences.

II. Indonesian Criminal Code³

In the First Book of the general rule in Chapter II, Crimes and Sentences are explained. In Article 10, punishments are divided into two kinds:

- a. Basic punishments
 1. capital punishment
 2. imprisonment
 3. light sentences
 4. fines
- b. Additional punishments:
 1. deprivation of certain rights
 2. forfeiture of specific property
 3. publication of judicial verdict

From looking at these facts, I draw the conclusion that what is meant in Article 3.1 of UNTAET Regulation No. 1/1999 is that the laws applicable in Timor Lorosa'e before 25 October 1999 were Indonesian laws not Portuguese laws. Because the provisions in Article 3 Clauses 2 and 3 refer more to Indonesian laws, which were considered to be in contravention of human rights standards as set out in Article 2 of Regulation 1/1999 and as such were not to be applied again in Timor Lorosa'e. Those (*Indonesian legal*) provisions were (*in fact*) applied in Timor Lorosa'e before 25 October 1999 and after the inclusion of Article 3 they were not able to applied again in Timor Lorosa'e.

7. In addition, Resolution 1272 provided the Mandate for the setting up of UNTAET which had the responsibility for administration in Timor Lorosa'e and the authority to undertake all legislative and executive powers, including administration of the Justice sector. UNTAET also had the mandate to develop Timor Lorosa'e including developing a justice system, (*based on*) laws drafted by UNTAET and Indonesian laws, until 20 May 2002, at which time the transitional administration surrendered power to the Government of Timor-Leste.
8. This is further supported by the fact that on 19 May 2002⁴, the National Parliament issued Regulation No. 2/2002 setting out the interpretation of the applicable law, which in Article 1 states that the law applied in Timor Lorosa'e on 19 May 2002 would still be applicable through *mutatis Mutandis* for all matters which are not in conflict with the Constitution and the principles contained within it. So the laws that applied from 25 October 1999 until 19 May 2002 were laws

³ Indonesian Criminal Code

⁴ Law No. 2/2002 dated 20 May 2002

drafted by UNTAET, laws drafted by democratic institutions in Timor Lorosa'e and in situations where there were no relevant laws, the laws applied were Indonesian laws which were not in conflict with human rights standards as set out in Article 2 of Regulation No. 1/1999.

9. So, in my opinion, the laws applicable in Timor Lorosa'e are the laws made by the National Parliament and the laws promulgated by the Government of RDTL and in situations where there are no relevant laws, (*one*) refers to the regulations promulgated by UNMISSET and the Indonesian laws not in conflict with human rights standards and the Timor-Leste Constitution and the standards contained therein. To put it concretely, a case is forwarded to the courts and the suspect is tried and a verdict arrived at based on laws applicable in Timor Lorosa'e, which, amongst others, are UNTAET Regulations, laws made by Parliament, laws made by the government as well as Indonesian laws. I am of the opinion that the High Court (*should*) still apply Indonesian laws to this case as long as they are not in conflict with the basic laws of the Democratic Republic of Timor-Leste and the principles contained therein.

Dili, 18 July 2003

(signature)

Jacinta Corriea da Costa