



## JUSTICE UPDATE

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### **Oppressive Indonesian Law Applied by the Court of Appeal**

On 25 May 2005 the Court of Appeal heard an appeal from an interlocutory decision of the Suai District Court. The decision extended the detention of suspects who had been charged with offences under Arts 106 and 107 of the Indonesian Penal Code (“IPC”).<sup>1</sup> Article 106 criminalizes any “attempt undertaken with intent to bring the territory of the state wholly or partially under foreign domination or to separate part thereof...”.

The appeal was submitted on the grounds that there was no evidence to support the charges, that the arrests were not made in accordance with the requirements prescribed by Art 6.2 of UNTAET Regulation 2000/30 (as amended by Regulation 2001/25), and that the judge had incorrectly applied Art 106 of the IPC.

The Panel of Judges upheld the decision of the District Court and dismissed each of the appellants’ grounds of appeal. What is of principal interest is that the Court of Appeal rejected the appellants’ contention that Art 106 of the IPC is no longer valid in Timor Leste, and was therefore incorrectly applied by the judge at first instance. In doing so the Court dismissed the submission that the repeal of the Anti-Subversion Law (under Art 3.2 UNTAET Regulation 1999/1) implicitly repealed Art 106 of the IPC, whose subject matter is similar to that of the offences prescribed by the Anti-Subversion Law. The panel further stressed that the prohibition on separatism was in accordance with the right of states to maintain territorial integrity and was commonplace in many other countries.

According to the Constitution “[l]aws and regulations in force in East Timor shall continue to be applicable”. This entrenches the position prescribed by UNTAET and RDTL Laws, according to which Indonesian law as at 25 October 1999 continues to apply unless it conflicts with either UNTAET or RDTL laws, is in violation of internationally recognised human rights standards, or is specifically repealed. Furthermore, Art 9.3 of the Constitution invalidates any domestic laws which conflict with “international conventions, treaties and agreements” to which East Timor is a party.

Until a new penal code is passed into law by Parliament, provisions of the IPC will therefore continue to apply in Timor Leste as long as they do not conflict with UNTAET or RDTL laws, international human rights standards, or international instruments to which East Timor is bound.

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<sup>1</sup> See *JSMP Press Release*, ‘Judge Applies Invalid Law’, 25 April 2005.

The question of whether or not Art 106 is consistent with international human rights standards was not raised in the grounds of appeal - the appellants instead relied on the argument that it was implicitly repealed by the repeal of the Subversion Law. Consequently, the Court did not directly address this issue. Nevertheless, in JSMP's view Art 106 is in clear violation of internationally recognized human rights standards and should therefore no longer be applied in Timor Leste.

Under international law the principle of *uti possidetis* arguably authorises legal measures intended to preserve existing state boundaries and the territorial integrity of a state previously colonized by another state. It appears that this was the principle that the Court was alluding to when referring to the validity of prohibitions of separatism in other states. Nevertheless, Art 106 is in JSMP's opinion far too broad and not adapted to giving effect to the legitimate purpose of *uti possidetis*, namely, to preserve existing state boundaries.

The actus reus under Art 106 is the "**attempt**...to bring the territory of the state...under foreign domination or to separate...". An 'attempt' in this context is so broad as to potentially include, and therefore make an offence of, legitimate acts carried out in the exercise of a whole range of civil and political rights. For example, under the International Covenant on Civil and Political Rights, Art 19 guarantees "the right to hold opinions without interference" and "the right to freedom of expression," including "freedom to seek, receive, and impart information and ideas of all kinds, regardless of frontiers..." whilst Art 21 recognizes the "right to peaceful assembly."<sup>2</sup> Articles 19 and 21 of the ICCPR both permit some amount of regulation in limited circumstances. However, they do not grant discretion to states to make unlimited restrictions in the name of these exceptions.<sup>3</sup> The Human Rights Committee clarified in General Comment 10 that "when a State party imposes certain restrictions on the exercise of freedom of expression, these may not put in jeopardy the right itself...the restrictions must be "provided by law"; they may only be imposed for one of the purposes set out in subparagraphs (a) and (b) of paragraph 3; and they must be justified as being "necessary" for that State party for one of those purposes."<sup>4</sup> Article 106, however, is drafted in a way that does nothing to limit its application according to international standards, and is conducive to misuse. Its application in such cases is thus left entirely to the unstructured discretion of prosecutors and judges.

That Art 106 is neither proportional nor adapted to legitimate purposes, and has the potential to severely and unnecessarily restrict the exercise of the rights to freedom of expression and of assembly, is demonstrated by the use Indonesia has made of this provision to stifle political activism and the free flow of information. Indonesia has used Art 106 as a "common weapon ... to detain and punish a large number of its peaceful opponents"<sup>5</sup> in East Timor and in other regions such as Aceh, Papua, and Maluku. Hundreds of political prisoners in East Timor have been held under Art 106 and

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<sup>2</sup> INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS, adopted 16 Dec. 1966, entered into force 23 March 1976, G.A. Res. 2200A (XXI), UN Doc. A/6316 (1966), 999 UNTS 171 ["ICCPR"].

<sup>3</sup> ICCPR Art 21. Art 19 reads: "[freedom of expression] may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary (a) for respect of the rights or reputations of others; (b) for the protection of national security or of public order (*ordre public*) or of public health or morals."

<sup>4</sup> Human Rights Committee, *General Comment No.10:Freedom of Expression (Art 19)*, ¶ 4, CCPR General Comment No. 10 (General Comments), 29 June 1983.

<sup>5</sup> Human Rights Information and Documentation Systems Report, 'East Timor', Huridocs Code # 7523, available at [www.law.qub.ac.uk/humanrts/emergency/timor/ti1.htm](http://www.law.qub.ac.uk/humanrts/emergency/timor/ti1.htm).

related provisions of the IPC.<sup>6</sup> Amnesty International estimates that “as of mid-July 2004, the authorities claimed to have arrested some 2,200 members of GAM [the Free Aceh Movement]. Hundreds, and possibly more than one thousand, of those detained have been or are in the process of being tried. The vast majority of those put on trial are accused of membership or support for GAM and have been charged under Articles 106 and 108 of Indonesia's Criminal Code.”<sup>7</sup> Most recently, an Indonesian court in May 2005 used IPC Arts 106 and 110 to sentence Yusac Pakage and Filep Karma to jail terms of 10 and 15 years respectively<sup>8</sup> for their participation in what Amnesty International calls a “peaceful flag-raising ceremony” in West Papua in December 2004.<sup>9</sup> The Working Group on Arbitrary Detention, too, has concluded that “the majority of individuals facing charges in connection with the above-mentioned symbolic flag-raising ceremonies were arrested for having mostly peacefully exercised their beliefs,”<sup>10</sup> and should be considered arbitrarily detained.

The focus of this analysis has been on Arts 19 and 21 of the ICCPR, however, the scope of Art 106 is so broad that it would potentially impugn legitimate activities carried out in the exercise of numerous other well-established rights: consider for example the rights to liberty and to be free from arbitrary detention (Art 9); freedom of thought, conscience and religion (Art 18); freedom of association (Art 22); the right to participation in public affairs (Art 25); the right to equal protection of the law and effective protection against discrimination (Art 26); and the right of minorities to practice their own culture, religion and language (Art 27).

JSMP is strongly of the opinion that, in light of the indeterminate liability potentially imposed by this provision, and its long history of misuse in Indonesia, Art 106 clearly infringes the human rights standards to which the laws of Timor Leste are subject under the Constitution. Criminal offences of this nature have no place in a developing democracy and should under no circumstances be applied by the courts.

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<sup>6</sup> Ibid.

<sup>7</sup> Amnesty International USA, News, *Indonesia: New military operations, old patterns of human rights abuses in Aceh*, available at <http://www.amnestyusa.org/news/document.do?id=199262E6818B048880256F020052A220>. Last accessed 21 June 2005. (Internal citations omitted). The report also refers to the case of Sofyan Ibrahim Tiba, Teungku Kamaruzzaman, Amni Bin Ahmad Marzuki, Teungku Muhammad Usman Lampoh Awe and Nashiruddin Bin Ahmed. They were negotiators on behalf of GAM who were arrested in May 2003 on their way to Tokyo to participate in peace talks with the Indonesian authorities. During the trial, the act of participating in the negotiations – i.e. participating in an officially approved and internationally mediated process aimed at achieving peace – was held to violate Art 106 of the IPC, and all five men were sentenced to prison terms between 12 and 15 years.

<sup>8</sup> BBC News, 26 May 2005, available at <http://news.bbc.co.uk/go/pr/fr/-/2/hi/asia-pacific/4582161.stm>

<sup>9</sup> *Supra* Note 8.

<sup>10</sup> Commission on Human Rights, Working Group on Arbitrary Detention, *Report of the Working Group on Arbitrary Detention on its Visit to Indonesia (31 January-12 February 1999)*, E/CN.4/2000/4/Add.2, 12 August 1999, at ¶ 65.