

© **APPLICABILITY OF INTERNATIONAL LAW AND PORTUGUESE LAW IN EAST TIMOR**

International law is an integral part of the common law of the United States, *see Filártiga v. Pena-Irala*, 630 F.2d 876, 887 (2^d Cir. 1980), and “[i]t is a principle of international law . . . that every violation of an international obligation which results in harm creates a duty to make adequate reparation.” *Velasquez Rodriquez Case*, Inter-American Court of Human Rights, Judgment of July 21, 1989, ¶ 25, 11 H.R.L.J. 127 (1989) (awarding the family of a disappeared person damages for loss of earnings and psychological injuries). Moreover, on remand in *Filártiga*, after a default judgment and a trial on damages, Judge Nickerson made clear that punitive damages are available to sanction international human rights abuses, and to deter their recurrence. 577 F. Supp. 860 (E.D.N.Y. 1984).

In addition to the causes of action available under international law, a plaintiff in a case coming before the federal courts by virtue of the Alien Tort Claims Act, 28 U.S.C. § 1350, may also have a cause of action under the law of the place where the abuses of human rights occurred. *See, e.g., In re Estate of Ferdinand Marcos Human Rights Lit. (“Marcos II”)*, 25 F.3d 1467, 1476 n. 10 (9th Cir. 1994). Such a party will be entitled to whatever damages are appropriate under the applicable foreign law (provided only that such an award is consistent with the public policy of the forum). *In re Estate of Ferdinand Marcos Human Rights Lit. (“Marcos I”)*, 978 F.2d 493, 503 (9th Cir. 1992). The foreign law at issue here is, of course, the law of East Timor.

The law of that troubled land is not, as of yet, set forth in an East Timorese Constitution or Code. East Timor was a Portuguese colony beginning in the sixteenth century, and, as such, it was subject to the laws and administration of the colonial power. Although the nature of its authority and the scope of its autonomy changed, Portuguese control survived well into the era of

global decolonialization. When Indonesia invaded and forcibly occupied East Timor in 1975, Portugal was acting as the administering power in East Timor on behalf of the international community and in accordance with the United Nations Charter, having been charged with the duty to assist the East Timorese people in achieving the right of self-determination. *See Declaration of Roger Stenson Clark*, Attachment 1 hereto.¹

While the Indonesian invasion and occupation physically prevented the Portuguese authorities from providing further assistance to East Timor, under international law, the primacy of Portuguese law in East Timor was never in question. *See id.* Indonesia's invasion and occupation violated a fundamental rule of international law, codified in Articles 2(4) and 51 of the United Nations Charter: the prohibition of the use of force by any nation except in self-defense. Indonesia's putative annexation of East Timor by force of arms was repeatedly censured by the United Nations Security Council and General Assembly.² *See id.* These United Nations Resolutions affirmed East Timor's status as a non-self-governing territory of Portugal,

¹ The Clark Declaration was prepared for this case. It appends as Exhibit B, and incorporates by reference, however, an Affidavit elaborating on the contents of Portuguese tort law. The latter attestation, by three Portuguese law professors, was presented to the U.S. District Court for the District of Massachusetts in *Todd v. Panjaitan*, No. 92-12255-PBS (1994).

² S.C. Res. 384, 30 U.N. SCOR, U.N. Doc. S/Res/384 (1975); S.C. Res. 389, 31 U.N. SCOR, U.N. Doc. S/Res/389 (1976); GAOR, C.4 (2188th mtg) 407, 412, U.N. Doc. A/C.4/SR.2188 (1975); G.A. Res. 3485, 30 U.N. GAOR, 30th Sess., U.N. Doc. A/Res/3485 (1975); G.A. Res. 31/53, 31 U.N. GAOR, 31st Sess., 31 U.N. Doc.A/Res/31/53 (1976); G.A. Res. 32/34, 32 U.N. GAOR, 32nd Sess., U.N. Doc.A/Res/32/34 (1977); G.A. Res. 33/39, 33 U.N. GAOR, 33rd Sess., U.N. Doc.A/Res/33/39 (1978); G.A. Res. 34/40, 34 U.N. GAOR, 34th Sess., U.N. Doc A/Res/34/40 (1979) ; G.A. Res. 35/27, 35 U.N. GAOR, 35th Sess., U.N. Doc A/Res/35/27 (1980) ; G.A. Res. 36/50, 36 U.N. GAOR, 36th Sess., U.N. Doc. A/Res/36/50 (1981). G.A. Res. 37/30, 37 U.N. GAOR, 37th Sess., U.N. Doc. A/Res/37/30 (1982). It should also be noted that the United States never recognized Indonesia's annexation of East Timor.

subject to Portuguese law. They reiterated the right of the East Timorese people to self-determination. *See id.* Put simply, the world community never accepted the incorporation of East Timor into Indonesia.

On August 30, 1999, as the Court is aware, the people of East Timor voted overwhelmingly for independence and an end to the Indonesian occupation, and Indonesia withdrew its forces from the eastern portion of the island. On October 25, 1999, the Security Council established the United Nations Transitional Administration in East Timor (“UNTAET”) to act as the temporary governmental authority. UNTAET’s Regulation No. 1999/1, *On The Authority Of The Transitional Administration In East Timor*,³ provides in § 3.1 that, until replaced by UNTAET regulations or legislation of democratically established institutions, the laws applied in East Timor before October 25, 1999 shall continue to apply, so long as they do not conflict with certain international legal norms. *See* Attachment 1. UNTAET has not yet passed any regulations addressing the torts of assault, battery, and intentional infliction of emotional distress. *See id.* Thus, the question is whether Portuguese law -- which has been in effect in East Timor for centuries -- provides causes of action for those torts.

© **PORTUGUESE TORT LAW**

The Portuguese legal system is code-based, a civil law system in which judicial precedent plays an extremely limited role. *See* Attachment 1, Exhibit B.⁴ Torts are generally actionable

³ A copy of Regulation 1999/1 is Exhibit A to the Clark Declaration, Attachment 1.

⁴ The Clark Declaration makes reference to Exhibit B, the Affidavit of Professors de Sousa Santos, Pedrosa, and Pureza. That Affidavit contains an elaborate review of Portuguese tort law, and is relied on for all of the assertions about that law set out in the text of this Memorandum. The Affidavit was prepared for counsel for Plaintiffs in *Todd v. Panjaitan*, a case, like the one at Bar, in which East Timorese plaintiffs brought suit against Indonesian officials under the Alien Tort Claims Act. The defendants defaulted, and there was a trial on damages. Although the

under the Portuguese Civil Code, although the Code does not itself specifically name such torts as assault, battery, or intentional infliction of emotional distress. *See id.* Rather, the Portuguese Constitution and the Civil Code together enumerate a set of broad rights, provide a right of action for interference with those rights, and set forth the elements of an action for such interference. *See id.* For example, Article 24.1 of the Constitution of the Portuguese Republic (April 2, 1976) establishes that “human life is inviolable.” Article 25 states that the “moral and physical integrity of persons is inviolable and that “no one may be submitted to torture, nor to cruel, degrading or inhuman treatment or punishment.” *Id.*

The Portuguese Civil Code, in Article 483, establishes a civil duty to respect these rights, setting forth the general principle of tort liability: the person who illicitly violates the right of another, or any legal provision for the protection of the interests of others, must compensate the injured party for the damage resulting from the violation. *See Declaration of Roger Stenson Clark*, Attachment 1, Exhibit B. Thus, under Article 483, a claim will lie where: (1) there has been a violation of an individual’s right or interest, such as the right to life or the right to physical and moral integrity, (2) that violation was not lawful, (3) the violation is imputed to the actor, (4) there was damage, (5) there is a nexus between the violation and the damage.

Portugal’s broad framework for tort liability thus provides for causes of action that parallel those for the American common law torts of assault, battery, and intentional infliction of emotional distress. Claims for assault, battery, intentional infliction of emotional distress,

report of the Judge’s decision contained in Westlaw does not set out its reasoning, the Court apparently applied Portuguese law as proposed by the plaintiffs, and awarded damages of \$2 million in compensatory damages to the estate of the decedent, \$2 million in compensatory damages to his survivor (his mother), and \$10 million in punitive damages. *See* 1994 WL 827111 (D. Mass.).

torture, and summary execution certainly fit well within a claim under Article 483 of the Portuguese Civil Code for violations of the right to life, the right to moral and physical integrity, and the right to be free from torture and cruel, degrading, or inhuman treatment. Perpetrators of such acts are liable in damages to those whom they have injured.⁵

CONCLUSION

In addition to international law, Portuguese law applies in East Timor. International law generally requires that where there is a right there is a remedy. Under Portuguese law, assault, battery, and intentional infliction of emotional distress are actionable, and the courts are empowered to order tortfeasors to pay compensatory damages to their victims.

⁵ The Portuguese law professors' Affidavit goes on to address other issues that do not come within the specific question posed by this Court, but that may be of interest. Under Portuguese law, that Defendant may have been a member of the military gives him no license or immunity. That law permits the survivors of decedents to sue in their behalf. And the measure of damages includes pecuniary losses, as well as death and damage to economic interests.

Respectfully submitted,

Steven M. Schneebaum
D.C. Bar No. 956250
R. Brian Hendrix
D.C. Bar No. 469475
PATTON BOGGS LLP
2550 M Street, N.W.
Washington, D.C. 20037
(202) 457-6300

Jennifer Green
Judith Chomsky
Anthony DiCaprio
Shawn Roberts
CENTER FOR CONSTITUTIONAL
RIGHTS
666 Broadway, 7th Floor
New York, NY 10012

Joshua Sondheimer
CENTER FOR JUSTICE &
ACCOUNTABILITY
588 Sutter Street, Suite 433
San Francisco, CA 94102

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