

## UNITED NATIONS INVOLVEMENT IN POST-CONFLICT RECONSTRUCTION EFFORTS: NEW AND CONTINUING CHALLENGES IN THE CASE OF EAST TIMOR

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### I INTRODUCTION

This commentary is intended to contextualise and expand upon Hansjoerg Strohmeyer's article in this issue of the *University of New South Wales Law Journal* on post-conflict reconstruction of the judicial system in East Timor.<sup>1</sup> In this commentary, I provide a brief overview of the history of United Nations ('UN') involvement in the governance of post-conflict societies generally, and describe some of the specific difficulties – both new and continuing – encountered by the UN mission in East Timor in responding to the challenge of creating a fair, transparent and effective judicial system as a critical part of its peace-building efforts in that country.

### II UNITED NATIONS INVOLVEMENT IN THE GOVERNANCE OF POST-CONFLICT SOCIETIES

Since the end of the Cold War, the role of the UN in the governance of post-conflict societies has expanded significantly. Prior to and during the Cold War, the UN was frequently involved in monitoring borders and ceasefires, and in the conduct and monitoring of elections. However, this involved little actual governance of territories.<sup>2</sup> Under art 77 of the *United Nations Charter* ('*UN Charter*'), the international trusteeship system applied to territories previously placed under League of Nations mandate, that is, those which had been detached from 'enemy states' as a result of the Second World War and voluntarily placed under the system by states responsible for their administration. The UN's role in relation to such territories was typically limited to general supervision, with

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1 Hansjoerg Strohmeyer, 'Policing the Peace: Post-Conflict Judicial System Reconstruction in East Timor' (2001) 24 *University of New South Wales Law Journal* 171.

2 See generally Michael Matheson, 'United Nations Governance in Postconflict Societies' (2001) 95 *American Journal of International Law* 76

actual governance carried out by the state which was granted the trusteeship.<sup>3</sup> During transition from Dutch colonial rule to Indonesian control in 1962-63, the United Nations Temporary Executive Authority administered Irian Jaya (western New Guinea) for seven months pursuant to an agreement between Indonesia and the Netherlands. In 1967, the UN asserted the right to govern the territory of Namibia after the General Assembly terminated the trusteeship acquired by South Africa under the League of Nations. When South Africa finally withdrew from Namibia, the United Nations Transition Assistance Group was created to monitor the cease-fire and withdrawal of forces. However, the UN did not engage in governance.<sup>4</sup>

The first major UN exercise in governance came with the 1991 *Agreement on a Comprehensive Political Settlement of the Cambodia Conflict*.<sup>5</sup> The Agreement created the Supreme National Council, composed of representatives of the various Cambodian factions, which delegated governmental functions to the UN to be exercised by a United Nations Transitional Authority in Cambodia ('UNTAC'). UNTAC was created and given its mandate by the Security Council acting not pursuant to its mandatory powers in Chapter VII of the *UN Charter* but pursuant to its Chapter VI powers to make recommendations to states for the settlement of disputes. Subsequent to the signing of the 1991 Cambodian accord, the Security Council exercised its Chapter VII powers on numerous occasions to, inter alia, end conflicts, disarm hostile forces and restore order.

In May 1994, acting under Chapter VII, the Security Council adopted Resolution 940,<sup>6</sup> authorising Member States to form a multilateral force to use all necessary means to facilitate the departure from Haiti of the military leadership and the restoration of the legitimate authorities. This mandate did not extend to the governance of Haiti. In December 1995, by Resolution 1031,<sup>7</sup> again adopted pursuant to Chapter VII, the Security Council endorsed the deployment, under the *General Framework Agreement for Peace in Bosnia and Herzegovina*,<sup>8</sup> of a multinational implementation force led by the North Atlantic Treaty Organisation ('NATO'). But again, governance was left to the Bosnian authorities.

In 1999, the Kosovo conflict presented a different situation for the international community. The NATO air campaign began in March, and by its conclusion the province was in a state of economic and social chaos, with no functioning system of governance and the displacement of more than three quarters of the population. On 10 June 1999, the Security Council adopted Resolution 1244 pursuant to Chapter VII of the Charter, authorising, inter alia, the establishment by the Secretary-General of the United Nations of an 'interim administration for Kosovo as a part of the international civil presence ... to provide transitional administration while establishing and overseeing the

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3 Ibid 76; Bruno Simma, *The Charter of the United Nations* (1994) 933-72.

4 Matheson, above n 2, 77.

5 23 October 1991, ATS 1991 No 40.

6 SC Res 940, UN SCOR (3413<sup>th</sup> mtg), UN Doc S/Res/940 (1994).

7 SC Res 1031, UN SCOR (3607<sup>th</sup> mtg), UN Doc S/Res/1031 (1995).

8 Initialed in Dayton on 21 November 1995, signed in Paris on 14 December 1995.

development of provisional democratic self-governing institutions'.<sup>9</sup> In response, the Secretary-General created the international civil presence known as the United Nations Interim Administration in Kosovo ('UNMIK'), and appointed a special representative possessing all executive authority with respect to Kosovo.<sup>10</sup>

Several months later, in the aftermath of the popular consultation in East Timor on 30 August 1999, the international community was confronted with the almost total destruction of East Timor – the collapse of civil administration and the judicial system, and the displacement of hundreds of thousands of civilians. Again acting pursuant to Chapter VII, the Security Council, by Resolution 1272 of 25 October 1999,<sup>11</sup> established the United Nations Transitional Administration in East Timor ('UNTAET'), which was 'endowed with overall responsibility for the administration of East Timor and ... empowered to exercise all legislative and executive authority, including the administration of justice'.<sup>12</sup> Like UNMIK, UNTAET identified as immediate priorities – apart from addressing the humanitarian disaster and facilitating the return of refugees – the restoration of governance and administration though the reconstruction of essential infrastructure, provision of basic social services, recruitment of civil servants, the revival of trade and commerce, and the rebuilding of the justice and law enforcement system.<sup>13</sup>

The complex and large-scale governance functions assumed by the UN in Kosovo and East Timor raise important policy questions about the capacity of the UN to perform such functions in territories severely affected by conflict. In weighing such questions, much will depend on whether the UN is judged to have succeeded or failed in the task of guiding post-conflict societies towards political stability, economic recovery and reconciliation.

### III DIFFICULTIES ENCOUNTERED BY UNTAET IN POST-CONFLICT JUDICIAL SYSTEM RECONSTRUCTION IN EAST TIMOR

In his contribution in this issue of the *University of New South Wales Law Journal*, Strohmeyer concentrates on one of the major tasks faced by UNTAET in establishing a functioning governmental structure in East Timor: the reconstruction of the judicial and legal system. Strohmeyer argues that this task must, in general, be among a UN mission's top priorities from the earliest stages of deployment in a post-conflict situation.

9 SC Res 1244, UN SCOR (4011<sup>th</sup> mtg), UN Doc S/Res/1244 (1999).

10 On the daunting tasks awaiting the UN upon its arrival in Pristina, see Hansjoerg Strohmeyer, 'Collapse and Reconstruction of a Judicial System: The United Nations Missions in Kosovo and East Timor' (2001) 95 *American Journal of International Law* 46, 48 ff.

11 SC Res 1272, UN SCOR (4057<sup>th</sup> mtg), UN Doc S/Res/1272 (1999).

12 On the tasks awaiting the UN upon its arrival in Dili, see Strohmeyer, above n 1, 172-9; Strohmeyer, above n 10, 50 ff.

13 See Secretary-General of the United Nations, *Report of the Secretary-General on the United Nations Transitional Administration in East Timor*, UN Doc S/2000/53 (2000) [40]-[62].

Strohmeier discusses some of the major priorities and challenges identified and experienced by UNTAET in the early stages of its attempts to create a functioning judicial and legal system. He then provides a description of the main tasks assumed by UNTAET, namely: the creation of a legal framework within which law enforcement and judicial institutions could operate; the selection of judicial personnel; the prosecution of crimes against humanity; and consideration of the role of customary law and customary forms of justice. Strohmeier was both Acting Principal Legal Adviser and then Deputy Principal Legal Adviser to UNTAET from October 1999 to June 2000, and was therefore well placed to describe the destruction and the challenges confronting UNTAET in the early days of the mission. In this section, I will endeavour to comment upon some of the areas in which UNTAET has encountered both new and continuing difficulties in the period since June 2000, both in meeting the challenges posed by judicial system reconstruction, and in performing the tasks assumed by it at the beginning of its mission.

### **A Non-prosecution of Crimes Against Humanity and Gross Violations of Human Rights**

Of particular concern to observers from East Timorese civil society, such as independent lawyer and co-founder of the East Timorese Jurists Association, Aderito de Jesus Soares, as well as international non-governmental organisations ('NGOs'), are the difficulties encountered and lack of progress made by UNTAET in prosecuting crimes against humanity and gross violations of human rights perpetrated in connection with the August 1999 popular consultation. On 13 June 2001, some 70 organisations with long-standing links with the peoples of Indonesia and East Timor (including La'o Hamutuk and other East Timorese NGOs) published a statement entitled *Justice for East Timor*, concerning the administration of justice for gross violations of human rights committed in East Timor. The primary purpose of the statement was to call upon the international community to set up an international tribunal for East Timor to bring to justice the perpetrators of crimes against humanity and gross violations of human rights. The organisations expressed concern about the performance of UNTAET and the East Timorese judicial system in delivering justice:

The judicial system in East Timor has also failed to deliver justice to date. Investigations by the Serious Crimes Investigation Unit ('SCIU') of UNTAET have been unacceptably slow. The SCIU initially concentrated on a select few cases and major atrocities, such as that committed at the Suai church compound on 6 September 1999 when dozens were murdered, have not been properly investigated. There are persistent reports that the SCIU's work is severely hampered by problems relating to a lack of resources, management conflicts, poor communications, the lack of clear policy guidelines, and a reluctance to expose the systematic nature of the 1999 violence. There are also allegations of political interference in the judicial process.<sup>14</sup>

Accordingly, it is critical that the necessary structural and management changes are made and sufficient resources and personnel allocated to the SCIU

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14 *Justice for East Timor* (2001) [14].

so that it can conduct credible investigations and prosecutions which take into account the systematic and planned nature of the 1999 violence. Observers from East Timorese civil society and international NGOs have also commented on the lack of due process attending the prosecution of some of the serious crimes. For example, there is a critical shortage of public defenders, with the consequence that many defendants have little comprehension of their rights, or of the proceedings in which they are involved. The lack of properly trained and adequately equipped judges and adequate interpreter services are also of concern. In a recent letter to Colin L Powell, United States Secretary of State, some 35 NGOs wrote:

Further, East Timor's own justice system is severely under-resourced and will likely become even more so upon the reduction of UN support once independence is declared, prohibiting investigations and trials of the magnitude needed to achieve justice. Currently, prosecutions are fraught with procedural and other errors, judicial infrastructure is poor, and highly-trained judicial personnel are scarce.<sup>15</sup>

At the same time, efforts to bring to justice in East Timor those responsible for crimes against humanity have been hindered by the inability to extradite, let alone question, military, police and militia leaders in Indonesia. In the letter to Secretary of State Powell, the 35 NGOs stated that

[a]lthough UNTAET investigators have shared information with their Indonesian counterparts, reciprocity has not been forthcoming. UN investigators who traveled to Jakarta to question Indonesian suspects and witnesses were not permitted to do so despite the April 2000 Memorandum of Understanding signed between the UN and Indonesia. The chief of Indonesia's armed forces, Admiral Widodo, has publicly refused to cooperate with any UN investigations. Indonesia's parliament supports this position. This leaves the East Timorese courts with access only to low-level militia; officers with command responsibility are out of reach. Basing East Timor's new democracy on the principle of [the] rule of law is made extremely difficult when those who designed and perpetrated heinous crimes are, in effect, above the law.

It is essential, therefore, that UNTAET and the Security Council acknowledge the existence of overwhelming political and legal obstacles in the way of meaningful trials in Indonesia. Many of those obstacles have in fact been introduced since Indonesia first committed itself in 1999 to bring the perpetrators of the violence in East Timor before its own courts. It has become incontrovertible that the Indonesian authorities are unable to administer meaningful justice in relation to the crimes committed in East Timor. The international community's inaction can no longer be justified. Civil society observers in East Timor are also agreed that the difficulties of the East Timorese judicial system in bringing the perpetrators to justice is having a serious effect on the building of confidence in, and respect for, the rule of law. The implications are grave, not only for the development of a commitment to the rule of law and confidence in the judicial and legal systems, but also for efforts to repatriate those refugees remaining in West Timor. According to the 70 organisations who endorsed the statement *Justice for East Timor*:

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15 Dated 6 June 2001.

The absence of credible justice in East and West Timor is seriously undermining attempts to repatriate those among the 100 000 or so refugees remaining in West Timor who wish to return home. The failure to prosecute those responsible for serious crimes helps to fuel an environment in which intimidation is widespread, humanitarian assistance is severely hampered and refugees are unable to make free and informed decisions about where they wish to live.<sup>16</sup>

### **B Inadequate Professional Training and Support**

Observers from East Timorese civil society and international NGOs have also commented on the insufficient attention which has been given to support for and training of the judiciary, prosecutors and lawyers. The training which has been provided has been uncoordinated and without continuity; it has also been of a theoretical, rather than applied nature, with little emphasis on the Indonesian procedural and other laws which the judges are required to apply. Little, if any, training has been provided in practical judicial skills such as decision writing, drafting directions and orders, and following courtroom procedure. While a mentoring system was adopted early on, as described by Strohmeier, it is reported that many judges sat alone during the hearing of early cases. Numerous concerns have been raised about the inadequate supply of the texts of relevant Indonesian laws, with many judges sitting without legislation or with photocopies made by them at their own expense. The Dili Court House Library first acquired a complete set of Indonesian legislation in December 2000. The judges' dissatisfaction with low salaries and inadequate personal security are widely known.

The need for greater professional and financial support for inexperienced East Timor judges, prosecutors and defenders is manifest. East Timorese lawyers such as de Jesus Soares are calling for a comprehensive reassessment of the training needs of judges, prosecutors and lawyers, and the institutionalisation of a coordinated, ongoing system focused on practical training needs.

### **C Non-establishment of a Mechanism to Address Land and Property Disputes**

Despite Strohmeier's identification of the establishment of a mechanism to address land and property disputes as one of the main challenges in the building of the judicial system in East Timor, no such mechanism has been established to date. A draft regulation was rejected by the National Council in December 2000. Accordingly, there are no mechanisms or standards for resolving the highly sensitive, politically volatile and numerous land and property disputes. The result is that such disputes are being dealt with by the Dili District Court in its civil jurisdiction. The decisions of the District Court in land and property matters, such as that in the *Hotel Dili Case* determined in the last week of June 2001, have been highly controversial.

Approximately 700 complaints concerning land and property disputes have been received by UNTAET's land and property unit. East Timorese lawyer de

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<sup>16</sup> Above n 14, [15].

Jesus Soares predicts that unless UNTAET acts to reinvigorate discussion of appropriate norms and mechanisms for the resolution of such disputes, East Timor will be left with huge, possibly intractable, but certainly politically explosive problems upon independence.

#### **D Inadequate Supply and Training of Interpreters**

Observers from East Timorese civil society and international NGOs have also commented on the general lack, and the very poor level, of interpreting services in court. There has been little if any training of East Timorese in the skills of courtroom interpreting or in legal terminology. Few East Timorese interpreters have competence in both English and Bahasa Indonesian. East Timorese lawyers have commented on the many mistakes in the translation into Bahasa Indonesian of critical UN documents, such as Regulation No 2000/30 on transitional rules of criminal procedure.<sup>17</sup>

#### **E Lack of Civics Education**

Some observers have also commented on the lack of civics education in the first 18 months of UNTAET's mission. The lack of knowledge about peoples' basic legal rights is said to have helped to contribute to a climate in which violence was able to prosper. In May 2001, in the lead-up to the election for the Constituent Assembly on 30 August, the first civics education was commenced. Criticism has been directed at the rushed manner of delivery and narrow focus of such education. Until May 2001, all information and training about legal rights and human rights was provided by the non-governmental sector.

#### **F No Attention to Issues of Customary Law**

Despite Strohmeier's identification of consideration of the role of customary law and customary forms of justice administration as one of the main tasks of UNTAET, these matters have not as yet been the subject of any research or official discussion. The potential of traditional local methods of dispute resolution in post-conflict reconstruction, democratisation and stabilisation, and in easing pressure on the fledgling court system, needs to be properly explored.<sup>18</sup>

### **IV CONCLUSIONS**

The joint UNTAET-World Bank background paper prepared for the International Donors' Meeting (held in Canberra on 14 and 15 May 2001) contains only three sentences on judicial capacity building. This is somewhat surprising given that the very authority and credibility of the UN's mission in

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17 UNTAET Regulation No 2000/30 on Transitional Rules of Criminal Procedure. UNTAET Regulations are available at <<http://www.un.org/peace/etimor/untactR/UntactR.htm>> at 27 May 2001.

18 See Jennifer Widner, 'Courts and Democracy in Postconflict Transitions: A Social Scientist's Perspective on the African Case' (2001) 95 *American Journal of International Law* 64.

East Timor is at stake in its response to the challenge of creating a fair, transparent and effective judicial system. The task of creating a stable legal system presents a particular challenge in a society such as East Timor where, under Portuguese colonial administration and repressive Indonesian occupation, there was little opportunity for the East Timorese people to develop an understanding of and commitment to concepts such as the rule of law and the independence of the judiciary. After one and a half years, the UN mission in East Timor is currently confronted with a crisis in confidence in the judicial system on the part of the East Timorese political leadership and civil society. If enthusiastic judges who have admitted to a need for assistance must continue to express frustration at a perceived lack of institutional support, the prospects for the development of a corruption-free judicial system and a flourishing rule of law in independent East Timor are less than good.