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COLLAPSE AND RECONSTRUCTION OF JUDICIAL SYSTEM: THE UNITED NATIONS MISSIONS IN EAST TIMOR

The article deals with the problem of the reconstruction of the judicial system of East Timor. The task was challenged by the United Nations through an interim government in East Timor. The UN had created the legal base which served a basis for the judicial system reconstruction.

Within the span of only a few months in 1999, the United Nations was faced with one of the greatest challenges in its recent history: to serve as an interim government in East Timor.

In the aftermath of the UN-organized "popular consultation" in which the overwhelming majority of East Timorese had voted for independence, the Security Council by its resolution 1264 (Sept. 15, 1999) created the International Force for East Timor (INTERFET) [1], to halt the violent campaign of killing, burning, and looting that had been waged by heavily armed militia supporting the integration of East Timor into Indonesia, at times with the support of the Indonesian security forces. Following INTERFET's successful restoration of peace and security to the half-island, the Security Council adopted Resolution 1272 (1999) on October 25, 1999, establishing the United Nations Transitional Administration in East Timor (UNTAET).

The scope of the challenges and responsibilities deriving from these mandates was unprecedented in United Nations peacekeeping operations. Resolutions vested the United Nations with a comprehensive mandate, in effect empowering it to exercise all legislative and executive authority in East Timor legislation. The latter alone was an enormous task, which essentially required the complete re-creation of the judiciary. In addition, however, the mission had to rebuild the entire public sector, including the reconstruction and operation of public utilities, ports, airports, and a public transport system, establish a functioning civil service, requiring the selection and payment of civil servants, create a network of social services, including employment offices and health care; rehabilitate and maintain road systems; ensure the provision of primary, secondary, and higher education; create the necessary conditions for economic development, including the establishment of a banking system, the formulation of budgetary and currency policies, the attraction of foreign investment, and the establishment of a comprehensive tax, customs, and levies scheme, and develop public-broadcasting and mass-media capabilities.

Above all, the United Nations needed to create a legal framework within which these activities could be carried out. The legislative powers granted by the Security Council could not be exercised until the mission took steps to draft, promulgate, and enforce a range of United Nations regulations [2],

which would have the force of law in the administered territories. This daunting task was further complicated by the fact that, in East Timor, the armed interventions had led to the withdrawal, in their entirety, of the political and administrative cadres that had previously governed the territories, including the security and law enforcement apparatus.

The initial operational strategy of the mission instinctively gave priority to traditional peace-building efforts, including ensuring peace and security in the territory to be administered and facilitating the return of hundreds of thousands of refugees. The experience of East Timor has proven, however, that from the outset the administration of justice must be counted among the top priorities of such an operation. Indeed, while emergency humanitarian assistance, physical rebuilding, and political negotiations are being carried out in postconflict situations, criminal activity does not cease; in fact, it often flourishes. Moreover, evidence of violations of international humanitarian and human rights law can be destroyed, while the perpetrators of serious crimes remain at large. The failure to address past and ongoing violations promptly and effectively, and to create a sense of law and order, can impede the broader objectives of the operation. At the same time, the United Nations civil police forces, which were entrusted in the undertaking with law enforcement, cannot do so in a meaningful way in the absence of a functioning judiciary.

Thus, it is essential that the mission, commonly referred to as "nation-building" operations, function within a framework of law and order, and that they be enabled, from the earliest stages, to carry out minimal judicial and prosecutorial functions, including arrests, detention, investigations, and fair trials. Moreover, the effective reconstruction of the justice sector requires a coherent approach that places equal emphasis on all its elements: police, prosecution, judiciary, and the correctional system.

It was against this backdrop that the United Nations missions in East Timor began their respective efforts to plan, design, and put in place initial arrangements aimed at addressing urgent needs and serving as the nucleus for a future judiciary in the territory. The enormity of the task, and the extent to which it would mirror the obstacles being experienced in the political, economic, and humanitarian sectors of each mission, soon became evident.

Appointment of Judges and Prosecutors In any legal system, the appointment of judges and prosecutors is a complex and multilayered effort. Despite the United Nations' comprehensive mandate and the urgent need to fill judicial positions as swiftly as possible, political considerations prevented the head of the mission from simply appointing candidates of his/her choosing. In view of the political and symbolic significance of such appointments in a postcrisis situation and the United Nations' desire to act in sharp contrast to the flagrant politicization of judicial appointments that had characterized the previous regime, it was essential to proceed in a transparent and professional manner that would give legitimacy to the undertaking. First, capable candidates had to be identified; next, selections had to be made in accordance with objective and verifiable criteria and merit, but also in mind of the need for political or ethnic balance; and finally, the entire process had to be transparent and based on a sound legislative framework. In East Timor, the establishment of independent judicial commissions became the primary mechanism for the selection of judges and prosecutors and served as an important safeguard for the establishment of an independent and impartial judiciary [3]. The commissions were designed as autonomous bodies; they were to receive applications from persons with a law degree, at a minimum. The commission would then select candidates for judicial or prosecutorial office on the basis of merit and, eventually, make recommendations on appointments to the head of the UN mission. The East Timorese commission was also entrusted with drawing up codes of ethics for judges and prosecutors and acting as a disciplinary body to review complaints of misconduct.

The commission was to include local and international legal experts. In East Timor, the Transitional Judicial Service Commission was a five-member body that included three East Timorese and two international experts, and was chaired by an East Timorese of "high moral standing" [4]. The United Nations deemed it essential to recruit the majority of the commission members among local experts and to empower them to overrule the international members so as to build a strong sense of ownership over the new judiciaries and to inject as much domestic expertise as possible into the process. Over time, the international membership of the commissions was expected to be phased out, but a suitable mechanism would meanwhile have taken root through which future local governments could make nonpartisan judicial appointments.

Within two months, over sixty East Timorese jurists had formally applied for judicial or prosecutorial office. All the applicants had completed law school—mostly in Indonesian universities—and were enthusiastic about the opportunity to play a historic role in the first criminal and civil trials of a free East Timor. They also took pride in being part of a judicial system that would strive to respect the rule of law and encourage, rather than inhibit, the professional participation of East Timorese. After a rigorous interview and selection process, conducted by the previously established Transitional Judicial Service Commission [4], the transitional administrator appointed the first-ever East Timorese judges and prosecutors on

January 7, 2000.

Legal Assistance. The scarcity of experienced legal personnel affected the legal-assistance sector as well. East Timor could not boast a developed legal aid system before the United Nations arrived in its territory. Faced with the high number of arrests carried out in the first weeks of the missions, the United Nations was impelled to live up to the due-process and fair-trial standards it itself had promoted for more than fifty years, and to ensure the provision of adequate legal counsel to the detainees. This was particularly important since many of those arrested belonged to certain ethnic or political groups or, in some cases, were suspected of grave violations of international humanitarian and human rights law, which made their cases politically sensitive.

Section 27 of UNTAET Regulation 2000/11 of March 6, 2000, expressly recognized the basic right to legal representation and the obligation to ensure effective and equal access to lawyers. Consequently, UNTAET set up the nucleus of an UNTAET-financed public-defender system; but owing to the scarcity of experienced lawyers, UNTAET identified only a relatively small pool of defenders.

Legal Training. The dearth of experienced lawyers placed a particular burden on the United Nations to ensure that adequate legal and judicial training programs were immediately put in place, so that the few available jurists, including the newly appointed judges and prosecutors, would be prepared, as soon as possible, to discharge their much-needed functions.

In East Timor, unlike other contexts in which the international community has supported judicial training programs, it soon became clear that professional legal training would need to extend beyond technical assistance: legal training was a pivotal element in building and empowering local judicial ranks and in creating a stable legal system. Such training had to focus not only on conveying legal and practical skills but, equally important, on fostering appreciation of the crucial role of the judiciary in society and the benefits of a culture of law. In a society that had never before experienced respect for the rule of law, and in which the law was widely perceived as yet another instrument for wielding authority and control over the individual, the meaning of independence and impartiality of the judiciary had to be imparted gradually.

To lay the foundation for comprehensive practical and theoretical training upon which the new East Timorese judiciary could be built, UNTAET developed a three-tiered approach consisting of (1) a series of one-week, compulsory "quick impact" training courses for judges, prosecutors, and public defenders prior to their appointment to office; (2) mandatory ongoing training for judges, prosecutors, and public defenders upon their appointment to office; and (3) a "mentoring scheme," in which a pool of experienced international legal practitioners who were familiar with civil-law systems would serve as "shadow" judges, prosecutors, and public defenders without actually exercising judicial power. This was essentially an interim approach; the mission recognized that it would ultimately be necessary to establish a judicial training center that functioned independently of the

government and that afforded an important role in defining the curriculum to the East Timorese themselves. However, its extremely stretched resources, and difficulties in recruiting a sufficient number of experienced trainers and mentors with a background in civil law, prevented the United Nations, at least at the outset, from fulfilling its objective of providing the newly appointed judges, prosecutors, and public defenders with sufficient legal training and assistance.

Legal Framework. All of these challenges were surpassed by the need to establish a basic legal framework for the judiciary. Judicial appointments, legal training, and the performance of judicial, prosecutorial, and other legal functions, all depended on the existence of a clear body of applicable law. In East Timor did the previous legislation constitute a sufficient legal basis for the establishment of an independent and effective judiciary. Thus, the United Nations first had to draft regulations indicating which previously existing laws still applied, or setting forth entirely new laws, before it could establish the corresponding judicial and other public institutions [5].

In their Regulation 1999/1, UNTAET had decided in effect that the laws that had applied in each United Nations-administered territory prior to the adoption of Security Council Resolutions 1244 and 1272, respectively, would apply, *mutatis mutandis*, insofar as they conformed with internationally recognized human rights standards and did not conflict with the Security Council's mandate to each mission or any subsequent regulation promulgated by the mission [6]. This decision was made solely for practical reasons: first, to avoid a legal vacuum in the initial phase of the transitional administration and, second, to avoid the need for local lawyers, virtually all of whom had obtained their law degrees at domestic universities, to be introduced to an entirely foreign legal system.

The experience of the United Nations in East Timor has shown that the reestablishment, at a minimum, of basic judicial functions—comprising all segments of the justice sector—must be among a mission's top priorities from the earliest stages of deployment. Indeed, the absence of a functioning judicial system can adversely affect both the short- and the long-term objectives of the peace-building effort, including the restoration of political stability necessary for the development of democratic institutions, the establishment of an atmosphere of confidence necessary for the return of refugees, the latitude to provide humanitarian assistance, the implementation of development and reconstruction programs, and the creation of an environment friendly to foreign investment and economic development. The lack of adequate law enforcement and the failure to remove criminal offenders can inevitably affect both the authority of the mission and the local population's willingness to respect the rule of law. In the worst of cases, such an atmosphere can push self-proclaimed vigilante forces to take law enforcement into their own hands and resort to illegal detention, which can threaten the safety and security of the local population and the international staff. Finally, a functioning judicial system can positively affect reconciliation and confidence-building efforts within often highly traumatized

postcrisis societies, not least because it can bring to justice those responsible for grave violations of international humanitarian and human rights law.

Establishment of judicial ad hoc arrangements. A law enforcement vacuum in the early days of a mission should be avoided by establishing ad hoc judicial arrangements to facilitate the detention and subsequent judicial hearings on individuals who are apprehended on criminal charges. The UN experience in East Timor demonstrates that, where there has been a complete breakdown of the judicial sector, the quick deployment of units of military lawyers, as part of either a United Nations peacekeeping force or a regional military arrangement such as INTERFET, can fill the vacuum until the United Nations is staffed and able to take over what is ultimately a civilian responsibility. The advantage of such an arrangement would be that military lawyers, who would make up an integral part of the peacekeeping force, could be rapidly deployed together with the troops. In contrast, civilian United Nations staff, many of which must go through a lengthier recruitment process, cannot be immediately deployed. In this emergency phase, military lawyers would have to be in a position to execute legal functions, including arrest, detention, prosecution, and initial adjudication, immediately, without engaging in the time-consuming task of assembling and familiarizing themselves with local laws. Thus, as a practical matter, they would all have to come from the same country and to apply the laws in force in that country. It would be understood, however, that such military arrangements would remain in place only for a limited and clearly defined period of time, until responsibility could be handed over to an adequately functioning civilian body. Moreover, any such arrangements would have to accord strictly with internationally recognized human rights and other relevant legal standards [7].

Intuitively, one would hesitate to involve military actors in this sensitive area of civil administration, but in the absence of sufficient and immediately deployable civilian resources, it may be the only appropriate response to avoid the emergence of a law enforcement vacuum. The experience in East Timor has proved that the emergence of such a vacuum can ultimately be more detrimental to the objective of developing an independent judicial system and effectively protecting a population's human rights than the establishment of a temporary military-run judiciary.

The establishment of ad hoc military arrangements for a transitional period would provide the United Nations with the time and space to devise the appropriate legal system for the duration of the transitional administration and to take the necessary steps toward building the foundation for a truly independent judicial branch. Such a system would help the mission avoid the sense of urgency that could drive it to fill judicial positions with individuals who might turn out not to grapple early on with the practical problems posed by the lack of experienced lawyers, as happened in East Timor. Moreover, this approach would permit the United Nations to carry out a proper assessment of the available human and physical re-

sources, possibly including the screening of applicants for serious violations of international law, to give due consideration to existing political and cultural sensitivities, and to provide initial legal training as necessary.

Immediate reconstruction of the correctional system. In view of the enormous difficulties experienced in East Timor in this sector, urgent priority must be given to the immediate establishment of an adequate prison infrastructure. A functioning correctional system is not only complementary, but also inextricably linked, to the creation of a functioning law enforcement mechanism. Despite the reluctance of many donors to finance correctional facilities, such a mechanism cannot be established without sufficient and quickly disbursable funding for immediate reconstruction efforts. Thus, the United Nations must make a concerted effort to convince donor countries that funding for this crucial task must be incorporated, from the outset, in the consolidated budget for the activities of a transitional administration, and based on assessed rather than voluntary contributions. In this connection, the United Nations should not fail to include a sufficient number of professional international prison guards and wardens in its mission planning and budgeting.

Creation of an immediately applicable legal framework
The availability of an immediately applicable legal framework is an important prerequisite for the building of judicial institutions. Capacities within and outside the United Nations must thus be identified for quickly drafting new legislation in accordance with internationally recognized standards and with due consideration to the legal traditions (i.e., civil law or common law) of the territory at issue. To facilitate this effort, the United Nations must develop standby arrangements with partner agencies such as the World Bank, the International Monetary Fund, and the Council of Europe, as well as with universities and nongovernmental organizations. Particularly in the setup phase of a mission, and at its request, these agencies could prepare initial drafts that would subsequently be finalized by the United Nations in concert with local lawyers. Significantly, such arrangements would promote early cooperation, without requiring lengthy assessment and approval procedures in advance. In this regard, a body of law-enforcement-related legislation should be developed as part of a "quick-start package" for United Nations-administered territories. Readily applicable criminal procedure and criminal

codes, as well as a code regulating the activities of the police, have proved to be essential to the unimpeded functioning of the UN civil police component of peace-building missions. First of all, the UN civil police need to act with legal certainty and in accordance with clearly spelled-out legal provisions so as to carry out their daily law enforcement activities effectively and without fear of breaching the law. Second, the civil police need a clear legal framework in which to train the future local police force in democratic policing. Third, newly appointed judges, prosecutors, and lawyers must be clear as to what the applicable law is in order to execute their functions. Thus, as an indispensable initial step, the United Nations must draft a set of interim rules of criminal procedure and substantive criminal law in core areas of police activity, including arrest detention and searches/seizures. In the long term, the United Nations could promote the development of a model criminal procedure code that would be used by all UN missions that are mandated to rebuild a legal system, including the temporary ad hoc military arrangements referred to above.

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ВИХРИСТ С.М., ФЕДОРЧИК В.Ю ДІЯЛЬНІСТЬ ООН ЩОДО ВІДБУДОВИ СУДОВОЇ СИСТЕМИ СХІДНОГО ТИМОРУ

Розглянуті питання відбудови судової системи у Східному Тиморі. Виконання цієї місії взяла на себе Організація Об'єднаних Націй шляхом створення тимчасової адміністрації Східного Тимору. Крім того, експерти ООН розробили законодавчу базу, що стала основою для перебудови всієї судової системи держави.

ВЫХРИСТ С.Н., ФЕДОРЧИК В.Ю ДЕЯТЕЛЬНОСТЬ ООН ПО ВОССТАНОВЛЕНИЮ СУДЕБНОЙ СИСТЕМЫ ВОСТОЧНОГО ТИМОРА

Рассмотрены вопросы восстановления судебной системы Восточного Тимора. Выполнение этой миссии взяла на себя Организация Объединенных Наций путем создания временной администрации Восточного Тимора. Кроме того, эксперты ООН разработали законодательную базу, которая стала основой для перестройки всей судебной системы государств.