Ideals and realities of the Rule of Law and Administration of Justice in Post conflict East Timor

By
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RESEARCH PAPER

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INTRODUCTION

The United Nations mission in East Timor came to an end on 20 May 2002 when the country declared independence. It has been replaced by the follow-on mission UNMISET with a greatly reduced mandate.

This paper is intended to examine the difficulties faced by UNTAET in reestablishing a system of rule of law and administration of justice in post conflict East Timor and to comment on the prospects for satisfying international standards and for continued improvement in the face of human and material shortages and deficiencies.

It will attempt to assess the impact of colonial and post colonial policies and incidents on the administration of justice in East Timor by examining the gaps left behind that have affected the accomplishment of the UNTAET mandate, and commenting on whether the return of Portuguese influence is not adding to the problems. The concept of a “gap” is derived from the Timor Sea Gap that is now expected to produce oil revenues for the impoverished new country.

And just as the way the tide recedes from the shore and leaves a sudden gap that starves everything it leaves of its life giving juices, so too did the sudden and disruptive departure of both the Portuguese and Indonesian leave gaps that has hampered the development of East Timor and which UNTAET was struggling to fill.

The major gaps that will be examined are:
- Brain Gap – the lack of a cadre of educational elite. This has had the major influence on the country and all of the other gaps can be traced to this.
- Language gap – language policy and the problems it creates
- Law and Justice gap – lack of laws and the role of traditional justice
- Enforcement gap – lack of skilled officers and professionals in law and justice.

FROM COLONIALISM TO UNTAET- HOW THEY GOT THERE

Background to the vote

East Timor is part of the Island of Timor. The Western part of the island is a former Dutch colonial possession that became part of Indonesia after decolonisation. The island is located around 500 Km from the Northern End of Australia. It is a mountainous country with an irregular topography that restricts easy access from one village to another, particularly after rains flood the river, which then makes the access roads impassable. The capital is Dili and this is where the UNTAET headquarters was based.
Portugal controlled the Indian Ocean from around the 1500s while exploiting the spice trade, but appeared to occupy the island of Timor in the 1520s. It remained a Portuguese colony for over 400 years and a treaty in 1859 between the Dutch and Portuguese divided the island in two with the Dutch controlling the western part. In 1974 the Carnation Revolution overthrew the Salazar Caetano regime in Portugal and the new government decided to allow its colonies to pursue self-determination. Army officers overthrew Caetano in what was called the flower revolution. It got its name from the picture of a little girl placing a carnation in the muzzle of a soldier’s rifle

In East Timor three main political parties emerged, each advocating a different agenda:

- Uniao Democratica Timoresene (UDT) or Timorese Democratic Party (continued association with Portugal)
- Frente Revolucionara de Timor Leste Independence (FREITILIN) or Revolutionary Front for an Independent East Timor (Independence)
- The Associacao Popular Democratica Timorense (APODETI) or Popular Democratic Association (integration with Indonesia)

In January 1975 the UDT and FREITILIN formed a temporary coalition but after its collapse civil war broke out. The Portuguese administration left the island in August 1975 in the face of the deteriorating security situation and in November FREITILIN unilaterally declared independence. In the same month UDT and APODETI also declared independence from Portugal and integration with Indonesia.

Indonesia invaded East Timor on 7 December 1975 on the pretext that it was invited to intervene by the pro Indonesian parties. The United Nations passed Resolutions 384 on 22 December 1975 and 389 on 22 April 1976 that:

- Called on Indonesia to immediately withdraw its forces
- Recognized the inalienable right of the East Timorese to self-determination
- Called on Portugal to relinquish its administering power in East Timor to enable the people to freely exercise their right to self-determination.

On 17 July 1976 Indonesia passed Law 7/76 that formally legalized the occupation and made East Timor its 27th Province. It was argued that the people of East Timor exercised their right to self-determination and had chosen integration through its Regional Popular Assembly, a body created by the Indonesian military.

Neither the UN nor Fretilin accepted the integration and the latter withdrew into the hills where through its military wing called FALANTIL – Forcas Armadas de Libertacao Nacional de Timor Leste - it continued armed guerilla resistance to the occupation.

In 1982 the General Assembly issued Resolution 37/30, which gave the SG the mandate to use diplomacy to final a comprehensive solution to the East Timor question. This led to continued UN action throughout the eighties and nineties with shuttle diplomacy to Indonesia, Portugal and East Timor.
The Indonesian occupation is estimated to have cost at least 200,000 Timorese lives through a combination of massacres, extra judicial killings, starvation and disease. Large numbers of the population also became displaced by the conflict.

By 1996 the question of East Timor appeared to have become ripe for resolution due to several related factors:

- The 1991 killing of a large number of persons by the Indonesian military that was filmed by a foreign journalist led to continued UN condemnation of the occupation
- In 1992 resistance leader Jose Alexandre “Xanana” Gusmao was captured by the Indonesian and sentenced to life in prison—later reduced to 20 years—thus increasing the profile of the struggle
- In 1996 the Noble Peace Prize was awarded to Bishop Carlos Felipe Ximenes Belo and Jose Ramos-Horta for their continued advocacy for East Timor in the international arena.
- Annual discussion of East Timor in the UN Decolonisation Committee
- Continued advocacy by Human Rights groups
- Continued direct discussions between Indonesia and Portugal assisted by the SG on creating an agreement with respect to East Timor
- The Asian financial crisis that severely affected Indonesian policies.

In 1997 the new SG Kofi Annan appointed Ambassador Jamsheed Marker of Pakistan as his Personal Representative on East Timor. The major turning point came in 1998 when Indonesian President Soeharto left office after 32 years in power. His successor B.J. Habibie agreed to give East Timor wide ranging autonomy while retaining control over foreign Affairs, external defence, and some aspects of monetary and fiscal policy.

Portugal and Indonesia also agreed to begin discussions on autonomy for East Timor. Even Australia, the only government to recognize the Indonesian annexation began to call for self-determination for the Timorese. The Australian Government’s previous position appeared to have been linked to their talks with Indonesia on an agreement to share the oil resources in the Timor Sea. “East Timor and Australia” edited by James Cotton. © 1999 Australian Defence Force Studies Centre

On 27 January 1999 President Habibie agreed that if East Timor wanted to separate from Indonesia and not accept the autonomy being offered then the government would recommend the rescinding of Law 30/76. He ruled out any “transitional autonomy” and gave what is referred to as the “second option” which basically was independence from Indonesia.

Not everyone agreed with Habibie’s plan particularly within the Indonesian Armed Forces (TNI). Pro integration militia forces in East Timor planned to violently oppose any independence and there was an immediate escalation of violence and intimidation directed against pro-independence supporters, many of whom were murdered.
On 5 May 1999 Portugal and Indonesia signed agreements in New York setting up the modalities for conducting a popular consultation for East Timorese to vote on the Indonesian autonomy plan. Portugal agreed to begin the procedures in the General Assembly to remove East Timor from the list of “Non self-governing territories.”

The UN Security Council by Resolution 1236 agreed to the setting up of a UN mission for conducting the consultation with Indonesia being responsible for security during the exercise. On 22 May 1999 the SG reported to the Security Council that in spite of the assurances of the Indonesian Government to stop the activities of the militias there were “credible reports of continued and widespread killings and intimidation of the population.” Militia had been setting up illegal checkpoints without any intervention by the Indonesian military or police. This was a good forewarning of the violence that took place after the vote.

On 11 June 1999 the Security Council by Resolution 1246 established UNAMET to register voters and conduct the consultation, which was eventually set for 30 August 1999. The Security Council noted with concern the SG’S assessment that the security situation remains “extremely tense and volatile”. It sets up UNAMET to conduct consultation on 8 August with the following components:

- Political component for monitoring the fairness of the election
- Electoral component for registration and voting
- Information component to explain the process in an objective and impartial manner.

446,953 persons, both inside and outside East Timor registered to vote. – Registration offices had been set up in Indonesia, Australia, Portugal, Mozambique, Maucau and USA to cater for East Timorese living abroad.

On 30 August 1999, 98.6% of those registered cast their ballot with an overwhelming 78.5% voting to reject special autonomy. Despite the short timetable, difficult logistical problems, and obstruction at every turn by Indonesian military and militia, UNAMET did a credible job of ensuring a free and fair voting process.

**Aftermath of the vote**

The violence that had been occurring throughout the registration process and campaigning escalated soon after the polls were closed, with widespread attacks and killings throughout most parts of the country. Indonesian backed militia killed at least 6 local UNAMET staff. UN staff from the regions had to be evacuated to the Capital Dili and eventually most staff was relocated to Darwin.

Internally displaced persons flocked the UN compound in Dili seeking protection whilst others escaped into the surrounding hills. Property throughout the country was looted, destroyed or burned and even UN vehicles and staff were physically attacked by weapon wielding militia, right under the noses of the Indonesian military. The most serious injury to a UN international occurred when a Civpol from USA was shot two times in the stomach through his flak jacket. Fortunately he made a full recovery.
Indonesian backed militia forcibly repatriated thousands or persons on trucks to West Timor. Even the declaration of Martial Law by Indonesia on midnight of 6-7 September 1999 failed to stop the onslaught due to the complicity in the violence of its own military and police forces.

In New York the SG proposed that a “coalition of the willing” be put together to intervene in East Timor, subject to the agreement of the Indonesian Government.

Peacekeeping principles of acceptance by parties

The Security Council had sent two fact-finding missions to East Timor on 6 and 11 September respectively and they had seen first hand the destruction of the city and the climate of fear and intimidation that existed. The latter mission reported that it “Could not have occurred without the involvement of large elements of the Indonesian military and police” and concluded:

“In our view, this massive forced relocation outside of East Timor has been designed to give the impression of large scale dissatisfaction with the vote, a situation of civil war, and to bring large groups of the population under Indonesian control away from the spotlight of international attention.”

An estimated 250,000 persons had become either refugees or were internally displaced by the conflict. Finally President Habibie informed the media on 12 September 1999 that the government accepted unconditionally the intervention by international peacekeeping forces. On 12 September the Security Council passed resolution 1264 under Chapter VII that authorized a multinational force (INTERFET) empowered to:

- Use all necessary measures to restore peace and security and
- Assist with the humanitarian relief effort

It was led by Major-General Peter Cosgrove of Australia and began deploying on 20 September. It moved quickly to deploy all over the territory and was able to successfully deal with any resistance from militia, the majority of which quickly realized that engaging a real fighting force in battle was not the same as attacking unarmed civilians. The robust presence and professional actions of INTERFET ensured that the security situation was quickly brought to a manageable level and assisted in no small measure in allowing the relatively smooth setting up of the UNTAET mission.

On 20 October the Indonesian Peoples’ Assembly “recognized the result of the consultation and revoked the law integrating East Timor within Indonesia”. Xanana had been released from house arrest in Jakarta and returned to a hero’s welcome in East Timor on 22 October. The final group of Indonesian representatives left the territory on 30 October.

The SG submitted a report to the Security Council on 4 October to set up the United Nations Transitional Administration in East Timor (UNTAET). On 25 October the
Security Council acting under Chapter VII established UNTAET along the lines of the SG’s report but had to delay its implementation for three weeks while the US Government consulted its Congress. Pending the approval, emergency measures were taken on the ground using whatever available assets to deal with the debacle caused by the destruction to civil, legal and judicial systems in East Timor.

**UNTAET Mandate**

Withdrawing Indonesian soldiers set fire to buildings and equipment thus deliberately destroying the infrastructure that they had laid down in the territory. Almost no stone was left unburnt. In his 4 October report to the Security Council the SG summarised as follows:

“The situation in East Timor is critical...the civil administration is no longer functioning. The judiciary and court systems have ceased to exist. Essential services, such as water and electricity, are in great danger of collapse. There are no medical services, and hundreds of thousands of displaced persons are in dire need of emergency relief.”

He recommended:

“As local institutions, including the court system, have for all practical purposes ceased to function, with the Indonesian civil service, police service, judges, prosecutors, and other members of the legal profession having left the territory, the Transitional Administrator will be entrusted with the task of rebuilding a structure of governance and administration capable of providing basic public services and a full functioning administration of justice”

In recognition of the fact that the country was virtually starting from scratch the Security Council gave UNTAET the mandate to:

- Provide security and maintain law and order throughout the territory
- Establish an effective administration
- Assist in the development of civil and social services
- Ensure the coordination and delivery of humanitarian assistance, rehabilitation and development assistance
- Support capacity-building for self government
- Assist in the establishment of conditions for sustainable development

UNTAET was thus endowed with overall responsibility for the administration of East Timor and the power to exercise all legislative and executive authority, including the administration of justice.10

**SC Resolution 1272 25 October 1999**

The Council stressed “the need for UNTAET to consult and cooperate with East Timorese people in order to carry out its mandate effectively with a view to the development of local democratic institutions, including an independent East Timorese human rights institution, and a transfer to these institutions of its administrative and public service functions.”
To satisfy this request a governance model was created that allowed the Transitional Administration to create a power-sharing relationship between Internationals and East Timorese officials. The East Timor Transitional Administration (ETTA) was headed by the Transitional Administrator Mr. Sergio Vieira de Mello, Special Representative to the Secretary General, and consisted of several departments under the authority of the respective “Cabinet Officer” including a Department of Police & Emergency Services and a Department of Justice.

Hayde and Ali\(^{11}\) outlined many of the other problems faced by the people of East Timor in the aftermath of the destruction, e.g.

- Lack of skilled local personnel to assist in reconstruction, rehabilitation and reorganisation, most notably medical, construction, education and legal and law enforcement professionals.

- Lack of financial institutions or private entrepreneurs to stimulate and support the economy.

- High unemployment among most of the working age population.

- Lack of confidence caused by fear of retaliation and attacks either by militia based in West Timor or by the local population against pro Indonesian supporters.

- Disturbed social network and breakdown of traditional social structures.

**UNTAET CIVPOL from emergency to transition**

**THE TIMOR “BRAIN GAP”**

Many of the deficiencies encountered in the administration of justice and rule of law in East Timor can be traced to the neglect and brutality of Portuguese colonial rule and subsequent Indonesian annexation and the lack of physical and human resources that the manner of their withdrawal created.

Revisionist history of today may attempt to cast Portuguese colonialism in a benevolent light, as if 450 years of domination was somehow rewarding to the people. Maybe this is due the extreme brutality of Indonesian Rule, and the nostalgia of a small group of mixed-race intelligentsia who left or stayed out of East Timor after the Portuguese withdrawal in 1974, most of whom lived and worked in Portugal and other former colonial possessions such as Angola and Mozambique.

Except for the very small group of professional elite fortunate enough to benefit from colonial rule and Indonesian occupation, the vast majority of people in East Timor remained under-trained and undereducated. This can be deemed as the existence of a “Brain Gap.”
Brain Gap can be contrasted with the concept of Brain Drain. A Brain Drain is defined as the long-term one-way migration of highly skilled people in whom considerable educational investment has been made, from the country of origin to another, and to the benefit of the latter. It is usually caused by push factors such as war and strife, and economic uncertainty, and by pull factors such as better economic and living opportunities and deliberate courting of skills by employers. Such movement is felt greatest in developing countries that can least afford to lose their stock of human capital, but it continues unabated.

The basic assumption in a brain drain is that the sending country has a pool of skilled professionals to choose from, even though it may become depleted by continuous outward migration.

By contrast a Brain Gap exists when the economic, socio/political and legal institutions are not geared to creating or developing such a pool, but remains dependent on outside skills, particularly when one country is occupied or dominated by another, as was the case of East Timor. The qualified persons almost all come from the former occupying power or the international community and when they leave a sudden skills and quality gap is created that the locals are unable to fill for a considerable length of time, thus hindering long term development.

**The Portuguese**

Portuguese rule in East Timor was constantly threatened by attacks from the local tribes. To maintain control over the rebellious natives they exploited old animosities to turn one tribe against another. A popular method was the Sange Consequiu or “oath of blood” in which the Portuguese created fictitious links between the royalty in Portugal and the local chiefs. The chiefs were given symbols of Portuguese association e.g. sword, and a pact was sealed by mixing blood with wine in a goblet from which they all drank. The chiefs then used their power to create loyalty to the Portuguese among their followers.12 – *Timor a nation reborn* pg 32-33

The Portuguese rule was centralized with Lisbon being the seat of control. Apart from exploiting the sandalwood resources East Timor was mainly used as a place of exile for political prisoners. The Portuguese Political Police known as Policia Internacional de Defensa do Estado (PIDE) was notorious for torturing and generally ill-treating Timorese rebels and other political prisoners.

In the early sixties less than 10,000 Timorese had received primary education and even though 50,000 pupils were enrolled in 1974, schooling was limited to four or six years; clearly inadequate to provide a proper primary learning foundation. In any case the schools lacked basic facilities and equipment, while the poorly trained teachers struggled with the Portuguese-based curriculum. Of the 2002 teachers only 18 had begun or received a teacher-training course. 400 of them were referred to as “auxiliary monitors”, meaning that they had little or no formal training.
Those who were fortunate enough to complete secondary school could only get tertiary education in Portugal through government assistance, and this was usually reserved for the half-caste children of Portuguese officials. The few Timorese who got the chance hardly ever came back after graduation. The Catholic Church provided one speck of educational opportunity for Timorese by operating schools in the interior and training priests at their seminary.

The lack of jobs or higher education after primary training meant that the vast majority of children went back to their villages and eventually returned to an illiterate state. The more affluent Chinese minority fared much better as they had schools for teaching their own children (including some mixed-race ones) after which they usually went to Taiwan or Australia for further studies.

Little attempt was made to improve the infrastructure. Pre world war towns had been built for the comfort of Portuguese officials but had been destroyed in the war and was never really returned to their former state. In 1974 Dili was the only town with any paved roads, which stopped at the Governor’s residence.

The vast majority of top-level administrators were Portuguese and even the local officials were “Portuguese leaning” at best. In 1974 there were only 39 Timorese students in Universities in Portugal and by 1979-80 it was expected that the country would have had a paltry grand total of 65 to 80 graduates, many of whom would have stayed in Portugal anyway. There was a critical need for medical assistants, skilled tradesmen and agricultural extension workers.

Nicol states “colonial apathy, mismanagement and deliberate neglect” left East Timor “backward and deprived”. He describes the Portuguese as “disastrously poor economic managers”. Their failure in education and its overall impact on administration of justice will be further elaborated on in this paper.

**The Indonesians**

As an occupying power Indonesia remained preoccupied with preventing revolt by the population or military advances by Falintil. Over 150,000 soldiers were based in the territory and they used brutal methods to maintain control over the territory.

While the Indonesians no built many schools and improved the educational levels in East Timor this was done more to have propaganda bragging rights than to improve the lot of the Timorese.

Attendance at schools increased and some Timorese attended University but this did not translate into meaningful employment after graduation. The Indonesian policy of encouraging transmigration from other Indonesian islands brought hundreds of thousands of mainly Javanese to the territory. These new immigrants were given all the major jobs in the public service and government, while the Timorese received lower level positions as a means of shutting them up.
The Timorese received very little actual work experience and were required more or less to “occupy a desk.” This was particularly true in the legal profession, where although they had legal qualifications, Timorese lawyers were never allowed to occupy judicial or prosecutorial office. Although it has been touted that over 60 law graduates had been identified from East Timor this must have included all of law graduates from jurisdictions other than Indonesia.

During Indonesian rule there were over 1,900 police officers based in East Timor. With the withdrawal most of these officers departed, leaving only a few law enforcement officials behind. Of the high-ranking officers only one Lieutenant (a female) and one Superintendent Paulo Martins (later appointed ETPS Commissioner in 2001) was left. An entire police service therefore had to be rebuilt using mainly inexperienced young people.

–about **400 locals who served as lower level police officers in the Indonesian police were eventually recruited to the ETPS**

The effect of Indonesia’s policies and actions became apparent after the withdrawal in 1999 when all of their officials fled to territory. An immediate skills gap emerged with the state apparatus virtually shutting down from lack of personnel with proper institutional memory. The vast majority of secondary and university teachers were Indonesians, all of whom left before or after the consultation, leaving vast educational gaps in their wake. The Indonesian government also cancelled the scholarships of Timorese studying in Indonesian universities thereby causing them to abandon their studies before completion.

Many of the Timorese graduates in Indonesia did not return and sought greener pastures elsewhere, thus adding a brain drain to the existing brain gap. The situation has not improved a great deal by 2002. The UNDP National Human Development Report in May 2002 stated that only 41% of the population is literate,\(^{13}\) **Jon Land “East Timor: Independence poses new challenges”** Green Left Weekly, 22 May 2002 thus retarding the human resource development programs that must now begin at the beginning.

Even the SG recognized the existence of the gap in human capital resources when in his report to the SC he stated “**when East Timor attains independence it will not yet have a fully functional civil administration…..many of the skills needed for a fully functioning administration will take years to acquire**”

Of course he was referring to an East Timorese professional class rather than an artificial inflation of the administrative ranks by international consultants from the UN or Portugal.

**LANGUAGE GAP**

East Timor is a complex multilingual society consisting of 12 indigenous languages. There are also 4 Austronesian and 4 Non-Austronesian languages, which can be further subdivided into 25 dialects and sub-dialects. Tetum is the major dialect spoken in East
Timor and serves as the sort of lingua Franca of the other languages, though its deficiencies as a true language has been recognized.\textsuperscript{14}


In colonial East Timor the ability to speak and write Portuguese was needed to obtain scholarships, government jobs and citizenship. When Fretilin declared independence in 1975 the Portuguese-trained elite among them declared Portuguese as the official language. But the majority of the population did not speak the language and with the limited educational opportunities available only a privileged few would have become fluent enough to benefit.

When the Indonesians came they sidelined Portuguese and instituted Bahasa. They built more schools between 1975 and 1980 than the Portuguese had ever done in the previous 100 years. For them this was a way of maintaining control over the population and strengthening their own security by ensuring that all activities were conducted in a language they understood.

Most of the Portuguese elite fled the country in 1974 and by 1999 less than 10\% of the population still spoke Portuguese. But the Indonesians were unable to remove the influence of the local languages in the rural areas and a 1980 Census showed that less than 30\% of the population spoke Bahasa.

The Catholic Church also resisted the use of Bahasa, seeking and getting permission from Rome to substitute Tetum for Portuguese. This was only slightly diminished when more Bahasa-speaking priests joined the clergy. By 1999 however 80\% of those under 25 years of age were fluent in Bahasa.

With the arrival of UNTAET came its English-speaking officials most of whom were unaware of the existence of East Timor before their appointment. There was also the return of large numbers of Portuguese-speaking Timorese, many of whom had obtained higher education and professional status overseas. This new political elite immediately rejected the use of Bahasa or English. In 2001 the National Council voted for Portuguese and Tetum as the language of government. This immediately created a separation between the leaders and the vast majority of the people and indeed the international agencies, as the majority of them did not speak Portuguese.

\textbf{The East Timor Constitution has instituted Portuguese and Tetum as the country’s official languages, with Bahasa and English as working languages. But many of the officials refuse to work in English.}

This created immense difficulties for law enforcement officers, administrators, and indeed students. It continues to be a source of discontent that has led to student demonstrations. Whereas Indonesia had brought in thousands of teachers to help perpetuate their language, only 150 Portuguese teachers have arrived so far.
Language differences created barriers for mission personnel, especially the CIVPOL the majority of whom did not speak Portuguese, Bahasa or Tetum. Only a small minority of locals spoke English and the phrase “hello mister” became the extent of international and local communication for some time. – **a supermarket that caters for internationals is called Hello Mister**

Bahasa is a language that is only spoken in South East Asia and only the Malaysians and some Singaporean CIVPOLs spoke it, though there are linguistic differences among the language forms. – **one or two Australian officers sent to the mission also spoke the language**

As a result of their limited training in and exposure to English, the quality of local interpreters was always questionable though they struggled mightily to keep the lines of communication open. This was exacerbated by the fact that the English language skills of many contingents did not always rise to the standard set by the UN. In this environment communication sometimes sounded more like the Biblical Tower of Babel rather than an exchange of ideas, and even written documents often took extra effort to decipher. **Of course there were good Indonesian interpreters available but it would have been suicide for UNTAET to employ any of them at that time.**

The inability to properly communicate with the population created particular constraints for a police component tasked to train local police officers. Everything had to be translated from English or Portuguese into Bahasa or Tetum and then back again. Normal communication is difficult enough without being complicated by language differences. In many instances it was not clear whether the local officers did not understand instructions given to them, or were deliberately feigning ignorance in order to avoid responsibility.

In the districts the lack of sufficient interpreters left sign language as the only alternative for complaints or information to pass between the police and the public. This communication gap “**reinforced a system of policing where some officers simply drove around or remained in the police station. Many took a very passive attitude towards policing, since communication was at times very difficult**” Mobekk pg 17

The decision to re-institute Portuguese creates practical and political pitfalls. At the present rate it will take at least 50 years for the majority of the population to become fluent in Portuguese. In the meantime there is a growing fear among the young people that an influx of Portuguese speakers will limit the opportunities for advancement of indigenous Timorese, a form of recolonisation. As one resident put it “**learning Portuguese is crazy....its like we are walking backwards.**”


There is no easy solution to this problem and if not deftly handled by the new government is certain to open new fault lines among a population still struggling to overcome its past. The closeness of Indonesia and Malaysia (Bahasa) and Australia and New Zealand (English) when compared to the distance of Portugal makes it imperative
that a pragmatic approach to language be adopted. If language is treated as a medium of communication and not a badge of ownership then East Timor can emerge from this period as a truly multilingual society that will give its citizens an advantage on the world stage. But the signs are not encouraging.

**LAW AND JUSTICE GAP**

*Laws*

In the liberal state Rule of law seeks a *“minimum of separation of government powers such as an independent judiciary that can protect individual rights against executive abuse. The fear of tyranny of the majority lies at the foundation of the argument for restrictions through a constitutional Bill of Rights limiting or putting conditions on what government can do”*  

Steiner Henry J & Alston Phillip “International Human Rights law in context”  
Oxford University press © 2000 pg 364

Thus it is the combination of laws and institutions that makes rule of law operative in a society. What is patently obvious is that for rule of law to be observed there must be the existence of laws. Not only must laws be created must also be available to those who have to implement them; those who must adjudicate them; and those who wish to comment on their applicability and suitability.

The authority of UNTAET and the Transitional Administrator is outlined in Section1.1 of UNTAET Regulation 1999/1:

“All legislative and executive authority with respect to East Timor, including the administration of judiciary, is vested in UNTAET and exercised by the Transitional Administrator.”

The absence of a legislative body to pass laws meant that those passed by the Transitional Administrator are described as Regulations, with the subsidiary legislation being called Directives.

UNTAET’s first dilemma was to determine the regime of legal instruments and authority to be used in East Timor. Section 3 of 1999/1 made Indonesian law applicable in East Timor, subject to three conditions:

- They would remain in force until repealed by UNTAET Regulations or subsequent legislation of democratically established East Timorese institutions;
- They do not conflict with internationally recognized standards;
- They do not conflict with the fulfillment of the mandate, or with present or subsequent regulation or directive issued by the Transitional Administrator.

Several pieces of Indonesian laws that had been used during the occupation were immediately struck out – **Section 4 of Regulation 1999/1 revoked the following**

1. **Law on Anti Subversion**
2. **Law on Social Organisation**
3. **Law on National Security**
4. Law on National Protection and Defense
5. Law on Mobilization and demobilization
6. Law on Defense and Security

This was certainly a good way to avoid reinventing the wheel by having to create a wholesale set of new laws. Most of the local people were familiar with Indonesian law, particularly those in the legal profession who had to apply and interpret it. The major difficulty in the approach was that since the laws were from an Indonesian reality, was a legally untidy way of establishing law for an ostensibly new country that wanted to do away with their oppressive past. Much mental gymnastics had to be constantly applied to use the words East Timor in all non-UNTAET laws instead of the words Indonesia or Indonesian. UNPOL officers had to be constantly reminded that these laws were still applicable in East Timor.

But the most intractable problem was the failure of UNTAET to make the applicable law available for use in East Timor. The Indonesians not only destroyed buildings but also as much documents as they could, including law books and records. In this scenario it would have been advisable for UNTAET to have identified and compiled all of the Indonesian laws that were considered as crucial for the early operation of the mission. The police were very interested in obtaining laws with respect to drugs, smuggling, organized crime, maritime, etc.

However it took a while for the Indonesian Penal Code to be made available and translated into English. It was decided that the Indonesian Criminal Procedure Code was too complex to be applied in the devastated country and some of its provisions would have been difficult to satisfy. Work began on creating a simplified procedure that would take into consideration the realities of the post-conflict society.

In February 2000 UNTAET issued “Guidelines for UNTAET-CIVPOL regarding the support of East Timorese Criminal Justice”. This was intended “to allow a swift transition from the former military administrative regime for the arrest and detention of persons suspected of having committed any of the crimes defined within the Indonesian Penal Code to a domestic judicial regime, which ensures the rule of law and consistency with international standards as to human rights” -it was prepared by the mission’s Office of Legal Affairs

It was based on the Indonesian Criminal Procedure and Penal Codes “with substantial changes to be introduced through UNTAET Regulations” UNTAET Regulation 2000/30 was eventually promulgated on 21 September 2000. It represented a civil law system with some common law concessions, and special provisions to cater for the persons who had been in the custody of the military without having the opportunity to be heard in court.

Judges and Prosecutors
Under the Indonesian system legal practitioners must graduate from one of the country’s law schools, which usually takes 4 to 5 years. Those who graduate receive the title of Sajana Hukum (SH), and this is sufficient to practice law and no bar examination is
needed. Those who intend to represent clients in court must take a professional oath administered by the Department of Justice or the High Court. They are called Advokat or Pengacara.

Asean Legal systems. Butterworths Asia © 1995

UNTAET decided to appoint judges and prosecutors to fill the void left by all of the legally trained Indonesians or pro-integration supporters who fled in the after the vote. As Hansjoerg Strohmeyer said in his article “fewer than 10 lawyers were estimated to have remained, and these were believed to be so inexperienced as to be unequal to the task of serving in an new East Timorese justice system”

Collapse and reconstruction of a judicial system: The United Nations missions in Kosovo and East Timor – The American Journal of International Law Vol. 95:35

Yet that is exactly what was done. Malunga and Alagendra says “....of the 7 judges appointed in January 2000, none had any previous judicial experience” and adds

“At the very outset it became clear that the lack of capacity among the East Timorese would pose a serious challenge to the establishment of the system of administration of justice in East Timor”

Prosecuting serious crimes in East Timor: and analysis of the justice system” (unpublished article) July 2002

Strohmeyer argues that this was done partly because it was imperative that the detainee in the custody of INTERFET for war crimes and crimes against humanity, as well as locals being arrested by CIVPOL for other crimes be dealt with by a judicial system as the military arrest and detention system was “neither mandated nor equipped to try, convict, or sentence criminal offenders.”

see Collapse and reconstruction

This was no doubt a crucial issue that needed early resolution. If the Indonesian law was strictly applied then all of those suspected mass murderers would have been set free. But the decision to appoint the admittedly inexperienced Timorese lawyers could undermine the success of the very legal system that UNTAET was attempting to build.

The Transitional Judicial Services commission that was set up -UNTAET Reg 1999/3 eventually appointed only 24 judges and prosecutors to service the entire country from Dili.

The lack of skilled personnel also extended to court stenographers, legal clerks and researchers, and general court administrators. Judges and prosecutors did not have access to skilled court workers that form the very backbone of a judicial system, and became further overburdened by having to perform many of these tasks themselves.

There have been many criticisms of the performance of the judges and prosecutors ranging from lack of knowledge of laws and legal procedure, laziness, political bias, and
lack of courage necessary to make fair and impartial decisions. The most serious example of judicial misconduct involved an Investigating Judge in Dili Court.

UNTAET Regulation 2000/30 on Transitional Rules of Criminal Procedure – see Section 9 empowers an Investigating Judge to:

- Ensure that the rights of suspects, accused and victims are respected;
- Issue warrants or other orders lawfully requested by the prosecutor, when there are reasonable grounds to do so.

Although an Investigating Judge can also serve as a Trial Judge – Section 10 – when acting in the former function he/she is only authorized to perform the tasks specifically given in law, which only extends to criminal cases not civil ones.

The judge in question purported to grant custody of a 10 year old Timorese girl, with the parents consent, to a departing CIVPOL officer from an African country. Border Control officials prevented the child from being taken out of the territory and the matter came to light. The judge was unrepentant about his actions and was eventually dismissed from service.

Fortunately there have not been many such cases, but the complaints are rising. – the recent comments by government officials who questioned the competence of the judges and the court over the order of release of allegedly contraband cigarettes seized by Customs officials and the handling of the matter has led to a war of words in the media. Countering such criticism is difficult when international UN officials also privately question the quality of the judges and prosecutors. The UNTAET approach of “quick impact” courses, on-the-job training and judicial mentoring of judges by internationals – Strohmeyer- may not have the desired effect of creating a cadre of professional legal officers anytime soon.

One of the reasons is that the longer these officials remain in office the more they believe in their own ability and less likely they are to accept mentoring in their own country by “Malay”, which is the local word to describe foreigners or outsiders.

In hindsight it might have been prudent for UNTAET to initially send the selected lawyers for practical court and procedural training overseas for at least six months. In the interim the tasks could have been carried out by internationals in the mission. On their return the locals would have been better equipped to carry out the difficult task of rebuilding their legal and judicial system. Strohmeyer admits that “the 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..........”

It still remains unfulfilled and this gap may take some time to fill. It also appears that none of the Portuguese or Australian trained Timorese lawyers are willing to take the massive pay cut that a local appointment would entail. Any criticism must therefore take these factors into account.
**Customary law**

The Traditional Justice or “customary law” system has always been used by Timorese to settle conflicts despite being exposed to developed legal systems for hundreds of years via Portuguese and Indonesian rule. The rural nature of the majority of the population often put the formal state legal system out of reach of most people, particularly given the relatively poor state of the access roads and transportation system.

Doinisio C.B. Soares states that although its role was confined to providing social guidance rather than legal imperative, it survived throughout the periods of domination. The Portuguese allowed customary law to operate throughout its colonial rule. The fact that 90% of the population was illiterate effectively prevented the people from better understanding and participating in the Portuguese legal system. However, if a party refused to obey the decision taken in the traditional court the matter had to be settled in the state court.

During Indonesian rule the perceived corruptness of the legal system created little credibility with the Timorese, and the high costs of proceedings took it out of the ability of the poor rural folk thus prompting them to rely more on traditional courts to settle most disputes.

The Timorese did not always agree with the manner in which matters were settled in state court. One major point of contention is that under customary law the victim is involved in the decision making process as to the quantity and quality of compensation. In most western societies this question is a matter for the courts, with imprisonment being considered as the major punishment. Even though compensation can be ordered to the victim the amount is so limited by law that the victim is left to sue in civil proceedings to obtain proper redress. But in traditional type societies like East Timor compensation to the victim and his/her family is of greater importance than placing the perpetrator in custody.

If a victim is not satisfied with the result then the matter may be settled in extra judicial ways e.g. beatings, killing, destruction of property etc. Says Soares

“indeed in East Timor, unsatisfactory settlements by state courts often compels generations of the two conflicting parties to engage in the so-called ‘Blood Feud’ phenomenon. Hence, a case might not only involve the two individuals engaged in a prima causa, but also involve their offspring and other relatives.”

Though there are variations in procedure and decisions from district to district the usual way of settling disputes is for the elders of the disputing groups to have a resolution meeting. If this fails then the Chefe d’ alderia is called in to mediate, failing which it goes to the Chefe du suco. If deemed necessary a meeting is arranged with other elders at
which the dispute is heard and a decision made. The police are seldom brought into this process.

The Indonesians attempted to disrupt the authority of the hereditary leaders and customary law by ensuring that the elected village officials were supportive of their policies. However this still failed to stop the operation of customary law in the villages.

The traditional justice system has always competed against foreign legal systems of which UNTAET is just another variation. In his research in UN administered East Timor Anthropologist David Means found that:

“Prosecutors and investigating judges are reported to have referred some case back to the traditional or village system on the basis that the matter was too trivial to be dealt with in the court or too politically sensitive to allow the officials to feel safe in making a judgement”

Many of these cases involved domestic violence to women by their husbands. While it is easy to criticise the judicial officials for failing to do their duty, it must be noted that they were weaned under Indonesian rule, which was characterized by lack of protection for women. In fact the Indonesian Marriage Act allows a husband to take a second wife if the first is unable to perform her conjugal duties or bear children, but reciprocal rights do not exist. Law No.1 of 1974 Article 4 In addition, the concept of marital rape does not exist in the Indonesian Penal Code. Since this is the culture in which the young judges and prosecutors got their training then their abdication of responsibility in domestic matters hardly surprising.

Given the resource-strapped, inexperienced Dili-based judiciary that now exists in East Timor, the Chefe do Suco and Chefe d’alderia remain the only regular authority in the villages. Attempting to reduce or remove the traditional justice system may do more harm than good to the rural population who cannot yet benefit from the fledging court system.

In the absence of quick action by law enforcement and judicial officials, locals tend to trust the traditional justice system to settle disputes. The real difficulty for CIVPOL was whether to intervene into every minor crime even though its resolution in court was uncertain at best, or whether to give tacit approval to traditional resolution. Many of them settled on the latter, even being present during the village gatherings to hear the dispute in spite of warnings that it was not in accordance with the Procedure Code.

Such an approach is very likely to be frowned upon as undermining the formal legal system and is actually contrary to the principles that international police officers are supposed to uphold. But waiting for the infant legal system to deal with all cases may result in even more serious crimes taking place by disaffected victims or their relatives. As Mearns notes:
“there was a general feeling among the local people outside the capital that the village system remained and would remain the most immediate, relevant and effective form of resolving disputes and punishing petty crimes.”

Despite the attempts to modernize the legal and political systems, the influence and authority of village leaders and elders is still being maintained and will be extremely difficult to replace in the short to medium term.

**ENFORCEMENT GAP**

The absence of a police service in East Timor meant that the enforcement of laws could not be done. It was recognised that it will take many years to rebuild the quantity and quality of officers necessary to manage the modern police service that is envisaged in East Timor.

An interim law enforcement body was needed and the Security Council responded by giving UNTAET CIVPOL an authorized strength of 1640 officers with executive law enforcement powers **though this number was never attained** – with three components:

1. UN Civilian Police/UN Border Police consisting of 1350 international officers with executive law enforcement powers. They were authorized to carry firearms on duty when required by the Commissioner with the Use of Force being regulated by the UN Rules of Engagement (ROE).
2. UN Rapid Reaction Units operating on a national contingent basis to provide specialized capabilities of crowd control, operational support and rapid response.
3. UN Marine Police to provide marine capabilities.

They were under the command of a Police Commissioner of which there has been two Portuguese and one Canadian. The basic qualifications for a CIVPOL were:

- a minimum of eight years of regular active police service with previous UN monitoring duties and training of police officers being an asset
- They must possess the ability to speak, read, and write English fluently, and have good interpersonal skills.
- Be experienced vehicle drivers with at least two years recent experience in driving standard shift motor vehicles and in possession of a valid national or international driving license.
- Must have demonstrated experience in Personnel Management.
- They must be in good physical condition due to the hardship conditions in the mission and should complete and pass a full medical examination

*From Notes for Guidance of UNCIIVPOL on assignment. DPKO Civilian Police Unit UNHQ New York Nov 1999-

The CivPol component was organised, with a Central Headquarters, 13 districts with varying amounts of police stations and sub-stations, and two Rapid Response Units one each from Portugal and Jordan. – **the Border and Marine Unit was never fully**
implemented as UNTAET created a Border Services under a civilian head with omnibus powers for customs and immigration any by extension marine services. The Commissioner was supported by two Deputy-Commissioners (Operations and Administration respectively), and an Assistant (later Deputy) Commissioner East Timor Police Service (ETPS) with responsibility for development of the local police service. The CIVPOL officers came from over 40 countries with every continent being represented.

The mandate of UNTAET CIVPOL included the creation of a credible, professional police service in East Timor. To perform both the executive policing and service creation roles, the civilian police must therefore possess skills in a variety of law enforcement areas such as training, traffic management, investigation, forensics, intelligence, border and marine, and personnel administration, recruitment and capacity building.

Prior training and experience

The Brahimi Report recommended the setting up of “on call lists of civilian police, international judicial experts, penal experts and human rights specialists .....in sufficient numbers to strengthen rule of law institutions”. Member states were called upon to “establish enhanced national pools of police officers and related experts, earmarked for deployment to United Nations peace missions, to help meet the high demand for civilian police and related criminal justice/rule of law expertise in peace operations dealing with intra-state conflicts”.

The reality is that very few police departments in the world are equipped or prepared to provide such a force in sufficiently large numbers to fulfill the required mission needs in situations such as East Timor. Some countries do possess police officers that are sent from mission to mission, but this is due more to their overseas experience than their specialists’ skills. Those with the most relevant skills are very likely to be needed in the home country and cannot be spared.

The only country that fulfills the Brahimi requirements to a large extent is Singapore. The government signed a Memorandum of Understanding with the UN in 1997 to train and equip a standby force of police officers for peacekeeping duties. It consists of a group of 98 officers who go through a rigorous process of selection, interview, tests and training. The training includes a one-week intensive course on peacekeeping followed by a five-week basic training in a variety of peacekeeping roles e.g. monitoring elections, military observation, and logistics. There is also a two-week refresher course every quarter where updates are received. Members who fail the training are replaced in the group by others who have satisfied the criteria for inclusion.

Whenever the country is called upon to provide officers, members of this standby group are selected based on availability and are then given a two-week mission-specific course. However it remains the prerogative of the Singaporean government whether or not to approve the deployment of their officers.
Another country that can be said to have a dedicated pool of skilled police personnel is the United States, but this is more out of convenience than deliberate intent. The US Government is prohibited by law from raising its own uniformed police force. So to fulfill its CIVPOL peacekeeping duties the Department of State has contracted a private company called DYNCORP that employs and keeps a roster of former and serving police, border and security officers to be deployed to particular missions. In this way they are not considered as government employees.

Gherdi Francis the DYNCORP representative in East Timor states in some instances the company will be requested to provide officers with certain skills set for a mission and they will be chosen from the existing roster if available or recruited for the job. For example in East Timor a small group of US officers with a background in Customs were requested for and posted to the Border Control Services to assist in the development of the local capacity there.

**Interview with Gherdi Francis by the writer in Dili East Timor in July 2002**

Officers come from mainly small police departments and are attracted by the higher pay and generous tax breaks received for overseas duty. Those who are recruited are required to quit their departments but can be re-employed after they leave peacekeeping duties. To be selected for the DYNCORP roster the officers must pass physical, written and psychological tests administered by the company.

However most countries have little or no peacekeeping selection system and usually send those officers who pass a selection process carried out by a CIVPOL Induction Training Team from the particular mission. Those selected are usually generalists and though some specialists might be present it is not specifically sought, especially in the early part of the mission when bodies are needed quickly.

In many cases mission duty selection takes on political dimensions and become part of a process of reward or connections that is unrelated to the needs or skills sought by the UN. Or the country might fail to comply with the UN requirements. In one case 8 officers were sent from the former Portuguese colony of Mozambique without undergoing the UN selection process at home. After their arrival in East Timor all except one failed the language, shooting and driving tests and had to be repatriated.

In its management audit of Civilian Police Operations the UN Office of Internal Oversight Services noted that both UNMIK and UNTAET had:

> “Progressed to the point where the number of civilian police who possess only basic police skills should be reduced, while specialists in areas such as training, investigations, organized crime, forensics, drug trafficking and police intelligence should be increased.”

But it is the contributing states that determine who is sent (subject to passing the selection tests) and there is little the mission can do about it. Even the contingent-owned equipment cannot be fully dictated by the UN. Countries such as Australia, USA, Canada and Singapore consistently provide their officers with adequate, up-to-date functioning
equipment while it is still a hit and miss effort with contingents from developing countries.

In 2000 all of the ammunition brought by the contingent from Ghana had to be destroyed after they were found to be defective. This then entailed a further wait for new ammunition to be sent thus undermining the effectiveness of their officers in the mission.

OIOS also recommended that the UN:

“Seek to increase the deployment of selected nationalities with cultural and language familiarity or knowledge of the operative legal system in the mission area.”

This recommendation will sit well with those who view language skills and heritage as important to the successful operation of CIVPOL duties. But as the Department of Peacekeeping Operations stated in response:

“The deployment of civilian police officers depended upon the willingness of contributing member states...further...political sensitivities could hinder the organisation’s ability to deploy officers from member states with cultural and language familiarity of the mission area”

This opinion is supported by the situation in Democratic Republic of Congo where those with the most familiarity of language and culture e.g. Rwanda, Uganda, Angola, Zimbabwe and Namibia are all involved in the fighting. Sending officers from those countries as part of the peacekeeping mission will certainly inflame the situation.

In East Timor the Portuguese speaking countries have very little in common with the present generation of Timorese; the Indonesians will remain the enemy for a long time; and there are not enough Malaysians of Bahasa-speaking Singaporeans to go around

Ignorance of the law

It has been argued - See Mobekk - that simply policing an area was not enough and CIVPOL should have explained their procedures and actions to the people, who as a result of the repressive and brutal tactics of the Indonesian police were naturally suspicious of law enforcement officials.

But this view emanates from an incorrect assumption that the officers themselves are sufficiently aware of what they were required to do. As outlined elsewhere in this paper the lack of applicable laws in hardcopy form made it impossible for the officer to know what to apply much less to explain the manner in which it was being done. In the early stages of the mission the officers were not taught about the legal system because UNTAET had not yet decided exactly what it should be. The Indonesian Penal Code and Criminal Procedure Code could hardly be found in the mission and there was an ongoing debate in the legal circles of UNTAET about possible changes to them. English versions were necessary in every station and district but this did not occur for a long time.
Induction training was being done in Darwin and it was difficult to assess the accuracy or relevance of the information being imparted to incoming contingents, and the officers were immediately dispatched to districts on their arrival in Dili. Eventually the Induction Unit was moved to Dili where lectures on the legal system and criminal procedure could be properly conducted.

One of the more intractable problems was the superiority complex held by many officers from developed countries. Many of them were ill prepared to operate in a post conflict situation and seemed to expect that the same procedures that applied in their countries should be available in East Timor. In many instances officers from common law jurisdictions have refused to apply civil law provisions with which they disagree. For example a female officer said that she would not accept that she was not allowed to search a male prisoner as stated in the Transitional Rules applicable in East Timor. – **males could not also search females but a member of the public of the same sex could be asked to assist in the search Sect 16.2**

By the end of 2000 the communication system was fairly established in the districts and all UNTAET Regulations became available in electronic version and could be downloaded from the intranet, or a hardcopy could be had in the form of the official Gazette.

Still some officers would not read the law or pretended that they were ignorant of it and applied procedures from their own countries. Others took the easy way out by calling headquarters seeking “legal advice” that were mainly questions about what the law was. They were often unhappy when told that it was available at the station and that they should read it.

Another drawback concerned officers mainly from developing countries who saw the mission as simply a way to collect and save as much MSA as possible to take back home. – **Monthly Subsistence Allowance paid to most UN internationals in the mission, and is given in addition to salary. It is USD 95 per day at time of writing** They were least likely to be very proactive in law enforcement and were content to perform mundane guard duties and avoid the more difficult investigation duties or training of ETPS officers. Since all officers were paid the same amount of MSA regardless of the job performed, some did the minimum possible while saving money to return home as relatively rich persons.

**Arrest and detention**
CIVPOL officers have kept suspects in custody beyond the 72 hours stipulated in the law for them to be taken before an Investigating Judge. – **Reg 2000/30 section 6** But this is often done at the behest of prosecutors. In some case where the suspect was arrested on a Friday and the following Monday is a holiday, prosecutors have verbally instructed officers to hold the suspect until the court opens the following day, thus deliberately flouting the provisions of the law.
In any case, locating a prosecutor at night or over the weekend is often very difficult. Many of them either do not have contact numbers or do not wish to be located. In districts where prosecutors and judges are not physically based there is no way to obtain the necessary orders in the time stipulated by law.

The dilemma faced by the officers is whether to release the suspect no matter how heinous the crime so as not to infringe his/her rights, or to keep the person in custody knowing that this is illegal so as to avoid the person tampering with evidence or witnesses, committing further crimes of a similar nature, absconding, or facing retaliation by the victim or relatives.

Those who seek legal advice from headquarters on whether they should obey prosecutors’ instructions are told to strictly follow the law. However not all of them choose to call for such advice.

The great danger is that handing over of districts to ETPS officers who lack the necessary knowledge or courage to resist officialdom may result in an increase in such abuses, as they are likely to follow instructions even when they know it is wrong. One fear is that devious ways will be used to circumvent the law such as releasing suspects at the end of 72 hours and immediately re-arresting them and claim the commencement of a new 72-hour period.

- the writer has had to inform CIVPOL officers of its illegality when they wanted to employ this method in the past

Gherdi Francis believes that as CIVPOL officers come from different culture, legal systems and police environments the UN ought to create Standard Operating Procedures for internal police management that could be used in all missions, thus avoiding the potpourri of procedure now being taught to the East Timor Police Service.

**Prisons**

One area of enforcement where the gap was most prominent is in the area of prisons. Just as with police officials, all of the Indonesian corrections officers abandoned the prisons in the aftermath of the violence in 1999. Prisoners simply walked out of the facilities and the entire system collapsed.

Persons arrested by PKF were kept in a Forced Detention Centre (FDC) in Dili until CIVPOL was asked to assume responsibility for it in January 2000 and it became a Civil Detention Centre (CDC). There were about 37 prisoners and the conditions were described as cramped, unsanitary and it did not meet the Standard Minimum Rules for the treatment of Prisoners as there was no way of separating juveniles from adult detainees.

- letter from Stromeyeh to SRSG dated 17 January 2002

Penal management is a specialist task and although there are places of detention in police stations in most countries in the world, this is usually a temporary measure from which detainees are transferred into the care of prison officials. In the absence of such persons
in East Timor the task fell once more to CIVPOL to perform a duty for which they were not trained or equipped.

Limited facilities meant that prisoners were lumped together in barely secure rooms, from which several of them escaped in early 2000. The lack of identification documents made it extremely difficult to determine the ages of detainees resulting in several juveniles being housed together with adults. The small physical size of most of the population made it difficult to estimate a person’s age, particularly those in the 16 to 25 age group.

New Zealand sent a group of professional Prisons Officers to take charge of the facilities and there has been a reduction of the CIVPOL role in prison management. But these officers are gone now and unless the system of corrections is fully funded and managed then the possibility is that problems will increase. In fact in March 2002 there was a riot at the prison in Becora just outside of the city, and the Director of Prisons reported that the lack of recruitment of Timorese to run the facility was one catalyst for the disturbance.

– Report of Investigation Team regarding the disturbance at Becora Detention Centre 18-19 March 2002

MEASURING SUCCESS

In spite of the extreme conditions faced by UNTAET in East Timor and the hard work put into making a country out of nothing, human rights advocates have been critical of the failure of the mission to ensure the highest level of application of International Human Rights standards.

–see Amnesty International Report – Justice past, present and future.

UNTAET as an organ of the UN is legally see - UNTAET Reg 1999/1 sec 2 and morally committed to observe internationally recognized human rights standards. In this regard there seems to be an all or none concept of application even if the physical or economic situation makes full compliance impossible. This appears to be the position also adopted by Dairiam - Personal Representative of High Commissioner for Human Rights when she said of the East Timor situation:

“various human rights standards are today accepted principles of customary international law and are not optional...hence a system being established by the UN cannot leave the application of its own standards to chance especially when the affected community has no prior experience of an acceptable and respectable culture of human rights.”

As outlined in this paper, the lack of financial and human resources and difficulty in applying normal or ideal procedures, has caused lapses in the maintenance of certain international standards e.g.

- Non-separation of minor and adults in person
- Acquiescence in allowing the traditional justice system to operate without reference to the formal legal system
• Improper application of the law by local judges

However the bar may have been raised too high for East Timor due to it being ruled by a UN administration. Indeed no country has been able or willing to fully comply with international standards. For example despite the prohibition on cruel and unusual punishment the USA continues to execute convicted felons without being cited as a major violator of international standards.

One of the debates on conflict with international standards in East Timor as raised by Amnesty, concerns the length of time a person can be held by the police. Suspects can be kept in custody for a period of 72 hours after which they must be taken before an Investigating Judge. –UNTAET Reg 2000/30 sec 6 to determine whether pre-trial detention is warranted see Section 21

This standard was set after an analysis of the geographic, infrastructure and personnel limitations in post conflict East Timor. In the majority of districts there are no operating courts so suspects still have to be brought to the court in Dili. The roads in the countryside are in a poor state of repair and were often made impassable during the rainy season when the rivers flooded their banks. Some UN vehicles were severely damaged when incautious drivers attempted to cross seemingly low streams only to be washed downstream. Insufficient numbers of personnel with investigative skills have also delayed the proper investigation of many crimes, particularly serious ones.

Amnesty argues that the International Convention of Civil and Political Rights requires that persons in custody be brought promptly before a judge, and:
“while no time limits are expressly stated .....the UN Human Rights Committee has questioned whether detention for 48 hours without being brought before a judge is not unreasonably long” see sec 5.2

This argument conceals more than it reveals. In most countries in the world, courts do not sit every day - usually closed on weekends and public holidays so “promptly” should be interpreted as meaning as soon as possible in the given circumstances, but with a maximum time limit imposed. If a suspect is arrested on a weekend and if the Monday next is a holiday, as happens occasionally, then for all practicable purposes 72 hours would have elapsed. In any case 72 hours is the maximum period and in most cases the practice is for the Prosecutor to bring the suspect before an Investigating Judge as promptly as the day following arrest.

Amnesty rails against this practice of allowing prevailing conditions to determine the implementation of international standards:
“Rather than accommodating institutional weaknesses in law, the focus of attention should instead be on ensuring the rapid development of a justice system which can process cases expeditiously, while preserving respect for human rights” – sec 5.2

But what is missing in their observations is the magic wand that would make this objective immediately achievable. This can be called a human rights Catch-22. If the
ideal provisions are set but not achieved this becomes an immediate violation that will be criticized. If a standard (even if transitional or temporary) is put that is not acceptable to human rights advocates but in keeping with prevailing conditions, this then becomes another ground for criticism. It must be indeed pleasant to say what ought to happen in the real world without having to live in it, or without having the responsibility of having to pay for the recommended solutions to be implemented.

Bil Hari Kausikan counters this narrow view of the world when he said:

“Forty five years after the Universal Declaration was adopted, many of its 30 articles are still subject to debate over interpretation and application....not every one of the 50 states of the United States would apply the provisions of the Universal Declaration in the same way. It is not only pretentious but wrong to insist that everything has been settled once and forever. The Universal Declaration is not a tablet Moses brought down from the mountain. It was drafted by mortals. All international norms must evolve enough through continuing debate among different points of view if consensus is to be maintained.”

Reprinted in International human rights law in context

Given all of the disadvantages faced by CJVPOL in East Timor, then the relatively low crime rate, and the professional appearance of members of the ETPS must be viewed for what is was, i.e. triumph in the face of adversity. Human rights is always at the top of the list of considerations by the vast majority of policy makers in the mission. Though all the gaps were not filled it is not from a want of trying.

Even Human Right Watch has acknowledged the success of the mission by stating:
“Given the enormity of the task at hand, UNTAET, the UN Security Council, the international donor community, and above all, the East Timorese themselves deserved credit for the enormous progress made in institution and capacity building.”

FORWARD TO THE PAST

East Timor became an independent country on 20 May 2002, in what is considered a remarkable achievement by many international observers given the recent history of the country.

UNTAET is now history, and while its relative success will be debated for some time, the history of East Timor is still ongoing. The gaps stated in this paper still exist and some of them will not be closed anytime soon.

It is hoped that we can learn from the past and not repeat its mistakes. In the brave new world of East Timor some are beginning to express concern that the resurgence of Portuguese influence in East Timor reeks of neo-colonialism, this time facilitated by the Portuguese-trained elite now in power.
It also seems that the neglect that was persistent during Portuguese colonialisation is creeping in again. At a time when an increase in education at the primary level is needed, a recent decision was made to reduce primary education from six to four years.

Nicol states that the adoption of Portuguese as the official language can lead to significant disconnect between leaders and the people, the vast majority of whom are more comfortable with Bahasa. He accuses Portugal of

“descending like a vulture on the slim pickings of the Timorese carcass. Portugal made the adoption of its language a condition for meeting the costs of government in Timor for the first five years.”

Independence is not the end of the process of development but just the beginning. It is hoped that all the international community will remain engaged in assisting the development of East Timor and not simply move on to the next story as too often happens. Lets hope that Nicol’s view is simply overblown rhetoric.
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