The United Nations in Transitional East Timor: International Standards and the Reality of Governance

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Introduction: No Instruction Manual

In late 1999, the dream of some, the nightmare of others, came true: First in Kosovo and then in East Timor the UN was asked to take on the functions of a Government.[1]

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The authors would like to thank, in particular, Sakuntala Akmeemana, Annemarie Devereux, Bruce Taplin, Sofia Borges, Dionisio Babo Soares, Natalie Hill, Hansjoerg Strohmeyer and Peter Galbraith for their comments on issues touched upon in this article, and upon earlier drafts of this article. Parts of this article are based on papers presented by Jonathan Morrow at a conference on Postcolonial Law at the Washington College of Law, the American University, 27 April 2001, and at the 2002 annual conference of the Australian and New Zealand Society of International Law, the Australian National University, 14 June 2002. The usual provisos apply: any shortcomings in this article are the responsibility of the authors. The views expressed in this article are those of the authors and do not necessarily reflect the views of the United Nations, UNTAET, UNMISET or the East Timor government.

1 S Vieira de Mello, 'How Not to Run a Country: Lessons for the UN from Kosovo and East Timor' (2000) (copy on file with the authors). De Mello was the Special Representative of the Secretary-General and UN Transitional Administrator in East Timor for the entirety of the UNTAET transition period.

How do you transform an international peacekeeping organisation into the government of one of the poorest countries in the world? How does that organisation, steeped in Northern European and Anglo-American values and dedicated to upholding the highest international legal standards,[2] establish a cheap and effective legal system? What happens when the United Nations (UN) – the very embodiment of the collective ideal that is international law – confronts the reality of governmental responsibility in the devastation and poverty of post-referendum East Timor?

This article examines some of the choices, challenges and dilemmas encountered in the development, during the UN Transitional Administration in East Timor (UNTAET) transition period from October 1999 to May 2002, of a viable legal system and an enduring constitutional framework for East Timor. It does not attempt to provide a comprehensive account of the difficulties that have been encountered in implementing the UN's mandate. Nor does it provide an analysis of that area of the East Timorese legal system that has already attracted a great deal of attention from academics, human rights activists and policy-makers – criminal justice and the prosecution of the perpetrators of the 1999 violence.[3] Rather, this article identifies areas for further inquiry and investigation in the broader sphere of legal development and governance – a sphere that is one of the most important to the UN,[4] and is undoubtedly critical to the success and stability of an independent East Timor. In this way, the article attempts to provide some specific legal examples, drawn from the East Timor experience, of general problems faced by the UN, which have been identified elsewhere.[5] The observations in this article are therefore not theoretical or prescriptive, but are deliberately experiential and exploratory; though we believe that the UNTAET experience indeed marked a necessary crisis point for the theory and practice of peacekeeping, we are happy for others to make these arguments. It seems likely that the UN will be asked to exercise governance functions, if not sovereignty, in

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2 The Charter of the UN states that one of the goals of the UN is to 'establish conditions under which justice and respect for the obligations arising from treaties and other sources of international law can be maintained'.

3 For a detailed analysis of UNTAET's record on the prosecution of 'serious crimes' committed in 1999, see S Linton, 'Prosecuting Atrocities at the District Court of Dili' (2001) 2 *Melbourne Journal of International Law* 414. See, also, East Timor Judicial System Monitoring Programme, *Justice in Practice: Human Rights in Court Administration* (November 2001) <www.jsmp.minihub.org> and the 'Report of the United Nations High Commissioner for Human Rights on the situation of human rights in East Timor' (1 March 2002), UN Doc E/CN.4/2002/39 (1 March 2002 Report).

4 As Sergio Vieira de Mello pointed out early in UNTAET's life, 'Perhaps where the UN has had most impact on global governance is in the realm of legal and regulatory reform': S Vieira de Mello, 'Global Governance and the UN', keynote speech, Trilateral Commission's 2000 Annual Meeting, Tokyo, 8-10 April 2000.

5 See, in particular, 'Report of the Panel on United Nations Peace Operations' (The Brahimi Report), 21 August 2000, UN Doc A/55/305-S/2000/809. See also S Chesterman, 'East Timor in Transition: From Conflict Prevention to State-Building', International Peace Academy (May 2001) <www.ipacademy.org>.

relation to new states and failed states in the future.[6] In this article we attempt to record some of the legal challenges that those operations will surely face, and to point towards some possible solutions.

This article is organised as a rough chronology of legal decision-making in East Timor during the transition period. Part I examines three of the most important jurisprudential dilemmas that confronted UNTAET during this period: (1) the choice of domestic law in East Timor; (2) compliance with internationally recognised human rights standards; and (3) the observance of the principle of separation of powers. Part II focuses upon a number of the recurring operational problems that influenced legal development and governance: (1) the tension between UNTAET's twin roles as mission and government; (2) UNTAET's donor-dependence; and (3) the daily compromise between the need for rapid legal decision-making and the need to build the capacity of the East Timorese legal system. Part III examines the development of the legal framework of: (1) the Constituent Assembly, which was mandated to draft East Timor's Constitution; (2) the electoral system; and (3) the East Timor Constitution, in the final stage of the transition to 20 May 2002, the day on which East Timor's independence was recognised.[7]

In broad terms, we suggest in this article that UNTAET was most successful in meeting the terms of its mandate when it approached governance and legal development as a *dialogue* between international standards and the local historical and political contingencies of East Timor; when it conceived of itself as a peculiarly well-resourced proto-government with real governmental legal responsibilities, rather than as a peacekeeping mission encumbered with the burden of bringing a client domestic administration into conformity with some

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6 Ralph Wilde views the exercise of administrative authority over territory by international organisations as unusual, but not unprecedented, going as far back as the governmental prerogatives exercised by the League of Nations in the Free City of Danzig from 1920 to 1939: 'From Danzig to East Timor and Beyond: The Role of International Territorial Administration' (2001) 95 *The American Journal of International Law* 583, 583. Chesterman takes a similar view, above n 5, 2. On the other hand, Paulo Gorjao suggests that the UN members (especially the permanent members of the Security Council) will not be disposed to finance UN state-building missions in the future, no matter how imperative the arguments might be for their establishment. Gorjao hints that this reasoning may have influenced the decision for Afghanistan's reconstruction to be conducted under the auspices of the Afghan Interim Authority, rather than a UN administration modelled on the East Timor experience: 'The Legacy and Lessons of the United Nations Transitional Administration in East Timor' (2002) 24 *Contemporary Southeast Asia* 313.

7 The word 'independence', when applied to the significance of 20 May 2002, needs to be treated with some caution. The position of the East Timor government is that East Timor's self-determination was completed on 28 November 1975. Therefore (according to this position) the culmination of the UNTAET transition period on 20 May 2002 was not independence *per se* but rather 'the international recognition' of an already-existing independent East Timorese nation that had suffered illegal occupation and which had invited the United Nations administration to govern in East Timor from October 1999 to May 2002.

rigid notion or other of governance and international law. The interests of the international community and East Timorese alike were best served when the ideals to which the UN is rightly bound and committed were used not dogmatically, but strategically; where the UN, so familiar with the techniques of promoting accountability over sovereignty, acknowledged the existence of the sovereign-like responsibilities with which it was, itself, now burdened.

How did UNTAET come into existence? On 30 August 1999 the East Timorese people voted resolutely for their independence, rejecting a proposal for special autonomy within Indonesia. The referendum, or Popular Consultation, as it was termed, on East Timor's future status was governed by agreements between the Secretary-General of the UN, the Indonesian government (the occupier) and the Portuguese government (the pre-occupation colonial power). If the special autonomy proposal was rejected in the ballot, the agreements provided for the UN to hold authority in East Timor and, 'subject to the appropriate legislative mandate, initiate the procedure enabling East Timor to begin a process of transition toward independence'.[8] In September 1999 the Security Council established the International Force in East Timor (INTERFET), a multinational force under a unified command structure, the mandate of which included the restoration of peace and security in East Timor.[9] Beyond this, the modalities of the transfer of authority from the UN to a sovereign state of East Timor were not foreshadowed. The transition process had no blueprint, no 'instruction manual'.[10]

On 25 October 1999 the Security Council, acting under chapter VII of the UN Charter, adopted Resolution 1272.[11] Resolution 1272 established UNTAET and empowered UNTAET, in the person of the Special Representative of the Secretary-General or 'Transitional Administrator', to exercise 'all legislative and executive authority, including the administration of justice'.[12] UNTAET was to exercise these powers so as to achieve the mandated tasks of, *inter alia*, providing security and maintaining law and order, establishing an effective administration, supporting capacity-building for self-governance and assisting in the establishment of conditions for sustainable development. In implementing this mandate, UNTAET was required to 'consult and cooperate closely with the East Timorese people'[13] but, as Fitzpatrick notes, owed the East Timorese no

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8 Agreement between the Republic of Indonesia and the Portuguese Republic on the question of East Timor, 5 May 1999, UN Doc S/1999/513, Annex I, particularly art 6; Agreement Regarding the Modalities of the Popular Consultation of the East Timorese through a Direct Ballot, 5 May 1999, UN Doc S/1999/513, Annex II; East Timor Popular Consultation, 5 May 1999, UN Doc S/1999/513, Annex III.

9 SC Res 1264 (1999). INTERFET handed military control of East Timor to UNTAET in February 2000.

10 See S Vieira de Mello, 28 June 2001 presentation to the National Council: 'We have not had available to us an instruction manual on how to build a country …'.

11 SC Res 1272 (1999).

12 Ibid art 1.

13 Ibid art 8. A requirement that UNTAET 'consult and cooperate closely with representatives of the East Timorese people' was enshrined in domestic law: see UNTAET Regulation No 1999/1 on the Authority of the Transitional

fiduciary duty.[14] There seems to be some consensus among commentators that UNTAET did not enjoy full sovereign powers and responsibilities, and that Portugal's sovereign claim continued, at least *de jure*, during the transition period.[15] However this jurisprudential fact, to the extent it was acknowledged in Dili in the aftermath of 1999, was used merely to shore up support for other less lofty arguments as to why UNTAET might avoid the very real governmental powers and responsibilities with which it was confronted.

It ought not be difficult to imagine why some were inclined to shy away from these responsibilities. The governance mandate contained in Resolution 1272 was broad and complex enough on paper, let alone in the circumstances of its implementation.[16] Those circumstances will not be detailed here: the scale and impact of the violence and destruction that occurred before and after the announcement of the results of the Popular Consultation have been extensively recorded elsewhere.[17] Hansjoerg Strohmeyer, one of the first international lawyers to survey the scene after the violence, has catalogued the disarray in the legal sector:

> Most court buildings had been torched and looted, and all court equipment, furniture, registers, records, archives … law books, case files, and other legal resources were burnt. In addition, all judges, prosecutors, lawyers, and many judicial support staff who were perceived as being … publicly sympathetic to the Indonesian regime had fled … Fewer than ten lawyers were estimated to have remained.[18]

Administration in East Timor (Regulation No 1999/1), 27 November 1999, s 1.

14 D Fitzpatrick, 'UNTAET and East Timor: The Current Legal and Institutional Context' in D R Rothwell and M Tsamenyi (eds), *The Maritime Dimensions of Independent East Timor*, Wollongong Papers on Maritime Policy No 8, Centre for Maritime Policy, University of Wollongong (2000) 21. A fiduciary duty was, however, sometimes imputed in circumstances where UNTAET exercised sovereign-like powers. For instance, the terms of the 10 February 2000 Exchange of Notes between UNTAET and Australia record the assumption by UNTAET, 'acting on behalf of East Timor', of the rights and duties of Indonesia at international law under the Treaty between Australia and the Republic of Indonesia on the Zone of Cooperation in an Area between the Indonesian Province of East Timor and Northern Australia, 11 December 1989, [1991] ATS 9 (the Timor Gap Treaty).

15 See, eg, Wilde, above n 6, and Fitzpatrick, above n 14.

16 For a commentary on the scope and complexity of UNTAET's mandate 'on paper' compared to other UN governance operations in post-conflict societies, see the sources cited above n 5.

17 See the 'Report of the International Commission of Inquiry on East Timor to the Secretary-General', UN Doc A/54/725, S/2000/59, 2000, and the 'Report on the Investigation of Human Rights Violations in East Timor', Indonesian Commission for Human Rights Violations in East Timor (KPP-HAM), 31 January 2000.

18 H Strohmeyer, 'Collapse and Reconstruction of a Judicial System: The United Nations Missions in Kosovo and East Timor' (2001) 95 *The American Journal of*

The period between the passage of Resolution 1272 in October 1999 and the recognition of East Timor's independence in May 2002 was characterised by three distinct governmental phases. First, from October 1999 to July 2000, the Transitional Administrator exercised his plenipotentiary powers, which had been defined for the purposes of domestic law in UNTAET Regulation No 1999/1.[19] Having already made a *de facto* delegation of his judicial powers to the East Timorese courts, the Transitional Administrator consulted on 'significant' legislative and executive decisions with a 15-member National Consultative Council, consisting of East Timorese leaders and senior UN officials.[20] In the second phase, from August 2000 to August 2001, an arrangement for power sharing between the UN and the East Timorese leadership was established.[21] The Transitional Administrator delegated a large measure of his executive authority to a Cabinet consisting of East Timorese political leaders and international experts with individual portfolio responsibilities.[22] He exercised his legislative authority with guidance from an all-East Timorese National Council, which he appointed to reflect all facets of East Timorese politics and civil society.[23] The beginning of the second phase also marked the implementation of the concept of the East Timor Transitional Administration (ETTA), an entity intended to be the embryonic governmental structure to be retained post-independence.[24] ETTA was staffed by East Timorese public

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International Law 46, 50.

19 In conformity with UN practice in Kosovo, UNTAET adopted the nomenclature of 'Regulations' to describe primary legislative instruments, and 'Directives' to describe subordinate legislative instruments. Both instruments required the approval and signature of the Transitional Administrator before they could take legal effect on the date specified within them.

20 See UNTAET Regulation No 1999/2 on the Establishment of a National Consultative Council (Regulation No 1999/2), 2 December 1999. The National Consultative Council was chaired by Sergio Vieira de Mello, and included as members both East Timorese appointees and UN officials.

21 The decision was controversial at the time, competing with a 'technocratic' proposal in which UNTAET would retain all political responsibility and East Timorese involvement would be limited to senior administrative roles: see the address of Sergio Vieira de Mello at the Tibar Conference, East Timor, 2 June 2000. However, the power-sharing model is now widely regarded as having been a qualified success: see, eg, Fitzpatrick: 'It is to UNTAET's credit that as the humanitarian and security crisis receded, institutional planning for greater consultation … came to the fore', above n 14, 24). See also J Steele, 'Nation Building in East Timor', (2002) Summer *World Policy Journal* 76, 80. The question of consultation in UNTAET's early days was a particularly sore point: see, for instance, J Chopra, 'The UN's Kingdom in East Timor' (2000) 42 *Survival* 3, (2000) Autumn *Survival* 27, and 'East Timor's birth pains', *The Economist* (26 August 2000).

22 See UNTAET Regulation No 2000/23 on the Establishment of the Cabinet of the Transitional Government in East Timor (Regulation No 2000/23), 14 July 2000.

23 See UNTAET Regulation No 2000/24 on the Establishment of a National Council (Regulation No 2000/24), 14 July 2000.

24 ETTA had no legal status as a matter of domestic law, an odd circumstance of rivalry between the National Council and the Cabinet during the transition period – see, 'National Council rejects ETTA Regulation', UNTAET Press Briefing,

servants and UN personnel within departments and offices that reported to Cabinet Members. The third and final phase of the transition followed the 30 August 2001 election of a Constituent Assembly, which prepared the Constitution for an independent East Timor.[25] During this final phase, the Constituent Assembly and the Council of Ministers (the successor institution to the Cabinet) held, by virtue of their democratic legitimacy, an even greater degree of formal and substantive authority. This third phase also saw the creation of ETTA's successor, the East Timor Public Administration (ETPA), which was established as a public legal entity, 'with the aim of implementing the laws of East Timor, and the programs and policies of the Council of Ministers'.[26] During this final phase, the governance-related powers of the Special Representative were, at least according to the theory of the political transition, merely formal.[27] Day-to-day governmental responsibility was discharged by the elected representatives of the East Timorese people. This phase ended on 20 May 2002, the date on which East Timor's independence was recognised and celebrated.

I. The Dilemmas: Jurisprudence

(a) Applicable domestic law

What law applies in countries that do not yet exist?[28]

The most immediate jurisprudential issue confronting UNTAET on its creation was the source and content of the applicable domestic law in East Timor. The terms of Resolution 1272 provided no guidance on this point. With crimes against humanity charges to be brought, borders to secure and political institutions to be established, a legal vacuum was no option. East Timor's customary law, though sophisticated in many respects, was plainly inadequate to the task.[29] The law of the former sovereign power, Portugal, had not been applied in East Timor for 24 years.[30] The UN had not yet formulated a uniform

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18 June 2001 <www.un.org/peace/etimor/DB/Db180601.htm>.

25 See UNTAET Regulation No 2001/2 on the Election of a Constituent Assembly to prepare a Constitution for an Independent and Democratic East Timor (Regulation No 2001/2), 16 March 2001.

26 See UNTAET Regulation No 2001/28 on the Establishment of the Council of Ministers (Regulation No 2001/28), 19 September 2001, Preamble and Section 2.

27 See P Galbraith, 'The Shape of Things to Come: Thoughts on the Post-Election Government of East Timor', 7 June 2001: 'Rather than have the transition from power sharing to full self-government take place at the time of independence, I propose it take place immediately after the elections. This way, self-government will begin under the protective sponsorship of UNTAET, with UNTAET having the reserve authority to correct serious errors.'

28 De Mello, above n 1.

29 For information on customary law in East Timor, see D C B Soares, 'A Brief Overview of the Role of Customary Law in East Timor', East Timor – Towards Self-Determination: The Social and Cultural Questions, Conference at the Faculty of Education and Languages, University of Western Sydney, Sydney, 15-16 July 1999.

30 Fitzpatrick notes that 'retroactive assessment of legal acts between 1975 and 1999, as though Portuguese law had remained applicable, would have engendered

code of justice, which might be used by transitional administrations.[31] As a territory under UN administration, customary international law was generally understood to be applicable in East Timor.[32] However, customary international law, alone, was clearly unable to give shape to an entire domestic legal system or to offer clear guidance to UNTAET in the establishment of a judiciary that could bring the perpetrators of the 1999 violence to justice. After a short period of intense debate among the small number of East Timorese leaders and UN staff who then inhabited Dili,[33] the UN made a choice that was not symbolic, but (at least by design) 'practical'.[34] Regulation No 1999/1 provided that the body of law that had been applied in East Timor before the adoption of Resolution 1272 should apply, that is, Indonesian law, the law of the Republic of Indonesia during the occupation, frozen at 25 October 1999, the date of Security Council Resolution 1272. There were, however, three qualifications to this wholesale adoption of Indonesian law.[35] First, such law would not apply if it conflicted with 'internationally recognised human rights standards'.[36] On this basis, several Indonesian laws were immediately declared to be no longer applicable in East Timor,[37] and capital punishment was abolished. Second, previously applicable

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substantial uncertainty', above n 14, 30.

31 In the discussions surrounding the Brahimi Report, above n 5, there have been calls for such a uniform code that might be promulgated immediately in situations faced by administrations such as UNTAET and the UN Mission in Kosovo (UNMIK).

32 The jurisprudential basis for this understanding was not, to the knowledge of the authors, articulated by UNTAET during the transition period. UNTAET Regulation No 1999/1 was silent on the matter; indeed the text of that Regulation, listing applicable international legal instruments, was from time-to-time interpreted as having excluded the *prima facie* operation of customary international law. This situation may be contrasted with the question of the applicability of customary international law *to* the Transitional Administration, on which it seems an understanding was not reached.

33 For instance, in January 2000, leader of the conservative União Democrãtica Timorense (Timorese Democratic Union), João Carrascalão, publicly queried the decision to institute Indonesian law, suggesting that Portuguese law continued to apply in East Timor, notwithstanding UNTAET Regulation No 1999/1.

34 See Strohmeyer, above n 18, 58.

35 UNTAET Regulation No 1999/1, above n 13, s 3.

36 Section 2 of UNTAET Regulation No 1999/1 listed the sources of these standards: Universal Declaration on Human Rights, GA Res 217A (10 December 1948); International Covenant on Civil and Political Rights (16 December 1966), 999 UNTS 171, and its Protocols (ICCPR); International Covenant on Economic, Social and Cultural Rights (16 December 1966), 993 UNTS 3 ; Convention on the Elimination of All Forms of Racial Discrimination (21 December 1965) 660 UNTS 195; Convention on the Elimination of All Forms of Discrimination Against Women (18 December 1979) 1249 UNTS 13; Convention Against Torture and other Cruel, Inhumane or Degrading Treatment or Punishment, GA Res 39/46 (17 December 1984); and Convention on the Rights of the Child, GA Res 44/25 (20 November 1989).

37 Section 3.2 of Regulation No 1999/1 specified that a number of Indonesian Laws were inapplicable in East Timor, including the Law on Anti-Subversion (Law No 11/PNPS/1963; Law No 5 of 1969) and the Law No 8 of 1985 concerning

law would not apply if it came into conflict with the fulfilment of UNTAET's mandate. Finally, previously applicable law would not apply if it conflicted with Regulation No 1999/1 or any subsequently promulgated regulation or directive.

It seemed to follow from this choice that UNTAET would urgently need to familiarise itself with Indonesian law. Regulation No 1999/1, at least on its face, continued the operation of Indonesian law across the field, including criminal law, commercial law, property law, family law and administrative law. It also seemed, at first, that the need for UNTAET to understand Indonesian law was increased by the decision to appoint a judiciary composed principally of East Timorese. The vast majority of these judicial appointees had undertaken their legal training in Indonesia and any familiarity with legal practice was confined to Indonesian courts.[38] In practice, however, UNTAET's legislative agenda and legislative drafting in East Timor proceeded not by reference to Indonesian law, but either by working from 'first principles' or, as was more often the case, taking as a model legislation from contexts thought to be similar to East Timor, including UN-administered Kosovo.[39] All significant areas of UNTAET's transitional governance took place under specially promulgated UNTAET regulations, including regulations on border control, taxation, the judicial system, business registration and criminal law procedure. The Transitional Administration paid little attention to applicable Indonesian law and the question as to whether its enforcement might better serve the interests of the Administration than its own creations. Though no formal decision had been taken by UNTAET to adopt the practice of marginalising Indonesian law, the attractions of such a practice were clear. The development of an entirely new legislative framework allowed UNTAET to offer East Timorese political representatives (in the National Consultative Council and, later, the National Council) a means of scrutinising each area of government activity as it was initiated. This, in turn, gave UNTAET a political imprimatur for law enforcement that could not be assumed in the case of perpetuated Indonesian law.[40] The development of UNTAET regulations sidestepped the problem of the relationship between Indonesian legal standards and applicable customary

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

39 Eg, the starting point for the political party registration provisions of UNTAET Regulation No 2001/2, above n 25 was UNMIK Regulation No 2000/16 on the Registration and Operation of Political Parties in Kosovo, 21 March 2000.

40 Even in areas where UNTAET officials did have substantive knowledge of applicable Indonesian law – as was the case with property and tax law, for instance – the elite of the East Timorese leadership was generally hostile to its continued operation. This was the case, for instance, in relation to the continued operation of international agreements on the prevention of double taxation of income, which were perpetuated from the Indonesian regime. Eventually, domestic law provided that these agreements were to have no effect in East Timor: see UNTAET Regulation No 2001/16 to amend Regulation No 2000/18 on a Revenue System for East Timor, 21 July 2001, s 1.

international law, the resolution of which would have required a level of judicial competence that clearly did not exist.[41] However, there were also reasons for adopting this legislative practice that were quite unrelated to the shortcomings of the East Timorese judiciary. Early on, UNTAET itself did not have the personnel or processes in place to understand, much less implement, Indonesian law. In particular, UNTAET had very few lawyers with knowledge of the intricacies of Indonesian legal practice.[42]

There is no doubt that, having made the choice to adopt Indonesian law, UNTAET would have been well served by a coherent and systematic process for reviewing and, where appropriate, superseding applicable Indonesian law, within the terms of Regulation No 1999/1 and customary international law. No matter how ambitious UNTAET's legislative agenda, Indonesian law continued, as a matter of form, to govern many areas of public and private life, including substantive criminal law, family law, and tax. The concept of an East Timor Law Reform Commission to conduct a review of Indonesian law was referred to in an early report of the Secretary-General,[43] was supported by some senior officials, and was urged on UNTAET by the Australian Chapter of the International Commission of Jurists. However, a concrete proposal was never brought to fruition. No credible alternative, such as a fixed-term consultancy to examine and report on the impact of Indonesian law in sectors critical to East Timor's reconstruction and governance, was developed. Such a review might have avoided some time-consuming errors. The 'Criminal Procedure Code', promulgated by UNTAET in September 2000, is a case in point.[44] The Code, which was expected to carry the weight of all criminal prosecutions in East Timor, was the product of a lengthy drafting exercise involving UN criminal lawyers with expertise in both civil law and common law systems. Some senior East Timorese lawyers[45] had put to East Timorese leaders and to UNTAET that the Indonesian Code of Criminal Procedure[46] could be used, provided that any

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41 See, eg, Strohmeyer, above n 18, 59.

42 Fitzpatrick notes that Indonesian law is hardly a coherent body of law and is not applied with any consistency in Indonesia itself: above n 14, 30-31. Also, for the first two phases of the transition, the actual texts of Indonesian laws were generally unavailable to UNTAET – legal documents and resources in East Timor were (like everything else) either looted or destroyed, and useful translations from outside East Timor were slow to arrive in Dili.

43 In his 4 October 1999 Report to the Security Council, the Secretary-General stated: 'UNTAET will initiate a process to amend current legislation in East Timor', UN Doc S/1999/1024, [54].

44 See UNTAET Regulation No 2000/30 on Transitional Rules of Criminal Procedure, 25 September 2000.

45 Including notably Aniceto Guterres, then director of Yayasan Hak, the East Timorese human rights non-governmental organisation, as reported by Mark Dodd, 'Frustration Grows over Timor Delays' *The Age* (27 May 2000).

46 *Kitab Undang-undang Hukum Acara Pidana* (KUHAP). UNTAET was criticised for its failure to comprehensively review KUHAP in order to identify provisions inconsistent with international standards: Amnesty International, *East Timor: Justice past, present and future*, AI-index: ASA 57/001/2001 (27 July 2001), s 5.2, 21 <http://web.amnesty.org/ai.nsf/Index/ASA570012001>.

provisions inconsistent with international human rights standards were removed. After all, it was thought, the Indonesian Code had recently been revised, was relatively straightforward and had the added advantage of being well understood by the East Timorese judges, lawyers and police. Moreover, the substantive criminal law in East Timor was, throughout this period, the Penal Code of Indonesia as modified by international human rights standards.[47] These arguments were not accepted, however, and the drafting debates continued. Consequently, East Timor had, from November 1999 to September 2000, a criminal law that was only sporadically enforced. Meanwhile, as prisoners (many from the days of the International Force for East Timor (INTERFET)) awaited trial in Becora Prison, a protracted and ultimately sterile debate on the respective merits of inquisitorial versus adversarial procedures culminated in a long-delayed UNTAET Code with which many East Timorese lawyers obviously felt uncomfortable.[48]

How might such an outcome have been different had a systematic process for reviewing Indonesian law been established? East Timor's decision-makers would have had the tools to better assess whether resource- and time-intensive legislative activity to supersede Indonesian law was really preferable to enforcing Indonesian law, however imperfect.[49] There would also have been greater legal and operational certainty as to whether particular provisions in Indonesian law were compatible with internationally recognised human rights standards, such that these provisions could be enforced as the applicable law. In the absence of a review mechanism, the pragmatic ambitions of Regulation No 1999/1 in perpetuating Indonesian law within certain safeguards provided by international law were severely curtailed.[50] UNTAET was, in general, unable to

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47 *Kitab Undang-undang Hukum Pidana* (KUHP).

48 At a public hearing of the National Council on the then draft Regulation on 19 September 2000, Aniceto Guterres stated that it 'lacks clarity of definition in certain provisions including the detention procedure and the confiscation procedure; it does not adequately define the rights of counsel; it makes no provision for legal aid; the rights of a defendant do not conform to international standards; the pre-trial detention periods are too long; the draft has inadequately defined the procedure in relation to serious crimes; and the treatment of corroboration in the draft provides inadequate protection to women in sexual assault cases'.

49 On a number of occasions, East Timor's National Council challenged the need for UNTAET to legislate on a particular matter, given the existence, in those instances, of applicable Indonesian law. It was on this basis that the National Council voted to reject, 'in principle', a draft UNTAET regulation on vehicle registration.

50 Serious difficulties posed by the absence of a legal review mechanism also emerged in the area of tax law. For instance, the East Timor representatives who met Australian officials in 2000 to begin negotiating a new Timor Sea Treaty had little access to advice on the Indonesian tax regime of the type that one might have expected a law review process to produce. Were bilateral treaties which Indonesia had entered into with other countries regarding reciprocal taxation arrangements, and which were explicitly referred to in Indonesian law, part of the applicable law of East Timor? If UNTAET Regulation No 1999/1 was to be read as not obliging

select strategically from the best of Indonesian law, opting instead to grapple with the politically convenient, but legally impossible, task of legislating anew with insufficient resources. Thus, what may have been a jurisprudential problem quickly revealed itself as a practical one: UNTAET's legal authority was certain, but its actual ability to exercise that authority was the subject of self-fashioned constraints.[51]

(b) International legal standards: a legacy of laws

> We are not interested in a legacy of cars and laws …[52]

If the first jurisprudential problem, then, was an implausibly ambitious legislative program, the second jurisprudential problem to emerge was the extent to which UNTAET regulations could, and should, comply with the highest standards of international law and law making. Side-stepping the problem of Indonesian law did not side-step the fundamental problem of applying the standards of the developed world in a post-conflict, developing country setting. On the one hand, East Timor was under the transitional governance of the UN, which was not only committed to those standards, but in many cases had created them. On the other hand, compliance with such standards was not always sought by East Timorese representatives who, after all, enjoyed a right of self-determination; and even where sought, compliance was frequently beyond East Timor's financial means, a point acknowledged by East Timorese and international observers alike. The formal injunctions on UNTAET were clear enough: UNTAET Regulation No 1999/1 required all public officials in East Timor to observe internationally recognised human rights standards. Subsequent UNTAET regulations also expounded standards in particular governmental activities, such as in the treatment of prisoners and the management of penal institutions.[53] Nonetheless, the actual business of legislating and applying the law was rarely characterised by consensus within the UN system on the precise implications of these human rights standards and their applicability in specific instances. Not surprisingly, expectations were high that UNTAET would show itself to be the model international citizen, instilling a culture of human rights

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East Timor to unilaterally assume these treaty obligations, what law did apply? Where billion dollar petroleum projects were seeking urgent clarity on their tax position, in the middle of the negotiation of international petroleum treaty negotiations, these were difficult issues to resolve satisfactorily.

51 In this sense, UNTAET's problem under a broad legislative and judicial mandate was a continuation of INTERFET's problem under a narrower mandate: see A Ladley, 'All necessary measures and justice questions over the last months of 1999 in East Timor' Australian and New Zealand Society of International Law 2002 Annual Conference, Canberra, 14 June 2002 <http://law.anu.edu.au/anzsil/ANZSILnewconferences.html>.

52 Xanana Gusmão referring to UNTAET Regulations (and UNTAET Landrovers) in his 'Public Announcement of the 1st National CNRT Congress Conclusions', Dili, 9 October 2000, and repeated in his New Year's Day Address, 1 January 2001.

53 UNTAET Regulation No 2001/23 on the Establishment of a Prison Service for East Timor ('Regulation No 2001/23'), 28 August 2001.

observance and setting legislative precedents for other developing countries. UNTAET was, however, also governing one of the poorest[54] and most culturally conservative countries in the world; a country primarily dependent on funding from the international community to undertake the mammoth task of reconstruction. The problem of reconciling international standards with domestic political and financial pressures – a problem familiar to sovereign nations – therefore presented itself to UNTAET in an unusual and acute form. This dilemma was posed most dramatically when UNTAET sought to establish institutions under its immediate authority, but with the intention that they continue in East Timor after independence. For instance, an initial draft of a regulation establishing an East Timor Police Service proposed a requirement that police officers meet international standards, but only 'where practicable'.[55] The rationale advanced for this qualification was financial: full compliance would require a level of resources that could not be guaranteed, especially once international donor interest in East Timor waned. The qualification was, however, ultimately removed from the approved regulation.[56] During the transition period, the UN considered that cultivating the rule of law within the Police Service required such standards to have unqualified legislative backing, regardless of whether it was possible, either after or during the transition period, for those standards to be met.

The UN in East Timor also denied itself the latitude possessed by sovereign nations to selectively apply non-binding standards. For instance, during the drafting of Regulation No 2001/23 establishing the East Timor Prison Service, the question arose of compliance with Rule 53(3) of the Standard Minimum Rules for the Treatment of Prisoners.[57] Rule 53(3) requires female prisoners to be attended and supervised by female prison officers only. UNTAET could hardly ignore this rule, since the Standard Minimum Rules represent 'the minimum conditions which are accepted as suitable by the United Nations'.[58] However, Rule 53 could not be met without the employment of additional female

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54 East Timor is reportedly Asia's poorest country and one of the poorest countries in the world. It has a GDP per capita of just US $478 and a human development rating placing it in the same category as the countries of Rwanda and Bangladesh: United Nations Development Program, *East Timor: The Way Ahead. National Human Development Report 2002* (13 May 2002) <www.undp.east-timor.org/Governance>. The 2000-2001 Consolidated Fund for East Timor expenditure budget – that is, the donor-supported government budget – was a mere US $65 million; the 2001-2002 budget US $77.7 million.

55 See, generally, Amnesty International, *East Timor: Justice past, present and future*, above n 46, 20.

56 UNTAET Regulation No 2001/22 on the Establishment of an East Timor Police Service, 10 August 2001, s 10: 'All Police Officers shall, in the performance of their duties, be subject to and shall comply with the laws applicable in East Timor, and shall comply with all internationally recognised standards, including but not limited to the standards stated in Section 2 of UNTAET Regulation No. 1999/1.'

57 Standard Minimum Rules for the Treatment of Prisoners, adopted by the First UN Congress on the Prevention of Crime and the Treatment of Offenders, UN Doc A/CONF/611 (1955).

58 Ibid Rule 2.

officers, for which no provision could be found in the Consolidated Fund for East Timor Budget. Nor was a short-term financial 'fix' from other possible funding sources in keeping with UNTAET's duty to the international community (as donors to East Timor's reconstruction) for maintaining a transparent budgetary process, not to mention its duty to the East Timorese people to leave behind a financially sustainable prison system. In this instance, a compromise was found and reflected in the approved Regulation No 2000/23. The compromise was a six-month delay in the operation of the provision that incorporated Rule 53, so that a budgetary review and the necessary hiring could occur.[59] In other instances, however, the question of how East Timor could afford to comply fully with human rights and good governance standards remained unresolved throughout the period of the transition. [60]

The difficulties presented by the fact that international standards are expensive were compounded by the fact that international standards are not tailored to UN-managed political transitions. The dilemma of reconciling international standards with the political specificities of post-conflict East Timor was most pronounced during debates on the institutions and processes of East Timor's transition to independence and self determination, where power-sharing between UN and local institutions was the norm. It was argued that, budgetary constraints aside, UNTAET should in any event yield on major matters of policy to the publicly expressed views of East Timorese political leaders, even where those views were inconsistent with other norms of international law (including, for instance, the freedom of association). Proponents of the latter argument appealed not only to the well-established rights of self-determination and political participation in international law,[61] but also to the emerging norm of

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59 Regulation No 2001/23, above n 53, s 37. This solution was preferred over an open-ended provision in the Regulation making compliance with Rule 53 conditional upon the availability of funding. Hiring of female prison officers was completed by December 2001. On 30 June 2002, there were 18 female prison officers working within East Timor's three penal institutions in Becora, Gleno and Baucau.

60 Eg, during the transitional period, both an Inspector-General's Office and an Ombudsman's Office operated. The UN recognised that these offices needed to be institutionally robust and separate from each other to perform their respective internal oversight and external accountability functions during the transition period. Yet it was also recognised that an independent East Timor was unlikely to have the financial capacity to maintain both offices – one of the reasons why UNTAET was hesitant to establish either institution in law. See UNTAET Press Briefings of 17 January and 1 June 2001, <http://www.un.org/peace/etimor/DB/UntaetDB2001.htm>.

61 Art 25 of the ICCPR provides: 'Every citizen shall have the right and the opportunity, without any of the distinctions mentioned in article 2 and without unreasonable restrictions: (a) to take part in the conduct of public affairs directly or through freely chosen representatives; (b) to vote and to be elected at genuine periodic elections which shall be universal and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the electors; and (c) to have access, on general terms of equality, to public service in his country.'

'democratic governance' in customary international law.[62] Though East Timor was of course not a democracy during the transition period up to August 2001, the fact that UNTAET's mandate flowed from the democratic moment of the 1999 popular consultation created an expectation in parts of the East Timorese and international community that UNTAET would behave 'as if' it were elected and drew its legitimacy directly from the East Timorese people.[63]

These arguments were especially prominent during the formulation of registration requirements for parties wishing to contest the 30 August 2001 Constituent Assembly election. International law and UN practice strongly favoured a completely open system of party registration, based on the principles of freedom of political participation and association. However, the East Timorese leadership (including Xanana Gusmão, then President of Conselho Nacional de Resistencia Timorense (CNRT), the National Council of East Timorese Resistance) was strongly inclined to require parties to submit their party platforms as a condition of registration.[64] The leadership was also inclined to prevent, by law, the registration of political parties with pro-Jakarta leanings.[65] Finally, a compromise was reached. All political parties and candidates seeking to contest the election were required to endorse a legislatively prescribed notice that they were registering 'for the purpose of nominating candidates for election to a Constituent Assembly to prepare a constitution of an independent and democratic East Timor'.[66] Additionally, a registering party was required to provide a 'written declaration signed by the leader and all other officers of the political party that they will continuously reside in East Timor for at least three (3) months prior to the date of the election'.[67] These requirements were intended to prevent the participation of pro-integrationist parties, and to clarify the position of those parties whose policies may have been doubtful, but did so within the terms of UNTAET's mandate to bring East Timor to independence. It seems, in retrospect, that these requirements did not in fact prevent any pre-

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62 See, for instance, T Franck, 'The Emerging Right to Democratic Governance' (1992) 86 *American Journal of International Law* 46, and G H Fox and B R Roth, *Democratic Governance and International Law* (2000).

63 This became apparent – to take one example – when in early 2001 the National Council approved an income tax regime that did not exempt local employees of NGOs. This action was described as 'undemocratic' by local NGO leaders.

64 See, for instance, the draft regulation prepared by CNRT, 'Draft Regulation No 2000/ On the Registration, Organization and Internal Democratic Processes of Political Parties in East Timor' provided by the CNRT to UNTAET on 26 October 2000.

65 The Political Affairs Committee of the National Council, in its 21 February 2001 Report on party registration, noted that 'there are two approaches … the liberal approach and the regulating approach, argued by many members of the NC [National Council] and by most speakers during the public hearings'. Oddly, the 'regulating approach' was backed by PNT (Partido Nacionalista Timorense, the Nationalist Party of Timor), whose President Abílio Araújo had publicly supported the special autonomy package with Indonesia in the Popular Consultation.

66 See Regulation No 2001/2, above n 25, sch.

67 Ibid s 22.

existing parties from registering,[68] although the requirements did, apparently, prompt the return of a pro-Indonesia political party leader who had been residing outside East Timor: his return allowing his party to obtain registration.[69] The requirements also certainly eliminated whatever possibility there might have been of pro-Indonesia campaigning, and assured the East Timorese public that the election would not re-open the issues of the August 1999 Popular Consultation.

It is, in fact, debatable whether these two legislative requirements were consistent with the 5 May 1999 Agreements,[70] with the International Covenant on Civil and Political Rights (ICCPR), and with international law more generally.[71] However, after receiving the advice of its Human Rights Unit, UNTAET arrived at a compromise position.[72] UNTAET should, it was decided, defer to the views of the East Timorese people as represented by their leaders, who had after all been duly appointed to leadership roles by the UN after consultation.[73] As a result, restrictions were placed in the electoral law.[74] It was

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68 Two parties that chose to remain unregistered, and therefore outside the electoral process, were BRTT (the East Timor People's Front), formerly a pro-autonomy party, and CPD-RDTL (the Council for the Defence of the Democratic Republic of East Timor), which opposed the election process on the basis that East Timor had become independent in 1975. It is unlikely that either party would have been denied registration had it been sought. A recommendation by some East Timorese leaders in March 2001 to 'ban' CPD-RDTL, on the basis of reliable reports of criminal activity undertaken by some of its members, was not accepted by the UN.

69 Abílio Araújo returned to East Timor from Portugal prior to the August 2001 election.

70 Above n 8. Those Agreements contained no restrictions for participation in the 1999 Popular Consultation on the basis of platform or policy. Arguably, UNTAET had no authority to restrict the franchise conferred on the East Timorese people by those agreements.

71 G H Fox and G Nolte conclude, on the strength of their analysis of national and international practice (including art 5(1) of the ICCPR), that states are not legally obliged to tolerate anti-democratic actors and may, according to a set of well-defined procedures, exclude them from the electoral process: 'Intolerant Democracies' in Fox and Roth, above n 62, 389-435. It is questionable, however, whether pro-integrationist parties seeking to contest the August 2001 election could have been described as 'anti-democratic', unless one views (as some have) the result of the 1999 Popular Consultation, reflected in Resolution 1272, as having established a democratically authorised constitutional norm that prevailed over freedom of expression.

72 On 31 October 2000, the Legal Adviser to the Human Rights Unit submitted to the UNTAET Department of Political Affairs that the electoral law should contain a clause stating that 'political parties shall respect and act in accordance with the outcome of the popular consultation of 30 August 1999'.

73 As Sergio Vieira de Mello pointed out in his January 2001 briefing to the Security Council: 'cabinet debates, for example on the political parties regulation recently passed, are often protracted affairs requiring compromise solutions': UN Doc S/PV 4268. The Transitional Administrator had, from the beginning of this debate in October 2000, indicated his own support for a requirement that political parties in East Timor submit a party program in order to register for the election. Some Australian commentators proposed further restrictions to the National Council. For

considered, on the basis of the evolving norm of 'democratic governance', that the East Timorese had a right to insist on certain limited restrictions to political participation in the elections, particularly if these restrictions were formal (such as, for instance, residency restrictions) rather than substantive.[75] Whether or not this particular compromise can be viewed as an instance in which a 'middle ground' was found between universalism and cultural relativism,[76] it clearly worked: the concerns of the East Timorese leadership were allayed, a peaceful election was held, and the electoral law itself escaped criticism.

(c) Separation of powers and the rule of law

Ad hoc solutions to budgetary and political crises inevitably became overshadowed by UNTAET's mandated need to promote an East Timor administration that had, as its basis, the principle of the separation of powers. UNTAET believed that if appropriate institutional relationships and cultures of governance were established, then respect for the rule of law and the promotion of human rights would follow.[77] The separation of legislative, executive and judicial power was recognised by UNTAET as integral to building a protective institutional backbone for an independent East Timor. This institutional imperative, however, faced institutional obstacles. The promotion of the doctrine

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instance, Bret Walker SC, in a 5 January 2001 paper 'Some issues relating to the foundational governing structures for an independent East Timor', suggested that a group should not *prima facie* be entitled to register if it 'evinces an ambition inconsistent with the full independence of East Timor from Portugal and the Republic of Indonesia; … the continued national identity of East Timor; and … the untrammeled exercise by the people of East Timor of their right of self-determination'.

74 UNTAET had gone to considerable lengths to explain that any restrictions to participation in the Constituent Assembly election would not affect the right of a party or group, whether registered or not, to exercise its right to freedom of speech, opinion, and peaceful assembly; see for instance 'Political activity, a fundamental right', public statement issued by UNTAET, 1 November 2000.

75 The content of the 'democratic governance' norm is said to be grounded not merely in the existence of appropriate participatory mechanisms, but a determinate relationship between these mechanisms and the actual exercise of political power: Fox and Roth, 'Introduction: the spread of liberal democracy and its implications for international law' in Fox and Roth, above n 62, 1-22, 11. The application of the norm in the context of the UN transitional governance appears to be a field open for further investigation.

76 A middle ground between human rights universalism and cultural relativism has been charted in numerous texts: see, eg, S Carney and P Jones (eds), *Human Rights and Global Diversity* (2001). See also, Sarah Pritchard, who offers examples of where international human rights standards have been 'deployed strategically' in different cultural contexts: 'The Jurisprudence of Human Rights: Some Critical Thoughts and Developments in Practice' (1995) 2 *Australian Journal of Human Rights* 3, 20.

77 For instance, in his 4 October 1999 report to the Security Council, the Secretary-General noted that UNTAET needed to 'create non-discriminatory and impartial institutions, particularly those of the judiciary and police, to ensure the establishment and maintenance of the rule of law and to promote and protect human rights': UN Doc S/1999/1024, [29(h)].

of separation of powers during the transition period was fundamentally constrained by the fact that Resolution 1272 vested all legislative and executive authority (including the administration of justice) during the transition period in one person: the Transitional Administrator. Chesterman saw this decision, obviously outside the control of UNTAET itself, as having posed a peculiar governmental conundrum:

> [Many political] problems are referable to a central contradiction within Security Council Resolution 1272 (1999). It establishes UNTAET in order to give the East Timorese eventual control over their embryonic country … At the same time, however, it concentrates all power in UNTAET and the Transitional Administrator.[78]

This paradox at the heart of UNTAET's identity made it notoriously difficult to judge when it was appropriate – legally, politically and/or operationally – for the Transitional Administrator to relinquish aspects of his authority when Resolution 1272 insisted that he be ultimately accountable for the way in which delegated authority was exercised.

(i) Judicial authority

> East Timor will be a democratic country … Underlying this democracy, and essential to it, will be a judicial system which is independent of government.[79]

Judicial independence was perhaps under most pressure. Early in the transition period, UNTAET took the first step toward establishing an independent judicial system by exclusively vesting judicial authority in the courts.[80] Though it is questionable whether the Transitional Administrator was legally capable of making that delegation, it was clear from his practice throughout the transition period that he considered judicial decision-making to be entirely outside his sphere of power. The first judges were appointed to an independent court in January 2000, and all judges were East Timorese. Regulation No 2000/11 set very high standards for the delivery of judicial services, contemplating a multi-layered hierarchy with eight district level courts, a resource-intensive panel system and the institution of investigating judges for all criminal matters. It is generally accepted that these standards were not met or were met too late in the transition period.[81] Expectations of the fledgling judiciary were tied to the

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78 Chesterman, above n 5, 14.

79 This statement was made in a paper read out on behalf of Xanana Gusmão entitled 'Democratisation and Peace', reprinted in L Taudevin, *East Timor: Too Little Too Late* (1999).

80 See UNTAET Regulation No 2000/11 on the Organisation of the Courts in East Timor (Regulation No 2000/11), 6 March 2000.

81 For an explanation of the rationale for the design of East Timor's judicial system and the appointment of East Timorese jurists, see Strohmeyer, above n 18. The

continuing debate within the international and East Timorese community as to whether the perpetrators of the 1999 violence were best punished according to some form of conciliatory justice, by the domestic court system, or by a (still non-existent) international criminal tribunal for East Timor. Only at a relatively late stage in this debate did it become clear that a strongly supported domestic court system was the only likely avenue for justice in respect of serious crimes; in the meantime, the judiciary remained chronically weak.

The extent of judicial independence was poorly identified and protected in East Timor precisely because the policy debate as to the proper jurisdiction of the East Timorese judiciary remained unresolved. The predominantly East Timorese judges were subject to oversight and remedial action from the Administration that was sporadic and sometimes ill-advised. Thus, in April 2000, a Cabinet-approved proposal was put before the National Council recommending that the Cabinet Member for Justice and the General Prosecutor become *ex officio* members of the Transitional Judicial Services Commission (TJSC),[82] a statutory body responsible for recommending judicial appointments and monitoring judicial performance.[83] TJSC members were required, in the exercise of their functions, '[to] be guided by the transitional administration's goal to establish an independent and impartial judiciary and to build confidence in the rule of law'.[84] The stated objective of the *ex officio* membership proposal was to enable the executive to better understand and respond to problems of judicial and prosecutorial selection and performance. Whilst this objective may have been legitimate – given that UNTAET would inevitably be held accountable for any failure to bring domestic prosecutions of perpetrators of the 1999 violence – the means recommended to pursue this objective clearly showed little regard for the perception of, and potential for, executive interference in the judiciary.[85] It is

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shortcomings of the East Timorese judicial system have been well-documented. See, eg, S Linton, 'The Creation of a Viable Criminal Justice System in East Timor' (2001) *Melbourne University Law Review* 5.

82 See UNTAET Regulation No 1999/3 on the Establishment of a Transitional Judicial Services Commission (Regulation No 1999/3), 3 December 1999.

83 One consequence of the decision to make the judiciary a predominantly East Timorese institution was that the bench was very inexperienced. Accordingly, s 28 of Regulation No 2001/11 made life-long judicial tenure subject to an initial probationary period of between two and three years. There have been many calls – too many to cite exhaustively – for the establishment of an international *ad hoc* tribunal with the jurisdiction to try international crimes committed after the Indonesian invasion of 1975. See, eg, 'Letter to the United Nations Security Council from NGOs' (16 October 2001) (copy on file with the authors).

84 See Regulation No 1999/3, above n 82, s 2.3.

85 Under the Cabinet-backed proposal, *ex officio* members of the TJSC were obliged to absent themselves from TJSC deliberations on a subject that may have given rise to an actual or perceived conflict of interest. Nonetheless, the National Council asserted that the proposed TJSC appointments violated Principle 10 of the UN Basic Principles on the Independence of the Judiciary and Guideline 2(a) of the Guidelines on the Role of Prosecutors: see, for an account of the National Council's position, Y Hak, 'Serious Concerns Regarding the Independence of the Judiciary' (16 July 2001) (copy on file with the authors). Cabinet subsequently

unusual that a public prosecutor should have the power to monitor and discipline judges. To UNTAET's credit, the approved amendments to the legislation reflected a much stronger concern for the safeguarding of the separation of powers than the original proposal; yet the episode stands out as a point of tension that was not properly resolved.[86]

(ii) Legislative and executive authority

Practical impediments to the promotion of the separation of powers were not confined to the judicial sector. The ambiguities of UNTAET's obligations in the justice system were matched by ambiguities in the exercise of legislative and executive power. As a matter of practical reality, by August 2001, the Transitional Administrator had relinquished a large measure of his executive authority, as well as his responsibility for legislative review. As a matter of law, however, final legislative and executive authority remained in the Transitional Administrator's hands, not delegable to any other institution during the period of UNTAET's mandate. The Transitional Administrator continued, in exceptional circumstances, to unilaterally undertake legislative review and exercise executive power, notwithstanding the delegation.

During the first phase of the transition, the fusion of these two modes of governmental power in the Transitional Administrator was acknowledged in the design of the National Consultative Council, which was mandated to advise the Transitional Administrator on 'significant executive and legislative matters'.[87] Mechanisms for the functional delegation of executive power were not instituted in East Timor until August 2000, when the Cabinet began to function: ten months after the creation of UNTAET. Cabinet Members were 'vested with executive authority over such offices and departments as may be assigned to the respective portfolios by the Transitional Administrator'.[88] At the same time, the function of legislative review – but not final law-making authority – was assigned to the National Council. The Council, composed of 36 East Timorese representatives appointed by the Transitional Administrator, was established by law as the 'forum for all legislative matters related to the exercise of the legislative authority of the Transitional Administrator'.[89]

Nonetheless, during the second phase of the transition, the institutional and practical observance of the doctrine of separation of powers was not pronounced. With the Transitional Administrator required by Resolution 1272 to be at the

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recommended to the Transitional Administrator that the amending regulations be approved, incorporating 'most' of the National Council's proposed revisions: UNTAET Press Briefing, 18 July 2001 <www.un.org/peace/etimor/DB/db180701.htm>.

86 See UNTAET Regulation No 2001/26, promulgated on 14 September 2001, for the approved amendments to the TJSC. The UN High Commissioner for Human Rights, in her 1 March 2002 Report, noted that the approved amendments aimed to ensure consistency with international human rights law: above n 3, [36].

87 See Regulation No 1999/2, above n 20, Preamble.

88 See Regulation No 2000/23, above n 22, s 1.3.

89 See Regulation No 2000/24, above n 23, s 1.1.

apex of every decision – promulgating legislation and endorsing Cabinet decisions – it proved difficult to maintain distinct pathways for legislative and executive decision-making. It was often political expediency that prompted UNTAET to dispense with the notion of the separation of powers. For instance in March 2001, after the National Council explicitly rejected a draft regulation creating Constitutional Commissions (bodies that were to consult with the East Timorese people on their views on the future Constitution),[90] those Commissions were given domestic legal status by means of a Directive, that is, by means of subordinate legislation. A broad consensus undoubtedly existed in the East Timorese community on the urgent need for constitutional consultation. It was also clearly within the Transitional Administrator's legal power to approve a directive, as a subsidiary instrument to a regulation, without the National Council's scrutiny. There was, however, no parent regulation to enable the directive in this case. The irregular use of 'orphaned' subordinate legislation to avoid the difficulty of reaching a political consensus about how consultation should occur[91] was, therefore, at the expense of the observance of the hierarchy of legal norms established, in East Timor's case, by Regulation No 1999/1.[92] Other operational factors frustrated a desire for the full observance of the principle of separation of powers during this second stage of the transition. UN officials were accustomed, from other UN operations, to channelling all decision-making through the office of the Special Representative of the Secretary-General, and were generally unfamiliar with legislative procedure and Cabinet process. Further, the separation of governance functions from mission-related functions through the establishment of ETTA[93] was not accomplished easily, nor were ETTA's composite parts legally self-evident. Regulation No 2000/23 established the Cabinet to exercise delegated executive authority as the representative organ of the 'transitional government'. However, the 'transitional government' was never clearly defined: in fact, the ultimately unsuccessful proposal to establish ETTA in domestic law had been designed, in part, to remedy this deficiency. The existence of a non-UN governmental structure with no formal legal identity created understandable uncertainty for the East Timorese Cabinet Members: the scope of their executive authority was unclear and routinely subject to UN administrative imperatives.[94]

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90 The decision by the National Council on 27 March 2001 to reject the Commissions led, famously, to the resignation by Xanana Gusmão from his position as President of the National Council.

91 UNTAET Directive No 2001/3 on the establishment of District Constitutional Commissions (UNTAET Directive 2001/3), 30 March 2001. Significantly, the Cabinet supported the bypassing of the National Council in this way: see UNTAET Press Briefing Note, 28 March 2001, <www.un.org/peace/etimor/DB/Db280301.htm>.

92 Section 6.1 of Regulation No 1999/1 provides: 'The Transitional Administrator shall have the power to issue administrative directives in relation to the implementation of regulations promulgated'.

93 See above n 24.

94 This uncertainty was also exacerbated by the relatively *ad hoc* manner in which policy was developed on those matters requiring collective decision and those that

The political circumstances of the third and final phase of the transition created the conditions for a greater observance of the separation of powers in institutional practice. Significant among these circumstances was, of course, the advent of democratic institutions: the elected Constituent Assembly, rather than the unelected National Council, was responsible for reviewing executive-initiated draft regulations referred to it by the Transitional Administrator.[95] There were few circumstances in which it was politically viable to urge the Transitional Administrator to exercise his legislative authority against the wishes of a democratically elected East Timorese body. Another significant institutional shift was that the Transitional Administrator, who had chaired the Cabinet in the second phase of the transition, was not a member of the successor body, the Council of Ministers.[96] With the Transitional Administrator thus removed from the formal institution of the executive, policy-makers and officials had fewer opportunities to invite the Transitional Administrator to take routine decisions outside the Council's processes. One wonders, however, whether the peculiar effects of Resolution 1272 did not establish institutional practices that will be very hard for the East Timorese government to shake off.

II. Collecting the Garbage: Operational Problems

> No other operation must set and enforce the law, establish customs services and regulations, set and collect business and personal taxes, attract foreign investment, adjudicate property disputes and liabilities for war damage, reconstruct and

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could be decided by individual Cabinet Members. This was a particular issue with funding agreements. The World Bank and other International Financial Institutions and donors experienced considerable difficulty in finding the right counterpart in the administration to negotiate funding agreements. The Cabinet Members were uncertain as to when they needed to seek Cabinet approval to enter into any such agreement.

95 On 30 August 2001, the East Timorese people elected the 88 members of the Constituent Assembly, in accordance with Regulation No 2001/2: above n 25. The primary task of the Assembly was to prepare a Constituent for an independent and democratic East Timor, but it was also empowered to consider draft regulations referred to it by the Transitional Administrator (s 2). The Constituent Assembly's decision to delegate its legislative review powers to a Specialised Legislative Committee was arguably unlawful within the terms of Regulation No 2001/2, and was the subject of international concern: see the 1 March 2002 Report, above n 3, [37].

96 Regulation No 2001/28 established the Council of Ministers as the representative body of the Second Transitional Government: above n 26. The members of the Council were appointed by the Transitional Administrator to reflect broadly the political composition of the elected Constituent Assembly (s 1). The Council formulated programs and policies for, and supervised, the East Timor Public Administration (civil service). It also recommended draft regulations to the Transitional Administrator (s 3). The Council was delegated executive powers necessary to run the East Timor Public Administration on a day-to-day basis, with its decisions subject to the Transitional Administrator's review and approval.

> operate all public utilities, create a banking system, run schools and pay teachers, and collect the garbage.[97]

In most cases, the peculiar effects of Resolution 1272 upon governmental practice in East Timor came down to the unusual nature of UNTAET as a legal institution. Though the international administration of territory has its precedents,[98] the UN peacekeeping experts could hardly have anticipated the full implications of the UNTAET governance mandate. UNTAET decision-making in the legal sphere suffered accordingly. The UN came to East Timor with the structure, the personnel, the expectations and the bureaucratic apparatus[99] of a UN peacekeeping mission, but with the duty to act, albeit temporarily, as the governing authority. This operational conundrum generated many problems throughout the transition period as UNTAET was buffeted by competing demands from donor countries, international institutions, other UN agencies, and neighbouring countries. Though not precisely jurisprudential in nature, these problems led to protracted debates that went to the very heart of the relationship between the UN and the rule of law.

(a) UNTAET – a peacekeeping mission or a government?

> One of the most significant lessons we have learnt is that a standard United Nations peacekeeping and peacebuilding mission … is not an ideal structure to undertake the broad and expansive role of government in East Timor.[100]

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97 Remarks in respect of the operations in East Timor and Kosovo: The Brahimi Report above n 5, [77].

98 See the research conducted by Ralph Wilde, 'The Complex Role of the Legal Adviser when International Organizations Administer Territory', *American Society of International Law Proceedings of the 95th Annual Meeting*, Washington (2001) 251.

99 Eg, the dogmatic application of the UN procurement rules in the initial phase of the transitional period affected the responsiveness of UNTAET on the ground. It took more than six months before the procurement system for the administration of East Timor was agreed: see UNTAET Regulation No 2000/10 on Public Procurement for Civil Administration in East Timor, 6 March 2000. In that time, a UN office that was familiar with procuring filing cabinets and stationery for UN mission offices was required to procure the infrastructure of an entire country. In his June 2001 presentation to the National Council, the Transitional Administrator remarked, in discussing early reconstruction setbacks, 'the procurement and other bureaucratic restrictions of the UN and the Banks and those imposed by donor countries are largely to blame. We could have moved better and faster', above n 10. For a commentary on the difficulties created by complex governance operations, like UNTAET, being 'cut from conventional peacekeeping cloth', see Astri Suhrke, 'Peacekeepers as Nation-builders: Dilemmas of the UN in East Timor' (2001) 8 *International Peacekeeping* 1.

100 S Vieira de Mello, 'Statement by the Special Representative of the Secretary-General to the Lisbon Donors' Meeting on East Timor', Lisbon (22-23 June 2000). Interestingly, the Brahimi Report recommends that peacekeeping and

(i) Immunity of UNTAET civilian personnel from the domestic law

The limitations of the UNTAET peacekeeping structure immediately presented themselves in the legal sphere, perhaps most demonstrably on the question of UN privileges and immunities. The UN, like other international organisations, has a separate legal identity from the member states that comprise it.[101] Consistent with this distinction in international law, UN personnel are granted the privileges and immunities laid down in the 1946 Convention on the Privileges and Immunities of the United Nations (the 1946 Convention).[102] These privileges and immunities have been relatively uncontentious during the decades when UN missions have been established at the invitation of host states. However, the question arose: are these privileges appropriate in circumstances where the UN is not just carrying out UN business in a foreign country, and is certainly not just representing UN interests, but is actually operating in the role of government? It was hotly debated in East Timor whether it was appropriate for UNTAET civilian personnel to have the privileges and protections of the 1946 Convention. Such personnel were, after all, working as civil servants in a transitional government alongside East Timorese colleagues who, not being UN staff, enjoyed no such special status.

Criminal law was the most obvious locus of these debates. Section 18 of the 1946 Convention granted UN officials immunity 'from legal process in respect of words spoken or written and all acts performed in their official capacity'. In effect, the substantive requirements and procedural steps required for a waiver under section 20 of the 1946 Convention made the criminal prosecution of a UN official in East Timor much more difficult than the prosecution of an East Timorese civil servant.[103] The difficulty faced by UNTAET in trying to promote the rule of law – and the principle of equality before the law – whilst insisting on two classes of civil servant was striking. There was an understandable perception that UN personnel, though administering East Timorese law in the East Timor government, were not accountable under that law to the East Timorese people for their conduct. To its credit, UNTAET obtained the Secretary-General's agreement to the waiving of the immunity from legal process in a number of high-profile criminal cases. In other instances, UNTAET accepted that immunities were unavailable to civilian personnel in East Timor, based on

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governance functions should be integrated to improve their effectiveness. In contrast, Astri Suhrke believes that the 'lessons of UNTAET' suggest such functions should be separated and undertaken through different structures: Suhrke, above n 99, 18.

101 See *Reparation for Injuries Suffered in the Service of the United Nations Case* [1949] ICJ Rep 174.

102 The Convention on the Privileges and Immunities of the United Nations was adopted by the General Assembly of the UN on 13 February 1946, 1 UNTS 15, (entered into force 17 September 1946).

103 Under s 20 of the 1946 Convention, waiver is the 'right and duty' of the Secretary-General exclusively. Waiver requires the Secretary-General to be of the opinion that 'the immunity would impede the course of justice' and waiver in a particular circumstance would be 'without prejudice to the interests of the United Nations'.

particular circumstances.[104] However the UN did not articulate, for the benefit of the East Timorese people, a clear policy as to when immunity would, and would not, be waived. Moreover, UNTAET did not, at any point in the transition period, undertake a sustained analysis of whether it was appropriate for such immunities to be applied at all in East Timor.[105]

Immunity from taxation was also a particularly sensitive matter. Section 7 of the 1946 Convention grants the UN, as an organisation, an exemption from any form of direct taxation, whilst section 18 gives UN officials exemption from income tax. The application of these exemptions in the tiny economy of East Timor narrowed its revenue base dramatically, whilst encouraging heavy use by those officials of East Timor's fragile infrastructure and utilities without fee. Since ETTA and ETPA were arguably components of UNTAET, it was also debatable whether they had the power to tax themselves and their officials. Such a legal impediment would have prevented UNTAET from implementing financial world-best-practice, according to which government officials, such as teachers, are required to pay income tax. Ultimately, the UN decided that government employees were not covered by income tax exemptions, even though the legal basis for this distinction was unclear.

UN mission practice on the granting of privileges and immunities to non-UN officials also significantly influenced the nature of domestic policy debate in East Timor. Under the UNTAET tax regulation, UN contractors were not exempt from paying income tax.[106] Within the community of financial advisers to UNTAET, and amongst the East Timorese leadership, there was unanimity that Headquarters should confirm the status of UN contractors as taxpayers. It was considered that exempting this category of person would erode an already small

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104 Those circumstances included one case in which an international civilian staff member was involved in a motor vehicle accident that resulted in the death of an East Timorese person. In that particular case, the Transitional Administrator explained to the East Timorese public that he insisted to the Secretary-General that the staff member's immunity be lifted, and that he be brought before the East Timorese courts to answer criminal charges: see 'SRSG briefs National Council', UNTAET Press Briefing Note (13 December 2000) <www.un.org/peace/etimor/DB/Db131200.htm>.

105 Amnesty International queried the applicability of these immunities in East Timor, on the same grounds that such immunities had, in fact, been questioned in Kosovo. In Kosovo, the privileges and immunities of UN and KFOR personnel were given domestic legal status by virtue of UNMIK Regulation No 2000/47. Subsequently, the Kosovo Ombudsperson reported that this UNMIK Regulation contravened the principle of the rule of law. Amnesty International, in its July 2001 report on East Timor, highlighted a particular aspect of the Kosovo Ombudsperson's report as having relevancy for East Timor: 'the Ombudsperson notes that the main purpose of granting immunity to international organisations in peacekeeping operation is to protect them from unilateral interference by the individual government of the state in which they are located, but goes on to make the point that this rationale does not apply … where the interim civilian administration, in fact, acts as a surrogate state'. Amnesty International above n 46, s 5.5, 29-30.

106 See UNTAET Regulation No 2000/18 on a Taxation System for East Timor, 30 June 2000.

tax base and make UNTAET – and the future East Timor government – vulnerable to other claims for special treatment. Pressure placed on UNTAET by the UN contractors to follow the practice of previous UN missions and amend the tax regulation to grant an exemption was unsuccessful, but the contractors periodically exploited UNTAET's uncertainty in this area by insisting on their tax-exempt status. The East Timorese were understandably puzzled and dismayed by the policy confusion.

(ii) Conduct of foreign relations by UNTAET

The tension between the role of UNTAET as a UN mission and the role of UNTAET as a governing authority caused particular difficulties in the conduct of foreign relations, including the negotiation of East Timor's entitlements under international law. Many of these difficulties arose from expectations of rigid UN neutrality in affairs involving member states. However, UNTAET was also mandated to advance the interests of a future independent state of East Timor against competing state interests that happened to include, most prominently, the interests of neighbouring Indonesia and Australia. Needless to say, the adoption by UNTAET of a dogmatically neutral position was not domestically palatable and threatened, from time to time, otherwise good working relationships with East Timorese political leaders.

Negotiations conducted by UNTAET with Australia in respect of revenues from rich subsea petroleum deposits in a disputed section of the Timor Sea raised precisely this problem.[107] It had, in early 2000, been doubted within the UN apparatus whether UNTAET had the mandate to engage in any form of negotiations with Australia over these revenues, even if the outcome of those negotiations was merely provisional and subject to the later approval of the government of a sovereign and independent East Timor. UN Headquarters at first advocated a cautious approach in respect of the conduct of foreign relations, reluctant to test the boundaries of UNTAET's powers under international law or UNTAET's authority to represent the East Timorese people on matters going strictly to sovereign rights. After considerable debate, however, authority was granted to UNTAET to negotiate a new Timor Sea Treaty, to replace the Timor Gap Treaty that had been concluded by Australia and Indonesia during Indonesia's illegal occupation of East Timor.[108] Once negotiations were initiated in mid-2000, Australia exercised its right to adopt a relatively aggressive stance, at one point insisting that an independent East Timor would, like UNTAET, have to accept the relatively unfavourable terms of the earlier Australia-Indonesia Timor Gap Treaty. When international and East Timorese negotiators adopted a similarly aggressive stance – rejecting the terms of the

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107 The result of these negotiations was the Timor Sea Treaty between the government of East Timor and the government of Australia, signed on 20 May 2002. At the date of writing, the two governments had submitted the Treaty to their respective domestic treaty ratification processes.

108 That authority was granted following an Exchange of Notes between UNTAET, acting on behalf of East Timor, and the government of Australia on 10 February 2000, which continued the terms of the 1989 Timor Gap Treaty; see above n 14.

Timor Gap Treaty and insisting on revenue terms that reflected the strength of East Timor's claims, at international law, to sovereign rights in the Timor Sea[109] – Australian government representatives made both informal and formal complaints to UN Headquarters and the US government.[110] The clear expectation within the Australian government was that the UN ought not be 'partisan' as against one of its member states, Australia. Against the background of these expectations of UN inactivity, the Timor Sea negotiations posed particular dilemmas for UN officials, who were duty-bound not only to represent the UN, but also to protect and promote the interests of East Timor. Ralph Wilde describes a type of 'functional duality':

> The problem is that, in performing their functions, [UN] officials cannot possibly combine these two contradictory roles. They cannot treat all states equally and advocate on behalf of one state in particular. It follows that, in any given act they perform, officials have to deny their dual personality and choose one role or the other.[111]

In the case of the Timor Sea negotiations, the choice made by officials on the UN negotiating team was clearly in favour of advocacy. It seems highly unlikely that a sovereign East Timor could have negotiated a more favourable Treaty than UNTAET.[112] The point is, however, that in the prosecution of East Timor's

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109 See the address given by Peter Galbraith, one of the leaders of the East Timor negotiating team on the Timor Sea Treaty, at the 9 April 2001 conference and exhibition of the Australian Petroleum Production and Exploration Association, Hobart, Australia, reprinted in 118 *Maritime Studies* (May/June 2001) 1: '[we] are prepared … to continuously negotiate with the Australian government to resolve these matters. We also recognise, however, we may have to wait and that both Australia and East Timor may lose important markets … the Timorese people are a patient people, and, when it comes to their rights, a very determined people. For 24 years, they fought the world's fourth largest country, matching handmade weapons against the latest weaponry. In the end the Timorese prevailed … and, without a treaty based on international law, the East Timorese are prepared to wait patiently for their rights.'

110 Peter Galbraith, a US citizen, is a former US Ambassador to Croatia. The Secretary-General of the United Nations is under no obligation to take into account the views of member states in exercising control of UN peacekeeping forces: see, for instance, D Sarooshi, 'The Role of the United Nations Secretary-General in United Nations Peace-Keeping Operations' (1999) 20 *Aust YBIL* 279.

111 Wilde above n 98, 7.

112 As Chesterman notes, 'The decision to have Peter Galbraith lead the negotiations – rather than, for example, José Ramos-Horta, now Cabinet Member for Foreign Affairs, was a tactical one. Ramos-Horta and Mari Alkatiri, Cabinet Member for Economic Affairs, are candid about the benefits of having the United Nations negotiate with Australia in the place of a very small and very new neighbour. Most importantly, it enables Galbraith … to play 'hard-ball', while confining any ill-will that this generates to an international (and American) official instead of the future Timorese leadership': above n 5, 20.

international economic interests – as with the attempts to promote equality before the law and to develop a robust East Timorese tax base – the Transitional Administrator was required to reverse what appeared to be decades of UN culture and practice in favour of a more demanding model of governance that could hardly have been more experimental, and in which success was matched with failure. Even after the Timor Sea Treaty negotiations had begun, UN Headquarters remained reluctant to cede to UNTAET the authority to establish relationships with foreign governments that took account of East Timor's approaching independence. UNTAET lawyers had, in early 2000, developed a set of diplomatic privileges and immunities to be offered to representatives of foreign governments in East Timor, which were generally regarded as suitable for a country soon to gain independence. Those draft privileges and immunities, reflecting at least so much of the Vienna Convention on Diplomatic Relations[113] as represents customary international law, were designed to be the basis for East Timor to establish enduring relationships with foreign government representatives. However, UN Headquarters took the decision that UNTAET should grant only the same limited privileges and immunities as had been offered in Kosovo,[114] a territory under temporary UN authority, but some way from having its future status determined. This outcome, embodied in UNTAET Regulation No 2000/31,[115] sat uneasily not only with the reality of East Timor's imminent independence, but also with the need for UNTAET to maximise East Timorese input into the legislative processes.[116]

(iii) The role of Headquarters in the domestic legislative process

One lesson for the future is the need for greater clarity on the extent to which UN Headquarters should permit itself, when transitional governance arrangements have been established, to influence or overrule domestic legislation that has passed through a legislative or proto-legislative process. In East Timor, UN Headquarters had a necessary and important role in ensuring that the Transitional Administrator's legislative authority was exercised in accordance with UNTAET's mandate. All draft legislation was forwarded to UN Headquarters for approval prior to promulgation. However, over the course of the transition

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113 Vienna Convention on Diplomatic Relations and Optional Protocols (18 April 1961), 500 UNTS 93.

114 UNMIK Regulation No 2000/42 on the Establishment and Functioning of Liaison Offices in Kosovo, 10 July 2000.

115 UNTAET Regulation No 2000/31 on the Establishment of Representative Offices of Foreign Governments in East Timor, 27 September 2000.

116 Not surprisingly, domestic political support (including National Consultative Council approval) had existed for the earlier draft Regulation. See generally 'Representative Offices of Foreign Governments Regulated', UNTAET Press Briefing Note (4 May 2000) <www.un.org/peace/etimor/DB/Db040500.htm)>. As Chesterman observes: 'when the UN entered East Timor it was reasonable to assume that it was entering an area of potential conflict. Kosovo represented the most relevant experience the UN had … The problem was that the mandate and mindset, once established, was slow to change with the reality on the ground': above n 5, 13-14.

period, the boundaries between the respective law-making roles of UN Headquarters and UNTAET were never well defined. The extent to which Headquarters might offer substantive policy instructions on governmental decision-making, as distinct from technical, legal advice on mission-based issues, was particularly unclear. Given the speed with which legal institutions evolved over the two-and-a-half-year life of the Transitional Administration, the difficulty of defining the boundaries of UN Headquarters' legislative role was hardly surprising. Yet it did seem as if UNTAET's belief in the need for law-making processes to adapt to the evolution and democratisation of East Timor's political life was not shared widely in New York, which adopted a uniform approach to UNTAET's legislative program, insisting on rights of veto until relatively late in the transition and only partially grasping the reality that law-making was progressively and inexorably becoming an East Timorese concern. It was certainly clear, by the time of the National Council's establishment in July 2000, that the Transitional Administrator felt constrained from legislating contrary to the advice he received from the all-East Timorese National Council, regardless of the position taken by Headquarters.[117] By that stage in the transition, any insistence by UN Headquarters that the advice of the National Council be rejected was potentially destabilising, not only for the National Council, but also for UNTAET itself: the legitimacy of UNTAET depended, as far as the East Timorese were concerned, upon its ability to incorporate the views of the representatives of the East Timorese people. Where domestic views did not entirely coincide with UN Headquarters' views or the standard position of the UN, complicated legal choices had to be made. UNTAET lawyers were required to ask themselves: should they take a legal policy position that would support the institutions of the East Timor Transitional Administration, even if it challenged the position that the UN would ordinarily be expected to take? If there was no strict fiduciary duty to an East Timorese client, at the same time it was obvious that an UNTAET lawyer who merely 'consulted' East Timorese opinion and then implemented standard mission practices would have failed both the UN organisation and the East Timorese people. How serious, in other words, was the UN in supporting the fragile legislative process of a nascent East Timorese government that would soon be free from UN stewardship?

(b) Laws on demand: UNTAET's donor dependence

The fragility of UNTAET's capacity to govern was made all the more acute by the fact that multilateral and bilateral donors were responsible for funding almost the entirety of UNTAET's governance activities. UNTAET, a wealthy enough peacekeeping mission, had access to minimal funds from UN sources to actually

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117 This is implicit in the comment from the Transitional Administrator in his briefing to the Security Council of 31 October 2001: 'At this stage UNTAET is, quite clearly, a mission *in support* of the government. Within the parameters laid out in resolutions 1272 and 1338 … all administrative decisions are now taken by the East Timorese themselves': UN Doc S/PV 4403.

run the government.[118] Much has been made of the breadth of UNTAET's mandate under Resolution 1272 and the concentration of power in the office of the Transitional Administrator. In an environment, however, where the donor community had significant funding control, UNTAET's capacity to deliver a viable legal regime for East Timor was, in reality, restricted.[119] Donors exerted a strong influence on East Timor's law-making processes. The International Monetary Fund's (IMF) lobbying strategy to introduce an export tax on coffee, for instance, involved the application of significant pressure upon all actors in the legislative process, including (having failed with the policy-makers) the legal drafters.[120] Likewise, legislative and institutional priorities were often significantly influenced by expectant donors,[121] who were generally not amenable to making funding commitments to sectional government projects without legislative regimes in place, even where those regimes were, as a matter of law, unnecessary.[122] Donor demands for speedy legislative action were not always reciprocated with the speedy flow of donor dollars.[123]

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118 The UN Assessed Contributions Budget for UNTAET met the salary and associated costs of UN defence and law-enforcement personnel in East Timor, as well as UN personnel working in the East Timor Transitional Administration and, later, the East Timor Public Administration. For a time, funds from this source were also available to support the operation of key infrastructure related to the peacekeeping mission, such as the Dili airport. However, funds from the Assessed Contributions Budget were not generally available to meet many of the other critical operating costs of transitional governance, including in the education and health sectors.

119 The lack of resources to support the East Timorese judicial system has been the subject of sustained attention and will not be repeated here, except to note the Transitional Administrator's following statement to the Security Council on 30 July 2001: 'Implementation requires resources. These have been sorely lacking in East Timor from the very start … For the future, should we ever be called on to administer justice, we must be in a position to do just that and we must be provided with the means to ensure that we have no excuse for not doing so.': UN Doc S/PV 4351.

120 Interestingly, whilst the export tax was supported by the early National Consultative Council on a 'provisional basis', this tax was later repealed by the more broadly representative National Council. See UNTAET Regulation No 2000/12 on the Establishment of a Provisional Tax and Customs Regime for East Timor, s 5; and UNTAET Regulation No 2001/20 to Amend Regulation No 2000/18 on a Revenue System for East Timor, 21 July 2001, s 9.

121 There are many other examples. Mention has already been made of the Timor Sea negotiations, which culminated in the signing of a bilateral Treaty between East Timor and Australia on 20 May 2002 (The Timor Sea Treaty). Donor countries from time to time sought, generally unsuccessfully, to influence the course of those negotiations. A speedy conclusion to Treaty negotiations was favoured by all donor nations who were looking for an exit strategy from their commitments in East Timor. From the date of the Popular Consultation to 20 May 2002, the United States, the European Community, Japan and Australia all had corporate citizens with investments in parts of the Timor Sea to which East Timor had, and has, a defensible claim under international law.

122 As in the case of the Community Empowerment Project: see UNTAET Regulation No 2000/13 on the Establishment of Village and Sub-District Development

UNTAET's financial dependence as a transitional administration also gave multilateral and bilateral donors greater scope to influence the very substance of the laws themselves. The negotiation process for the Community Empowerment Project was an early indicator of such influence. The Project, advocated by the World Bank and the Asian Development Bank in January 2000, was designed to make small grants of money available to East Timorese political groups, conditional upon the acceptance of 'democratic' practices by those groups. As a further condition of the grant, UNTAET was required to pass a regulation giving these political groups legal status as local government bodies. UNTAET initially resisted this legislative condition, with the support of some East Timorese leaders,[124] on the basis that such legislation would pre-empt a proper constitutional debate within the East Timorese community regarding an appropriate structure of government. There was no obvious reason why, as a matter of law, these bodies could not have acquired corporate personality through mechanisms under the existing Indonesian law. Eventually, a regulation was prepared in which certain compromises were struck between the UN and the World Bank, including an agreement to dub the fund recipients 'development councils' rather than give them recognition as local government bodies.[125] However, with the World Bank acting as trustee for international donations to aid East Timor's reconstruction, the ability of UNTAET to shape this regulation was constrained, and the stated concerns about the pre-empting of constitutional debates were put to one side.[126]

Councils for the Disbursement of Funds for Development Activities (UNTAET Regulation No 2000/13), 10 March 2000.

123 Donor desire for legislation accelerated the timing of the passage of UNTAET Regulation No 2000/10 on the Establishment of a Commission for Reception, Truth and Reconciliation in East Timor, 13 July 2001. Nonetheless, by the end of May 2002, US $1.3 million in funds required to ensure the Commission's two-year period was still outstanding, according to the Commission's web site <www.easttimor-reconciliation.org/Funding.htm>. This outstanding amount included a number of funding grants pledged by bilateral and multilateral donors in October 2001.

124 Including Mari Alkatiri, later to become Chief Minister following the 30 August 2001 elections.

125 See Regulation No 2000/13, above n 122. In May 2000, UNTAET had prepared a draft law to give legal recognition to district-level East Timorese decision-makers (draft Regulation on the Establishment of District Advisory Councils), but this law was never promulgated.

126 Anne Orford has argued that the 'narrative of humanitarian intervention operates to construct a sense of the "benevolent character of international administration" by entities with global economic power': A Orford, 'Self-Determination in an Age of Intervention', Monash University (2001) <www.law.monash.edu.au/castan centre/conference2001/papers/orford.html)>. Donor countries also applied significant pressure upon UNTAET to pass legislation granting income tax exemptions to international staff of international NGOs operating in East Timor. UNTAET's tax regime already provided for all registered NGOs to import goods for the 'public benefit' free from import duty, excise duty and sales tax, and to be exempt from income tax unless they made a profit. However, under pressure from Ireland and the United States, the Security Council yielded on this point (4308th

(c) Capacity-building

During the second phase of the transition, from July 2001, it became clear that all of UNTAET's legal dilemmas, both jurisprudential and operational, crystallised around the problem of capacity-building. After East Timor's independence, how many East Timorese would be familiar with the legacy of UNTAET's legislation? East Timor had a relatively large number of local activists and politicians who were familiar with international human rights law; but how many could, for instance, draft foreign investment legislation, prepare lease contracts or advise a government on how to negotiate petroleum production sharing contracts? How committed was the UN to creating a sustainable community of East Timorese lawyers and civil servants, who might be able to understand the difference between a Cabinet member and a judge, and who might have the skills relevant to East Timor's future? A satisfactory resolution of the specifically jurisprudential crises might have created an environment in which the East Timorese could have learned more about ordinary governmental processes. There was not much to be learned by East Timorese bystanders during the quasi-theological debates within UNTAET regarding special-purpose tax exemptions or the respective roles of mission and headquarters, particularly where those debates were resolved in favour of standard UN peacekeeping practice. It is, of course, questionable whether such dilemmas were ever really capable of resolution at the policy or operational level, given the duality of UNTAET's mandate.[127] In the early part of the transition period, the scale and severity of the task of establishing a functioning administration meant that, generally speaking, capacity-building could only be a second-order priority.[128] Infrastructure was crippled, militia activity was continuing, many East Timorese people were still in refugee camps or internally displaced, and deployed UN personnel were small in number. These practicalities shielded from view, at least initially, the

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meeting, 5 April 2001, S/PV4308), followed by the Transitional Cabinet itself: see 'Cabinet agrees to NGO Country Agreement for East Timor', UNTAET Press Briefing Note (6 June 2001) <www.un.org/peace/etimor/DB/Db060601.html>.

127 Ralph Wilde identifies two common objectives of international territorial administration: first, the performance of certain vital administrative activities until local capacity exists and can be exercised, and second, the promotion of the viability of the territorial unit as a political entity. He argues that advancing either of these objectives necessarily undermines the other (and *vice versa*), with the result that these objectives cannot be achieved in equal measure as part of any one mandate: R Wilde, 'The Ambivalent Mandates of International Organisations in Bosnia-Hercegovina, Kosovo and East Timor', *Australian and New Zealand Society of International Law Proceedings of the Joint Meeting with the American Society of International Law* (2000) 319 <http://law.anu.edu.au/anzsil/ANZSIL newconferences.html>. Inadequacies in planning at UN Headquarters have been well-documented: see, eg, Gorjao, above n 6, and Suhrke, above n 99, 6-8.

128 According to James Fox, 'the extraordinary destructive events in East Timor during September 1999 required a scale of planning by the UN that would probably have been outside the scope of any contingency planning had it occurred': 'East Timor: Assessing UNTAET's role in building local capacities for the future', Council for Asia Europe Co-operation Conference on Comparing Experiences with State Building in Asia and Europe (2001) 9.

consequences of relatively poor planning on the way in which the capacity-building element of the mandate might be implemented.[129] In time, however, the lack of planning for skills transfer became apparent.[130] UN Headquarters had recruited many international personnel who had neither the governmental experience nor the relevant languages (Tetum, Indonesian and Portuguese) needed to assess local capacities and work effectively with East Timorese counterparts in the civil service.[131] Overcoming these inadequacies in planning meant that it was relatively late before UNTAET understood that, 'we, in the UN, have too often looked for managers rather than mentors, who have thus not seen the need to deliver in the vital area of skills transfer'.[132] It had been assumed, incorrectly, that those who could 'do' could also teach and mentor.

This assumption certainly seemed to prevail so far as the legal sector of the Transitional Administration was concerned.[133] Throughout the transition period, the Office of the Principal Legal Advisor (OPLA) provided legal advisory and legislative drafting services to the Transitional Administrator. This reflected UN mission-based practice. However, OPLA did not evolve with the political and administrative transition as readily as other offices that also enjoyed a place within the peacekeeping mission structure.[134] The UN was apparently content for OPLA, staffed almost entirely by non-East Timorese UN officers,[135] to undertake little or no capacity-building for the benefit of the future government.

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129 Fox argues that, 'Too little was done, at the outset of the mission, to identify and evaluate local capacities and there were relatively few training programs to build on the capacities that did exist.': ibid 6.

130 The Brahimi Report recommended a number of measures to improve the UN's general peacekeeping planning and deployment capacity. For instance, it recommended that the Secretary-General be allowed funds to begin planning for anticipated peacekeeping operations before the Security Council formally approves such operations. It also recommended that a centralised taskforce be established in UN Headquarters to plan each peacekeeping operation from its inception.

131 The post-independence government and civil service also faces the 'archival legacy', as Fox calls it, of key legal and government documents created during the UNTAET period being predominantly in English: above n 128, 9.

132 S Vieira de Mello, Statement at the Donors' Meeting on East Timor, Canberra (14 June 2001) 9-10.

133 The impact of a critical shortage of lawyers (particularly public defenders) and interpreting and translating services for the East Timorese courts has been detailed elsewhere: see, eg, S Pritchard, 'United Nations Involvement in Post-Conflict Reconstruction Efforts: New and Continuing Challenges in the Case of East Timor' (2001) 24 *University of New South Wales Law Journal* 183.

134 Eg, the UNTAET Human Rights Office was, like OPLA, located in the mission-structure, rather than the East Timor Transitional Administration Structure, and did not have a Cabinet Member to represent directly its position in the Cabinet. Nonetheless, the Human Rights Unit, unlike OPLA, focused upon capacity building, and obtained funding under the Consolidated Fund for East Timor Budget for ongoing human rights activities.

135 In February 2000, two East Timorese lawyers, Serzio Dias Quintas and Benevides Barros, were hired by OPLA. Soon after they were hired, one was appointed to the bench, the other took a postgraduate scholarship overseas.

Had it been attempted, there were obvious obstacles that might have hindered this capacity-building process, including of course the severe shortage of qualified East Timorese lawyers and the relatively poor salary scales for civil service positions as compared with the salaries offered by the courts or by non-governmental organisations (NGOs) in the legal sector. Even so, it was open to UNTAET to offer internships or clerkships to university students who might, over time, have developed legal skills suitable for government; no such program was instituted. Accordingly, ETTA had the short-term benefit of the legislative drafting and legal advice services of OPLA's international staff – funded by the UN's own generous Assessed Contributions budget[136] – but received no assistance in the development of a sustainable indigenous legal advisory and drafting capacity within government.[137] In all probability, therefore, the post-independence government will need to look to technical assistance in this area for some time to come, where otherwise an embryonic Attorney-General's Department of East Timorese lawyers and paralegals might have existed.[138]

III. A Transitional Administration in Transition: Constitutional Development

As the Transitional Administration reached its later stages, the question of local capacity in the legal sector became part of the larger question of East Timor's political viability as an independent nation. One of the most crucial areas in which UNTAET was required to balance international standards against local exigencies was in the politically-charged process of developing a legal framework in which a constitution for an independent East Timor would be adopted.[139] At the centre of this framework was UNTAET Regulation

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136 For an explanation of the Assessed Contributions budget, see above n 118.

137 Eg, the Consolidated Fund for East Timor Budget for 2001-2002 did not make a specific allocation for the establishment of a government legal advisory mechanism. Fourteen positions to support the legal and judicial system have been identified as necessary in the 100-strong Civilian Support Group of the post-independence UN Support Mission in East Timor. This excludes personnel available to support the Serious Crimes Unit and the Human Rights Unit: 'Report of the Secretary-General on the United Nations Transitional Administration in East Timor' (17 April 2002) UN Doc S/2002/432, 11.

138 ETTA itself did not push for the creation of an indigenous legal capacity within government, apparently content to rely indefinitely on legal assistance from lusaphone countries.

139 Resolutions 1272 and 1338 contained no specific constitution-making mandate. The authors can find no record of a debate within UNTAET or the East Timorese community as to whether, in the context of East Timor, a constitution was a necessary precondition to independence. Despite the fact that, historically, most newly independent states come into existence without a constitution, it was always assumed that East Timor could not emerge from UNTAET authority without one. This was the assumption from the UNTAET 'brainstorming' sessions in early 2000 and the assumption continued. See the address of Sergio Vieira de Mello at the First CNRT Congress, Dili, 21 August 2000: 'East Timor will claim its full independence once a democratically elected government is formed, under a democratically mandated constitution.' The fact that this assumption apparently

No 2001/2, the law establishing the basis of the election of a Constituent Assembly to draft a Constitution that would enter into force on East Timor's independence.[140] That Regulation was promulgated on 16 March 2001 for an election on 30 August 2001. It was followed by a regulation prescribing electoral offences[141] and a directive establishing a process of consultation with the East Timorese people on the desired contents of their future Constitution.[142]

(a) Democratic legitimacy: assembly or convention?

The central problem in establishing a legal framework for an East Timorese constitution was that UNTAET – charged with the responsibility of creating the conditions for democratic legitimacy – had no such legitimacy itself. Without any pre-existing democratic institutions in East Timor, it was logically impossible for UNTAET to avoid dictating the terms of that democracy. An election seemed the obvious way forward, but that did not entirely solve the problem. If there is to be an election, who drafts the electoral law? Who appoints the electoral commissioners? What happens to UNTAET's powers after the election? To what extent was democracy to be a lesson from the UN, and to what extent was it to be an indigenous process? The unsettling answer was, of course, that it was to be a lesson: UNTAET would draft the electoral law, appoint the commissioners and UNTAET's powers would continue. The UNTAET political transition was thus faced, whilst developing the electoral framework, with a minor crisis of legitimacy. Though it is conceivable that UNTAET may have been able to claim that the electoral law was the sole creation of the National Council of Timorese Resistance and the East Timorese National Council, as things transpired this was impossible. The UN was repeatedly called upon to introduce standards from international law into the legal framework of the election, without having any reliable guide (in the absence of any pre-existing democratic legitimacy) as to whether those standards were acceptable to the people of East Timor. In international law terms, the problem was how to balance a perceived need for so-called 'first generation' rights with the clear absence of 'third generation' rights: that is, how to balance a desire to see the election and the constitutional text itself reflect international best practice (including the protection of fundamental human rights) with an often contradictory desire to deliver to the East Timorese people on the promise of self-determination, including East Timorese control over the process leading to the creation of their constitution.[143]

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went unchallenged, even by those who advocated a slower transition timetable, no doubt derived from the UN's culture of promoting constitutionalism as an integral part of promoting human rights.

140 Regulation No 2001/2, above n 25.

141 UNTAET Regulation No 2001/11 on Electoral Offences for the Election of a Constituent Assembly, 13 July 2001.

142 Directive No 2001/3, above n 91.

143 Catriona Drew has recently argued that the right of self-determination can be understood as conferring not only the well-recognised right of a people freely to determine their political and territorial destiny, but also a right to more substantive

This problem first arose as a concrete policy issue in relation to the question of whether UNTAET should give the constitution-drafting mandate to a body that was elected or unelected. In November 2000, a senior UN consultant with constitutional law expertise presented the argument to the Transitional Administrator that the East Timor Constitution should be prepared by an appointed 'Constitutional Convention', consisting of East Timorese lawyers and intellectuals, who would then submit the constitutional text to a popular referendum. The Transitional Administrator himself had earlier predicted the creation of such an unelected Convention,[144] having seen the recommendations of the National Congress of the CNRT in August 2000,[145] though the Convention model had by no means attracted universal support within the UN apparatus. The Convention proposal, once it had been elaborated by UN consultants, found some influential proponents in the East Timorese leadership,[146] but it became clear that the Convention model was not as popular amongst the East Timorese leaders as the August 2000 Congress recommendations might have suggested. The international proponents of the Convention model suggested that to grant a constitutional mandate to an elected body would be politically destabilising: too much power would be transferred in the ballot box, too quickly, from the UN to an elected assembly. It was also suggested that an elected body with a constitutional mandate would produce an unsophisticated Constitution for East Timor, since politicians would lack the familiarity with international legal standards known to those (unelectable, it was thought) East Timorese with relevant expertise. However, once it became clear

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entitlements. Drew argues that, 'while its normative contours are yet to be definitively settled', the law of self-determination confers on a people a substantive entitlement to, *inter alia*, territorial integrity, permanent sovereignty over natural resources, cultural integrity and economic and social development. C Drew, 'The East Timor Story: International Law on Trial' (2001) 12 *European Journal of International Law* 651, 663.

144 See the address of Sergio Vieira de Mello at the First CNRT Congress, Dili, 21 August 2000: 'A draft constitution will be prepared by a Constitutional Commission, taking into account elements drawn from the people. I believe that this Commission should be named by the new National Council, since it will be the most representative body available, though committee members themselves need not be NC members.' (copy on file with the authors)

145 The Congress recommended that a Commission 'made up of experts on constitutional law' be established to draft the constitution, that would then be approved by an elected Constituent Assembly: see 'Outcomes of the CNRT National Congress 21-30 August 2000 (English Version)', 2-28.

146 Including, prominently, the support of the then Cabinet Member for Foreign Affairs, José Ramos-Horta. In his testimony to the National Council at public hearings on the political transition on 19 January 2001, he stated that, 'The constitutional convention/conference would be formed on the basis of consultation – not elections. This would be more representative than an elected body, and would have wider representation.' Under Ramos-Horta's proposal, following the drafting process an Assembly would be elected, and would be able to make changes to the draft constitution for a period of one month before approving it. This proposal was supported at the hearings by Yayasan Hak and the NGO Forum.

that CNRT supported an elected constitutional drafting assembly,[147] and that the National Council agreed, the Transitional Administrator truncated this debate by granting the constitutional mandate to an elected Constituent Assembly, which once elected would have the power to adopt the constitution itself, and the power to dispense with the additional step of a referendum if it so chose.[148] Later, at a ceremony for the promulgation of the Constituent Assembly electoral law on 16 March 2001, the Transitional Administrator implied that any alternative would have been less than democratic: 'every decision about the future of East Timor – from those relating to the institutions of its government, to the protection of fundamental human rights, to the resolution of a host of essential questions – will be the product of an initial democratic act'.

Once the initial debate was over, the decision in favour of a Constituent Assembly was widely supported within the UN on the basis of two premises: first, that UNTAET should minimise its own role in the constitution-drafting process; and second, that this model was favoured by a majority of the East Timorese representatives in the National Council.[149] The decision to maximise the democratic legitimacy of the Constitution was not, however, without its difficulties. There were lingering doubts as to whether the National Council – itself appointed by UNTAET – really represented the views of the East Timorese people when it had stated a preference for elections, and when it had approved the electoral law.[150] Also, there was a constant anxiety in the months leading up to the August 2001 election that an East Timorese electorate with no experience of free and peaceful ballots might be drawn into violent campaign practices, precipitating a politically unstable final stage in the transition. Moreover, observers realised that if, indeed, the quality of the constitutional text did suffer

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147 On 12 December 2000, the National Council endorsed a political calendar, which included an election for a constituent assembly. Xanana Gusmão proposed the calendar, in his capacity as president of the CNRT.

148 This decision was surrounded in controversy: see the Portuguese newspaper *Lusa*, 'Vieira de Mello Accepts Resignation of Portuguese Constitutionalist' (11 December 2000).

149 The National Council held extensive public hearings on the nature of the transition to constitutional democracy in January 2001, reaching a decision in favour of a Constituent Assembly in March 2001, by which stage Security Council Resolution 1338 of 31 January 2001, acknowledging the necessity of UNTAET-conducted 'elections' in East Timor, had already been issued: SC Res 1338 (2001).

150 In fact, members of the National Council proved themselves to be remarkably independent of the hand that picked them. Very early in its life, the National Council tested the extent of its inherent powers as a legislature. It sought to compel the production of documents from the executive and to compel members of the public service to appear before it: see the Resolution of the National Council of 16 November 2000. This prompted the UNTAET Office of the Principal Legal Advisor to write to the National Council on 27 November 2000, advising the Council that it had exceeded its powers. In June 2001, despite intense lobbying from the IMF and the executive, the Council refused to approve a draft Regulation that would have established a Banking and Payments Authority, arguing that the establishment of such an important institution should be left to an elected government.

at the hands of untrained politicians, then the UN would have some difficulty in claiming success in bringing East Timor to independence. No doubt, it was for this reason that even the strongest proponents within the UN system of a Constituent Assembly with full 'plenary' power did not restrain themselves from making recommendations as to the Constitution's actual contents.[151]

(b) The electoral system

Even after the decision had been made in favour of a Constituent Assembly, the preparation of the electoral law gave rise to a repetition of this fundamental problem of legitimacy. The most significant challenge with the electoral law was the drafting of the Constituent Assembly mandate itself. Aside from the modalities of the election, what precisely were the Assembly's responsibilities to be? No guidance was provided to UNTAET by the Security Council.[152] To the extent that UNTAET needed an exit strategy from East Timor, it also had a strong interest in a 'practical' Assembly mandate that provided a deadline for completion of the Constitution, as well as a mechanism for adoption that would not be too difficult to satisfy. Against these interests, however, lay the argument that the Assembly, as a democratically elected body with constituent powers, should be free to define for *itself*, within the scope of Resolution 1272, the limits of its authority. When UNTAET prepared the mandate provision in the electoral law that was passed by the National Council, the latter view prevailed, though not without meeting considerable resistance from those within the UN system who did not want to see an indigenous source of authority that might conceivably compete with the UN. For that reason, there were real limitations to the Constituent Assembly mandate. The mandate, as promulgated, provided for a very tight 90-day timetable for the adoption of a Constitution, requiring for adoption only the vote of 60 of the 88 representatives of the Assembly.[153] There

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151 See, eg, Peter Galbraith, then Cabinet Member for Political Affairs and the Timor Sea, in his testimony to the National Council on 20 January 2001: 'Constitutions are more likely to achieve consensus if they avoid social and economic questions which are better handled in legislation.'

152 Close analogies, however, were to be found in the history of the UN: see eg, the mandate of the Namibian Constituent Assembly set out in the Further Report of the Secretary-General Concerning the Implementation of SC Res 435 (1978) Concerning the Question of Namibia, UN Doc S/20967/Add.1, 29 November 1989.

153 The 90-day timetable, similar to a timetable used in Cambodia, had been controversial from the early stages of discussions. In February 2001, East Timorese NGOs, represented in the National Council by then Yayasan Hak director Aniceto Guterres, presented to the National Council a draft Regulation that set out a timetable that involved the concurrent operation of the Constituent Assembly and Constitutional Commissions for a nine-month period. The advocates of a slower timetable, including the UNTAET Human Rights Unit, argued both for a longer constitutional consultation period, and for the need for a more gradual transition: see, for instance, 'A Gradual Path to full Sovereignty in East Timor' a paper circulated in April 2001 by East Timorese NGOs. On 18 April 2001, Aderito de Jesus Soares and Filomena Barros dos Reis wrote to the Director of the Political Affairs Office, arguing that the establishment of Constitutional

was a requirement that the Assembly refer to the results of community consultations on the Constitution. The Assembly was given legislative powers, though (unlike its predecessor, the National Council) it did not have the power to initiate regulations. The mandate included, at the recommendation of UN Headquarters, a provision that prevented the Constitution from entering into force prior to the date on which East Timor's independence was to be confirmed.[154]

Within these constraints, however, the mandate of the Constituent Assembly as set out in the electoral law was nonetheless very broad; and the constraints themselves proved to be somewhat illusory. The strong view, put by some within UNTAET, that the Assembly should have no prescribed mandate whatsoever, being free to determine its own powers, did not win UNTAET support. However, there was nothing to stop the Assembly from drafting a Constitution that had an additional adoption requirement; for instance, a requirement for a referendum. The 90-day timetable requirement also proved itself to be flexible, with decisions of the Transitional Administrator in December 2001 and February 2002 ultimately granting the Assembly, at its request, a further three months to complete its work.[155] UN Headquarters had suggested a provision in the electoral law that would have limited the powers of the Constituent Assembly to those 'explicitly conferred on it by the present Regulation'. However, this suggestion was rejected by UNTAET, preferring instead to accommodate the possibility that the Assembly might have been unwilling or unable to work within the precise terms of the mandate: it was suspected, in particular, that the Assembly might be unwilling to produce a Constitution to order, and might itself prefer to have independence declared (and presumably to have governed as an East Timorese legislature) without a Constitution having been adopted. Moreover, the Assembly did not feel constrained to follow the results of the constitutional consultations conducted by the Constitutional Commissions. In the end, the Security Council apparently recognised the breadth of the mandate provisions in the electoral law, ceding a large measure of control over the final date for the formal recognition of East Timor's independence.[156]

In broad terms, then, the architecture of the election reflected a commitment by UNTAET to allow, as far as possible, the East Timorese to define the main

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Commissions in East Timor under the UNTAET and National Council proposed timetable 'will be seriously insufficient both in terms of substance and process', and declined an invitation to sit on the selection panel for Constitutional Commissioners.

154 The mandate provision is set out in s 2 of Regulation No 2001/2, above n 25.

155 The Constitution, originally planned for adoption in December 2001, was finally adopted on 22 March 2002 (72 votes in favour, 14 against, and 1 abstention).

156 On 19 October 2001, 73 members of the Constituent Assembly voted in favour of 20 May 2002 as the date for the international recognition of East Timor's independence. However, the first argument advanced in the Assembly by Chief Minister Alkatiri was that 20 May 2002 was the latest date on which the UN, now struggling for resources to support missions in Afghanistan, was prepared to transfer sovereignty to East Timor.

elements of the electoral law and the main elements of the final stages in the political transition, going so far as to think the unthinkable: an independent East Timor without a formal Constitution to mark the abiding legacy of the UNTAET period. This commitment to principles of self-determination, reflected in the mandate provisions of the electoral law, was tested most spectacularly in March 2001, around the question as to whether the electoral law was required to provide for mandatory quotas for women. It was the UNTAET Gender Affairs Unit that had first proposed the idea to the National Council that the electoral law include a provision requiring all political parties, as a condition of their participation, to field a female candidate in every third position on the party list.[157] In the January 2001 public hearings on the transition calendar, the idea was taken up in the Council by the new centre-right party Partido Socialista Democratica (PSD). A quota provision was accepted by the influential Political Affairs Committee of the Council,[158] but after a protracted debate on 13 March 2001, the National Council in a plenary session voted against the proposal.[159] The quota proposal was only rejected, however, after representatives of the UNTAET Political Affairs Office and the UNTAET Electoral Affairs Office voiced to the National Council their opposition to the quota provision. Both these offices argued that any quota provision would undermine the legitimacy of the electoral result to the extent that it would prevent political parties from presenting to the electorate those candidates who, regardless of gender, would be preferred by East Timorese voters. Representatives of the Political Affairs Office went further still, suggesting that any quota provision would be deemed unacceptable by UN Headquarters, presumably as a violation of the principle of self-determination. Additional arguments were also presented to the National Council, including the suggestion that mandatory quota provisions, although they may increase the number of women elected to the Constituent Assembly, would on the basis of international experience be unlikely to elect women of true political influence. Following the vote in the National Council to defeat the quota submission, the Transitional Administrator was immediately petitioned by international and East

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157 Regulation No 2001/2 provided for an election based predominantly on a 'closed party list' system. This meant that voters had the opportunity to vote for the political party of their choice, but would be unable to vote for individuals in the party list: the party itself would choose the order of candidate priority within the party.

158 On 8 February 2000, the Committee tabled in the National Council a report recommending that 'there be a minimum 30% quota of women fielded by each party'. However had the National Council accepted the proposal, the percentage of guaranteed female representation in the Constituent Assembly would have been less than 30 per cent (in fact, around 28 per cent) because the quota provision would, under the proposal, only have applied to the national electorate, not to the 13 district electorates.

159 Thirteen members voted against the proposal, seven voted in favour and three members abstained. With one exception, all the women members of the National Council voted against the quota provision. All members of the National Council, who spoke against the proposal, expressed support for high levels of women's candidacy in the Constituent Assembly election.

Timorese[160] women's groups to exercise his legislative prerogative under Resolution 1272 by promulgating the law complete with a quota provision, notwithstanding the views of the National Council. A compromise was finally struck, with the Transitional Administrator accepting the decision of the National Council but insisting on the preparation of a package of UNTAET assistance for women candidates.[161] At the signature of the electoral law, the Transitional Administrator publicly expressed his own personal disappointment at the fact that the National Council had rejected both mandatory and incentive-based quota provisions.[162] Of the 992 candidates who registered for the election, 268 were women. Following the August 2001 election, approximately 28 per cent of seats in the Assembly ended up being held by women,[163] notwithstanding the absence of quotas.[164]

(c) The Constitution

Once the electoral law had been settled in March 2001, the election for the Constituent Assembly proceeded peacefully and with results that were generally accepted in the East Timorese and international community. The Assembly convened on 15 September 2001, and East Timor immediately became the focus of attention for UN agencies with an interest in constitutional protections and for constitutional lawyers worldwide. UNTAET, for its part, realised that the measure of its success would be judged by both the integrity of the drafting process in the Assembly and, of course, the quality of the final constitutional document. It is outside the scope of this article to trace the historical evolution of

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160 Those groups included the Network of East Timorese Women.

161 This assistance included office space, transport and increased public broadcasting time to political parties which met a 30 per cent quota of women candidates. The package also provided women candidates with training in the skills of campaigning and organising.

162 On 16 March 2001, at a well-attended ceremony in Dili for the promulgation of UNTAET Regulation No 2001/2, he stated: 'Personally, I favoured the principle of incentive-based quotas.'

163 See, the Secretary-General's progress report to the Security Council, 24 July 2001, UN Doc\ S/2001/719, [2] and the Transitional Administrator's briefing to the Security Council on 10 September 2001, UN Doc S/PV 4367.

164 In the National Council's discussions regarding the electoral law, the drawing up of electorates was relatively uncontroversial. A proposal was put forward by the UN and the Political Affairs Committee of the National Council to maximise the diversity of the Constituent Assembly by drawing 75 of the 88 members from a single national electorate. This proposal, which on its face worked to the disadvantage of the major party, Fretilin, was accepted without much discussion. Some Australian lawyers, including Justice John Dowd (representing the Australian Section of the International Commission of Jurists) and Peter Wertheim, in correspondence presented to the National Council in February 2001, had recommended that East Timor be divided into 40 single-member constituencies, and a small number of larger constituencies. See Dowd, 'Proposal for the structure of government and the electoral system of East Timor', and Wertheim, 'Proposals for an electoral system in East Timor' (copies on file with authors).

the East Timor Constitution from the preparation by Fretilin[165] of a draft constitution in 1998 to the adoption of the final constitutional text of the Democratic Republic of East Timor by the Constituent Assembly on 22 March 2002 and its entry into force on 20 May 2002. The approach taken by UNTAET to that process, however, gave rise to some of the most delicate balancing acts of the transition.

The most immediate policy decision for the Transitional Administrator in September 2001 was the extent, if any, to which he could intervene in constitutional debates in order to bring the Constitution into greater conformity with the standards expected or desired by the UN. How could UNTAET create the conditions for the best possible East Timorese Constitution but without prejudicing the autonomy of the Assembly, a body that (unlike UNTAET) enjoyed democratic legitimacy? UNTAET initially maintained a distance from the substance of the Constitution itself,[166] instead simply trying to ensure that the Fretilin-dominated Assembly was properly staffed and had access to a range of independent international advisers.[167] UN officials with constitutional law and electoral experience were assigned to follow the drafting process and report back to the Transitional Administrator, recommending that from the outset the work of the Assembly would be of significance for the mission when it impacted upon the fulfilment of UNTAET's mandate under Resolutions 1272 and 1338, but that UNTAET ought not adopt a position on those parts of the Assembly's activity that fell within its plenary power to prepare a constitution for an independent country. It became common practice, however, for the Constituent Assembly's consultative mechanisms – which had been designed primarily to allow members of the East Timorese public to comment on the drafting process – to be used by components of the UN administration to provide advice directly to the Constituent Assembly on the contents of the Constitution.[168] Moreover, in December 2001, some initial concerns were relayed from the Transitional Administrator to UN Headquarters: the Assembly was not adhering to its own rules and procedures and there was a lack of transparency in the drafting process. Constitutional drafts and other relevant documents were not generally being

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165 Frente Revolucionaria de Timor Leste Independente (Revolutionary Front of Independent East Timor).

166 See S Vieira de Mello, 28 June 2001 presentation to the National Council: 'I do not want to see a Constitution written by a foreign expert or by UNTAET international staff. Indeed, I believe the transition will have partially failed if that were the case. Your Constitution should be based on your own thoughts, written in your own language and in your own words, by you. Only then will it be a document owned by the Timorese people themselves. If I know you at all, I do not see you accepting any alternative approach.'

167 UNTAET cooperated with the Asia Foundation in arranging for constitutional experts from Hong Kong, the United States, Mozambique, the United Kingdom, Australia and Sri Lanka to provide advice to the Constituent Assembly.

168 In particular, the human rights, health and environment offices in the UN Transitional Administration addressed the Assembly and provided it with written submissions.

made available by the Assembly to the East Timorese or international public.[169] Some substantive problems with the initial draft text presented for debate within the Constituent Assembly were identified as well: for example, there was no explicit provision guaranteeing security for judicial tenure, significant political and economic rights were contingent upon East Timorese citizenship, and the right to enforce constitutionally entrenched rights extended only to a restricted group of office holders. On 22 February 2002, the Special Representative of the Secretary-General conveyed by letter the UN's views on some of these issues to the heads of the political parties represented in the Assembly, in relation to a further provisional draft adopted on 9 February 2002. The suggestions in this letter were variously accepted,[170] or ignored,[171] by the Constituent Assembly, which it seems had generally maintained a strong sense of its own autonomy from the UN administration.

However, the extent of East Timorese authority over their Constitution could be exaggerated. In view of the UNTAET experience, we would argue for a complex or descriptive model of constitutionalism in particular, and governance in general. It is one thing for UNTAET to have set up a process where East Timorese had a large measure of sovereign control over the formal constitutional drafting process. It is true that UNTAET went to considerable, perhaps extraordinary, lengths to ensure that there was little or no interference with the right of the East Timorese people, through the elected Constituent Assembly, to prepare whatever sort of constitution they wanted; and that right was exercised. However, it is another thing to identify a clean break on 20 May 2002 between UNTAET 'governance' and East Timorese 'sovereignty'. There was, we believe, no such break, and the Constitution of 20 May 2002 does not stand alone as a legal text marking the end of transition. In an important sense, UNTAET from the very beginning – from the very first UNTAET Regulation – had created an earlier Constitution that East Timor had no choice but to inherit. It was a Constitution that continued, post-UNTAET, a tension between East Timorese and imported legal institutions. This earlier 'UNTAET Constitution', if we can call it that, had as central and regulating texts Security Council Resolutions 1272 and 1338: but included (by virtue of Regulation No 1999/1) a corpus of Indonesian law and practice, as well as UNTAET legislation and government practice. It included, at least in theory, a strong commitment to international law

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169 This concern was also emphasised by the UN High Commissioner for Human Rights in her 1 March 2002 Report: '[I]n emphasising the "representative democratic" model of government, the work of the Assembly itself seems to minimise the right of individuals in East Timor to participate in political life by contributing to political debate surrounding the Constitution. … [T]here is a popular perception that, to a large extent, the drafting process has focused on the prepared drafts of political parties …': above n 3, [46].

170 As was the case, for example, in respect of the citizenship point. The final text of the Constitution narrowed the range of rights available only to East Timorese citizens. Freedom of speech, freedom of assembly, freedom of association and freedom of movement were extended to all persons.

171 As was the case with the UN's arguments on security for judicial tenure.

and international human rights law in particular. It was a Constitution that was all the more complex because it was, in the English sense, 'unwritten' or, more precisely, scattered around an extremely wide range of legal texts; and all the more complex because it comprised at least two types of international law: the law applicable to states and the law applicable to international organisations. In this sense, international law and international society could hardly have had a greater constitutional impact than they did in East Timor in 2002.

The UNTAET Constitution had many positive attributes, including a fairly sophisticated legislative process and set of Cabinet procedures.[172] However, it also contained, at its centre, a judiciary that was congenitally weak; and the UNTAET Constitution was silent on most matters where UNTAET had failed in its enterprise of legislating *de novo*; in the areas of property law, most notably,[173] but also corporations law and administrative law. Though it is true that under this proto-constitution, UNTAET did not have the full powers and responsibilities of a sovereign, the precise implications of this limitation were either unclear or, as was often the case, exaggerated, with the result that very real governmental responsibilities were not executed. Thus, to take the most striking example, the UNTAET Constitution left unanswered the very question of whether UNTAET was bound by the international human rights instruments to which it referred in its own laws. In this sense, the newly independent East Timor, with its brand new Constitution, the subject of months of drafting by the Constituent Assembly, has inherited from the UN a set of positive law and conventions that will, for many years, shape East Timorese institutions and society; an inheritance formalised by section 165 of the Constitution, which continues the force of pre-independence laws, but which, at an informal level, permeates governmental practice in Dili.[174] This is neither a wholly good nor a wholly bad thing, but a simple fact.

We may of course find it somewhat frustrating to recall that this imperfect constitutional arrangement was put in place by a manifestation of the UN that had considerable resources at its disposal, and had complete authority in the legal arena. The luxury of hindsight makes it possible to suggest, somewhat paradoxically, that UNTAET may have done better, and might have been even more respectful of self-determination, had it been less concerned to defer major decisions on institution-building to a future East Timorese government. That is to say, UNTAET might have met with greater success had it been more willing to

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172 Including a Cabinet Legislation Committee, which sat regularly from December 2000 to July 2001, with the then Cabinet Member for Justice, Gita Honwana-Welch, as its Chair.

173 This was acknowledged by the UN. In his 17 January 2002 Report to the Security Council, the Secretary-General stated, 'The single greatest obstacle to secure investment in the country is the lack of a workable long-term Land and Property Code', UN Doc S/2002/80, [52].

174 *'São aplicáveis, enquanto não forem alterados ou revogados, as leis e os regulamentos vigentes em Timor-Leste em tudo o que não se mostrar contrário à Constituição e aos principios nela consignados.*': 'Laws and regulations in force in East Timor shall continue to be applicable to all matters except to the extent that they are inconsistent with the Constitution or the principles contained therein.'

face the fact that, whether it liked it or not, it was itself a *government*: and face the corollary, the fact that almost everything done and *not done* prior to independence had, and continues to have, governmental and constitutional significance in East Timor. The August 2001 election and the May 2002 Constitution notwithstanding, decisions made by UNTAET on jurisprudential and operational matters, and the legacy of those decisions for the East Timorese leadership and civil service, will continue to define the extent to which the rule of law will be practised, and the extent to which constitutional protections and guarantees will be observed in East Timor.[175]

Conclusion: Transitional Governance Minus the Manual

> We have not had available to us an instruction manual on how to build a country … Mistakes have been made, many of them. I am aware of the criticisms. Some, though not all, have merit. The United Nations is only now coming to grips with the reality of government … In short, it has been quite some lesson to learn.[176]

Though it was left unspoken, the 'reality of government', at least in East Timor, was the reality of compromise. In one sense, UNTAET's mandate ought to have been easy: the massive resources of the UN were made available for the benefit of a very small nation that was relatively free from internal conflict and that, by and large, welcomed the UN's role as transitional administrator. However, the small scale of East Timor was, in another sense, the nub of the problem, a problem that was never quite addressed, squarely, in the debates that took place within UNTAET itself. Our final comments, then, are twofold. First, we draw the relatively straightforward conclusion that UNTAET functioned best when it conceived of itself as a proto-government, and least well when it acted simply in the traditional mission role: setting high standards for other governments to meet. However indeterminate may be the status of the customary international law norm of 'democratic governance', decisions that UNTAET took on the basis of an acceptance of governmental responsibility to the governed, consultation with the East Timorese, and respect for domestic legal institutions, however imperfect, were almost always superior and were rarely, if ever, susceptible to sustained legal criticism. The second, more important point, however, is that UNTAET would have benefited from an analysis of the very problem: precisely when is it acceptable for the servants of the UN to depart from a conventional understanding of 'international standards'? When reading a Security Council resolution such as 1272, at what point might we – *must* we – as UN officials

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175 Or, in the terms of Susan Marks, the extent to which East Timor will emerge as more than a minimalist democracy in which the emancipatory mission of international law is reflected only in regular multi-party elections: see S Marks, *The Riddle of All Constitutions: International Law, Democracy, and the Critique of Ideology* (2000).

176 S Vieira De Mello, 28 June 2001 presentation to the National Council, above n 10.

reject the heroic, undoubtedly masculinist narrative of the European peacekeeper (*pace* Bosnia), and identify with something quite different: identify with the narratives of the people and governments of struggling countries for which the apparatus and aspirations of UN may only be viewed as obstacles?[177] How might we go about justifying and insisting upon a departure from that apparatus, those aspirations, and still call ourselves lawyers?[178] As it turned out in East Timor, the *ad hoc* approach of 'learning lessons' on the run adopted by UNTAET did not fail; by most measures it was a success.[179] The exhilaration of East Timor's independence celebrations on 20 May 2002 should remind us that UNTAET was extremely fortunate. Unlike most peacekeeping missions, unlike most transitional governments and unlike most rapid decolonisation projects, the shortcomings of UNTAET's work in the legal sector have not, at the time of writing, led to serious administrative collapse, civil unrest or investor flight. However, it may be suggested that the terms in which UNTAET success has been measured do not make sufficient acknowledgment of the fact that the UN peacekeeping mission in East Timor began, if only imperfectly and sporadically, to think of itself not as a 'knight in white armour',[180] but as a humble partner in the struggle of East Timorese to bring about the true reward of self determination: effective government. The real success of UNTAET, it may be suggested, lay in its realisation that the problem was not the Promethean one of the oft-cited 'nation-building' but the rather less-glamorous problem of nation *administration* and governance in circumstances where, on the really important decisions, the decision-makers needed to be East Timorese, and the real institutional impact would be felt not in 2000 or 2001, but in 2010 or 2020. We believe that an acknowledgment and a comprehensive articulation of these problems, and their long-term solution, remains to be prepared, both within the East Timorese government and, of course, within the UN and the international community.[181] How do we resolve the inevitable collisions between

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177 Anne Orford points to ways in which narrative theory and discourse analysis can help us understand the political stakes of humanitarian intervention: see, in particular, A Orford, 'Muscular Humanitarianism: Reading the Narratives of the New Interventionism' (1999) 10 *European Journal of International Law* 679. See also C Chinkin, 'East Timor: A Failure of Colonisation' (1999) 20 *Aust YBIL* 35, who notes that the specific 'drama' of East Timor was, in 1999, presented as one of novel and heroic UN willpower rather than as an episode in the evolution of a governmental (and specifically postcolonial) problem.

178 See, on the self-image of international lawyers in humanitarian intervention, A Orford, 'Embodying Internationalism: The Making of International Lawyers' (1998) 19 *Aust YBIL* 1.

179 The authors generally agree with the assessment of Peter Galbraith: 'With today's transfer of sovereignty to East Timor's democratically elected government, the United Nations concludes its most ambitious and successful such effort.': 'The lessons of East Timor' *Boston Globe* (20 May 2002).

180 See C Bellamy, *Knights in White Armour: The New Art of War and Peace* (1997).

181 Much has already been written about the need for the UN to better prepare itself, logistically, for the challenges of implementing transitional governance mandates; see, to take just one example, Strohmeyer above n 18. However, as Simon Chesterman notes, the question of how political power is to be transferred

internationally recognised human rights standards and local political and governmental imperatives? How can we develop a praxis of international law for transitional administrations, where international law itself so often does not provide solutions to the problems that it poses? How do we think strategically and historically about the UN's rapidly developing role in promoting human rights, good governance, and the rule of law?[182] These are not new questions, but during the implementation of UNTAET's mandate they could hardly have been raised more starkly. They are likely to be raised again.

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by the UN into local hands has been the subject of 'little serious policy research', above n 5, 4.

182 At the outset of the UNTAET mission, Sergio Vieira de Mello defined the problem as one not just of global governance but one of '*ethical* global governance' (emphasis added), above n 4.