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Affirming Brahimi: East Timor Makes the Case for a Model Criminal Code

Megan A. Fairlie

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AFFIRMING BRAHIMI: EAST TIMOR MAKES THE CASE FOR A MODEL CRIMINAL CODE

MEGAN A. FAIRLIE*

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* Admitted to practice law in New York and North Carolina; B.A., University at Albany (N.Y.), *Summa cum laude*, Phi Beta Kappa, J.D., Washington and Lee University, *Cum laude*, LL.M. candidate, National University of Ireland, Galway. The author would like to express her gratitude to Brian and Gail Fairlie for their generous and unwavering dedication to the principle that parenting requires a life-long commitment. The author would also like to thank Dr. Ray Murphy, founder and director of the LL.M. programme in *International Peace Support Operations*, for his kindness and accessibility. This article is dedicated to the memory of Kristin Leigh Hynes, human rights advocate, cherished friend and continual source of inspiration.

INTRODUCTION

In August of 2000, the Report of the Panel on United Nations Peace Operations (“Brahimi Report”) addressed the issue of transitional civil administration as an element of United Nations field operations.¹ Despite acknowledging the fact that support for the same was not universal amongst the U.N. member states, the panel pointed out the possibility that circumstances such as intra-state conflicts and instability may well necessitate its inclusion as an aspect in future missions.² In light of this recognition, the Brahimi Report cites the need for an interim legal code as part of a U.N. justice package to address the issue of “applicable law” in the early stages of a U.N. mission.³ This paper addresses the potential benefit of producing such a set of laws by providing an overview of the experience of the United Nations Transitional Administration in East Timor (“UNTAET”) in the absence of access to a ready-made temporary legal code.

1. *See Identical Letters dated 21 August 2000 from the Secretary General to the President of the General Assembly and the President of the Security Council*, U.N. GAOR, 55th Sess., Agenda Item 87, paras. 76-83, U.N. Doc. A/55/305-S/2000/809 (2000) [hereinafter Brahimi Report] (stating that no other United Nations field operations must conduct a myriad of responsibilities such as to set and enforce the law, establish customs services and regulations, and collect taxes, all while rebuilding civil society and promoting respect for human rights in a war torn region), available at http://www.un.org/peace/reports/peace_operations/ (last visited Mar. 19, 2003).

2. *See id.* para. 78.

3. *See id.* para. 81. The development of an interim legal code is presently a component of the United States Institute of Peace Project on Peacekeeping and the Administration of Justice. *See Applicable Law in Complex Peacekeeping Situations*, at http://www.nuigalway.ie/human_rights/applicable%20law%20project.htm (last visited May 3, 2003).

I. BACKGROUND

East Timor comprises approximately one-half of an island that lies East of the Indian Ocean, between Australia and Indonesia.⁴ Portugal colonized and held East Timor for more than four hundred years.⁵ Though recognized by the United Nations General Assembly as a non-self-governing territory in 1960,⁶ one day after the General Assembly adopted its Declaration on the Granting of Independence to Colonial Countries and Peoples,⁷ Portugal continued to hold the territory until 1974.⁸ Its rule in the latter half of the twentieth century was repressive and the living conditions in East Timor were sub-standard.⁹

In the early 1970's, Portugal's economy was suffering¹⁰ and a revolution brought down its governing military dictatorship.¹¹

4. See James Traub, *Inventing East Timor*, 79 FOREIGN AFF. 74 (2000) (detailing East Timor's precise location and describing its terrain as thickly forested), *available at* <http://www.globalpolicy.org/security/issues/etimor/traub.htm> (last visited Apr. 1, 2003).

5. See IAN MARTIN, SELF-DETERMINATION IN EAST TIMOR: THE UNITED NATIONS, THE BALLOT, AND INTERNATIONAL INTERVENTION 15 (2001) (stating that Portugal considered East Timor its "overseas province"); see also Roger S. Clark, *East Timor, Indonesia and the International Community*, 14 TEMP. INT'L & COMP. L.J. 75, 77 (2000) (stating that Portugal began its presence in Timor as it developed its trading routes).

6. East Timor would remain on this list until removed by General Assembly Resolution in 2002. G.A. Res. 56/282, U.N. GAOR, 56th Sess., Agenda Item 18, U.N. Doc. A/RES/56/282 (2002).

7. G.A. Res. 1514 (XV), U.N. GAOR, 15th Sess., Supp. No. 16, at 66, U.N. Doc. A/4684 (1961), *available at* <http://www1.umn.edu/humanrts/instreet/c1dgcpcp.htm> (last visited Apr. 1, 2003).

8. See MARTIN, *supra* note 5, at 15 (noting that in July 1974, Portugal adopted a constitutional law that accepted the right of independence for its colonies).

9. See Jani Purnawanty, *Various Perspectives in Understanding the East Timor Crisis*, 14 TEMP. INT'L & COMP. L.J. 61, 63 (2000).

10. See Clark, *supra* note 5, at 79 (positing that this made it difficult to finance the administration of an overseas territory).

11. See Colin McDonald, *Out of the Ashes-A New Criminal Justice System for East Timor*, 6 (Aug. 30, 2001) (paper presented to the International Society for the Reform of the Criminal Law, 15th International Conference, Politics, Crime and Criminal Justice, Aug. 26-30, 2001, Canberra, Australia) (recounting that at the time of the April 1974 revolution, the Portuguese economy was in decline and hard

Political parties began to develop within East Timor, with the most noticeable divide between those factions that championed independence and those that preferred integration with Indonesia,¹² which controlled the western half of the island.¹³ The Portuguese revolution created a void in governance in East Timor that was seized upon; civil war ensued until East Timor declared independence on November 28, 1975.¹⁴ Indonesian military forces invaded shortly thereafter and claimed East Timor as Indonesia's twenty-seventh province in July 1976.¹⁵ The rule that followed was oppressive, corrupt, and predatory.¹⁶

In the ensuing years, Australia was the only state to officially recognize the Indonesian occupation of East Timor,¹⁷ but there were no real international challenges to Indonesian control.¹⁸ While the United Nations Security Council passed two resolutions "deploring the intervention" and calling upon "all States to respect the territorial

pressed to deal with the effects of the revolution), *available at* <http://www.isrcl.org/Papers/McDONALD.pdf> (last visited Mar. 19, 2003).

12. *See id.* (noting that there were three major political groups at the time: the Uniano Democratic Timorese that favored eventual independence, the Frentilin that favored greater participation of East Timorese in government and independence, and the Adopeti group that preferred integration with Indonesia); *see also* Clark, *supra* note 5, at 79 (arguing that the majority of East Timorese favored independence).

13. *See* Traub, *supra* note 4 (describing how Holland transferred the western half of the island, also a former colony, to Indonesia in 1949).

14. *See* McDonald, *supra* note 11, at 6 (noting that this declaration was officially rejected by Portugal).

15. *See id.* (stating that the United Nations never formally recognized this act of annexation).

16. *See* Joel C. Beauvais, Note, *Benevolent Despotism: A Critique of U.N. State-Building in East Timor*, 33 N.Y.U. J. INT'L L. & POL. 1101, 1102 (2001) (recognizing Indonesia's twenty-four years of brutal occupation of East Timor).

17. *See* Jarat Chopra, *The UN's Kingdom of East Timor*, 42 SURVIVAL 27, 29 (2000); *see also* Suzannah Linton, *Rising from the Ashes: The Creation of a Viable System of Justice in East Timor*, 25 MELB. U. L. REV. 122, 127 (2001) (positing that Australia recognized Indonesian control in order to contract with the state for the extraction of oil from the continental shelf around East Timor), *available at* <http://www.etan.org/etanpdf/pdf1/linton.pdf> (last visited May 4, 2003); Traub, *supra* note 4 (noting that although no country except Australia had ever recognized the legitimacy of this annexation, the UN Security Council had always treated this as an internal Indonesian problem).

18. *See* McDonald, *supra* note 11, at 7.

integrity of East Timor,”¹⁹ little else was done except the passage of like resolutions by the General Assembly.²⁰ The apparent indifference of the international community has been attributed to the Cold War theory of the “domino effect” and Indonesia’s resultant vital role as a non-communist state in Southeast Asia.²¹

Throughout the period of Indonesian occupation, those East Timorese who were members of the pro-independence armed forces, Falintil, practiced guerrilla warfare.²² Despite Indonesian efforts to suppress the independence movement, Indonesia never completely accomplished this objective²³ and in the late 1990’s, Indonesia began to experience its own difficulties.²⁴ Indonesia incurred a financial crisis in 1998²⁵ and, like the Portuguese experience twenty years earlier, the economic situation resulted in a change in leadership and discussion about the liberation of East Timor.²⁶

On January 27, 1999, Indonesia announced that the new administration would allow for a referendum in which the people of

19. S.C. Res. 384, U.N. SCOR, 30th Sess., 1869th mtg., U.N. Doc. S/RES/384 (1975); S.C. Res. 389, U.N. SCOR, 31st Sess., 1914th mtg., U.N. Doc. S/RES/389 (1976).

20. See MARTIN, *supra* note 5, at 18 (noting that Resolution 37/30 gave a mandate to the Secretary-General to begin a diplomatic effort to find a solution to the East Timor problem; however, the item was deferred each year).

21. See Ramesh Thakur, *Cambodia, East Timor and the Brahimi Report*, 8 INT’L PEACEKEEPING 115, 117 (2001) (noting that the Cambodian conflict was entangled in the process of decolonization and the politics of the Cold War); see also Purnawanty, *supra* note 9, at 65 (suggesting that the United States feared East Timor becoming a communist state).

22. See Hilary Charlesworth & Mary Wood, “Mainstreaming Gender” in *International Peace and Security: The Case of East Timor*, 26 YALE J. INT’L L. 313, 314 (2001) (recognizing the effect this violence has had on East Timor’s men and women during the years of occupation).

23. See Clark, *supra* note 5, at 80 (“Resistance would continue for the whole of the period until 1999, in spite of claims that only a few ‘rebels’ remained.”).

24. See Traub, *supra* note 4 (explaining that the Indonesian president was forced from office in 1998).

25. See Linton, *supra* note 17, at 127 (highlighting the crisis was precipitated by the Asia-wide currency crash).

26. See *id.* at 128 (noting that the internal problems experienced included public unrest and civil disorder and eventually resulted in the resignation of then President Suharto).

East Timor would be given an opportunity to vote on an offer of special autonomy²⁷ within the Republic of Indonesia.²⁸ Indonesia's new leader, President Habibie, stated that should the East Timorese reject the offer, he would recommend revocation of the 1976 Indonesian law that authorized integration.²⁹ Shortly thereafter, Indonesia and Portugal agreed that the Secretary General of the United Nations would organize and conduct the popular consultation.³⁰ In response to rising tensions in East Timor, the United Nations Security Council established the United Nations Mission in East Timor ("UNAMET") by resolution on June 11, 1999.³¹ The resolution not only dictated that UNAMET would organize and conduct the consultation, but also that it was the responsibility of Indonesia to maintain peace and security in East Timor.³²

In spite of the UNAMET presence, in the months following the resolution, peace was elusive and, due to escalating violence, the United Nations twice postponed the referendum.³³ However, when the consultation took place on August 30, 1999, ninety-eight percent

27. See Purnawanty, *supra* note 9, at 66 (specifying that the offer provided for home rule in areas other than defense, foreign affairs, and monetary policies).

28. See MARTIN, *supra* note 5, at 21; see also McDonald, *supra* note 11, at 7 (referring to the announcement of the same as a "political bombshell"); Purnawanty, *supra* note 9, at 66 (asserting that the proposal of special autonomy was given "to correct past mistakes and eradicate the heavy burden of political instability and economic collapse" and that the continued occupation of East Timor was politically disadvantageous for Indonesia).

29. See Simon Chesterman, *East Timor in Transition: Self-determination, State-building and the United Nations*, 9 INT'L PEACEKEEPING 45, 60 (2002) (reflecting the position that, based upon poor intelligence, Indonesian leaders mistakenly believed that such an election would result in a vote for integration).

30. See *Question of East Timor: Report of the Secretary-General*, U.N. GAOR, 53rd Sess., para. 1, U.N. Doc A/53/951-S/1999/513 (1999) (giving the Secretary General the power to establish a United Nations mission in East Timor for this purpose).

31. S.C. Res. 1246, U.N. SCOR, 54th Sess., 4013th mtg., at 2, U.N. Doc. S/RES/1246 (1999).

32. See *id.* para. 9 (stressing the necessity of this responsibility "in order to ensure that the popular consultation is carried out in a fair and peaceful way").

33. See Traub, *supra* note 4 (noting that the United Nations' wish to send in foreign troops to supervise the voting process was thwarted by Indonesia). Unarmed police officers were sent in their stead. *Id.*

of those registered voted, with seventy-eight and one-half percent choosing independence over the offer of autonomy.³⁴ The intended outcome of the referendum was “the delayed exercise of self-determination by a colonial people; . . . not a case of secession from a state of which it was a legitimate part.”³⁵ Regrettably, it was not so recognized by Indonesia and pro-integration forces and the situation that followed was one of mass devastation and destruction.³⁶

The chaos that ensued post-referendum lasted three weeks and was christened by the Indonesian armed forces as “Operation Clean Sweep.”³⁷ The Indonesian military and militia allegedly received orders to execute everyone over the age of fifteen; the “scorched earth campaign” resulted in the burning and gutting of housing and infrastructure alike.³⁸ The resultant devastation and the animosity that fueled the campaign were perhaps best exemplified by the graffiti later observed on the walls of Dili, “A free East Timor will eat stones.”³⁹

Contrary to the U.N.’s original plan for a gradual transfer of power, the post-referendum violence required immediate action.⁴⁰ In response to the devastation, widespread displacement of many East Timorese and attacks on civilians and U.N. staff, the Security Council issued Resolution 1264.⁴¹ Acting pursuant to the authority of

34. See Chopra, *supra* note 17, at 28.

35. Clark, *supra* note 5, at 76.

36. See Traub, *supra* note 4 (asserting that after the election, the militia moved from town to town, engaging in acts of looting, burning, and murder).

37. See Chopra, *supra* note 17, at 27 (explaining that in the campaign, the Indonesian military and militia executed hundreds and possibly thousands of East Timorese).

38. See *id.* (noting that both males and females died as a result, and that more than seventy-five percent of the country’s population was displaced).

39. See Terry McCarthy, *Hard Lessons: East Timor Must Avoid Becoming Another Cambodia*, TIME ASIA, Mar. 1, 2000, available at <http://www.time.com/time/asia/asiabuzz/2000/03/01/> (last visited Mar. 23, 2003).

40. See Chopra, *supra* note 17, at 28.

41. See S.C. Res. 1264, U.N. SCOR, 54th Sess., 4045th mtg., at 1, U.N. Doc. S/RES/1264 (1999) [hereinafter Resolution 1264] (determining that the situation in East Timor constitutes a threat to peace and security and listing the United Nations’ concerns and proposals for change).

Chapter VII of the U.N. Charter,⁴² and with the consent of Indonesia, the resolution authorized the establishment of the International Force for East Timor (“INTERFET”) to restore peace and security in East Timor.⁴³

II. UNTAET- RESOLUTION 1272

Slightly more than one month later, on October 25, 1999, the U.N. Security Council issued Resolution 1272.⁴⁴ The Resolution established the United Nations Transitional Administration in East Timor.⁴⁵ Requesting cooperation between UNTAET and INTERFET, the resolution provided for the replacement of the latter⁴⁶ and specified the mandate of UNTAET.⁴⁷ Most notably, Resolution 1272 bestowed upon UNTAET the power to “exercise all legislative and executive authority, including the administration of justice.”⁴⁸

UNTAET thus became one of several “latter-day complex peace support operations.”⁴⁹ Such missions went beyond that of earlier, traditional peacekeeping missions that were largely diplomatic, dependent upon the consent and cooperation of the parties to the

42. *See id.* at para. 2 (stating that the United Nations possesses the authority to create INTERFET by virtue of the power granted by Chapter VII of the UN Charter, which authorizes the Security Council to take preventive and enforcement measures in order to maintain international peace or security).

43. *See id.* at para. 3. In authorizing the establishment of this multinational force, the Resolution specifies the tasks it is to perform “to restore peace and security in East Timor, to protect and support UNAMET in carrying out its tasks and, within force capabilities, to facilitate humanitarian assistance operations. . . .” *Id.*

44. *See* S.C. Res. 1272, U.N. SCOR, 54th Sess., 4057th mtg., at 1, U.N. Doc. S/RES/1272 (1999) [hereinafter Resolution 1272].

45. *See id.* para. 1 (stating the general purposes of UNTAET).

46. *See id.* para. 9 (stating that this replacement would occur while taking into account conditions on the ground).

47. *See id.* para. 2 (requiring that UNTAET: provide security and maintain law and order; establish an effective administration; assist in the development of civil and social services; ensure coordination and delivery of humanitarian assistance, rehabilitation and development assistance; support capacity building for self-government; and assist in the establishment of conditions for sustainable development).

48. *See id.* para. 1.

49. *See* Thakur, *supra* note 21, at 117.

conflict and in which the use of armed force was only permissible in cases of self-defense.⁵⁰ These were post-Cold War missions in territories experiencing problems unique to internal conflict such as anarchy, factionalism, and the “war-lord syndrome.”⁵¹ Requiring more than the assistance of the blue helmets, their lawlessness, chaos, and devastation made them better suited for “an overall blue umbrella under which law and order [could be] maintained.”⁵²

Earlier in the decade, the United Nations first tried its hand at extensive governance, exercising functions delegated to it by the Supreme National Council in Cambodia.⁵³ There, the United Nations possessed broad-reaching authority, including control over the three areas that would have been outside the purview of East Timorese administration had it voted for integration.⁵⁴ However, the delegation limited the U.N. Transitional Authority in Cambodia by requiring it to follow the advice offered by the Supreme National Council.⁵⁵ In the wake of the Cambodian mission, the U.N. presence arguably acted as a *de facto* government in Somalia, though the mission’s mandate did not clearly confer such authority.⁵⁶ A system of transitional governance was next required to quell the chaos that ensued in Kosovo in the spring of 1999, though recognizing in that

50. See Jarat Chopra, *Introducing Peace-Maintenance*, in *THE POLITICS OF PEACE-MAINTENANCE*, 1, 3-4 (Jarat Chopra ed., 1998) (providing a brief history of disputes and diplomatic interventions).

51. See *id.* at 6.

52. See *id.* at 8.

53. See Michael J. Matheson, *United Nations Governance in Postconflict Societies*, 95 *AM. J. INT’L L.* 76, 77 (2001) (describing the United Nations’ previous involvement in governance).

54. See *id.*; see also *supra* note 27 (delineating the limitations on East Timorese administration under intergration).

55. See Agreement on a Comprehensive Political Settlement of the Cambodia Conflict, Oct. 23, 1991, Ann. 1 §A(2)(a), 31 *I.L.M.* 174, 189, 1663 *U.N.T.S.* 27, 69 (describing the relationship between Cambodia’s Supreme National Council and the United Nations), available at http://www.usip.org/library/pa/cambodia/comppol_10231991_annex1.html (last visited Apr. 2, 2003).

56. See Chesterman, *supra* note 29, at 70 (stating that at the time, Somalia did not have a functioning government and the Special Representative to the Secretary General reinstated the former Somali penal code).

instance the continuing sovereignty of the Federal Republic of Yugoslavia.⁵⁷

The unique characteristic of the UNTAET mandate, however, has not gone unnoticed. Writers observe this as the first time that sovereignty has passed to the United Nations independent of any competing authority.⁵⁸ Though previous field missions encompassed practical governance and administration, those same missions involved a sharing of authority with a "host state."⁵⁹ For this reason, observers deem the creation of UNTAET as "a step forward of millennial proportions."⁶⁰

The extensive authority of UNTAET was conferred exclusively upon the Special Representative of the Secretary General, the UNTAET Transitional Administrator.⁶¹ One man, Sergio Vieira de Mello, received powers likened to that of "a pre-constitutional monarch in a sovereign kingdom"⁶² and "those of a Roman provincial governor."⁶³ For his part, de Mello recognized the difficulty of his position noting that "there are no positive models on how to exercise such broad powers."⁶⁴

One of the first items on the agenda of the Transitional Administrator was to establish a rule of law in East Timor. Integral

57. *See id.* at 58.

58. *See* Chopra, *supra* note 17, at 29 (describing Resolution 1272 as "bestowing sovereignty over East Timor to the U.N."); Carla Bongiorno, *A Culture of Impunity: Applying International Human Rights Law to the United Nations in East Timor*, 33 Colum. Hum. Rts. L. Rev. 623, 653 (2002) (noting that the U.N.'s governmental responsibilities in East Timor were "independent of any rival authority").

59. *See* Beauvais, *supra* note 16, at 1110.

60. *See* John Sanderson, *The Cambodian Experience: A Success Story Still?*, in UNITED NATIONS PEACEKEEPING OPERATIONS: AD HOC MISSIONS, PERMANENT ENGAGEMENT 155, 159 (Ramesh Thakur & Albrecht Schnabel eds., 2001).

61. *See* Resolution 1272, *supra* note 44, para. 6 (stating that "the Transitional Administrator . . . will be responsible for all aspects of the United Nations work in East Timor and will have the power to enact new laws and regulations and to amend, suspend or repeal existing ones").

62. Chopra, *supra* note 17, at 29.

63. *See* Sanderson, *supra* note 60, at 158.

64. *See* Sergio Viera de Mello, *How Not to Run a Country: Lessons for the UN from Kosovo and East Timor* 3 (2000).

to the success of the mission, it “sets a precedent for the future and can be a central factor in the long-term development of . . . democracy, economic development and respect for human rights.”⁶⁵ Indeed, de Mello recognized the necessity of promptly addressing the issue of law and order,⁶⁶ the importance of which cannot be underestimated as it is an essential prerequisite for lasting peace.⁶⁷ Consequently, the issue was the primary focus of the first regulation issued by the Transitional Administrator.

III. REGULATION 1999/1

Regulation 1999/1 entered into effect slightly more than two months after the arrival of the first INTERFET troops⁶⁸ and one month subsequent to the authorization of UNTAET.⁶⁹ The instrument addressed the issue of the applicable law in East Timor, declaring that, until replaced by regulation or legislation, the laws that applied in East Timor prior to October 25, 1999, shall continue to apply.⁷⁰ An important caveat, however, was that those laws in conflict with internationally recognized human rights standards,⁷¹ the fulfillment

65. See Beauvais, *supra* note 16, at 1149.

66. See de Mello, *supra* note 64, at 3.

67. See Mark Plunkett, *Reestablishing Law and Order in Peace-Maintenance*, in *THE POLITICS OF PEACE-MAINTENANCE*, 61, 64 (Jarat Chopra ed., 1998).

68. See MARTIN, *supra* note 5, at 139 (supplying a timeline of international involvement in East Timor).

69. See Reg. No. 1999/1, *On The Authority of the Transitional Administration in East Timor*, UNTAET, U.N. Doc. UNTAET/REG/1991/1 [hereinafter Reg. No. 1999/1].

70. See *id.* § 3.1; see also Hansjörg Strohmeyer, *Collapse and Reconstruction of a Judicial System: The United Nations Missions in Kosovo and East Timor*, 95 AM. J. INT'L L. 46, 58 (2001) (stating that the phrase “the laws applied” was chosen over that of “the applicable laws” to avoid giving *post hoc* legitimacy to Indonesian rule).

71. See Reg. No. 1999/1, *supra* note 69, § 2 (noting that these standards are particularly reflected in The Universal Declaration on Human Rights of December 10, 1948; The International Covenant on Civil and Political Rights of 16 December 1966 and its Protocols; The International Covenant on Economic Social and Cultural Rights of 16 December 1966; The Convention on the Elimination of All Forms of Racial Discrimination of 21 December 1965; The Convention on the Elimination of All Forms of Discrimination Against Women on 19 December 1979; The Convention Against Torture and Other Forms of Cruel, Inhumane or

of the UNTAET mandate under Resolution 1272,⁷² or any regulation or directive issued by the Transitional Administrator, would cease to be valid.⁷³ Leaving open the possibility for continuing review of the law, six laws were specifically repealed⁷⁴ and capital punishment was abolished.⁷⁵

Whether the choice to continue to apply Indonesian law, *mutatis mutandis*, enjoyed popular endorsement is a matter of debate. Because Indonesia has neither signed nor ratified the International Covenant on Civil and Political Rights,⁷⁶ it appears to have been a peculiar choice. It is perhaps not surprising, then, that the selection has been asserted to be “a controversial one.”⁷⁷ However, others have argued to the contrary, maintaining that the choice to apply Indonesian law was sound⁷⁸ and that the selection enjoyed widespread acceptance.⁷⁹ The former acting principal legal adviser to UNTAET, Hansjörg Strohmeyer, expressed a more dispassionate position by stating that the selection of Indonesian law was a practical one and noting the existence of objectors to the choice.⁸⁰

Degrading Treatment or Punishment on 17 December 1984; The International Convention on the Rights of the Child on 20 November 1989).

72. See Resolution 1272, *supra* note 44, para. 2 (listing the elements of the mandate).

73. See Reg. No. 1999/1, *supra* note 69, § 3.1 (providing limitations).

74. See *id.* § 3.2 (repealing the following laws: Law on Anti-Subversion, Law on Social Organizations, Law on National Security, Law on National Protection and Defense, Law on Mobilization and Demobilization and Law on Defense and Security); see also Linton, *supra* note 17, at 137 (providing criticism of the section for its failure to provide law numbers and years associated with the laws in question, resulting in uncertainty as to which laws are to be deemed repealed).

75. See Reg. No. 1999/1, *supra* note 69, § 3.3.

76. International Covenant on Civil and Political Rights, Mar. 23, 1976, 999 U.N.T.S. 171 [hereinafter ICCPR].

77. See Linton, *supra* note 17, at 137 (indicating that part of the controversy stems from a lack of appreciation for the transitory nature of UNTAET's decision).

78. See Beauvais, *supra* note 16, at 1156.

79. See McDonald, *supra* note 11, at 13 (indicating that the acceptance included East Timorese lawyers).

80. See Strohmeyer, *supra* note 70, at 58; see also Hansjörg Strohmeyer, *Policing the Peace: Post-Conflict Judicial System Reconstruction in East Timor*, 24 U.N.S. WALES J. 171, 174 (2001) [hereinafter, Strohmeyer, *Policing the Peace*].

Primarily, two practical reasons have been cited as the catalysts for the adoption of Indonesian law, the first of which was to sidestep a legal void in the early days of UNTAET's administration.⁸¹ As an initial matter, a legal framework was necessary in order for UNTAET to fulfill the responsibilities under its mandate.⁸² Additionally, the decision of which law would apply in post-referendum East Timor needed to be made quickly in order to avert a "legal vacuum."⁸³ Such a void is often devastating in post-conflict situations, when the population is divided and when poverty and limited access to resources are prevalent problems.⁸⁴ Not only can a chaotic state serve as a criminal's playground, but its existence under new leadership can also undermine public confidence in the same.⁸⁵ Lawlessness in such situations can threaten progress in the advancement of human rights⁸⁶ and create a forum wherein evidence of prior legal violations may be destroyed.⁸⁷

The second reason cited in favor of applying Indonesian law was that doing so would retain the system under which the attorneys in the country studied and, thus, would circumvent the need for those lawyers to be trained in a completely foreign legal system.⁸⁸ While such an argument is compelling in theory, it is possibly less persuasive in the case of East Timor. In the days that preceded and

81. See Strohmeyer, *Policing the Peace*, *supra* note 80, at 174 (noting that Indonesian laws would apply to the extent they were consistent with internationally recognized human rights standards).

82. See Strohmeyer, *supra* note 70, at 47 (defining the challenges and responsibilities deriving from that mandate).

83. See *id.* at 58 (identifying a legal framework as a prerequisite to the establishment of judicial and other public institutions).

84. See Beauvais, *supra* note 16, at 1149 (citing economic crisis, factional vendettas, and lack of law enforcement as characteristics of post-conflict situations).

85. See *id.* (identifying the assertion of the rule of law as a prerequisite to the success of all other reconstruction and state-building activities).

86. See *id.* (specifying that citizens, especially minorities, are highly vulnerable during this period of time).

87. See Strohmeyer, *supra* note 70, at 47 (indicating that the failure to address past and ongoing violations promptly can impede the broader objectives of the operation).

88. See *id.* at 58 (indicating that virtually all of the local lawyers had obtained their law degrees at domestic universities).

followed the “scorched earth campaign,” East Timor saw a veritable diaspora of its legal community.⁸⁹ In the aftermath of the departure of Indonesian and pro-Indonesian judges and lawyers, fewer than ten lawyers remained in East Timor, and these individuals were considered to have been very inexperienced.⁹⁰ Since no East Timorese had ever held the position of judge or prosecutor under Indonesian rule,⁹¹ and since the field of prospective attorney candidates grew to include only sixty novices,⁹² intensive training of the legal community was already the order of the day.⁹³

Of course, the application of Indonesian laws and procedure provided continuity for more than merely the fledging legal community. For many East Timorese, Indonesian law, which had been in place for twenty-four years prior to the issuance of Regulation 1999/1, was the only known legal system. However, whether this enhances the argument in favor of its continued application is questionable. In the aftermath of both Portuguese and Indonesian rule, the East Timorese had an understandable distrust of the legal system.⁹⁴ Further, the most recent East Timorese experience with the legal system was littered with historic abuse by Indonesia.⁹⁵ Indeed, it would be understandably difficult to establish respect for a rule of law that was previously viewed as a tool of oppression.⁹⁶

89. *See id.* at 50 (indicating that all those who were perceived as being members of the administrative and intellectual privileged classes fled East Timor).

90. *See id.*

91. *See id.* at 53 (describing the task of identifying candidates for judicial or prosecutorial office as “herculean”).

92. *See id.* at 53-54 (explaining that these individuals were law graduates found in part by the dropping of leaflets from airplanes advertising the need for their services).

93. *See id.* at 55-56 (noting that the training of judges, lawyers, and public defenders was provided via “quick impact” training courses, mandatory continuing legal education, and through a mentoring plan).

94. *See Strohmeyer, Policing the Peace, supra* note 80, at 174 (reporting that members of the East Timorese community found the ‘very idea’ of the continued application of the Indonesian code objectionable).

95. *See Beauvais, supra* note 16, at 1158 (noting that, precisely because of Indonesian abuse of the justice system, the importance of recruiting local judges was heightened significantly).

96. *See Strohmeyer, Policing the Peace, supra* note 80.

However, to better understand the choice of applying Indonesian law, it is important to review the options that were available to the Transitional Administrator upon promulgation of Regulation 1999/1. The experience in East Timor, as one in a relatively new genre of complex peace support operations, was evolutionary in nature; rather than rely solely on the military to provide security, as was common in earlier missions, UNTAET needed the assistance of legal experts in order to establish the rule of law.⁹⁷ Lacking an applicable model code and without time to devise a new one,⁹⁸ the decision arguably consisted of either the “law of East Timor’s 500-year long colonial master” or that of the “nation that had illegally occupied and brutalised East Timor for the [preceding] 25 years.”⁹⁹ Thus, it is important to be mindful throughout the subsequent review of its application, that the decision to continue to apply the Indonesian Criminal Code and Code of Criminal Procedure may well have been the lesser of the evils.

A. THE APPLICATION OF TRI-LAW

Before engaging in an analysis of the Indonesian Code under UNTAET, it is important to evaluate the practical application of Regulation 1999/1. In essence, the Regulation created “tri-law” for the transitional state: a combination of the Indonesian Code, international human rights standards, and those regulations issued by

97. See Plunkett, *supra* note 67, at 61 (explaining that the military has traditionally been employed to deal with crises because it possesses the ability to contend with violence while simultaneously providing logistical support of rapid transportation and communications).

98. See Hansjörg Strohmeyer, *Making Multilateral Interventions Work: The U.N. and the Creation of Transitional Justice Systems in Kosovo and East Timor*, 25 FLETCHER F. OF WORLD AFF. 107, 112 (2001); see also Beauvais, *supra* note 16, at 1149 (noting that the Transitional Administrator needed to make its choice “virtually immediately . . . to provide security in the post-conflict phase”).

99. See Linton, *supra* note 17, at 131 (describing INTERFET’s choice of law query). *But see* Suzannah Linton, *Cambodia, East Timor and Sierra Leone: Experiments in International Justice*, 12 CRIM. L.F. 185, 217 (2001) [hereinafter Linton, *Cambodia, East Timor and Sierra Leone*] (alleging that the use of the Indonesian criminal justice code in the context of the serious crimes unit evidences UNTAET’s ambiguous attitude towards criminal prosecutions in East Timor).

the Transitional Administrator.¹⁰⁰ Compliance with the Regulation necessitated a review of Indonesian law “through the lens of international human rights instruments” and required that, in cases of conflict, suitable substitutions be made.¹⁰¹ Thus, the aforementioned international treaties did not apply *per se*; rather the existing laws had to be read subject to them.¹⁰² Such a task is certainly not easy and it is likely that even seasoned lawyers would not agree on the outcome.¹⁰³ However, the matter was neither a hypothetical for legal minds to ponder, nor a question on a law school exam, but a prerequisite to the daily application of the rule of law in East Timor.¹⁰⁴

This issue is one that is of major significance with regard to the United Nations’ civilian police (“CIVPOL”), which, in November of 1999, assumed responsibility for the investigation of crime in East Timor.¹⁰⁵ Of necessity, CIVPOL operates independently from the hierarchy within the United Nations and is expected to exercise discretion in its arrests.¹⁰⁶ Additionally, it performs the important function of training local forces integral to the goal of self-sufficiency for East Timor.¹⁰⁷ By the very nature of its duties, which

100. See Strohmeyer, *supra* note 70, at 59 (specifying that Regulation 1999/1 required the application of Indonesian law as long as it did not conflict with internationally recognized human rights standards and did not interfere with the Security Council’s mandate).

101. See *id.* (arguing that this was a “complex task”).

102. See Linton, *supra* note 17, at 137.

103. See Hansjörg Strohmeyer, *Building a New Judiciary for East Timor: Challenges of a Fledgling Nation*, 11 CRIM. L.F. 259, 267 (2000) (noting that the interpretation would be difficult for any lawyer).

104. See *id.* (submitting that tri-law was difficult to apply in practice because it did not positively and unambiguously define the content of the laws).

105. See Linton, *supra* note 17, at 133 (explaining that CIVPOL took over this responsibility from UNAMET mission members who had re-entered East Timor by late September 1999).

106. See Plunkett, *supra* note 67, at 73 (indicating that CIVPOL is not integrated within a military component).

107. See *id.* at 72 (addressing lessons learned from CIVPOL’s experience in Cambodia).

demand public interaction, CIVPOL is arguably the face of UNTAET in the community.¹⁰⁸

Although the members of CIVPOL are not jurists but law enforcement officers, operating underneath Regulation 1999/1, they had to make the aforementioned legal assessment in order to perform their daily functions.¹⁰⁹ It is therefore not surprising that CIVPOL, along with the judiciary, “struggled” to perform its duties in conformity with the Regulation¹¹⁰ and that CIVPOL’s enforcement of unknown and inaccessible laws proved to be a “nightmare.”¹¹¹

In addition to CIVPOL, new lawyers and judges, few of whom were familiar with the practical application of human rights standards, were also required to make like evaluations.¹¹² Thus, with the background of an already overburdened court system came the additional responsibility of evaluating an ever-developing hybrid set of laws.¹¹³ This range of applicable laws made the work of the young

108. *See id.* at 73 (maintaining that CIVPOL, like any law enforcement agency, strives to be representative of, responsible for, and accountable to the community at large).

109. *See* Strohmeyer, *supra* note 98, at 49 n.10 (addressing the related issue that States are often wary to contribute troops when the applicable laws are unclear).

110. *See* Strohmeyer, *Policing the Peace*, *supra* note 80, at 174-75 (noting that CIVPOL did its best to comply with UNTAET Regulation 1999/1 in the daily application of the existing legislation).

111. *See* McDonald, *supra* note 11, at 13 (specifying that CIVPOL was charged with enforcing laws that could be subject to debate and rapid change).

112. *See* Linton, *supra* note 17, at 134 (stating that CIVPOL investigators were as “equally confused” as these judges and lawyers and that the former had a tendency to utilize their national requirements when unsure as to how to proceed under the new system); *see also* Strohmeyer, *supra* note 98, at 112 (explaining that the substantive criminal code and criminal procedure code in existence were inconsistent with international human rights standards); Bongiorno, *supra* note 58, at 676 (asserting that UNTAET has subsequently been criticized for its failure to proactively abolish those provisions in the code that were contrary to international human rights standards).

113. *See* McDonald, *supra* note 11, at 19 (claiming that in July 2001, there were more than 600 outstanding cases from pre-September 1999); *see also* Linton, *Cambodia, East Timor and Sierra Leone*, *supra* note 99, at 203 (stating that the hybrid laws were based on the legal system of Indonesia, international human rights standards, and the amendments made by UNTAET).

judiciary all the more challenging.¹¹⁴ In light of all this, it is not surprising that one critic found the restrictions placed upon the application of Indonesian law, intended to correct the repressive and unfair elements of the same, only “theoretically comforting.”¹¹⁵ As Hansjörg Strohmeyer recounted, “[I]n practice, the formula introduced by the United Nations’ [administration] in . . . East Timor, which was aimed at avoiding a legal vacuum and ensuring that the laws applied conformed to international standards at the outset, led to considerable legal and political difficulties.”¹¹⁶

B. TECHNICAL PROBLEMS

In order for the transitional administration to utilize Indonesian Code and Procedure, it would need to be familiar with the substance of the same. Unfortunately, legal texts were only available in Bahasa Indonesia and, because of the “scorched earth campaign,” East Timor had no surviving texts.¹¹⁷ Thus, the transitional administration was put in the difficult position of attempting to obtain the relevant legislation from the state that, for all intents and purposes, had just been expelled.¹¹⁸ In addition, UNTAET relied on assistance from Indonesian and international law firms, legal aid organizations, and universities.¹¹⁹ The difficulty in accessing the laws is illustrated by the fact that the Dili Courthouse Library, responsible for serving as the lead court in East Timor¹²⁰ and home to the serious crimes panel,

114. See McDonald, *supra* note 11, at 18 (discussing the language, physical location, lack of resources, and lack of personnel problems the judges experienced).

115. See Gordon Renouf, Some Features of the Legal System in East Timor, 2 (Mar. 2002) (paper presented to the delegates to the East Timor Legal Coordination Symposium, Mar. 11-12, 2002, Darwin, Australia).

116. Strohmeyer, *supra* note 70, at 59.

117. See *id.* at 50 (claiming that additionally, court equipment, records, and archives were also dislocated or burned).

118. See Strohmeyer, *Policing the Peace*, *supra* note 80, at 174.

119. See Strohmeyer, *supra* note 98, at 113.

120. See Reg. No. 200/11 *On the Organization of Courts in East Timor*, § 7.3, UNTAET, U.N. Doc. UNTAET/REG/2000/11 (2000) (declaring the Dili District Court the only court to have jurisdiction for the whole of East Timor); see also *id.* § 10.1 (giving the court exclusive jurisdiction for the prosecution of serious

did not acquire its own complete set of texts until December of 2000.¹²¹ Additionally, it is questionable as to whether there was ready access to the declarations and treaties that delineated the pertinent human rights standards.¹²² The National Council of East Timorese Resistance (“CNRT”) had to specifically request the enumeration of the same, as the organization had referenced the documents in its “Magna Carta.”¹²³

To further complicate the situation, there were no Bahasa Indonesia speaking lawyers in the United Nations Department of Judicial Affairs.¹²⁴ Additionally, the U.N. international staff was unfamiliar with Indonesian law and, because of the language barrier, was incapable of remedying that problem.¹²⁵ Consequently, the laws, once obtained, had to be translated before international mentors could begin to assist the neophyte lawyers and judges with the application of Regulation 1999/1.¹²⁶ This delay perhaps seems to refute the application of the Indonesian Code as a mechanism for circumventing a legal vacuum and is one that, in all likelihood, could be ill-afforded.¹²⁷

crimes: genocide, war crimes, crimes against humanity, murder, sexual offences, and torture).

121. See Sarah Pritchard, *United Nations Involvement in Post-Conflict Reconstruction Efforts: New and Continuing Challenges in the Case of East Timor*, 24 U.N.S. Wales L.J. 183, 188 (2001) (noting that, in the interim, many judges were sitting without access to the law).

122. See Judicial System Monitoring Programme, *Justice in Practice: Human Rights in Court Administration*, 10 (JSMP Thematic Report 1, Dili, East Timor, Nov. 2001) (claiming that while this may seem unlikely in the information age, as of late 2001, East Timorese judges did not have professional access to the Internet).

123. See Beauvais, *supra* note 16, at 1151; compare with Chesterman, *supra* note 29, at 70 (quoting Xanana Gusmão’s concerns: “What seems to be absurd is that we absorb standards just to pretend we look like a democratic society and please our masters of independence”).

124. See McDonald, *supra* note 11, at 19.

125. See de Mello, *supra* note 64, at 4.

126. See Strohmeier, *supra* note 70, at 56 (explaining that a “mentoring scheme” was planned that would allow experienced international lawyers to serve as “shadow judges” in civil law systems, although they would not exercise actual judicial power).

127. See de Mello, *supra* note 64, at 3 (noting that “unlike other nation-building tasks, law and order cannot wait”).

Additional difficulties emerged in efforts to train the local professionals in accordance with the Indonesian structure, particularly in light of the fact that Indonesia employs a civil law, or inquisitorial system of justice.¹²⁸ Most helpful in the period of transition, Australia hosted a two-week training session in Darwin for East Timorese jurists.¹²⁹ However, symptomatic of the aforementioned difficulty, Australia itself employs the common law, adversarial system.¹³⁰ Indeed, the inability to obtain mentors with sufficient civil law backgrounds thwarted U.N. efforts to “[fulfill] its objective of providing the newly appointed judges, prosecutors and public defenders with sufficient legal training and assistance.”¹³¹ In light of East Timor’s relationship with Indonesia, training in that system also was not feasible, resulting in such arrangements as the training of the judiciary in Portugal.¹³² Finally, the limited amount of legal training that was offered was primarily only available to governmental employees; thus, attorneys affiliated with non-governmental organizations, whose services were desperately needed to assist in filling the human resources void in the fledgling legal system, did not have a mechanism whereby they could familiarize themselves with the Indonesian system.¹³³

C. THE INDONESIAN CRIMINAL CODE AND CODE OF CRIMINAL PROCEDURE

By including in Regulation 1999/1 the provision that those laws contrary to international human rights standards would cease to

128. See Linton, *supra* note 17, at 137.

129. See McDonald, *supra* note 11, at 15.

130. See *id.* at 20-21.

131. Strohmeyer, *supra* note 70, at 56; see also Pritchard, *supra* note 121, at 188 (claiming that this is perhaps related to an observed lack of emphasis placed on training in Indonesian procedure).

132. See McDonald, *supra* note 11, at 20 (explaining that the intense training the judges received in Portugal lasted four months and was focused on the needs of the East Timorese).

133. See Renouf, *supra* note 115, at 9 n.43 (noting that after June 2001, six non-governmental officials attended the National Conference of Community Legal Centres in Perth, Australia, and received some legal training).

apply, such conflicts were arguably recognized to exist.¹³⁴ While the instrument retained the possibility for further review, no such review was, in fact, conducted.¹³⁵ Thus, the possibility for prosecution under statutes that should have been abolished, as well as non-prosecution for acts that should have been but were not incorporated into the penal code, created very real problems in the application of the law.¹³⁶ Additionally, the application of the code itself was not necessarily a straightforward activity. The U.N. Working Group on Arbitrary Detention noted that Indonesian law includes a “multitude of special laws adopted at any given period in the history of Indonesia and never abrogated.”¹³⁷

While the application of a pre-existing set of laws can be extraordinarily beneficial in attempting to quickly establish a rule of law, the overall effectiveness of the same may be challenged if the law applied is incomplete. A solid legal framework is a necessary prerequisite for the establishment and development of respect for human rights.¹³⁸ In the case of Cambodia, its government noted that “inadequacies in the operating legal system [can] delay the rehabilitation of the country.”¹³⁹

Applying Regulation 1999/1 from this perspective is an even more daunting task than in cases where the law is arguably in direct

134. See Strohmeier, *supra* note 98, at 112 (acknowledging that the criminal and procedural codes “contained numerous provisions inconsistent with international human rights and criminal law standards”); see also Dionísio Babo-Soares, Law and Order: Judiciary Development in East Timor, 12 (paper prepared for the Conference on Comparing Experiences with Post-Conflict Statebuilding in Asia and Europe, Oct. 15-17, 2001, Denpasar, Bali-Indonesia) (noting that Indonesian law was “popularly deemed” to be contrary to international human rights standards by the UNTAET international staff).

135. See Linton, *supra* note 17, at 137.

136. See *id.* (noting that, “when inexperienced persons are put in positions of power without adequate guidance, [it] can be [a] dangerous” situation).

137. *Report of the Working Group on Arbitrary Detention on its Visit to Indonesia, Jan. 31- Feb. 12, 1999*, Commission on Human Rights, 56th Sess., Item 11(a) on the Provisional Agenda, para. 40, U.N. Doc. E/CN.4/2000/4/Add.2 [hereinafter Working Group visit to Indonesia].

138. See Plunkett, *supra* note 67, at 65 (claiming that an “effective and neutral government” is also needed).

139. See *id.* (quoting the Kingdom of Cambodia, Implementing the National Programme to Rehabilitate and Develop Cambodia, 14 (Feb. 1995)).

contradiction to international standards. In this case, the legal analysis involved is made more complex, initially by the fact that its need is less likely to be obvious. Thus, by its nature, the undertaking is not one that judges can quickly perform in order to establish a workable criminal code.¹⁴⁰

The subject of this part of the analysis of the Indonesian Criminal Code, then, is not the prohibition or criminalization of conduct which ought to be unfettered. Rather, it is a query as to whether the Code, as written, suitably punishes reprehensible activity and sufficiently protects victims. Quite likely, women were the most vulnerable group in East Timor under the application of the Indonesian Criminal Code.¹⁴¹ In her 1999 report on the mission to Indonesia and East Timor, the Special Rapporteur on violence against women, its causes and consequences, observed the Indonesian criminal justice system to be gender insensitive.¹⁴² The Special Rapporteur also observed that, amongst the female population, there was a general distrust in the criminal justice system and that this distrust resulted in the limited reporting of crimes against women.¹⁴³

I. Domestic Violence

Of particular concern to the Special Rapporteur was the failure of the Indonesian Criminal Code to meaningfully address acts of violence against women, along with its failure to recognize domestic violence as a distinct crime.¹⁴⁴ Thus, rather than facilitate prosecutions for the same, promote awareness and education, and provide proper outlets for victims, such acts of violence would only

140. *See id.* (explaining that the practice of creating new standards was problematical and arduous).

141. *See Report on Indonesia of the Special Rapporteur on Violence Against Women, Its Causes and Consequences*, Ms. Radhika Coomaraswamy, U.N. Commission on Human Rights, 55th Sess., Item 12(a) on the Provisional Agenda, para. 50, U.N. Doc. E/CN.4/1999/68/Add.3 (1999) [hereinafter *Report on Indonesia*] (pointing to the lack of training in human rights within the criminal justice system as one of the reasons the rights of women are ignored).

142. *See id.* para. 49 (observing that the police must make their institutions more accessible to women).

143. *See id.* (implying that the close association of the police with the army contributed to this over-all distrust).

144. *See id.* para. 34.

be tried as general crimes and were rarely prosecuted.¹⁴⁵ Noting that the Indonesian Criminal Code is void of many of the changes that have assisted other countries in dealing with violence against women, the Special Rapporteur stressed the importance of amending the Code to “incorporate many of the standards advocated at the international level with regard to violence against women.”¹⁴⁶ Additionally, she encouraged Indonesia to reform its Code by introducing domestic violence legislation in keeping with international standards.¹⁴⁷

Unfortunately, such compliance was not forthcoming. This was an issue of vital importance for the women of East Timor where domestic violence in the post-conflict state surfaced as a “significant problem.”¹⁴⁸ In fact, domestic violence became the country’s most prevalent crime, comprising forty-percent of all reported criminal cases in the year 2000.¹⁴⁹ One can draw a parallel from this to the experiences in other post-conflict states where changes in societal values, poor economies, increased access to weaponry, and other factors have contributed to an increased risk of family violence.¹⁵⁰ In fact, the findings of two Independent Experts appointed to determine

145. *See id.*

146. *Id.* para. 53.

147. *See id.* para. 116 (noting that the Special Rapporteur also remarked on the absence of, and need for, legislation prohibiting sexual harassment).

148. *See* U.S. Dep’t of State, Country Reports on Human Rights Practices-2001, East Timor (Mar. 4, 2002), §5 (quoting East Timor’s chief minister, Mari Alkatiri, who expressed concern over mounting domestic violence against women, claiming that “cases of domestic violence are increasing” and that many “consider the beating of women to be a private affair”), *available at* www.state.gov/g/drl/rls/hrrpt/2001/eap/8300.htm (last visited Mar. 30, 2003).

149. Maggie O’Kane, *Return of the Revolutionaries*, THE GUARDIAN, Jan. 15, 2001, *available at* <http://www.tip.net.au/~wildwood/JanRev.htm> (last visited Mar. 29, 2003).

150. *See* Marina Ajdukovic, *Violence Against Women: Mental Health and Human Rights Issues in the Aftermath of War*, International Society for Health and Human Rights (discussing the emotional and physical challenges suffered by women in post-war nations), *available at* http://ishhr.org/conference/articles/ajdukovic_marina.pdf (last visited Mar. 24, 2003); *see also* Martina Vandenberg, *Women, Violence, and Tajikistan* (examining the various emotional factors women are forced to deal with following incidents of violent behavior), *available at* www.eurasianet.org/policy_forum/vand022001.shtml (last visited Mar. 24, 2003).

the effect of armed conflict on women, in accord with Security Council Resolution 1325, indicated that “violence during conflict is inextricably linked to an increase in violence after conflict, particularly in the form of domestic violence.”¹⁵¹ Additional factors that contributed to the problem in East Timor included the return to the home of men who participated in many years of guerrilla warfare¹⁵² and the high level of unemployment in post-conflict East Timor, estimated at approximately eighty percent.¹⁵³ These dynamics served to make East Timor a veritable breeding ground for acts of domestic violence. Despite this, not only does the Indonesian Criminal Code fail to specifically prohibit acts of domestic violence, it also does not provide for the criminalization of threats of violence, acts of attempted assault,¹⁵⁴ and threats to kill,¹⁵⁵ though all three crimes are common to domestic violence prosecutions. As a result, the Code itself was observed as an impediment to efforts to address the problem of domestic violence in East Timor.¹⁵⁶ This difficulty is

151. ELISABETH REHN & ELLEN JOHNSON SIRLEAF, WOMEN, WAR AND PEACE: THE INDEPENDENT EXPERTS' ASSESSMENT 14 (2002), available at <http://www.unifem.undp.org/resources/assessment/> (last visited Mar. 29, 2003). The difficulties experienced in East Timor caused then Special Representative of the Secretary-General Vieira de Mello to initiate a nation-wide campaign against domestic violence. *Id.* at 15.

152. See O'Kane, *supra* note 149 (discussing possible causes of violent behavior in men against women).

153. See Charlesworth & Wood, *supra* note 22, at 315 (providing statistics on the economic condition of East Timor); see also World Bank, *Gender Based Violence: The Case of Vietnam* (1999) (noting that in a recent study, economic hardship was noted to be one of the two greatest contributing factors to domestic violence), available at http://www.worldbank.org.vn/data_pub/reports/Bank1/rep4/vib001.htm (last visited Mar. 26, 2003).

154. See Kate Halliday & Diane Farsetta, *East Timorese Women Still Await Legal Protections*, CAPITAL TIMES (Madison, WI), Nov. 28, 2001, available at <http://etan.org/et2001c/november/25-30/28etwomn.htm> (last visited Mar. 25, 2003).

155. Amnesty International, *East Timor: Justice Past, Present and Future 2* (2001) [hereinafter Amnesty, 2001 Report (discussing inadequacies in East Timor's justice system subsequent to U.N. intervention)], available at <http://web.amnesty.org/library/index/ENGASA570012001> (last visited Mar. 29, 2003).

156. See Halliday & Farsetta, *supra* note 154.

no doubt exacerbated by the fact that the Indonesian Code also effectively sanctions marital rape.¹⁵⁷

2. Rape

“Any person who by using force or threat of force forces a woman to have sexual intercourse with him out of marriage shall, being guilty of rape, be punished by a maximum imprisonment of twelve years.”¹⁵⁸ This statute, along with other Indonesian statutes delineating sex offences, remained in place throughout the UN’s transitional administration of East Timor. In fact, Regulation 2000/15 specifically sanctioned the continued application of this provision.¹⁵⁹ This occurred in spite of the fact that the statute allows for rape to be committed within the confines of marriage. Such a limitation may have untold effects on East Timorese women, beyond that previously referred to in the context of domestic violence. It is well documented that under Indonesian rule, East Timorese women were “forced into ‘marriages’ with members of the occupation army.”¹⁶⁰ Thus, for these women, continued application of the law has the potential to legitimize cases of sexual assault in instances where the perpetrator is the same individual who coerced the victim into marriage.

As noted by the Special Rapporteur on violence against women, its causes and consequences, the legal definition of rape under the Indonesian Criminal Code is “limited to forced penetration of the

157. See Linton, *Cambodia, East Timor and Sierra Leone*, *supra* note 99, at 147 n.88 (citing Article 285 of the Indonesian Criminal Code).

158. See *id.* (providing the specific language of Article 285 of the Indonesian Criminal Code).

159. See Reg. No. 2000/15 *On Establishment of Panels with Exclusive Jurisdiction over Serious Criminal Offences*, § 9, UNTAET, U.N. Doc. UNTAET/REG/2000/15 [hereinafter REG. No. 2000/15] (stipulating that the laws of East Timor would apply to sexual offenses).

160. Charlesworth & Wood, *supra* note 22, at 315; see, e.g., *Alternative Approaches and Ways and Means Within the United Nations System for Improving the Effective Enjoyment of Human Rights and Fundamental Freedoms, Report of the Special Rapporteur on Violence Against Women, Its Causes and Consequences*, U.N. Commission on Human Rights, 54th Sess., Agenda Item 9(a), § I.A.(Indonesia) para. 2, U.N. Doc. E/CN.4/1998/54 (1998) (noting that the Special Rapporteur had received a large number of complaints regarding sexual violence in East Timor, including forced marriages, and that no cases had resulted in prosecution).

vagina by the penis," and thus does not cover other forced sexual actions.¹⁶¹ This limitation is hardly in compliance with international standards as delineated by the respective Court in cases before the International Criminal Tribunal for the Former Yugoslavia¹⁶² and the International Criminal Tribunal for Rwanda.¹⁶³ One such case noted nearly universal acceptance, in both adversarial and inquisitorial systems, of the fact that the definition of rape includes the penetration of the vagina or the anus by the penis or any other object.¹⁶⁴ The limitation of the Indonesian Criminal Code is particularly disturbing in light of examples wherein women have been sexually violated by objects, such as guns, in conflict and post-conflict situations.¹⁶⁵ It is not surprising, therefore, that the Special Rapporteur stressed the need for a broader definition of rape and recommended amending the rape provision in the Indonesian Criminal Code.¹⁶⁶ The statute, as written, fails to adequately protect female victims from being sexually violated by alternative means and makes no provision whatsoever for male victims.

Another troubling aspect in this area is the application of the Indonesian Code of Criminal Procedure. The Code provides that: "The testimony of one witness is not sufficient to prove that a

161. *Report on Indonesia, supra* note 141, para. 36.

162. *See Statute of the International Criminal Tribunal for the Former Yugoslavia*, 32 I.L.M. 1192, adopted by S.C. Res. 827, U.N. SCOR, 48th Sess., 3217th mtg. at 6, U.N. Doc. S/RES/827 (1993) (establishing the tribunal under the jurisdiction of the United Nations).

163. *See Statute of the International Criminal Tribunal for Rwanda*, 33 I.L.M. 1602, adopted by S.C. Res. 955, U.N. SCOR, 49th Sess., 3453rd mtg. at 3, U.N. Doc. S/RES/955 (1994) (establishing the tribunal under the jurisdiction of the United Nations); *see also* Linton, *supra* note 17, at 170 (discussing rape cases adjudicated before the international tribunals, noting that international law defines rape "as a 'physical invasion of a sexual nature, committed on a person under circumstances which are coercive'" (citing *Akayesu*, Case No. IT-96-4-T (Sept. 2, 1998)).

164. *See* Linton, *supra* note 17, at 170 (citing *Furundzija*, Case No. IT-95-17/1-T10 (Dec. 10, 1998) [181]; 38 I.L.M. 317, 355). The case also found that "forced penetration of the mouth by the male sexual organ constitutes a most humiliating and degrading attack upon human dignity." *Id.*

165. *See* REHN & SIRLEAF, *supra* note 151, at 9 (providing specific examples of violence against women).

166. *See* Report on Indonesia, *supra* note 141, para. 116 (recommending as well that the government should accelerate this process of law reform).

defendant is guilty of the act of which he is charged.”¹⁶⁷ Thus, under the Code, a *prima facie* case of rape may not be established in the absence of corroboration, including the testimony of two witnesses.¹⁶⁸ Though the Code was ultimately replaced by Regulation 2000/30, which did much to remedy the deficiencies in this area,¹⁶⁹ the Indonesian Code of Criminal Procedure, with its corroboration requirements, was applicable for nearly the first year of UNTAET’s administration.

3. Torture

In the early days of the East Timor’s post-conflict state, there existed a gap between *de facto* and *de jure* control, with the latter bestowed upon the CNRT.¹⁷⁰ The status of the same arguably continued, to a certain degree, under UNTAET governance. In particular, unofficial “security forces,” comprised of members of groups which included the CNRT, were noted in a 2001 report to the Transitional Administrator.¹⁷¹ To some extent, CNRT groups enjoyed their remaining authority courtesy of CIVPOL and UNTAET, who allowed the “irregular CNRT security groups” to screen returning refugees to determine whether the same were associated with Indonesian intelligence or militias.¹⁷² However, the screenings, at times, deteriorated to include maltreatment, most notably in the case of a beating and stabbing of a militia member.¹⁷³

167. *Id.* para. 38 (quoting Indonesian Code of Criminal Procedure, art. 185, para. 2).

168. *See id.* para. 53 (citing the Indonesian Code of Criminal Procedure). This shifts the burden of proof onto the victim and ensures that the victim is subject to trial. *Id.* para. 38.

169. *See* Reg. No. 2000/30 on Transitional Rules of Criminal Procedure, § 34.3, UNTAET, U.N. Doc. UNTAET/REG/2000/30 (removing the corroboration requirement and precluding admissibility of the victim’s sexual history), available at <http://www.un.org/peace/etimor/untactR/reg200030.pdf> (last visited Apr. 6, 2003).

170. *See* Chopra, *supra* note 17, at 32.

171. *See* Bongiornio, *supra* note 58, at 651-52 (describing the efforts of UNTAET to monitor unofficial security forces that were not accountable to legal bodies).

172. *See* U.S. Dep’t of State, *supra* note 148, § 1(c).

173. *See id.*

The existence of such forces and their resultant ability to mistreat returning refugees is particularly relevant to a discussion on the crime of torture *vis-à-vis* applicable law in East Timor. The United Nations criticized the Indonesian Criminal Code for its failure to prohibit torture in full compliance with its definition in the Convention Against Torture.¹⁷⁴ Specifically, the Convention Against Torture provides that the perpetrator inflict the punishable act “by or at the instigation of or with the consent or acquiescence of a public official.”¹⁷⁵ In contrast, the Indonesian Criminal Code limits its definition of torture to acts by public officials in criminal cases where the act is used to procure a confession or statement¹⁷⁶ and thus does not preclude torture outside of the process of criminal investigation.¹⁷⁷

Consequently, as the actions of the irregular CNRT sponsored security forces were not related to the investigation of a criminal case, they do not fall within the purview of the Indonesian statute. Turning then to the Convention Against Torture, which is both included in the list of instruments which reflect internationally recognized human rights standards in Section 2 of Regulation 1999/1 and is also recognized as customary international law,¹⁷⁸ the acts arguably are also not covered. In order for the maltreatment by the irregular forces to fall within the purview of torture, as defined in the Convention Against Torture, either its members would need to be recognized as “public officials” or their punishable acts be deemed to have occurred with the consent or acquiescence of a public official. The former appears unlikely in light of the fact that the CNRT forces

174. See *Conclusions and Recommendations of the Committee against Torture: Indonesia*, para. 9, 27th Sess., Nov. 12-23 2001, U.N. Doc. CAT/C/XXVII/Concl.3 (2001) (assessing the country’s compliance with the United Nations torture regulations). The statute is subject to further disapproval due to its failure to provide for penalties which adequately reflect the severity of the crime. *Id.* para. 10(a).

175. Convention Against Torture, art. 1(1), *opened for signature* Dec. 10, 1984, 1465 UNTS 85, *with changes* at 24 ILM 535, *entered into force* June 26, 1987.

176. See Linton, *supra* note 17, at 168.

177. See *Summary Record of the 492nd Meeting: Indonesia*, para. 20, Committee Against Torture, 27th Sess., U.N. Doc. CAT/C/SR.492 (2001).

178. See Linton, *supra* note 17, at 166-67.

were not accountable to the legal administration.¹⁷⁹ With regard to the latter, successful prosecution would also prove difficult. The available information is that the screening of the returning refugees by the CNRT was merely “permitted” to take place by CIVPOL and local UNTAET officials.¹⁸⁰ At best, this proves consent or acquiescence to the screening, not the punishable acts.

The fact that the definition of torture under customary international law fails to encompass maltreatment inflicted by private actors, has resulted in some regarding the same as too restrictive.¹⁸¹ Indeed, in its adoption of Regulation 2000/15, UNTAET chose to utilize two definitions for the crime of torture, neither of which limits the application of the same to acts of state officials.¹⁸² While this may appear to address the aforementioned acts of the CNRT irregulars, the regulation was not adopted until June 6, 2000. Thus, operating without the same as “black letter law,” CIVPOL had no cause to either document or prevent such activity insofar as it related to the crime of torture prior to June 2000. Further, in light of the fact that the definitions included in the regulation are more expansive than that of customary international law, *post hoc* application of the definitions contravenes the principle of *nullem crimen, nulla poena, sine lege*.¹⁸³

4. *Defamation and the Case of Takeshi Kashiwagi*

While the aforementioned gaps in the Indonesian Code present a very real problem, they comprise only part of the difficulty associated with the application of the Indonesian Criminal Code. Equally problematic is the presence of certain statutes in the Code that are offensive to international standards. While numerous laws

179. See Bongiornio, *supra* note 58, at 652-53.

180. See U.S. Dep’t of State, *supra* note 148, § 1(c).

181. See, e.g., Linton, *Cambodia, East Timor and Sierra Leone*, *supra* note 99, at 221.

182. See REG. No. 2000/15, *supra* note 159, §§ 5.2 (d), § 7.1 (providing two separate definitions of torture).

183. See Linton, *Cambodia, East Timor and Sierra Leone*, *supra* note 99, at 220 (stressing the importance of the requirement that “no one can be tried for acts that were not criminal at the time they were committed”).

were repealed by Regulation 1999/1,¹⁸⁴ many more remained in place, potentially subject to either prosecutorial and judicial discretion or subsequent regulation.¹⁸⁵ Of particular relevance is the charge of defamation, delineated in Chapter XVI, Articles 310-21 of the Indonesian Criminal Code.¹⁸⁶ In the Chapter, one finds that defamation may be established in the absence of publication, provided that an "obvious intent" to publicize is shown.¹⁸⁷ As a result, under Indonesian law, one can be convicted of attempt to defame.¹⁸⁸ Further, the law provides that the truth is not always a defense, and in fact may only be utilized as such when a judge so decides, or when the accused is a public official and the charge is related to an official act.¹⁸⁹ In addition, if the defamed person is ultimately acquitted of the alleged act, the acquittal is deemed to be "perfect proof" of the untruth of the fact.¹⁹⁰ Under the Indonesian Code, one can defame the dead,¹⁹¹ punishments are enhanced by one-third when the defamed individual is a public official,¹⁹² and only the defamed individual may bring charges, except in the case of a public official.¹⁹³

Historically, Indonesia's criminalization of the charge of defamation has not existed in the absence of international censure. Used as a tool to silence political opposition and criticism, it has been the subject of investigation by the Special Rapporteur on the

184. See Reg. No. 1999/1, *supra* note 69, § 3.2 (repealing several sections of Indonesian law). The effectiveness of this has been subject to criticism. See Linton, *supra* note 17, at 137 n.55 (stating that "the Regulation does not specify any years or law numbers and it is not clear which laws are referred to").

185. See Linton, *supra* note 17, at 137 (noting that treaties are not directly applicable, so existing laws are read subject to them).

186. See INDON. CRIM. CODE arts. 310-21 (defining and describing the crime of defamation).

187. See *id.* art. 310. The offense is punishable by a period of imprisonment of up to nine months. *Id.*

188. See *id.*

189. See *id.* art. 312.

190. See *id.* art. 314.

191. INDON. CRIM. CODE arts. 320-21.

192. See *id.* art. 316.

193. See *id.* art. 319.

protection and promotion of the right to freedom of opinion and expression.¹⁹⁴ The United Nation's Commission on Human Right's Working Group on Arbitrary Detention has found its application to be contrary to the exercise of the rights guaranteed by the Universal Declaration of Human Rights¹⁹⁵ and the International Covenant on Civil and Political Rights,¹⁹⁶ the first two documents referenced in Regulation 1999/1.¹⁹⁷

Takeshi Kashiwagi, a Japanese journalist and long-time activist for East Timorese independence, was imprisoned in East Timor in the summer of 2000 under charges of defaming and threatening to kill Xanana Gusmão, then the CNRT leader.¹⁹⁸ In the period prior to his arrest, Kashiwagi had accused upper level members of the CNRT of conspiring with foreign powers to obtain an advantage in East Timor's first representative government.¹⁹⁹ CIVPOL subsequently

194. See *Report of the Special Rapporteur, Mr. Abid Hussain, pursuant to Commission on Human Rights Resolution 1993/45*, UNGAOR, Hum. Rts. Comm., 52d Sess., paras. 49-54 U.N. Doc. E/CN.4/1996/39 (1996) (discussing the imprisonment of Nuku Suleiman for having disseminated stickers which alleged that human rights violations were committed by the Indonesian president's security forces).

195. Universal Declaration of Human Rights, G.A. Res. 217(III)(A), U.N. GAOR, U.N. Doc. A/810, art. 19 (1948) (declaring that everyone has the right to freedom of expression).

196. See ICCPR, *supra* note 76, art. 19(2) (stating that everyone has the right to freedom of expression); see also *Report of the Working Group on Arbitrary Detention*, ESCOR, Hum. Rts. Comm., 51st Sess., at 12, U.N. Doc. E/CN.4/1995/31 (1994) (finding the detention of Nuku Suleiman to be arbitrary, category II); *Report of the Working Group on Arbitrary Detention*, para. 9, Commission on Human Rights, 49th Sess., Item 10 of the provisional agenda, U.N. Doc. E/CN.4/1993/24 (1993) (delineating the parameters of category II).

197. See Reg. No. 1999/1, *supra* note 69, §2 (referencing the Universal Declaration of Rights and the International Covenant on Civil and Political Rights).

198. See Shinichi Murakami, *Japanese Activist Fights Corruption in East Timor*, ASAHI EVENING NEWS, Oct. 26, 2000 (describing the arrest of Takeshi Kashiwagi), available at <http://www.etan.org/et2000c/november/1-4/00japan.htm> (last visited Apr. 20, 2003).

199. See *id.* CNRT's association with UNTAET and the legitimacy derived therefrom were observed prior to the dissolution of the faction. See U.S. Dep't of State, *supra* note 145, § 1(f) (describing the close relationship between CNRT and UNTAET).

arrested Kashiwagi on August 22, 2000²⁰⁰ pursuant to warrants issued by the Dili District Court that did not specifically name the alleged victim.²⁰¹ The transcript of Kashiwagi's interview by CIVPOL, performed on the date of arrest, reveals that the journalist was joined at the questioning by a public defender and that he admitted to no more than criticism of the CNRT and its leader, Xanana Gusmão.²⁰²

On the day following his arrest, a Dili District Court Investigating Judge issued a thirty-day detention order, in which the charge of threatening was omitted.²⁰³ Kashiwagi, thus, remained in prison on the single charge of criminal defamation, a charge that is incompatible with international standards.²⁰⁴ Although Kashiwagi's assigned counsel made two subsequent applications for his release,

200. See Bruno Kahn, *The Kashiwagi Case*, AGIR POUR TIMOR (Sept. 29, 2000) (on file with author) (depicting the warrants associated with Kashiwagi's arrest, his release order, a transcript of an interview of Kashiwagi at CIVPOL headquarters, and Kahn's own interview with the journalist).

201. See *id.* (referencing the charge stated on Kashiwagi's arrest warrant).

202. See *id.* (describing Mr. Kashiwagi's interrogation).

203. See *id.*; see also Amnesty, 2001 Report, *supra* note 155, at 25 (stating that the charge, in fact, was not a part of the Indonesian Criminal Code and, thus, was contrary to the applicable law); C. Vasconcelos, *Briefing to the Annual Conference of the International Association of Prosecutors*, (Sept. 2001) (briefing presented Sept. 2-7, 2001, Sydney, Australia (confirming the accuracy of the Amnesty International Report)), at <http://www.etan.org/et2001c/august/26-31/25cv.htm> (last visited Mar. 21, 2003). But see East Timor Action Network/U.S., *East Timor: U.N. Officials Dismiss Amnesty's Critical Report as 'Exaggeration'* (July 31, 2001) (describing Amnesty International's report as exaggerated), at <http://www.etan.org/et2001c/august/01-4/00un.htm> (last visited Mar. 21, 2003). The charge might have been an example of the U.N. legal officers of the UNTAET drawing on their knowledge of the laws of their home countries, a hallmark of the UNTAET in its early days. See McDonald, *supra* note 11, at 13.

204. See *supra* note 197 and accompanying text; see also U.S. Dep't of State, *supra* note 148, § 2(a) (describing the Kashiwagi case and noting that a court held he had a legal right to compensation for his arrest); Amnesty 2001 Report, *supra* note 155, at 23-25 (describing the Kashiwagi case and its inconsistencies with international law); *Universal Declaration of Human Rights*, *supra* note 195, art. 19 (declaring that everyone has a right to freedom of expression); ICCPR, *supra* note 76, art. 19(2)-(3) (protecting the freedom of expression).

neither were successful²⁰⁵ and neither raised the issue that the outstanding charge was contrary to international standards.²⁰⁶ It also seems unlikely that either application raised the issue that Kashiwagi's continued detention was in contradiction with the relevant applicable Code.²⁰⁷ The case ultimately came to the attention of the Transitional Administrator, Sergio Vieira de Mello, who, on September 7, 2000, issued Executive Order 2000/2 that decriminalized the charge of defamation.²⁰⁸ Although the General Prosecutor requested Kashiwagi's unconditional release the next day, Kashiwagi received only a conditional release on September 9.²⁰⁹ After calling the Court's attention to the Executive Order, Kashiwagi's release became unconditional on the twentieth of September.²¹⁰ Kashiwagi later received a letter from Acting Transitional Administrator Jean-Christian Cady apologizing for his unlawful arrest and detention and advising Kashiwagi to file a request for compensation for the same.²¹¹

205. See Amnesty 2001 Report, *supra* note 155, at 24 (noting that the court denied Kashiwagi's applications on the ground that he might commit defamation again, or commit other crimes).

206. See E-mail from Takeshi Kashiwagi, to Megan Fairlie (Dec. 13, 2002) (on file with author) (noting that neither of Mr Kashiwagi's lawyers raised the issue of his detention being contrary to international standards). When asked whether either of the public defenders associated with his case ever raised this issue, Takeshi Kashiwagi responded, "Neither did. Both might be unaware of it." *Id.*

207. See Amnesty, 2001 Report, *supra* note 155, at 24 (noting that there was no legal ground for Kashiwagi's detention). As UNTAET, at this point, had yet to promulgate a code of criminal procedure, Indonesian procedure applied. The same allowed for pre-trial detention only in cases wherein an individual is charged with a crime for which the associated penalty is imprisonment of five years or more. *Id.* Kashiwagi's charge carried a maximum penalty of nine months imprisonment. *Id.*

208. See *On the Decriminalisation of Defamation*, Executive Order 2000/2, UNTAET, U.N. Doc. UNTAET/ORD/2000/2 (2000) (on file with author) (decriminalizing defamation). A review of the relevant CIVPOL records reveals that the Order was issued on the same day that the Transitional Administrator requested Mr. Kashiwagi's criminal file. See Kashiwagi Case- CIVPOL records (on file with author).

209. See Amnesty 2001 Report, *supra* note 155, at 25 (noting that Mr. Kashiwagi received only a conditional release on September 9, 2000).

210. See Murakami, *supra* note 198.

211. See Letter from Jean-Christian Cady, Acting Transitional Administrator, UNTAET, to Takeshi Kashiwagi (Sept. 27, 2000) (on file with the American University International Law Review).

Kashiwagi's subsequent civil case, brought against the Minister of Justice, the Transitional Administrator, the Investigating Judge, and two of the General Prosecutors, is illustrative of the many problems associated with the application of Regulation 1999/1.²¹² The basis of Kashiwagi's claim for unlawful imprisonment was not the aforementioned incompatibility of his charge with either international standards or Indonesian Procedure, but rather that, contrary to the Code, the allegedly defamed individual did not bring the complaint against him.²¹³ The fact that non-compliance with the requirements of the charge, rather than the invalidity of the charge itself, formed the basis of Kashiwagi's claim is likely illustrative of the fact that the East Timorese bar was, at the time, in its nascent stages.

After unsuccessfully challenging the issue upon which the suit was brought,²¹⁴ defense arguments focused on such areas as the Court's lack of subject matter jurisdiction to hear the case before it.²¹⁵ The defense proffered by the Investigating Judge was more than disturbing: ignoring the fact that Kashiwagi had not brought his claim as a result of the Executive Order 2000/2, the judge asserted that the same was an illegitimate order and that he had acted in accordance with his duties.²¹⁶

In finding for the plaintiff, the District Court noted non-compliance with the Indonesian Criminal Code, in that the details of the investigation, received into evidence, failed to include a complaint made by the defamed individual.²¹⁷ However, the Court

212. See Bongiornio, *supra* note 58, at 672 (describing the confusion that resulted from conflicting claims by the defendants and other interested parties in Kashiwagi's civil suit).

213. See *id.* at 671 (describing the legal basis for Kashiwagi's civil claim). CIVPOL may have been under the impression that the public official exception applied. See *supra* note 192 and accompanying text (explaining the public official exception).

214. The defense that the public official exception applied was raised but then rejected by the Dili District Court in the early stages of the litigation. E-mail from Takeshi Kashiwagi to Megan Fairlie (Mar. 7, 2002) (on file with author).

215. Bongiorno, *supra* note 58, at 673 (alleging that the matter should have been brought before a non-existent administrative court).

216. *Id.* at 672.

217. See *id.* at 675 (noting that Kashiwagi prevailed because there was no allegation of a victim/witness who claimed injury).

did not limit its holding accordingly. Rather, it also found that Executive Order 2000/2 was unlawful and ordered it to be set aside.²¹⁸ Amongst the culpable defendants, the Court included the Transitional Administrator who issued the executive order “which carried implications for the legal status of the former accused/plaintiff. . . . and which conflicted with the basis of the criminal code.”²¹⁹ The Court’s patent misunderstanding of both the legitimacy²²⁰ and ramifications²²¹ of the executive order have been described as “alarming” and “bizarre.”²²²

As a result, the status of the charge of criminal defamation in East Timor remains unclear.²²³ Despite the Dili District Court decision, many assume that Executive Order 2000/2 resolved the issue.²²⁴ However, it does not appear that anyone has revisited the District Court decision to set the executive order aside, except insofar as to

218. *See id.* at 673 (noting that the court struck down Executive Order 2000/2).

219. *Id.* at 675.

220. *See* Reg. No. 1999/1, *supra* note 69, § 3.1 (specifying not only that regulations and directives in conflict with the applicable law result in the invalidity of the latter, but also stating that the applicable laws shall continue to apply “only in so far as they do not conflict” with international standards). Thus, arguably, no positive act was required to invalidate the criminal charge of defamation. *See supra* note 200 and accompanying text (noting that Kashiwagi’s detention on a charge of criminal defamation was contrary to international standards).

221. Translation of Civil Appeal 2001/01 (Aug. 20, 2001) (on file with author) (translating the decision in which the Court of Appeal noted that “the executive decision issued by Sergio Vieira de Melo [sic], far [from] being the cause of Takeshi’s damages, was effectively the fact that ended the illegal imprisonment he was subjected to”). It is possible that the District Court’s holding with regard to the Transitional Administrator and the Executive Order may have been, in part, the result of the Court’s perception of the manipulation of the law, a problem that reared its head earlier in the transitional administration. *See* Interview by Susanna Lobez with Pene Mathew, Senior Lecturer, Australian National University, Faculty of Law, *Take Four Legal Systems and Stir!*, RADIO NATIONAL (July 11, 2000), at <http://www.abc.net.au/rn/talks/8.30/lawrpt/stories/s150455.htm> (last visited Mar. 22, 2003).

222. *See* Bongiornio, *supra* note 58, at 675.

223. *Id.* (noting that the court set aside Executive Order 2000/2).

224. *See* U.S. Dep’t of State, *supra* note 148, §1 (e) (reporting that the Indonesian statute was subsequently revoked by UNTAET); Linton, *supra* note 17, at 137 (noting that the Kashiwagi case led to an “immediately effective” executive order nullifying the offence).

observe that the order actually assisted Kashiwagi.²²⁵ Certainly, the likelihood of the UNTAET administration issuing additional charges of criminal defamation was virtually non-existent.²²⁶ However, if left as a valid part of the criminal code, the possibility for negative future ramifications remains.²²⁷

Thus, the Kashiwagi case is symbolic of the difficulties experienced as a result of Regulation 1999/1.²²⁸ A young judiciary and prosecutorial staff, along with CIVPOL, were ineffectual in applying the regulation to the existing criminal code.²²⁹ As a result, an individual was unjustly imprisoned and the United Nations was placed in the embarrassing position of having facilitated his arrest by CIVPOL, on the authority of a warrant issued by a court operating under UNTAET's administration.²³⁰ In addition, UNTAET became subject to a subsequent civil action, wherein the inherent inability of the judiciary to master the meaning and application of Regulation 1999/1 was further demonstrated.²³¹

225. See Translation of Civil Appeal 2001/1, *supra* note 221.

226. See Letter from Heng Sou Kaw, Acting Commissioner UNPOL, to Takeshi Kashiwagi (May 1, 2002) (on file with author) (stating that "the SRSG has by executive order revoked all of the relevant sections of the Indonesian Penal Code that applies to the [Kashiwagi] case"). "As a result, such action cannot be taken against [Kashiwagi] or any other person under the applicable laws in East Timor. . . ." *Id.* The letter further states that "the circumstances that led to [Kashiwagi's] unlawful arrest and detention will not happen again under the present laws in force in East Timor." *Id.*

227. See Strohmeier, *supra* note 98, at 48 n.8 (asserting that new states tend to retain the legislation enacted during the period of transition). The situation in the Kingdom of Cambodia certainly supports this contention. The criminal code and code of criminal procedure, instituted by the U.N. transitional authority in Cambodia in 1992 and 1993, respectively, remain in place to date. U.S. Dep't of State, Country Reports on Human Rights Practices- 2001, Cambodia, §1 (d) (2002), available at <http://www.state.gov/g/drl/rls/hrrpt/2001/eap/8283.htm> (last visited May 9, 2003).

228. See Linton, *supra* note 17, at 134-35 (describing the problems concerning East Timor's legal regime).

229. See *id.*

230. See *id.* at 137 (describing the Kashiwagi case).

231. See Bongiorno, *supra* note 58, at 672 (describing the civil case Kashiwagi brought against UNTAET).

5. Additional Areas of Concern

The Kashiwagi case, thus, creates concern with regard to the continued application of other problematic provisions in the Indonesian Code.²³² After its visit to Indonesia in 1999, the Working Group on Arbitrary Detention remarked upon numerous statutes in the Code that the Indonesian government needed to address.²³³ In particular, the group observed that various statutes failed to include a clear *mens rea* and the legislature drafted the laws in a vague and general manner that resulted in the potential for abuse in their application.²³⁴ Regulation 1999/1 did not specifically repeal any of the four chapters cited by the Working Group.²³⁵

On the contrary, at least one individual was improperly detained under one of the chapters cited by the Working Group.²³⁶ Authorities held Afonso da Costa, a militia suspect, for approximately six months in 2000, presumably in violation of crimes against the security of the state, pursuant to Chapter I, Article 107 of the Indonesian Criminal Code.²³⁷ The UNTAET Office of the Principal Legal Advisor informed Amnesty International, however, that in light of the fact that Regulation 1999/1 repealed the Anti-subversion Law, by extension, Article 107 should also no longer apply.²³⁸ This scenario exemplifies not only the continued application of a law that

232. See Linton, *supra* note 17, at 137 (noting that “[w]ithout precise instruction on what is or is not an internationally acceptable legal provision, it remains at the discretion of the relevant prosecutor whether a certain offence will be pursued”).

233. See Working Group visit to Indonesia, *supra* note 137, para. 50 (citing the respective chapters on crimes against security of the State, crimes against the dignity of the President and Vice-President, crimes against public order, and crimes against Public Authority).

234. See *id.* (noting that the potential targets for such abuse included the press, political opposition, and trade unions).

235. See *supra* note 74 and accompanying text (listing the laws that Regulation 1999/1 repealed).

236. See Working Group Visit to Indonesia, *supra* note 137, para. 50 (including crimes against the security of the state in its list of provisions).

237. See Amnesty 2001 Report, *supra* note 155, at 25 (noting that the U.N. Peacekeeping Forces never actually clarified the specific charges behind da Costa’s arrest).

238. See *id.* (commenting that Article 107 was still in the statute book when forces arrested da Costa).

should have been repealed, but also the complexity involved in applying Regulation 1999/1.²³⁹ While the charge in question is Article 107 of Chapter I of the Indonesian Criminal Code, the repealed Anti-subversion Law was Presidential Decree 11/1963.²⁴⁰ Thus, the connection shared by the two laws does not derive from their affiliation within the Code and is arguably not readily apparent.

IV. THE NEED FOR A MODEL CODE

The difficulties experienced in UNTAET's application of the Indonesian Criminal Code and the Indonesian Code of Criminal Procedure, which ranged from a basic lack of access to the texts that delineated the controlling law to the incarceration of individuals under statutes that are contrary to international standards, serve to make the case for a model code. Armed with the same, future transitional administrations would be better able to comply with Sergio Vieira de Mello's admonition: be prepared.²⁴¹ A ready-made code would enhance public confidence in the relevant administration in that it would enable the administration to focus on the job at hand rather than on how to do the job.²⁴²

Of course, these would fail to be pertinent arguments if the United Nations were not to again assume the responsibility of the transitional administration.²⁴³ In fact, when presented with the possibility of transitional governance in Afghanistan, Lakhdar Brahimi, the U.N. Secretary General's Special Representative to the country, stated that the prevailing lesson from previous missions is that they should not be repeated.²⁴⁴ While that is a possibility,²⁴⁵ it is

239. See *supra* notes 228-231 and accompanying text (discussing the problematic application of Regulation 1999/1).

240. See Working Group visit to Indonesia, *supra* note 137, para. 42 (stating that Presidential Decree 11/1963 deals with detaining persons).

241. See de Mello, *supra* note 64, at 2.

242. See *id.* at 3 (noting that work on the set-up "makes the UN appear slow and more dedicated to itself than those it is mandated to assist").

243. See Mark Riley, *We Won't Clean up the Mess, Says U.N.*, SYDNEY MORNING HERALD, Oct. 19, 2001 (noting that a transitional administration was suggested for Afghanistan), available at <http://old.smh.com.au/news/0110/19/world/world2.html> (last visited May 5, 2003).

244. See *id.*

far from certain and, in fact, many subscribe to the opposite point of view.²⁴⁶ Commentators note that “[t]he most common form of contemporary international insecurity calls for complex [peace support operations] as the tool of choice of the international community”²⁴⁷ and it is likely that the U.N.’s involvement in transitional governance will intensify.²⁴⁸

Thus, many camps call for a “generic legal framework.”²⁴⁹ Support for the same is understandable. In cases of transitional governance, it is a necessary pre-requisite for effective and immediate international assistance.²⁵⁰ It would also be a means for assuring that the arrests and prosecutions, initiated under the auspices of the U.N., are aligned with the U.N.’s own standards.²⁵¹

However, amongst those who advocate for a code, there is a lack of unanimity as to the type of code that is required. While some promote the idea of limiting the model code to procedural issues and serious crimes,²⁵² others have recognized the imperative of

245. See Brahimi Report, *supra* note 1, para. 78 (mentioning that no one expected that the United Nations would take the role of transitional administrator in East Timor and Kosovo); see also de Mello, *supra* note 64, at 6 (noting that “[i]t is unlikely that the United Nations will be asked again in the near future to assume such broad Governance mandates”).

246. See de Mello, *supra* note 64, at 6 (stating that recent history teaches us “that what is unlikely usually happens”).

247. Thakur, *supra* note 21, at 119.

248. See Beauvais, *supra* note 16, at 1178 (predicting that there is good reason to expect the United Nations’ involvement to intensify due to the historical evolution of peace operations).

249. Thakur, *supra* note 21, at 122; see Brahimi Report, *supra* note 1, para. 81 (arguing that a common justice package would have been easier to apply); see also CHOPRA, *supra* note 50, at 16 (stating that criminal law should be a “simplified document”), Plunkett, *supra* note 67, at 69 (observing that “where no law exists, a UN ‘off the shelf’ criminal law and procedure is essential in any peace maintenance arsenal”); Beauvais, *supra* note 16, at 1156 (noting that an interim criminal law created by the United Nations would be potentially useful).

250. See Thakur, *supra* note 21, at 122 (noting that judges, prosecutors, and investigators cannot aid civil authority where no legal framework exists).

251. See Plunkett, *supra* note 67, at 69.

252. See Beauvais, *supra* note 16, at 1157 (citing an interview with Hansjörg Strohmeier).

integrating human rights law with domestic criminal law.²⁵³ It is likely that the prior experiences of U.N. missions are the most instructive sources on the need for a model code and the degree to which it should be drafted.

V. LESSONS LEARNED

A. OTHER MISSIONS

Just as East Timor was not the first example of a complex peacekeeping operation, it was also not the first time when observers recognized the need for a generic criminal code.²⁵⁴ In the aftermath of the Cambodian experience, some note that a body of criminal procedure and law derived from universal principles is a necessary item for inclusion in U.N. "justice packages."²⁵⁵ In that mission, the application of Vietnamese-drawn criminal law and procedure proved "woefully unworkable to achieve the U.N.'s fundamental objectives."²⁵⁶ As a result, the U.N. Transitional Authority in Cambodia sought to devise its own code, an activity that proved time consuming and resulted in an incomplete set of laws.²⁵⁷

The mission in Somalia utilized the former Italian penal code,²⁵⁸ however, in the case of Kosovo, the public bristled at the application of the penal code and criminal code of procedure of the former Yugoslavia.²⁵⁹ While the Transitional Administrator responded accordingly and set in place the application of the Kosovar laws that preceded Yugoslavian authority, these laws were no more aligned

253. See CHOPRA, *supra* note 50, at 16.

254. See Plunkett, *supra* note 67, at 67.

255. See *id.* (quoting GARETH EVANS, COOPERATING FOR PEACE: THE GLOBAL AGENDA FOR THE 1990'S AND BEYOND 56 (1993)).

256. *Id.* at 69.

257. See *id.* (noting that the code failed to enumerate and define legal defenses). It also drafted the offense of rape without including the requirement of a lack of consent. *Id.*

258. See *id.* (citing the Italian penal code as the legal basis for the criminal justice system in Somalia).

259. See Strohmeier, *supra* note 98, at 112 (noting that this response was likely due to the fact that Yugoslavia's laws fueled discrimination policies and repressed the Kosovar Albanian people for a decade).

with international standards than those of Yugoslavia.²⁶⁰ Because the first regulation issued by the United Nations Interim Administration in Kosovo (“UNMIK”), also entitled Regulation 1999/1, is virtually identical to UNTAET’s first regulation, it is reasonable and accurate to infer that the UNMIK endured difficulties similar to those experienced by UNTAET.²⁶¹

B. EAST TIMOR

The difficulties that surfaced in the application of the Indonesian Code *vis-à-vis* Regulation 1999/1 varied in scope and effect. While each arguably serves to affirm the need for a model criminal code, certain examples specifically highlight the requirement that a model code needs more substance than a mere “bare-bones” version.

While domestic violence would almost certainly fall outside the scope of a criminal code that is limited to “serious violations,” East Timor is representative of the fact that post-conflict situations are ripe for such activity.²⁶² It would be difficult to defend the absence of domestic violence provisions in a model code for transitional governance as domestic violence emerged as the dominant crime in East Timor, comprising nearly half of all criminal offenses in the post-conflict state.²⁶³ This fact is entirely on point with the findings of Rehn and Sirleaf, the two independent experts working pursuant to a Security Council Resolution on Women and Peace and Security.²⁶⁴ In fact, the East Timorese experience speaks in the same voice as the experts’ Executive Summary: “[d]omestic violence [needs] to be recognized as systemic and widespread in conflict and post-conflict situations and addressed in . . . legal and security responses and training in . . . post-conflict reconstruction.”²⁶⁵

260. *See id.* (noting protest among politicians and the legal community).

261. *See id.* at 59 (describing the similar experiences of UNMIK and UNTAET).

262. *See supra* note 148 and accompanying text.

263. *See* O’Kane, *supra* note 152 (stating that domestic violence is the most prevalent crime in East Timor, making up forty percent of the total offenses).

264. *See* REHN & SIRLEAF, *supra* note 151, at 17 (describing the “woefully inadequate” provisions for female victims of violence).

265. *Id.* at 18.

The applicable code in East Timor under the U.N. Transitional Administration also reinforces the need to include suitable rape provisions in a model code for transitional governance. A review of the Indonesian statute establishes the fact that a transitional administration may not be able to rely on an existing code to address this issue.²⁶⁶ Though a cultural argument may exist for limitations placed upon the offence, such as its non-existence within the confines of marriage, the experience in East Timor creates a strong argument for the fact that such a restriction has no place in the justice system of a post-conflict state. The existence of forced marriages in East Timor illustrates that this type of restriction served to place yet another tool in the hands of the oppressor.²⁶⁷ In addition, the very limited definition of the crime left some female victims, and all male victims, unprotected and without recourse.

The activity of the CNRT in post-conflict East Timor is arguably representative of what one can expect to find in other post-conflict situations.²⁶⁸ Namely, it is reasonable to anticipate, particularly in cases of internal division, that a prevailing faction may seek to extract revenge upon its former opposition. Thus, there exists a strong argument for an expansive definition of torture in a model code for transitional governance.²⁶⁹ In light of the fact that the model code may achieve domestic compliance with present customary international law by limiting the application of the crime to instances involving official conduct, a broader definition needs to be included in the model code.²⁷⁰

As with regard to domestic violence, the case of Takeshi Kashiwagi argues against the creation of a narrowly drawn model

266. See *supra* notes 158-169 and accompanying text.

267. See Charlesworth & Wood, *supra* note 22, at 315.

268. See U.S. Dep't of State, *supra* note 148, §1(c) (noting that the CNRT security groups were involved in instances of torture and other forms of cruel and inhuman punishment).

269. See *supra* note 181 and accompanying text (noting UNTAET's decision to ultimately apply an expansive definition of torture that would include the activity of private citizens).

270. See *supra* note 175 and accompanying text (citing language used in the Convention Against Torture).

code.²⁷¹ Not only would defamation provisions fall outside the purview of “serious crimes,” acts of libel, slander and the like would likely rather be civil in nature. The danger in drafting an incomplete model criminal code is the resultant likelihood that former legal provisions would come into play to fill the void left by a narrowly drafted code. In the case of a state wherein speech has been severely curtailed in order to assure political dominance, the danger of history repeating itself is clear.²⁷² The case of Takeshi Kashiwagi is one wherein the oppressed became the oppressor, with the newly found state using its former persecutor’s tool as its own, and all under the auspices of U.N. authority.²⁷³ To fail to address the potential for this danger by providing a complete model code would likely subject the United Nations to criticism, result in instances of unjust imprisonment, and hinder the growth of the nascent state in both the context of politics and human rights.

Had a complete model code existed prior to UNTAET, authorities would have circumvented the difficulties experienced in both accessing and translating the applicable code.²⁷⁴ Further, both CIVPOL and U.N. legal experts would have been familiar with, and trained in, the applicable law *prior* to its application.²⁷⁵ The existence of a code would have been helpful in procuring legal assistance from non-governmental organizations that, in a like manner, could have had the earlier training necessary to assist in the establishment of the East Timorese justice system.²⁷⁶ Such a code would also have ensured that the applicable punishments were commensurate to the

271. *See supra* Part III.C.4 (describing the Kashiwagi case).

272. *See supra* note 194 and accompanying text (noting that historically, the crime of defamation existed as a tool to silence political opposition and criticism).

273. *See supra* notes 198-202 (describing the circumstances surrounding Kashiwagi’s arrest).

274. *See supra* notes 228-230 and accompanying text (describing the difficulties inherent in acting without a clear code that is consistent with international human rights standards).

275. *See* Linton, *supra* note 17, at 137 (noting that the officials’ lack of instruction and experience with legal provisions can have dangerous results, as exemplified by the Kashiwagi case).

276. *See supra* note 133 and accompanying text (stating that non-governmental organizations were not able to receive legal training reserved for governmental employees).

relevant crime and would have enabled the transitional administration to have an alternative focus for the energies it expended on a code that provided for the criminalization of attempted defamation but not attempted assault. An interim code would also have created a “clean slate” that would have brought with it an increased likelihood of respect for the rule of law. It would also have guaranteed textual compliance with international standards, making the transitional administration less vulnerable to civil liability, as in the case of Takeshi Kashiwagi.²⁷⁷ As was acknowledged in the Universal Declaration of Human Rights, “it is essential, if man is not to be compelled to have recourse, as a last resort, to rebellion against tyranny and oppression, that human rights should be protected by the rule of law.”²⁷⁸ A model code would establish such protections.²⁷⁹ In sum, a complete model criminal code for transitional governance would have assisted the transitional administration in East Timor on many fronts and could thus, analogously, serve to prevent similar problems from surfacing under future administrations.

277. See *supra* note 213 and accompanying text (describing the basis of Kashiwagi’s civil suit).

278. Universal Declaration of Human Rights, *supra* note 195, pmb1.

279. See CHOPRA, *supra* note 50, at 16 (stating that “special account should be taken of the unique dimensions of human rights law”).