Constitutional Exception as the Basis for Security Sector Reform in Timor-Leste

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Abstract The current legal regime on national security in Timor-Leste is based on the response given to situations of Constitutional exception. After the restoration of the independence in 2002, the crises of 2006 and 2008 led to the creation of joint military and police taskforces. The lessons then learned shaped the legal regimes for the organization, development and engagement of the military and security Forces, as much as traditional doctrine on national security. The legal reform of 2010 was tested by Operation “Hanita” in 2015 and led to the approval of the Strategic Concept on National Defence and Security in 2016. There are still many challenges in the implementation of these legal regimes, which are now the building blocks of a system of Defence and Police Forces under the Rule of Law in times of peace.

1 Introduction

It is ironic that this Symposium on Constitutionalism under Extreme Circumstances, where many papers turn to the problems arising from military interventions in constitutional regimes, takes place precisely under the consequences of a military intervention in Turkey after a supposed failed coup. The pessimistic outlook when dealing with military interventions throughout the world is the result of the authoritative regimes, in some cases the dictatorial, implemented. Presently difficult processes of democratization after military interventions take place not only in Egypt, but also in Myanmar, Thailand and still in The Salomon Islands and elsewhere in the world.¹ The power of the military is still very much felt in modern societies, even

¹See in this volume Manar Mahmoud, Constitution-Making, Political Transition and Reconciliation in Tunisia and Egypt: A Comparative Perspective.
democratic ones, as Eisenhower alerted in his Farewell Address to the weight of the “military-industrial complex”.

Not all examples are negative, however. In Portugal, the democratic transition was prompted by the military coup of 25 April 1974. After 48 years of dictatorship, and more than a decade of a disastrous colonial war, a military coup initiated the transition to a modern, democratic regime under the rule of law. After some years of political unrest, the militaries withdrew to the barracks and allowed the political process to take its normal course. The first elected President was a former General, and the process was not always easy—at one point the military exercised full power over the country, even judicial control of the constitutionality of the laws. However, the constitutional amendment of 1982 allowed for a smoother transition that culminated with the full membership of the EU in 1986 and led to a functioning democracy.2

Timor-Leste, a former Portuguese colony in Southeast Asia, is another example where the weight of the military is still largely felt. In Timor-Leste, the role of the military is the heritage of the 24 years of a military struggle for national liberation (together with the diplomatic and the clandestine fronts) against the violent occupation of Indonesia, from 1975 to 1999. Following the same military coup in Portugal, that allowed for the referred transition to democracy, a plan for decolonization was devised between Portuguese authorities and emerging Timorese authorities, including national political parties. Before that plan could be put into action, Indonesia unlawfully invaded Timor-Leste, with the (at least tacit) support of the USA and Australia. Domestic unrest in Timor-Leste (which covert Indonesian operations had promoted) was invoked as a reason for the invasion branding the fear of a communist government in Timor-Leste, in times of high tension during the Cold War.3

The UN and the international community never legally recognized the annexation of Timor-Leste by Indonesia, apart from Australia. The only de jure recognition of Indonesian rule in Timor-Leste by Australia had in mind the need for an agreement on the delimitation of the maritime border to allow the exploitation of the rich natural resources (oil and gas) of the Timor Sea. Mounting international pressure, especially after the 1992 Santa Cruz massacre, led to the signing of the international agreement between Portugal (the de jure administration power of a territory in the process of decolonization) and Indonesia (the de facto occupying power),4 under the auspices of the UN, which paved the way for the referendum on the exercise of self-determination by the Timorese people of 30 August 1999.5 The overwhelming majority of Timorese voted for independence and, after brief episodes of violence during the withdrawal of the Indonesian forces (promoting

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2 On the large bibliography on the matter vide Pinto (2005: 83 et ff) and Rezola (2012: 83 et ff).
3 On the vast bibliography on the matter vide the Nobel Peace Prize laureate’s, Ramos-Horta (1987: 1 et ff).
4 Agreement between the Republic of Indonesia and the Portuguese Republic on the question of East Timor, signed in New York, 5 May 1999, 2062 UNTS 39.
5 On the legal basis for the exercise of the Timorese people’s right to self-determination vide Teles (1996: 215).
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violence of civilian militia), a military peacekeeping intervention was led by the UN (INTERFET—International Force East Timor—under the authority of UNSC Resolution n.° 1264 (1999)) aimed at creating the necessary conditions to promote the safe transition to independence. The UN created UNTAET (United Nations Transitional Administration in East Timor) by UNSC Resolution 1272 (1999), which assumed full power over the territory of Timor-Leste during this period, under the Transitional Administrator, Sérgio Vieira de Melo.⁶ The independence, declared on 28 November 1975, was declared “reinstated” on the 20th May 2002.⁷ During the Timorese transition to independence and democracy, many, including foreign diplomats and staff with the UN Administration, pressured the new country to abdicate its armed forces. An independent study was asked of the King’s College to highlight the options for the security sector reform and the winning option led to the transformation of the guerrilla force (the FALINTIL) into a modern Defence Forces (the FDTL) creating the FALINTIL—Forças de Defesa de Timor-Leste.⁸

In 2006, a political crisis led to a conflict between the Armed Forces and the Police Forces, which culminated in the death of 10 members of the Police Forces and the flight of most of its members, prompting a new UN mission—the United Nations Mission in Timor-Leste (UNMIT—United Nations Mission to Timor-Leste—created by UN SC Resolution 1704 (2006) of 25 August 2006). The reasons are deeper than the apparently obvious clash between the two branches of the security forces with the monopoly for the use of force and include the continued dispute between the main forces of the resistance to the Indonesian occupation. From 2006 to 2008, a small group of rebels challenged the authority of the State, spreading unrest all over the territory and evading capture by the local police and the international military forces present in the territory. However, their actions were put to rest by a joint action of the national Defence Forces and the Police after an alleged attempt on the life of the President and the Prime Minister on 11 February 2008.⁹

It was the response to this crisis that first established the system of governance on the National Security, which was later enshrined into the legislative reform of 2010 and is today still in place, as a system of “National Security” regulating the conditions and modalities of operational engagement of the military and the police in situations that do not determine the declaration of any of the types of constitutional exception allowed by the Constitution. The relevance of this system was recently confirmed by its use in the implementation of the measures to fight the COVID19 pandemic, with

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⁶UN missions in TL included a follow-up mission from 20/05/2005 to 20/05/2005 and, following the crisis of 2006, a new UNMIT mission created by UN SC Resolution 1704 (2006) of 25 August 2006.

⁷The Constitution refers to “restauration of the declaration of independence”, which is not without consequences: on the one hand, this aims to indicate to the illegality of the occupation, annulling all acts during this period (which was not the case, v. g., on the succession of legal regimes); on the other hand, it aimed to perpetuate the political project of the Democratic Republic of Timor-Leste unilaterally declared by the FRETILIN in 1975, which has still been the source of political conflict.

⁸MOD (2006: 68) and Simões (2012: 1 et ff).

⁹Molnar (2009: 135 et ff).
the creation of a dedicated Situation Room, by the Diploma of the Prime-Minister n.º 14/2020, of 31 March.

2 The National Security of Timor-Leste

All States have the right and the obligation to protect their essential elements: the integrity, control and sovereignty over their territory, the autonomy of their political power and the security of their citizens. Art. 6.º of the Constitution of the Democratic Republic of Timor-Leste sets out this aim as an objective of the State “to defend and ensure the sovereignty of the country”. The definition of “Security” is, however, today much more difficult to enunciate than this Constitutional provision.

2.1 The Evolving Concept of National Security

Security, in a broader sense, is no longer only the absence of war. Security increasingly implies the existence of conditions to ensure the sustainable and harmonious development of the populations, since the sources of conflict are more and more rooted in socioeconomic conditions of poverty and the unjust distribution of wealth. The concept of human security considers every dimension of human security.10

The security of the State is also increasingly undermined by threats that are transnational, asymmetrical and multidirectional. This is the result promoted by globalization as the technological development facilitates communication and movement of people, goods and information on a planetary scale. New threats are also the result of the abundant resources currently at the hand of transnational criminal networks, as much as at the service of ideological or political objectives and economic interests. These threats are not military in nature and range from air and maritime piracy, organised crime with links to international terrorism, drug trafficking, smuggling of goods, human trafficking, illegal fishing and the exploitation of seabed resource, imposing an increasingly integrated intervention of all the resources available to the State.

Only in a very narrow sense, can “security” be referred to the absence of conflict with regard to the intervention of armed and security forces. Even this stricter sense of security can no longer simply rely on the traditional distinction between Defence Forces, that protect against external threats, and Security forces, that protect against internal threats. All the means of the State, citizens and resources are invested in ensuring the overall security of the population, considering the increasing complexity of the threats. Therefore, defence and security forces no longer participate only in their main activities but integrate the efforts of the

10Vide the UNDP (1994: 22 et ff).
State in order to ensure homeland security, assist the populations and promote well-being, justice and security as primary aims of the State, as threats to the security of States are increasingly diffuse in their origin. The relevance of the terrorist threat in recent years in Western societies has revealed exactly how external and internal forces collude to fight for a violent change to a determined constitutional order. Terrorism is characterized by the special intentionality to change the constitutional order using human resources, materials and funding that are both internal and external.

The growing scarcity of resources in many societies implies that the public investment in defence and security is increasingly integrated, looking for capacities with “dual-use”, civilian and military. This principle of complementarity, or “dual-use”, imposed both by the changing threats to the strategic environment and the need to rationalise the resources, has had a domestic and international perspective.

Internationally, it is widely accepted that no State can alone ensure its security and should share these resources at the local, regional and global level. The relevance of bilateral, regional and global security arrangements is nowadays paramount for collective security. In the case of Timor-Leste, it has imposed the participation in the collective security system of the United Nations and the military cooperation agreements in the CPLP (Community of Portuguese-Speaking Countries), the ASEAN meetings and the many bilateral partnerships with Portugal, Australia, China and the US. The security of all States is nowadays referred to the concept of Cooperative Security, since no country is able to ensure full security alone, which can also no longer be considered as the absence of conflict, but requires the active promotion of security in the relationship between Peoples for the prevention and peaceful resolution of conflicts in different international forums, informal structures, international organizations, regional or global policy coordination instruments bilateral or multilateral in nature. In this context, the security and defence forces are increasingly asked to support the foreign policy of the State by participating in peace-keeping missions in the framework of international organizations, like the UN. Despite the diminished resources available to them, Timorese engineering forces were part of the Portuguese deployment of an engineering unit that participated in UNIFIL (United Nations Interim Force in Lebanon, created under the auspices of UNSC Resolutions 425 (1978) and 426 (1978), of 19 March 1978, and UN SC Resolution 1701 (2006), of 11 August 2006).

Domestically, the principle of complementarity determines that, within their legal and constitutional framework, the military are asked to support civilian authorities in carrying out their duties, as all civilians may be asked to participate in all necessary activities of National Defence. The missions of military and civilian cooperation (CIMIC missions) are one of the most relevant lessons learned in recent years. In Timor-Leste, for instance, the capabilities of the “aerial component” (the embryonic Air Force) can also be assigned to rescue missions at sea or patient transport, military engineering can also be put to the service of the people affected by natural disasters and the naval component’s resources will to be applied in the surveillance of waters under national jurisdiction in the prevention and repression of illegal activities, such as piracy or the trafficking in human beings. The question is now debated
on the role of the Naval Component and the Military Police in the framework of the Maritime Authority. The wiser use of the limited resources of a small State like Timor-Leste would advise against creating two competing naval forces—one in the Defence Forces, another in the Police forces. However, this idea is not always easily accepted by the competing forces with different sources of authority, moreover so when both are fed by international pressure in a strategically important small island state as is the case of Timor-Leste. The principle of complementarily also determines that all civilian resources can be put at use for the National Defence (hence allowing for conscription systems in case of war) and, in this sense, also the resources of the security forces and civil protection can be involved in the defence against any external threats to the security of the State.

2.2 National Security in Timor-Leste

The particular conditions of Timor-Leste determine very special circumstances in matters of national security. Timor-Leste has a population just over one million and one hundred thousand inhabitants\(^ {11} \) living in the eastern part of the island of Timor, the largest of the Sonda Islands. The territory is about 480 km long and 105 km wide, with a total surface area of 32,350 km\(^2 \) a land border with Indonesia (province of Nusa Tenggara Timur) to the West and along the border with Oe-Cusse Ambeno, with a total of 220 km. The coastline is 700 km long, with territorial waters of 16,000 km\(^2 \) and an area of the Exclusive Economic Zone (EEZ) of 75,000 km\(^2 \). To the Northwest, it is bordered by the Savu Sea, which separates Timor from the islands of Alor, Sumba and Flores, by the Strait of Ombai and to the North by the Sea of Wetar, which separates it from the island of the same name. To the South, Timor-Leste is bathed by the Timor Sea, which separates it from Australia by about 430 km.

The traditional social structure in Timor-Leste was highly fragmented into “Kingdoms”, which the Portuguese colonization unified in spite of some cases of uprising. The Portuguese colonization is the historical ballast that justifies the construction, under the western and modern concept of a sovereign nation-state, of a national identity built on a sociological reality different from the “Other”.\(^ {12} \) The role of the colonial Portuguese rule had a limited colonial administration, more religious than military, but was largely based on pre-existing traditional social structures, therefore, always a foreigner (“malae” in the tétun language). One of the most important milestones of this identity construction in relation to the “other” was the local resistance against the Japanese invasion in World War II and the “black columns” largely composed of elements from the other half of the island of Timor, little supported externally by the

\(^ {11} \) Results from the Census 2015 available in [http://www.statistics.gov.tl/category/publications/census-publications](http://www.statistics.gov.tl/category/publications/census-publications), last accessed in 24 January 2017.

\(^ {12} \) Schmitt (1932: 27). In Timor-Leste vide da Cunha, Press (2010a: 10 et ff).
neutral Portuguese colonial forces or by the Australian forces of the Allies. The same is said to have happened in reaction to the violent Indonesian occupation, which strengthened the ties of national identity already built against the colonial presence largely around the undeniable weight of the religious catholic heritage. The violence of the foreign occupation, at times close to genocidal, is still the main trait of national identity leading to the “restoration”, in 20 May of 2002, of independence declared in 28.th November 1975, on the eve of the Indonesian invasion. The weight of the relation to the “other” is, in Timor-Leste, decisive to the point of reinventing the national founding myth of the Timorese national identity—the boy on the back of a crocodile that voluntarily turns into land to give shelter to the child, in the tale of Luis Cardoso, grows up to become a fighter for the guerrilla.

### 2.3 The Geostrategic Position of Timor-Leste

Timor-Leste enjoys a privileged geostrategic location at the confluence of the Indian and the Pacific Oceans, dividing these two Oceans with its territory—the North coast is bathed by the Indian Ocean and the South coast by the Pacific Ocean. The territory of Timor-Leste marks the end of the passage between these two of the major oceans of the planet, initiated by the Strait of Malacca. The control of this passage has historically justified the appetites of colonial Portuguese presence, as well as those of the Japanese imperialism in World War II, and was at the heart of the geostrategic decision of the Indonesian invasion of 1975. This important geostrategic position is today still decisive. Militarily control over maritime lines is crucial at a time when the orientation of the great world powers refocuses on Asia and the new US geostrategic concept is aimed at containing Chinese economic and military power.

This territorial position is combined with a deep depression in the ocean floor of the North shore, between the capital Díli and the island of Ataúro, which, together with the size of the island itself, conceals submarine military forces. In civilian terms, this passage is also important for the Sea Lines of Communication (SLOC) with a fundamental importance to shipping lines of global trade.

Timor-Leste is located between two dominant countries in the region: Australia and Indonesia. Indonesian territorial continuity was threatened by the restoration of Timorese independence, but both countries have endured democratization processes hand in hand. Australia also projects in Timor-Leste many of its national security considerations, among others, the concerns with the flows migrants and refugees from Central Asia to the insular territory of Australia.

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13 Mendes (2005: 144 et ff).
14 Cardoso (1994: 1 et ff).
15 The US National Security Strategy (2015: 1 et ff).
From the Australian perspective Timor-Leste integrates an arch of small island-nations in Southeast Asia, which protect the Continent-island from external threats. The stability/instability of these small island-States of Southeast Asia is therefore a factor for the national security of Australia, as the invasion of (then) Portuguese Timor-Leste by both Australian and Japanese forces in World War II painfully illustrated.

Many issues remain unresolved in the bilateral relations between the two neighbouring States. The demarcation of the maritime boundary between Australia and Indonesia in 1972 followed the natural extension of the Australian continental shelf. This agreement was the basis for Australian support of Indonesia annexation of Timor-Leste and was used to boost the international credibility of the authoritarian regime of Suharto. However, international law moved from this position, since the United Nations Convention on the Law of the Sea (UNCLOS) was signed in Montego Bay, in 1982, with prejudice to the maritime jurisdiction of Indonesia.

The argument on the natural prolongation of the continental shelf was always refused by Portugal and by the succeeding Timorese authorities for the delimitation of the maritime border at the Timor Gap. The parties reached an agreement under the procedure of compulsory arbitration initiated by Timor-Leste at the Permanent Court of Arbitration, at The Hague, under the UNCLOS. Timor-Leste and Australia signed in New York, at the UN Headquarters, a new Maritime Boundary Agreement, on 6 March 2018. The delimitation of the maritime borders between Timor-Leste and Australia is decisive for the exploration of the rich seabed mineral resources, particularly oil and gas. The terms for the exploration of the seabed will also be part of the agreement between the two countries and shall include private investors, particularly interested in the dispute over the place for the establishment of the downstream sector, most relevant the refineries and the necessary pipeline.

The delimitation of the maritime border at the Timor Sea has had relevance at the global level as well, since it has the potential to influence the delimitation of maritime borders in Southeast Asia, in particular regarding the dispute between China, the Philippines and other States in the South China Sea. Both these disputes highlight the relevance of energy policies in the definition of national security conditions, in the case of Timor-Leste moreover so considering the importance of the exploitation of natural resources.

3 The Integration of the National Security from Practice to the Law

The growing integration of the functions of defence and security is evident in Timor-Leste. The interpretation of the separation of competences of the Defence Forces and the Police was one of the reasons at the heart of the 2006 crisis. A strict interpretation of art. 146.° of the Constitution would limit the intervention of the Defence Forces to the military defence of national sovereignty, whereas the same reading of art.
147° would limit the intervention of Police Forces to the internal security. This interpretation is refused by the textual formulation of the principle of the exclusivity of the military function in art. 146°, which establishes the exclusive competence of the Defence Forces for the military defence of the State but does not limit them to that sole military function. The involvement of the Defence Forces in the overall national defence is contemporarily imposed by the aforementioned evolution of the concept of national security, which 16 in Timor-Leste, has been recognized by the Organic Statute of the PNTL (DL n.° 9/2009, of 18 February) that characterized the Police as having nature “similar to the military”.

3.1 The Practice in the Recent History of Timor-Leste

The overcoming of the 2006 crisis, in particular, the conflicts between Defence Forces and Police Forces, was only possible in 2008 in response to a new threat to the organs of the State caused by the same group of military rebels. This group allegedly attacked the President of the Republic and the Prime-Minister on 11 February 2008, which led to the death of its leader and the flight of the rest of its members to the mountains. In light of the seriousness of the situation there was the Declaration of a State of Siege and a “joint command between the F-FDTL and PNTL” was created for “Operation HALIBUR” by Government Resolution n.° 3/2008, of 17 February. At the time the F-FDTL and PNTL kept their respective legal regimes, but both were ordered to implement the necessary security operations aimed at restoring democratic normality, under the authority of the constitutional regime on State of Siege according to art. 25°, n.° 6 of the Constitution.

Law n.° 1/2008, of 11 February, authorized the PR to declare a State of Siege, 17 which took place by the Decree of the PR n° 43/2008, of 11 February (adopted by the interim PR, the President of the PN). The State of Siege was declared throughout the national territory for a period of 48 hours with the suspension of the exercise of the fundamental rights to free movement (with a curfew between the 20:00 and 6:00 h), assembly and demonstration. Over this period, Law n.° 2/2008, of 13 February, authorized the PR to renew the Declaration of a State of Siege, which was declared by Decree of PR n° 44/2008, of 13 February, throughout all of the national territory. This time it was declared for a period of 10 days, suspending the right to free movement (with a curfew between the 20:00 and 6:00 h) and the right to assembly and demonstration. At the end of this period, the interim PR renewed emergency rule by Decree of the PR No 45/2008, of 22 February (authorized by law No 4/2008 of 22 February), for a period of 30 days in the whole national territory, with suspension of the right of free movement (curfew between the 22:00

16In this sense AAVV (2011: 457 et ff).
17On constitutional exception see in this volume Ming-Sung Kuo, From Institutional Sovereignty to Constitutional Mindset: Rethinking the Domestication of the State of Exception in the Age of Normalization.
and 6:00 h) the right of expression and to assembly and the right to inviolability of domicile, allowing for house searches at night without prior judicial order.

The circumstances at the end of this period determined, once again, the need for its renewal, by the Law n.º 5/2008, of 20 March, which authorized the PR to renew the Declaration of a State of Siege, but limited to the districts of Aileu, Ermera, Bobonaro, Covalima, Ainaro, Liquica and Manufahi, and declare the State of Emergency in the districts of Baucau, Manatuto, Viqueque and Lautem.

The Decree of the PR n.º 48/2008, of 20 March, renewed the State of Siege in these districts and declared a State of Emergency in the districts of Baucau, Lautem, Manatuto, Viqueque and Dili, with the exception of the sub-district of Ataúro, for a period of 30 days. During the State of Siege, in each respective district, the suspension of the exercise of the right of free movement (imposing a curfew) and of the rights of expression and assembly and the right to inviolability of the home, allowing for house searches at night, with prior court order. For the districts in which the State of Emergency was declared, the exercise of the right of free movement was suspended (with a curfew between the 23:00 and 5:00 h), the right to demonstration and assembly and the right to inviolability of the home, allowing for house searches at night, with prior court order.

The regime of renewal of the State of Siege and State of Emergency, in different districts, influenced Law n.º 3/2008, of 22 February, which approves the regime of the State of Siege and State of Emergency. Although publication coincides with the date of the third law of authorizing the renewal of the Declaration of a State of Siege, this law had not yet entered into force on that date. During this period, the F-FDTL and PNTL forces based the implementation of security operations, including the measures necessary to restore democratic normality, directly on paragraph 6 of art. 25.º of the Constitution. This was the historic example, highlighted in the Decree of the PR n.º 49/2008, of 22 April, and in the Decree of the PR n.º 52/2008, of 14 May, that came to be enshrined as the integrated exercise of functions of national security in the National Security Law (Law n.º 2/2010, of April 21).

3.2 The Joint Operation Engagement of Defence and Security Forces

The joint operational engagement of the F-FDTL and the PNTL was designed to face the threats that each of the forces cannot solve on their own, but that are not sufficiently grave to justify the declaration of any of the terms of constitutional exception, as was the case of 2008. This interpretation determines the revocation, at least tacitly of the provisions regarding
the “State of Crisis” in articles 18°, 19°, 20°, 21°, 22° and 24° of Decree-Law n° 7/2004, of 5 April (organic of FALINTIL-FDTL), which had already been partially repealed by Decree-Law n° 15/2006, of 8 November.

This option also had an impact in the organization of the IV Constitutional Government (DL n° 7/2007, of 5 September), which established the Ministry of Defence and Security. The unification of the political oversight over the Defence Forces and the Police was not continued by the V Constitutional Government (2012) and VI Constitutional Government (2015), which had separate Defence and Interior Ministries, but was again followed by the VII Constitutional Government in 2017. Similarly, the success of this operation was highlighted in the Decree of the PR n° 49/2008, of 22 April, and the Decree of the PR n° 52/2008 of 14 May, whereby the integrated exercise of functions of National Defence and Security by Operation Halibur was complimented. These Presidential Decrees and the evaluation of Operation Halibur were the basis for the legal reform of the security sector in Timor-Leste, under the National Security Law (Law n° 2/2010, of April 21). This is an integrated perspective of National Security which is in line with the Constitutional objectives of the State stated in art. 6° a) of CRDTL, based on the concept of Homeland Security.

3.3 The Legal Context

The design of the requirements for the joint engagement of the Defence and Security Forces in Timor-Leste obeys a strict legal regime, increasingly complex, with international, constitutional and legal origin.

3.3.1 The International Law Context

In Ancient Rome, Cicero’s traditional aphorism stated that “laws are silent among armies”, which later evolved to the quest, with St. Augustine and St. Thomas Aquinas, for the “right intention” of the sovereign in declaring war. With the emergence of Classical International Law, most notably between the sixteenth and nineteenth centuries, few would still be the constraints to the use of force between sovereign States. In the XIX century, elementary rules on the conduct of war [ius in bello] began to emerge in order to limit human suffering to the minimum necessary in periods of armed conflict, international or domestic. Special reference should be made to the Geneva Conventions, which after 1863 marked the birth of international humanitarian law, referring to the treatment of those wounded on the battlefield. Historically, The Hague Conventions of 1899 and the most recent Geneva Conventions of 1949 governing the conduct of war and the treatment of civilians, prisoners and wounded, developed this legal regime. This international normative framework governing the conduct of war is constantly evolving, as evidenced by the recent limitation of the use of certain
weapons by the Geneva Convention of 2001 and the various additional protocols adopted, most recent in 2000 on the treatment of children.

The essence of these norms, particularly the “elementary considerations of humanity”, has long seemed to have acquired the status of a peremptory norm of international law (\textit{ius cogens}),\textsuperscript{18} under art. 53.\textdegree of the Vienna Convention on the Law of Treaties, in particular in the light of the jurisprudence of the International Court of Justice in the case of the “Corfu Channel” of 1949.\textsuperscript{19}

In the same sense, International Law has sought to limit and legitimize the use of war in international relations, the traditional \textit{ius ad bellum}. Especially at the end of World War I (“the war to end all wars” such as the violence of the fighting), there was a renewed impulse to discipline the use of force in the relations between sovereign states. The technological development of warfare during the twentieth century made war highly undesirable to the point of threatening human survival on the planet. Therefore, there has been a movement during the twentieth century to the progressive limitation of the use of force in relations between States. In particular, art. 10.\textdegree the Pact of the League of Nations aimed at prohibiting the War of Aggression and the Briand-Kellogg Pact, between France and the United States, was signed by States wishing to “renounce war”.

\subsection*{3.3.2 The System of Collective Security in the UN Charter}

None of these efforts succeeded in avoiding the barbarity of World War II and only at its end the Charter of the United Nations established the principle of the prohibition of the use of force between States. Article 2 (4) of the UN Charter states: “\textit{Members shall refrain in their international relations from resorting to the threat or use of force, whether against the territorial integrity or political independence of a State, or in any other way incompatible with the objectives of the United Nations}.”. This is the general prohibition of the use and threat of the use of force in international relations, which, in view of the universal UN membership, certain authors refer to having acquired the nature of peremptory norm [\textit{ius cogens}], under the terms of art. 53.\textdegree of the Vienna Convention on the Law of Treaties. More recently, the provision of the Rome Statute, which establishes the International Criminal Court, and which criminalizes individual conduct of the War of Aggression, has reinforced this norm of international law. However, the difficulty in defining this type of crime led to the casuistic application by the UN Security Council.

The UN Charter enshrined a system of “Collective Security” that obliged States to exhaust all conciliatory channels before recourse to war. Peacekeeping on a global scale thus is no longer simply a bilateral issue but it is to be dealt with in a multilateral forum. In this sense, Chap. 7 of the Charter of the UN regulates the collective exercise of security, in particular by attaching important prerogatives to the UN Security Council and concentrating the monopoly of the legitimate use of force on the United

\textsuperscript{18}On the subject vide Green (2011: 215).

\textsuperscript{19}ICJ Reports (1949: 22).
Nations. Thus, it is enshrined in art. 41 (f) of the UN Charter, the possibility for the UN Security Council to determine the existence of a “threat to global peace and stability” by imposing on States certain conducts aimed at restoring the disturbed order. These measures are mandatory (art. 25 and 103) and may include the use of force—this was the case of the first Iraq War of 1991 characterized by Danilo Zolo as the “first Cosmopolitan War”. However, this multilateral system of collective security does not exclude the possibility of each of the sovereign States exercising the “Right of Self-Defense” to deal with a present or eminent threat under art. 51 of the Charter. This last prerogative is strictly regulated and always subject to the principle of proportionality.

The recent international phenomenological reality, tragically marked by the events of 11.09.2001, opened the door to a profound change in terms of the exercise of the “collective security” system, now said to be “cooperative”, in particular, the possibility of exercising the right to legitimate self-defense against a threat caused by non-state entities (as was the case of Al Quaeda), although indirectly involved State entities (as in the case of the sovereign state of Afghanistan). More problematic would always be the proposal to allow the exercise of preventive “Legitimate Defense” to account for threats that are not yet existent or eminent. The construction of this principle of international law, under which certain Authors intended to legitimize the conduct of the 2004 Iraq War, seems difficult to accept in the face of the text of art. 51 of the UN Charter. The customary formulation of such principle will always find the material limits of a “repeated practice” incompatible with the formation of an instantaneous customary rule.21

The international regulation of the law of war, both as regards *ius ad bellum* and *ius in bello*, is the defining framework that Timor-Leste joined on independence.

### 3.3.3 Constitutional and Legal Provisions in Timor-Leste

Art. 146.° of the Constitution of Timor-Leste enshrines the principle of exclusivity of military function to the F-FDTL. This principle states that only the F-FDTL may exercise the military function on behalf of the State of Timor-Leste. However, the uniqueness of the competences of the Defence Forces does not prohibit other forms of use for the F-FDTL. On the contrary, the aforementioned reality increasingly imposes such uses in CIMIC missions.

Regarding security forces, under to art. 147.° of the Constitution, “The police forces defend the democratic legality and guarantee the internal security of populations”, which, however, does also not bar them from carrying out non-military functions of National Defence. Again, this is the only reading compatible with a constitutional answer to the reality of integrated fight against globalized and complex threats to National Security.

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20 Zolo (1997: 169).
21 Cunha (2010: 241).
Art. 1.° of the National Security Law (Law n.° 2/2010, of 21 April), therefore, establishes a functional perspective of National Security with reference to a set of activities of the State that are involved in the defence and security of Timor-Leste. More than to define national security matters for the State, it is fundamental to best know how to integrate their resources to this effect, which determines the references in the LSN to the integrated system of national security.

The modalities of joint operational engagement of the F-FDTL and PNTL provided by the National Security Law are the lessons learned by the response to the crisis of 2008 and today are considered the best answer to the threats to the security of States, increasingly complex, as is the case of highly organized crime. This is the consequence of adopting a broader concept of National Security, combining the actions of the military component (military defence) and non-military components (civil defence). In this sense, the military support of civilian missions is constitutional and can be politically and legally decided under the Integrated System of National Security (SISN).

4 The Integrated National Security System

The SISN imposes an integrated approach to the activities of National Security, which allows for a double use of military and police forces. On the one hand, all of the forces involved have the obligation to develop their capacities in such a manner that facilitates their interaction under the substantive legal regime for combined employment. On the other hand, the law establishes an organic structure of coordination of the shared engagement of forces—the SISN. However, rather than devalue any of the functions of the State, under this new concept it is necessary to enhance the capabilities of each of the forces to participate in the SISN, ensuring, in particular, the development of CIMIC capacities in an integrated interpretation of the exercise of the functions of the State in matters of defence and security.

4.1 Principles

The SISN is designed to operate when both military and police forces are confronted with situations that, falling within their constitutional and legal competencies, each of the forces is unable to face alone. The SISN is designed for those situations that are insufficiently serious to justify the declaration of any of the modalities of constitutional exception of State of Siege or State of Emergency, which have their own constitutional legal framework, but may also be used in these situations. In the cases, v.g. public demonstrations, riots or natural catastrophes, the fundamental principle for their operation is the principle of subsidiarity and complementarity, under art. 4.° of the National Security Law (Law n.° 2/2010, of 21 April). That is the consequence of the non-strictly military powers of the F-FDTL, as well as for
the participation of the PNTL in National Defence activities. This principle means that the military and police forces are only called to support the actions of each other when either is unable to carry out its main function. The decision for the operational engagement of the military and the security forces under the SISN is placed at the political level, involving both the Government and the President of the Republic. The National Parliament is only called upon when it is necessary to declare a case of Constitutional exception (State of Emergency or State of Siege).

The action of all these entities is also subject to the strict enforcement of the principle of proportionality, which, in spite of not being expressly in the CRDTL, is a direct consequence of the principle of the rule of law (art. 1.° of the Constitution). This principle of proportionality is particularly relevant with regard to the operational engagement of the forces to ensure the legal and political control in the case of the use or threat of use of force by the definition of the “Rules of Engagement” (ROE) to be approved by the President of the Republic. The PR, therefore, is always called upon to decide on the operational engagement of the F-FDTL, as the Commander-in-Chief. This is an interesting trait the Timorese Semipresidentialism, which demands further consideration.

4.2 The F-FDTL Operational Engagement

Under art. 11.° of the National Defence Law (Law n.° 3/2010 of 21 April), each of the organs of sovereignty exercise their powers in the field of national defence under the Constitution, the Law and other legislation in force. The distribution of powers over the armed forces is not always easy, in particular, in Timor-Leste.

The PR is the Supreme Commander of the Armed Forces, pursuant to art. 74.°, n.° 2, and art. 85.° (b). In addition to other competences, provided for in art. 74.°, n.° 2 of the Constitution, the President of the Republic, as Supreme Commander: (a) authorizes any form of operational engagement of F-FDTL, either independently or as part of the SISN, under art. 14.°, n.° 2 (b) and c) of the National Defence Law and art. 25.° of the National Security Law; (b) ratifies the rules of engagement, defined for the operation, when the use of force is allowed, in accordance with art. 14, n.° 2 (c) of the National Defence Act.

In both cases, the approval of the ROE is the initiative of the Member of Government responsible for national defence, setting in clear terms the mission for which the military leaders can give the order of operations and rules of engagement, subject to political approval by the Council of Ministers and Presidential ratification. In the case of joint operational engagement with the security forces, under the integrated system of national security, clear provisions for “command and control” should also be enacted, encompassing, if necessary, the terms of the joint

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22 Vasconcelos/ da Cunha (2009: 231 et ff).
command. Pursuant to art. 14.°, n.° 2 and) of the National Defence Law, the President of the Republic is informed throughout the process, as Commander-in-Chief of F-FDTL, and has the right to consult directly the General-Chief (CEMGFA) or whoever his substitute is.

The question of the separations of the powers of civilian oversight over the military between the President and the Government has been one of the most complex to solve. On the one hand, the President is the Commander-in-Chief of the Armed Forces (art. 74.°, n.° 2 of the Constitution) taking command and control over the military in case of war. On the other hand, the Armed Forces are part of the Government, particularly for administrative purposes. The question arose again more recently regarding the appointment of the General-Chief (CEMGFA). The divergence over the names appointed between the President and the Government was settled with a change in the law (by DL n.° 28/2016, of 13 July, the 1.st change to DL n.° 7/2014, of 12 March, on the Legal Statute of the Military of the F-FDTL). The solution for the security sector legal reform under analysis was mostly concerned with the operational engagement of the forces before the declaration of constitutional exception or the declaration of war and, even though the balance struck between the PR and the Government was not the one preferred by President Ramos-Horta at the time, the law was eventually promulgated.

4.3 The Implementation Under Operation HANITA

Besides the original Operation “HALIBUR” that inspired the legal regime in force, other joint operations implemented this same normative system. Operation “HANITA” constituted a taskforce composed by members of the F-FDTL and the PNTL by the Resolution of the Council of Ministers n.° 11/2015, of 10 April, aimed at dealing with the escalation of violence from a group of former guerrilla members and to fulfil the judicial orders for the capture.

This Joint Operation was subject to the ROE “approved” by Government Resolution n.° 12/2015, of 18 March, and “ratified” by Decree of the PR n.° 41/2015, of 18 March, pursuant to art. 74.°, n.° 2 and art. 85 (c) of the Constitution and art. 14.° of the National Defence Law (Law no. 3/2010, of 21 April). The ROE aimed to legally and politically discipline the use of force by the taskforce. The ROE established the different degrees of intensity of use of force (from minimum force to lethal force) and the competence to authorize each of them. The actual ROE were not publicized with the competent Government Resolution and the Presidential Decree for security reasons in order to protect the forces on the ground. However, one may assume that for this type of mission only the minimum use of the force was authorized to fulfil the mission of the taskforce as well as to avoid any interference in the performance of the mission.

The question of the limits of the use of force by the taskforce under ROE is very delicate. On the one hand, the ROE can never limit the right to self-protection of the force in case of attack, which would defeat the purpose of the taskforce itself. On
the other hand, the ROE do not invalidate the legislation in force in Timor-Leste, which violation may constitute a disciplinary and criminal offense. The individual violations of the ROE, however, cannot prevent the fulfilment of the mission for which the taskforce was established. In all these cases, the most important principle in the implementation of the ROE is the principle of proportionality — using the least intrusive measure for the rights of citizens to achieve a goal. Protecting citizens not involved in operations, their life, freedom and property is the guiding principle of the actions of the taskforce as one of the foundations of the principle of the Rule of Law (art. 1.° of the Constitution), after all, the reason for its existence.

5 Conclusion

The reform of the Security Sector in Timor-Leste has been shaped as much by doctrine as by its rich Constitutional reality, before and after the restoration of independence. The long military tradition of the struggle for national liberation led to the conversion of a guerrilla force into a modern army in the context of a sovereign democratic country. This path was not easy and still faces many challenges, but the civil oversight over the military under the rule of law is more and more a reality in Timor-Leste.

After the restoration of the declaration of independence in 2002, the crisis of 2006–2008 presented real challenges to a young nation still building the structures of the State. These challenges could have proven fatal. Fortunately, they were not and were able to shape the legal regime for the development and engagement of the military and security Forces under the legal reform of 2010, by Law n.° 2/2010, of 21 April (National Security Law), Law n.° 3/2010, of 21 April (National Defence Law) and Law n.° 4/2010, of 21 April (Internal Security Law).

The operational engagement of the military has been restricted by the legal reform of 2010 and demands the intervention and accord of both the Government and the President, as Commander-in-Chief. The strict limitation of the intervention in support of the security forces has also been clearly defined in the same laws under the Integrated System of National Security.

The continued development of the Military and the Security Forces is now framed by the Strategic Concept of National Defence and Security (Government Resolution n.° 43/2016, of 14 December), which more clearly defines the missions and capacities of each of the Forces and of the other services of the State involved in National Security matters. The CEDSN was negotiated between the Government, the National Parliament and the President of the Republic and is aimed at defining the (international and domestic) environment of National Security and at enunciating the strategic actions that all of the institutions of the State must adopt for National

23David Webster, “Failing Fragile States: Canada and East Timor” in Michael K. Carroll and Greg Donaghy From Kinshasa to Kandahar: Canada and Fragile States in Historical Perspective, University of Calgary Press (2016: 73 et ff).
Security purposes, with obvious special reference to the National Defence and Security institutions. Naturally, a long way is still to be done. Lacking is still the organic implementation of the SISN (Integrated System of National Security), as well as the negotiation, drafting and approval of the Laws on Military Programming for the equipment of the Forces and the review of the Organic Laws of the F-FDTL and the PNTL according to the new Strategic Concept.

Decisive for the survival of the first independent nation of the XX.th century is the daily implementation of the constitutional and legal system approved by the political oversight of the defence and security forces. This continued investment has already been and will surely continue to be tested in extreme circumstances, which are the proof of their resilience and the guarantee of their success.

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