



# Policy Brief

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## Overview

International actors seeking to consolidate peace and democracy in disrupted states have increasingly recognised the critical importance of establishing the rule of law. Yet rule of law practitioners in the UN system and elsewhere have struggled to achieve this goal. With the establishment of a new Rule of Law Coordination and Resource Group in the UN Secretariat, it is important to consider the potential for, and limitations on, external actors in nurturing rule of law transformations. This policy brief draws on the experience of UN transitional administrations in Cambodia, East Timor and Kosovo to suggest factors for consideration in formulating rule of law strategies.

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## *Building the Rule of Law under UN Transitional Administration*

**F**OR INTERNATIONAL ACTORS SEEKING TO CONSOLIDATE peace and democracy in disrupted states, the importance of establishing the rule of law is well-recognised. Yet this goal has proven frustratingly elusive. In the hostile intervention environment of the post-conflict disrupted state, international actors in the UN system and elsewhere have struggled to build legitimate state structures to redress disputes peacefully. They have found it even more challenging to instil principles of governance that promote accountability to the law, protect against abuse and generate trust in the state. This brief examines the difficulties faced by UN peace operations in attempting to build the rule of law, with reference to UN transitional administrations in Cambodia, Kosovo and East Timor.

In assuming direct political and administrative authority over disrupted states or territories, transitional administrations have taken on ambitious state-building agendas aimed at creating stable, democratic and viable states. In so doing, they have not only sought to promote international stability, but have pursued political solutions to maintain a particular international order. Hence the UN Transitional Authority in Cambodia (UNTAC, 1992–93) was mandated not only to stabilise the security situation, maintain law and order, oversee refugee repatriation and coordinate reconstruction, but to conduct democratic elections and to oversee those parts of the bureaucracy with the potential to influence the election outcome.

Similarly, the UN Interim Administration Mission in Kosovo (UNMIK, 1999–present) was mandated with full legislative, executive and judicial powers to administer Kosovo as an autonomous region under the Federal Republic of Yugoslavia. In addition to security and reconstruction responsibilities, UNMIK was charged with the highly political tasks of establishing 'multi-ethnic' government structures; facilitating the political process to determine Kosovo's future status; maintaining law and order, including by developing a police force; developing provisional institutions for democratic and autonomous self-government; and building genuine rule of law and an independent, multi-ethnic judiciary.

Likewise, in assuming the most comprehensive mandate of any UN mission to date, the UN Transitional Administration in East Timor (UNTAET, 1999–

2002) was required to provide security; to establish an effective administration including judicial, police and prison services; to build capacity for self-government; and to conduct elections for an East Timorese government.

### Rule of law challenges

Increasingly, establishing the rule of law has become a core concern of UN state-building missions. The rule of law agenda in UN state-building has sought to support a particular normative order based on a cluster of values characteristic of liberal democratic states. Hence establishing the rule of law is perceived to play a critical transformative role in moving a disrupted state towards a social order characterised by peace and stability, human rights protection, democratic institutions, sustainable development and ‘justice.’

A central concern of actors engaged in attempting this transformation has been the lack of priority accorded to rule of law issues relative to other more visible and immediate state-building demands. A second, related concern is that of continued disappointing results in attempts to implement rule of law reform.

The Secretary-General’s 2004 report on *The rule of law and transitional justice in conflict and post-conflict societies* catalogued a myriad of relevant issues. Beyond the question of giving sufficient priority to the rule of law in mission mandates, these included a failure to consider country context; to identify, support and empower domestic reform constituencies and cultivate broad-based support for reforms; to recognise the political dimensions of rule of law reform; to ensure post-mission support, including long-term development assistance; to develop holistic strategies that engage all official and non-official justice institutions; and to address the issue of past crimes

through appropriate institutional mechanisms.

Increasingly, the UN system has sought to address these concerns by strengthening the UN’s strategic and practical capacity. This includes the establishment in December 2005 of the UN Peacebuilding Commission, with a mandate to advise on strategies for post-conflict recovery, including rule of law issues; the 2006 release by the Office of the High Commissioner for Human Rights of ‘rule of law tools for post-conflict states’; and the launch in 2007 of integrated ‘model codes’ to provide a legal framework for responding to justice needs in post-conflict environments.

Despite these advances, by late 2006 the Secretary-General’s report *Uniting our strengths: Enhancing United Nations support for the rule of law* noted that much remained to be done to enhance both UN doctrine and approach. This underscored the decision to establish a Rule of Law Coordination and Resource Group in the UN Secretariat to focus on coordination and strategic policy response and to identify and address gaps in capacity.

### Lessons from UN transitional administrations

UN transitional administrations have sought primarily to establish the rule of law through state-based enforcement mechanisms: establishing formal rules of behaviour with the force of law (the legal system) and constructing coercive state structures to enforce those laws (state organisations such as judiciaries, police forces and prisons). This approach has enjoyed only limited success in establishing the rule of law: by the end of the UNTAC and UNTAET missions, and eight years into the UNMIK mission, the rule of law was manifestly not established, with fundamental building blocks such

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as separation of powers and equality before the law not in place. In each case, the persisting reality has been one of dysfunctional justice systems, continued state abuse and reversions to violence. In understanding the reasons for this lack of impact, several lessons may be summarised as follows:

procedural shortcomings became institutionalised as permanent deficiencies, leaving a legacy of problems that successor governments were ill-equipped to resolve. Ultimately, the state justice system proved ineffective in making and enforcing rules governing cooperative patterns of social behaviour because

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**Mission mandate.** The extent to which mission mandates set appropriate parameters for rule of law work proved important, as did the way each mission interpreted that mandate. In Cambodia, the failure of the Paris Agreements to provide for a specific rule of law mandate constrained UNTAC from pursuing critical rule of law initiatives. In contrast, the expansive mandates of UNMIK and UNTAET offered broad scope, but lacked clarity regarding rule of law priorities and guidance.

**Establishment of state rule of law institutions.** State justice structures were often poorly designed, incomplete, inaccessible and inappropriate to local mores. A protracted justice vacuum in the opening phases of UNMIK and UNTAET, and for most of the UNTAC mission, spawned violence, retaliations and the growth of new criminal threats. The lack of a holistic approach that recognised synergies between legal, judicial, police and correctional bodies caused systemic dysfunction. In both East Timor and Kosovo, hybrid legal systems were developed which, although closer to international standards than their predecessors, were nonetheless incomplete and difficult to implement, both practically and politically. Legal flaws and

relevant actors did not believe it provided real solutions to real problems.

**Building commitment.** Transitional administrations struggled to build meaningful domestic support for rule of law reforms at either elite or mass level. This appeared to be a function of the disempowerment of key constituencies; poor management of expectations for consultation and ownership; the difficulty of bridging disconnects between western and local conceptions of justice and the rule of law; and scepticism about the ability of new systems to deliver benefits to the community. These problems caused resentment, eroded support and sometimes prompted local actors to circumvent state processes or to challenge the UN's authority. Conversely, in instances where efforts were made to build confidence in and ownership over rule of law processes, better results were registered. New indigenous police services enjoyed a relatively high level of support, which appeared to stem from their visibility as a symbol of change and close ties with the community.

These experiences highlighted the dilemma of how to strike a successful balance between devolution and control that both satisfied indigenous demands for 'ownership' and ensured

mission objectives were met. In the face of immature institutional safeguards, devolving power saw justice processes fall hostage to local politics. Not devolving power generated resistance from key elites.

**Rebuilding social relationships.** In each case, the UN operated in a society lacking in robust collective social relationships, where state-society linkages were weak and debilitated by mistrust and the prevailing channel for interest representation was a politically or ethnically biased and corrupt patronage system. Such environments proved an unsound basis for developing sustainable rule of law institutions. Anonymous trust was slow to emerge, with much of the population continuing to avoid interaction with the authorities, including state justice structures. Strategies to address these issues were weak. Further, UN actors either underestimated, or were powerless to address, the capacity and expectations of local civil society to play a role.

**State capacity.** In some respects, UN transitional administrations helped improve the state’s capacity to promote the rule of law. They supported more stable government and disempowered destabilising influences—regional hegemony in Cambodia and militia elements in East Timor, for example. Nonetheless, post-UN Cambodia and East Timor remained weak states, as did Kosovo under UNMIK. In Cambodia, the government remained the key threat to the rule of law. In East Timor and Kosovo, the successor ‘state’ was ill-equipped to continue rule of law work, both in terms of logistical capacity and the commitment of state actors. In all cases, the UN made insufficient efforts to equip fledgling state apparatus to cope with the demands of refining and consolidating rule of law institutions.

**Restoring security.** UN intervention arguably proved an effective ‘circuit breaker’ in intrastate security dilemmas, restoring security to a level sufficient to create ‘space’ for the mission to promote the rule of law through assisting the transition from violent to non-violent forms of power acquisition and conflict management. Nevertheless, the incomplete restoration of security complicated access to, trust in and willingness to use new justice systems. Missions were only partly successful in neutralising spoilers whose behaviour undermined the rule of law. The missions also proved unable to defuse destabilising local political struggles, which saw the Cambodian coup of 1997, violent riots in Kosovo in 2004 and renewed violence in East Timor in 2006 and 2007.

**Informal justice structures.** UN transitional administrations did not sufficiently incorporate informal structures into a broader rule of law strategy. Failing to do so created confusion and inconsistency that undermined the legitimacy of the state justice system, which in many cases was less accessible, effective and trusted than informal alternatives. Local justice regimes remained as competitors to the state justice system and at times contradicted core principles of the rule of law. Conversely, in cases where non-state processes such as alternative dispute resolution, restorative justice and reconciliation mechanisms were harnessed, such as the use of restorative justice processes in Cambodia and East Timor, they appeared to assist in embedding justice processes consistent with the western liberal model.

**Dealing with the past.** The transitional administration experience demonstrated that unreconciled grievances



may impede the ability of a society to move beyond patterns of violence and adopt regularised institutional patterns supportive of the rule of law. In Cambodia, for example, the continued impunity of political figures directly implicated in the genocide remained a divisive issue a decade later. Reconciliation processes such as those employed in East Timor tended to be more effective where they enjoyed a strong domestic backing and linked with poverty reduction initiatives.

**Mission performance.** Key mission performance problems included resource constraints; strategic management shortcomings; difficulties in creating a common vision of rule of law objectives; and poor mission coordination, particularly where several UN agencies or more than one international organisation had rule of law responsibilities. This was most striking in Kosovo, where two mission pillars with key rule of law responsibilities were run by separate organisations with limited coordination. UNTAET and UNTAC suffered from short deployments, emphasising the tension between the short-run results-driven focus of peace-keeping missions and state-building as a time dependent, resource-intensive developmental process. Poor entry and exit strategies left missions underprepared to meet both immediate and long-term challenges. Finally, in some respects missions failed to lead by example by adhering to their own rule of law principles. This undermined the credibility not just of the mission, but of the rule of law principles at stake.

### Towards a rule of law strategy

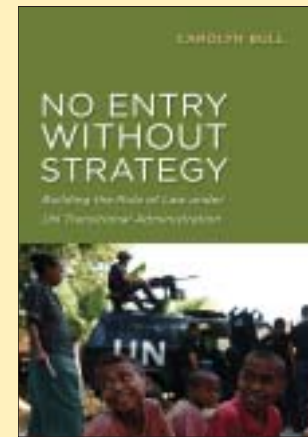
The experience of transitional administrations suggests a number of key lessons for rule of law strategies:

**1. Building the rule of law should not be equated automatically with establishing state-based coercive mechanisms such as state law, judiciaries and police systems.** Such an approach may not account adequately for the existence of entrenched informal justice institutions; for the fact that adherence to a rules system may rely less on state sanction than on voluntary consent; or for the influence of indigenous power struggles.

Adherence to the rule of law as a value system appears to depend on the extent to which local actors accept it as legitimate and commit voluntarily to it. In this respect, power dynamics may have a profound influence. Rule of law reform may threaten powerful spoilers bent on taking advantage of a period of flux to consolidate their authority. Further, the legitimacy of the rule of law is undermined where it is not perceived as compatible with pre-existing social values, where local actors do not have a sense of 'ownership' over key processes or where the new system does not deliver desired and reliable outcomes. The capacity to commit may be undermined by security disincentives, such as the threat of violent retribution for going to court; access disincentives, such as excessive financial or logistical constraints; and knowledge gaps, whereby communities may be unaware that new ways of doing things are on offer.

**2. Giving real substance to rule of law institutions may depend primarily on internal processes of change.**

The potential for external actors to substantially influence rule of law development may depend on their ability to create an enabling 'space' in which internal processes of change can occur. This may involve enforcing



This policy brief is based on the forthcoming book *No Entry without Strategy: Building the Rule of Law under UN Transitional Administration* by Carolyn Bull (United Nations University Press, ISBN 978-92-808-1151-3).

For international actors seeking to consolidate peace and democracy in disrupted states, the importance of establishing the rule of law is now well-recognised. Yet, this goal has proven frustratingly elusive. UN peace operations have struggled to ensure lasting security against violence and to build legitimate structures to redress disputes peacefully. It has proven even harder to instil principles of governance that promote accountability to the law, protect against abuse and generate trust in the state.

Beyond the complicated tasks of reforming laws, judiciaries and police forces, UN actors have confronted a fundamental dilemma: if embedding the rule of law rests on complex political and social transformations regarding conflict, power and the state, can external actors make a difference?

The book investigates the challenges faced by UN transitional administrations in establishing the rule of law in Cambodia, Kosovo and East Timor. In so doing, it explores conceptual understandings of the UN's state-building agenda and speaks to broader questions about the role of external actors in disrupted states.

a political settlement acceptable to all key players, supporting the development of civil society groups as a check on the state or upholding a level of personal security that allows ordinary people to resume ordinary interactions, including those in the legal arena.

the narrow window of opportunity in which the UN can ‘call the shots’.

**3. Post-conflict disrupted states are a hostile intervention environment,** to which the liberal normative template of UN state-building may be funda-

## Rule of law reform may threaten powerful spoilers bent on taking advantage of a period of flux to consolidate their authority

Within the space thus created, providing technical expertise or training can assist local actors to acquire knowledge and skills in the rule of law field. Nonetheless, creating ‘space’ is not enough if local actors are not willing or able to fill it in constructive ways.

Empowering local actors to participate in strategies designed to promote the rule of law is a key challenge. Although there is no simple answer to the dilemma of where to draw the line between UN and local responsibilities for rule of law creation, including how and when to devolve authority, failing to adopt a principled approach or to manage the expectations of local elites and the broader population can complicate almost every rule of law initiative. Managing the issue actively, transparently and from the outset allows for the possibility of generating and retaining commitment to reforms.

Ultimately, a transitional administration may have only limited control over the pace at which it devolves power. This may depend not only on pressure within the UN system for rapid transition and exit, but on the extent to which local players are willing to support the administration’s continued presence. This underscores further the need for decisive, well-planned efforts to build commitment to UN authority and make the most of

mentally ill-suited. Low state capacity, ongoing hostilities, fragile social relationships and the challenges posed by informal political and institutional alternatives to the UN model made it extremely difficult to implement rule of law initiatives. The potential for such factors to constrain the extent to which peace operations can realistically pursue rule of law objectives needs to be carefully assessed and built into mission strategy before over-ambitious programs are attempted, particularly against short time frames.

Further, attempting ambitious liberalising reforms may be destabilising. Just as holding democratic elections may establish dangerous ‘win-lose’ conditions in a highly combustible environment, so too rule of law interventions may exacerbate conflicts, rather than moving towards more peaceful modes of dispute resolution. This may be particularly the case if spoilers are bent on undermining the rule of law. This points to the need for careful sequencing of reforms and clear recognition that in the disrupted state, attempting too much too soon may impose high risks.

**4. Rule of law promotion is a long-term enterprise ill-suited to truncated interventions.** UN administrations need to consider which

aspects of rule of law establishment may be supported in the short term by an external player, and which are time dependent processes that ultimately rely on intricate long-term domestic interactions. It is conceivable that by attempting to work across the entire range of justice sector activities in a very short time, less progress may be made towards establishing the rule of law than might be achieved through a more modest agenda. Focusing on

ment to the rule of law objectives of the mission were won or lost. It would follow that the principal opportunity for the UN as an external actor to create constructive parameters for change lies in demonstrating a principled, strategic approach to state-building, from the outset. Entry strategies should address, at a minimum, the questions of how to create an enabling space, to engage local populations and to ensure an adequate deployment period. They should

## Strategies may need to strike a trade-off between lofty notions of the rule of law and what can realistically be achieved

a core set of appropriately sequenced objectives supported by clearly articulated follow-on activities may be a better strategy, particularly if backed by strong Security Council commitment for a targeted long-term UN presence.

**5. Front-end planning is critical.** Deploying at short notice into unpredictable emergency situations necessarily restricts the time available to devise a nuanced strategy appropriate to local context. However, the transitional administration experience has demonstrated that ad hoc and strategically flawed responses can strike serious blows to the legitimacy and authority of the UN, creating a negative impression at the outset from which missions never fully recover. Being unable to act swiftly to establish effective law enforcement and judicial presences, for example, only reinforced the breakdown in the rule of law and the impunity this entailed. Similarly, choosing one set of laws and then abandoning these for another, or implementing hastily conceived, technically deficient legislation only further undermined confidence in the legal system.

The entry phase proved the critical point at which respect for and commit-

ment to the rule of law objectives of the mission were won or lost. It would follow that the principal opportunity for the UN as an external actor to create constructive parameters for change lies in demonstrating a principled, strategic approach to state-building, from the outset. Entry strategies should address, at a minimum, the questions of how to create an enabling space, to engage local populations and to ensure an adequate deployment period. They should be formulated with careful reference to context, based on a robust and revisable theory of change and sequenced carefully. Crucially, they should be communicated to and accepted by a critical mass of key players. Strategies may need to strike a trade-off between lofty notions of the rule of law—which may require extensive social and political engineering—and what can realistically be achieved. Although the parameters of what is ‘realistic’ will depend on the intervention context, trying to establish a fully-fledged state justice sector from scratch is a high-risk strategy that may be neither achievable nor relevant to real community needs.

**6. Prospects for successful state-building depend on broader UN reform issues.** The politics of UN decision making and the structural constraints of the UN system suggest that prospects for successful state-building strategies depend on attention to broader UN reform issues such as coordination, resourcing and commitment to long-term interventions. In this respect, such measures as the establishment of the Secretariat’s Rule of Law Coordination and Resource Group could play a key role.



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**INSIDE:**

## Policy Brief

### *Building the Rule of Law under UN Transitional Administration*

If embedding the rule of law rests on complex, largely internal political and social transformations, can UN actors make a difference?

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