



CALIN TRENKOV-WERMUTH

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# United Nations Justice

LEGAL AND JUDICIAL REFORM  
IN GOVERNANCE OPERATIONS

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# United Nations justice: Legal and judicial reform in governance operations

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# Introduction

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For the first four decades of the existence of the United Nations, Cold War rivalries between the United States and the Soviet Union hampered the organization's work in many areas. Its conflict management activities were mainly limited to what came to be known as *peacekeeping operations*, a concept invented by the then Canadian Minister of Foreign Affairs, Lester Pearson, and UN Secretary-General Dag Hammarskjöld in response to the need to oversee the withdrawal of French, British and Israeli troops from Suez in 1956. Starting with the UN Emergency Force in Egypt in 1956, most peacekeeping operations until the late 1980s took a similar form: that of a lightly armed military corps, prohibited from the use of force, with the exception of self-defence needs, and from interfering in the domestic politics of the host state; traditionally their task was either to monitor a cease-fire agreement or to patrol a neutral buffer zone between adversaries.<sup>1</sup>

The territorial rivalries of the two superpowers ensured that there was little deviation from this basic model of UN engagement in the management of hostilities. The United States and the USSR wanted to maintain a dominant influence over any political developments in their respective spheres of influence, and were therefore keen to minimize any outside interference; thus, a new peacekeeping mission could be set up only to the extent that the strategic interests of either of the two powers were not significantly threatened.<sup>2</sup> Furthermore, apart from Article 2(7) of the UN Charter expressly prohibiting the organization's interference in matters that fall within the domestic jurisdiction of the state, the ideological

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differences of the superpowers also ensured that the United Nations would stay out of the domestic politics of states, failing or not, because any such interference would be ideologically charged: it would either support the liberal democratic and market-oriented economic model of the United States, or the model of the Soviet Union, a one-party people's democracy with public ownership and control of the means of production.<sup>3</sup>

The end of the Cold War in the late 1980s, and the collapse of the Soviet Union in 1991, gave rise to a new era of international involvement in inter- and intra-state conflicts.<sup>4</sup> This was the case mainly for two reasons. Firstly, the end of the confrontation between the superpowers changed their perception of the international community's involvement in conflicts as a threat to their strategic interests; thus there was less reason for either the United States or Russia, as the successor to the Soviet seat on the Security Council, to block any UN moves to establish peace missions. And secondly, the end of the tensions also signalled the end of much of the military and economic aid which the superpowers had used to influence and prop up various regimes. On both grounds, the United States and Russia began to allow the international community to become involved in conflict resolution in areas that were no longer strategically significant to them.<sup>5</sup>

Nevertheless, the end of the Cold War itself sparked intra-state conflicts, allowing political problems hitherto suppressed to come to the fore: the dissolution of Yugoslavia, for instance, although brewing for at least 10 years after Tito's death in 1980, did not become a reality until 1991.<sup>6</sup> Furthermore, the end to external financing of certain regimes prevented the continued suppression of their internal political opposition, and ultimately led to violent civil conflicts. For this reason, once external aid for Somalia began to dry up in the early 1990s, Siad Barre's government was driven from office by his political enemies, who then went on to fight among each other for political control.<sup>7</sup> This not only led to a protracted civil conflict, but also to a large-scale humanitarian crisis.

Yet with the UN's newly found freedom to intervene in conflicts and regions where it was previously unable to help came increasingly complex mandates, which not only called for its traditional *peacekeeping* role, but also for the United Nations to *make, restore, enforce* or *build* peace. The "Agenda for Peace" of 1992 signalled a change in the organizational culture, from one that focused mainly on conflict management or resolution to one that also incorporated conflict *prevention* as a main goal of the organization.<sup>8</sup> In particular, the notion of *peacebuilding* entered the UN's official language, and was regarded as key in order for peacemaking and peacekeeping operations to be "truly successful".<sup>9</sup> *Peacebuilding* activities were defined by UN Secretary-General Boutros Boutros-Ghali as actions "to identify and support structures which will tend to consolidate

peace”<sup>10</sup> in order “to prevent the recurrence of violence”.<sup>11</sup> The *action* was to be undertaken through a set of mechanisms which included the disarmament of warring factions and the restoration of order, the gathering and potential destruction of weapons, the repatriation of refugees, the training of security personnel, the promotion of human rights, the reform and strengthening of government institutions and the enhancement of political participation through formal and informal procedures.<sup>12</sup>

The increasingly complex peacekeeping, peace-enforcement and peace-building demands of the early 1990s eventually culminated in mandates which called for the UN’s outright governance of war-torn regions. Three territories came to be governed by the United Nations: Eastern Slavonia in 1996 (UNTAES), Kosovo in 1999 (UNMIK) and East Timor, also in 1999 (UNTAET). What made these three UN missions distinctive is that all sovereign powers traditionally associated with the state – executive, legislative and judicial – were vested in them; but while UNTAES focused on the peaceful reintegration of Eastern Slavonia into an existing polity, Croatia,<sup>13</sup> UNMIK and UNTAET had to set up new political entities. They had to govern all aspects of public life, from the running of schools and public utilities to fiscal management and law enforcement.<sup>14</sup> This exercise of sovereign power was an entirely different enterprise from any previous peacekeeping activities the United Nations had undertaken, no matter what their complexity,<sup>15</sup> and presented problems for which any precedents were not directly helpful.

One of the important areas of peacebuilding for the United Nations was rule-of-law reform. UN attention to this area was triggered by its experience in the transitional authority mission to Cambodia (UNTAC):<sup>16</sup> since that protracted conflict had left Cambodia’s justice system in a debilitated state, the mission’s mandate required the United Nations to assist Cambodia’s Supreme National Authority with judicial reform and administration prior to national elections.<sup>17</sup> However, UNTAC failed to accord sufficient resources and attention to this task, which ended in disappointing and inconsequential results.<sup>18</sup> This negative experience led in 1993 to the then Australian Foreign Minister, Gareth Evans, proposing the introduction of UN *justice packages*, which “should be part of any peacekeeping and post-conflict peacebuilding exercises in countries where the rule of law, and the institutions needed to support it, have manifestly broken down”.<sup>19</sup> Although the United Nations failed to adopt and in fact officially rejected the idea of the justice package a decade after its initial conception,<sup>20</sup> from 1993 onwards the organization began to pay more attention to rule-of-law reform.

While police reform in particular became a central and often successful feature of many of the UN’s missions during the 1990s,<sup>21</sup> legal and judicial reform proved to be a much more challenging and controversial



area of peacebuilding. In 2000 the report of the UN Panel on Peace Operations noted that:

the United Nations has faced situations in the past decade where the Security Council has authorized the deployment of several thousand police in a peacekeeping operation but has resisted the notion of providing the same operation with even 20 or 30 criminal justice experts.<sup>22</sup>

But what the UN's experience has shown is that due to the interdependence of the "triad"<sup>23</sup> of the justice system – the police, the judiciary and the prisons – a failure to reform one of these sectors will undermine any achievements reached in any of the other sectors: in Haiti, for instance, the UN's human rights staff observed that the effectiveness of the newly reformed police force was undermined by the weakness of the judicial institutions and prisons.<sup>24</sup>

In addition to political and budgetary problems within the United Nations itself and among its membership regarding judicial and legal reform efforts, the organization had to contend with many technical, structural and substantive problems in the field. For instance, in countries that had been plagued and polarized by civil war, and that had little or no experience of democratic institutions, political influence over the judiciary was a common phenomenon.<sup>25</sup> Furthermore, the relatively low income of judicial officials in societies emerging from conflict and economic hardship allowed for extensive corruption in the judiciary. Both of these problems created a real challenge for the United Nations in establishing judicial independence. Haiti is a particular case in point. Its justice system had suffered greatly under the military dictatorship of Raoul Cédras between 1991 and 1993: the military dominated the judiciary, which was in itself corrupt; the judges and prosecutors lacked adequate legal training, and most facilities were in a state of disrepair; civilian and military leaders were immune to prosecution; and the people had little respect for rule-of-law officials.<sup>26</sup>

Furthermore, the grim reality of the sheer physical loss and damage to judicial institutions and materials, and the death or flight of qualified legal and judicial personnel, created a huge obstacle to UN reconstruction and reform. In Kosovo and East Timor the retreating Serb and Indonesian forces, respectively, left a trail of destruction; most court buildings in East Timor had been burned, and most court equipment and materials necessary for legal practice, such as legal texts and case files, had been looted, dislocated or burned.<sup>27</sup> In Kosovo many courtrooms had been booby-trapped or mined, records destroyed or dislocated and court and office equipment looted.<sup>28</sup>

Moreover, after Yugoslav President Slobodan Milošević had stripped Kosovo of its autonomy in 1989, he replaced many Albanian judges and prosecutors with Serbian appointees. Most of these left their posts along with the Serbian forces retreating from Kosovo in 1999. So Kosovo was left with only a few judges and prosecutors; many of them had last served in 1989, but now they had to fill important posts without adequate training or recent legal experience, a not uncommon scenario in UN missions. In East Timor all judges and prosecutors had been directly appointed from Indonesia, and after the withdrawal of the Indonesian forces, no jurists were left. The United Nations had to attempt to recruit individuals with any sort of legal experience by dropping leaflets from aircraft; even after these efforts, only a handful of individuals applied for judicial posts. Thus the United Nations was assigned the daunting task of building a judiciary entirely anew.<sup>29</sup>

In addition, the United Nations frequently had to contend with either the absence or the inadequacy of legal codes, and thus had somehow to fill the legal vacuum or the gaps in the law. In Cambodia the Vietnamese-drawn criminal and criminal procedure codes were not viable if the United Nations was to achieve its key objectives, and consequently UNTAC chose to draft and enact its own laws. This effort, however, was marred by the fact that these UN laws failed to live up to international standards: the absence of consent, for instance, was not included as a key factor in the offence of rape.<sup>30</sup> In Somalia the former Italian penal code was utilized,<sup>31</sup> and in Afghanistan the Bonn Agreement resurrected Afghanistan's 1964 constitution as the central legal document to guide the legal and political development of the country.<sup>32</sup> In East Timor the Indonesian legal code was chosen as the applicable law, and in Kosovo the laws of the Federal Republic of Yugoslavia were used for the first five months of the mission, until this unpopular decision was overturned, mainly as a result of effective protests by Kosovar jurists who favoured Kosovo's legal code of 1989 instead. The difficulty with these legal codes was that they were inadequate in addressing many *modern* crimes, and were unable to respond to the needs of a modern economy.

Finally, the task of reforming the legal and judicial systems in the respective missions was made significantly more difficult because of the lack of historical precedent for this type of assignment and thus adequate practical experience from which the United Nations might draw lessons. Given the organization's membership and prior involvement with decolonization, a consideration of colonial experience and practice may have been inappropriate. Furthermore, the United Nations was also not an occupying power, and certainly did not have the resources and financial means of one; thus drawing on historical examples such as US



involvement with legal and judicial reforms in Germany and Japan after the Second World War would have yielded few useful lessons. The United Nations could and did adopt some of the guidelines on legal and judicial matters for territories under occupation, as outlined in the law on belligerent occupation, as part of its approach in its governance operations. However, applying the law of belligerent occupation to missions that did not have the resources of an occupying power, and whose mandate included not only judicial administration but by implication also the establishment of a sustainable legal system, did not prove to be useful.

For these reasons, and in particular the lack of a real model on which to base its approach, many of the UN's early decisions on justice sector reform and transitional justice were broadly taken *ad hoc*. But after some initial mishaps with its *ad hoc* decisions, after a decade of gruesome violence and after some sharp academic criticisms about its peacebuilding and justice sector reform endeavours, the United Nations began to develop certain assumptions on how best to restore the rule of law in post-conflict societies, how to address problems of transitional justice, and in this respect also how to undertake legal and judicial reform.

By the time the United Nations came to govern Kosovo and East Timor in 1999, some of these assumptions had taken a firm hold in the UN's thinking on justice sector reform, and the approach which emerged consisted of five key elements: firstly, the laws chosen for the beginning of a mission had to be based on previously applicable legal codes, and these codes had to be as comprehensive as possible; secondly, the chosen legal framework had to incorporate a complete human rights catalogue from the beginning of a mission; thirdly, the courts had to continue to function or be re-established in the same configuration as had existed previously in a territory from the beginning of the mission; fourthly, past atrocities needed to be addressed promptly, and wherever necessary through the local legal framework and court system; and fifthly, local participation in the judicial process was to be pursued from the start of the mission, and to the fullest extent possible.

The central argument of this book is that these five main elements of the UN's approach were not suited to the task of establishing a sustainable legal system, largely because they failed to address adequately some of the key tensions at the heart of such governance operations. These tensions stem firstly from a mission's need to balance the demands for order and security on the one hand and justice on the other hand, and secondly from a mission's need to govern a territory to a high standard while also helping to empower the local community through local ownership of institutional processes. The failure to take such tensions into account led to the violation of numerous legal principles and judicial norms, to frequent and major local opposition to various UN decisions, and in some in-

stances to increased levels of violence and political destabilization. In essence, the approach confused the *ends* with the *means*: there appears to have been a naïve assumption that by starting with what should be the final product of the reform efforts, the desired results could be achieved. This assumption not only proved to be ineffectual, but also yielded an approach which threatened to undermine the fundamental goals of justice and the re-establishment of the rule of law.

It is clear that a sustainable legal system is vital for the rule of law in any society, and that the rule of law is vital for a sustainable peace. As Kofi Annan has acknowledged, the United Nations has “learned that the rule of law delayed is lasting peace denied and that justice is the handmaiden of true peace”.<sup>33</sup> Thus the failure to reform the legal framework and judicial institutions quickly and effectively, and thereby to aid in the creation of a sustainable legal system, has the potential to result in an eventual relapse into violence. In this respect, it is crucial to understand the failures of the UN’s reform method, and how the UN’s approach has itself contributed to problems in this area, since such an understanding may render any future governance operations with a justice sector reform mandate more effective and successful. While this study focuses predominantly on uncovering, analysing and assessing the UN’s approach to legal and judicial reform in its governance operations, some of the alternative methods proposed in the literature, which may better balance the above-mentioned tensions, thus decreasing the likelihood that legal principles and judicial norms are violated in the reform process and increasing the likelihood that a sustainable legal system will be established, are analysed and evaluated in the final chapter.

Delay to the rule of law in early UN peacebuilding operations, starting with Namibia in 1989, resulted from the *ad hoc* basis of decisions on justice sector reform. But by the time the United Nations began administering Kosovo and East Timor, a decade’s worth of failed peacebuilding experiences, together with academic developments in the areas of transitional justice and peacebuilding and the changing nature of the post-Cold War conflicts, had led the United Nations to adopt the assumptions about justice sector reform, and the particular approach to such reforms, discussed above. However, much of the literature on the subject presents the UN’s reform decisions in a way which fails to account for these assumptions and the approach which they led to. Such accounts clearly lean towards an explanation of key decisions as having been taken on an *ad hoc* basis, depending on the particular circumstances and exigencies found in the territories under administration. The principal legal adviser to the UN Transitional Administration Mission in East Timor (UNTAET), Hansjoerg Strohmeyer, presents the UN’s decision on the choice of law in Kosovo and East Timor as having been taken *ad hoc* for “practical”

reasons,<sup>34</sup> an explanation which ignores the political context, the legal rationale and the theoretical basis underpinning this decision. Thus, in addition to highlighting the five key elements to the UN's approach to legal and judicial reform in both Kosovo and East Timor, this book will root these elements within their academic, political, legal and historical context.

It is undeniable that many of the difficulties which the United Nations encountered with its legal and judicial reform efforts resulted from inadequate funding and resources, and inappropriate decisions taken by particular individuals. But explanations of the difficulties based on these factors, however true, fail to relate to the key elements of the UN's approach and the assumptions which underpinned those decisions. Hence the solution to the problems lies not solely in better funding and more resources, as advocated in a number of articles and reports.<sup>35</sup> The UN's own approach contributed to and in part created the difficulties which the organization encountered in reforming the legal system in the territories it administered, and thus a better understanding of the way in which this occurred will lay the groundwork for an approach which leads to fewer complications.

To date, there is no comprehensive account and analysis of the UN's *approach* to legal and judicial reform in its governance operations. The issue of international territorial administration and the UN's governance of war-torn societies is treated in a number of books written on the subject.<sup>36</sup> There are also various articles and reports that focus broadly on the subject of international territorial administration, or more specifically on the UN's efforts to that end.<sup>37</sup> Legal and judicial reform as an aspect of rule-of-law reform, and of international territorial administration more broadly, is addressed in some of those works. There are articles which deal with particular aspects of legal and judicial reform in governance operations, e.g. the establishment of special courts, tribunals and internationalized panels for the addressing of past atrocities, the deployment of international judges and prosecutors, and various specific rule-of-law issues.<sup>38</sup> One book focuses exclusively on the new internationalized criminal courts.<sup>39</sup> Another deals with the challenges of addressing serious crimes in post-conflict societies.<sup>40</sup> A third deals with the establishment of the rule of law in UN governance operations in broad terms, but does not aim to focus on transitional justice as such.<sup>41</sup> Some authors try to tackle particular problems, such as how to address the legal vacuum in the immediate aftermath of a conflict, for instance focusing on model legal codes<sup>42</sup> or the role of legal advisers in international territorial administration;<sup>43</sup> others deal with the question of what lessons can be learned from legal and judicial reform efforts in multidimensional peacekeeping operations, and how to strengthen the rule of law in such operations.<sup>44</sup> However, such *lessons learned* accounts are broader in scope

and draw lessons that apply more generally to rule of law reform in all types of multidimensional peace operations, whereas this study focuses more in depth on legal and judicial reform in operations where the UN has governed a territory. And the aforementioned articles, on the other hand, are too focused on particular aspects of the reform efforts. An attempt to discuss legal reform and judicial reconstruction in governance operations was made by an official directly involved with and responsible for many of the key reform decisions taken in Kosovo and East Timor, but he fails to discuss flaws and mistakes made during the operations.<sup>45</sup>

Furthermore, no article or study accounts for all key elements of the UN's approach, or attempts to link that approach to the intellectual assumptions which underpinned it and the theories which had an impact on it. Also, a number of the works have evaluated some aspects of that approach in terms of internationally accepted standards of justice, particularly as reflected in international human rights instruments, but an attempt to assess and evaluate it through legal theory is lacking. This book attempts a more comprehensive explanation of the UN's approach to legal and judicial reform in its governance operations, and also an assessment and evaluation of that approach through the lens of jurisprudence.

What renders this study important is the fact that the UN's experience with such reforms in its governance operations is likely to inform not only any similar future UN endeavours in international territorial administrations with a justice sector reform mandate, but also more broadly the conduct of such reforms in the UN's peace-assistance missions, and the conduct of such reforms undertaken by other bodies and organizations. While the international community has taken a step back from governance operations at the moment, as the *light-footprint*<sup>46</sup> approach which was adopted in Afghanistan in 2001 and in some of the UN's subsequent missions clearly illustrates, the history of international territorial administration throughout the twentieth century and the international community's most recent efforts to that end in Eastern Slavonia, Kosovo, East Timor and Bosnia teach us that the international community may sooner or later revert to the model of international governance again.<sup>47</sup> Given the challenges and difficulties which the United Nations faced with such reforms, it is important to undertake a comprehensive analysis and assessment of the UN's approach, so as to gain an insight into the ways in which that approach itself contributed to the problems, and the ways in which it must be adjusted so as to lead to a better and improved method in the future. However, even if no governance operations were ever undertaken again, it is clear that the UN's experience with legal and judicial reforms is likely to hold many valuable lessons for its own peace-assistance missions where such reforms have to be undertaken, as well as for the endeavours of other institutions involved with such reforms.

While many intergovernmental, regional, non-governmental and governmental organizations and bodies have become involved with justice sector reforms in recent years,<sup>48</sup> the particular interest here in UN practice stems from the fact that no other organization has been involved in such reforms to the same extent as the United Nations: only the United Nations has been mandated in recent years to establish a legal system in a post-conflict society virtually from the ground up; all other organizations have been involved in such reforms primarily in an advisory capacity, and have mostly dealt with a legal system that was already in place. Furthermore, the focus on UN operations is also because the United Nations has been involved in international territorial administration more than any other institution or body in the last 60 years. This fact has a bearing on the relevance of the study's focus on UN operations, since it serves as an indication that any potential future governance missions will more likely than not be led by the United Nations, and therefore UN practice and its particular methods of reforming the justice sector merit close scrutiny. And finally, focusing on legal and judicial reform in UN governance operations, rather than within a broader context, makes the subject more manageable within the given limits, and allows for sufficient breadth and depth in the case-study analysis.

It should be stressed here that the book will not consider any questions and issues relating to legal and judicial reform from an organizational or managerial perspective: for instance, questions about where within a UN mission, or the United Nations more broadly, decisions on such reforms should be made. The question as to which department or UN body plays or should play the leading role on issues of rule-of-law reform is very interesting indeed, and until relatively recently the matters were not clear-cut: the Office of the High Commissioner for Human Rights (OHCHR) was designated as the focal point for rule-of-law issues within the UN system for a long time. But while it undertook noble initiatives, such as the development of various rule-of-law tools for post-conflict states,<sup>49</sup> the relatively small size and budget of the institution did not place it in a position to undertake initiatives that go beyond the publishing of reports which offer practical guidance on the matter to field missions, and to become actively involved with rule-of-law reform in peace operations itself.

Most of the legal and judicial reform efforts have been run directly by the field missions themselves and thus also indirectly by the UN's Department of Peacekeeping Operations, which has been in charge of these missions. However, despite such a key responsibility and the department's extensive involvement with legal and judicial reform through its missions, it has employed in the past only a few criminal justice and rule-of-law experts, whose duties have been stretched well beyond capacity, frequently mandating them to be in several places at the same time.<sup>50</sup>

Furthermore, the UN's Office of Legal Affairs was consulted on some legal and judicial reform matters for the UN's governance operations, but it did not play a formal role in the reforms undertaken in the UN's missions. And while the crisis prevention and recovery efforts of the UN Development Programme (UNDP) have focused over the course of the past decade to no small extent on rule-of-law reform and transitional justice,<sup>51</sup> and the UNDP does have capacity and some funding for legal and judicial reform initiatives, it was not extensively involved in such reforms in the UN's governance operations.

It is evident that for many years the United Nations lacked clarity as to which of its departments, units or sister organizations should lead on rule-of-law reform matters. At one point more than 10 different UN departments or agencies claimed expertise in the rule-of-law area, and some of these were running competing law reform programmes, sometimes even in the same country.<sup>52</sup> This confusing and competitive approach led to various calls, from member states and experts alike, for a more coordinated and coherent approach to such reforms.<sup>53</sup> Since 2007, the Rule of Law Coordination and Resource Group, bringing together nine leading UN departments and agencies engaged in rule-of-law activities, and supported by a Rule of Law Unit, has attempted to improve the coordination of such efforts. Whether this coordination mechanism will be enough remains uncertain, but it is a positive step in the right direction. But while the question of how to best coordinate rule of law reform efforts is highly interesting, this book will not broach this subject. Such questions, as well as questions about where decisions and advice on matters of legal and judicial reform within a particular mission should originate, would best be answered in a study that focuses on organizational management – something which this work does not aspire to do.

There are a few other areas that this book will not touch upon: since this is essentially not a *legal* study, it does not concern itself with any major discussions on subject matter jurisdiction, legal procedures, specific issues related to substantive criminal or procedural law, or any overly legalistic accounts of legal frameworks, institutional structures and judicial mechanisms. While each of these topics is touched upon to a certain extent, a competent discussion on these matters requires the expertise of a lawyer, or an international lawyer, which this author does not possess. Furthermore, the issue of the integration of customary laws and judicial mechanisms within a modern and statutory-based legal system will also not be discussed in depth, and neither will the question of how peacebuilders can contend with legal pluralism in a post-conflict context, for the reasons outlined below. Finally, the book will not address in any significant detail the grand questions of rule-of-law reform, such as whether it is true that there can be no peace without justice, whether



amnesties granted through truth and reconciliation processes must indeed be shunned in favour of trials and prosecutions for past atrocities, and how broadly to attain *justice* in a post-conflict society.<sup>54</sup>

The book will touch upon a number of these topics, but there will be no substantive discussion of these issues; this is not because they are not interesting and relevant for justice sector reform, but simply because they are beyond the feasible scope of this study – each topic would warrant a lengthy study by itself. In essence, the main focus of the study will remain on an evaluation of the UN's legal and judicial reform efforts in its governance operations, particularly in Kosovo and East Timor, and on demonstrating that the UN's approach to such reforms was not well suited to its goal of establishing a sustainable legal system.

The book is divided into five chapters. Chapter 1 examines the UN's early legal and judicial reform efforts, focusing particularly on the first decade of post-Cold War operations; further, it investigates the assumptions which the UN formed about such reforms, and which eventually underpinned the UN's approach to these reforms in its governance operations. Chapter 2 briefly discusses the case-study selection – Kosovo and East Timor – and provides the rationale for that selection; it introduces the various criteria which are used in the case-study chapters for the assessment of the UN's approach, and briefly discusses the questions which are asked of each case study in the controlled comparison. Chapter 3 presents the Kosovo case study. After a brief introduction to the background of the conflict over Kosovo, and the UN Interim Administration Mission in Kosovo (UNMIK), the chapter goes on first to demonstrate how the five key elements of the UN's approach were implemented in practice, and then to discuss various legal and judicial developments in the territory which followed, in no small part as a result of that approach. The chapter moves on to analyse and discuss the developments as presented, and to evaluate the approach critically on the basis of the criteria introduced in Chapter 2. The concluding section summarizes the various ways in which the UN's approach was responsible for the problems and challenges which the mission had to face, and for the numerous violations of legal principles and judicial norms which resulted; it also suggests that it was the approach's failure to address adequately and balance the key tensions of a governance operation which led to these failures. Chapter 4 presents the East Timor case study, and follows a similar structure to Chapter 3. Chapter 5 highlights the issues raised by the UN's legal and judicial reform experience in Kosovo and East Timor, explores how these issues have been represented in the literature on the topic, contends with some of the main assumptions underlying the UN's approach and analyses and evaluates some of the proposed changes to key elements of that approach.

## Notes

1. The two notable exceptions to this model were the UN's operations in the Belgian Congo (ONUC) and in Western New Guinea (UNTEA) in the early 1960s. For an overview of the UN's early peacekeeping operations see Ratner (1995).
2. Paris (2004: 15).
3. *Ibid.*
4. On this see Mayall (1996); Kaldor (1999).
5. Paris (2004: 16).
6. Any earlier moves towards dissolution of the Yugoslav federation would have been countered by the Soviet Union, and might also have met with military intervention by Soviet forces.
7. Paris (2004: 16).
8. UN General Assembly and Security Council (1992).
9. *Ibid.*, para. 55.
10. *Ibid.*
11. *Ibid.*, para. 21.
12. *Ibid.*, para. 55.
13. For an overview of UNTAES and its challenges see Schoups (2001); Boothby (2004).
14. Caplan (2005: 2).
15. Richard Caplan (*ibid.*) draws this distinction between international administration and any "'expanded', 'complex', or 'multidimensional' peacekeeping" operations. Hansjoerg Strohmeyer (2001b: 46) argues regarding UNMIK and UNTAET that the "scope of the challenges and responsibilities deriving from these mandates was unprecedented in United Nations peacekeeping operations".
16. Mani (2002: 54).
17. See "Agreement on a Comprehensive Political Settlement of the Cambodia Conflict", Annex I: UNTAC Mandate, Section B: Civil Administration, para. 5.b – see Treaties list. For a discussion of UNTAC's civil mandate see Doyle (1995).
18. Mani (2002: 54).
19. Evans (1993: 56, 110). Gareth Evans was Australia's foreign minister from 1988 to 1996. He served as president and CEO of the International Crisis Group from 2000 until 2009 and is currently Honorary Professorial Fellow at the University of Melbourne. In his initial conception (*ibid.*: 56), the justice package contained four key elements: "the provision, as appropriate, of a body of criminal laws and procedures, drawing on universal principles; civil police, with training as well as law enforcement responsibilities; a panel of judges, prosecutors and defenders able to work with available local professionals during the transition period, again with an obligation to train their local successors; and adequate correctional facilities, and personnel to staff them while developing local replacements". On justice packages see also Plunkett (1998).
20. See UN Security Council (2004).
21. For a good overview of peacebuilding and police reform see Holm and Eide (2000).
22. UN General Assembly and Security Council (2000b) (Brahimi Report), para. 40.
23. The term "triad" is borrowed from Rama Mani (2002: 56), who refers to the judiciary, the prisons and the police as "the tripod or triad of the justice system".
24. Mani (*ibid.*). For a further discussion of police reform in Haiti see Neild (1995).
25. Caplan (2005: 60).
26. Mani (2002: 64–65). For an overview of judicial reform in Haiti see O'Neill (1995); see also MICIVIH (1994a). For a general overview of peacebuilding in Haiti see Kumar (1998).
27. Strohmeyer (2001b: 49).

28. Caplan (2005: 61).
29. Ibid.
30. Plunkett (1998: 69).
31. Plunkett (2003: 69).
32. See “Agreement on Provisional Arrangements in Afghanistan Pending the Re-establishment of Permanent Government Institutions”, section II, 1(i) – see Treaties list.
33. Comments of UN Secretary-General Kofi Annan to the Security Council – see UN Security Council (2003).
34. Strohmeyer (2001b: 58).
35. See, for instance, Cohen (2002); see also the Brahimi Report (UN General Assembly and Security Council, 2000b), which attributes the difficulties with legal and judicial reform partly to the UN’s attitude towards the allocation of resources.
36. Chesterman (2004); Caplan (2005); Zaum (2007); Fox (2008); Knoll (2008); Stahn (2008); Wilde (2008).
37. See, for instance, Chesterman (2001a, 2001b, 2002a, 2003, 2004); Kondoch (2001); Matheson (2001); Ruffert (2001); Stahn (2001); Wilde (2001a, 2003, 2004); Caplan (2002, 2004a, 2004b); Yannis (2004).
38. See, for instance, Linton (2001a, 2001b, 2001c, 2002); Stahn (2001); Cohen (2002); Dickinson (2003a, 2003b); Katzenstein (2003); Cockayne (2005a, 2005b); Nouwen (2006); Perriello and Wierda (2006).
39. Romano, Nollkamper and Kleffner (2004).
40. Rausch (2006).
41. Bull (2008).
42. Fairlie (2003); Oswald (2004); O’Connor (2005); O’Connor and Rausch (2005, 2007).
43. Wilde (2001b).
44. Baskin (2002); Carlson (2006); UN Department of Peacekeeping Operations (2006). Please note that Scott Carlson was the consultant with primary responsibility for developing the latter document for the UN’s Department of Peacekeeping Operations.
45. Strohmeyer (2000, 2001a, 2001b, 2001c).
46. See, for instance, UN General Assembly and Security Council (2002), para. 98. For a further discussion of the *light-footprint* approach see Chesterman (2004: 88–92).
47. Bosnia was a case of international territorial administration since it was governed by the Peace Implementation Council, made up of “an *ad hoc* coalition of states and organizations operating with the backing of the UN Security Council” (Caplan, 2005: 34), but was not a case of UN governance, a point important for the discussion of the case-study selection in Chapter 2.
48. For instance, the World Bank, the UN Development Programme, the Office of the High Commissioner for Human Rights, the Inter-American Development Bank, the American Bar Association, the Organisation for Security and Co-operation in Europe and the US Agency for International Development.
49. See OHCHR (2006a, 2006b, 2006c, 2006d, 2006e).
50. Interview with UN official, April 2005.
51. See UNDP (2006).
52. Carlson (2006a), p. 14.
53. In his lessons-learned study, Scott Carlson calls for such a ‘One UN Approach’; member states had also called for more coherent efforts since 2005.
54. On the latter question see Mani (2002).

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# United Nations Justice: Legal and Judicial Reform in Governance Operations

by Calin Trenkov-Wermuth

At the end of the 20th century, and at the dawn of the 21st, the United Nations was tasked with the administration of justice in territories placed under its executive authority, an undertaking for which there was no established precedent or doctrine. Examining the UN's legal and judicial reform efforts in Kosovo and East Timor, this volume argues that rather than helping to establish a sustainable legal system, the UN's approach detracted from it, as it confused ends with means. In the process, justice standards were sacrificed for the sake of prosecutions; the legal vacuum was not filled effectively; the UN's desire to create functioning courts exceeded its efforts to deal with detainees; local ownership was erroneously regarded as a means to the end of achieving a sustainable legal system; and the UN's adoption of rights standards unsuited to the circumstances led it to break its own laws. As a result, instead of easing key tensions at the heart of governance operations, the UN's approach aggravated them.

Dr. Calin Trenkov-Wermuth offers the first full account of the UN's endeavours with the administration of justice in governance operations. He also suggests some methods by which these efforts can be improved upon. This book will be of interest to academics and practitioners in multiple disciplines: international law, political science, ethics and applied philosophy, and transitional justice.

**Calin Trenkov-Wermuth** holds a Ph.D. in International Relations from the University of Cambridge. He has taught politics at Cambridge, and is currently Visiting Fellow at the European Union Institute for Security Studies in Paris.

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