



CALIN TRENKOV-WERMUTH

United Nations Justice

LEGAL AND JUDICIAL REFORM
IN GOVERNANCE OPERATIONS

United Nations justice: Legal and judicial reform in governance operations

Calin Trenkov-Wermuth



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Endorsements

“Extensively researched and powerfully argued, *United Nations Justice* is a penetrating criticism of past efforts to bring the rule of law to conflict-ridden countries and an inspiring effort to identify better practices that can help the UN assist those countries in the creation of a sustainable peace.”

Michael W. Doyle, *Harold Brown Professor of International Affairs, Law and Political Science, Columbia University*

“Establishing sustainable justice systems in societies torn by civil strife is an enormously complex, sensitive, and ambitious task. Few have tried it, fewer have succeeded. *United Nations Justice* provides a candid assessment of two such efforts: the United Nations’ attempts to nurture such transformations in Kosovo and East Timor. The author questions the UN’s approach as much as its delivery. In doing so, he raises timely questions that demand further reflection by scholars, policy analysts, and practitioners alike. Not everyone will agree with his provocative conclusions, but we could all benefit from the debate that should ensue.”

Edward C. Luck, *Senior Vice President, International Peace Institute, and Professor of Practice, School of International and Public Affairs, Columbia University*.

“As Dr Trenkov-Wermuth argues in this important book, the UN’s attempts to craft judicial and legal systems in the territories it has found itself administering has been deeply flawed, partly because they have been too ambitious and partly because they have too often failed to take

note of local custom and reality. His critique deserves to be read by all those, scholars and practitioners alike, with an interest in improving the process of post conflict reconstruction.”

James Mayall, *Emeritus Sir Patrick Sheehy Professor of International Relations, University of Cambridge.*

“Calin Trenkov-Wermuth’s book is a sobering assessment of the considerable obstacles and small victories, but also the avoidable fumbles and troubling legacies, of the UN’s unprecedented efforts at comprehensive legal and judicial reform in Kosovo and East Timor – a remarkable and sorely needed memento for future operations.”

Cesare P.R. Romano, *co-Director, Project on International Courts and Tribunals and Loyola Law School Los Angeles*

“This study marks an important new contribution to the scholarship on legal and judicial reform carried out under the auspices of the UN. It is highly relevant to scholars and practitioners from all disciplines who explore the relationship between international rule-of-law reform and local ownership.”

Carsten Stahn, *Leiden University & Grotius Centre for International Legal Studies, The Hague*

“This important and timely book analyzes the very considerable deficiencies of international legal and judicial interventions. What the author demonstrates is that these failures are as much conceptual as programmatic, with outcomes that can undermine the very ideals that inspire them. The study is well grounded, unflinching in its findings and conclusions and provides compelling insights important for practitioners, planners and theorists.”

Jim Whitman, *Head, Department of Peace Studies, University of Bradford*

To
my parents

In memory of
Khristo and Lilia Trenkov, and Max Wermuth

In gratitude to
Israel Almog, David and Sarah Evans, Gitta and Gee Martin, Georg and
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For man, when perfected, is the best of animals, but, when separated from law and justice, he is the worst of all. . .

Aristotle, *Politics*, Book I, Chapter 2

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Abbreviations

CIVPOL	civilian police
COMKFOR	Commander of KFOR
CPA	Coalition Provisional Authority (Iraq)
DMU	Detainee Management Unit (East Timor)
DPKO	UN Department of Peacekeeping Operations
ECHR	European Convention on Human Rights
EU	European Union
FALINTIL	Forças Armadas de Libertação Nacional de Timor Leste (National Armed Forces for the Liberation of East Timor)
FRY	Federal Republic of Yugoslavia
GC IV	Geneva Convention IV
HRFOR	UN Human Rights Field Operation in Rwanda
IAC	Interim Administrative Council (Kosovo)
ICC	International Criminal Court
ICCPR	International Covenant on Civil and Political Rights
ICRC	International Committee of the Red Cross
ICTR	International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for the Former Yugoslavia
IJPs	international judges and prosecutors
INTERFET	International Force for East Timor
JAC/PJA	Joint Advisory Council on Provisional Judicial Appointments
JIAS	Joint Interim Administrative Structure (Kosovo)
JSMP	Judicial System Monitoring Programme
JSAP	Judicial System Assessment Program (Bosnia)
KFOR	Kosovo Force
KLA	Kosovo Liberation Army

KTC	Kosovo Transitional Council
KWECC	Kosovo War and Ethnic Crimes Court
LSMS	Legal System Monitoring Section
LRA	Lord's Resistance Army
MICIVIH	UN/OAS International Civilian Mission in Haiti
NCC	National Consultative Council (East Timor)
NATO	North Atlantic Treaty Organization
NGO	non-governmental organization
OAS	Organization of American States
OCHA	UN Office for the Coordination of Humanitarian Affairs
OHCHR	UN Office of the High Commissioner for Human Rights
ONUC	UN Operation in the Congo
ONUSAL	UN Observer Mission in El Salvador
OSCE	Organisation for Security and Co-operation in Europe
PISG	Provisional Institutions of Self-Government (Kosovo)
RUF	Revolutionary United Front (Sierra Leone)
SC	UN Security Council
SCU	Serious Crimes Unit (East Timor)
SOC	State of Cambodia
SRSG	Special Representative of the Secretary-General
STL	Special Tribunal for Lebanon
TA	Transitional Administrator (East Timor)
TJSC	Transitional Judicial Service Commission (East Timor)
UDT	Uniao Democratica Timorese (Timorese Democratic Union)
UN	United Nations
UNAMET	UN Mission in East Timor
UNDP	UN Development Programme
UNHCR	UN High Commissioner for Refugees
UNITAF	Unified Task Force (Somalia)
UNMIBH	UN Mission in Bosnia and Herzegovina
UNMIK	UN Interim Administration Mission in Kosovo
UNMISET	UN Mission of Support in East Timor
UNOSOM	UN Operation in Somalia I & II
UNPOL	UN Police
UNTAC	UN Transitional Authority in Cambodia
UNTAES	UN Transitional Administration in Eastern Slavonia, Baranja and Western Sirmium
UNTAET	UN Transitional Administration in East Timor
UNTAG	UN Transitional Assistance Group (Namibia)
UNTEA	UN Temporary Executive Authority (West Irian)
USAID	US Agency for International Development

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Introduction

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.¹

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.² 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

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.³

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.⁴ 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.⁵

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 1991.⁶ 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.⁷ 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.⁸ 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".⁹ *Peacebuilding* activities were defined by UN Secretary-General Boutros Boutros-Ghali as actions "to identify and support structures which will tend to consolidate

peace”¹⁰ in order “to prevent the recurrence of violence”.¹¹ 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.¹²

The increasingly complex peacekeeping, peace-enforcement and peacebuilding 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,¹³ 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.¹⁴ 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,¹⁵ 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):¹⁶ 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.¹⁷ However, UNTAC failed to accord sufficient resources and attention to this task, which ended in disappointing and inconsequential results.¹⁸ 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”.¹⁹ Although the United Nations failed to adopt and in fact officially rejected the idea of the justice package a decade after its initial conception,²⁰ 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,²¹ legal and judicial reform proved to be a much more challenging and controversial