

Can Might Make Rights?

*Building the Rule of Law After
Military Interventions*



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A project of the American Society
of International Law



CAMBRIDGE
UNIVERSITY PRESS

Parr, Executive Assistant to the Special Representative of the U.N. Secretary-General; Foreign Minister Jose Ramos-Horta; and U.S. Ambassador G. Joseph Rees. In Sierra Leone, special thanks are due to David Crane, Prosecutor of the Special Court for Sierra Leone; and Eric Witte, Special Assistant to the Prosecutor.

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CHAPTER ONE

Introduction: A New Imperialism?

It is hard to find anything good to say about imperialism. Fueled by greed and an easy assumption of racial and cultural superiority, the imperialism of the 19th-century European powers left in its wake embittered subject populations and despoiled landscapes. Traditional governance structures (some just, some unjust) were displaced by European implants, indigenous cultural practices suppressed, and natural resources ruthlessly exploited for the benefit of colonial elites and distant European overlords. Although imperialist ideologies and practices were frequently justified by reference to lofty ideals (the need to bring civilization, industry, or Christian values to more primitive nations, for instance), today there are few who would defend imperialism.

Until quite recently, most scholars were content to declare that the age of imperialism was over and good riddance to it. After World War II, strong international norms emerged favoring self-determination, democracy, and human rights and condemning wars of expansion and aggression. In the 1950s and 1960s, independence movements in colonized regions gained strength and moral credibility. As the possession of colonies increasingly became a political liability, most of the former imperial powers divested themselves of the trappings of empire. Some did so with almost unseemly haste, with a quick election, a ceremonial changing of the flag, and a series of bows and handshakes sufficing to transfer governmental power from foreign hands to those of the indigenous leaders.

By the time the Cold War ended, *imperialism* seemed a relic of a bygone era. The term remained handy as a disparaging metaphor used by those inclined to criticize American foreign policy muscle-flexing, but for the most part, imperialism seemed to be as extinct as the dodo bird: it had collapsed under its own weight, a victim of greed, sloth, and insufficient brainpower. Although the former imperialist powers continued to dominate the world stage militarily and economically, they had gone out of the business of invading and exercising permanent military control over foreign lands.

goals of the old imperialists were territorial expansion and economic gain, and imperialist governing elites enjoyed broad support from their domestic constituencies, the architects of today's military interventions find themselves in a far different situation. Interventions are a costly and dangerous business, diverting government resources away from domestic priorities and risking the lives of the intervening power's soldiers. The electorates of western nations are often loathe to support expensive, risky foreign ventures that offer few clear short-term domestic dividends. Because modern international and domestic norms forbid interventions designed explicitly to exploit the resources of other states, today's interventionists must generally make a public commitment to building just, democratic, peaceful, and prosperous societies in the areas that they control, if they are to avoid worldwide condemnation. Yet building just and prosperous societies is complex and requires intervening powers to make virtually open-ended commitments of resources and people to post-intervention societies – which is, again, likely to be less than popular with domestic constituencies concerned about how their tax dollars are spent.

Thus, while a potentially critical world watches events unfold in real time on the Internet and CNN, today's "new imperialists" must pledge themselves to ensuring peace and stability, rebuilding damaged infrastructures and economies, protecting vulnerable populations, nurturing a strong civil society, fostering legitimate indigenous leaders, and supporting democratic state institutions. Since today's interventionists generally intervene in the name of global order and "the rule of law," they must consequently strive to build the rule of law in the societies in which they intervene, at risk of losing their own global credibility. They must work closely with regional and international organizations and with a wide range of nongovernmental actors (from human rights groups to humanitarian aid organizations). At the same time, they must satisfy domestic constituencies concerned about costs and domestic social and economic priorities.

This is no easy task. Building the rule of law is no simple matter, although triumphal interventionist rhetoric occasionally implies that it is. The idea of the rule of law is often used as a handy shorthand way to describe the extremely complex bundle of cultural commitments and institutional structures that support peace, human rights, democracy, and prosperity. On the institutional level, the rule of law involves courts, legislatures, statutes, executive agencies, elections, a strong educational system, a free press, and independent nongovernmental organizations (NGOs) such as bar associations, civic associations, political parties, and the like. On the cultural level, the rule of law requires human beings who are willing to give their labor and their loyalty to these institutions, eschewing self-help solutions and violence in favor of democratic and civil participation.

Especially in societies in which state institutions and the law itself have been deeply discredited by repressive or ineffectual governments, persuading people to buy into rule of law ideals is difficult. Both institutionally and culturally, building the rule of law also requires extensive human and financial resources, careful policy coordination between numerous international actors and national players, and at the same time an ability to respond quickly, creatively, and sensitively to unpredictable developments on the ground.

Today's interventionism presents a mix of old and new problems. In the age of human rights, what goals, if any, justify military interventions? In what ways do the values and methods of the new interventionism constrain and complicate the process of achieving the new imperialism's goals? Just what is it that we mean when we talk about "the rule of law"? Concretely, how does one go about creating the rule of law? How can one tell when the rule of law has successfully been established? At what stage do interveners have an obligation to stick around, and at what stage do they instead have an obligation to go home and leave local actors to determine their own destinies?

These are difficult questions, and none of them can be easily answered. We believe, however, that answers need to be attempted nonetheless. The new interventionism will probably be a feature of the global order for years to come, and the stakes are too high to shrug off the hard questions as unanswerable, or to continue to address these dilemmas in an ad hoc and ill-considered fashion.

This book was initially conceptualized in early 2001, before the events of September 11 shook up the global legal order. In the first months of 2001, looking back on the recent international interventions in Bosnia, Haiti, Kosovo, Liberia, East Timor, and Sierra Leone, it seemed to us that a book on humanitarian interventions would make a useful contribution to U.S. and international policy debates. We initially planned to write a book that would focus in part on establishing clear legal and pragmatic criteria for humanitarian interventions and in part on the issue of post-intervention efforts to rebuild the rule of law in conflict-ridden societies. When we first began to plan this book, we took it for granted that most humanitarian interventions would have broad, if not universal, international support and that the intervening powers would also enjoy a reasonably high degree of support from the local population in post-conflict societies.

The events that followed the September 11 terrorist attacks challenged these assumptions. Although the U.S.-led invasions of Afghanistan and Iraq had humanitarian dimensions (ousting the repressive and murderous Taliban and Baathist regimes), both interventions were motivated mainly by perceived national security imperatives (eliminating terrorist bases in

East Timor provides another recent example. Just one year after the termination of the UN peacekeeping operation sent to restore order and establish democratic institutions, the newly independent state was forced in May 2006 to declare a state of emergency and invite a new international peacekeeping force back into the country to stop rapidly escalating local violence. The inability of the Timorese government to maintain order on its own revealed the fragility of its democratic institutions and political culture, and exposed fault lines and grievances within Timorese society that will continue to fester if left unaddressed. It also highlighted the failure of the UN Transitional Administration in East Timor (UNTAET) and other international actors to create adequate preconditions for stability and the rule of law during the period in which all legislative, administrative, and executive power rested with the interveners. As in Haiti, interveners scaled back their commitment too soon, and so were forced to return.

Unfortunately, Haiti and East Timor are hardly atypical. Time and again, interveners have underestimated the time, effort, and resources needed for the rule of law to take root. The temptation to undertake interventions “on the cheap” has undercut longer-term policy goals for the United States and other major international and regional powers. Resource and other constraints often lead to a reluctance to intervene in the early stages of a humanitarian or security crisis, even when all the warning signs point to the dangers of remaining passive. Military interventions – especially those primarily humanitarian in nature – often involve too little force, too late, followed by an even more minimal commitment of resources to the post-intervention rebuilding phase. When the “immediate crisis” is past, public attention dwindles, and so does donor support; post-conflict, interveners often then find it difficult to provide enough troops, civilian police, reconstruction funds, and so on to make much of a dent in post-conflict problems.

The lack of resources in turn often comes to shape post-intervention aims, as initially ambitious reconstruction plans are scaled down to reflect diminishing resources. This often forces unappealing compromises with local power-brokers or “spoilers” (such as warlords in Afghanistan or the KLA in Kosovo), who must be relied on to “make the trains run on time” in the absence of viable alternative structures, abandoned because they cost too much. Needless to say, compromises with spoilers and conflict entrepreneurs usually come back to haunt interveners a short way down the road, and conflict may well ultimately break out again – requiring another cycle of interventions, lofty promises, and a rapid retreat from initial commitments.

Thus, even if moral considerations are insufficient to persuade some policymakers of the importance of building the rule of law in post-conflict settings, Haiti and similar examples should suggest that what goes around, comes around: the failure to invest adequately in interventions to build the

rule of law in the first place has long-term negative consequences for human rights, human security, and global security.

This book consequently proceeds from two premises. The first is that the United States and the international community will continue to engage in military interventions followed by post-conflict efforts to rebuild the rule of law. The second is that all post-conflict reconstruction efforts face many similar challenges, regardless of the rationale behind the original intervention. In this book, we thus try to analyze the common lessons that interventions from Bosnia to Iraq hold for future post-conflict reconstruction efforts.

Concretely, this book seeks to examine what we know and what we don't know about rebuilding the rule of law in the wake of military interventions. The bad news, which will come as no surprise either to foreign policy professionals or to careful newspaper readers, is that the track record of the international community in general, and the United States in particular, is not very impressive. From Bosnia and Haiti to Afghanistan and Iraq, post-intervention efforts to build the rule of law have been haphazard, under-resourced, and at times internally contradictory, with as many failures as successes. This is in part because post-conflict societies tend to be inhospitable environments for efforts to promote the rule of law. Post-conflict societies are often characterized by high levels of violence and human need, damaged physical and civic infrastructures, and sometimes little or no historical rule of law traditions. But to some degree, the poor track record of rule of law promotion efforts is due to the failure of interveners to appreciate the complexities of the project of creating the rule of law.

The good news is that the international community is finally beginning to have a sense of "best practices," an increasingly nuanced understanding of what works and what doesn't in post-conflict settings. The Iraq experience has underlined the critical importance of immediately reestablishing basic security in the wake of military interventions. This in turn requires that the international community plan in advance for the rapid deployment of civilian police in the post-conflict period – something that was neglected in Iraq, with costs that continue to be felt today. The Iraq experience also underlines the fact that effectively reestablishing security means far more than simply ensuring that looting and violent crime are kept in check: it also involves ensuring that basic daily needs are met and that people have adequate food, water, shelter, medical care, and so on. After more than a decade of well-intentioned but flawed interventions, it has become increasingly clear that the various aspects of post-conflict reconstruction must be addressed in a *coordinated* way: when security, economic issues, civil society, and governmental issues are all dealt with by separate offices operating on more or less separate tracks, confusion and problems easily multiply. Perhaps most critically of all, we know from past failures that there is no "one size fits all" template for rebuilding the rule of law in post-conflict settings: to be successful, programs

interventions have been justified and perceived by interveners, bystanders, and “intervenees,” for people’s beliefs about the legitimacy of a military intervention have a strong effect on their attitudes toward post-conflict projects. When we consider efforts to promote the rule of law, this is particularly true. If an intervention’s legality and legitimacy is widely contested, as was the case with the U.S.-led intervention in Iraq, this can complicate postwar efforts to build the rule of law, as we will elaborate. Although legality and legitimacy are not always one and the same – and success can create its own post hoc legitimacy – the stronger the legal basis for an intervention, the greater the prospects that an intervener will enjoy widespread international support for its post-conflict rebuilding efforts.

The problem of resources is more straightforward. Most rule of law efforts are funded by foreign donors, who are often unable or unwilling to make their financial assistance quite match their rhetorical commitment to the rule of law. Problems of coordination are also readily intelligible: to successfully create the rule of law, governments, NGOs, civil society institutions, politicians, and ordinary people must all work together cooperatively and efficiently. And finally, as noted above, there is the role of culture. Just as 19th-century Egyptian governmental efforts to “better” the lot of nomadic tribespeople by constructing houses for them failed when it turned out that the nomads did not particularly value staying in one place and living in houses, so too efforts to build the rule of law in post-intervention societies will inevitably fail if ordinary people lack an underlying cultural commitment to the values associated with the rule of law.

Building the rule of law is a holistic process, and it is almost inevitably marked by internal contradictions. Short-term interests may genuinely conflict with long-term interests (for instance, collaboration with local warlords or militias may be useful in establishing security in the short term but may dangerously empower “spoilers” in the long term). Fostering “local ownership” and respecting local cultural norms may conflict with efficiency interests and international standards. Satisfying minority political participation interests may conflict with satisfying majorities. Promoting the rule of law is not politically neutral, although interveners often like to imagine that it is. In practice, the decisions interveners make necessarily empower some local actors at the expense of others. This incites opposition (sometimes violent), which can in turn force interveners to respond with coercion, which then generates more opposition.

Building the rule of law requires a constant balancing act. As a result, movement toward the rule of law often is not linear, but back and forth. Interveners must constantly make choices among problematic alternatives. But interveners, precisely because they are interveners (and so don’t fully understand local culture, interests, or institutions), are often not well positioned to make such choices and may not fully understand the likely consequences.

This does not mean that building the rule of law is a fool's errand. It does mean that is far more difficult than is generally understood. The evidence suggests, however, that interveners can achieve moderate success if they take these complexities into account and plan accordingly. The goal of this book is to help interested actors understand the difficulties of post-conflict rule of law promotion and the conditions, time, energy, resources, and skills required for success. We argue that a constructive approach to building the rule of law must be *ends-based and strategic, adaptive and dynamic, and systemic*. We call this the *synergistic approach* to post-intervention rule of law, and we think it offers a helpful framework for planning, implementing, and evaluating rule of law-related projects.

The structure of this book is straightforward and flows from the architectural metaphor elaborated above. Following this first introductory chapter, we have two chapters containing background historical, legal, and theoretical discussions.

Chapter 2 discusses the international legal framework governing the use of force and its impact on understandings of when military intervention is justified. We examine how the framework set forth in the United Nations Charter has functioned and evolved in practice from the Cold War to the post-9/11 era, noting in particular the growing influence of human rights principles in shaping international understandings of legitimate military intervention. This legal and historical analysis illuminates how international perceptions of an intervention's legitimacy can significantly influence the willingness of states to contribute to post-conflict reconstruction. The chapter also examines the complex question of local perceptions of an intervention's legitimacy and the extent to which intervener compliance with international law is one, among many, contributing factors. Given that promoting the rule of law after military intervention is, in no small part, an effort to convince local actors that law matters, Chapter 2 argues that how interveners conduct themselves – and their ability to maximize their legitimacy among the local population – invariably will influence the success of these efforts.

Building on this, Chapter 3 discusses the elusive idea of the “rule of law.” Most scholars and policymakers agree that the rule of law is what protects people against anarchy and arbitrary exercises of power, but there is less agreement about whether the rule of law consists primarily in certain formal structures and processes (elections, constitutions, courts, fair trial guarantees, etc.) or whether the rule of law is a matter mainly of certain substantive commitments (to human rights, for example). Chapter 3 briefly explores this debate and ultimately argues for a very pragmatic conception of the rule of law. A pragmatic conception of the rule of law acknowledges the importance both of institutions and substantive commitments, and relies on international human rights norms as the touchstone for evaluating whether particular practices comport with the rule of law. In Chapter 3, we discuss