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978-0-521-86089-5 - Can Might Make Rights?: Building the Rule of Law after Military Interventions

Jane Stromseth, David Wippman and Rosa Brooks

Excerpt

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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.

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But something odd happened in the years since the early 1990s. For reasons that are complex, many of the same powerful western states that contritely rejected imperialism a few short decades ago today are increasingly resorting to military force to intervene in the territories of other states, and in many cases, they are remaining on as de facto governments years after the fighting ends. Consider the past decade's interventions in Bosnia, Haiti, Kosovo, East Timor, Liberia, Sierra Leone, Afghanistan, and Iraq. Ironically, these recent military interventions have generally been made in the name of the very same values that led to the rapid dismantling of imperialist structures in the second half of the 20th century: human rights, democracy, and a rejection of the use of aggressive war as an instrument of foreign policy. Although most of the recent interventions have been engaged in on behalf of "the international community," or at least some sizeable subset thereof, most of the intervening states have been western states – mainly the United States and the North Atlantic Treaty Organization (NATO) powers. Not entirely coincidentally, most of the states intervened in (the "failed states" like Sierra Leone and the "rogue" states like Iraq) have been states formerly subject to imperialist rule.

Some of these recent interventions are usually seen as having been essentially humanitarian in nature (Kosovo, East Timor). Others were motivated primarily by national and international security considerations, with humanitarian concerns very much a secondary motive (Afghanistan, Iraq). Each of these recent interventions has had both passionate defenders and passionate detractors, and there is little question that from the perspective of international law, some recent interventions have been more justifiable than others.

Nonetheless, whether they are justifiable or unjustifiable, wise or unwise, such military interventions will almost certainly be a fact of life for some time to come. The "international community" – and the United States, as the most significant military and economic power in the world today – will likely engage in, or assist, many more such interventions, at least in instances where there appears to be a clear threat to U.S. security.

In part, this is because the events of September 11, 2001 left the United States and many of its NATO allies determined to root out terrorism and other global security threats wherever they can be found, through the use of military force when necessary. The desire to incapacitate the terrorist al-Qaeda network drove the U.S.-led military intervention in Afghanistan; the perceived threat of weapons of mass destruction was the primary driver of the subsequent U.S.-dominated intervention in Iraq. Military interventions (and the deployment of peacekeeping forces) will also continue to be motivated in part by broader humanitarian concerns, such as the need to prevent genocide and other mass atrocities and the need to restore peace and stability in regions devastated by civil war.

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Frequently, of course, the motives behind military interventions will be complex and mixed. In Haiti, for instance, U.S. military interventions (both in 1994 and in 2004) were motivated partly by humanitarian considerations (a concern about political repression and indiscriminate bloodshed) and partly by more pragmatic (and self-interested) considerations: the desire to prevent a massive influx of refugees from Haiti to the United States, for instance. In the age of globalization, there can often be no neat distinction between “humanitarian” concerns and “security” concerns. Repression, poverty, and injustice can fuel terrorism, instability, civil war, and organized crime, and these in turn can lead to still more repression, poverty, and injustice. In the future, many military interventions are likely to arise jointly out of humanitarian concerns and security concerns.

The military interventions driven by interwoven humanitarian and security concerns have often been compared – and contrasted – to traditional imperialism. Indeed, many commentators – some approving, some less so – have referred to recent interventions as “liberal imperialism” or “the new imperialism.” Unlike earlier imperial powers, those western states and regional powers that have backed recent military interventions have explicitly (and, on the whole, credibly) disclaimed any desire to exercise permanent control over defeated populations and territories or to gain economically from their military ventures. Also, today’s interventions tend to be multilateral in nature, often (though not always) authorized by the United Nations (UN) or parallel regional structures. But like earlier imperial powers, today’s interventionists find themselves acting as *de facto* governments in dysfunctional and war-torn states.

This may be inevitable. Creating durable solutions to humanitarian and security problems requires a long-term commitment to rebuilding and reforming repressive or conflict-ridden societies. In particular, long-term solutions require rebuilding (or building from scratch) the rule of law: fostering effective, inclusive, and transparent indigenous governance structures; creating fair and independent judicial systems and responsible security forces; reforming and updating legal codes; and creating a widely shared public commitment to human rights and to using the new or reformed civic structures rather than relying on violence or self-help to resolve problems. Yet these tasks often cannot simply be left entirely to local populations, because in the immediate wake of interventions, such societies usually continue to be riven by the same conflicts and problems that motivated the intervention in the first place. After genocide, ethnic cleansing, or war, few societies are immediately able to “get back on their feet.” Most need – and many demand – substantial outside assistance in reestablishing security and reconstructing governance and economic institutions. Post-conflict reconstruction is slow, expensive, and fraught with difficulty, and in part for that reason, today’s “liberal imperialists” are often somewhat reluctant imperialists. If the main

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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.

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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

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Afghanistan and preventing the acquisition of weapons of mass destruction by Iraq).

For the most part the international community supported the intervention in Afghanistan and accepted the invasion's legality. In the case of Iraq, however, there was no such acquiescence; the invasion's legal legitimacy rested on a highly contested claim of authority. Even many traditional U.S. allies openly criticized it, and UN Secretary-General Kofi Annan publicly called it illegal. The U.S.-led invasion of Iraq found only limited and ambivalent international support, and global skepticism of the intervention has only been exacerbated by the subsequent failure to find weapons of mass destruction within Iraq, despite the prewar claims of the U.S. government. All this has fed a popular perception in the greater Middle East that the U.S. intervention was motivated by little more than a desire for regional domination and control of Iraqi oil resources. Inside Iraq, public attitudes toward the intervention vary substantially among the different segments of the population. Although most Iraqis are happy to see Saddam Hussein gone, there has been widespread criticism of American inability to restore basic security in key parts of Iraq. Iraqi mistrust of the U.S.-led intervention has been further exacerbated by popular perceptions of U.S. military heavy-handedness, combined with the global scandal sparked by revelations about the abuse of Iraqi prisoners at Abu Ghraib and elsewhere.

These two post-9/11 interventions posed a dilemma for our initial conception of this book. After 9/11, a book focusing entirely on humanitarian interventions no longer seemed to make much sense, because the U.S. and international discourse had moved on to a very different place. The U.S.-led invasions of Afghanistan and Iraq seemed like a far cry from the international humanitarian interventions in places like Kosovo and East Timor. Nonetheless, as events in Afghanistan and Iraq unfolded, it became increasingly clear to us that however different these various military interventions were on the front end, post-conflict issues in Afghanistan and Iraq had a great deal in common with post-conflict issues in Kosovo, East Timor, or any of the other societies subject to international humanitarian interventions before 9/11.

Regardless of the motivations behind particular past military interventions – regardless of whether they were justifiable or unjustifiable, popular or unpopular, wise or unwise – all post-intervention societies face many similar challenges. Although Kosovo, East Timor, and Iraq are dramatically different societies, for instance, with divergent histories and cultures, they all had similar needs when the main phase of the fighting ended. All had damaged infrastructures – bombed roads, burnt-out homes and offices, devastated electrical and sanitation systems. All had significant populations in desperate need of humanitarian assistance such as food, shelter, and medical care. All had public institutions that either barely functioned or entirely lacked popular credibility and a population that had to one extent or another

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been cut off from access to critical skills or the outside world. All faced the challenge of ensuring accountability for past human rights abuses and preventing future abuses.

In a broad sense, then, there is much that all these post-intervention societies have in common. As a result, intervening powers face grave and similar responsibilities when the bombs stop falling, regardless of the intervention's underlying legitimacy or motives.

Interveners may be tempted to cut and run after the initial military phase of an intervention ends, getting out with as little loss of life and money as possible. Yet both moral and pragmatic considerations suggest that taking a longer-term view is better in the end.

In part, this is because even the United States, as the sole remaining superpower, needs to maintain some degree of international legitimacy and support. Although the United States may be willing and able to accept the costs of going it alone (or almost alone) when it comes to perceived national security imperatives, the United States still faces significant political and diplomatic pressure to be a good global neighbor and a responsible superpower. U.S. domestic and international commitments to democracy and human rights force even reluctant American politicians to promise that American power will be used for the benefit of the people in post-intervention societies, as well as for U.S. benefit.

In addition, military interventions that do not ultimately rebuild the rule of law in post-conflict societies are doomed to undermine their own goals. This is true whether the interventions were undertaken initially for humanitarian reasons, security reasons, or a complicated mix of the two. Unless the rule of law can be created in post-intervention societies, military interventions will not fully eradicate the dysfunctional conditions that necessitated intervention in the first place. Without the rule of law, human rights abuses and violence will recur and continue unchecked, posing ongoing threats not only to residents of post-conflict societies but also to global peace and security – and perhaps necessitating another intervention a few years down the road.

Haiti is a case in point: ten years after sending in U.S. and UN troops to restore a democratically elected leader to power, the United States recently found itself, ironically, complicit in removing the very same leader and forced to send in troops to ensure a peaceful transition to a new government. Had the United States and the international community made a more sustained investment in rebuilding the rule of law in Haiti and maintained the pressure for reform, many abuses might have been prevented, and there might have been no need to send in the Marines a second time around. As of this writing, there is little reason to believe that the United States has yet learned this lesson from the first U.S.-led intervention in Haiti: once again, U.S. troops were quickly withdrawn, and U.S. promises of meaningful reconstruction assistance have amounted to little.

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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

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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

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to rebuild the rule of law must respect and respond to the unique cultural characteristics and needs of each post-intervention society.

Much of this may sound obvious, and on some level it is. Nonetheless, the international community and the U.S. foreign policy establishment have been slow to learn these lessons, and slower still to turn abstract insight into concrete policy changes. Much has already been written on the subject of post-conflict reconstruction, but this book strives to fill a need that still remains unmet: to have a single volume available that pulls together the disparate bits of knowledge we have gained in the past decade, particularly regarding the central challenge of building the rule of law, broadly construed to include both the operation of the law itself and the background social and political institutions required to stabilize and promote it. Our goal in this book is to offer enough theoretical, legal, and historical background to enable readers to contextualize and understand the basic dilemmas inherent in interventions designed to build the rule of law, while also offering concrete suggestions for getting it right in the future.

This book is not a how-to manual, but its focus is fundamentally pragmatic: we are less concerned with political and legal theory than with what seems to work on the ground, and what does not. Nonetheless, when it come to creating “the rule of law” in post-intervention settings, we are convinced that understanding what does and doesn’t work requires some basic historical and theoretical insights. We present those insights here in what we hope is a straightforward and readable manner before moving on to a detailed analysis of concrete challenges and positive practices.

Although building the rule of law may seem like a rather abstract idea, it can be useful to think of it in the same way we think about building a house. To build a house – and not just any house, but a house that will be sturdy, functional, beautiful, affordable, and appropriate to its geographic and cultural setting – one needs a mix of different insights and skills. First of all, one needs some historical and theoretical background: one will want to know at least a bit about the various ways in which people have designed houses in the past; one will want to understand that houses can be built in many different styles. One will want to understand what the other houses in the area look like: if they all have peaked roofs, there may be a good reason (to enable heavy snow to slide off the roofs easily, for instance). One needs to understand the trade-offs between, for instance, letting in lots of light and ensuring that the house is neither too cold in winter nor too hot in summer. One also needs to know a bit about the physics of houses: how much weight can be borne by walls of different materials? How big of a furnace is necessary to heat a particular space?

At some point, such insights and questions lead to a basic conception of the kind of house it makes sense to build in a particular place. From this more abstract kind of knowledge, one must move through some very practical steps. An architect must create a design for the house: a preliminary