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Book Review of Can Might Make Rights? Building the Rule of Law After Military Interventions

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RECENT BOOKS ON INTERNATIONAL LAW

EDITED BY RICHARD B. BILDER

BOOK REVIEWS

Can Might Make Rights? Building the Rule of Law After Military Interventions. By Jane Stromseth, David Wippman, & Rosa Brooks. New York, Cambridge: Cambridge University Press, 2006. Pp. x, 414. Index. \$80, £45, cloth; \$29.99, £17.99, paper.

In this incisive and provocatively titled book—*Can Might Make Rights?*—law professors Jane Stromseth, David Wippman, and Rosa Brooks examine the complex task of instituting the rule of law after military interventions. There are, of course, many types of military interventions—including, for example, those undertaken unilaterally by one country or multilaterally by the international community, and those motivated by humanitarian or security concerns. Because globalization tends to blur previously well-demarcated distinctions, the authors themselves acknowledge that “there can often be no neat distinction between ‘humanitarian’ concerns and ‘security’ concerns” (p. 3). Extreme poverty and injustice may lead to instability, wars, and terrorism—which, in turn, may further fuel poverty and injustice. As a result, military interventions will likely be fueled by a mix of actors with a mix of motivations.

These actors and their varied motivations may have important consequences for conditions faced by intervenors in the wake of the intervention itself. As in the case of Iraq, unilateral interventions motivated primarily by a country’s own perceived national security interests—especially when those interests are contested by other states—will likely be deemed by some other states as either illegal or illegitimate. To the authors’ credit, however, *Can Might Make Rights?* provides an overarching framework in which to examine

the interlocking issues arising out of a rule of law project following a military intervention, regardless of the initial conditions motivating the intervention. Thus, as the authors note, “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” (p. 6). These post-conflict commonalities can, indeed, be found in societies that would otherwise be radically different. The authors aptly observe that “[a]lthough 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” (*id.*).

The organization of the book reflects the authors’ approach—to provide a comprehensive, integrated examination of the common issues and challenges most postconflict societies face. The book thus is not organized along specific regional lines, but rather along broader, more thematic lines that emphasize the necessary building blocks for rule of law efforts—“Blueprints for Post-Conflict Governance,” “Security as *Sine Qua Non*,” “The Challenge of Justice System Reform,” “Accountability for Atrocities,” “Creating Rule of Law Cultures,” and “Enhancing Rule of Law Efforts.” This approach allows the authors to highlight not just the historical and theoretical foundations of a rule of law endeavor, but also the pitfalls and difficulties faced by recent and current reconstruction efforts. The authors bring out the nuanced particularities of the situations they address, but in a way that does not overemphasize or exaggerate their uniqueness, thereby averting the hopeless conclusion that no broader lessons can be drawn from the specific situations discussed.

Because the authors have managed to cull similarities drawn from so many diverse scenarios and have also provided the readers with an overarching set of principles around which to organize rule of law efforts, they have, in effect, written a curiously optimistic book, despite what may at first glance appear to be a generally gloomy assessment because of the many documented failures in past rule of law efforts. In addition, conceptual, normative, and theoretical issues characteristic of broad, abstract approaches to the rule of law are made concrete by the authors' concerted efforts to write a book that also benefits the practitioner. For example, they have drawn on an array of detailed case studies of armed interventions in Afghanistan, Bosnia, East Timor, Haiti, Iraq, Kosovo, Liberia, Sierra Leone, and Somalia, and they have broken down broad themes into eminently digestible parts, including "blueprints" drawn up to identify what worked and what did not. This emphasis on the concrete is, indeed, one of the reasons why the book projects such an optimistic tone. By focusing on how problems should be approached, why past efforts had failed, how to improve the likelihood of success, and such matters, the book not only aims to be of help to the practitioner, but suggests, in effect, that these problems, though entrenched, are not intractable.

The book's central question, as the authors put it, is the following: "Concretely, how does one go about creating the rule of law?" (p. 5). The task is difficult and complex, especially because rule of law has become "a handy shorthand way to describe the extremely complex bundle of cultural commitments and institutional structures that support peace, human rights, democracy, and prosperity" (p. 4). But the task is also a necessary one because, as the authors put it, "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" (p. 7).

Drawing from their own understanding of the theoretical underpinnings of the rule of law, as well as from concrete lessons distilled from specific

case studies, the authors emphasize one dominant, recurring theme—as simple and obvious as it is profound. First and foremost, intervenors need to realize from the outset that effectively building the rule of law is immensely complex and beset by internal contradictions. It thus requires a "holistic process" (p. 12) that is broadly based and takes into account, for example, that each sector of reform is inextricably linked to others. To consider just one case, if one attempts to build up state institutions, such as the police or the judiciary, without a concomitant effort to engage in governance reforms creating a system of checks and balances, the ultimate result may be to create a lopsided set of state institutions in which one branch is dominant, willful, or oppressive, or that allows for the emergence of a political leader with the same characteristics. When the United States launched Operation Uphold Democracy in Haiti in 1994, the United States and the international community separated the much feared military from the police and implemented police reform designed to create a professional, well-disciplined force. Although police reform was initially successful, the failure to institute comparable reform in other related sectors, such as the judiciary, ultimately undermined the positive record of police reform. Corrupt judges released suspects with political connections or financial resources, resulting quickly in the demoralization of the police force.

Consequently, according to the authors, the process adopted must be "ends-based and strategic, adaptive and dynamic, and systemic" (p. 13). Political choices must be constantly balanced, evaluated, and exercised in a holistic way. The authors call theirs a "synergistic" approach to post-intervention rule of law. It requires intervenors to identify fundamental objectives behind a rule of law project and to adapt existing local resources and conditions toward these objectives. An adaptive orientation requires intervenors to focus on the desires and needs of ordinary people and to engage with grassroots demands. Of course, as I discuss later and as the authors undoubtedly recognize and warn about throughout their book, this objective is itself fraught with deeply rooted internal contradictions.

Not surprisingly, because of their desire to write a book that will be helpful to on-the-ground practitioners, the authors opted for a descriptive and pragmatic definition of the rule of law

in which the state successfully monopolizes the means of violence, and in which most people, most of the time, choose to resolve disputes in a manner consistent with procedurally fair, neutral, and universally applicable rules, and in a manner that respects fundamental human rights norms (such as prohibitions on racial, ethnic, religious and gender discrimination, torture, slavery, prolonged arbitrary detentions, and extrajudicial killings). In the context of today's globally interconnected world, this requires modern and effective legal institutions and codes, and it also requires a widely shared cultural and political commitment to the values underlying these institutions and codes. (P. 78)

This definition can be parsed and analyzed in many ways. But for the purposes of this review, there are at least two crucial points that are served by, and embedded in, this definition: first, the rule of law is inextricable from culture, and second, security is vital to the rule of law.

I will start with the culture question. Rarely have rule of law projects taken culture into account. In fact, most commentators wish to sidestep what is generally deemed a thorny and all-too-controversial subject. *Can Might Make Rights?* is thus one of those rare gems that take on this delicate subject. Indeed, the authors confront the issue head-on, declaring that "the rule of law is a matter of cultural commitments as well as institutions and legal codes" (p. 78). Throughout the book, culture is granted a prominent stage—which is not surprising, of course, given the authors' preference for a synergistic approach. Such an approach, once recognized as crucial and adopted as vital, necessitates the view espoused by the authors that "[w]ithout a widely shared cultural commitment to the idea of the rule of law, courts are just buildings, judges are just bureaucrats, and constitutions are just pieces of paper" (p. 76).

Given that the authors have defined the rule of law to include a relatively thick substantive component—adherence to fundamental human rights norms—it is obvious that a society's nonadher-

ence to such fundamental human rights norms on cultural grounds will present intervenors with a cultural quandary and more. Intervenor, who are typically outsiders, will have to confront the difficult choices between promoting international human rights and respecting local mores and garnering domestic support and legitimacy. This process will, without doubt, require intervenors to strike a balance that enables them to achieve a set of locally acceptable arrangements that also meet international human rights standards.

On the one hand, the authors warn that new laws, even nominally better ones that satisfy human rights norms, cannot simply be imposed from "on high" (p. 195) without creating local antagonism. Institutions and rules cannot be imported wholesale but must be constructed on a preexisting cultural base. On the other hand, the authors recognize the need, under certain circumstances, to confront the culture issue directly. In their discussion of Liberia, for example, they note that reforms cannot take root "without a fundamental transformation of Liberian political institutions and culture" (p. 101) and that "domestic legitimacy is not the only touchstone for law reform in post-conflict societies" (p. 197). Indeed.

But what if the indigenous cultural base is violative of international human rights norms? As the authors note, in Kosovo the authorities administering Kosovo under UN auspices vacillated between various options. First, they opted to keep local law, the law in existence before NATO intervention, as the applicable law. This decision alienated Kosovars, who refused to be ruled by "Serb law." The authorities resolved the crisis by declaring that the law applicable in Kosovo would be the law in force before Serbian termination of Kosovo's autonomy—in effect, "Kosovo law," even though, ironically, it was far less consistent with international human rights norms than "Serb law." Recognizing the need to uphold international human rights law, the international authorities also decreed that whatever law was applied had to be consistent with international human rights standards.

These conflicting decrees themselves highlight the clashing imperatives that intervenors face when confronted with the question of whether to

promote self-determination or human rights. One option is to look for a balance that will not alienate local actors even as the human rights dimensions of the rule of law are being pursued incrementally. Another option is to engage outright in a fundamental transforming of local culture, instilling new values and norms in order to bring local culture into alignment with minimum human rights standards. The authors state emphatically that building the rule of law involves “both a practical project of institution-building and a cultural project of shaping attitudes and commitments” (p. 178). At some point, then, intervenors may have to bite the bullet and confront the dilemma directly. What should intervenors do when customary practices and the traditional authority figures discriminate against certain vulnerable segments of the population? Of course, the “law” component of “rule of law” must be called upon; intervenors will draft the necessary laws, construct the necessary institutions, and provide the requisite institutional tools necessary for broad reform. Yet history and experience have shown that such measures are not sufficient. “Changing attitudes and expectations” is also necessary and “may be the hardest challenge of all” (p. 246).

New norms would have to be inculcated. If the effort succeeds, a “tipping point” will be ultimately be reached, and the new norms will “cascade” through a society until they enjoy relatively broad support. Yet how does one go about doing this? With much insight and clarity, and in a way that is both simple and profound, the authors provide examples of how new norms might be instilled and propagated. Take, for example, their assessment that two fields of law—“transitional justice” and “rule of law reform,” which have been long segregated and divided into two relatively separate areas of study—should best be studied in conjunction with one another. Transitional justice usually focuses on accountability, whereas rule of law reform, the authors convincingly demonstrate, needs to focus on the inculcation of new norms. Nevertheless, why not use the criminal trials of perpetrators of atrocities as a vehicle in post-conflict societies for instilling in a systematic way the norms of accountability and transparency? This suggestion is, of course, itself an example of

the very “holistic” process that they advocate. As the authors so aptly put it, the closing of this divide would mean that “opportunities for valuable synergies between accountability efforts and rule of law reform programs can be pursued more effectively” (p. 253). The authors then identify three factors that would maximize the chances that international accountability proceedings would have a positive impact on the norm-creating component of rule of law: (1) whether key perpetrators are effectively disempowered, (2) whether the proceedings themselves demonstrate a rejection of past abuses and an embracing of fairness, and (3) whether the accountability proceedings will contribute to the building of domestic capacity for instituting the rule of law (for example, through outreach efforts between the international criminal law sector and its domestic counterpart).

In other words, like so much that is incisive about the book, the authors have backed up their normative and theoretical framework with concrete, practical suggestions. If the “rule of law is as much a culture as a set of institutions, as much a matter of the habits, commitments, and beliefs of ordinary people as of legal codes” (p. 310), then how might it be created? The authors offer some suggestions. Although lawyers are the ones who are most likely to be involved in rule of law projects, they need to think not just about legal codes and institutions, but also about cultural transformation, and hence about turning to non-legal institutions, such as the media, civil society, and popular culture. The authors urge intervenors to fund “standard” nongovernmental organizations (NGOs) that monitor the justice system and disseminate information to the public, as well as less conventional, non-law-oriented NGOs, such as those that focus on the status of women as reflected in education and health care.

The authors’ focus on women, in particular, is well placed. Indeed, issues related to women’s education and health care have been shown to have a ripple effect on women’s legal rights. As I’ve discussed elsewhere,¹ the Grameen Bank, which specializes in microcredit, engages in more than just lending. It has also adopted a social-development

¹ Lan Cao, *Culture Change*, 47 VA. J. INT’L L. 357, 410–11 (2007).

agenda called the “Sixteen Decisions” as part of its objective to transform the social consciousness of its borrowers. At weekly meetings, borrowers thus agree to advance principles that have health, education, and social components. Some of these principles address basic sanitation issues, such as the need to build and use pit latrines. Some address education by asking borrowers to practice a “deferral of selfish gratification by saving and educating children.” Others deal with social attitudes and beliefs, such as asking borrowers not to take dowry at their sons’ weddings, not to give dowry at those of their daughters, and not to practice child marriage.

The effort to eradicate female genital mutilation is another example of moving beyond the law alone to achieve social change. In particular, countries that have ratified the Convention on the Elimination of All Forms of Discrimination Against Women² (CEDAW) are obligated by the terms of the treaty to “to promote equality by breaking down commonly held stereotypes impacting culture and tradition.”³ Article 5(a), in particular, requires states parties to “take all appropriate action” necessary “to modify the social and cultural patterns of conduct of men and women, with a view to achieving the elimination of prejudices and customary and all other practices which are based on the idea of the inferiority or the superiority of either of the sexes or on stereotyped roles for men and women.” To consider one relevant example, Egypt’s effort to eliminate the genital mutilation of girls had been ineffective by legislation alone. But then, with a view to changing this cultural practice, one of the nation’s largest NGOs pursued an education campaign aimed at women, religious leaders, and unmarried men that portrayed the issue as one of family planning and health care, thus changing the meaning of female genital mutilation. This Egyptian campaign, funded by the United States and United Nations, has achieved a 75 percent eradication rate even in

Egypt’s more remote villages, and the same experience has been replicated in Senegal.⁴

The authors have thus clearly zeroed in on one of the most glaring gaps in rule of law work. As they succinctly put it, intervenors need to move “beyond elites and legal institutions and focus on the long-term project of building deep cultural commitments to the rule of law” (p. 346). Their suggestions run wide and deep—investing in civil society, legal education, general outreach programs that include women, and so on—much beyond conventional projects that have focused primarily on formal institutions and legislation.

As I noted at the beginning of the review, among the many significant points emphasized by the authors is that security is, without doubt, the sine qua non; the authors observe that “extreme insecurity (insurrection, civil war, frequent terrorist attacks) makes it virtually impossible for societies to sustain the rule of law” (p. 78). By the same token, “[a]bsent basic security, efforts to reform political institutions, adopt new laws, promote national reconciliation, and jump-start economic growth are destined to fail” (p. 134). Yet as the authors also point out, their case studies show that military victory is elusive and ambiguous, and even in the case of Iraq and Afghanistan, victory over Saddam Hussein and the Taliban was simply a first stage followed by an arduous and complicated second stage of bringing under control the unending, hit-and-run counterinsurgencies.

That is to say, security may well remain an unresolved issue even as rule of law efforts continue. Additionally, other, outside states sometimes intrude into failed states or into those that have not completed their state-building process. In the absence of an effective government, such states are also susceptible to exploitation by warlords, private militias, bandits, criminals, terrorists, and other spoilers. Needless to say, building a rule of law under those conditions is a daunting challenge. The same process that took Europe centuries to complete is collapsed by international actors into a span of only a few years.

Imagine implementing the disarmament and demobilization of belligerents in an atmosphere of

² Dec. 18, 1979, 1249 UNTS 13.

³ Cao, *supra* note 1, at 404; see Abby Morrow Richardson, *Women’s Inheritance Rights in Africa: The Need to Integrate Cultural Understanding and Legal Reform*, 11 HUM. RTS. BRIEF, Winter 2004, at 19.

⁴ Cao, *supra* note 1, at 405–06.

chaos and insecurity, and at the same time setting in motion the conditions necessary to restart the economy and stabilize the sociopolitical structure so the former belligerents can be meaningfully reintegrated. Indeed, not just security—though security is absolutely vital as a necessary precondition for rule of law reforms that follow—but cultural transformation and everything else advocated by a holistic, or synergistic, approach will require a long-term commitment by intervenors. Yet this long-term commitment, whether military or financial, is unfortunately—but predictably—unlikely. Indeed, intervenors' unwillingness to enter into sustained, costly endeavors is generally foreseeable. As the authors note, intervenors are often caught in a catch-22. For example, American reluctance to use deadly force against looters in the immediate postintervention period served to fuel the violence of remnants of the Iraqi army, not to mention terrorists and other militants. "Spoilers who conclude that intervenors lack the political will to confront them will invariably take advantage" (p. 158), "especially if the intervenors cannot be counted on for protection" (p. 147). And Iraqis who would have otherwise supported coalition forces in their reconstruction of Iraq "had to hedge their bets for fear that the coalition either could not protect them or might abandon the whole reconstruction project" (p. 146). It is not difficult for the local population to discern that "spoilers are there for the long haul" (p. 156) or for the belligerents to discern that intervenors may be "timid or incapable of imposing their will" (p. 146).

Yet one needs to ask, what does it mean—in efforts to achieve the rule of law—to "use coercion" (p. 147) and to impose one's will? House-to-house searches? Air strikes? Other draconian measures? The authors rightly observe that the mission in Afghanistan is endangered "partly because of the reluctance of the intervenors, principally the United States, to confront the warlords and military commanders who run much of the country" (p. 160). But what would confrontation entail and require? Throughout the book, the authors urge intervenors to act decisively. "When spoilers threaten to derail the peace process through violence, intervenors cannot remain neutral. Instead,

early and vigorous opposition to spoilers may prove essential to building a lasting peace" (p. 136).

But the requisite military actions by intervenors—which might inevitably result in civilian injuries and deaths—may well create political problems and generate new opposition, both locally and internationally, and even pose potential legal problems (are the efforts required to stabilize the country disproportionate?). As a consequence, political realities on the ground and opposition by domestic constituents in the intervenors' home states may make a holistic approach to the rule of law and postintervention reconstruction difficult to accomplish. In addition, if spoilers are able to flourish and continue their attacks, the government's ability to maintain order and security will diminish, starting a vicious spiral of deteriorating security and respect for the rule of law. And unless the situation can be stabilized, the situation can easily, and quickly, come to be seen as unsalvageable.

As the authors note, troops are often withdrawn prematurely in "inappropriately early exits" (p. 105), even when, as in Haiti and East Timor, a continued presence would have been uncontroversial. The reality of these rule of law efforts, including the maintenance of security, is that intervenors generally have only a short time frame in which to complete their missions. The brevity is not necessarily due to a myopic understanding of what it takes to draft a constitution and otherwise move a society more generally toward achieving the rule of law. It is more likely due to the intervenors' recognition that their own constituents at home are unlikely to tolerate protracted, expensive, and potentially brutal endeavors in faraway places. Intervenors are consequently under intense scrutiny and subject to immense "pressure to end the fighting . . . and to minimize their own post-conflict involvement" (p. 89). The authors remark that "it is often difficult for intervenors to muster the political will to support aggressive measures against spoilers in the post-conflict intervention phase. . . . [P]olitical support and associated resources dwindle accordingly. Tolerance for casualties similarly declines . . ." (p. 156).

As a result, choices are made that are unlikely to satisfy the holistic, or synergistic, approach that

the authors favor. For example, the initial mission in Somalia was to establish a secure environment for a humanitarian mission—to distribute food to Somalia's population following the collapse of the government in the early 1990s. Yet even this limited mission could not be sustained in a situation that lacked viable institutions and was fraught with security risks posed by warring clans. Thus, what started out as a limited humanitarian intervention needed to morph into something more wide-ranging because the distribution of food required security—and “sustainable security requires at least minimally functioning state institutions,” which can likely be achieved only “as part of a larger post-conflict reconstruction and rule of law project” (p. 140). Additionally, the U.S.-led Somalia operation was so fearful of “mission creep” that it resisted expanding its mandate to include disarming local militias to increase overall security. The American operation—its scope, mission, and objective—was defined by the insistence on “an early exit,” an insistence that became all the more vehement when nineteen U.S. soldiers died in March 1994.

Throughout the book, the authors warn that an effective rule of law effort requires intervenors both “to make virtually open-ended commitments of resources and people to post-intervention societies” and to recognize that such an effort is “likely to be less than popular with domestic constituencies concerned about how their tax dollars are spent” (p. 4). Nonetheless, the authors argue in favor of “moral and pragmatic considerations,” and caution intervenors against the temptation “to cut and run after the initial military phase of an intervention ends” (p. 7).

In one succinct phrase, the authors are able to capture the essence of what has impeded the effective development of postconflict rule of law: “Perhaps the most common problem has been haste” (p. 95). The result: in order to demonstrate quick improvements to satisfy domestic constituents in their home countries, intervenors fall for “seemingly attractive short-term options with disastrous long-term consequences” (p. 132). Even assuming that intervenors manage to avoid missteps, engage in the necessary advance planning and coordination, and devote the resources necessary to insti-

tute the rule of law, the process will inescapably remain complicated, difficult, and time-consuming, and will be marked by inevitable cycles of advances and retreats, as well as by “inherent paradoxes and contradictions” (p. 391). In the end, intervenors' commitment to postintervention reconstruction will depend ultimately on “whether assisting the affected country is seen as vital to the national interests of a major or regional power,” otherwise “the resources and commitment necessary for coercive strategies to succeed will not be forthcoming” (p. 368, quoting Stephen Stedman).

Whether or not the authors intended it to be so, many parts of *Can Might Make Rights?* should be aimed primarily at rich-country intervenors and their domestic constituents. That is, one of the book's few weaknesses is its failure to situate the time-frame problem identified above in the appropriate context—as inherently interconnected with domestic politics in intervenors' home countries. Other parts of the book, such as those that deal with culture change, are appropriately directed at those countries in which rule of law efforts are being undertaken. In any event, the book is a magisterial achievement in both its theoretical and scholarly sweep, and in the concrete case studies that will undoubtedly provide invaluable guidance to those doing rule of law work on the ground.

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Fairness in the World Economy: US Perspectives on International Trade Relations. By Americo Beviglia Zampetti. Northampton, MA; Cheltenham, UK: Edward Elgar, 2006. Pp. ix, 220. Index. \$95, £55.

WTO supporters and antiglobalization activists do not agree on much. However, they emphatically share the assessment that the international trading system is unfair. Recent years have witnessed an unlikely combination of Nobel laureates, globe-trotting rock stars, and third-world nongovernmental organizations decry the lack of