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SUMMARY OF: *DOES MIGHT MAKE RIGHTS?*

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SUMMARY OF: *DOES MIGHT MAKE RIGHTS? BUILDING THE RULE OF LAW AFTER MILITARY INTERVENTIONS*

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ABSTRACT: This is a summary of *Does Might Make Rights?* By Jane Stromseth, David Wippman and Rosa Brooks, using USAID guidelines.

Does Might Make Rights?: Building the Rule of Law After Military Interventions
(2006, Cambridge University)

By Jane Stromseth, David Wippman and Rosa Brooks

In Does Might Make Rights? Building the Rule of Law After Military Interventions, the authors introduce what they call a “new Imperialism” in recent cases of perceived shortsightedness in Western military and humanitarian efforts in several countries. They build upon these cases and attempt to move beyond a how-to’ manual and present a more pragmatic but sensible way to establish rule of law.

- The history of interventions and international law presents similar concepts in legality and legitimacy but both rely on the interveners’ own conduct as well as the local population’s perception of that conduct. The United Nations Charter of 1945, the Cold War and post-Cold War security structures, and UN Security Council all provided different contexts for intervention as demonstrated in the region-led ECOWAS campaign in West Africa and the humanitarian Dilemma in Kosovo in the 1990s.
- The campaigns in Afghanistan and Iraq bring into discussion the concepts of “preemption”, or intervening before an action can occur in a target country, as well as whether interveners take into consideration human rights when intervening and afterwards. Even with the UN Charter as a guide to limit the use of force, national security and political priorities will often drive interveners to act beyond established norms, ultimately affecting the efforts of rebuilding efforts.
- In clarifying rule of law as a “complex, fragile and inherently unrealizable goal”, the authors advocate a *synergistic* approach to establishing a foundation for law. This method creates an ends-based and strategic criteria that is adaptive and dynamic in each unique development context. In other words, rule of law must be based on pre-existing cultural and physical elements, be non-discriminatory against any social groups and be on a macro-level and not focus on just one component in a larger structure.
- The authors point out that post-intervention ROL blueprints should not be fixed but instead act as flexible guidelines subject to evolution and

reinterpretation for each context, and constitutions should reflect a society while fostering a shared sense of community. A phased constitutional design can provide an orderly structure post conflict and relieve some high-stakes pressure while timing should vary and excluding political actors may be necessary to accommodate local relations. Liberia's example shows how introducing elections at the proper point will hurt reform long-term while East Timor's example shows how ethnic homogeneity makes reform easier than if conflict ethnic groups as in Bosnia existed.

- Post-conflict blueprints are foundations for ROL design and should emerge via a process of bargaining, and NOT be a single, hard design. Blueprints based on power-sharing consociational design as in Iraq and Afghanistan may be difficult because existing conflicts may be institutionalized, showing how short-term and long-term difficulties must be weighed.
- Because post-intervention work takes place in a demanding and often hostile environment, four conditions must be met including: 1) using force or threat of force to deter hostility by locals, 2) having security providers with expertise in law enforcement, 3) subsuming security into the larger peace/rebuilding process, and 4) collaborating with local actors to form indigenous security organs.
- Securing a conducive environment quickly during the window of opportunity and using the right mixture of force and resources is critical in weakening spoilers who might attempt to foil intervention efforts. These actors include law enforcement, the courts, and corrections must function in unison, and Western security models should enhance (and not replace) local and traditional institutions if possible.
- Building criminal justice systems is a difficult, long-term task, requiring a viable legal framework that protects basic rights, transparent and merit-based promotions, monitoring, appropriate education and training, and changing the attitudes of both officers and citizens alike on its role. Police reform is usually quickest but legal and court reform is critical because public legitimacy is required as well as political reform to complement the larger synergistic approach. Corrections can be overlooked in criminal

justice reform and prisons must be well maintained with clear rules, competent staff and having international support can be beneficial.

- General traps to criminal justice reform include using laws that have no legitimacy, premature institution-building without political reform, premature empowerment of judicial officials before adequate training, and failing to address vulnerable populations including females and minorities especially in rural areas. Positive lessons include using mutually reinforcing synergies in reform, deploying international and local actors simultaneously, promoting criminal justice transparency and inclusive staff representation.
- Several cases concerning past atrocities have , resulted in success and failure for rule of law with demonstration effects (trials of major offenders whose fair conviction sets an example for a society) and capacity building via international hybrid tribunals can increase criminal justice system resources, examples being the International Criminal Trial in Yugoslavia (ICTY) and International Criminal Trial in Rwanda (ICTR).
- Hybrid tribunals that combine outside experience and knowledge with local actors show the best combination as in Sierra Leone where Charles Taylor finally experienced justice but truth and reconciliation commissions as in East Timor can upgrade local justice capabilities especially in post-conflict societies that need enhanced community-based accountability.
- On the other hand, Kosovo's United Nations Mission (UNMIK), Iraq's Special Tribunal and Afghanistan's Human Rights Commission all experienced less success in designing and establishing rule of law foundations for varying reasons related to unique national circumstances. The founding and need of the International Criminal Court acknowledges that national jurisdiction can be an obstacle to larger efforts to prosecute human rights violations and although not perfect, can encourage local leaders to investigate and pursue violators at home.
- Creating a rule of a law culture requires changing long-held attitudes of old institutions and must start from day one of a ROL intervention. These efforts must adapt in some way local and non-Western methods (*jirgas* in Afghanistan, paralegals and mediators), and reconcile the use of force to set up an system that emphasizes replacing force with rule of law. ROL Programs must be designed that form a consensus among elites and

ordinary citizens on the need for law, and that leverage civil society groups and media in doing so to build local capacities.

- Building ROL is a long term project that must use civic and professional education for reinforcement. In post-conflict settings, victims and especially minorities, undereducated and underemployed youth, can find more ownership of the system by use of innovative outreach programs as occurred in South Africa post-Apartheid. Being creative in linking traditional conflict resolution to imported ROL can more easily transmit messaging especially with popular culture (i.e. Judge Judy-like television shows).
- Enhancing rule of law efforts requires planning and coordination among interveners and local stakeholders, who should first assess a broad strategy, then form key activities, timetables, benchmarks while reviewing completed tasks. Unity of effort, field-level planning and coordination mechanisms will achieve tasks in a simpler manner.
- Sufficient resources and commitment are critical to success as even partial completion generally improves on doing nothing, and limited ROL funds are frequently gathered in haphazard ways due to changing donor priorities. Local participation is vital for ROL to become sustainable and have popular support. Local actors must be involved from the start and be given input on design even if time makes deliberation difficult.

The authors conclude that building rule of law in post-conflict societies is very complicated but taking a holistic or synergistic approach is the most sound, ends-based and strategic method to do so, even if progress in a country situation is uneven.

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