

POST-CONFLICT RULE OF LAW BUILDING: THE NEED FOR A MULTI-LAYERED, SYNERGISTIC APPROACH

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INTRODUCTION

In recent years, considerable blood, sweat, and treasure have been devoted to building the rule of law in the wake of armed conflicts and military interventions in many parts of the world. From Afghanistan to Iraq, Kosovo to East Timor, and Sierra Leone to Haiti and elsewhere, international interveners and local leaders have struggled to address both security and humanitarian challenges in societies seeking to overcome a legacy of violent conflict.

Increasingly, international and domestic reformers have come to appreciate that long-term solutions to security and humanitarian problems depend crucially on building and strengthening 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.¹

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

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1. JANE STROMSETH, DAVID WIPPMAN & ROSA BROOKS, CAN MIGHT MAKE RIGHTS? BUILDING THE RULE OF LAW AFTER MILITARY INTERVENTIONS 3 (2006).

involves courts, legislatures, statutes, executive agencies, elections, a strong educational system, a free press, and independent non-governmental 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.² 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.³ Building public trust in newly developing legal institutions can take years, and mutually reinforcing reforms may be needed in multiple areas—from constitutional and justice system reform to initiatives designed to strengthen access to justice and increase public confidence in the very idea of the rule of law. 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.⁴

For the last few years, my colleagues David Wippman, Rosa Brooks, and I conducted research in many societies—including Sierra Leone, Iraq, Kosovo, Bosnia, East Timor, and elsewhere—with the aim of understanding the many challenges of strengthening the rule of law in the aftermath of conflict. We interviewed national officials and civil society leaders, UN officials and staff, rule of law experts from different governments, and practitioners from many different NGOs and organizations, and we looked carefully at the unique circumstances and challenges in particular diverse, post-conflict societies.

Our resulting book, *Can Might Make Rights? Building the Rule of Law After Military Interventions*, is designed to pull together in one volume the disparate bits of knowledge gained in the past decade with the goal of understanding why past international efforts to strengthen the rule of law after conflict have so often

2. *Id.* at 4.

3. *Id.* at 5.

4. *Id.*

fallen short, and to offer concrete suggestions for what might be done better in the future.⁵ We deliberately aimed to write a practical book that would assist policymakers and field workers, 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, and help to evaluate unique as well as recurring challenges in different post-conflict societies.⁶ Our aim throughout was to examine the rule of law holistically, to make the whole elephant visible—not just the trunk or the tail—and to explore how the pieces fit together: from blueprints and constitutional frameworks for post-conflict governance, to security and justice system reform, to accountability for human rights atrocities, to initiatives aimed at building public and cultural support for the rule of law.

Recent experience holds both good news and bad. The bad news is that the track record of interveners in building the rule of law after conflict has not been very impressive.⁷ This is in part because post-conflict societies—with legacies of insecurity, discredited political institutions, damaged infrastructure, limited resources, and public distrust—are usually not ideal environments for promoting the rule of law.⁸

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 we are finally beginning to have a sense of “best practices,” an increasingly nuanced understanding of what works and what does not in post-conflict settings.⁹ For instance:

- We now have a clear sense of the critical importance of immediately reestablishing basic security in the wake of military interventions, which in turn requires that the international community plan in advance for the rapid deployment of civilian police in the post-conflict period.¹⁰

5. *Id.* at 10.

6. *Id.*

7. *See id.* at 9.

8. *See id.*

9. *Id.*

10. *Id.*

- Similarly, we now understand 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.¹¹
- After more than a decade of well-intentioned but flawed interventions, we now understand the importance of addressing the various aspects of post-conflict reconstruction in a *coordinated* way, rather than allowing security, economic issues, civil society, and governmental issues all to be dealt with by separate offices operating on more or less separate tracks.¹²
- Perhaps most importantly, we have learned from failures in the past that there is no “one size fits all” template for rebuilding the rule of law in post-conflict settings: to be successful, programs to rebuild the rule of law must respect and respond to the unique cultural characteristics and needs of each post-intervention society.¹³ Moreover, the rule of law cannot be imposed from on high; to enjoy legitimacy, it must be built with the support and leadership of the local population.¹⁴

This Article will highlight some of the major themes and conclusions of our book. First, I will discuss our diagnosis of why past efforts to strengthen the rule of law in the wake of conflict and intervention have not been as effective as any of us would like.¹⁵ Second, I will sketch out the positive framework we offer: an integrated, synergistic approach to building the rule of law that keeps a clear focus on ultimate goals, is adaptive and seeks to build upon solid cultural foundations, and is systemic in stressing the need for mutually reinforcing reforms in multiple areas.¹⁶ Third, I will discuss some of the key obstacles that need to be tackled in

11. *Id.*

12. *Id.*

13. *Id.* at 9-10.

14. *See id.* at 195.

15. *See infra* Part I.

16. *See infra* Part II.

order to achieve more effective results on the ground.¹⁷ Above all, I will stress the importance of a multi-layered approach to building the rule of law—an approach that focuses not only on strengthening institutions but also on building cultural and political support for the rule of law. Indeed, without a widely shared commitment to the idea of the rule of law, courts are just buildings, judges are just bureaucrats, and constitutions are just pieces of paper.¹⁸

I. WHY HAVE PAST POST-CONFLICT RULE OF LAW EFFORTS TOO OFTEN FALLEN SHORT?

Despite millions of dollars and considerable human effort and sacrifice over recent years, initiatives to strengthen the rule of law in many post-conflict societies have often been disappointing in terms of their results and impact.¹⁹ There are many reasons for this, including reasons specific to particular post-conflict countries, such as the extent to which domestic leaders are committed to rule of law reforms and are viewed by the public as effective and legitimate. But let me highlight three overarching reasons that have tended to recur across different societies.

First is simply the inherent difficulty of the endeavor. In societies that have been wracked by violent conflict, building the rule of law, understood broadly, is incredibly hard. Particularly in post-conflict societies where political institutions are discredited, legal institutions are distrusted to the extent they exist at all, and infrastructures are devastated, positive change generally will require enormous commitments of time, energy, and resources. Spoilers may contend for power and resources and local leaders may oppose reforms. Overcoming public distrust and building institutions worthy of confidence can take many years.²⁰

To complicate matters further, efforts of external interveners to help build the rule of law are fraught with paradoxes and difficulties. Indeed, a paradox is inherent in the very project of trying to

17. *See infra* Part III.

18. STROMSETH ET AL., *supra* note 1, at 76.

19. *See id.* at 65-68 (discussing challenges in societies as diverse as Kosovo, Haiti, East Timor, Afghanistan, and Iraq). However, despite problems, rule of law programs have helped people in many societies. *See id.* at 388.

20. *See id.* at 311.

build the rule of law in the aftermath of a military intervention: a core idea of the rule of law is that reason is better than force as a means of resolving disputes, yet by definition, interventions resolve problems through force.²¹ There is no way around this problem, but interveners should at least acknowledge the paradox inherent in trying to pull the rule of law from the barrel of a gun and recognize the ways in which the very fact of the intervention itself may undermine their claims about the value of the rule of law.²²

The intervention's perceived legality and legitimacy, for example, can have significant effects on subsequent efforts to build the rule of law. Interventions increasingly involve a long-term process of transformation; their legitimacy will constantly be reassessed by relevant actors as circumstances evolve on the ground, but a strong consensus about the intervention's legality and legitimacy at the outset can increase the prospects for ongoing cooperation from both local and international actors.²³ Recent experience in Iraq and elsewhere, for example, has shown that governments are far more likely to participate in an intervention—and contribute to post-conflict reconstruction—if they view the underlying intervention itself as legitimate.²⁴

An intervention's perceived legitimacy will also be influenced by the concrete objectives interveners pursue once they are deployed on the ground.²⁵ Here again international legal norms are relevant. Whatever factors trigger states to intervene in the first place, they increasingly face international pressure to help build institutions that advance self-determination and protect basic international human rights, even as they also seek to respect the unique culture of the people whose future is directly at stake.²⁶ In short, if interveners want to be successful at a practical level in building the rule of law domestically, they will need to take seriously international legal norms that can have a significant impact on whether other states—as well as the local population—view their intervention as legitimate and worth supporting.

21. *See id.* at 312-14.

22. *Id.* at 325.

23. *Id.* at 19.

24. *See id.* at 18-19.

25. *See id.* at 19.

26. *Id.*

Another set of challenges includes the difficult trade-offs that accompany efforts to build the rule of law. Building the rule of law is a holistic process, and it is almost inevitably marked by internal contradictions.²⁷ For example:

- 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).²⁸
- Fostering “local ownership” and respecting local cultural norms may conflict with efficiency interests or international standards.²⁹
- Satisfying minority political participation interests may conflict with satisfying majorities,³⁰ and constitutional blueprints designed to bring an end to armed conflict may defer rather than resolve difficult tradeoffs.³¹
- 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.³²

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

27. *Id.* at 12.

28. *Id.*

29. *Id.*

30. *Id.*

31. See *id.* at 88-89 (citing Donald Horowitz, *Constitutional Design: Proposal Versus Processes*, in *THE ARCHITECTURE OF DEMOCRACY: CONSTITUTIONAL DESIGN, CONFLICT MANAGEMENT AND DEMOCRACY* 1, 15-16 (A. Reynolds ed., 2002)). Blueprints emerge from a process of political bargaining and compromise; what emerges is not an ideal, coherent design, but a cobbled-together mix of sometimes conflicting and ambiguous provisions focused principally on meeting the short-term interests of key international and local actors. The better that interveners understand the risks of different blueprint options, the easier it will be to avoid the pitfalls associated with each, and to resist seemingly attractive short-term options that have disastrous long-term consequences. STROMSETH ET AL., *supra* note 1, at 132.

32. See *id.* at 12.

problematic alternatives. But interveners, precisely because they are interveners (and so do not fully understand local culture, interests, or institutions), are often not well positioned to make such choices and may not fully understand the likely consequences.³³ Although progress will rarely be linear, reformers nonetheless need to strive to keep the momentum going in the direction of the rule of law.³⁴ Once the balance tips too much in the other direction, it can be exceptionally difficult to recover.³⁵

This does not mean that building the rule of law is a fool's errand. It does mean that it is far more difficult than is generally understood. The evidence suggests, however, that reformers can achieve moderate success if they take these complexities into account and plan accordingly.³⁶

A second reason why past rule of law efforts have fallen short is the tendency of interveners to focus on formal institutions—the means—with insufficient appreciation for the underlying complexities of building the rule of law. Especially important is the need to focus on the perceptions of ordinary citizens and to strengthen cultural commitments to the very idea of the rule of law.³⁷

Theorists disagree about whether the rule of law is primarily formal in nature (a matter of institutions and procedures), or fundamentally substantive as well (a matter of rights and justice).³⁸ In practice, when policymakers talk about the rule of law as a goal, they usually have in mind a mix of formalistic and substantive outcomes. That is, they are looking for an outcome in which new or reformed legal and judicial institutions are created, respected, and actually used by members of the society in a way that furthers core international human rights norms.³⁹

But rule of law programs usually focus almost exclusively on institutions and legal codes as a means of achieving such an outcome, assuming that a cultural commitment to the rule of law and the values that underlie it will follow naturally from reformed

33. *Id.*

34. *Id.* at 391.

35. *Id.*

36. *Id.* at 13.

37. *See id.* at 179.

38. *See id.* at 13.

39. *See id.* at 69.

institutions and codes. This assumption is flawed. Although institutions and codes are an important part of the picture, for the rule of law to exist, people must also believe in the value and efficacy of legal institutions as a means of resolving disputes. A belief in the value of the rule of law does not follow inevitably from the creation of formal legal structures.⁴⁰

Getting people to believe in the rule of law is very complex.⁴¹ It not only requires creating appropriate background conditions (fostering perceptions that the intervention is legitimate, establishing security, creating viable governance blueprints, moving forward on justice system reform, and so forth), but it also involves grappling with complex issues of how cultures change and creating rule of law programs that foster cultural change. In order to build the rule of law, interveners must understand how complex an edifice it really is, as it includes both formal and substantive aspects.

We found that although many organizations and individuals have an intuitive sense of what the rule of law entails, too often interveners pay insufficient attention to its complexities—especially to the need for cultural commitments to the very idea of the rule of law—and to whether reforms are accessible and responsive to a country's people and their needs.⁴² The importance of cultural context is illustrated by a story, perhaps apocryphal, that we tell early in the book and is worth recounting here.

During the nineteenth and early twentieth centuries, some Middle Eastern governments were anxious to improve the lot of nomadic tribespeople, who roamed from place to place, living in tents, and rarely having reliable access to clean water, health care, or schools. The governments built new houses for the nomads in various towns and gave them to the tribes for free, confidently expecting that the nomads would immediately transform themselves into ordinary townspeople. The nomads promptly quartered their camels in the fine shelters and then lived themselves in their old tents outside the houses, to the government's great consternation. The houses soon deteriorated, as they were not designed with the needs of camels in mind, and before long, most of the nomads

40. *See id.* at 310-11.

41. *See id.* at 311.

42. *See id.* at 56-57.

returned to their wanderings. The nomads, it turned out, did not particularly want to live in one place.⁴³

Well-intentioned efforts by interveners to build the rule of law in post-conflict societies by creating formal structures and rewriting constitutions can run into similar problems.⁴⁴ Rule of law reformers may assume that “if you build it, they will come” applies to courts as much as to baseball fields. But courts and constitutions do not occupy the same place in every culture, and external efforts focusing on formal institutional reform can often appear irrelevant to the concerns and practices of ordinary people, social groups, tribes, and other segments of the population in different post-conflict societies.⁴⁵

Furthermore, law cannot—nor should it—be imposed from on high by external interveners; we emphasize the need to understand the unique culture, history, and political terrain in each country and to work with local leaders to build upon existing cultural foundations. The intervener’s understanding (or lack of understanding) of the unique culture and aspirations of the local population will have a profound impact.⁴⁶

We offer a pragmatic definition of the rule of law that seeks to capture what most policymakers are aiming for in promoting the rule of law:

The “rule of law” describes a state of affairs 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.⁴⁷

43. *Id.* at 76-77.

44. *See id.* at 77.

45. *Id.*

46. *See id.* at 195.

47. *Id.* at 78.

Our pragmatic definition highlights that the rule of law is a matter of cultural acceptance as well as institutions and legal codes; it focuses on both substantive aspects (protection of basic human rights) as well as processes and institutions; and it recognizes that much conflict resolution takes place in the “shadow of the law” and depends on the public’s confidence and belief in the very idea of law.⁴⁸

A third and related problem with many rule of law programs is their segmentation. Different agencies and organizations understandably focus on their areas of specialization and expertise, such as improving police, or courts, or prisons, or reforming legal codes. But too often these efforts fail to pay adequate attention to how different institutions and reforms relate to one another or to the larger political system in which they are embedded.⁴⁹ Also, rule of law projects are often primarily determined by the practical constraints of external interveners: their need to show measurable outputs (number of courthouses built, computers installed, cops put out on the beat, judges trained), with a hope that these steps will add up to something we would recognize as the rule of law.⁵⁰

It is, of course, understandable that interveners (including government agencies, NGOs, and so forth) focus on building needed institutions—including courts, police, and prisons. The problem is not an institutional focus per se, but rather an overly narrow and insular concentration on institutions with insufficient attention to the interrelations between them or to the larger cultural and political context in which they function.

A narrow and segmented approach to institutions can lead to piecemeal reforms of little enduring impact,⁵¹ and to a continuing deficit in public support.⁵² It also can reinforce a tendency for predatory politics—that is, if institutions are built without careful attention to the accountability of newly empowered actors and to their role in the larger political system, interveners may simply

48. *See id.* at 78-80.

49. *See id.* at 179.

50. *See id.*

51. *See id.*

52. *See id.*

provide new tools for self-interested power holders to pursue their own agendas rather than effectively building the rule of law.⁵³

The intervention in Haiti during the mid-1990s, for example, ran up against many of these problems. Although enormous initial progress was made in vetting and training the Haitian National Police during the United Nations mission following Jean-Bertrand Aristide's return to power, other parts of the justice system did not receive the same degree of assistance or pressure for reform.⁵⁴ As a result, corrupt judges could be bribed to release suspects, and bad governance generally undermined the larger political system in which police operated.⁵⁵ Large numbers of pre-trial detainees languished for months or years in squalid prisons without legal process.⁵⁶ Little was done, moreover, to address the widespread suspicion among ordinary people that law is a vehicle of control and repression rather than of justice.⁵⁷ And the initial police reforms were ultimately undercut most profoundly by the failure to build a more accountable political system in Haiti more generally.⁵⁸ Similar kinds of problems have occurred in other post-conflict societies as well.

II. A POSITIVE, SYNERGISTIC APPROACH TO BUILDING THE RULE OF LAW

Recognizing the enormous challenges of building the rule of law in the wake of conflict and intervention, we offer a positive framework that acknowledges these complexities but seeks to move in a positive direction.⁵⁹

We begin by stressing that interveners need to be much more self-conscious about the inherent paradoxes and complexities of building the rule of law after intervention. Interveners, as mentioned earlier, need to acknowledge the paradox of trying to build the rule of law from the barrel of a gun, and they need to recognize that the

53. *See id.*

54. *Id.* at 179-80.

55. *Id.* at 180.

56. *See id.* at 215.

57. *Id.* at 180.

58. *See generally id.* at 180, 214-18.

59. *See id.* at 388.

perceived legitimacy of the intervention—and of their own conduct on the ground—will profoundly influence the credibility of their efforts to argue that law matters. Poorly thought-through rule of law programs can be self-undermining and actually do damage to the project of building the rule of law.⁶⁰

We argue that interveners, like physicians, should therefore do their best to first “do no harm.”⁶¹ To avoid inadvertently undermining their own efforts, interveners should:

- Be *transparent*. When interveners seek to create consultative processes, but then ignore advice they don’t like, it undermines their credibility. Acknowledging that certain policies and principles are nonnegotiable, at least in the short term, may make interveners unpopular—but hardly more unpopular than they are when they feign a willingness to allow local societies to make their own choices but then veto those choices.⁶²
- Be *accountable*. When interveners insist that legal codes in a post-conflict society must reflect international human rights standards, but interveners themselves seem unable or unwilling to comply with those same standards, their credibility inevitably suffers. Similarly, when anyone affiliated with an intervening power behaves inappropriately or commits crimes, interveners need to ensure that investigation, trial, and punishment are prompt, fair, and public.⁶³
- Be *better educated about the language and culture* of the local society.⁶⁴ Lack of cultural understanding can severely undermine efforts to build the rule of law, whereas cultural sensitivity can go a long way to building trust and confidence.⁶⁵
- *Plan carefully*. It is easier to prevent damage than to undo it, and poor planning often leads only to a need for embarrassing about-faces further down the road.⁶⁶

60. *See id.* at 390.

61. *Id.* at 315.

62. *Id.* at 326.

63. *Id.*

64. *Id.*

65. *Id.*

66. *Id.* at 327.

- *Act multilaterally and collaboratively.* Given the paradoxes inherent in trying to create the rule of law in the wake of military interventions, interveners need to gain as much legitimacy as possible. Ensuring that no one state or religion or ethnicity is seen as behind all rule of law programs can help diminish resentment and skepticism about the motives of interveners.⁶⁷

Next, we advocate a multi-layered approach to building the rule of law that explicitly recognizes the need for multiple, mutually reinforcing reforms that are carefully attuned to strengthening cultural and political as well as institutional foundations for the rule of law. We call this the *synergistic* approach.⁶⁸

The synergistic approach to building the rule of law is ends-based and strategic.⁶⁹ In other words, reformers need to be clear about the ultimate rule of law goals they are striving to achieve rather than focusing simply on building up institutions and formal structures.⁷⁰ Working toward fundamental goals such as establishing basic law and order, a government bound by law, equality before the law, and protection of basic human rights, among others, will require a variety of cross-cutting programs and initiatives.⁷¹ Reformers will need to recognize that tensions may sometimes arise between some of these goals and that it may not be possible to advance each goal equally at the same pace, particularly in post-conflict settings with limited resources and fragile stability.⁷² But keeping such overarching goals firmly in mind—rather than assuming that they will naturally emerge by building institutional structures—will help interveners and local leaders focus on developing a range of interrelated capabilities and the programs and initiatives that are most likely to promote and sustain those capabilities.⁷³

67. *Id.*

68. *See id.* at 80-84.

69. *See id.* at 81.

70. *See id.*

71. *Id.*

72. *See id.* at 81, 181-83. For a thoughtful defense of an ends-based approach to rule of law building, see Rachel Kleinfeld, *Competing Definitions of the Rule of Law*, in *PROMOTING THE RULE OF LAW ABROAD: IN SEARCH OF KNOWLEDGE* 31, 34-37 (Thomas Carothers ed., 2006).

73. STROMSETH ET AL., *supra* note 1, at 81.

The synergistic approach to strengthening the rule of law is also adaptive and dynamic. In this respect, it aims to build upon existing cultural and institutional resources for the rule of law and to move them in a constructive direction, but it also recognizes that the rule of law is always a work in progress, requiring continual maintenance and reevaluation.⁷⁴ This approach understands that the rule of law cannot be imported wholesale; instead, it needs to be built upon preexisting cultural commitments, enjoy popular legitimacy, and address the needs of ordinary people in particular societies in order to be sustainable.⁷⁵

We thus devote a major chapter⁷⁶ to the difficult issue of building rule of law cultures and stress that the rule of law is as much a matter of creating new cultural commitments as a matter of creating new legal institutions and codes.⁷⁷ Yet we still do not know much about how cultures change. As a result, fostering rule of law cultures is exceptionally difficult, even assuming that all the background conditions, such as security and institutions, are in place. These background conditions in themselves are exceptionally difficult to establish. It is particularly tough to foster a rule of law culture in post-conflict settings where former leaders have discredited the law through past inefficacy or by prior use of law as an instrument of repression.⁷⁸

Successfully building a rule of law culture requires interveners and local leaders to think broadly and creatively, to understand the needs and aspirations of the local population, and to work innovatively on a wide range of programs.⁷⁹ For example, when considering ways to foster rule of law cultures, interveners should examine the degree to which formal legal institutions such as courts are utilized in a given society. In some societies, educated urbanites may have made extensive use of formal legal institutions prior to an intervention and be ready to use them again once stability is restored, but these same institutions may have been virtually irrelevant in rural areas or among less educated and less affluent

74. *Id.* at 80.

75. *See id.* at 183.

76. *Id.* ch. 8.

77. *Id.* at 310.

78. *See id.* at 311.

79. *See id.* at 345.

people. In such contexts, many people may be more accustomed to turning to traditional or informal dispute settlement mechanisms. These may range in complexity and legitimacy, but in some societies, such as East Timor, traditional dispute resolution mechanisms enjoy considerable local support.⁸⁰ Reaching rural and less affluent people may require finding creative ways to engage with traditional and customary dispute settlement regimes while working to alleviate discriminatory aspects of such systems.⁸¹

We urge reformers who seek to build rule of law cultures to:

- *Get to the grassroots.* Reformers need to find ways to reach beyond cities, state institutions, and political elites and to build citizens' education, access to justice, and community organizing and advocacy programs that will reach a larger segment of the population.⁸²
- *Strengthen civil society.* Building and sustaining a rule of law culture also requires a strong civil society.⁸³ An independent and effective media, strong NGOs, and other civil institutions can be essential to effectively promoting the rule of law.⁸⁴ Independent NGOs can play an important role in helping to build a more transparent, effective, and fair justice system and in keeping officials accountable.⁸⁵ In East Timor, for example, the Judicial System Monitoring Programme (JSMP) has helped to strengthen the country's developing justice institutions by monitoring and evaluating problems and recommending reforms.⁸⁶
- *Focus on the next generation.* In post-conflict societies with little or no prior rule of law tradition, reformers may have to overcome years of skepticism about law before the rule of law can flourish.⁸⁷ Educational programs and cultural exchange

80. *Id.* at 334-35.

81. *See id.* at 334-39.

82. *See id.* at 341.

83. *Id.* at 341.

84. *See id.* at 341-42.

85. *See id.*

86. *See id.* at 330-31. For information about the Judicial System Monitoring Programme, see Judicial System Monitoring Programme, <http://www.jsmp.minihub.org> (last visited Feb. 16, 2008).

87. *See* STROMSETH ET AL., *supra* note 1, at 342.

initiatives can help educate and inspire young people about the importance of human rights and the rule of law.⁸⁸

- *Give people a stake in the law.* To sustain support for the rule of law, reformers need to find ways to give large numbers of people a stake in laws, legal institutions, and the institutions of governance more broadly. This can be done both through programs that seek to give ordinary people a sense of “ownership” over the law,⁸⁹ for instance by involving them in contributing ideas for new institutions and codes, and by linking rule of law programs to development and anti-poverty initiatives.⁹⁰
- *Include marginalized groups.* In addition to traditional rule of law programs that focus mainly on the “supply side” of the law—judges, lawyers, legislators, and so on—reformers also need to focus on the “demand side” and on marginalized groups,⁹¹ such as women, youth, and minorities, who will otherwise remain vulnerable to abuse and possibly, in the case of underemployed or unemployed youth, become disaffected enough to pose a significant threat to stability.⁹²
- *Be creative.* Since rule of law is a culture as much as a set of institutions and legal codes, interveners need to be willing to use the tools of “culture” as well as the tools of law and development.⁹³ To capture the imagination and loyalty of citizens in any society, reformers need to be willing to use media, pop culture, and traditional narratives and methods creatively to build support for rule of law reforms.⁹⁴ In South Africa, for example, reformers used such means successfully to solicit ideas from the general public on the new constitution.⁹⁵

88. *See id.* at 342-43.

89. *Id.* at 343.

90. *See id.*

91. *See id.* at 345.

92. *See id.* at 343-44.

93. *Id.* at 345.

94. *See id.*

95. *See id.* at 343.

Finally, in addition to being adaptive and dynamic, the synergistic approach to building the rule of law is systemic.⁹⁶ Appreciating how institutions intersect and operate as a system is vital to designing effective and balanced programs for reform.⁹⁷ Although the priorities in a particular society will depend on the areas of greatest need, a systemic perspective can help to achieve more enduring results not possible by focusing on single institutions in isolation.⁹⁸

A systemic approach is especially crucial in working to strengthen justice systems in post-conflict societies.⁹⁹ Here it is important to keep a clear eye both on the linkages between the different parts of the justice system and on how they function within the larger political system and culture.¹⁰⁰ If one component of the justice system, such as police forces, is strengthened without adequate attention to the others, such as courts and prisons, reforms may end up being unsustainable. Likewise, if particular institutions are built up without careful attention to the accountability of newly empowered actors or to their role in the political system, reforms may end up being unsustainable or simply empowering unaccountable local actors rather than genuinely building the rule of law.¹⁰¹

In addition to addressing the now familiar “justice triad” of police, courts, and prisons, we stress the importance of developing *critical capacities* in the broad areas of law making, law enforcement, and dispute adjudication, as well as a capacity for legal education.¹⁰² Thinking in these terms helps to underscore the principle that building and sustaining an effective justice system requires an interrelated web of supporting institutions, personnel, and capabilities.¹⁰³

To be sure, each post-conflict society presents unique circumstances, obstacles, and opportunities for justice system reform. Thus a crucial starting point is a strategic assessment that takes account of factors such as the distinctive “conflict legacy” in that society; the

96. *See id.* at 82.

97. *Id.*

98. *See id.*

99. *See id.* at 183.

100. *See id.*

101. *See id.* at 183-84.

102. *See id.* at 184.

103. *See id.*

particular needs; the available human, cultural, and material resources; and the main obstacles and threats to reform.¹⁰⁴ At the same time, countries recovering from conflict frequently face a number of common challenges.

Law reform, for example, is usually a critical task in post-conflict societies.¹⁰⁵ Existing law—or parts of it—may lack public legitimacy, fail to address complex criminal activity, and fall short of international human rights standards.¹⁰⁶ Criminal law and procedure often require particularly urgent reforms.¹⁰⁷ All too often, however, new laws are drafted by outsiders with limited local involvement.¹⁰⁸ We emphasize the importance of strengthening local capacity for lawmaking and compromise. Laws, after all, are a reflection of the values and tradeoffs in a particular society, and strengthening the processes of local lawmaking is just as important as substantively reforming the law.¹⁰⁹

Regarding law enforcement capacity, we recognize the particularly daunting challenges of transforming police-society relations¹¹⁰ and changing long-standing expectations and patterns of behavior, especially in societies in which public distrust runs deep.¹¹¹ Changing the organizational culture of police is often critical to meaningful reform.¹¹² A successful post-conflict police force will need fair and transparent selection and promotion criteria, adequate pay, good training, incentives for good performance, and mechanisms in place for improving police-society relations.¹¹³ Police reform often moves

104. *See id.* at 189.

105. *See id.* at 193-95.

106. *See id.* at 194-95.

107. *See id.* at 192.

108. *See id.* at 199 (discussing the lack of local involvement in post-conflict legal reform in Kosovo and Afghanistan); *see also* David Marshall & Shelley Inglis, *The Disempowerment of Human Rights-Based Justice in the United Nations Mission in Kosovo*, 16 HARV. HUM. RTS. J. 95, 117-19, 145 (2003).

109. *See* STROMSETH ET AL., *supra* note 1, at 199.

110. *See id.* at 204-05.

111. *See id.* at 203.

112. *See id.* at 205; *see also* DAVID H. BAYLEY, U.S. DEPT OF JUSTICE, DEMOCRATIZING THE POLICE ABROAD: WHAT TO DO AND HOW TO DO IT 13-15 (2001), *available at* <http://www.ncjrs.gov/pdffiles1/nij/188742.pdf>.

113. STROMSETH ET AL., *supra* note 1, at 211-13; William G. O'Neill, *Police Reform in Post-Conflict Societies: What We Know and What We Still Need To Know* 9 (Int'l Peace Acad. Policy Paper, Apr. 2005), *available at* <http://www.ipacademy.org/pdfs/PolRefERpt.pdf>. Police-society relations can be improved through public outreach and complaint mechanisms. *See id.* at 7.

more quickly than reforms in other parts of the justice system, as was the case in Haiti.¹¹⁴ But without corresponding reforms in prisons and the judiciary, problems such as extended pretrial detention, lack of due process, and unfairness in treatment of suspects will persist.¹¹⁵

In fact, prisons are usually shortchanged in post-conflict justice reform.¹¹⁶ Yet, as experience in Iraq and elsewhere has shown, neglecting prisons can result in severe abuse and can have devastating long-term costs.¹¹⁷ The Abu Ghraib prison abuse scandal in Iraq, for instance, has greatly undermined U.S. efforts to promote the rule of law in Iraq and elsewhere.¹¹⁸ Effective prison reform requires clear rules that protect fundamental rights, good training, competent personnel, credible monitoring and accountability, adequate resources, and often sustained international support.¹¹⁹

In many post-conflict societies, building more impartial and competent judiciaries has proven to be the most complex and difficult aspect of justice system reform.¹²⁰ The specific challenges and obstacles vary in different countries, but critical reforms generally include: transparent and merit-based appointment procedures; good training; building structural protections for impartial decision making by increasing the transparency and accountability of judicial operations; providing adequate resources and budgets; supporting independent court monitoring organizations; investing in legal education; and, above all, addressing larger systemic problems of external influence, political control, and corruption that prevent impartial adjudication.¹²¹

Changing the attitudes and expectations of officials, police, judges, and the public regarding how the justice system should operate may be the hardest challenge of all, particularly in societies in which police and courts previously served as tools of self-inter-

114. See STROMSETH ET AL., *supra* note 1, at 217.

115. See *id.* at 218.

116. See *id.*

117. See *id.* at 218-19.

118. See *id.* at 219.

119. See *id.* at 221-22, 226.

120. See *id.* at 247.

121. *Id.* at 247-48.

ested leaders and other powerful actors rather than as instruments of justice.¹²²

Even as each post-conflict society presents distinctive obstacles and opportunities, some common problems and pitfalls have plagued efforts to strengthen justice systems in a number of post-conflict countries.¹²³ These include:

- A failure to provide for applicable law that enjoys local legitimacy¹²⁴ or to involve local decision makers sufficiently in law reform efforts;¹²⁵
- Unbalanced reform in the justice sector and premature institution building without corresponding political reforms;¹²⁶
- Premature empowerment of judges or other justice system officials without adequate training and before credible disciplinary mechanisms are established.¹²⁷ In East Timor, for instance, newly appointed national judges assumed the bench without sufficient training.¹²⁸ They later failed retention exams and were replaced by international judges while they underwent extensive training;¹²⁹
- Failure to address sufficiently the needs of vulnerable segments of the population, including women and girls, who often face increased violence after conflicts;¹³⁰
- Neglecting rural areas and problems of access to justice more generally;¹³¹ and
- Focusing on institutional building blocks and surface indicators, such as numbers of courthouses established and computers installed, without paying sufficient atten-

122. *See id.* at 246.

123. *See id.* at 248.

124. This was initially a problem in Kosovo. *See id.* at 195-96, 316-18.

125. *See id.* at 248.

126. *Id.*

127. *See id.*

128. *See id.* at 234; *see also* Hansjörg Strohmeyer, *Collapse and Reconstruction of a Judicial System: The United Nations Missions in Kosovo and East Timor*, 95 AM. J. INT'L L. 46, 55-56 (2001).

129. *See* STROMSETH ET AL., *supra* note 1, at 234-35; *see also* JUDICIAL SYS. MONITORING PROGRAMME, OVERVIEW OF THE JUSTICE SECTOR: MARCH 2005, at 7, 12, 27-28 (2005), *available at* <http://www.jsmp.minihub.org/reports.htm>.

130. STROMSETH ET AL., *supra* note 1, at 248.

131. *Id.*

tion to building the solid political foundations of a fair justice system.¹³²

At the same time, recent experience has also shown a number of positive practices in post-conflict justice system reform.¹³³ These include:

- Putting together an effective mix of international and local jurists to help strengthen domestic justice systems after conflict;¹³⁴
- Pursuing systemic reforms that address connections and build synergies between key justice institutions, such as police, prisons, and courts;¹³⁵
- Promoting greater transparency in the justice system and instituting merit-based selection and promotion procedures;¹³⁶
- Working to promote sustainable reforms by investing in civil society organizations that can monitor legal institutions and advocate for reform, and by investing in legal education;¹³⁷ and
- Working to develop inclusive and representative composition in justice institutions and paying greater attention to problems of access to justice.¹³⁸

None of this is easy. For example, developing an optimal combination of local and international jurists who can work together to strengthen a domestic justice system after conflict is a difficult, complex, highly context-specific endeavor.¹³⁹ On the one hand, building local capacity, ownership, responsibility, and leadership is fundamental. On the other hand, experienced international judges, prosecutors, and defense counsel from different countries can provide an infusion of skills that can assist new domestic legal personnel. International judges, for instance, can provide valuable

132. *Id.*

133. *See id.*

134. *See id.*

135. *See id.*

136. *Id.*

137. *Id.*

138. *Id.*

139. *See id.* at 236-37.

balance in highly charged, ethnically divided post-conflict settings.¹⁴⁰

International jurists can also help reinforce impartiality and independence in the domestic judicial system.¹⁴¹ In Bosnia's Brcko district, for example, local judges credit international jurists for contributing to significant improvements and reforms in the justice system.¹⁴² International jurists have made an impact in Kosovo, East Timor, Sierra Leone, and other countries as well.¹⁴³ But finding experienced judges who can deploy rapidly to post-conflict settings, or who have relevant cultural knowledge and language ability, has often not been easy, and ensuring a beneficial relationship between national and international jurists requires considerable effort.¹⁴⁴ The experience to date highlights the need for more systematic thinking up front about designing effective arrangements and partnerships.¹⁴⁵

The need for a systemic and synergistic approach to post-conflict rule of law building is not limited to the justice system alone. The requirement for more self-conscious connections and synergies among different areas of reform exists more broadly. In many post-conflict societies, for instance, groups and individuals who work on justice system reform often have little contact with those who focus on legal accountability for war crimes and human rights atrocities through criminal tribunals and truth and reconciliation commissions.¹⁴⁶ Yet, with thoughtful planning, these accountability proceedings can be designed more effectively to help build and strengthen domestic rule of law after conflict.

Sierra Leone's Special Court is one concrete example. A hybrid war crimes tribunal designed to bring to justice those who bear the greatest responsibility for the brutal atrocities that marked Sierra Leone's violent civil war, the Special Court includes both international and national judges, prosecutors, defenders, investigators, and administrative personnel.¹⁴⁷ Though not without its challenges,

140. *Id.* at 236.

141. *See id.*

142. *See id.* at 239.

143. *See id.* at 237-38.

144. *See id.* at 237.

145. *See id.* at 239.

146. *See id.* at 256-57.

147. *See id.* at 289-90.

the Special Court has made positive contributions to strengthening the rule of law in Sierra Leone through its demonstration effects regarding the value and importance of fair justice, and through concrete capacity-building effects.¹⁴⁸ These include the direct training and experience gained by the Sierra Leonean investigators, lawyers, and other personnel participating in the Special Court, and social capacity building more broadly by creative outreach to Sierra Leone's population.¹⁴⁹ The Special Court has reached out to the public through community-based dialogues about the meaning and significance of the Special Court's proceedings, through the establishment of "Accountability Now" clubs at local universities and schools, and through networking with local NGOs that focus on the work of the court and on strengthening governmental accountability more generally.¹⁵⁰

The experience in Sierra Leone highlights that much more can be accomplished if reformers think systematically and creatively from the beginning about how accountability proceedings can contribute to strengthening domestic rule of law.

III. CHALLENGES AHEAD IN PURSUING A MORE EFFECTIVE APPROACH TO RULE OF LAW BUILDING

Even with a more nuanced understanding of the multi-layered challenges of strengthening the rule of law in post-conflict societies, many practical obstacles to actually implementing a more effective approach on the ground still remain. Rule of law assistance is part and parcel of the larger rebuilding effort in post-intervention societies.¹⁵¹ Just as the larger effort will not succeed unless rule of law takes hold, so too will rule of law efforts fail if the larger effort to restore peace and foster democratic governance does not succeed.¹⁵² In addition to specific and often daunting obstacles in

148. See *id.* at 295-98 (discussing demonstration and capacity-building effects in Sierra Leone); Jane E. Stromseth, *Pursuing Accountability for Atrocities After Conflict: What Impact on Building the Rule of Law?*, 38 GEO. J. INT'L L. 251, 304-08 (2006). See generally STROMSETH ET AL., *supra* note 1, at 258-62 (discussing demonstration and capacity-building effects in general).

149. STROMSETH ET AL., *supra* note 1, at 297-99.

150. See *id.* at 295-98.

151. See *id.* at 61.

152. See *id.* at 386.

particular societies,¹⁵³ a number of practical challenges have undermined rule of law building in many post-conflict situations. These include:

- Insufficient resources, commitment, and patience;¹⁵⁴
- A lack of unified planning domestically or internationally;¹⁵⁵ and
- Inability or failure to engage local populations effectively in designing and sustaining reforms.¹⁵⁶

Because military interventions of the sort we consider in our book take place principally in conflict-ridden states whose governmental institutions are often discredited, devastated, and in enormous need of assistance, post-conflict reconstruction necessarily takes substantial commitments of time, money, and personnel.¹⁵⁷ Half-hearted efforts to build peace after a conflict will likely fail and may even render a bad situation worse.¹⁵⁸ Hence, interveners must strive to match resources and commitment to the problems at hand.¹⁵⁹ In difficult environments, a major or regional power's support based on perceived national interest may be critical. Even then, however, states frequently underestimate the commitment and resources required and have a hard time sustaining domestic support in their own societies for the extended effort needed.¹⁶⁰

Contributions from many states and organizations are often required, but the present system of cobbling together resources is inadequate.¹⁶¹ Donors have their own particular agendas and priorities, and their incentives to provide sustained funding are often limited, resulting in sometimes inadequate and poorly coordinated assistance programs.¹⁶² Also, the explosion in the

153. For example, in Iraq, sectarian violence and insurgency impede efforts to create security and build the rule of law in much of the country. *See id.* at 368.

154. *See id.*

155. *See id.* at 350-51.

156. *See id.* at 376-77.

157. *See id.* at 367.

158. *See id.*

159. *See id.* at 368.

160. *See id.*

161. *See id.* at 371; *see also* United Nations Dev. Programme, *Governance in Post-conflict Situations* 5-6 (UNDP Background Paper for Working Group Discussions, 2004), available at <http://www.undp.org/oslocentre/docs04/Cover,%20Contents%20&%20Introduction.pdf>.

162. *See* STROMSETH AT AL., *supra* note 1, at 372-73.

number of actors involved in post-conflict governance and rule of law promotion has led to duplication of effort, confusion, competition for resources, gaps in assistance, mixed messages, and lost time, and has opened the door for spoilers intent on playing different international actors off against each other.¹⁶³ Efforts to strengthen coordination mechanisms, monitor pledges and disbursements, and increase transparency and accountability are crucial.¹⁶⁴ In recent years, progress has been made in improving mission planning, and various planning models now exist.¹⁶⁵ Less important than the particular structure chosen is the need to foster a genuine partnership among the multiplicity of organizations and government agencies involved and to allocate clear responsibility for achieving agreed objectives in post-conflict reform.¹⁶⁶

In this process, promoting local ownership of post-conflict reforms has justifiably become a touchstone.¹⁶⁷ Several key points must be kept in mind. First, durable social change needs to come from within; it can be guided but not imposed.¹⁶⁸ Local leadership and support is essential to building sustainable institutions and a culture of respect for democratic governance and rule of law that will outlast the presence of the interveners.¹⁶⁹ Second, the notion of “local ownership” is complicated.¹⁷⁰ Building the rule of law is an inherently political exercise, with local winners and losers in terms of opportunities, resources, power, and status.¹⁷¹ For better or worse, an intervener’s choice of local interlocutors necessarily shifts the balance of power among competing domestic actors with different visions of their society and different claims to represent it.¹⁷² Reformers need to appreciate the political complexities and challenges involved, and must be savvy about who they are

163. *Id.* at 350-51.

164. *See id.* at 376.

165. *Id.* at 355-67, 376. The newly created United Nations Peacebuilding Commission, for example, despite its limitations, may help to better coordinate funding and planning of post-conflict peace building, including rule of law assistance. *See id.* at 362-64, 376.

166. *See id.* at 386.

167. *See id.* at 376; *see also* Michèle Flournoy & Michael Pòn, *Dealing with Demons: Justice and Reconciliation*, WASH. Q., Autumn 2002, at 112.

168. STROMSETH ET AL., *supra* note 1, at 377.

169. *See id.* at 378-79.

170. *Id.* at 377.

171. *See id.* at 379.

172. *Id.* at 380.

supporting and who is likely to have an interest in sabotaging reform.¹⁷³ Third, international and local priorities, standards, and values will at times conflict, forcing interveners to strike a delicate balance between respect for local preferences and promotion of international norms.¹⁷⁴ On top of all these dilemmas, deep political, sectarian, and other conflicts within post-conflict societies can pose enormous challenges to rule of law building efforts.

This does not mean that building the rule of law is impossible. But it does mean that it is far more difficult than generally understood. Interveners need to have realistic goals and more humility about their ability to achieve cultural change.¹⁷⁵ They need to be more aware of the many paradoxes of building the rule of law after conflict and of the need to move ahead on multiple fronts simultaneously, despite frequent setbacks. They need to understand the enormous amount of time, resources, and patience that building the rule of law requires and the political trade-offs and challenges in particular societies. If reformers understand these complexities, take them into account up front, and plan accordingly, their efforts to build the rule of law may have a greater chance of some success.

Although we are not overly optimistic, we are not overly pessimistic, either, and we stress that post-conflict efforts to strengthen the rule of law will continue to be as important as they are difficult.¹⁷⁶

To maximize chances of success, interveners must:

- Recognize that perceptions of the intervention's legality and legitimacy will have an impact on the ground;¹⁷⁷
- Acknowledge the complexity of the rule of law and be clear about what it is that they are trying to achieve;¹⁷⁸
- Develop basic governance blueprints to determine how to create appropriate institutions, while recognizing that the choice of blueprints will inevitably constrain and possibly undermine some rule of law goals;¹⁷⁹
- Seize early opportunities to ensure basic security;¹⁸⁰

173. *See id.* at 379-84 (discussing the importance and challenges of local ownership).

174. *Id.* at 377.

175. *See id.* at 81.

176. *Id.* at 392.

177. *See id.* at 52.

178. *Id.* at 391-92.

179. *Id.* at 392.

180. *Id.*

- Reform police, prisons, courts, law schools, and so on, all in tandem;¹⁸¹
- Ensure that accountability efforts send the right messages and enhance local capacity;¹⁸²
- Avoid undermining rule of law efforts through cultural insensitivity, poor planning, lack of transparency, or appearance of hypocrisy;¹⁸³
- Think creatively about building rule of law cultures, which requires going beyond the traditionally “legal” to consider informal dispute resolution, community organizing and advocacy, civil society, education, media, antipoverty and development initiatives, and ensuring inclusion of nonelites and marginalized groups;¹⁸⁴
- Plan and coordinate effectively and ensure resources are commensurate to the task.¹⁸⁵

Although it may be impossible to do all of this, strengthening the rule of law will remain an urgent, compelling task in many post-conflict societies. To move ahead constructively, reformers will need to be both more humble and more ambitious at the same time.¹⁸⁶ They need to be more humble in acknowledging the magnitude of the task and in recognizing that the role of outsiders is limited. Reformers must also be more humble in recognizing that durable cultural change is exceptionally difficult, and that we do not know as much about how to foster such change as any of us would like. Yet reformers must also be more ambitious in their willingness to pursue the rule of law in more creative and holistic ways.

By providing an integrated, thematic study of the many challenges of building the rule of law after intervention, my co-authors and I hope to encourage those working on these efforts to think more clearly about the broader endeavor and about how their particular activities can contribute to a larger whole. For although each of us may only paint one small piece of the picture, it will

181. *Id.*

182. *Id.*

183. *Id.*

184. *Id.*

185. *Id.*

186. *See id.* at 81, 392.

surely be a better work of art if we all understand just what the picture is supposed to represent in the end, and if we have all given careful thought to how our own sketches or brushstrokes may fit into the complex and evolving whole.¹⁸⁷

187. *Id.* at 392.