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# GETTING TO THE RULE OF LAW

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## IN DEFENSE OF IMPERIALISM? THE RULE OF LAW AND THE STATE-BUILDING PROJECT

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The rule of law is not only a philosopher's concept but a multi-billion-dollar industry and the dominant ideal of our time. As a concept, its success is in part a result of its vagueness, as it is broad enough to incorporate an overlapping consensus among free marketers, human rights activists, and promoters of the regulatory state. Countries as diverse as China, Chad, and the Czech Republic agree on its virtue. At the same time, the idea of the rule of law has captured the policy-making imagination of the West and has become our modern *mission civilisatrice*.<sup>1</sup>

The burst of activity associated with promoting the rule of law abroad has been commented on but rarely studied systematically. A notable exception was Stromseth et al.,<sup>2</sup> a major contribution to the literatures on postconflict societies and on the role of law and development that is further advanced in the chapter for this volume. Stromseth's distinctive move is to link issues of reconstructing basic order to the broader project of international criminal justice for perpetrators of severe human rights violations.<sup>3</sup>

Over the years, there have been many critiques of postconflict intervention, of legal development work, and of international criminal justice.<sup>4</sup> Stromseth's approach to all of these issues is one of clear-eyed optimism. She recognizes many of the critiques, and

her writing is full of intelligent considerations of pitfalls, tensions, and tradeoffs. Notwithstanding the critiques, she is committed to the idea that, with more resources, better knowledge, and improved coordination, we can do a better job in postconflict intervention and institutional construction.<sup>5</sup> In this sense, her project is ultimately technocratic in character. We can do better if we just develop the right approaches to assessment, planning, implementation, and evaluation.

In this brief comment, I want to express some skepticism. It is not a position I have come to lightly, as a long-time advocate of a position of cautious optimism. But, for the difficult situations of contemporary postconflict reconstruction, I have come to conclude that only intervention on a far more intrusive scale, of a type no longer politically acceptable, has the potential to truly transform the societies and to enable them to achieve anything approaching the "rule of law." Hence the reference to imperialism in my title. Basic order may be more achievable but, ironically, is easier to impose with a more authoritarian model than is politically acceptable in the "intervening" societies. Without a truly massive effort of a type that is unlikely to be sustainable, our piecemeal interventions around the edges are not only likely to be ineffective but will in some cases be counterproductive. We are insufficiently imperialistic to carry out social transformation from abroad. And our intervention often undermines social transformation from within.

I begin by considering the important literature on self-enforcing institutions and then consider the effect of introducing an external enforcer. The argument is that external intervention can in some conditions crowd out domestic efforts to produce social order. I then examine the record of successful postconflict intervention and find it to be a null set with regard to the rule of law. In this section I take a brief detour to modern Japanese legal history, noting its misuses in recent debates. Japanese experience, in my view, shows not that postconflict interventions can deliver the rule of law but rather that effective state building can be done only from within. The final section concludes with some thoughts on international criminal justice. The idea that intervention to promote justice will provide a demonstration effect is attractive but not empirically verified and subject to the concerns about crowding out identified in Part I.

Throughout, my theme is that we need to consider the politics of conflict intervention in a rigorous way, thinking in terms of incentives. A hallmark of technocratic politics is its denial of politics, and this view must be overcome to make progress on the problem of building the rule of law. To be sure, it is a commonplace in discussions of the issues under consideration here that politics are important. Too often, however, the need for "political will" to effectuate reform receives lip service without serious analysis. Political will is often viewed as an essential but exogenous factor that leaders can generate autonomously. But there are deeper structural factors at play that may limit the efficacy of well-intentioned reforms.

#### 1. DEMOCRACY AND THE RULE OF LAW: THE PARADOXES OF EXTERNAL ENFORCEMENT

Democratic governance involves the selection of agents to govern on behalf of the people. Once selected, however, agency problems arise. How can we ensure that government agents behave on behalf of their principal, the *demos*? The rule of law provides one apparent solution: by ensuring that agents announce the rules in advance, follow proper procedures, and are subjected to punishment by independent courts when they misbehave, the rule of law helps to minimize agency problems of democratic governance. But this solution is illusory, for it raises second-order problems about why the courts will act as faithful agents and why the government will obey the courts.

To understand how democracy and the rule of law are sustainable, political scientists draw on Weingast's<sup>6</sup> important model, in which he elaborates the conditions for self-enforcing democracy. Self-enforcement refers to the idea that, in most cases, there is no external guarantor of constitutional or democratic order.<sup>7</sup> Only when it is in the interest of all major power-holders in society will democracy and the rule of law be sustained. Courts can sanction government agents, but decisions will be effectively obeyed only when the agents have an interest in compliance because they anticipate costs from attempts to violate the rules. Democracy and the rule of law, in this view, represent equilibrium outcomes, sustained when the principal (the *demos*) can credibly commit to en-

forcing the rules. But these desirable outcomes are not the only equilibria. If social groups cannot coordinate their understanding of the rules of the game and coordinate their efforts to enforce those rules, the government agent will be able to benefit some groups at the expense of others. Weingast's model thus emphasizes coordination and enforcement as key elements in developing democracy and the rule of law.

The model has many implications for postconflict societies. It helps to understand the divide-and-conquer strategies that lead to violent conflict in the first place: an autocrat seeks to disrupt social coordination by suppressing information and providing selective benefits to key groups. The model also suggests that a key element of establishing democracy and the rule of law is that the people know the rules so as to be able to enforce them; public information and education about the law and rights are important in this regard. Independent courts and other actors can help to monitor government agents, and, when they observe violations of the rules, they can provide focal points for the people to coordinate their enforcement behavior. Though the model does not say much about postconflict transitional justice, one can view such efforts as a type of enforcement behavior, helping to generate focal points for future enforcement activity. The demonstration effect might plausibly signal that future enforcement is possible, thus deterring violations of the rules down the road.

Self-enforcement is an attractive idea that accords with many of our intuitions about the bases of social order. In the real world, however, democracy is not always self-enforcing, but international and foreign actors play a legitimate role.<sup>8</sup> Only in the richest countries can self-enforcement be said to be a primary mechanism of democratic stability. In most societies, external actors *do* play a role in enforcing democracy in some sense, for example through supplemental monitoring of government behavior, publicizing violations of the rules, and disincentivizing regressions to autocracy. For example, a mandatory cutoff of aid after a military coup disincentivizes coups and thus can be said to be, in part, an enforcement mechanism that sustains democracy. More extreme cases include invasions to restore or protect democracy, as have repeatedly been undertaken by the international community in places like Haiti and the Dominican Republic. Some of the cases Stromseth

is concerned with are such efforts to restore democracy. And all of them involve an element of external enforcement.

The problem with external enforcement is that it can, in some circumstances, "crowd out" local enforcement efforts. "Crowding out" refers to the idea that, under market circumstances, prices can disincentivize altruistic behavior. Paying people for blood donations, for example, may actually reduce the amount of blood donated as people's intrinsic motivation is reduced.<sup>9</sup> External enforcement is the society-wide equivalent of extrinsic motivation, while internal enforcement is loosely analogous to intrinsic motivation. Just as intrinsic and extrinsic motivation can substitute for each other, external enforcement may sometimes rival internal enforcement.<sup>10</sup>

The alternative conception is that external enforcement is complementary with local efforts. This position is normatively attractive but not necessarily accurate. Enforcement activity has the quality of a public good—everyone benefits from a restrained state, even those who do not participate in enforcement efforts. In addition, enforcement activity is costly and risky. As Weingast points out, coordination of enforcement efforts involves trust that other actors in the society will join in the effort—otherwise, the government agent can use the divide and conquer strategy. Why should local groups take the risk of enforcing democracy when an external actor is willing to bear those costs? Creating self-enforcing democracy in ordinary circumstances is difficult; with the possibility of external enforcement, it may become impossible.

One might think about the consequences in terms of moral hazard. Knowing that external actors will monitor the behavior of government, local actors can pay less attention to that behavior. Because there will be external costs imposed on government agents who violate the rules, local actors will not themselves have to bear the risk. Indeed, it might incentivize holdout behavior in which local actors make reckless demands, knowing that government cannot punish them too severely without risking international opprobrium. All this may in fact invite the very violence that we seek to prevent.

There are hints of the problem in *Can Might Make Rights?* The story about East Timor inviting Australia, Malaysia, and New Zealand to enforce the peace in 2006 is one illustration.<sup>11</sup> Another

example concerns the impact of intervention on local bargaining. In the discussion of Bosnia, the short-term solution to an ethnically divided polity was to create a mutual veto at the national level, mediated by the use of the so-called Bonn powers vested in the High Commissioner. These powers arguably make it *more* difficult for the substate entities to reach agreement, and indeed at this writing there are significant internal tensions. Why should the Bosnian representatives engage in hard bargaining? There are no costs to holding out if the ultimate decision gets made by the High Commissioner. Indeed, there are benefits with one's own constituents from signaling resolve in such a situation. This seems to be exactly what has occurred in Bosnia.

To be sure, it is not *always* the case that external enforcement crowds out the local. In many cases, external enforcement can complement local efforts by providing a relatively neutral enforcer, by supplementing gaps in definitions of the rules of the game, and by supplementing local monitors.<sup>12</sup> But, where locals have potentially high costs and are subject to major dilemmas of collective action, external enforcers may indeed undermine incentives for internal enforcement.

The technocratic response to such dynamics is to try some new or deeper intervention. In 1997, the international community strengthened the power of the High Commissioner in Bosnia, resolving a short-term deadlock but undermining future agreement. Stromseth and co-authors point out that "had interveners been willing to run the risks of a significant military engagement in Bosnia, they could have insisted on a more workable blueprint at the outset."<sup>13</sup> The remedy for intervention is thus more intervention.

Weakness can become addictive on the part of local interlocutors: be small and weak enough and your coalition will get the benefits of significant international aid. Stand on your own, and your country may be better off in some sense but risks a cutoff in aid as funds get shifted to other hot spots in worse condition. In any case, even if a country would be better off without support, the ruling coalition will almost certainly not be. There is little political incentive to "graduate." (Nationalism, to be sure, is one important factor that can overcome this incentive structure and has done so in important cases like that of South Korea.)

There is another level of moral hazard problem induced by the



possibility of external enforcement of democracy, namely moral hazard on the part of potential secessionist state builders. Today we are talking about creating state entities that are not in any real sense viable without significant international aid on a permanent basis. There are certain fixed costs to state building, and, without a certain size and administrative apparatus, one cannot provide for basic public goods.<sup>14</sup> To be sure, these fixed costs are less than they used to be, and a more benevolent international environment has led to a secular increase in the number of small states. Free trade means that the size of one's domestic market is of less importance, making smallness less costly.<sup>15</sup> Furthermore, the post-World War II security regime has lowered the costs of national defense, in part because of external enforcement of norms of territorial integrity. But it does not follow from all this that Kosovo is a viable proposition.

In short, external enforcement can crowd out local enforcement, encouraging the creation of inherently dependent entities. This analysis suggests that the law of unintended consequences is alive and well. It implies that some consideration ought to be given not to fine-tuning ever-deeper interventions but to the virtues of doing nothing.

At the more micro-level of legal assistance, consider another unintended consequence that has not received sufficient attention: the effect of intervention on the local labor market. When Rule of Law builders show up, they need local staff conversant in English and able to function in the local legal system. Such people are often the most talented on the local scene, and these people are certainly more likely to be familiar with international norms than the rump judiciary left over from the preconflict days. The interveners hire the local talent at a significant wage premium, justifying it to themselves by arguing that the local system will be better off with the intervention. But the collective result of this is that all the human capital is on the intervention side, and none is left on the local side. No wonder the local legal system always seems pathologically weak. And pity the poor chief justice or minister of justice in such a country; his life is a parade of meetings with donors and diplomats, eager to gather information and negotiate the terms of cooperation. Every minute spent with the interveners is a minute *not* deciding cases or managing the courts.<sup>16</sup>

Hence, I take some issue with the notion that the answer lies in devoting more resources to developing the rule of law. It is not clear that Rule of Law efforts are "underresourced." Without evidence that funds can be used effectively, why should we spend more funds? We are now deep enough into the effort that more empirical evidence ought to be required before we double down on the rule of law.

## 2. DEMOCRACY FROM SCRATCH? THE MISUSES OF JAPAN

Here is the problem: we have no real examples of anything approaching the rule of law in recent postconflict intervention. Externally building democracy from scratch is not merely a daunting challenge: it has *never* been done. Never. The frequently cited cases of the post-World War II occupations of Germany and Japan, sometimes invoked by members of the Bush II administration as models for the interventions in Iraq and Afghanistan, are widely misunderstood (though not by Stromseth et al.). These were cases of authoritarian legality, in which an advanced state structure was produced before the rule of law and democracy were introduced. We turn to a brief discussion of the Japanese case in this section.

As Stromseth et al. recognize, both postwar Germany and Japan were already industrialized before they needed reconstruction, and each had substantial if unsustained prewar experience with democratic governance. Perhaps more important for our discussion, each country had experience with a culture of authoritarian legality: nineteenth-century Prussia and Meiji Japan *did* have the "rule of law" of a sort, in which legality structured and limited the behavior of most state agents even if it did not constrain those at the core of the system. It is this experience, and not the postwar occupations, that has the most relevance for contemporary practice.

I use the term "rule of law," but, more precisely, both countries were imbued with the idea of the *rechtstaat*, which is of far more relevance for today's world than the Diceyan notion of the rule of law. As used in contemporary practice, the rule of law is really shorthand for the rule of lawyers, though of course the two projects can overlap. But the *rechtstaat* idea focuses much less on technical lawyering and courts and much more on the bureaucratic legality of a predictable, organized state operating according to rules.

Japan and Prussia adopted the *rechtstaat* idea not as a result of external assistance but *in reaction to* external pressure. Prussia felt constrained by its location, bounded by powerful states in Russia, Britain, and France; Japan was under direct threat of Western colonialism. In response to these security threats, nineteenth-century Japan and Germany created nationalist programs of developmental modernization in order to *retain* autonomy. State building in each case was internally directed under external constraint. In contrast, today's postconflict interventions might be thought of as cases of external direction under internal constraint—the local operating environment is seen as the chief limitation on building the rule of law.

Let us focus for a moment on the Japanese case, and in particular the somewhat distinct dynamics of creating the rule of law in authoritarian Meiji Japan. The Western nations that arrived in East Asia in the mid-nineteenth century borrowed an element of Chinese statecraft to impose "unequal treaties" on the East Asian monarchies. These treaties involved exclusive extraterritorial jurisdiction over the activities of foreign nationals on East Asian soil, justified by the view of local criminal justice as barbaric. The treaties were a grave insult to the sovereign pride of these ancient nations.<sup>17</sup>

What followed in Japan (and with less success in China) was an effort to build a legal system from scratch. It followed an internal revolution, the Meiji Restoration, in which the proto-totalitarian Tokugawa shogunate was replaced with direct imperial rule. Hiring foreign advisers from France and Germany, the Meiji leaders set out to build the legal system so as to undercut the claim of legal barbarity. Their central goal was revision of the unequal treaties. And, within three decades, the newly formed legal institutions were sufficiently autonomous that a version of the *rechtstaat* was arguably in place.

The sequence is important and of some interest to contemporary efforts. We have a good overall statement of goals and conception at the outset of the period in the form of the quasi-constitutional Charter Oath of the Emperor, promulgated in 1868: this promised to base policy on public opinion, expand administration, and, particularly relevant to the international context, "abolish the uncivilized customs of antiquity and administer justice and

impartiality in accordance with universally recognized principles." In the immediate aftermath of the Meiji Restoration, in 1868, some law was needed, but Tokugawa law was considered insufficiently legitimate. Local custom played a gap-filling role, even as the institutions of authoritarian rule were replaced. There was a brief flirtation with Chinese models, but thereafter all legal knowledge came from France, Germany, and other Western nations.

Public order was threatened in these early years. The new leaders had to contend with removing the privileges of the samurai, a class of potential "spoilers" who were heavily armed. Two rebellions, including one led by a major legal reformer (Etō Shimpei), were effectively quashed.<sup>18</sup> In terms of transitional justice, the last shogun was stripped of titles and land but allowed to live in quiet retirement for the remaining several decades of his life.

In building a legal system, the Japanese focused on institutions before rules. In the first decade after the Restoration, courts were initially set up under the Ministry of Justice. Soon, however, they were broken off into a distinct court structure, then as now one of the central requirements of Western models. Prosecutors were also set up as a distinct profession. Lawyers followed (but were less emphasized). Legal training was established under the Ministry of Justice at a school which later became Tokyo Imperial University.

Only in the second decade of reform did constitution making occur, and then as a rearguard action to protect *against* rising demands from liberals for democracy. The constitution was not democratic—it was formally a gift from the emperor to the people, drafted by a small group around one of the oligarchic advisers to the emperor. It is interesting that the constitution *followed* institutional reform. In modern intervention efforts, we often proceed in an implicitly Kelsenian sequence. Because the constitution has the highest order in the legal system, it must—as a matter of legal logic—come first. But, as a matter of social if not legal reality, this seems exactly backwards. A constitution can purport to create institutions, but it can be effective only if the underpinnings of those institutions are already in place.

The constitution preceded the codes of law. Modern codes of law and procedure were being drafted well before the constitution but were not adopted until vigorous internal debate occurred on which model to follow, pitting the so-called English school against

the French school. The choice of the German Bürgerliches Gesetzbuch (BGB) as a model—four years before it came into force in Germany—reflected a sense that German law was the most modern law and institutionally most similar to Japan. Crucially, all this was an internal choice, in which foreign models were chosen and not imposed, which certainly explains part of the success.<sup>19</sup>

By the 1890s, Japanese legal institutions were sufficiently independent that the courts could rule against a position advocated by the executive in a high-profile case.<sup>20</sup> Law schools were now fully functioning, including important private universities. And the country was an industrial and military powerhouse, by then engaged in colonial adventures of its own.

This nineteenth-century experience of building a legal system from scratch occurred under a developmentalist authoritarian leadership in which democracy was postponed. The key analytic point from this tale is that state building, including legal modernization, was defensive in character. It was driven by security imperatives above all: there was no external enforcement but only external threat. This not only provides a very different context from contemporary Afghanistan but in some sense provides a counterexample. Only out of fear of being colonized did the Japanese state transform. Had foreigners been administering justice in Japan directly, the local institutions would simply not have developed the way they did. They would likely have been crowded out.

This prewar history is important because it means that the postwar occupation was not working on an empty slate. The story of the adoption of the 1946 constitution is a fascinating one that involved, even in its apparent imposition, important points of negotiation and collusion with Japanese actors.<sup>21</sup> And the institutional structures that made the Japanese postwar state so effective were largely continuous with prewar versions. The crude version of the rule of law associated with authoritarian legality was already in place. The allied forces did not build the rule of law; rather, they were successful precisely because it already existed.<sup>22</sup>

It is at least possible that authoritarian legality may be a helpful stage for societies undergoing such dramatic transformations. One surely does not want to generalize to all cases, but the experiences of some developmental authoritarian states suggest that in some circumstances it might be a viable trajectory to the rule of law. It

is surely not the case that authoritarianism is a desirable end in and of itself. But, as Mill reminds us in *Considerations on Representative Government*, the long-run capacity for self-government might sometimes be advanced through nondemocratic means. It is surely an empirical question whether societies starting from a situation of major conflict can get to the desirable end of the rule of law within a reasonable historical period and what the fastest and best pathway might be. An authoritarian state-building stage might be helpful in many circumstances as a path toward democracy and the rule of law. Indeed, surveying members of the OECD as the most successful exemplars of democracy and the rule of law, one sees only a handful (Switzerland, along with settler societies such as the United States, Australia, and Israel) that did not experience a long stage of authoritarian state building before developing the rule of law. Leap-frogging such a stage might be possible, but we ought to at least acknowledge the historical record.

### 3. MOTIVES OF INTERVENERS

As suggested in the first part of this chapter, order is a public good whose provision is costly. In the absence of a world hegemon, too little order will be produced globally. In the absence of effective government incentives, too little order will be produced domestically. Nationalism seems to be a helpful condition at the level of the nation-state to incentivize local enforcement.<sup>23</sup>

We ought to consider, then, the motives of interveners to produce the rule of law. Why do interveners seek to do so? The answers are as varied as the situations in which intervention arises. Sometimes, as in Afghanistan, an intervention is designed to replace a hostile regime; other times, as in Haiti, it is undertaken to prevent a refugee crisis; in rare instances, it may even be intended to prevent humanitarian catastrophe. For all of these outcomes, the intervening country need not build a full-fledged democracy with the rule of law. It simply needs a local actor capable of providing a basic level of order.

To externally produce something approaching the rule of law in developing societies, we would need to incentivize intervention more than we do. Colonialism, in which an external actor takes charge of the society to extract wealth, might under some circum-



stances leave an institutional legacy that could contribute to the rule of law. To be sure, it did not always do so. But many societies do attribute a positive legacy to colonial legal structures—take Hong Kong, Singapore, or Malaysia, to name a few former British colonies. Taiwan probably benefited in this regard from Japanese colonialism. Fortunately, we live in an era in which colonialism is not only illegal as a matter of international law; it is undesirable from the point of view of “interventionist” state populations. Who wants to take responsibility for a loss operation like Kosovo, which will surely need external assistance if not outright occupation for many years to come?

Without more vigorous interventions, outcomes may be worse, and compromises with brutal forces will have to be made. Stromseth et al.’s<sup>24</sup> story of Sierra Leone is illustrative. The 1999 RUF invasion of Sierra Leone “galvanized the international community” but did not motivate it to provide the proverbial boots on the ground. Nigeria, which had already played a role, had no incentive to stay. In the absence of external enforcement, all that was left was for Sierra Leone’s nascent leadership to compromise with Foday Sankoh, extending and to some degree rewarding his horrific record, until Britain took it upon itself to provide the public good of intervention.

A final footnote on the Japanese experience is relevant to the argument advanced in Stromseth’s chapter in this volume.<sup>25</sup> As in postwar Germany, the allied authorities sought to try the military leadership for various international crimes. They drew on the Nuremberg Charter, though the standards of evidence were significantly relaxed: unlike the Germans, the Japanese had kept less meticulous records of their wartime abuses, and many of the records had been destroyed. Many of the Japanese war crimes were committed in the chaos of war rather than as part of a specific exterminationist plan and in this sense were closer to many contemporary situations than were those of the well-documented Nazi regime. As elucidated in the famous dissenting opinion of Justice Radhabinod Pal of India, the trial failed to meet basic standards of legitimacy. It is speculative, but I think it safe to say that the Tokyo War Crimes trials had little if any demonstration effect.<sup>26</sup> The Japanese already knew what a trial was. But, at the time, the war crimes

trials were seen as unadulterated victor’s justice. To some degree, this view of the trials persists today.<sup>27</sup>

In my view, the notorious problems of the Tokyo war crimes trials have more continuing relevance than we might hope. Certainly, by any objective standard of the rule of law, our contemporary efforts fare much better. In contemporary postconflict justice, procedural fairness is sometimes pursued to excess (see Slobodan Milosevic). The view is that external criminal enforcement is complementary with local criminal enforcement, through a demonstration effect. But we have little evidence of the actual existence of any demonstration effect. We must, necessarily, proceed by counterfactuals. We have to ask whether Romania would be better off if Nicolau Ceausescu had been tried rather than shot; whether Cambodians would have more faith in law had the initial trials of the Khmer Rouge in the early 1980s followed the standards of Western justice rather than Vietnamese, or whether it would have been better had the current hybrid tribunal been established a decade or two earlier. These points can be argued, but the answers are not obviously yes in each case.

#### 4. CONCLUSION

All these questions are technocratic and empirical in character. I want to close with a more reflexive perspective. In my view, international criminal law is not (only) about the perpetrators and victims, about punishment and reconciliation. The international criminal law project from the beginning has been as much about the interveners as about the target societies. Nuremberg and Tokyo were self-conscious attempts to demonstrate that allied justice was of a higher quality than that of the Axis powers. This demonstration was as much for the home audience as for the target society. *We* are different from them; *we* follow procedures, whereas *they* pursue summary justice.

Similarly, the contemporary zeal for the rule of law says more about us than them. If intervention, however, is partly for our own benefit, then we ought to consider the potential externalities for the target populations. If our enforcement efforts crowd out the local, then they may in fact cause harm to those we seek to benefit.



A central theme of this short, and perhaps overly skeptical, essay has been that we need to understand the politics of postconflict intervention. We ought not assume a target population governed by primal politics and a set of neutral interveners guided by law. Interveners have to have the *motive* to intervene. How could it be otherwise? The expressive function of distinguishing a civilized us from a genocidal other is such a motive. But we ought at least to recognize that we are intervening partly for ourselves.

External intervention in the name of the rule of law and democracy has promised a good deal. It has delivered very little. Basic order, to be sure, has been restored in each case. But basic order is perfectly compatible with a form of developmentalist authoritarianism that is quite different from the international models on offer. Many of the same ends sought by democratic interveners—basic order, effective constraints on state agents, and some role for legal institutions—can be achieved equally well or better in a version of authoritarian legality that might be called *Rule by Law*.<sup>28</sup> For East Timor or Kosovo, Singaporean institutions would be more desirable than American ones—and possibly easier to produce.

The possibility of authoritarian legality exposes the inherent tensions among democracy, order, and independence.<sup>29</sup> Perhaps postconflict societies can have only two of the three goods: they can be democratic and independent of foreign support but likely will be wracked by conflict; they can be democratic and have order safeguarded from outside, or they can have independence and authoritarian order. We have not yet, alas, figured out a technocratic way to produce independent, democratic states with high levels of public order.

#### NOTES

Many thanks to Allen Buchanan, Jeremy Waldron, and other participants at the Nomos Meeting, January 2010, for helpful comments. Special thanks to James Fleming for his invitation to think about these issues.

1. Roland Paris, "International Peacekeeping and the Mission Civilisatrice," *Review of International Studies* 28 (2002): 637.

2. Jane Stromseth, David Wippman, and Rosa Brooks, *Can Might Make Rights? Building the Rule of Law after Military Interventions* (New York: Cambridge University Press, 2006).

3. For a thoughtful approach to these issues, see Brad R. Roth, "Peaceful Transition and Retrospective Justice: Some Reservations," *Ethics and International Affairs* 15 (2001): 45.

4. For example, the 1970s law and development movement ended with a mea culpa decrying the effort as legal imperialism. James A. Gardner, *Legal Imperialism* (Madison: University of Wisconsin Press, 1980). On international criminal law, see Mark Drumbl, *Atrocity, Punishment, and International Law* (New York: Cambridge University Press, 2007).

5. Stromseth et al., *Can Might Make Rights?*, chapter 9.

6. Barry Weingast, "The Political Foundation of Democracy and the Rule of Law," *American Political Science Review* 91 (1997): 245.

7. See also Russell Hardin, "Why a Constitution?," in *The Federalist Papers and the New Institutionalism*, ed. Bernard Grofman and Donald Wittman (New York: Agathon Press, 1989), 100.

8. Alan Buchanan and Robert Keohane, "Reciprocal Legitimation: Reframing the Problem of International Legitimacy," paper on file with author.

9. Richard Titmuss, *The Gift Relationship* (London: Allen and Unwin, 1970); Bruno S. Frey and Felix Oberholzer-Gee, "The Cost of Price Incentives: An Empirical Analysis of Motivation Crowding Out," *American Economic Review* 87 (1997): 746.

10. On rivalrous enforcement, see Robert Scott and Paul Stephan, *The Limits of Leviathan* (New York: Cambridge University Press, 2006), 101–3.

11. Stromseth et al., *Can Might Make Rights?*, 192.

12. Stephen Gardbaum, "Human Rights as International Constitutional Rights," *European Journal of International Law* 19 (2008): 749.

13. Stromseth et al., *Can Might Make Rights?*, 111.

14. Alberto Alesina and Enrico Spolaore, *The Size of Nations* (Cambridge, MA: MIT Press, 2003); Philip Roeder, *Where Nation-States Come From* (Princeton: Princeton University Press, 2006).

15. David Lake and Angela O'Mahoney, "The Incredible Shrinking State: Explaining the Territorial Size of Countries," *Journal of Conflict Resolution* 48 (2004): 699.

16. Stromseth discusses this briefly in the context of the hybrid court of Sierra Leone. Jane Stromseth, "Justice on the Ground? International Criminal Courts and Domestic Rule of Law Building in Conflict-Affected Societies," this volume, 185–90. I raise it to identify it as a broader point, beyond the criminal justice capacity.

17. The East Asian countries can be considered as more or less natural

nation-states in the modern sense, a further point of dis-analogy from, say, contemporary Kosovo.

18. Donald Keene, *Emperor of Japan* (New York: Columbia University Press, 2002).

19. Daniel Berkowitz, Katharina Pistor, and Francois Richard, "Economic Development, Legality and the Transplant Effect," *European Economic Review* 47 (2003): 165.

20. The Otsu incident. For a brief discussion see Tom Ginsburg, "Studying Japanese Law Because It's There," *American Journal of Comparative Law* 58 (2010): 15.

21. Ray Moore and Donald Robinson, *Partners for Democracy: Crafting the New Japanese State under MacArthur* (New York: Oxford University Press, 2002); Zachary Elkins, Tom Ginsburg, and James Melton, "Baghdad, Tokyo, Kabul: Constitution-Making in Occupied States," *William and Mary Law Review* 49 (2008): 1139.

22. It is important to note that Japanese courts in World War II were largely autonomous and were not subject to the same ideological pressures that characterized Nazi law. The legal system both during and after the war had a relatively small scope. But it was effective in the domains in which it operated.

23. Liah Greenfeld, *Nationalism: Five Roads to Modernity* (Cambridge, MA: Harvard University Press, 1992).

24. Stromseth et al., *Can Might Make Rights?*, 158.

25. Stromseth, "Justice on the Ground."

26. Timothy Brook, "The Tokyo Judgement and the Rape of Nanking," *Journal of Asian Studies* 60 (2001): 673.

27. See the films *Puraido—Unmei no Toki* (Pride: The Fateful Moment; dir. Toshiya Ito, 1998); *Ashita E No Yuigon* (Best Wishes for Tomorrow, dir. Takashi Koizumi, 2008).

28. *Rule by Law? The Politics of Courts in Authoritarian Regimes*, ed. Tom Ginsburg and Tamir Moustafa (New York: Cambridge University Press, 2009).

29. I should be clear that these tensions are recognized by Stromseth.

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## BYSTANDERS, THE RULE OF LAW, AND CRIMINAL TRIALS

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In discussions about the rule of law in transitional justice, whether in domestic or international contexts, the focus is normally on those who are perpetrators. The puzzle is to figure out how to get those who have been perpetrators or those who might become so instead to conform to the rule of law so that a lasting peace can be restored. But there should also be a strong focus on those who have been or who might become mere bystanders to atrocities. In building or restoring the rule of law, it is the bystanders who are often overlooked, and yet it is they who play a significant role in the rule of law. Most significant, bystanders form the bulk of a society, and the rule of law can exist only where the bulk of the society has respect for law and does not acquiesce in the face of violence. For it is the bulk of the society, rather than the few who are perpetrators or might become so, whose conformity to law is what glues a peaceful society together.

In this essay, I will argue that it is society's respect for procedures and its belief that such procedures are fair, especially among current and potential bystanders to atrocities, that are the crucial normative glue for restoring the rule of law. I will draw on the just-war tradition, as well as on recent work concerning the rule of law in transitional societies, especially by Jane Stromseth, and I will also discuss the Rwandan transitional justice process known as *gacaca*.