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Brittany Jordan Finder
May 17, 2012

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ABSTRACT

Over the past two decades, efforts to promote the rule of law around the globe have expanded, especially in post-conflict environments. As Thomas Carothers remarked, "One cannot get through a foreign policy debate these days without someone proposing the rule of law as a solution to the world's problems."[1] The rule of law went through a revival in the 1990s, as Western nations and private donors poured hundreds of millions of dollars into programs to redraft constitutions and laws, strengthen judicial institutions, professionalize and reform police forces, curb corruption, and improve correctional systems in transitional and developing countries. Such programs have shown promise, but profound questions remain as to their impact on political, economic and social conditions, particularly in societies broken apart by civil wars and ethnic conflict. From Bosnia and Haiti to Afghanistan and Iraq, rule of law reform has been haphazard, under-resourced, and at times internally contradictory, with as many failures as successes.

This project explores two competing approaches to rule of law reform in post-conflict environments: the security-based approach, a top-down procedure whereby the attention is on establishing law and order; and the norms-based approach, which focuses on the importance of a background of normative expectations, a standard by which reform is to be evaluated and to which efforts to promote the rule of law should aspire. This project identifies the theoretical underpinnings and practical implications of the two approaches. It asks why rule of law reform efforts so often fail in post-conflict environments. Moreover, it asks what needs to change before they can succeed. To answer this question, I examine Kosovo, a post-conflict setting in which rule of law reform has taken center stage for over a decade. I draw out the inherent tradeoffs between the two approaches and their ensuing effects in four distinct periods of rule of law reform in Kosovo.

Overall, I find that rule of law reform in post-conflict environments typically follows the security-based approach, which actors prioritize to prevent spoilers, deter crime, and restore public trust. The norms-based approach is often more difficult to implement, as it depends on the ability to bring about substantial changes in the values and attitudes of those who hold political power, yet it is crucial to sustainable reform with real impact. In Kosovo, intervention forces carried out large-scale arrests and detentions with no clear legal authority, which sent a message of arbitrary rule that effectively undermined the rule of law norms they sought to promote. More than a decade later, Kosovo is still struggling to hone the rule of law. This study reaffirms the tensions between the two approaches, and should spur further research on the problematic realities of rule of law reform in other post-conflict cases.

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[1] Thomas Carothers, "The Rule of Law Revival." *Foreign Affairs,* Vol. 77, No. 2 (1998): 95-106.

RULE OF LAW REFORM IN POST-CONFLICT ENVIRONMENTS: PROBLEMATIC REALITIES FROM KOSOVO

BRITTANY JORDAN FINDER

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ACRONYMS

CIVPOL	International Civilian Police
COMKFOR	Kosovo Force Commander
EU	European Union
FRY	Federal Republic of Yugoslavia
IAC	Interim Administrative Council (Kosovo)
ICTY	International Criminal Tribunal for the former Yugoslavia
KFOR	Kosovo Force
KLA	Kosovo Liberation Army
KPS	Kosovo Police Service
LDK	Democratic League of Kosova
NATO	North Atlantic Treaty Organization
OSCE	Organisation for Security and Co-operation in Europe
RS	Republika Srpska
SFRY	Socialist Federal Republic of Yugoslavia
SRSG	Special Representative to the Secretary-General
UNDPKO	United Nations Department of Peacekeeping Operations
UNMIK	United Nations Interim Administration Mission in Kosovo
USAID	United States Agency for International Development

INTRODUCTION

Over the past two decades, efforts to promote the rule of law around the world have expanded, especially in post-conflict environments. As Thomas Carothers remarks, "One cannot get through a foreign policy debate these days without someone proposing the rule of law as a solution to the world's problems."[1] Western states and private donors revived rule of law reform in the 1990s, pouring hundreds of millions of dollars into programs to redraft constitutions and laws, strengthen judicial systems, professionalize and reform police forces, curb corruption, and improve correctional systems in transitional and developing countries.[2] A rule of law consensus has emerged among policymakers, consisting of two elements: the belief that rule of law reform is essential to the foreign policy goals of Western nations, and the belief that international interventions must include a rule of law component.[3]

Rule of law reform has become part of bilateral and multilateral assistance strategies across the globe. Almost every type of development organization, from multilateral development banks and bilateral aid agencies to private foundations and activist groups, has integrated rule of law reform into its responses to some of the most compelling challenges to democracy and economic development that

[1] Thomas Carothers, "The Rule of Law Revival." *Foreign Affairs,* Vol. 77, No. 2 (1998): 95-106.
[2] Charles T. Call, "What We Know and Don't Know About Postconflict Justice and Security Reform," in *Building States to Build Peace*, eds. Charles T. Call and Vanessa Wyeth (Boulder, CO: Lynne Rienner, 2007), 4.
[3] Rama Mani, "Exploring the Rule of Law in Theory and Practice," in *Rule-of-Law Programming in Conflict Management*, ed. Agnes Hurwitz (Boulder, CO: Lynne Rienner, 2008).

transitional and developing countries face.[4] By the late 2000s, the United States, for example, was devoting a growing portion of its bilateral assistance packages to rule of law reform programs. The United States Agency for International Development (USAID) allocated more than $202 million in 2009, more than $272 million in 2010, and more than $190 million in 2011 to rule of law reform programs.[5] The United Nations has also funneled considerable resources and marshaled significant attention toward the rule of law over the past two decades. The General Assembly first recognized the rule of law as an essential factor in the protection of human rights in 1993, and in 2004, the Secretary-General published its first report on the relationship between the rule of law and transitional justice in post-conflict environments.

The United Nations Department for Peacekeeping Operations (UNDPKO) has incorporated rule of law reform into most of its recent peace-building missions, including Kosovo, East Timor, Haiti, Liberia, Afghanistan, Cote d'Ivoire, Burundi, the Democratic Republic of Congo, and Sudan. The focus of such programs has been on establishing law and order through institutional reform. The mandate of the 2004 United Nations Stabilization Mission in Haiti, for example, included monitoring and reporting on the human rights situation; investigating violations of human rights and humanitarian law; helping to rebuild, reform and restructure the Haitian National Police, including vetting and

[4] Lelia Mooney, Martin Schonteich, Jennifer Windsor and Colette Rausch, "Promoting the Rule of Law Abroad: A Conversation on its Evolution, Setbacks, and Future Challenges." *The International Lawyer*, Vol. 44, No. 2 (2010): 837-856, 838.
[5] "Where Does USAID's Money Go?" United States Agency for International Development, 2011, available at <http://www.usaid.gov/policy/budget/money/>.

certifying that its personnel have not committed grave human rights violations; developing a strategy for institutional reform of the judicial system; and assisting with the maintenance of security.[6]

Similarly, while international financial institutions eschewed rule of law reform as political and outside the scope of their work for more than forty years, by 2000, the World Bank and other regional development banks had also made rule of law reform a centerpiece of their policies. Over the last decade, rule of law reform has become a substantive element of the World Bank's response to poverty challenges around the world.[7] From 2003 to 2008, the World Bank allocated more than $1.3 billion in Europe and Central Asia, more than $814 million in Latin America and the Caribbean, more than $309 million to rule of law programs in Africa, more than $157 million in East Asia and the Pacific, and more than $142 million in the Middle East and North Africa.[8] Such funding levels, which have only continued to increase in recent years, reflect a commitment by the World Bank and its member states that rule of law reform is crucial in virtually all contexts.[9]

Although elaborate financial and rhetorical commitments to rule of law reform have grown increasingly common over the past two decades, the impact of

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[6] "Rule-of-Law Tools for Post-Conflict States: Mapping the Justice Sector," Office of the High Commissioner for Human Rights (New York: United Nations, 2006), 1.
[7] Kirsti Samuels, "Rule of Law Reform in Post-Conflict Countries: Operational Initiatives and Lessons Learnt" (Washington, D.C.: International Bank for Reconstruction and Development, 2006), iii.
[8] "Initiatives in Legal and Judicial Reform," Vice Presidency Group (Washington, D.C.: International Bank for Reconstruction and Development, 1999), 89.
[9] Call, 5.

such programs remains to be seen. Efforts to promote the rule of law around the world have shown promise, but profound questions remain as to their long-term impact on political, economic and social conditions, particularly in societies broken apart by civil wars and ethnic conflict. From Bosnia and Haiti to Afghanistan and Iraq, rule of law reform has been haphazard and at times internally contradictory, with as many failures as successes.[10] The poor track record has often resulted not from lack of resources, but from the failure of interveners to appreciate the complexities of building the rule of law in post-conflict environments: societies that are typically characterized by high levels of violence and threats to human security, with damaged civil infrastructure, and often little to no historical patterns of rule of law.[11] Rule of law reform has tended to be one-size-fits-all, ignoring the demands of a country's particular context. In many cases, the expenditure of tens of billions of dollars toward such programs has resulted only in disenchantment and mutual recrimination between interveners and the local population without many significant improvements for the rule of law.

This project asks why rule of law reform efforts so often fail in post-conflict environments. Moreover, it asks what needs to change before they can succeed. To date, this question has not been sufficiently answered within the academic literature. Several scholars point to the thin base of knowledge about

[10] Jane Stromseth, David Wippman and Rosa Brooks, *Can Might Make Rights? Building Rule of Law After Military Interventions* (Cambridge: Cambridge University Press, 2006), 9.
[11] *Ibid*.

the motives, methods, and goals of rule of law promotion efforts, but have neglected to examine the problem of knowledge in relation to post-conflict environments, even though such contexts offer clear benefits for understanding rule of law reform. Those scholars that have looked at post-conflict environments have almost all generated conclusions that lack specificity, such as "programs must be shaped to fit the local environment" and "interveners should not simply import laws from other countries." Furthermore, those scholars, like policymakers themselves, often maintain a narrow focus on institutional reform, confining rule of law reform to reconstruction of the police, courts, and prisons, without full appreciation for the roles such institutions play within a more broadly defined rule of law system. Moreover, scholars debate how to access the question of success and failure because there is a lack of consensus on definitions of the rule of law and its purpose within a society. Thus the field is ripe for a study that illuminates the complexities of building the rule of law in post-conflict environments.

To answer these key questions, I first review the literature on the core rationales for rule of law reform—democracy and economic development—to clarify why policymakers generally undertake rule of law reform. Next, based on the range of rule of law definitions present within the literature, I survey the theoretical underpinnings and practical implications of rule of law ends. Most importantly, I draw upon these ends to explore two competing approaches to rule of law reform in post-conflict environments: the security-based approach and the

norms-based approach. I define the security-based approach as a top-down procedure whereby the attention is on establishing law and order, while the norms-based approach focuses on the importance of a background of normative expectations, a standard by which reform is to be evaluated and to which efforts to promote the rule of law should aspire. I argue that the inherent contradictions between the two approaches present a dilemma for policymakers, which has the potential to complicate rule of law reform efforts.

To examine the tensions between the two approaches, I study Kosovo, a post-conflict setting in which rule of law reform has taken center stage for over a decade. I explore the trade-offs between the two approaches and their effects at four critical junctures in rule of law reform in Kosovo, from the debate over applicable law within the first six months after intervention to the riots of March 2004. The junctures represent moments where interveners faced a choice between the short-term ends of the security-based approach and the long-term ends of the norms-based approach, and ultimately made decisions that weakened the rule of law.

Rule of law reform efforts in Kosovo provide particular advantages for understanding the tensions between the two approaches. First, heightened security concerns in the immediate aftermath of intervention pressed interveners to make weighty trade-offs between short-term and long-term rule of law ends early in the mission. Second, the trade-offs typically resulted in the centralization of decision-making and the marginalization of input from local actors, which led

many from within the local population to view rule of law reform efforts in Kosovo as part of a neo-colonist or neo-imperialist enterprise. Third, interveners often failed to adhere to the international standards they sought to promote in Kosovo, which resulted in mixed signals toward the local population, and ultimately, a double standard for the rule of law. Fourth, the inability of interveners to facilitate inter-communal peace within Kosovo fettered progress on the rule of law. More than a decade later, few would assert that the rule of law has been successfully consolidated in Kosovo.

I contend that interveners tend to prioritize the short-term ends of the security-based approach. The long-term ends of the norms-based approach are often more difficult to implement, as the norms-based approach depends on the ability to bring about substantial changes in the values and attitudes within the government and the general population, yet it is crucial to sustainable reform with real impact. I thus conclude the paper with suggestions for improving rule of law reform efforts in post-conflict environments in the future.

RATIONALES FOR RULE OF LAW REFORM

Policymakers often claim that enhancing the rule of law allows countries to effectively consolidate political and economic reform. Two controlling rationales reside at the crux of this assertion: that rule of law reform *grosso modo* is necessary for both democracy and economic development.[12] The North Atlantic Treaty Organization (NATO) demands that all new members demonstrate their commitment to it, and the European Union (EU) requires its existence before a country can even begin negotiating for accession. As funding levels demonstrate, enhancing the rule of law is a strategic objective of USAID, a priority for United Nations peacekeeping missions, a growth blueprint for the World Bank, as well as a rhetorical trope for policymakers worldwide.[13] The claim, however, that rule of law reform is some kind of "magical elixir" for democracy and economic development,[14] as has become common, is at best oversimplified, and can be misleading when used as justification for rule of law reform. In post-conflict environments, in particular, interveners pursue rule of law reform with the idea that specific improvements in the rule of law will inevitably lead to democracy and economic development. While the normative links between rule of law reform, democracy and economic development are considerable, the causal

[12] Thomas Carothers, *Promoting the Rule of Law Abroad: In Search of Knowledge* (Washington, D.C.: Carnegie Endowment for International Peace, 2006), 17.
[13] Brian Z. Tamanaha, "The Rule of Law for Everyone?" *St. John's Legal Studies Research Paper* (Jamaica, NY: St. John's University School of Law, n.d.), available as Social Science Research Network Working Paper, available at <http://ssrn.com/abstract=312622>.
[14] Rachel Kleinfeld, "Competing Definitions of the Rule of Law," in *Promoting the Rule of Law Abroad: In Search of Knowledge*, ed. Thomas Carothers, 31-74 (Washington, DC: Carnegie Endowment for International Peace, 2006), 32.

relationships are riddled with caveats, and are by no means as clear-cut as many would hope.[15]

The following sections explore the theoretical underpinnings and practical implications of the relationship between the rule of law, democracy and economic development, demonstrating the complexities inherent in the rationales for rule of law reform. I establish that there is a connection between the rule of law, democracy and economic development, which fuels policy and policymakers' focus on it. Yet I also show that there exists considerable skepticism of the ability of rule of law reform to really achieve what policymakers expect. Because scholars have not sufficiently determined to what extent there are direct causal connections between the rule of law, democracy and economic development, particularly in post-conflict environments, it raises the question of whether the rule of law even matters.

The Rule of Law and Democracy

One major cluster of work within the rule of law literature focuses on the relationship between the rule of law and democracy, shaped in large part by the experience of the law and development movement in Latin America in the 1980s. At a theoretical level, the rule of law and democracy are closely intertwined,[16] yet it has become new credo among development organizations that rule of law

[15] See generally: Frank Upham, "Mythmaking in the Rule-of-Law Orthodoxy," in *Promoting the Rule of Law Abroad: In Search of Knowledge*, ed. Thomas Carothers, 75-104 (Washington, DC: The Carnegie Endowment for International Peace, 2006).
[16] Rebecca Bill Chavez, *The Rule of Law in Nascent Democracies: Judicial Politics in Argentina* (Stanford, CA: Stanford University Press, 2004), 1.

reform is a "tripwire for democracy."[17] One form of this political rationale focuses on rights protection. Through a regime of civil and political rights protection, "the rule of law establishes a positive connection between state and society, and provides the legal space for the development of citizenship."[18] Based on his study of democracy in Latin America, Guillermo O'Donnell contends that "there is a close connection of democracy with certain aspects of equality among individuals who are posited not just as individuals, but as legal persons, and consequently as citizens."[19]

Another form of this political rationale focuses on government accountability. As Pilar Domingo and Rachel Sieder describe in their account of legal and judicial reform in Latin America, the rule of law presumes government by consent, "within the boundaries of a constitutional arrangement that establishes the normative and legally binding criteria of [a] limited, responsible and accountable government."[20] In a rule of law system, the respect of a government for the sovereign authority of the people and a constitution depends on its acceptance of the law.[21] Powerful state and private actors are subject to legality and are bound by the formal rules of the game. According to political philosopher Jean Hampton, it is the existence of such "meta-rules, built into the political

[17] Carothers 2006, 19.
[18] Pilar Domingo and Rachel Sieder, *Rule of Law in Latin America* (London: Institute of Latin American Studies, University of London, 2001), 154.
[19] Guillermo O'Donnell, "Polyarchies and the (Un)Rule of Law in Latin America: A Partial Conclusion," in *The (Un)Rule of Law and the Underprivileged in Latin America*, eds. Juan E. Méndez, Guillermo O'Donnell and Paulo Sérgio Pinheiro, 303-338 (Notre Dame, IN: University of Notre Dame Press, 1999), 305.
[20] Domingo and Sieder, 154.
[21] Carothers 2006, 4-5.

process," that forms the foundation upon which the viability of contemporary democracy rests.[22] "Contemporary democracy," she maintains, "is distinctive in being based on the rule of law."[23] This view takes it as axiomatic that rule of law reform is necessary to ensure respect for constitutional order, the separation of powers, individual liberties and other cornerstones of democracy.[24]

For new democracies, enhancing the rule of law appears to be a way of improving the performance of patronage-ridden governments, reining in elected but only haphazardly law-abiding politicians, and curbing continued violations of human rights.[25] The idea that specific improvements in the rule of law remove the obstacles on the path to democracy, however, is simplistic.[26] Democracy often "co-exists with substantial shortcomings in the rule of law,"[27] or as Domingo and Sieder describe, "tough trade-offs."[28] In many countries that are considered consolidated democracies, and that hold themselves out to post-conflict environments as examples, various deficiencies in the rule of law remain: judiciaries that are substantially overrun with cases to the point where justice is delayed on a regular basis; minority groups discriminated against and unable to find remedies within the legal and judicial systems; legal and judicial systems that chronically mistreat minority groups; and politicians who manage to abuse the

[22] Ian Shapiro, *The Rule of Law NOMOS 36*, American Society for Political and Legal Philosophy (New York: New York University Press, 1994), 2.
[23] *Ibid*.
[24] Domingo and Sieder, 9.
[25] Carothers 2006, 6.
[26] *Ibid*, 18.
[27] *Ibid*, 18.
[28] Domingo and Sieder, 164.

law with impunity.[29] Transitional and developing countries do not face a weighty choice of "no rule of law, no democracy," but rather a series of smaller, more complicated choices between problematic realities.[30] The project of building the rule of law requires a constant balancing act.

The use of democracy as a benchmark for rule of law reform has significant limitations. As Brian Tamanaha suggests, it a "blunt and unwieldy mechanism" that offers no assurance that the laws enacted and carried out will be moral in content or effect upon rights protection and government accountability.[31] As Paul Chevigny points out, in his attempt to define the role of the police in Latin America, "if we think of democracy in its primordial sense of rule by the mass of people, there is no obvious reason that the *demos* should care deeply about the generality and continuity of laws."[32] For Chevigny, the alliance between the rule of law and democracy is "uneasy at best."[33] Tamanaha surveys the positions of theorists such as Rousseau, Kant, and Habermas on the relationship between the rule of law and democracy; he argues that they present a "ideal, setting up as a goal that legal systems should strive toward enacting laws all persons affected would agree to, without actually expecting that this would be achieved in practice."[34]

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[29] Carothers 2006, 18.
[30] *Ibid*, 19.
[31] Brian Z. Tamanaha, *On the Rule of Law: History, Politics, Theory* (Cambridge: Cambridge University Press, 2004), 101.
[32] Juan E. Méndez, *The (Un)Rule of Law and the Underprivileged in Latin America*, eds. Méndez et. al., 52.
[33] *Ibid*.
[34] Tamanaha 2004, 100.

Policymakers can probably continue to prescribe rule of law reform with safe belief that such programs may be helpful to democracy in transitional and developing countries, but as this section demonstrates, scholars have not determined to what extent there are direct causal connections at work. Thus the axiomatic quality with which policymakers recommend rule of law reform as a solution for democracy may not be justified. In the following section, I review the academic literature on the relationship between the rule of law and economic development. Like democracy, I seek to explore why policymakers so often use economic development as a rationale for rule of law reform, and whether and to what degree rule of law reform actually achieves this goal.

The Rule of Law and Economic Development

Prompted by the massive move in transitional and developing countries toward market economies in the 1990s, a second major cluster of work within the rule of law literature focuses on the relationship between the rule of law and economic development. Among policymakers, there was a general realization that economic development could not be achieved in a given country without modifying and sometimes completely overhauling existing institutions, or creating new institutions, and firmly establishing the rule of law to create the necessary climate for stability.[35]

Within the literature, the claim that the rule of law is determinant of a country's economic development trajectory resides within the instrumental

[35] "Initiatives in Legal and Judicial Reform," 1–2.

perspective.[36] The instrumental perspective is strongly supported by the logic of the neo-institutional theory of the behavior of economic actors, which maintains that economic actors, including foreign investors, will generally be averse to investing in countries with higher transaction costs, and therefore will gravitate toward countries with more efficient and transparent legal and judicial systems.[37] The neo-institutional theory emphasizes the need for legal and judicial predictability, the protection of private property rights, and the enforcement of long-term contracts as essential to raising levels of foreign investment and rates of economic growth. In other words, the neo-institutional theory maintains, if a country lacks progress on the rule of law, it will not be able to attract foreign investment, and therefore, it will not be able to support economic development.

Subscribing to the instrumental perspective, Robert Barro suggests that independent improvement in the rule of law tends to stimulate economic growth and sets in motion the kinds of increases in economic development that lead to further increases in the rule of law. Such arguments about the relationship between the rule of law and economic development are two-pronged. In their review of the rule of law and economic development, Stephan Haggard et al. argue that the core theoretical insight linking the rule of law to economic

[36] Michael J. Treblicock and Ronald J. Daniels, *Rule Of Law Reform And Development: Charting the Fragile Path of Progress* (Northampton, MA: Edward Elgar, 2008).
[37] Ibrahim F.I. Shihata, "Legal Framework for Development: Role of the World Bank in Legal Technical Assistance." *International Business Lawyer* (1995): 360–68; Jeswald Salacuse, "Direct Foreign Investment and the Law in Developing Countries." *ICSID Review*, Vol. 15, No. 2 (2000): 382–400; Ann Seidman, Robert B. Seidman, and Thomas Walde, "Building Sound National Frameworks for Development and Social Change," in *Making Development Work: Legislative Reform for Institutional Transformation and Good Governance*, eds. Seidman et. al. (Boston: Kluwer Law International, 1999).

development runs through two distinct but closely related channels: the effects of property rights on foreign investment and the effects of contract enforcement on trade. The more private property rights and contract enforcement are protected, Haggard et. al. maintain, the greater the incentives for foreign investment.[38] As such, the instrumental perspective drives rule of law reform policy in large part, however, it is not without its detractors. Like democracy, it remains unclear whether specific improvement in the rule of law fosters economic development.

Examining the economic development trajectory of post-communist countries, John Hewko challenges the instrumental perspective.[39] He argues that an extensive overhaul of existing institutions is generally not a necessary precondition to attract direct investment from large multinational investors or from smaller entrepreneurial investors. Most foreign investors, he maintains, when faced with significant business opportunities, are prepared to accept the fact that the legal and judicial systems in transitional and developing countries may be inadequate. While foreign investors will generally prefer a country with efficient and transparent legal and judicial systems to one in which the rule of law is absent, if a country offers significant business opportunities and does not present any formal barriers to investment—such as ongoing conflict, significant social unrest, severe economic crisis, or legislation that prohibits foreign investment—it will attract a certain level of foreign investment despite deficiencies in the rule of

[38] Rafael La Porta, Florencio Lopez-de-Silanes, Andrei Shleifer, Robert W. Vishny, "Law and Finance." *Journal of Political Economy*, Vol. 106, No. 6 (1988): 1113-55.
[39] John Hewko, "Foreign Direct Investment: Does the Rule of Law Matter?"
Carnegie Paper No. 26 (Washington, D.C.: Carnegie Endowment for International Peace, 2002).

law. Hewko determines that the inverse of the instrumental perspective may actually be more accurate: given their material leverage, foreign investors may set the rule of law reform agenda.[40]

Michael Todaro and Stephen Smith also challenge the instrumental perspective, cautioning against over-generalizations in assuming a common set of characteristics among transitional and developing countries.[41] They note that such countries, and especially post-conflict environments, exhibit marked diversity within a variety of dimensions, including the size of the country, its demographic composition, and its degree of dependence on external political and economic forces.[42] Todaro and Smith, and other scholars, argue that such diversity affects the impact of rule of law reform on economic development. In a study of the relationship between an idealized apolitical, rule of law system and the economic development of the United States and Japan, for example, Frank Upham argues that the nexus between the rule of law and economic development is not very strong.[43] Similarly, in a review of studies that attempt to find direct causal relationships between legal and judicial systems and economic

[40] He points to the cases of the Czech Republic, Hungary, and Poland: as foreign investors in post-communist countries began to complain and demand changes in commercial legislation and procedures, the negative publicity in the media put indirect pressure on the host governments until they addressed the need for legal and judicial predictability, the protection of private property rights, and the enforcement of long-term contracts. The changes only partially resolved the problems, but the cycle would repeat several times until gradually the host governments began to conform to the standards required for market economies. The overall perception of the countries would improve, and the general investment climate would attract further foreign direct investment.
[41] Michael P. Todaro and Stephen C. Smith, *Economic Development*, 11th Edition, (Essex, UK: Pearson, 2009).
[42] Other dimensions include a country's historical background, its physical and human resources, the relative importance of its public and private sectors, its industrial structure, and the distribution of power with its institutional structure.
[43] See generally: Upham.

development, Rick Messick notes, "the relationship is probably better modeled as a series of on-and-off connections, or of couplings and de-couplings."[44] In other words, the causal arrows go both directions and sometimes do not appear at all.

Experience in transitional and developing countries also challenges the instrumentalist perspective. Several countries that have achieved significant economic development in recent decades have done so in the absence of Western-style rule of law reform. China is a leading example.[45] Despite the "conviction and finality" with which certain scholars present their findings on rule of law reform as a mechanistic, causal imperative, the debate surrounding the relationship between the rule of law, democracy and economic development in post-conflict environments is by no means settled.[46] This raises the question of what rule of law reform can attain in post-conflict environments, as will be explored in the following section.

Does Rule of Law Reform Matter?

As the discussion above reveals, scholars remain divided as to whether and to what degree rule of law reform leads to democracy and economic development. Yet policymakers repeatedly invoke it as a panacea for countries struggling to consolidate politically and economically. They may be expecting

[44] Richard E. Messick, "Judicial Reform and Economic Development: A Survey of the Issues." *The World Bank Research Observer*, Vol. 14, No. 1 (1999): 117-136.
[45] See generally: Kenneth W. Dam, "China as a Test Case: Is the Rule of Law Essential for Economic Growth?" *U Chicago Law & Economics* (Olin Working Paper No. 275, October 2006) available at Social Science Research Network <http://ssrn.com/abstract=880125>.
[46] Stephan Haggard, Andrew MacIntyre and Lydia Tiede, "The Rule of Law and Economic Development" *Annual Review of Political Science* 11 (2008): 205–34, 214.

too much, as democratic consolidation and economic development are lofty goals. Does this mean that policymakers should abandon rule of law reform? The short answer is no. Rule of law reform may not be able to advance democracy and economic development in transitional and developing countries with the swiftness and ease policymakers expect, but it certainly can improve the wellbeing of a country.

Rule of law reform in post-conflict environments is best suited to achieve a range of specific goals, or ends, related to legitimate, efficient governance. These goals fit into the framework of two very different, yet complementary approaches. At one level, the security-based approach focuses on establishing law and order within a society. At yet another level, the norms-based approach focuses on the importance of a background of normative expectations, some standard by which reform is to be evaluated and to which rule of law promotion efforts should aspire.[47] The security-approach consists of two short-term ends: subordination of belligerents and other spoilers; and institutional reform of police, courts, and prisons. The norms-based approach, on the other hand, consists of four long-term ends: (1) a government bound by law; (2) equality before the law; (3) efficient, predictable justice; and (4) human rights. When these rule of law ends are achieved within a given country according to the two approaches they create a "reinforcing loop of stability, predictability, trust, and empowerment."[48]

[47] Trebilcock and Daniels, 24.
[48] Ashraf Ghani and Clare Lockhart, *Fixing Failed States: A Framework for Rebuilding a Fractured World* (New York: Oxford University Press, 2008), 126.

They stabilize government and make it accountable; establish a predictable environment in which actors can make plans; promote confidence within the general population, which trusts that, when change is necessary, it will take place within a framework of transparency and efficiency; and empower citizens to take initiatives, form associations, create companies, and work within the confines of a rule of law system more broadly.[49]

As the previous section demonstrated, the rule of law literature has yet to provide strong and conclusive empirical evidence regarding the specific impact of rule of law reform on democracy and economic development. Therefore, the vigor with which policymakers advance rule of law reform as a cure-all for transitional and developing countries may be misguided. Rule of law reform is more apt to fulfill the ends enumerated above, which fit within the framework of the two approaches. Even focusing on these more limited reforms is not easy. The two approaches, while their ends may be complementary, are difficult to implement together. In the following section, I further explore the two approaches and the inherent contradictions that make achieving these reforms challenging.

[49] *Ibid*.

WHAT IS RULE OF LAW REFORM?

The rule of law literature lacks a shared conceptual definition; however, three dimensions reside within most theoretical conceptions of the rule of law, and inform the security-based approach and the norms-based approach to rule of law reform in post-conflict environments. The first is an institutional dimension broadly conceived to include the institutional attributes a society must have to be considered to possess the rule of law: the laws themselves, which are publicly known and relatively settled, a judiciary independent of political manipulation and corruption, and a force able to enforce laws, execute judgments, and maintain public peace and safety.[50] The second is an individual dimension linked to the prevention or correction of discriminatory practices in legal and judicial systems. As Montesquieu warned, "It is not sufficient to [examine] political liberty as relative to the constitution; we must examine it likewise in the relation it bears to the subject," because "the constitution may happen to be free, and the subject not."[51] The third is a social dimension related to the way in which members of the general population interact with one another within a rule of law system.[52] The three dimensions, however, are deeply embedded in theoretical conceptions of the rule of law, which are based in large part on the long-term historical

[50] John Locke first stated that legitimate governments were "bound to govern by establish'd standing Laws, promulgated and known to the People, and not by Extemporary Decrees, by indifferent and upright Judges, who are to decide Controversies by those Laws; and to imploy the force of the community at home only in the execution of such Laws."
[51] Montesquieu, *The Spirit of the Laws: A Compendium of the First English Edition*, David Wallace Carrithers, Ed., Book XII (California: University of California Press, 1997), 216.
[52] See generally: Judith N. Shklar and Stanley Hoffman, *Political Thinkers and Political Thought* (Chicago: Chicago University Press, 1998).

patterns of Western nations. As such, they do not provide clear benefits for studying the practical application of the rule of law, specifically rule of law reform in post-conflict environments.

The security-based approach and the norms-based approach offer particular advantages for examining rule of law reform in post-conflict environments. The two approaches encompass multiple ends, which require several different types of reforms at many different levels; as mentioned above, the security-based approach focuses on the short-term ends, while the norms-based approach focuses on the long-term ends. Moreover, the inherent contradictions between the two approaches reveal the complexities of building the rule of law in post-conflict environments. In the following sections, I further explore the two approaches. First, I examine the security-based approach, and I identify the four types of reforms required for this approach to achieve its two ends. Then I examine the norms-based approach, and clarify the theoretical underpinnings and practical implications of the four ends associated with this approach. Finally, I draw out the tensions between the two approaches.

The Security-Based Approach

The security-based approach to rule of law reform insists that establishing law and order should be interveners' first task in post-conflict environments, "the *sine qua*

non of post-conflict reconstruction,"[53] vital to the provision of a secure environment. In nearly all post-conflict environments, security efforts take place in fragile contexts, which typically involve a breakdown of the formal judicial system, a weak or destroyed legal community, and the general perception that judges and prosecutors who have not been killed are weak or biased. In addition, the police force is likely to be corrupt or non-existent, and the prison system is likely to be inadequate.[54] The security-based approach thus requires the subordination of belligerents and other spoilers to ensure that citizens are free from major threats to human security,[55] which creates the conditions for institutional reform of the police, courts, and prisons—the foundations of legitimate governmental authority. No legitimate governmental authority, least of all one committed to a rule of law system, can function effectively if its citizens cannot go about their daily life without fear of being shot, tortured, raped, robbed, or bombed.[56]

In order for the short-term ends of the security-based approach to be achieved in such contexts, there are four types of reform policymakers must engage.[57] First, security efforts cannot depend solely or even primarily on force or the threat of force. Particularly in the immediate aftermath of intervention,

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[53] "Play to Win: Final Report of the Bipartisan Commission on Post-Conflict Reconstruction" (Washington, D.C.: Center for Strategic and International Studies and the Association of the U.S. Army, 2003).
[54] See generally: Samuels.
[55] Seth G. Jones, Jeremy M. Wilson, Andrew Rathmell and K. Jack Riley, *Establishing Law and Order After Conflict* (Santa Monica, CA: RAND Corporation, 2005), xi.
[56] Stromseth et. al., 137.
[57] See generally: *Ibid*, 135.

force or the threat of force is often necessary for the maintenance of law and order, but in the long-term, law and order rests on a societal consensus about the legitimacy of institutions and public confidence in the capacity of institutions to deliver. As such, to achieve lasting security, interveners must also provide minimally acceptable levels of public goods until the local governmental authority can be restored to provide such goods on its own. Otherwise, belligerents and other spoilers will advance, and public support for the mission will wane.

Second, security efforts in the post-intervention period require a mix of forces significantly different than those required for intervention. Security concerns are particularly acute in the immediate aftermath of intervention, and at that point, only the military forces can provide security. As the situation stabilizes, however, different skills are needed for the maintenance of law and order, and interveners must deploy some combination of international civilian police and locally recruited police.

Third, security efforts must be part of the peace process. Therefore, when belligerents and other spoilers threaten to derail the peace process through violence, interveners cannot remain neutral. Yet, while early and vigorous opposition to belligerents and other spoilers may be essential to establishing a secure environment, interveners must also realize that premature attempts to disarm warring factions may actually undermine efforts to engage them in the peace process. In other words, an overly aggressive pursuance of security efforts can alienate a country's citizens and make them less willing to participate in later

reconstruction projects, and success in creating positive, lasting results in other areas of rule of law reform becomes both more complicated and more critical.

Fourth, and finally, interveners must work with local actors to rebuild security institutions from the beginning of the mission. Interveners can impose law and order temporarily, but they ultimately lack the local knowledge required for effective security efforts over the long-term. Ideally, local actors will participate fully in all decision-making pertaining to security from the outset; involving local actors can help interveners build capacity for the eventual full transfer of security efforts to local forces.

The four types of reform, each functions of establishing law and order, are often viewed narrowly as institutional reform of the police, courts, and prisons—and distinct from other rule of law ends. The slant toward definitions based on institutional reform, however, has serious implications for the success or failure of rule of law reform. The four types of reform require cooperation and coordination across rule of law institutions, yet institutional reform is generally carried out within institutions, first by determining in what ways the selected institutions do not resemble their counterparts in countries that policymakers believe successfully embody the rule of law, and then attempting to modify or reshape those institutions to fit the desired model.

The problem is not the treatment of the security-based approach as institutional reform per se, but rather the insular concentration on institutions with insufficient attention to the interrelations between them or to the larger cultural

and political context in which they function. Interveners almost always turn to institutional reform "not as means, but as intermediate or measurable ends,"[58] and too often they focus on numeric outputs—numbers of international civilian police units deployed, judges and prosecutors trained, belligerents and other spoilers arrested and detained—without adequately articulating the objectives sought by rule of law reform. With a narrow focus on establishing law and order, interveners working toward other rule of law ends virtually guarantee that they will not achieve their own objectives. Rule of law reform also requires a normative background, as will be further discussed in the section below.

The Norms-Based Approach

Promoting the rule of law is an issue of norm creation and cultural change as much as an issue of modifying and sometimes completely overhauling existing institutions, or creating new institutions.[59] The norms-based approach to rule of law reform specifies the distinct goods that the rule of law brings to society, composed of four related ends: (1) a government bound by law; (2) equality before the law; (3) efficient, predictable justice; and (4) human rights. Among policymakers, however, these ends are jumbled; "any end may be implied when the phrase rule of law reform is invoked, and differences between ends are often ignored."[60] In the short term, interveners may find pursuit of these ends to conflict, yet attention to all ends is necessary to establish a foundation of

[58] Kleinfeld, 47.
[59] Stromseth et. al., 75.
[60] Kleinfeld, 32.

normative expectations and ensure the success of rule of law reform. Tensions may sometimes arise between some of these ends, as it may not be possible to advance each end equally at the same pace, particularly in the fragile contexts of post-conflict environments. The following section will elaborate further on each of these four ends.

Government Bound by Law

A government bound by law must act through published, publicly known laws in executing its decisions, and suspend or create laws through established legislative means. It thus requires that governmental authority is subordinate to law to promote accountable, transparent governance. Conceptually, the origins of this end date back to the ancient Greeks. Aristotle considered whether it was better for rulers to rule with discretion or according to law, and determined that in a state governed by law, "God and reason alone rule," whereas "passion perverts the minds of rulers, even if they are the best of men."[61] Though the concept of a government bound by law fell out of favor in the course of history, especially during the centuries of monarchical absolute rule in Europe, the Magna Carta reintroduced it in England.[62] The celebrated English Petition of Grievances of 1610 further advanced the concept when it claimed that the most prized traditional right of English subjects was "to be guided and governed by the certain rule of law, which giveth to the head and the members that which of right belongeth to

[61] Aristotle, *Politics*, III, 15, 1286a-16, 1287a, in *The Complete Works of Aristotle*, ed. J. Barnes (Princeton, NJ: Princeton University Press, 1995).
[62] Kleinfeld, 36.

them, and not be any uncertain and arbitrary form of government."[63] In 1689, the English Bill of Rights ultimately codified the idea that the monarch needed to act through parliament to suspend or create laws.[64]

Within the context of rule of law reform in transitional and developing countries, binding a government to law is often treated as an issue of judicial independence. Law enforcement is generally ignored in achieving this end. Yet in any absolute government, one of the "mainstays of extralegal power" is a law enforcement apparatus that answers to the regime rather than the citizens.[65] The transfer of police and military allegiance from the regime to the citizens—which can be facilitated by institutional reform that limits the powers of these bodies[66]—is often the most critical step in moving toward the norm of a government bound by law. A government bound by law is an essential element of sustainable rule of law reform in post-conflict environments. First, it increases the legitimacy and effectiveness of governmental authority in the eyes of the general population, and second, it limits governmental arbitrariness.

Equality Before the Law

Equality before the law is closely related to the norm of a government bound by law. Though the concept of equality before the law also fell out of use during the centuries of monarchical absolute rule in Europe, the Enlightenment

[63] F. A. Hayek, *Constitution of Liberty*, quoted in Kleinfeld, 32.
[64] *English Bill of Rights*, 1989.
[65] Kleinfeld, 37.
[66] Paul Chevigny, "Defining the Role of the Police in Latin America," in Méndez et. al., 66.

and the French Revolution revived the normative expectation that all people are equal before the law and that all people, particularly government officials and clergymen, must be tried under the same laws and in the same courts.[67] It is one of the core ways in which citizens can ensure that the wealthy and powerful do not become a "caste apart,"[68] and for protecting the rights of the underprivileged, poor, and marginalized.[69]

In post-conflict countries, the lack of equality before the law is a prime complaint. Many citizens do not believe that their government implements, or attempts to implement, the law with equality and impartiality for all citizens. The underprivileged, poor, and marginalized often see the law as an instrument of oppression in the service of the wealthy and powerful.[70] As with binding a government to law, creating equality before the law alters the balance of power in a society, giving far more power to ordinary people at the expense of the wealthy and powerful.[71] This end is therefore likely to meet with resistance; to combat such resistance, this end requires judicial systems that are strong and independent, since the wealthy and powerful can use bribery and other means when judiciaries are marked by "venality, inefficiency, and lack of autonomy."[72]

Particularly in societies broken apart by civil wars and ethnic conflict, equality before the law for all communities is a key end in constructing a rule of

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[67] A. C. Dicey, *Introduction to the Study of Law*, quoted in Kleinfeld, 37.
[68] Kleinfeld, 38.
[69] See generally: Paulo Sergio Pinheiro, "The Rule of Law and the Underprivileged in Latin America" in *The (Un)Rule of Law and the Underprivileged in Latin America*, eds. Méndez, et. al.
[70] *Ibid*, 11.
[71] Kleinfeld, 38.
[72] Pinheiro, 11.

law system. At one level, it prevents against flagrant inequalities between formerly warring factions, which may contribute to vigilantism or renewed violence. At another level, it increases public confidence in a rule of law system when all communities feel protected by the law.

Efficient, Predictable Justice

A predictable, efficient legal and judicial system allows citizens and businesses to plan, enables them to stay on the correct side of the law, and provides some level of deterrence against crime.[73] What is most important, however, is that the majority of people view the legal and judicial systems as viable means for solving disputes so that they are not forced toward vigilantism or renewed violence. The concept of efficient justice had been implicit since the Magna Carta, which first hinted that justice would neither be denied nor delayed.[74] In 1693, William Penn wrote, "Our law says well, 'To delay justice is to deny justice.'"[75] Efficient justice was seen in part as a way to support other rule of law ends. Friedrich von Hayek did the most to revive the concept of predictable justice, in the twentieth century, as a "stand-alone element" of the rule of law.[76] For Hayek, predictable justice made it "possible to foresee with fair

[73] Kleinfeld, 42.
[74] *Magna Carta*, 1215, c1. 40. "To no one will We sell, to no one wil We deny or delay, right or justice."
[75] William Penn, *Some Fruits of Solitude* (1693), ed. Eric K. Taylor (Scottdale, PA: Herald Press, 2003).
[76] Kleinfeld, 42.

certainty how the authority will use its coercive powers in given circumstances, and to plan one's individual affairs on the basis of that knowledge."[77]

Predictable, efficient justice is closely linked with establishing law and order, as framed within the security-based approach to rule of law reform, and with equality before the law. A lack of either law and order or equality before the law can harm efficiency and predictability, while a lack of efficiency and predictability can undermine law and order by forcing citizens to bypass the legal and judicial systems. In many post-conflict countries, however, the reach of "legal state," which furnishes a basic element of stability to social relations, is limited; in many regions, whatever formally sanctioned law there exists is "applied, if at all, intermittently and differentially."[78] The result is dominant informal legal and judicial systems—punctuated by arbitrary reintroductions of the formal one—which supports a world of extreme violence.[79] Rule of law reform typically focuses on predictability and efficiency as attributes of the legal and judicial systems, but law enforcement is also needed to support this end of efficient, predictable justice and to expand the reach of the legal state.

Efficient, predictable justice is often difficult to implement in the immediate aftermath of intervention in post-conflict environments where the legal state has collapsed, and has been reinstated by intervention forces. Personnel within the newly established emergency judiciaries may lack adequate training

[77] F. A. Hayek, *The Road to Serfdom* (Chicago: University of Chicago Press, 1994), 80.
[78] O'Donnell, 313.
[79] *Ibid*, 313-314.

and support, which may create growing columns of backlog cases. Yet efficient, predictable justice is a fundamental long-term end of rule of law reform. Policymakers should continually strive for predictable, efficient justice in order to create a normative expectation of stability and accountability within the society.

Human Rights

The world of rule of law reform grew in large part out of a desire to improve human rights in Latin America in the 1980s,[80] and to create democracies in Eastern Europe in the 1990s. As such, from the beginning, persuading states to recognize and not violate human rights was an intrinsic, but also instrumental, normative expectation of rule of law promotion efforts.[81] Human rights, however, are the most contested rule of law end. A debate has raged for centuries between maximalists, who believe the rule of law must contain some substantive content, and minimalists, who claim that the rule of law is simply about the rules and practices that are routinely followed.

Experience in countries where the government is above the law, where anarchy has taken hold, or where laws change so frequently that citizens and businesses cannot plan give the minimalist view weight.[82] Some minimalist theories of the rule of law emphasize the importance of having laws that predate their application, created through some sort of democratic process, as it limits

[80] Pinheiro, 1.
[81] Kleinfeld, 44-45.
[82] *Ibid*, 45.

opportunities for unfairness among government officials.[83] Other minimalist theories of the rule of law "emphasize the importance of having laws that are universal in form, consistently applied, and sufficiently well known so that citizens can plan their lives around them."[84] Still others emphasize the importance of "process to the rule of law," insisting that the rule of law involves and requires accessible, transparent mechanisms for legal and political change.[85] Insofar as it provides justice, it does so procedurally, through efficiency, predictability, and equality before the law. According to the minimalist conception, the rule of law cannot be expected to provide just or moral outcomes such as protection of human rights. Protection of human rights may be a laudable goal,[86] but for minimalists, they are viewed as "distinct ideals" independent of the rule of law.[87]

Aristotle was the first maximalist, stating that that "laws, when good, should be supreme," raising the question of what a "good" law requires.[88] Locke's treatment of the rule of law concludes with the statement, "all this is to be directed to no other end but the Peace, Safety, and publick good of the People,"[89] which suggests that the rule of law was intended to have substantive content to protect citizens from the state. The maximalist conception of the rule of law is

[83] Stromseth et. al., 70.
[84] *Ibid*.
[85] *Ibid*.
[86] Joseph Raz, "The Rule of Law and its Virtue," *Law Quarterly Review,* Vol. 93 (1977): 195.
[87] Mani, 27.
[88] Aristotle, *Politics*, III, 11, 1282b-III, 12, 1283a and IV, 8, 1294a.
[89] Locke, *Treatise II*, 131, 353.

characterized mainly by the greater substantive content it incorporates.[90] Maximalists believe the minimalist conception amounts to rule by law, which strengthens the government, and does not bind it to "certain acceptable ways of treating citizens."[91] For maximalists, formal, minimalist theories of the rule of law cannot be fully adequate, "because it is easy to imagine a horrifically abusive government that might fully comply with the purely formal dimensions of the rule of law."[92] States such as Nazi Germany or Apartheid South Africa, which were run by law but used law as an instrument to deprive some citizens of peace and safety, were not governed by the rule of law. The rule of law, maximalists maintain, must be distinguished from rule *by* law.

Some critics argue that more minimalist conceptions of the rule of law are superior to maximalist conceptions precisely because of their emptiness. Robert Summers, for instance, argues that only more formal accounts of the rule of law can "generate support for across the political spectrum, because formal accounts do not require consensus on potentially divisive questions about rights."[93] Rule of law reform that includes human rights is thus taking a stance in this debate, positing a "cultural idea with substantive, values-driven content" as part of the normative expectations of the rule of law.[94] As with the other rule of law ends, the protection of human rights requires reforming many rule of law institutions, as

[90] Robert S. Summers, "A Formal Theory of the Rule of Law," *Ratio Juris*, Vol. 6, No. 127 (1993): 135.
[91] Kleinfeld, 45.
[92] Stromseth et. al., 71
[93] Summers, 135.
[94] Kleinfeld, 45.

well as establishing new cultural norms. Laws can and must be established to promote these rights, but laws are among the weakest instruments for protecting human rights. Police must also be trained to protect human rights, as police are often among the worst human rights abusers.[95] A functioning, independent judicial system under the rule of law can end the impunity, preferential treatment, and political protection of the human rights abusers,[96] but in post-conflict countries, the judicial system can only serve this function to the extent that its members accept this cultural idea; otherwise, "human rights and humanitarian guarantees are fragile, and social justice merely a dream."[97]

The Two Approaches: From Theory to Practice

As I demonstrated in the preceding section, the norms-based approach to rule of law reform emphasizes the importance of rule of law principles to achieving long-term ends. Critics, however, question the relevance of such principles when faced with the urgent need to address security concerns. In this section, I draw out the way in which this tension plays out at three levels of rule of law reform, and then, most critically, in the immediate aftermath of intervention.

There are three levels at which rule of law reform efforts take place. The security-based approach to rule of law works primarily at the first two levels, partly because these types of reforms are relatively easy to achieve upon establishing law and order. At the first level, reform concentrates on revising

[95] See generally: Chevigny.
[96] Clair Apodaca, "The Rule of Law and Human Rights," *Judicature,* Vol. 87 (2003): 292.
[97] *Ibid*.

laws and frequently changing legal codes. At the second level, reform concentrates on modifying or reshaping institutions. The norms-based approach to rule of law works primarily at the third level, which concerns a particular set of cultural commitments to the rule of law project. Reform efforts falling under the third level are crucial to reform that is sustainable and has the potential to have real impact on the ground. This level of reform depends significantly on the ability to bring about substantial changes in values and attitudes within the government and the general population, based on the assumption that change does not come naturally from key institutions, but rather is dependent on key individuals.

In the immediate aftermath of intervention, interveners seek to control belligerents and establish basic law and order. Interveners usually refer to this period as the "golden hour,"[98] the critical window of opportunity during which they have the chance to demonstrate that "a new sheriff is in town and it is no longer business as usual."[99] During the golden hour, belligerents and other spoilers may be intimidated by the arrival of professional military forces; they may be weakened from the fighting, demoralized, and prepared to accept disarmament and demobilization. Moreover, the local population, exhausted by years of conflict, may be eager to cooperate with an international mission promising the restoration of normalcy. Failure to establish security during the

[98] See generally: Jones et. al.
[99] Stromseth et. al., 145.

golden hour, which may last only several weeks to several months,[100] can undermine public confidence, or invite the entrenchment of belligerents and other spoilers opposed to the larger peace process or intent on taking advantage of the security vacuum.

Security efforts in this period set the tone in large part for the rule of law project. When existing security institutions cease to function, instability thrives, and if action is not pursued quickly, it may become woven tightly into the political, economic, and social fabric of the society—and almost impossible to eradicate later.[101] The establishment of a secure environment may not necessarily guarantee success, but the inability to create a secure environment may guarantee failure. Meeting the challenges of security efforts in the immediate aftermath of intervention, while also adequately balancing a commitment to rule of law principles, is a complex task. Interveners typically face strong pressures to address short-term needs, but doing so may run counter to the long-term requirements for establishing effective, legitimate governmental authority. In Kosovo, interveners learned this the hard way.

[100] Jones et. al., xii.
[101] Stromseth et. al., 172.

KOSOVO

In the late 1990s, a long history of "persistent and pervasive"[102] human rights violations culminated in the Kosovo War—two discrete, but at times parallel, armed conflicts in Kosovo, then an autonomous province of the Republic of Serbia within the Federal Republic of Yugoslavia (FRY). The first armed conflict took place from February 1998 to April 1999 between Yugoslav and Serb police, paramilitary, and military forces in opposition to members of the Kosovo Liberation Army (KLA), the paramilitary force that sought to end Yugoslav President Slobodan Milošević's campaign of ethnic cleansing that drove roughly half of the majority Kosovar Albanians from the province. Between February 1998 and April 1999, more than 863,000 civilians were forced to flee outside of Kosovo, and an additional 590,000 were internally displaced.[103] The second armed conflict took place from 24 March 1999 to 10 June 1999, when the North Atlantic Treaty Organization (NATO) commenced *Operation Allied Force*, a 78-day air strike on Kosovo, Serbia, and Montenegro. Prior diplomatic initiatives at Rambouillet, France, had failed to broker an agreement between Milošević and the Kosovar Albanians, leading NATO to assert a moral imperative to intervene.

Milošević's campaign of ethnic cleansing in Kosovo was the apex of more than a decade of Yugoslav and Serb oppression intended to bolster his own power within the FRY. By stoking Serb nationalism while simultaneously quelling

[102] *Human Rights in Kosovo: As Seen, As Told*, Volume II (Pristina: OSCE Office for Democratic Institutions and Human Rights, 1999), viii.
[103] *Ibid*.

Kosovar Albanian aspirations for independence,[104] Milošević sought to exploit the age-old question of a sovereign Kosovo rather than to resolve it.[105] Previously, under the rule of Marshal Josip Broz Tito, Kosovo was rendered an autonomous province within the Socialist Federal Republic of Yugoslavia (SFRY). It was considered a "quasi-republic," almost equal to that of the six republics of the SFRY, except it did not have the right to secede.[106] Most importantly, Kosovar Albanians were self-governing in the selection and administration of their legal and judicial systems.

On 22 March 1989, as Serb demands to take control over Kosovo gained momentum,[107] Milošević issued a series of constitutional amendments to expunge Kosovar Albanians from political, economic, and social life within Kosovo, even though they comprised more than 90-percent of the population. Over 100,000 Kosovar Albanians were removed from their jobs in the public sector, which included government, education, and health care.[108] Shortly thereafter, Milošević rescinded Kosovo's status as an autonomous province, and stripped Kosovar Albanians of their rights as an ethnic minority group within the FRY. The changes led to a storm of violent riots, and a state of emergency was declared in

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[104] See generally: William G. O'Neill, *Kosovo: An Unfinished Peace* (Boulder, CO: Lynne Rienner, 2002).
[105] Dale C. Tatum, *Genocide at the Dawn of the Twenty-first Century: Rwanda, Bosnia, Kosovo, and Darfur* (New York, NY: Palgrave Macmillian, 2010), 125.
[106] *Ibid*.
[107] Julie Mertus, *Kosovo: How Myths and Truths Started a War* (Berkeley, CA: University of California Press, 1999), 19.
[108] Armend R. Bekaj, "The KLA and the Kosovo War: From Intra-State Conflict to Independent Country," *Berghof Transitions Series, Resistance/Liberation Movements and Transition to Politics* (Berlin, Germany: Berghof Conflict Research, 2010) available at <http://www.berghof-conflictresearch.org/documents/publications/transitions8_kosovo.pdf>.

Kosovo, backed by a strong presence of Yugoslav and Serb forces from late 1989 to late 1992.[109] During this period, international observers found that Yugoslav and Serb forces were responsible for the torture and killing of hundreds of Kosovar Albanians, as well as a high number of arbitrary arrests, prosecutions, and incarcerations.[110]

Kosovar Albanians initially responded to Yugoslav and Serb oppression in two ways: the development of a non-violent resistance movement, led by Ibrahim Rugova, leader of the Democratic League of Kosova (LDK); and the implementation of a parallel government, established by the LDK and funded mainly by the Albanian diaspora. Within the parallel government, they held referendums; collected taxes; delivered health care; and provided primary, secondary, and higher education outside the occupied premises. They also restored traditional conflict resolution mechanisms based on customary practices. Their efforts, however, failed to capture the attention of the international community.[111] Despite the global attention drawn to the region by the Balkan Wars in Slovenia, Croatia, and Bosnia and Herzegovina, the international community did not address the plight of the Kosovar Albanians.[112]

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[109] OSCE DHRRL, "Review of the Criminal Justice System, February 1, 2000-July 21, 2000" (Pristina: OSCE, 2000).
[110] "Yugoslavia: Human Rights Abuses in Kosovo 1990-1992," Human Rights Watch, 1992, available at <http://www.hrw.org/reports/1992/Yugoslavia/>.
[111] The Independent International Commission on Kosovo, *The Kosovo Report: Conflict, International Response, Lessons Learned* (Oxford: Oxford University Press, 2000), 63.
[112] Julie Mertus, *Bait and Switch: Human Rights and U.S. Foreign Policy* (New York: Routledge, 2004), 118.

Believing that the Dayton Peace Accords, which ended the conflict in Bosnia and Herzegovina in 1995, rewarded Serb aggression by recognizing the self-declared Republika Srpska (RS), some Kosovar Albanians thought violent tactics were essential to their struggle for independence. The LDK managed to prevent large-scale violence for nearly five years. In 1997, however, the KLA, which had formed in the early 1990s, launched a guerrilla campaign, in which Yugoslav and Serb forces came under increasing attack. The forces, however, led by Milošević, retaliated aggressively with widespread human rights violations, from rape and torture, to looting, pillaging and extortion.[113]

Milošević "gambled" on the apparent indifference of the international community to Kosovo's future.[114] In late 1998, he unleashed a brutal campaign of ethnic cleansing.[115] It resembled the kind of ethnic cleansing seen before in Bosnia and Herzegovina.[116] As the violence progressed, more than 863,000 civilians were forced to flee. Following failed diplomatic efforts in Rambouillet, NATO (by then familiar with Milošević's ethnic cleansing tactics) resolved to launch an air strike on Kosovo, Serbia, and Montenegro, which would force Milošević to withdraw Yugoslav and Serb forces from Kosovo. NATO justified the air strike on four grounds: refusal by Milošević to sign the Rambouillet

[113] *Human Rights in Kosovo: As Seen, As Told*, viii.
[114] Tatum, 126.
[115] "Background Note: Kosovo," U.S. Department of State, 2012, available at <http://www.state.gov/r/pa/ei/bgn/100931.htm>.
[116] Javier Solana, "NATO's 'Humanitarian War' over Kosovo." *Foreign Affairs,* Vol. 78, No. 6 (1999): 114-120, 115.

Accords; his breach of the 13 October 1998 agreement;[117] his disproportionate recourse to force in Kosovo in response to the KLA's guerrilla campaign; and the risk of yet another humanitarian catastrophe from within the FRY.[118]

After nearly three months of bombing, the NATO air strike resulted in the withdrawal of Yugoslav and Serb forces from Kosovo in June and July 1999. Immediately thereafter, the United Nations Security Council authorized Resolution 1244 through a Chapter VII mandate of the United Nations Charter, to create the United Nations Interim Administration Mission in Kosovo (UNMIK).[119] Although Kosovo remained under Serbia's juridical sovereignty, pending determination on the final status of the province, UNMIK was to provide Kosovo with a "transitional administration while establishing and overseeing the development of provisional democratic self-governing institutions to ensure conditions for a peaceful and normal life for all inhabitants in Kosovo."[120]

UNMIK initially divided security efforts in Kosovo among multiple security organizations. The United Nations international civilian police (CIVPOL) managed day-to-day security and was tasked with developing the locally recruited Kosovo Police Service (KPS). Meanwhile, NATO maintained

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[117] On 13 October 1998, NATO authorized activation orders for an air strike. This move was designed to support diplomatic efforts to make Milošević withdraw forces from Kosovo. At the last moment, following further diplomatic initiatives including visits to Belgrade by NATO's Secretary General Solana, US Envoys Holbrooke and Hill, the Chairman of NATO's Military Committee, General Naumann, and the Supreme Allied Commander Europe, General Clark, Milošević agreed to comply and the air strike was canceled.

[118] Philip Alston and Euan Macdonald, *Human Rights, Intervention and the Use of Force* (Oxford: Oxford University Press, 2008), 109.

[119] UNMIK was divided to four pillars: Police and Justice; Civil Administration; Democratization and Institution Building, managed by the Organization for Security and Cooperation in Europe (OSCE); and Reconstruction and Economic Development, managed by the EU.

[120] S/RES/1244, available at <http://www.nato.int/kosovo/docu/u990610a.htm>.

full and exclusive operational control over a 50,000-strong Kosovo Force (KFOR), which provided security in areas where CIVPOL lacked capacity. From the time of its initial deployment in Kosovo, however, UNMIK failed to provide a secure environment. Belligerents and other spoilers, many linked to the former KLA, were quick to exploit the security vacuum. Conflict between Kosovar Albanians and Serbs continued to play out through organized crime, corruption, and ethnic retaliation, all of which thrived at the beginning of the mission.

In the immediate aftermath of intervention, there followed "a disturbing spate of cold-blooded killings," and Serbs and members of other minority ethnic groups were forcibly evicted from their homes and businesses on a regular basis.[121] The surge in violence that Kosovar Albanians directed against Serbs and members of other minority ethnic groups forced the majority to flee the province. Serbs that remained concentrated within enclaves in Gracanica, Orahovac, and Mitrovica. High levels of insecurity under UNMIK even prompted Carla Del Pointe, chief prosecutor at the International Criminal Tribunal for the former Yugoslavia (ICTY), to declare: "What is currently happening is as serious as what happened there before [NATO's intervention]."[122]

Prior to deployment, the international community believed UNMIK had it all: a full executive mandate and more resources than many previous post-conflict missions operated by the United Nations. Given that it was able to start with a

[121] Independent International Commission on Kosovo.
[122] Quoted in Gordon N. Bardos, "International Policy in Southeastern Europe," in *Yugoslavia Unraveled: Sovereignty, Self-Determination, Intervention*, ed. Raju G. C. Thomas, (Lanham MD: Lexington Books), 150.

"clean slate" (in the sense that it did not need to work with pre-existing leadership) and had administrative control over a population of less than two million,[123] some even referred to UNMIK as the "perfect mission."[124] It was seen as a "petri dish" for the rule of law.[125] Yet those who viewed the mission as such lost sight of the fact that UNMIK faced the daunting challenge of governing in a devastated region with a large and rapidly returning refugee population; no functioning police, courts, or prisons; and a legacy of ethnic bitterness between Serbs and Kosovar Albanians, who for over a decade had been unable to participate in governance.[126]

The tension between the security-based approach and the norms-based approach to rule of law reform emerged early in the mission. Many experts argue that it would have been better to declare a public emergency, or martial law, in Kosovo at the beginning of the mission, which would have allowed limited derogation from certain international standards as permitted under international law.[127] UNMIK, however, was not willing to declare a public emergency, as it would have revealed its inability to create a secure environment while simultaneously consolidating rule of law norms. In the end, the mission in Kosovo succeeded on neither side of the purported trade-off between the security-based approach and the norms-based approach, providing insufficient security and

[123] Stephen Golub, "A House Without a Foundation," in Carothers 2006, 119.
[124] Colette Rausch, "From Elation to Disappointment: Justice and Security Reform in Kosovo," in Call, 299.
[125] *Ibid*.
[126] Stromseth et. al., 316.
[127] O'Neill, 75-76.

failing to deliver justice in compliance with international standards.[128] The following analysis examines the trade-offs between the two approaches and their effects at four critical junctures in the trajectory of rule of law reform in Kosovo.

Critical Juncture 1: Applicable Law

The path interveners took to resolve the debate over applicable law in Kosovo demonstrates how simplistic formalism with an insular focus on reforming institutions and legal codes, can lead to problems, particularly when it comes up against powerful cultural and political understandings.[129] In the immediate aftermath of intervention, it was unclear what body of law applied in Kosovo. UNMIK Special Representative of the Secretary-General (SRSG) Bernard Kouchner decided to address the issue by making the applicable law in Kosovo the same body of law that was in place before the NATO air strike. On 25 July 1999, he issued UNMIK Regulation 1, which stated that "the laws applicable in the territory of Kosovo prior to 24 March 1999 shall continue to apply in Kosovo," as long as such laws did not conflict with international human rights standards, the UNMIK mandate under Resolution 1244, or any other UNMIK regulation.[130] This was interpreted to mean that the laws of the FRY and Serbia would be in effect, but not the Kosovo Criminal Code because Milošević had repealed it when he revoked the autonomous status of the province in 1989.[131]

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[128] Rausch, 299.
[129] Stromseth et. al., 316.
[130] UNMIK/REG/1999/1, available at <http://www.unmikonline.org/regulations/1999/reg01-99.htm>.
[131] Rausch, 277.

Shortly thereafter, the quick, seemingly efficient solution to the debate over applicable law backfired. Beset by the security vacuum, the fact that the Serbs had enacted applicable law in Kosovo before the NATO air strike mattered little to UNMIK. To Kosovar Albanians, however, the pre-1999 laws represented "Serb laws," "one of the most potent tools of a decade-long policy of discrimination against and repression of the Kosovar Albanian population."[132] For them, the notion that interveners would issue a decree requiring Kosovar Albanians to continue to live under pre-1999 "Serb laws," after ten years of Yugoslav and Serb oppression, and especially after Milošević's campaign of ethnic cleansing, was profoundly insulting.[133] The decree particularly outraged the Kosovar Albanian legal community expected to apply the law; nearly all of the 55 people sworn in by UNMIK to serve as judges and prosecutors in UNMIK's emergency judicial system declared that they would not apply the pre-1999 "Serb laws."[134] The Kosovar Albanian legal community insisted that applicable law should be the body of law in force immediately prior to 22 March 1989, because those laws were enacted before Milošević removed Kosovar Albanians from public life and eliminated the autonomy of the province.

It made hardly any difference that Regulation 1 enshrined international human rights standards as supreme in the event of conflict between applicable law and international human rights standards. Crisis emerged, as judges and

[132] Hansjörg Strohmeyer, "Collapse and Reconstruction of a Judicial System: The United Nations Missions in Kosovo and East Timor." *American Journal of International Law,* Vol. 96, No. 46 (2001): 46-63, 58-59.
[133] Stromseth et. al., 317.
[134] *Ibid*.

prosecutors protested UNMIK's interpretation of applicable law and the lack of involvement on the part of the local population. UNMIK refused to rescind Regulation 1, and as a result, few proceedings began in the emergency judicial system. Ultimately, the controversy ended in defeat for UNMIK. On 12 December 1999, six months after promulgating Regulation 1, the SRSG issued UNMIK Regulation 24, which declared that applicable law in Kosovo would henceforth be the law in force immediately prior to 22 March 1989, the Kosovo Criminal Code.

Regulation 24 essentially permitted Kosovar Albanian judges and prosecutors to select from whatever legal provisions they preferred: when the pre-1989 laws failed to cover a given situation, Regulation 24 granted judges and prosecutors the latitude to apply the pre-1999 laws, as long as they remained consistent with international human rights standards.[135] Regulation 24, however, like Regulation 1, neglected to identify which sections of the applicable law were inconsistent with international human rights standards, or to outline a procedural mechanism for handling perceived conflict between applicable law and international human rights standards.

In practice, the few remaining Serb judges continued to apply the pre-1999 "Serb laws," while Kosovar Albanian judges subscribed to the pre-1989 laws, which essentially resulted in the prosecution of individuals under different sets of

[135] UNMIK/REG/1999/24, available at <http://www.unmikonline.org/regulations/1999/reg24-99.htm>.

applicable law depending on the ethnicity of the judge handling the case.[136] Somewhat ironically, the pre-1989 laws were far less consistent with modern conceptions of international human rights standards than the pre-1999.[137] The pre-1989 laws were drafted within the framework of communism, before the end of the Cold War and the advent of greater political and economic opening in the FRY. Property law and civil law, for example, reflected a very different set of assumptions about how society should be organized than those most Kosovar Albanians held ten years later.[138] Thus, rather than the content of the pre-1999 laws, which appeared to UNMIK as an improvement over the pre-1989 laws, it was the imposition of the pre-1999 laws—without consideration for the culturally and politically sensitive issues at stake—that manifested as discriminatory and exclusionary to Kosovar Albanians.

The debate over applicable law in Kosovo exemplifies the trade-off between the security-based approach and the norms-based approach to rule of law reform in post-conflict environments. As security concerns peaked in the absence of a functioning legal code, interveners opted for a quick, seemingly efficient solution without consideration for how its decision would be perceived by the local population. Kosovar Albanians read UNMIK's imposition of pre-1999 "Serb laws" as evidence that interveners lacked understanding of Kosovo's historical complexities. UNMIK, however, viewed Kosovar Albanians' rejection of

[136] Rausch, 277.
[137] Stromseth et. al., 318.
[138] *Ibid*.

Regulation 1 as obstructive to the process of establishing law and order in swift measure. Moreover, UNMIK's ultimate reversal of Regulation 1 signaled to Kosovar Albanians that the transitional administration was little more than a web of arbitrary decrees that could be issued and reversed by an unaccountable bureaucracy.[139]

In the first critical juncture, the security-based approach ultimately won out. This trade-off demonstrates the importance of reform that fits within a normative framework based on respect for culturally and politically sensitive issues. It illustrates how failure to consider pre-existing conditions can diminish the legitimacy of rule of law reform efforts in the eyes of the local population. It also exemplifies the interrelations across rule of law institutions; here, weak legal reform negatively impacted the strength of the judicial system. In the second critical juncture, as interveners tended to centralize decision-making and marginalize the concerns of the local population, similar tensions emerged.

Critical Juncture 2: Democratic Decision-Making

In the early years after intervention, following the debate over applicable law, UNMIK established advisory councils, including the Interim Administrative Council (IAC), which included prominent lawyers, academics, and politicians from within Kosovo who would assist in important rule of law reform decisions.[140] Though the advisory councils were meant to address challenges

[139] Stromseth et. al., 318.
[140] *Ibid*, 319.

such as organized crime, corruption, and ethnic retaliation, the advisory councils failed in making significant progress toward the rule of law.[141] The consultative process within the advisory councils frequently collapsed. Disputes broke out over substantive issues, but also over administrative issues, such as who would serve on the advisory councils and in what language UNMIK would conduct proceedings; no clear criteria existed and the different ethnic groups clashed.

For instance, Kosovar Albanian participants would express the view that there should be no Serb judges, because all Serbs were complicit in war crimes; or that property law should reallocate Serb property to Kosovar Albanians, since it had been stolen from them in the first place, even if decades before; or that retaliatory killings of Serbs and members of other minority ethnic groups by Kosovar Albanians should be treated more leniently than other killings.[142] UNMIK, often justifiably, interpreted these suggestions and demands as threats to human security. The situation was difficult, but instead of working through the paralysis of messy democratic decision-making, UNMIK ignored input from local actors when the process slowed down its efforts. In some cases, it even dissolved the advisory councils and made key rule of law reform decisions on its own to expedite the establishment of law and order. UNMIK's tendency to assume the role of an unaccountable bureaucracy countered basic rule of law principles. In the end, UNMIK's failure to establish normative precedent for democratic

[141] Aidan Hehir, "Autonomous Province Building: Identification Theory and the Failure of UNMIK." *International Peacekeeping*, Vol. 13, No. 2 (2006): 200–213, 201.
[142] Stromseth et. al., 319.

decision-making fundamentally hindered efforts to consolidate the rule of law in Kosovo.

In creating the advisory councils, UNMIK intended for the decision-making process to be as participatory as possible; the IAC, for example, consisted of four Kosovar Albanian participants, one Serb participant, and four representatives from the international community.[143] Yet when democratic decision-making came into contact with real or perceived threats to human security, democratic decision-making was pushed to the sidelines with little consideration for how such precedent would resonate with the local population.

At one level, UNMIK allowed the advisory councils to function as semi-permanent forums for deliberation on contentious issues, but when Kosovar Albanians proposed suggestions and demands that interveners found unreasonable, UNMIK assumed the role of unaccountable bureaucracy, increasingly arbitrary in its rule. Rather than working to achieve democratic-decision making, UNMIK falsely believed it could establish law and order by taking a top-down approach. The alternative to a commanding international role, UNMIK held, would have been rule by paramilitary forces "with little interest in Western notions of liberal democratic governance or the rule of law, or in Serb areas, continued rule by Belgrade."[144] Yet as a result, UNMIK failed to establish normative precedent for liberal democratic governance or the rule of law.

[143] Hehir, 201.
[144] Stromseth et. al., 113.

In the second critical juncture, again, the security-based approach ultimately won out. This trade-off demonstrates the importance of activities that engage local actors in rule of law reform decisions throughout the decision-making process. It illustrates how failure to take seriously input from local actors can portray interveners as representative of an unaccountable governmental authority, their rule as arbitrary. In the third critical juncture, as interveners pursued quick action to curb security concerns, in violation of international human rights standards, again, similar trade-offs emerged.

Critical Juncture 3: Arrests and Detentions

KFOR arrived in Kosovo amid the debate over applicable law, followed by the disagreements about how to apply and adapt the law to international human rights standards. These disputes contributed most acutely to tensions between international human rights standards and security concerns. While quick action was required to establish a secure environment in the absence of functioning security institutions, by carrying out large-scale arrests and detentions with no clear legal authority and in contravention of international human rights standards, KFOR sent a message of arbitrary rule that threatened to undermine the rule of law norms interveners sought to promote.[145] Such tensions ultimately led to segmentation and institutional insularity within rule of law reform, decreased public confidence in the international community's commitment to good

[145] *Ibid*, 173.

governance, and increased vulnerability of the fledgling judicial system to organized crime, corruption, and ethnic retaliation.

Of necessity, KFOR initially led security efforts in Kosovo with the assumption that CIVPOL would assume law and order functions in short order—but the United Nations took months to deploy CIVPOL. Early in the mission, KFOR became concerned that the emergency judicial system established by UNMIK, substantiated by the debate over applicable law and substantial resource limitations, was releasing criminal suspects. As security concerns heightened, KFOR instituted "COMKFOR holds:" a procedure whereby the commander of KFOR could approve continued detention, despite a release order from the local judiciary, if he believed the judiciary had acted improperly.[146] At first, KFOR used COMKFOR holds to address only serious crimes, such as retaliatory killings. Within two weeks, however, KFOR was holding over 200 detainees in makeshift UNMIK jails, without adequate detention facilities in which to detain them or adequate courts in which to try them. The armed conflicts had damaged most existing civil infrastructure, therefore, few detainees were held in facilities that were purpose-built for long-term detention.[147] Many ended up in police holding cells or in tents behind barbed wire. Court resources also varied, and as a result, most local judiciaries were slow to begin hearing cases. In many areas of Kosovo, judicial proceedings were not held for more than eight months after

[146] Rausch, 299.
[147] Stromseth et. al., 321.

UNMIK arrived.[148] Moreover, because KFOR represented multiple member states with widely varying legal procedures, arrests and detentions were not conducted in accordance with any uniform standard, although virtually every interpretation of applicable law and international human rights standards made it clear that suspects could not be arbitrarily held indefinitely without charge.

The OSCE maintained that there was little justification for COMKFOR holds.[149] In the exceptional case where holds were necessary, the OSCE argued, "there must be a legal mechanism whereby the detainee can challenge the lawfulness of his detention."[150] The mission's normative commitment to upholding international human rights standards, and more generally, rule of law principles, thus created a quandary. While prolonged, arbitrary detention was clearly a violation of applicable law and international human rights standards, allowing criminal suspects to run free—including a number of people accused of war crimes—seemed unacceptable to KFOR. It would have undermined their efforts to establish a secure environment. On 22 December 1999, UNMIK addressed the quandary by issuing UNMIK Regulation 26, which read that "in order to ensure the proper administration of justice," detainees could be held for a full year if they were suspected of serious crimes.[151] Yet Regulation 26 did not resolve the issue of ethnic bias within the emergency judicial system; international observers claimed that those criminal suspects most often released in

[148] *Ibid*.
[149] Rausch, 283.
[150] OSCE DHRRL.
[151] UNMIK/REG/1999/26, available at <http://www.unmikonline.org/regulations/1999/reg24-99.htm>.

accordance with Regulation 26 disproportionately tended to be Kosovar Albanians who had "connections" to powerful stakeholders, while Serbs and members of other minority ethnic groups remained subject to prolonged, arbitrary detention.[152]

In the third critical juncture, yet again, the security-based approach won out. This trade-off demonstrates the importance of action that remains consistent with international human rights standards on the part of policymakers. It reveals the pitfalls of a double standard, in which regulative precedent does not bind interveners to law. In the fourth critical juncture, as vigilantism and violence renewed, intervention forces made virtually no attempt to protect the targets of the violence. The resultant tensions between the security-based approach and the norms-based approach alienated entire communities within Kosovo.

Critical Juncture 4: The Riots of March 2004

On 17-18 March 2004, precipitated by sensational, inaccurate reports that Serbs had been responsible for the drowning of three Kosovar Albanian children, Kosovar Albanian crowds violently rioted throughout Kosovo.[153] At least 33 major riots broke out, involving an estimated 51,000 participants, and for nearly 48 hours the security organizations in Kosovo—KFOR, CIVPOL, and the KPS—completely lost control.[154] After two days of riots, Kosovar Albanian crowds had

[152] Stromseth et. al., 321.
[153] "Failure to Protect: Anti-Minority Violence in Kosovo, March 2004," Human Rights Watch, July 2004 Vol. 16 No. 6 (D), 1.
[154] See generally: *Ibid*.

looted and burned at least 550 homes and 27 historic Serbian Orthodox churches and monasteries, which resulted in the displacement of approximately 4,100 Serbs and members of other minority ethnic groups. Ultimately, the riots of March 2004 represented the most serious setback to the international community's efforts to reconstruct a multi-ethnic Kosovo in which both the government and the general population respect the rule of law.

KFOR, CIVPOL, and the KPS failed in their mandates to protect Serbs and members of other minority ethnic groups from the violence; in several documented cases, the security organizations left them entirely unprotected.[155] In Svinjare, for example, French KFOR failed to come to the assistance of besieged Serbs, though their main base was just a few hundred meters away. French KFOR also failed to respond to besieged Serbs in Vucitrn, located between two major French KFOR bases. Similarly, in Belo Polje, almost adjacent to the Italian KFOR main base, Italian KFOR refused to assist besieged Serbs, forcing them to run for several hundred meters through the rioters before eventually evacuating them; Belo Polje burned to the ground. In Prizren, despite calls for assistance from CIVPOL, German KFOR also failed to protect besieged Serbs, as well as the many historic Serbian Orthodox churches and monasteries. Even in Pristina, the capital, Serbs barricaded themselves into their apartments for nearly six hours before KFOR and CIVPOL responded, as Kosovar Albanian crowds looted and burned the apartments below and around them.

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[155] *Ibid*, 2.

The failure of KFOR and CIVPOL to effectively respond to the violence left the provision of security mainly in the hands of the KPS.[156] The locally recruited KPS units, however, many of them recently trained, were poorly equipped to manage the violence. Some KPS units acted professionally and courageously, risking their own lives to rescue Serbs and members of other minority ethnic groups. Other KPS units, however, stood by idly as Kosovar Albanian crowds looted and burned homes and attacked Serbs and members of other minority ethnic groups. Some KPS units demonstrated ethnic bias, arresting only Serbs and members of other minority ethnic groups defending their homes, while ignoring the activities of the Kosovar Albanian crowds. Still other KPS units were accused of taking active part in the violence.

A number of factors sparked the riots of March 2004, including persistent ethnic bitterness, the uncertain final status of the province, and a lack of economic development.[157] The riots demonstrated the frustration of the local population, as well as the lack of preparedness on the part of KFOR, CIVPOL, and the KPS—evidenced by their inability to curb the violence until after 19 people had been killed, more than 900 people had been injured, and more than 550 homes and some 27 Serbian Orthodox churches and monasteries had been burned.[158] At the formal level, the riots revealed that UNMIK had not put in place the types of institution-based reforms needed to prevent the recurrence of violence and the

[156] See generally: "Collapse in Kosovo," ICG Europe Report N°155, 2004, available at <http://www.crisisgroup.org/~/media/Files/europe/155_collapse_in_kosovo_revised.pdf>.
[157] Rausch, 304.
[158] *Ibid*, 305.

renewed collapse of functioning security institutions. At the substantive level, the riots confirmed that the mission had failed to consolidate a normative commitment to the rule of law within the local population, as belligerents and other spoilers realized that they could effectively challenge the international security organizations. In the end, Serbs and members of other minority ethnic groups essentially lost all remaining trust in the mission.

In the fourth critical juncture, neither the security-based approach nor the norms-based approach won out in the purported trade-off. Interveners failed to meet the ends of either approach, which led many local actors to question their commitment to the rule of law project in Kosovo.

Overall, the examination of the four critical junctures above illustrates the importance of balance between the two approaches to rule of law reform in post-conflict environments. In all four junctures, policymakers were faced with decisions over establishing law and order, and their choices between security efforts and normative expectations had a significant impact on long-term rule of law efforts. The following section concludes the paper by summarizing these findings in the context of the large theoretical debates, examines the wider applicability of the study's findings, and suggests avenues for future research.

SUMMARY OF FINDINGS

Overall, my analysis demonstrates how the tensions between the security-based approach and the norms-based approach create a dilemma for policymakers, which then complicates efforts to promote the rule of law. Policymakers are often pushed to choose between the short-term ends of the security-based approach and the long-term ends of the norms-based approach. The inherent contradictions between the two competing approaches may be a significant explanation for why rule of law reform efforts in post-conflict environments so often fail. Based on an examination of the trade-offs between the two approaches and their effects at four critical junctures in the trajectory of rule of law reform in Kosovo, this project suggests that when interveners pursue only the short-term ends of the security-based approach, it typically results in either failure to provide a secure environment, failure to consolidate rule of law principles within the government and the general population, or both.

The lack of systemic and strategic integration of the security-based approach and the norms-based approach plagued Kosovo, and suggest the need for a new approach to improve rule of law reform in post-conflict environments in the future. First, interveners should consider pre-existing conditions and implement policies that demonstrate an understanding of cultural and political issues. Second, interveners should limit their tendencies to centralize decision-making and marginalize input from local actors. Third, interveners should demonstrate a commitment to international standards in order to avoid the

emergence of a double standard. Fourth and finally, as they promote the rule of law, interveners must simultaneously work to effectively facilitate inter-communal peace and minimize the resurgence of large-scale violence between warring factions.

What is the potential for this framework to be applied more generally to post-conflict environments outside of Kosovo? A quick examination of recent rule of law reform efforts in a number of other countries suggests that the trade-off between the security-based approach and the norms-based approach may indeed be a larger problem plaguing post-conflict environments. In Haiti, for example, early successes in police reform were undermined and eventually defeated by insufficient progress in reform of the legal and judicial systems.[159] Similarly, in East Timor, the major focus of rule of law reform efforts was on police reform, rather than the more difficult task of building the capacity of effective, legitimate legal and judicial systems.[160] In Liberia, interveners tended to concentrate on the most immediate security concerns, with a narrow focus on establishing law and order in the short-term, yet they left most low-level security concerns unchecked.[161] Likewise, in the cases of El Salvador and Guatemala, scholars note that arbitrary arrests and detentions were largely ineffective as part

[159] Roland Paris and Timothy D. Sisk, "The Dilemmas of Statebuilding: Confronting the Contradictions of Postwar Peace Operations" (New York: Routledge, 2007).
[160] "A Review of Peace Operations: A Case for Change." *East Timor Study* (London: Conflict, Security and Development Group, King's College, 2003).
[161] Jennifer M. Hazen, "Violence in Liberia: Falling Between Peacekeeping and Peacebuilding," *Conflict Trends*, Issue 3 (2011).

of the long-term strategy for rule of law reform.[162] Even in what are considered to be the most "successful" cases of recent rule of law reform in post-conflict environments, such as Cambodia, Burundi or the Democratic Republic of Congo, scholars remind us that institutional reform was more superficial than sustainable.[163] Future research should thus explore the effect of this trade-off in other post-conflict cases. Doing so may enable us to better identify the reasons for the failure of rule of law reform efforts in so many post-conflict environments and in turn generate more effective policy solutions to bring rule of law where it is often needed most.

[162] "Protect and Serve? The Status of Police Reform in Central America" (Washington, D.C.: Washington Office on Latin America, 2009).
[163] Paris and Sisk.

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