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State-Building, the Social Contract, and the Death of God

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In the past decade, "state-building" has moved from the margins to the mainstream. Bold experiments in East Timor and Kosovo have led to the creation of the independent state of Timor-Leste and the embryonic Republic of Kosovo. Less successful experiments continue in Afghanistan and Iraq. In each instance, many people assumed — wrongly — that it was the first time anything like this had ever happened, and the last time it ever would happen. Now a cottage industry of grants and conferences offers endless opportunities to revisit a senior official's epithet on UN policy planning: "No wheel shall go un-reinvented." This essay considers the past and the future of efforts to build or rebuild institutions of the state in fragile and conflict affected countries, focusing on the difficulty of balancing the need for local ownership against the imperatives that led to foreign intervention in the first place.

Two thousand and nine is a year of many anniversaries for the state-building project. It is ten years since the United Nations began its bold experiments of state-building in East Timor and Kosovo, now the independent state of Timor-Leste and the embryonic Republic of Kosovo. It is twenty years since Namibia held elections in the course of becoming independent, heralding a new post-Cold War activism (Berdal and Economides, 2007). It is also ninety years since the League of Nations established the Mandates System, which — even though it applied only to the colonies of enemy states defeated in the Great War — marked the beginning of the end of colonialism.

From the perspective of international law, the century in which all these things took place saw two remarkable transformations in content, and one major change in structure. The structural change was the move from bilateralism to multilateralism; the shift from, as it were, contract to social contract (Maine, 1861: 100, Weiler, 2004). This could be seen in, among other things, the creation of the League of Nations, its successor the United Nations, and vague references to the existence of an "international community".

The first change in the content of international law was clearly related to this new structural paradigm: the prohibition on the use of force (Brownlie, 1963). Now the twentieth century was, by any measure, the bloodiest in human history. But it remains remarkable that today we tend to regard peace as the norm and war as the exception. For most of human history it had been the other way around: the very word "peace" derives from the Latin *pax*, meaning an agreement — a pact — to refrain from hostilities (Neff, 2005: 29-38).

The second major change in content was more ambiguously related to the new paradigm: the discrediting of colonialism. When the United Nations was established, around 700 million people — about a third of the world's population at the time — lived under foreign control. Today the number of people in non-self-governing territories is more like 700,000.

Many of the drivers of these changes were political. It took two world wars to entrench the prohibition on the use of force; resistance on the part of colonial peoples clearly played a key role in throwing off the yoke of oppression. Some drivers were economic: new powers such as the United States, for example, found more efficient means of obtaining the benefits of colonialism without actually having to run a formal empire (Raghavan, 1990, Chandler, 2006). But it was law that typically provided the vocabulary and the tools for consolidating and implementing these changes.

So I would like to take the opportunity of this anniversary, this set of anniversaries, to look backwards at what we have learned about the role of law in state-building and forwards at how we might improve on our recent experiments.

The essay starts with a brief survey of the burgeoning literature in this area and the different approaches that authors have taken — and those that they have not taken. It then attempts to reframe the relationship between law and state-building in terms of the social contract that defined the evolution of the modern state. The last section of the essay attempts to map out what that might mean in practice.

1   No Wheel Shall Go Un-Reinvented

The literature on state-building is, by now, enormous. Part of that size is because of the slippery definition of what, exactly, is being discussed. For some, "state-building" means the very limited set of cases in which external actors have assumed some or all of the trappings of sovereignty. This is frequently referred to as international territorial administration and embraces the most prominent cases such as Kosovo, East Timor, and Iraq.

As we have come to realize that these cases were rather unusual, a broader definition has been adopted by many commentators and practitioners. This encompasses a wider range of efforts to support the institutions of the state and places more emphasis on the role to be played by national actors. The Report of the Secretary-General on Peacebuilding issued in June 2009, for example, repeatedly emphasizes that primary responsibility lies with national actors, though the "international community" can play a critical role (Report of the Secretary-General on Peacebuilding in the Immediate Aftermath of Conflict, 2009).

The danger, of course, is that one slips into the language of peacebuilding — a term often defined so broadly as to embrace virtually all forms of international assistance to or engagement with countries that have experienced or are at risk of conflict (Cousens, 2001: 5-10).

For the purpose of clarity, I will define state-building as "extended international involvement (primarily, though not exclusively, through the United Nations) that goes beyond traditional peacekeeping and peacebuilding mandates, and is directed at constructing or reconstructing institutions of governance capable of providing citizens with physical and economic security. This includes quasi-governmental activities such as electoral assistance, human rights and rule of law technical assistance, security sector reform, and certain forms of development assistance." (Chesterman, 2004: 5)

Across these definitional divides, most of the literature tends to focus on one or more of four basic questions. The first is, simply, what happened? This encompasses the wide range of historical studies of particular cases, with shelves of books on some cases, such as Bosnia, alone. We may think of these as the *Lonely Planet™* travel guides of the field (Doyle, 1995, Woodward, 1995, Chandler, 1999, Saltford, 2002, Ignatieff, 2003, Dobbins, et al., 2009).

The second question is: how can we do this better? Initially this literature had to push against the exceptionalist understanding of Kosovo and East Timor: the view that these operations were the first time anything like this had ever happened, and the last time it ever would happen. A cottage industry of grants and conferences now offers endless opportunities to revisit Alvaro de Soto's epithet on UN policy planning: "No wheel shall go un-reinvented" (Dobbins, et al., 2003, Page Fortna, 2004, Paris, 2004, Caplan, 2005, Dobbins, et al., 2005, Stromseth, et al., 2006, Call, 2008, Berdal, 2009, Chetail, 2009). These are, perhaps, the functional equivalent of *State-building for Dummies™* — the RAND Corporation has, in fact, published a *Beginner's Guide to Nation-Building* (Dobbins, et al., 2007) — with subgenres on security sector reform, running elections, promoting the rule of law, kick-starting the economy, and so on.

A third set of books examines some of the interesting legal uncertainties that have arisen in this context, such as the legal basis for the activity, the status of such territories, and the accountability structures applicable to so-called "internationals" (Knoll, 2008, Stahn, 2008, Brabandere, 2009). These tend to be more narrowly targeted in their appeal, often deriving from doctoral dissertations. The cliché here is sometimes accurate, with the academic expert learning more and more about less and less.

The fourth set of books examines the more theoretical question of what this phenomenon means for sovereignty and the institution of the state. Some writers approach this as indicating the arrival of a brave new post-sovereign world (Zaum, 2007); others see in it echoes of the colonialism — even if benevolent in intent — of the past (Zisk, 2004, Chandler, 2006, Wilde, 2008). This last category is the most speculative and blends into the wealth of literature on sovereignty and the state more generally. A vast amount was written in the 1990s on the death of the state — I wrote some of it myself — and the vast majority of it was utterly wrong.

Sovereignty, of course, has changed. With a few exceptions, the state is no longer identified with the person of the prince; in 2005 every member state of the United Nations accepted the vague formulation of a "responsibility to protect" those within their jurisdictions (Evans, 2008, Bellamy, 2009). But the state remains the fundamental political unit. Human rights activists would largely agree that although states are the primary violators of rights, legitimate and sustainable state institutions are the only viable means to protect and promote them. Security hawks since September 11 have worried more about failing states than conquering ones (The National Security Strategy of the United States of America, 2002). And, more recently, we have seen that despite the enormous transformations associated with globalization, rescuing the global financial architecture required the coordinated action of state agencies.

So it is good that we have this literature on state-building. But surveying the field it is striking that there is a lot more energy spent on *how* to do this than on *why*. The "why" question is important because it leads to the corollary *for whom*.

So why do we find ourselves engaged in this enterprise? Why did the Bush administration move from announcing that "we don't do nation-building" (Doyle and Schrader, 2001) to attempting two of the most ambitious state-building projects in modern history? Why did the United Nations, which could not agree on saying anything substantive about state-building in the 2000 Brahimi report (Report of the Panel on United Nations Peace Operations (Brahimi Report), 2000), create a Peacebuilding Commission just five years later?

The formal justifications offered tend to focus on the target states. Broadly two-and-a-half categories of cases can be identified. The first is situations in which internal governance structures are incapable of exercising effective control. This may be in the aftermath of conflict — as in East Timor, Afghanistan, and Iraq — but also encompasses circumstances in which developmental and political efforts are intended to prop up weak governments. The second is situations in which internal governance structures might be effective but are deemed illegitimate. This may be due to the unrepresentative nature of the regime, or to fears that a regime will use the powers of the state to oppress minority groups. Examples include Bosnia and Kosovo.

We can think of these as the *incapacity* and *malevolence* scenarios and they have some descriptive appeal. But as an analytical tool they are weak. Notably they imply that this is a demand-driven enterprise when none of the most important cases cited above occurred in the continent with the biggest need: Africa. Following the slightly broader definition I have adopted there are, of course, state-building operations in various African countries. But it is noteworthy that these have enjoyed neither the broad mandates nor the deep resources given to operations in Europe and elsewhere.

So let us consider the "why" questions on the supply side. Here different schools of international relations would point us in different directions. Realists would point to self-interest: Kosovo stabilized the Balkans and avoided an embarrassing loss of face before the upstart Milosevic; East Timor prevented a flood of refugees into Australia; Afghanistan is an ongoing attempt to remove a base for terrorism; Iraq was a failed attempt to assert US dominance in the Middle East that became a desperate effort to stabilize the country with the second largest oil-reserves in the world.

Idealists or liberal institutionalists might point to the role that law and international organizations played: Kosovo stood up for the promise of human rights in Europe; East Timor was a concluding chapter in the dark history of colonialism; Afghanistan and Iraq were wars of necessity and choice, respectively, but both acknowledged the obligation to leave behind a better state than one found. (This has become known as the "Pottery Barn principle", articulated by Colin Powell before the Iraq war: "You break it, you own it." (Woodward, 2004: 150) Interestingly, Pottery Barn itself — an upscale home-furnishing store with outlets across the U.S. and Canada — has no such rule and just writes off broken merchandise as a loss (Huntley, 2004).)

Constructivists would look to the manner in which ideas shaped the foreign policy choices available: Kosovo saw Europe trapped by its human rights fetishism and NATO by its ill-considered ultimatums to Milosevic; East Timor was a perfectly timed crisis that allowed the West to say they didn't only rescue white-skinned victims in Europe; Afghanistan began as revenge but quickly transformed into a hearts and minds exercise driven by the moralistic rhetoric of the US; Iraq also saw the US trapped in its own rhetoric of benevolent imperialism.

And so on. It is not possible to come up with a conclusive answer to the "why" question, except to say that the various hypotheses sketched out are broadly consistent in that they reflect a divergence between the interests of national actors and those of their international counterparts. This deduction is borne out in practice, with the political, military, economic, and human resources available being driven more by the interests of the supplier than the needs of the recipient.

Which returns us to the "for whom" question, with very different answers, say, if the purpose of a state-building operation is to reduce the chances of a terrorist attack on Americans or maintain the flow of oil, as opposed to making Afghanistan or Iraq a decent place in which to live (Hehir, 2007).

But it also poses more general and fundamental problems for the state-building enterprise as it highlights a key disjunction between what we might think of as postmodern state-building and the emergence of the modern state. I would like to explore this in the second part of my essay by reviving a slightly worn idea in political theory: the social contract (Deng, 1996: xviii).

2 The Social Contract and the Death of God

The term social contract has come to be embraced by a range of traditions in political philosophy (Boucher and Kelly, 1994). The central idea upon which I wish to draw is that coercive political authority can be legitimized through the notion — either historical or hypothetical — of some kind of pact. (You will recall my earlier reference to the etymological link between "pact" and "peace".)

In its original formulation, Thomas Hobbes grounded this pact in a fairly base self-interest. Life in what he termed the state of nature was "solitary, poore, nasty, brutish, and short" (Hobbes, 1914: #ch. xiii); to escape this existence — "that miserable condition of war" — men ceded their natural rights to govern themselves to establish a common-wealth, creating centralized political authority in exchange for order (Hobbes, 1914: #ch. xvii).

Critics such as David Hume have long pointed to the absurdity of grounding the origins of government upon any actual agreement, and the dubiousness of asserting that citizens continue tacitly to agree to government today. In any case, Hume argued, such a promise could not provide the basis for ongoing political obligations as promises themselves are part of those political obligations rather than the foundation for them (Hume, 1962).

Now more nuanced contractarian theories, such as that of John Rawls, follow Kant in rejecting the literal contractual basis for political authority, but still use the idea of a social contract to describe a form of political association based on some measure of reasoned consent (Rawls, 1972).

What is interesting for our purposes is that Hume did not exclude the possibility of government by consent. He just thought it seemed pretty unlikely:

> My intention here is not to exclude the consent of the people from being one just foundation of government where it has place. It is surely the best and most sacred of any. I only pretend, that it has very seldom had place in any degree, and never almost in its full extent; and that, therefore, some other foundation of government must also be admitted. (Hume, 1962: 154)

Hume preferred to justify government on the basis of its usefulness in preserving order. He argued that this was preferable to the artifice of consent (associated in the eighteenth century with the Whigs) or the alternative position (adopted by the Tories) of the divine right of kings with political authority traceable up to God (Hume, 1962: 147).

So what does all this have to do with state-building? I think it suggests a modest analytical point and a more substantive political point.

The modest analytical observation is that the foundation of coercive authority in a state-building operation typically is *not* the consent of the governed. That is clearest in situations like Kosovo and East Timor, where internationals act without democratic checks and with various degrees of immunity from legal process. But it also applies to many situations where weak governments adopt unpopular policies in order to secure military assistance, please foreign donors, or gain entry into the global financial system (Branch, 2008).

So where does authority come from? The choices are unpalatable. If we reject the contractarian position, the alternative philosophical position with the longest history would be that we locate the origins of authority in God. Now to many nationals of these countries, that might not seem inconsistent with the manner in which internationals conduct themselves: as a kind of priestly class with a secret language of acronyms, communing with the absent representatives of an unseen deity. Alternatively we are left with Hume's somewhat unsatisfactory and circular argument that the institutions and rules must be accepted because society would otherwise not exist (Hume, 1962: 161).

The more substantive point concerns the implications for state-building policy: how do you get from benevolent despotism to democracy? This contradiction between means and ends is something on which many have written. It includes the political question of whether you can establish the conditions for legitimate and sustainable national governance through a period of foreign autocracy. It also includes the interesting theoretical challenge posed by the admixture of idealism and realism: the idealist view that a people can be saved from themselves through education, economic incentives, the space to develop mature political institutions, and so on; and the realist basis for that project in what is ultimately military occupation or coercion (Chesterman, 2004: 1).

But a more interesting point is, perhaps, whether you *ever* really get to meaningful democracy. The idea of a social contract was traditionally that a state provides basic goods to its citizens in exchange for authority to raise an army, collect taxes, and exercise power on their behalf. Such a relationship is reinforced by democratic structures and reflects the theory (at least) of most industrialized countries. In the developing world, however, many governments are now engaged in a kind of *external* social contract: complying with foreign standards in order to receive official development assistance and gain entry into the global financial system. Such a dynamic may actively undermine democratic processes (Rubin, 2005).

This is the import of the "for whom" question, and it points to a fundamental problem in the effort to establish legitimate and sustainable national governance. If our end state is determined primarily by external considerations, those standards may not be consistent with democracy-reinforcing political structures and may in fact weaken them.

We see this in some of the quasi-democratic endgames of a number of state-building efforts. The dilemma for many leaders is how to keep foreigners happy and aid flowing, while at the same time establishing their local democratic credentials or political authority. The reason it is a dilemma is that you can do one or the other, but rarely both. In the Balkans, the search for alternative leaders to, say, Milosevic was given the kiss of death when a picture of a candidate being embraced by Madeleine Albright was produced. In Iraq, those who collaborate with the Americans are targeted more often than the Americans themselves. Afghanistan is an interesting case where the window of opportunity for supporting a truly popular local leader seems to have passed. If Hamid Karzai had been supported with many more troops in 2002 and 2003, this would have reinforced his democratic credentials. Instead, with resources diverted to Iraq, Karzai turned to the warlords with predictable results. Today the United States and its allies face unpleasant choices between supporting him despite his clearly *un*democratic victory, or throwing him under a bus and starting again with the relatively unknown quantity of Abdullah Abdullah at a point when US support may hurt rather than help. The United States also has significantly less leverage than it did in, say, the Balkans. There, Richard Holbrooke could essentially lock people in a room and scream at them until they came around. Now with the "AFPAK" brief, Holbrooke appears to realize that such browbeating will not work, but it is not clear what other metier he has.

This points to the great irony of many state-building operations. We say that our endgame is to build a legitimate and sustainable state. But in some situations, the only way to succeed in that aim is to *fail*. By this I mean that local legitimacy will often be secured independently of and sometimes in the face of international support. The proof that we have done our job, if you like, is that the people we are helping can kick us out and make it on their own. Picking up my philosophical leitmotif, if coercive political authority in a state-building operation can be likened to the divine right of internationals, the shift to a social contract model of democratically-reinforcing national political bonds may require a Nietzchean moment — the moment in which the subjects kill God.

"God is dead. God remains dead. And we have killed him.

"How shall we comfort ourselves, the murderers of all murderers? What was holiest and mightiest of all that the world has yet owned has bled to death under our knives: who will wipe this blood off us? What water is there for us to clean ourselves? What festivals of atonement, what sacred games shall we have to invent?" (Nietzsche, 1974: 181)

I note that this is metaphorical. Metaphorical in the sense that I am not advocating the assassination of senior representatives of the United Nations, the World Bank, and so on. But also metaphorical because in Nietzsche's account the death of God is realized only in retrospect. The killing is less important than the obligations it imposes on the killers:

"Is not the greatness of this deed too great for us? Must we ourselves not become gods simply to appear worthy of it?" (Nietzsche, 1974: 181)

I should, perhaps, also add that Nietzsche's famous passage is presented not as his own words but as the ravings of a madman who elicits much laughter. Yet to me the interesting point is that this intentionally provocative formulation captures, I think, something of the dilemma for the national leaders who must deal with their international counterparts.

3 Fail Again, Fail Better

So, finally, what might this mean in practice? (Apart from, perhaps, suggesting the need for caution when circulating Enlightenment philosophy in state-building operations.) I would say that it suggests three things: one trite, one cynical, and one idealistic.

The first point is the trite one — though it bears repeating — that we need to learn more about the states we are purporting to build. In particular, however, international actors might want to do more to understand the specific political position of their national counterparts. To "climb into [their] skin and walk around in it", as Atticus Finch advised his daughter in *To Kill a Mockingbird* (Lee, 1960: 36). In some circumstances it will be helpful for internationals to take the lead and the credit, as Peter Galbraith and others did when negotiating on behalf of the Timorse with Australia over resource rights in the Timor Gap — thereby confining Australian ire to the UN staff who would later leave and make trouble elsewhere. But more often it is necessary to look for ways in which the substance and the form of any decision can reinforce rather than undermine the legitimacy and sustainability of national governance structures.

This brings up the second, cynical, point: the relevance of ownership. Now I think everyone would accept that local ownership is the intended end of any state-building operation. But it tends not to be the means of achieving it. There is usually a reason why international actors have assumed governance responsibilities; typically this is either the malevolence or incapacity of existing governance structures. Intervention is premised on the need to transform or build those structures, rather than to maintain them (Chesterman, 2007). What I have tried to do here is to point to the difficulties of making that transition, and suggest that it goes beyond the Kosovo and East Timor-type situations to challenge development actors more generally. The lens of the social contract may be of some use in evaluating the impact of policies not merely on the economy but on the political system more generally.

Thirdly, and perhaps idealistically, all this suggests to me that we should start thinking about law slightly differently in state-building operations. The dominant focus in the legal discourse tends to be on questions of transitional justice, which is of course important and has a whole literature of its own. In addition there is a great deal of activity in the area of rule of law or the justice or security sector, though this tends to coalesce around extremes of technical quick-fixes or rhetorical abstractions. A number of countries today have state-of-the-art court management software and no judges; others have fine constitutional protections and no police force to uphold them. (Afghanistan, just to pick one case, has a robust constitution that provides among other things for elaborate guarantees even in the event that the president declares a state of emergency. In fact, despite its troubled recent history Afghanistan has never invoked these provisions. Some Afghan scholars and watchers wryly speculate that the government might instead one day declare a state of "normality.")

As I hope I have shown, law also plays an important role in shaping the relationship between ruler and ruled, one that can be in a mutually reinforcing relationship with democracy. It is not always understood in that way, however. The "rule of law" for example, is often promoted by the officials of donor governments as a means of advancing human rights and liberal democracy; yet their counterparts in the post-colonial states have tended to embrace law as a means to augment centralized authority rather than to restrain it (Chesterman, 2008: 340).

Again, the lens of the social contract may help in evaluating the manner in which constitutional structures can support rather than undermine democratic values. Consider, if you will, the Constitutional Framework for Provisional Self-Government adopted by UNMIK in Kosovo in 2001. In the preamble, it provides that the Special Representative of the Secretary-General,

> Determining that, within the limits defined by UNSCR 1244(1999), responsibilities will be transferred to Provisional Institutions of Self-Government which shall work constructively towards ensuring conditions for a peaceful and normal life for all inhabitants of Kosovo, with a view to facilitating the determination of Kosovo's future status through a process at an appropriate future stage which shall, in accordance with UNSCR 1244(1999), take full account of all relevant factors including the will of the people …
>
> Hereby promulgates the following… (Constitutional Framework for Provisional Self-Government in Kosovo, 2001)

It's not quite "We hold these truths to be self-evident…" Compare it with the preamble to the Constitution that Kosovo adopted in April 2008:

> We, the people of Kosovo,
>
> Determined to build a future of Kosovo as a free, democratic and peace-loving country that will be a homeland to all of its citizens;
>
> Committed to the creation of a state of free citizens that will guarantee the rights of every citizen, civil freedoms and equality of all citizens before the law …
>
> In a solemn manner, we approve the Constitution of the Republic of Kosovo. (The Constitution of the Republic of Kosovo, 2008)

It's better text, but it is also important that this was adopted in the face of some international resistance — and that that resistance enhances rather than undermines the legitimacy of the document. Though perhaps only for the Kosovar Albanians and not so much the Serbs (Bilefsky and Brunwasser, 2009, Hehir, 2009: 139-140).

Even in relative success, then, there is an element of failure.

Conclusion

As we celebrate these various anniversaries — the nine decades since the Mandates Commission, two decades since Namibia, one since Kosovo and East Timor — it is useful to look back on what we have learned about state-building. In this proliferation of practice and literature, I think much of it boils down to a single word. If we have learned anything — if we *should* have learned anything — it is modesty.

Modesty about our ability to understand and take decisions for populations that have their own history, their own culture, and their own political aspirations. Modesty about our ability to match the powerful and blunt means at our disposal to the nuanced and complicated ends of a self-sustaining political system. And modesty as to our ability to manage the process when that political system begins to run itself and realizes that "we" may be getting in the way.

For states cannot be built from the outside. International assistance may be necessary, but it is never sufficient to establish institutions that are legitimate and sustainable. This is not an excuse for inaction, if only to minimize the humanitarian consequences of a state's incapacity to care for its vulnerable population. Beyond that, however, international action should be seen as part of a process complementary to the creation of local processes, providing resources and creating the space for national actors to start a conversation that will define and consolidate their polity by mediating their vision of a good life into responsive, robust, and resilient institutions (Chesterman, et al., 2005: 384).

I am not saying that we should not keep trying. In the history of international affairs a decade or two is a short period. And there is some reason to hope that things are improving, perhaps due in small part to the work that many of us do on this topic. So while I am not triumphant about the prospects for state-building, I'm not fatalistic either. I tend to fall back on a line from Samuel Beckett — who, as it happens, died a month after the Namibian elections in 1989. This line comes from one of his last pieces of prose, "Worstward Ho" (Beckett, 1983: 7), and captures, I think, both the history, the difficulties, and the imperatives of state-building: "Ever tried. Ever failed. No matter. Try again. Fail again. Fail better."

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