

State-Building, Nation-Building, and Constitutional Politics in Post-Conflict Situations: Conceptual Clarifications and an Appraisal of Different Approaches

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I. Defining the Issues

1. A Useful Distinction

After military defeats of political regimes or civil wars, one crucial problem of the rebuilding efforts in general and the constitutional process in particular can be termed as follows: does the country need only state-building or nation-building as well? The problem is not terminological, but substantive.¹

a. State Failure and State-Building

State failure can be defined as the failure of public institutions to deliver positive political goods to citizens on a scale likely to undermine the legitimacy and the existence of the state itself.² State failure occurs in respect to a wide range of political goods of which the most important ones are the provision of security, a legal system to adjudicate disputes, provision of economic and communication infrastructures, the supply of some form of welfare policies, and increasingly also opportunities for participation in the political process. The degree to which individual

¹ The difference between state building and nation building is not always appreciated. Simon Chesterman uses only the term state-building, because, he claims, nation-building is specific to post-colonial situations. James Dobbins and his co-authors at RAND solve the problem in an equally sweeping, but opposite fashion by declaring all US involvements in post-conflict reconstruction, from Germany to Iraq, to have been exercises in nation-building. Francis Fukuyama acknowledges that there is a distinction between state-building and nation-building but his usage of both terms would suggest that he regards nation-building as a term employed in the language of politics describing what he – in academic discourse – calls state-building. See J. Dobbins et al., *America's Role in Nation Building: From Germany to Iraq*, 2003; S. Chesterman, *You, the People: The United Nations, Transitional Administration, and State-Building*, 2004; F. Fukuyama, *State-Building: Governance and World Order in the 21st Century*, 2004; J. Hippler (ed.), *Nation-Building: Ein Schlüsselkonzept für friedliche Konfliktbearbeitung?*, 2004.

² R.I. Rotberg, “Failed States, Collapsed States, Weak States: Causes and Indicators”, in: R.I. Rotberg (ed.), *State Failure and State Weakness in a Time of Terror*, 2003, 1 et seq.

states are capable of delivering those political goods significantly influences their relative strength, weakness, or failure.³

A number of indicators for state weakness potentially leading to state failure have been identified: disharmony between communities, inability to control borders and the entirety of the territory, a growth of criminal violence, corrupt institutions, and a decaying infrastructure.⁴ In Europe, a number of post-communist countries exhibit some of these symptoms. While the scope of public services has been reduced in almost all Eastern European countries and open criminal violence has increased after the fall of communism, the new Caucasian states in particular have had grave difficulties in establishing their territorial integrity as well.

State weakness does not necessarily mean under-performance in all those categories. A number of states appear to be strong in terms of government institutions and control of territory while failing to deliver political goods, especially public services, to their citizens, such as North Korea, Belarus, pre-war Iraq, or Cambodia under Pol Pot.⁵ In such countries, however, the state structure consists largely of the coercive structure, so that the state is likely to collapse together with its coercive structure.

There is a great variety of causes for state failure. In addition to those already mentioned, economic underdevelopment, failures made by the former colonial powers in general and the drawing of arbitrary post-colonial borders in particular, lack of democracy, misgovernment, widespread poverty, heavy dependence on foreign aid, problematic programs by international institutions such as the IMF or the IBRD are of particular importance.⁶ Each case is different and needs to be evaluated on its own merits.

It is possible, though, to identify two fundamental categories of state failure: cases which do not alter the underlying willingness of the population to accept rules, decisions and measures adopted by a common government on the one hand, and cases which do alter this disposition, on the other. The latter can be called *nation failure* and will be discussed

³ Ibid.

⁴ Ibid., 5-7.

⁵ Ibid., 5; E.K. Jenne, "Sri Lanka: A Fragmented State", in: Rotberg, see note 2, 219 et seq. (219-223).

⁶ On the various causes, see C.A. Crocker, "Engaging Failing States", *Foreign Aff.* 82 (2003), 32 et seq.

in greater detail below. The former is the less complicated variant and most likely to respond to state-building measures.

Hitherto the description of indicators, symptoms and categories of the “failed states” - doctrine and the enumeration of different causes eventually leading to state failure have suggested that we would be dealing with determinate terms. Moreover, it seemed that the identification of a state as a “failed state” is obvious. Both assumptions are misleading and disregard the problems of the “failed state” - doctrine. Concerning the alleged determinacy of the respective criteria of “failed states” we must, first of all, confront an irritating multiplicity of different terms. Authors not only mention “failed states”, but also refer to “failing states”, “states of perpetual weakness”, “deteriorating”, “disintegrating”, “collapsed”, “chaotic”, “non-liberal” or “rogue states”.⁷ Very rarely these terms are being defined or elaborated.

What is meant exactly when a state is characterized as a failed state thus often remains vague and it seems extremely difficult to come to the conclusion “where, or if, this is indeed the state of events in any particular situation.”⁸ Instead of a precise, consistent or workable definition a multitude of lists and examples circulate in the political and legal discourse and it is not always clear why a particular state is mentioned, whereas others are disregarded. In consideration of the vagueness of the criteria and the inevitable subjectivity of every classification this comes as no surprise. Firstly, hardly any country will ever fully meet all criteria and, secondly, as the term “failing state” indicates more clearly, we mostly observe ongoing processes of weakening and failing instead of a situation in which the “failing state” arrives in a final form. This also makes it difficult to control the application of these criteria. Thirdly, the “facts” are almost never clear but rather controversial and disputed. To speak of a “crisis” is the result of an assessment of particular circumstances, not the simple reproduction of an objective reality. But the constructive elements are far from being restricted to the characterization of a state as a “failed state”, rather one can find them in the perception of the author’s own role, too.

Confronted with a crisis in a “failed state”, we easily “cast ourselves grandly in a heroic mould”, “develop a deep personal and professional investment in crisis” and create an image of ourselves as “problem-solvers and cool professional realists imbued with humanitarian mo-

⁷ For the latter, P. Minnerop, *Paria-Staaten im Völkerrecht?*, 2004.

⁸ R. Gordon, “Saving Failed States: Sometimes A Neocolonialist Notion”, *Am. U. J. Int’l L. & Pol’y* 12 (1997), 903 et seq. (906).

tives.”⁹ Concrete policies and measures, adopted on this basis, can evolve disadvantageous effects for and in “failed states”. Finally, we should deal carefully with the “failed states” - doctrine because of its tendentious susceptibility for being misused for imperial or hegemonic interventions. In reaction to the propagation of a “new form of colonialism”¹⁰, some authors have already worked out the relative nearness of the rhetoric of “failed states” to a recurrence of colonialism and new forms of colonialism, respectively. So when using the “failed states”-doctrine it is advisable to ask to what extent typical patterns of colonialism emerge, like the assumption of the inability of “failed states” to self-determination or a natural superiority of western administrations and governments. In other words, any analysis of issues surrounding the “failed states” - doctrine should omit the possible neo-colonialist and colonialist aspect.¹¹

*State-building*¹² means the establishment, re-establishment, and strengthening of a public structure in a given territory capable of deliv-

⁹ H. Charlesworth, “International Law: A Discipline of Crisis”, *The Modern Law Review* 65 (2002), 377 et seq. (387 et seq.). For the construction of passive victims and the heroic and good-hearted “agents of freedom, order, democracy, liberalisation transparency, humanitarianism and human rights”, see also, A. Orford, “Embodying Internationalism: The Making of International Lawyers”, *Australian Yearbook of International Lawyers* 19 (1998), 1 et seq. (2 et seq.); A. Orford, “Muscular Humanitarianism: Reading the Narratives of the New Interventionism”, *EJIL* 10 (1999), 679 et seq. (699).

¹⁰ W. Pfaff, “A New Colonialism”, *Foreign Aff.* 74 (1995), 2 et seq. “In the absence of an alternative”, Pfaff writes, this new colonialism “must be considered.” See also, P. Johnson, “Colonialism’s Back – and Not a Moment Too Soon”, *New York Times* of 18 April 1993, 22 (including the more traitorous subtitle “Let’s Face it: Some Countries Are just Not Fit to Govern Themselves”)

¹¹ H. Richardson, “Failed States, Self-Determination, and Preventive Diplomacy: Colonialist Nostalgia and Democratic Expectations”, *Temp. Int’l & Comp. L. J.* 10 (1996), 1 et seq. (8 et seq.). On the interdependencies between international law and colonialism, see also Gordon, see note 8, 903; A. Anghie, *Imperialism, Sovereignty and the Making of International Law*, 2005.

¹² The “building” terminology carries an association with a technocratic understanding of society, see K.W. Deutsch, “Nation-Building and National Development”, in: K.W. Deutsch/ W.J. Foltz (eds), *Nation-Building*, 1966, 1 et seq. (3).

ering public goods.¹³ Essential to state-building is the creation of sovereign capacities of which the fundamental one is the successful and generally undisputed claim to a “monopoly of the legitimate use of physical force”.¹⁴ To be sure, the aim of state-building is not the use of physical force, but rather the establishment of a state as a concentration and expression of collective power without the need to exercise coercion.¹⁵ This, however, can in most cases only be achieved if the source of power and the rules governing it are widely regarded as legitimate. The foremost source of legitimacy in societies today is ‘the people’, a concept which in substance calls for a balance between both the differentiation between the governing and the governed, and a bond uniting the governing and the governed at the same time.¹⁶ The idea of the ‘nation’ comprises all these elements and is thus often central to legitimizing state-building processes.¹⁷

The allied occupation and reconstruction efforts in Western Germany and Japan following World War II, but also the process in Cambodia or post-communist Poland are examples of successful state-building. The feature common to them all is their underlying and stabilizing sense of national identity which has never been disputed. Poland is a good recent example of a nation rebuilding its state. Despite the often painful nature of the transition, touching upon many aspects of a political culture deeply influenced by four decades of Communist rule, it is precisely the sense of national unity which has carried governments of different political persuasions through this process.¹⁸

¹³ Fukuyama, see note 1, ix.

¹⁴ M. Weber, *Soziologische Grundbegriffe*, 1984, 91. On “capacity”, see Fukuyama, see note 1, 7.

¹⁵ M. Canovan, “Sleeping Dogs, Prowling Cats, and Soaring Doves: Three Paradoxes of Nationhood”, in: M. Seymour (ed.), *The Fate of the Nation-State*, 2004, 19 et seq. (22).

¹⁶ D. Beetham, *The Legitimation of Power*, 1991, 64-99.

¹⁷ On the idea of the nation and the relevant literature, see R. Utz, in this Volume.

¹⁸ M. Glenny, *The Rebirth of History: Eastern Europe in the Age of Democracy*, 1990 provides an overview of the situation at the beginning of the 1990s. He does, however, point to corruption as one of the central problems in Eastern European societies, and it features in almost all analyses of state failure now. Crocker, see note 6, 34; Fukuyama, see note 1, 10. On the important example of a national consensus and its importance in the political and economic transition, see T. Garton Ash, *The Polish Revolution:*

b. Nation Failure and Nation-Building

In some cases of failed statehood, however, the failure is not limited to breakdown and illegitimacy of the structure of public power. Sometimes, the “basis” for that structure, i.e. the nation, is also substantially weakened. *Nation failure* thus describes a process in which the requirements of normal politics, the social substratum essential for the acceptance of majority and redistribution decisions, disappear.¹⁹ Nation failure is an aggravated form of state failure particularly relevant to multi-community states. The individual communities may define themselves by shared religion, class, language, or ethnicity, different to that of the other communities. Along these characteristics irreconcilable dissensions can emerge that make it unlikely if not impossible that government decisions will be adhered to.

Nation failure, therefore, occurs when in a particular state nationhood no longer provides the foundation of accepted public power. In other words: the cultural projection of a nation is no longer convincing to many; there is no consensus on the cultural traditions, customs, symbols, rituals, and the historical experience – there is no “usable past”.²⁰ A situation like this can descend into violence and civil war. The key moment here is when individual and mutually exclusive nationalisms replace the former common identity. Then militant and violent community leaders, often termed as ‘elites’, might create an atmosphere of fear in which war in the name of national self-defense appears to a significant part of the affected population to be not only a reasonable but, perhaps, even the only solution. The collapse of Yugoslavia, and the war in Bosnia-Herzegovina in particular, are examples of what can happen in such a case.²¹ Yet, as has been exemplified by analyzing the events during the Kosovo-Crisis in 1998/99, in many “crises” the above-mentioned disintegration of the population along religious, ethnic or linguistic criteria are not the only factors that trigger and intensify violent struggle. Usually the story is more complex.

Solidarity, 1991; F. Millard, *The Anatomy of the New Poland: Post-Communist Politics in its First Phase*, 1994.

¹⁹ Canovan, see note 15, 20-21. See also M. Canovan, *Nationhood and Political Theory*, 1996, 16-26, 68-74.

²⁰ On this, see Utz, see note 17.

²¹ For descriptions see L. Silber/ A. Little, *The Death of Yugoslavia*, 1995; M. Ignatieff, *Blood and Belonging: Journeys into the New Nationalism*, 1994.

In fact, wrong actions (like the withdrawal of international observers) or wrong strategies (like the absence of a sufficient legitimacy for a military attack or the drafting of a proposal that is obviously unacceptable for the negotiation partner) by powers who are attempting to influence the conflict in various ways can also be of importance for a particular conflict. In other words, the origins and forces of violent conflicts are seldom reducible to internal factors: the responsibilities of foreign governments, institutions and individuals have to be kept in mind.²²

Nation-building is the most common form of a process of collective identity formation with a view to legitimizing public power within a given territory. This is an essentially indigenous process which often not only projects a meaningful future but also draws on existing traditions, institutions, and customs, redefining them as national characteristics in order to support the nation's claim to sovereignty and uniqueness. A successful nation-building process produces a cultural projection of the nation containing a certain set of assumptions, values and beliefs which can function as the legitimizing foundation of a state structure.²³ So far, this has happened essentially in societies with substantial elements of "social modernity". Among the elements which distinguish such societies from pre-modern ones, are: an open system of stratification allowing and encouraging social mobility, the state as an impersonal form of government, the pursuit of economic growth, and a cultural system establishing collective meaning and identity for all envisaged members of society.²⁴ In order to avoid misunderstanding, it is important to state the temporal and spatial contingency of the nation state, i.e. the fact that this form of political organization finds its origins in western Europe in the 18th and 19th century.

It is important to avoid composing a western influenced blueprint of a universal model of the nation state as a self-evident normative standard for other regions in the world regardless of their own cultural, po-

²² Charlesworth, see note 9, 382 et seq. For the inextricable links between "state failure" and the effects of colonial or military interventions, see also, Richardson, see note 11, 16 et seq., who examines the situations in Haiti and Rwanda.

²³ On this and the relevant literature, see Utz, see note 17.

²⁴ L. Greenfeld, "Is Modernity possible without Nationalism?", in: Seymour, see note 15, 38 et seq.

litical and historical experiences.²⁵ Yet, the model of the nation state since its emergence in Western Europe has been “globalized” and has become the prevalent form of political organization. Although in some countries other forms of political organization might remain viable, it seems difficult to pursue in a post-conflict situation a state model which does not conceive the body polity as a nation.

A nation state can be composed of various nations. However, such multi-national states depend on the compatibility of the various nation-building processes of its constituent nations. For a while, incompatibilities may be papered over and expressions of nationally motivated dissent may be repressed; in the long run, however, such frictions can be a cause for state weakness. A number of Eastern European countries emerging from the double pressures of the Cold War and a Communist dictatorship have experienced a resurgence of nationalisms directed against their statehood.²⁶ A new public structure alone has not always been powerful enough to check these divergent movements and alter existing patterns of belonging, established and enshrined in local traditions and customs.

Of crucial importance for determining the possible success of any outside response would be the degree to which the old national cultural projection has broken down. As soon as there is widespread violence inspired by different nationalisms the chances of peaceful coexistence in one state decrease dramatically. State-building measures in such a context are unlikely to be successful if they do not respond to the contrasting patterns of social identity.

A dual response is therefore recommendable. This would need to stop the process of national erosion, provide openings for a re-linking of increasingly separate identities, re-establish areas of cooperation, *and* stabilize the existing institutions charged with fulfilling common tasks in order to turn them into widely accepted institutions. Given the limited possibilities to influence nation-building from outside, it is important to note that any attempt to inject certain values or concepts into such a process will need time and substantial financial resources: as the nation is a cultural conception, much of the necessary work will have to be done in the cultural sphere, too. But whatever political concepts are

²⁵ On the problematic distinction between “modern” and “pre-modern”, “civilized” and “uncivilized” societies and its usage in international law, see Anghie, see note 11.

²⁶ L. Anderson, “Antiquated before they can Ossify: States that Fail Before they Form,” *Journal of International Affairs* 58 (2004), 1 et seq. (11).

implemented to further and strengthen the emergence of a national identity the responsible activists, politicians or lawyers have to keep in mind not only the basically limited possibilities of external measures, but furthermore, “the fact that externally designed and managed nation building, even under the auspices of the United Nations, can easily become an arrogant usurpation of the right of self-determination”.²⁷ In particular, in former colonies such an impression is likely to evolve given the historical experiences of colonized and suppressed people and hence their understandable mistrust of Western states which are now again intervening, this time with recourse to a “failed states” - doctrine.²⁸ Therefore, it is essential for the success of respective responses not to create the impression that the exertion of influence on the nation building process from outside is a renewed form of neo-colonialism or just another guise for imperial behavior, avoiding thereby resentments.

c. The *Habitus* of Obedience to Law

Nation failure and some variants of state failure are closely connected to the *habitus* of obedience to law,²⁹ e.g. the *habitus* of accepting law as the basis on which to construe social relationships and to resolve conflicts.

The disintegration of Yugoslavia is a case of both national aspirations destroying a *habitus* of resolving conflicts peacefully within an existing legal framework and a legal tradition being undermined by decades of communist rule. Essentially, there was no rule of law in a liberal understanding in the communist countries. Although all of them had constitutions as the prevailing *formal* law of the land, the policies pursued by the ruling parties were the *actual* law serving to regulate and control the population.³⁰ ‘Socialist legality’, to use a term coined by

²⁷ M. Reisman, “Why Regime Change Is (Almost Always) a Bad Idea”, *AJIL* 98 (2004), 516 et seq. (524 et seq.).

²⁸ In more detail, Richardson, see note 11, 13; M. Trachtenberg, “Intervention in Historical Perspective”, in: L. Reed/ C. Kaysen (eds), *Emerging Norms of Justified Intervention*, 1993, 15-36.

²⁹ On the concept of *habitus*, see P. Bourdieu, *Outline of a Theory of Practice*, 1977, 78 et seq. Some of the factors undermining the acceptance of law as a normative order in modern civil society have already been described by G. W.F. Hegel, *Grundlinien der Philosophie des Rechts* (1821), 1999, §§ 148, 244, 245, 258.

³⁰ This has been called “instructive law” by a former Soviet prosecutor, see F. Neznansky, *The Prosecution of Economic Crimes in the USSR, 1954-1984*,

Khrushchev, was established to curb the most extreme excesses of Stalinist terror on the one hand, and to regularize and perpetuate the role of law as an extension of one-party rule on the other.³¹ Even the 1974 Yugoslav constitution was designed to support communist rule against the most potent form of opposition – that of nationalism. Not only did the constitution devolve substantial competences to the six republics, but to two autonomous regions inside Serbia, Kosovo and Vojvodina, as well, including having a seat on the rotating presidency. The reason for this was to diminish the disparity between Serbia with a population of 10 million and the other republics, of which the largest, Croatia, only had 5 million inhabitants. Because of this power sharing, various Serbian leaderships together with many Serb intellectuals regarded the Yugoslav constitution as a violation of their national ‘rights’.³² Seen from the Serbian perspective, the 1974 constitution was an act of repression in legal form. From a Croat perspective, it is the Croat aspirations that had been consistently and vigorously repressed under the Tito-regime and its constitution.³³ In circumstances like this, a *habitus* of obedience to law is unlikely to take root; it is difficult to imagine that the constitution will be considered the best tool to resolve conflicts inspired by nationalism.

The case of Somalia illuminates the importance of a legal tradition tied to modern statehood and the consequences of state collapse for the *habitus* of obedience to law. The problem here has not been a lack of potentially unifying traditions: there are common folk traditions, a

1985, 32-37, quoted in: R. Sharlet, “Citizen and State under Gorbachev and Yeltsin”, in: S. White et al., *Developments in Russian and Post-Soviet Politics*, 1994, 109 et seq. (110).

³¹ On this, see R.M. Cutler, “Soviet Dissent under Khrushchev: An Analytical Study”, *Comparative Politics* 13 (1980), 15 et seq.; A.K.R. Kiralfy, “Campaign for Legality in the USSR”, *ICLQ* 6 (1957), 625 et seq. For a more general overview, see J.N. Westwood, *Endurance and Endeavour: Russian History, 1812-1992*, 1993, 411-414. For a particularly interesting treatment of legal theory in East Germany, see S. Meuschel, *Legitimation und Parteiherrschaft in der DDR: Zum Paradox von Stabilität und Revolution in der DDR 1945-1989*, 1992, 171-176, 267-273.

³² Silber/ Little, see note 21, 32-33. For the memorandum prepared at the Serbian Academy of Sciences and Arts in 1986 in reaction to the perceived imbalance of the constitution and voicing national grievances, see B. Magaš, *The Destruction of Yugoslavia: Tracking the Break-Up, 1980-92*, 1993, 49-52.

³³ Silber/ Little, see note 21, 87 et seq.

shared ethnicity, and Sunni Islam providing a common religion as well. However, Somali statehood only began in earnest when the previously separate colonial administrations set up by the United Kingdom and Italy united in 1960 when the country gained independence. It appears that the subsequent history of Somalia illustrates the inherent weakness of the notion of modern statehood in a society still constituted to a significant extent along the lines of various clans and sub-clans.³⁴

A weak *habitus* of obedience to law considerably reduces the chances of democratic development. One might, therefore, consider the option of pursuing a policy of promoting an efficient administration based on the rule of law as well as a basic system of justice perhaps even before vigorously promoting fully fledged modern democracy. This approach could have a number of short term advantages while possibly laying the foundations for more solid and fully developed democracy in the long run;³⁵ arguably, such an approach can also be acceptable under democratic theory provided that certain minimum standards of decency are adhered to in the process.³⁶

First, it would be possible to work within existing traditions and structures of local law, thus reducing the risk of resentments.

Second, in post-conflict situations, it would establish peace and involve the local population in the keeping of the peace, both as actors and beneficiaries.

Third, and perhaps most importantly, it might improve the chances of constitutional politics. Particularly in multi-national countries or similarly divided communities constitutional politics would have to include a strong element of establishing collective rights and federal structures that can include the pragmatic distribution of competences and votes. Without appropriate constitutional accommodation of minority groups and nations in countries plagued by inter-community unrest, the guarantee of individual rights often remains precarious. Group representatives rather than isolated individuals play a decisive role in the construction of a culture, offering, in turn, possibilities for identification to the individual. It is even argued that no one “will reasonably be

³⁴ See on Somalia C. Philipp, in this Volume.

³⁵ R. Paris, *At War's End. Building Peace After Civil Conflict*, 2004, 187-207.

³⁶ J. Rawls, *The Law of Peoples*, 1999, 62 et seq.

inclined to plead allegiance to his or her wider society if this society does not recognize his or her own local societal culture.”³⁷

2. Foreign Intervention and the Promotion of Democracy

Following state failure in general, and nation failure in particular, the desire for self-determination is often sharpened, and the right to rule by the former public institutions is called into question.³⁸ Since nations are usually imagined as sovereign and limited at the same time, the implication is that there are other nations equally sovereign and limited but different. Although it has been argued that it is possible to imagine a nation as coterminous with mankind, the close connection between nationhood and statehood and in consequence the practices and conventions of the state system have done much to translate the cultural claim to national uniqueness into a demand for political self-determination.³⁹

By establishing the people as the bearer of sovereignty, the national imagination not only reveals itself as an offspring of the enlightenment in its struggle against the divine right of kings. The concept of democracy and that of the nation are closely connected in many understandings. Nevertheless, nationalism did not always lead to the immediate construction of modern democracies, and in some societies not even over time.⁴⁰ Nationalism can be a program or a vision of modernity focusing on demarcation from other nations rather than implementing social or institutional reforms leading to the emergence of a democratic society. In fact, it is possible that precisely those elements precluding modern democracy acquire fundamental importance in a particular na-

³⁷ M. Seymour, “Collective Rights in Multi-Nation States: From Ethical Individualism to the Law of Peoples”, in: Seymour, see note 15, 105 et seq., 125-127. On this, see also W. Kymlicka, *Multicultural Citizenship*, 1995.

³⁸ See, for example, L. Greenfeld, *Nationalism: Five Roads to Modernity*, 1992, 8-12; B. Anderson, *Imagined Communities: Reflections on the Origin and Spread of Nationalism*, 1991, 7.

³⁹ Greenfeld argues that a nation encompassing the entire globe is theoretically possible and cites the example of the United States as the model coming closest to such a self-imagination which has important ramifications on the notion of universal values pursued by the United States. See Greenfeld, see note 38, 7 et seq. Anderson clearly establishes demarcation as a central aspect of the national imagination. See Anderson, see note 38, 7.

⁴⁰ On this, see Utz, see note 17; Greenfeld, see note 38, 10.

tionalism.⁴¹ Democracy, therefore, is not an automatic component of nations, and it may be difficult to export to societies where the former type of nationalism prevails.⁴²

a. The Policy of the United States

Ever since September 11 2001 and the subsequent “war on terror”, promoting democracy has returned forcefully to the foreign policy agenda of the United States. Although bringing about democratic change has been a foreign policy goal ever since President Wilson, and has been employed during the Cold War by different presidents with different emphases, one official reason for its renewed rise to prominence is the belief that a lack of democracy is conducive to the growth of Islamic extremism and the rise of terrorist networks threatening the United States.⁴³

Before taking office as Secretary of State, Condoleezza Rice set out the foreign policy program following from these convictions:

“In these momentous times, American diplomacy has three great tasks. First, we will unite the community of democracies in building an international system that is based on our shared values and the rule of law. Second, we will strengthen the community of democracies to fight the threats to our common security and alleviate the hopelessness that feeds terror. And third, we will spread freedom and democracy throughout the globe. That is the mission that President Bush has set for America in the world – and the great mission of American diplomacy today.”⁴⁴

⁴¹ Greenfeld, see note 38, 46 et seq.

⁴² *Ibid.*, 10.

⁴³ L. Gelb/ J.A. Rosenthal, “The Rise of Ethics in Foreign Policy: Reaching a Values Consensus”, *Foreign Aff.* 82 (2003), 2 et seq.; T. Carothers, “Promoting Democracy and Fighting Terror”, *Foreign Aff.* 82 (2003), 84 et seq. See also C. Rice, “Opening Remarks by Secretary of State-Designate Dr. Condoleezza Rice”, 18 January 2005, available at <www.state.gov/secretary/rm/2005/40991.htm>. One of the first sentences in the National Security Strategy of the United States reveal the interconnections between “failed states” and security threats: “America is now threatened less by conquering states than we are by failing ones.” Cf. The National Security Strategy of the United States of America, September 2002, 1, available at <<http://www.whitehouse.gov/nsc/nss.pdf>>

⁴⁴ Rice, see note 43.

This approach is imbued by a specific perspective on nation-building and state-building shared by many US policy makers and analysts. In his influential work on state-building, for example, Francis Fukuyama points out that nation-building in the American understanding reflects their own “national experience” in which the United States’ constitution is seen as the starting point and frame of reference of a national history and common identity. Accordingly, many Americans see their state *and* their nation as essentially coterminous and both originating from the Declaration of Independence and the 1787 constitution.⁴⁵ Applying these findings to foreign policy, he continues:

“for Americans, their Declaration of Independence and the Constitution are not just the basis of a legal-political order on the North American continent; they are the embodiment of universal values and have a significance for humankind that goes well beyond the borders of the United States. [...] This feeling leads at times to a typically American tendency to confuse its own national interests with the broader interests of the world as a whole.”⁴⁶

Relating her upbringing, Secretary Rice reinforced those sentiments at her confirmation hearings at the US Senate:

“[This] is a story of the triumph of universal values over adversity. And those values – a belief in democracy, and liberty, and the dignity of every life, and the rights of every individual – unite Americans of all backgrounds, all faiths, and all colors. They provide us a common cause in all times, a rallying point in difficult times, and a source of hope to men and women across the globe who cherish freedom and work to advance freedom’s cause. And in these extraordinary times, it is the duty of all of us – legislators, diplomats, civil servants, and citizens – to uphold and advance the values that are the core of the American identity, and that have lifted the lives of millions around the world.”⁴⁷

What is remarkable here is the definition of a form of government (democracy) as a value-system and, therefore, as an identity. By promoting democracy in this fashion, the distinction between state-building and nation-building is largely ignored. It also becomes apparent that this approach rests on the assumption that erecting democratic institutions in the course of a state-building process will double as a na-

⁴⁵ Fukuyama, see note 1, 99.

⁴⁶ *Ibid.*, 113.

⁴⁷ Rice, see note 43.

tion-building process leading to a democratic society united by a democratic collective identity.

Given the nature of the US involvement in establishing democratic institutions in Iraq,⁴⁸ however, the question arises whether and in which guise democracy can be a reasonable foreign policy goal, especially when a truly democratic process may produce results unfathomable to the other foreign policy interests of the United States. There is the danger that trying to harmonize divergent policy aims might lead to ‘semantic democracy’, leading not only to renewed mid-term instability but damaging and de-legitimizing the concept of modern democracy itself.⁴⁹

Considering the current policy of the United States the shady sides of the “failed states”-doctrine become apparent. As already mentioned, the doctrine is susceptible to an instrumentalization for hegemonic power politics, disguised as the propagation of democracy and liberal values and legitimated with reference to a sloppy rhetoric of “failed states”.⁵⁰ To assume such an instrumentalization is not only influenced by the vagueness of the criteria of the doctrine, but is also a result of the fact that, until now, there is little work on the genealogy of this rhetoric. Its origins as well as the underlying political and historical aspects are anything but clear. The questions how it is linked to the promotion of the last superpower’s interests and what are the reasons for the emergence of this doctrine in the political and legal discourse still remain largely unanswered. But an analysis of the literature in which the doctrine is used can at least ascertain that there is a predominance of western authors in defining the content of the “failed states”-doctrine. It is true that the term is used in non-western countries, too, but “the term, insofar as used in the Southern Tier, seems to imply a wider legal and

⁴⁸ See the case study Iraq by R. Wolfrum, in this Volume.

⁴⁹ ‘Semantic democracy’ is a variation on the theme of ‘semantic constitution’ by Karl Loewenstein. See K. Loewenstein, *Verfassungslehre*, 1959, 153. For the legal status of the US forces in Iraq after the election see case study Iraq, *ibid.* See also A. Arato, “Interim Imposition”, *Ethics and International Affairs* 18 (2004), 25 et seq.

⁵⁰ Michael Reisman has described this kind of imperial propagation of democracy and liberal values as a “democratic Trotzkyism” that “ignore[s] the persistent force of nationalism, culture, religion, language, and other powerful – and manipulable – focuses on identity.” Cf. Reisman, see note 27, 523.

moral liability on the governing bodies of the Northern Tier for colonialism's consequences: it is becoming a rallying call for African action".⁵¹

b. The Policy of the United Nations

A much more cautious approach is pursued by the United Nations with regard to the promotion of democracy. It still appears to be common sense that the specific role of the United Nations as a universal institution forbids political or ideological partiality. Given that the United Nations are primarily meant to safeguard international peace, this approach was carefully adhered to until the end of the cold war. The United Nations were meant to stay impartial precisely to ensure the neutrality of a forum for the major opponents. Yet, with the end of the major east-west conflict, some tendencies seem to point at an – albeit subtle – adjustment of this policy towards the promotion of democracy.⁵² This does not mean that the United Nations policy has shifted to the promotion of democracy as a new primary goal. The question rather seems to be, how this orientation towards democratization can be incorporated in the overall framework of United Nations policies.⁵³ Scholarly analysis finds that promotion of democracy can either be regarded as an instrument in ensuring international peace itself⁵⁴ or at least as not conflicting with safeguarding international peace.⁵⁵ Consequently, there is as of now no international consensus on UN enforce-

⁵¹ Richardson, see note 11, 12.

⁵² M. Griffin, "Accrediting Democracies: Does the Credentials Committee of the United Nations Promote Democracy through its Accreditation Process, and should it?" *N.Y.U.J. Int'l L. Pol.* 32 (1999/2000), 725 et seq. (757-761); T. Stein, "Demokratische Legitimierung auf supranationaler und internationaler Ebene", *ZaöRV* 64 (2004), 563 et seq.

⁵³ T.J. Farer, "The promotion of democracy: International Law and Norms", in: E. Newman/ R. Rich (eds), *The UN Role in Promoting Democracy. Between Ideals and Reality*, 2004, 32 et seq. (52-53).

⁵⁴ T. Maruhn, "Konfliktfolgenbewältigung in Afghanistan zwischen Utopie und Pragmatismus", *AVR* 40 (2002), 480 et seq. (510); R. Ben Achour, "La contribution de Boutros Boutros-Ghali à l'émergence d'un droit positif de la démocratie", in: *Boutros Boutros-Ghali Amicorum Disciplinamque Liber*, Vol. II, 1998, 909 et seq.

⁵⁵ R. Harbour, "Towards Democracy: United Nations Involvement in Electoral Processes", *International Geneva Yearbook* IX (1995), 61 et seq.

ment measures to install or even to restore democracy as this could contravene the primary goal of the organization.⁵⁶

II. Constitutional Politics

Promoting democracy as a set of values and, therefore, as an element of social identity, faces a serious challenge in the form of a possible reaction of resentment, if pursued by means of foreign intervention, leading to a backlash against democracy and democratic institutions.⁵⁷ The role of constitutional politics in post-conflict situations, therefore, must oscillate between checking possible resentment and establishing a workable and efficient legal-political framework. By having a substantial bearing on both state- and nation-building, constitutional politics can contribute to both while establishing a more democratic state and laying the foundations of a culture of habitual obedience to law at the same time. Constitution-making offers the possibility to influence a nation-building process towards establishing a set of ideas, values, and institutions as part of the collective, national identity.⁵⁸

1. Constitutional Nation-Building

Constitutional nation-building has been defined as focusing on “enshrining the political values of a political community in a constitutional document that ought to become the focus of nation-building initia-

⁵⁶ M.A. Osman, *The United Nations and Peace Enforcement. Wars, Terrorism and Democracy*, 2002, 167 et seq., 201 et seq. With regard to “failed states” Richardson observes at least three current models of involvement and active participation for the United Nations: “governance assistance, delegation of governmental authority, and the most radical option – direct U.N. trusteeship, which would resurrect the old trusteeship system and apply it to failed states.” Cf. Richardson, see note 11, 3. For the old trusteeship system of the League of Nations, see also: Gordon, see note 8, 940 et seq., as well as N. Matz, in this Volume.

⁵⁷ On *resentment* and the relevant literature, see Utz, see note 17. The risks in a foreign policy context have recently been pointed out by D. Lal, *In Praise of Empires: Globalization and Order*, 2004.

⁵⁸ For a remarkable statement by the judiciary, see Supreme Court of Canada, /Reference re Quebec Secession,/ [1998] 2 S.C.R. 217.

tives.”⁵⁹ According to Fukuyama, but also to Habermas’ concept of constitutional patriotism, the constitution itself can become the focal object of collective loyalties and even replace other objects of identification, so that other, traditional elements of identity become largely irrelevant.⁶⁰ In many environments a strategy of constitutional nation-building deliberately ignoring such elements is unlikely to be successful. In consequence, it is suggested to conceive the constitutional nation-building as follows: by incorporating into the constitutional text some of the traditional elements of collective identity (such as institutions or symbols), constitutional nation-building is able to filter, formalize, and direct the nation-building process towards democracy and the rule of law. Constitutional nation-building, thus, should make use of the legitimizing power of nationalism rather than attempting to replace it.⁶¹

There are three main tools available to constitutional nation-building: the form and procedure of constitution-making itself, the institutional arrangements made in the constitution, and the values and symbols employed or referred to both during the political process and in the final text.

Ideally, the *pouvoir constituant* is exercised by a national assembly elected by the entire population for the purpose of writing and promulgating a constitution, which is then adopted in a referendum.⁶² In some post-conflict situations, however, this scenario may be neither feasible nor desirable.

A general election could result in the political isolation of a minority group among the population leading to a withdrawal from the political process of that group thus decreasing the legitimacy of the assembly and the constitution, perhaps even sparking unrest or civil war. Instead, it is necessary to reassure all sections of the population about the prospects of their groups in a new constitutional arrangement. As we shall see below, the crucial element in such a process of preparing the ground

⁵⁹ D. Weinstock, “Four Kinds of (Post-)nation-building”, in: Seymour, see note 15, 51 et seq. (53).

⁶⁰ Ibid. See also J. Habermas, *The Inclusion of the Other*, 1998, 225 et seq. Originally, the term has been coined by Dolf Sternberger. See D. Sternberger, “Verfassungspatriotismus”, in: *Schriften*, Vol. X, especially 17 et seq., 24, 30 et seq.

⁶¹ But see J. Habermas, *Die postnationale Konstellation: Politische Essays*, 1998, 94-96, 114.

⁶² K. Loewenstein, see note 49, 138 et seq.

for a new constitution and increasing its acceptance before it is put to a vote in an assembly or a referendum, is the convening of a body representing the 'elites' of the various sections of the population without necessarily appointing them through a democratic process. The fundamental paradox of having to establish democracy by undemocratic means is often a feature of a post-authoritarian situation.⁶³ The negative effects of this democratic deficit at the very beginning on legitimacy and aims of the process can be counterbalanced by adherence to the principles of "plurality, publicity, and legality".⁶⁴ Furthermore, agreement on constitutional principles within such a body, as happened in South Africa, has an immensely reassuring effect on society as a whole.

In the actual drafting of the constitutional text, as already mentioned, the institutional structure should not exclusively be determined by deliberations of efficiency or 'modernity', i.e. imitating Western style institutions. State institutions have a particularly strong bearing on collective identity, and it may be helpful to draw on traditionally legitimized institutions in order to further acceptance of the constitution as a whole. Moreover, in fragmented societies, the institutional layout should reflect this diversity and allow for representation of as many groups as possible. This may even go as far as asymmetrical constitutional relationships between a central government and different regions.

The inclusion of traditional symbols and values in the constitutional text offers opportunities for establishing the constitution as an expression, or reformulation, of collective identity. The power to recognize elements of culture and traditions by means of mentioning them in the text is a considerable one, and indeed important to successful attempts at making multi-national states work.⁶⁵ Most importantly, however, reference to certain symbols or cultural values and their allocation to a particular state institution, help to lend dignity to the constitution and makes it more intelligible.⁶⁶ It is even said: "The dignified parts of gov-

⁶³ See Arato, see note 49, 25 et seq., 28.

⁶⁴ Ibid., 29.

⁶⁵ M. Seymour, "Collective Rights in Multi-nation States: From Ethical Individualism to the Law of Peoples", in: Seymour, see note 15, 105 et seq.

⁶⁶ Dignity and intelligibility are central elements in Walter Bagehot's famous discussion of the monarchy in his treatment of the English constitution, first published in 1867. See, W. Bagehot, *The English Constitution*, 1937, 4, 32.

ernment are those which bring it force – which attract its motive power. The efficient parts only employ that power”.⁶⁷

By providing openings for individual and group identities to focus on the dignified parts of the constitution, the “educational” purpose of a constitutional text created in post-conflict situations can be supported and amplified and thus help to prevent the emergence of mere “semantic constitutionalism”.⁶⁸

2. Collective Identity and Constitutional Identity

Phenomena of social identity are regarded as *collective* identity and establish a “We,” insofar as human beings understand themselves to be members of a group.⁶⁹ The essential element of collective identity is – according to social psychology – a mutual perception of belonging.⁷⁰ *Cognitive* processes account for the phenomenon of collective identity.

Social psychology explains it thus: every perception brings about an act of categorization which then organizes the object of perception into discontinuous classes. This categorization provides clarity in an otherwise diffuse world by grouping the potentially infinitely diverse stimuli into a limited number of categories. Individuals arrange themselves and others within their system of classification. It is, then, not merely a matter of deciphering what one perceives, but also of self-locating. The individual’s self-concept is based on her or his (self-) assignments to particular categories. Social identification is the “internalization of a social

⁶⁷ Ibid., 4.

⁶⁸ See Loewenstein, see note 49, 153 et seq.

⁶⁹ The linkage of collective identity to psychological processes of individual citizens appears advisable in order to avoid problematic essentializations, U. Neumann, “Wissenschaftstheorie und Rechtswissenschaft,” in: A. Kaufmann/ W. Hassemer (eds), *Einführung in die Rechtsphilosophie und Rechtstheorie der Gegenwart*, 6th edition, 1994, 422, 430 et seq.; this parallels methodic individualism, H. Albert, “Methodischer Individualismus und historische Analyse,” in: K. Acham/ W. Schulze (eds), *Teil und Ganzes*, 1990, 219.

⁷⁰ On the following, see O. Angelucci, *Zur Ökologie einer europäischen Identität*, 2003, 33 et seq., 53 et seq., which bases itself on the theory of social identity (foundational: H. Tajfel, *Human groups and social categories: Studies in social psychology*, 1981) and the theory of social representation (foundational: S. Moscovici, *La Psychanalyse, son image et son public*, 1961).

category,” the transformation of a given social category into an internal designation. In metaphoric terms, collective identity is based on “entries,” which compose a sort of “collective dictionary” (as core elements of the discourse of a group), which must exist for every group.⁷¹ A change in the categories, by which an individual defines his or her own identity, will resultantly influence this identity. Correspondingly, current social psychology considers social identity to be a construction rather than a stable entity.

Collective identity is social affiliation that is conscious and reflexive. In exactly this sense, identity politics strive to shape the citizen. He or she should conceive of him or herself as being part of a group and should then act accordingly in the social sphere. Given that identity is based on social constructs, the formation of such an identity, based on a constitutional document, appears to be possible;⁷² such a position does not require recourse to the philosophy of constitutional patriotism.⁷³

A constitution, certainly, can only be *one* element in a broad, social evolution that shapes the identities of citizens.⁷⁴ It is, moreover, a long way from a constitution, which is initially a mere constitutional *text*, to the psychological processes of self-categorization by citizens. It is use-

⁷¹ This terminology is well established, e.g. D. Cerruti/ W. Rudolph (eds), *Un'anima per l'Europa. Lessico di un'identità politica*, 2002.

⁷² It seems almost impossible to predict the number of years before a collective identity is established. The decade would probably be a proper unit of measurement. But Angelucci, see note 70, 160 et seq., 163 et seq., shows that demonstrable changes can occur during a period of five years.

⁷³ On this philosophy, see J. Habermas, “Geschichtsbewußtsein und posttraditionale Identität,” in: J. Habermas, *Eine Art Schadensabwicklung*, 173 et seq., 1987; see Sternberger, see note 60; see also J.H.H. Weiler, “Federalism without Constitutionalism: Europe’s Sonderweg,” in: K. Nicolaidis/ R. Howse (eds), *The Federal Vision*, 2001, 63 et seq.

⁷⁴ This can be demonstrated by comparison with the Federal Republic of Germany, in which the identity-forming role of the Basic Law seems rather important. See J. Gebhardt, “Verfassungspatriotismus als Identitätskonzept der Nation”, *Aus Politik und Zeitgeschichte B 14/93* (1993), 31 et seq. (33 et seq.); M.R. Lepsius, *Interessen, Ideen und Institutionen*, 1990, 63, 77 et seq.; H. Rausch, “Politisches Bewußtsein und politische Einstellungen im Wandel,” in: W. Weidenfeld (ed.), *Die Identität der Deutschen*, 1983, 119, 130. On the relevant role of the Federal Constitutional Court, see the articles in G.F. Schuppert/ C. Bumke, *Die Konstitutionalisierung der Rechtsordnung*, 2000; U. Haltern, “Integration als Mythos”, *Jahrbuch des öffentlichen Rechts* 45 (1997), 31 et seq.; J. Isensee, “Die Verfassung als Vaterland”, *Allmanach* 71, 1988.

ful to distinguish between *direct* and *indirect* effects. A constitution *directly* affects identity formation, if it is a *per se* criterion for the relevant identity process. This would require that the large majority of citizens identify and affiliate with their group on the basis of the constitution as such or of specific constitutional principles. In turn, constitutional law *indirectly* affects identity formation when it shapes or creates the relevant criteria which then form identity. In any event, a constitution's identity-forming force depends on suitable starting-points for citizens' identification processes.

Research on nationalism shows that an important "entry" in the "Dictionary of Collective Identity" is a common history.⁷⁵ A "We" is most often anchored in a common past. Such a historical "entry" — to borrow from Jean-François Lyotard — can be characterized as a "great narrative."⁷⁶ Many examples can be cited, as to how an intellectual spearhead construed a "narrative" out of amorphous historical material, which they then used as a common "Whence" (or "Where we are from") for a planned, emerging, or existent group.⁷⁷

Considering the contingency and construal of any such narrative, a project to write a new and common history seems possible — if it can sustainedly pursue the (re)interpretation of the historical materials with proper instruments. In text-centered cultures it stands to reason that the contours of a group's "Whence" can be written into the fundamental document of its political structure. To the extent that a constitution is supposed to contribute to such a narrative, the preamble is particularly well-suited.⁷⁸ The preamble can directly affect identity formation

⁷⁵ See Anderson, see note 38; K. Deutsch, *Nationenbildung – Nationalstaat – Integration*, 1972; E. Gellner, *Nationalismus und Moderne*, 1995; E. Hobsbawm, *Nationen und Nationalismus*, 2nd edition, 1992; H. Schulze, *Staat und Nation in der europäischen Geschichte*, 2nd edition, 1995.

⁷⁶ J.F. Lyotard, *Das postmoderne Wissen*, 4th edition, 1999, 63 et seq., 112; J.F. Lyotard, *Der Widerstreit*, 2nd edition, 1989, 12, 251 et seq.

⁷⁷ On the difficulties of such constructions, especially in a European context, see F. Hanschmann, "'Geschichtsgemeinschaft'. Ein problematischer Begriff und seine Verwendung im Staats- und Euoparecht", *Rechtsgeschichte* 5 (2004), 150 et seq.

⁷⁸ On the functions of preambles, see P. Häberle, *Europäische Verfassungslehre*, 2001-2002, 273 et seq.; H. Dreier, "Präambel", in: H. Dreier (ed.), *Grundgesetz*, Vol. I, 1996, Nr. 8 et seq.; J. Isensee, "Staat und Verfassung," in: J. Isensee/ P. Kirchhof (eds), *Handbuch des Staatsrechts* Vol. I, 2nd edition, 1995, § 13, Nr. 4 et seq.; C. Starck, "Präambel", in: H. v. Mangoldt et al. (eds), *Das Bonner Grundgesetz*, Vol. 1, 1999, Nr. 29 et seq.;

through the reading and promulgation of the preamble itself. Or it can indirectly influence the relevant “narratives” and, thereby, constructions of reality by providing an origin for further constructions, such as are found in educational materials.

A common history is undisputedly an important element in forming a group out of individuals. Conceptions vary as to further relevant elements. One line of research suggests that the perception of common group membership is only possible with positive, emotional bonds: a “We” requires that people — pointedly — “like” each other.⁷⁹ Socio-psychological research, however, attributes little importance to such bonds: the formation of a group and the corresponding identity depend on the perception of belonging to a single social category, not on an emotional disposition.⁸⁰ The mental mechanisms of perception, not their positive evaluations, are the basis of group formation.

Collective identity requires *identification* with one’s in-group and *dissociation* from out-groups.⁸¹ Like an “I” needs and implies a “You,” a “We” needs a counterpart group. A group must be cognizant of its own peculiarity. This does not suggest that a group necessarily defines itself as opponent of other groups, much less as enemy, as Carl Schmitt influentially postulated in regard to political communities.⁸² Other groups are not “the Other” but are merely different(iated) in certain respects. The untenability of the radical position is proven by successful cooperation among self-cognizant groups or by the regular functioning of multiple, social identities. An adequate understanding of group formation thus does not negate that which unites all humans, as shown by the universal possibility of communication and normative agreement.

All these elements will only yield effects in the medium and long run. In a shorter term, the most important feature how constitutional politics might contribute to nation-building is its procedure of elaboration.

H.D. Treviranus, “Preamble”, in: R. Bernhardt (ed.), *EPIL* 2 (1997), 1097 et seq.; A. von Bogdandy, “Preamble”, in B. de Witte (ed.), *Ten Reflections on the Constitutional Treaty for Europe*, 2003, 3-10.

⁷⁹ J.H.H. Weiler, “To be a European citizen: Eros and civilization”, in: J.H.H. Weiler, *The Constitution of Europe*, 1999, 324, 338 et seq.; U. Haltern, “Europäischer Kulturkampf”, *Der Staat* 37 (1998), 591 et seq. (620); M. Zürn, *Regieren jenseits des Nationalstaates*, 1998, 257, 348.

⁸⁰ See Angelucci, see note 70, 44 et seq.

⁸¹ *Ibid.*, 40.

⁸² C. Schmitt, *Der Begriff des Politischen*, 6th edition, 1996, 26 et seq., 29 et seq., 50 et seq.

tion and its institutional accommodation of the conflicting groups. As illustrated above, short-term features of constitutional politics may entail the use of traditionally legitimized institutions, the representation of as many diverse groups as possible in the process and their needs and aspirations in the institutional arrangement.

3. The Procedural Aspect: Democracy, Elite Consensus, and Foreign Intervention

a. The South African Constitution

An ideal way to build a nation via constitutional politics is a fully democratic and all inclusive process of deliberative constitution-making. Unfortunately, there are rarely the circumstances for unfolding such a procedure. As constitutional history tells, the procedure of the *pouvoir constituant* rarely lived up to the principles laid down in the final document.⁸³

There are examples which tell us that constitutional politics do not have to be fully democratic in order to be successful in nation-building. A case in point is South Africa. Granted, South Africa's transition was not a result of state failure. The administration and especially the internal security machinery of the Apartheid state were still well functioning when transition was initiated. One motivation for reform on the side of the Apartheid government is certainly to be found in international and internal political pressure and the insight of the apex of political power that South Africa should have an inclusive nation in order to avert civil unrest.⁸⁴

The underlying reason can therefore be attributed to the perception of the white political 'elites', that a specific South African version of na-

⁸³ See accounts of the often dubious historical practices in K. von Beyme, *Die verfassunggebende Gewalt des Volkes*, 1968, 7 et seq.; J Elster, "Deliberation and Constitution Making", in: J Elster (ed), *Deliberative Democracy*, 1998, 97, 100 et seq.

⁸⁴ K. Hopkins, "Assessing the World's Response to Apartheid: A Historical Account of International Law and its part in the South African Transformation", *Miami U. Int'l & Comp. L. Rev.* 10 (2001-2002), 241 et seq. (250-254); on the policy of the United States see A. Klotz, "Norms reconstituting interests: global racial equality and U.S. sanctions against South Africa", *International Organization* 49 (1995), 451 et seq.

tion failure made a long-term resistance to growing political pressure unlikely. This specific nation failure situation in South Africa may most aptly be described as a result of non-nation building policies (meaning the failure of an attempt *not* to form a nation comprising all the citizens on the territory). Apartheid ideology and politics, especially with regard to the attempted creation of a whole range of nation states along racial lines, aimed at the creation of a Boer-dominated white South Africa along with several all-black nation states in the so-called Homelands, or Bantustans.⁸⁵ Whereas the underlying model of an all-white nation state was widely accepted among the Boer majority of the white population,⁸⁶ the counter-model of black oppositional groups in their majority rejected this model of different nations on the territory of South Africa. The most important counter-model, strongly advocated by the African National Congress (ANC), upheld the model of a unitary South African nation, comprising both white and black parts of the population and made this inclusive model the basis for political campaign.⁸⁷ South Africa's nation failure is therefore threefold: first, the model of an all-white nation state collapsed under consistent international and internal pressure. Second, the model of all-black nation states was not accepted by the majority of its potential subjects. Third, the collapse of an all-white nation state and the rejection of all-black nation states read together may be described as the failed denial of an all-encompassing unitary nation.

Although South Africa's nation failure resulted from a situation of under-inclusiveness, the constitutional process in reaction to it was not an essentially democratic one itself. Rather, political 'elites' of both the Apartheid government and the major political opposition groups negotiated yardsticks that were materially binding on the subsequent, democratically inclusive, drafting of a new constitution. Due to fierce po-

⁸⁵ See A. Isert, *Die Homeland-Politik in Südafrika: Die Entwicklung und Kontrolle der territorialen, demographischen, politischen und ökonomischen Ressourcen der Großen Apartheid zwischen 1950 und 1990*, 1997; E. Klein, "South African Bantustan Policy", in: Bernhardt (ed.), *EPIL* 4 (2000), 477 et seq.

⁸⁶ On the ideological foundation of Apartheid theory and all-white nationalism see J.P. Brits, *Op die vooraand van apartheid: Die rassevraagstuk en die blanke politiek in Suid-Afrika, 1939-1948*, 1994, 83 et seq.; H. Giliomee/ L. Schlemmer, *From Apartheid to Nation-Building*, 1991, 35.

⁸⁷ As in the ANC's 1955 Freedom Charter; H. Klug, *Constituting Democracy: Law, Globalism and South Africa's Political Reconstruction*, 2000, 111 et seq.

litical disagreement on the form and content of this negotiation process, some parts of the population were not even represented in the process.⁸⁸ The major political players nevertheless took due regard for the interests of the groups not represented in the process itself, e.g. via extensive constitutional rights for regionally or culturally defined groups.⁸⁹

There was no foreign direct intervention; therefore, the danger of a reaction of resentment was reduced. South Africa's constitutional transition was an indigenous process⁹⁰ in which the major parts of the population were either represented or taken account of in a public process with high visibility right from the beginning.⁹¹ One should not forget, though, that yardsticks for the transitional process were put into place when the beginning of a transitional process was officially announced by President De Klerk in 1990.⁹² Negotiations undertaken before the official announcement preceded the conventional process of constitution making. These negotiations between the highest officials of the Apartheid state and the main opposition movement outflanked the parliamentary representation of the white population as well as the local cadres of the opposition movements. Subsequent negotiations on a new constitution also lacked universal inclusiveness, which could seem all the more problematic, since the constitutional principles laid down in the interim constitution⁹³ came to be binding on the (now democratically elected) drafters of the final constitution.⁹⁴ Nevertheless, provi-

⁸⁸ H. Klug, "Historical Background", in: M. Chaskalson et al. (eds), *Constitutional Law of South Africa*, 4th revision, 1999, 2-13 et seq; R.J. Goldstone, "The South African Bill of Rights", *Tex. Int'l L. J.* 32 (1997), 451 et seq.

⁸⁹ For an overview of the process see Klug, see note 88, 93 et seq.

⁹⁰ This does not mean, however, that international support was discouraged. The United Nations were explicitly asked to coordinate the activities of international observers of the process, see Report of the Secretary-General on the question of South Africa, Doc. S/1994/717 of 16 June 1994, 31.

⁹¹ On the process and its public perception see generally H. Corder, "Towards a South African Constitution", *The Modern Law Review* 57 (1994), 491 et seq.; D. Thürer, "Vom paradigmatischen Einfluss des Völkerrechts auf das Staatsrecht", in: K. Weber/ N. Wimmer (eds), *Vom Verfassungsstaat am Scheideweg*, 2005, 385, 391.

⁹² Republic of South Africa (ed.), *Debates of Parliament* (Hansard) 16 (1990), 1 et seq.

⁹³ Constitution of the Republic of South Africa Act 200 of 1993.

⁹⁴ Constitution of the Republic of South Africa Act 108 of 1996; on the legal significance of the set of constitutional principles see Constitutional Court

sions that took due regard for groups not continuously represented were negotiated under these circumstances.⁹⁵ Arguably, this holds true even with regard to the proceedings of the South African Truth and Reconciliation Commission (TRC). Foreseen as one ingredient of transition in the interim constitution of 1993, the TRC explored the role of individual perpetrators during Apartheid as well as the role of the organs of state and institutions in society.⁹⁶ With high public visibility, strong moral and religious foundations⁹⁷ and a strenuous effort to appear impartial the TRC fulfilled an important role in the post-Apartheid nation-building process by establishing a forum for a reconstruction of a new usable past.⁹⁸

There are two decisive factors in the success of the subsequent constitutional process. First: the successful initiation of the conventional process that led to the drafting of an interim constitution in 1993 depended on a prior basic understanding of the top political leadership. Second: the success of the conventional process itself did not depend on universal inclusiveness, but rather on the convincing provisions made for groups not properly represented in the process itself.

The positive results of constitutional politics can be further reinforced by a legally strong and symbolically adept constitutional jurisprudence, as is again demonstrated by the South African case. Following the establishment of a new constitutional order based on the unitary nation model, the South African Constitutional Court embarked on a project of constitutionalization of the entire legal order, hereby spreading the constitution and its principles throughout the society. The un-

of South Africa, Judgment of 6 September 1996 (*Certification of the Constitution of the Republic of South Africa, 1996*), CCT 23/96.

⁹⁵ See Klug and Goldstone, see note 88.

⁹⁶ Truth and Reconciliation Commission (ed.), *Truth and Reconciliation Commission of South Africa Report*, 7th Vol., 1998-2002; for an overview on the process see A. Boraine, *A Country Unmasked*, 2000.

⁹⁷ L.S. Graybill, "South Africa's Truth and Reconciliation Commission. Ethical and theological perspectives", *Ethics & International Affairs* 12 (1998), 43 et seq.

⁹⁸ With the exception of the early challenge brought against the legality and legitimacy of the TRC provisions brought under constitutional law in the AZAPO case, Constitutional Court of South Africa, Judgment of 25 July 1996 (*AZAPO and others v President of the RSA and others*), CCT 17/96. The high number of applications nevertheless speaks for a success of the TRC also in this respect, see <http://www.doj.gov.za/trc/>; on "usable past", see Utz, see note 17.

derlying constitutional model is the achievement or preservation of a unitary national society amidst historical, cultural and ethnic differences.⁹⁹ The Court's comprehensive jurisprudence on human rights, legal questions concerning the scope of economic and social rights as well as questions of affirmative action and remedial measures are all based on this concept.¹⁰⁰ One major ingredient is the rejection and the reparation of past injustices; this is, however, not based on a one-sided accusation of the segments of the population that formerly supported Apartheid. The Court's approach might rather be described as relying on a shared (as opposed to common) national past in whom all parts of the population were subject to an inhuman system.

b. The Afghan Constitution

Contrary to the South African case, Afghanistan after decades of foreign domination, invasion and internal civil unrest showed the characteristics of nation failure as well as state failure. Nevertheless, one has to keep in mind that there were no well developed structures of central statehood in Afghanistan even before the war.¹⁰¹ National institutions were and to a certain extent still are not functioning¹⁰² and national co-

⁹⁹ E.g. Constitutional Court of South Africa, Judgment of 6 June 1995 (*S v Makwanyane*), CCT 3/94, at 308; Judgment of 25 July 1996 (*AZAPO and others v President of the RSA and others*), CCT 17/96, para 19, 22 et seq.; Judgment of 18 April 1997 (*President of the RSA and another v Hugo*), CCT 11/96, at para 41; Judgment of 7 October 1997 (*Harksen v Lane NO and others*), CCT 9/97, at para. 51; Judgment of 4 October 2000 (*Government of RSA and others v Grootboom and others*), CCT 11/00; Judgment of 4 September 2003 (*Alexkor Ltd v Richtersveld Community and others*), CCT 19/03; Judgment of 29 July 2004 (*Minister of Finance and others v Van Heerden*), CCT 63/03; Judgment of 1 October 2004 (*Port Elizabeth Municipality v Various Occupiers*), CCT 53/03; Judgment of 11 March 2005 (*Affordable Medicines Trust and others v Minister of Health and another*), CCT 27/04, at para. 58 et seq.; Judgment of 13 May 2005 (*President of RSA and another v Modderklip Boerdery and others*), CCT 20/04.

¹⁰⁰ Ibid.

¹⁰¹ See Thürer, see note 91, 392; E. Afsah/ A.H. Guhr, in this Volume.

¹⁰² A. Their/ J. Chopra, "The road ahead: political and institutional reconstruction in Afghanistan", in: S. Barakat (ed.), *Reconstructing War-Torn Societies: Afghanistan*, 2004, 93 et seq. (95).

herence is historically sparse.¹⁰³ The challenges that had to be responded to were thus twofold: first, the new Afghan constitution had to provide the necessary instruments for the reconstruction or even establishment in the first place of essential state functions. Second, in order to provide for a sufficient basis of legitimacy of the new constitution, the process itself had to be structured in a way acceptable to the Afghan people.

The constitutional response to this situation was the drafting of a constitution with far reaching competencies for the President as leader of a unitary Afghanistan.¹⁰⁴ The process itself included traditional features of Afghan political order e.g. by entrusting the enactment of the constitution to the *Loya Jirga* as the traditional congregation of tribal 'elites'.¹⁰⁵

Although the contents of reports vary and are often contradictory, recent analysis seems to indicate an evolving consensus of the Afghan people and its 'elites' to accept the constitutional order of the new Afghanistan.¹⁰⁶ This might be due to the fact that visible successes of reconstruction and peace-keeping efforts foster acceptance of the central government. To what extent a reliable national identity can be based on the constitutional parameters of the new Afghan constitution remains to be seen since the Afghan historical tradition seems to limit the possibility of a successful short-term construction of a coherent concept of national identity.¹⁰⁷ On the other hand, the experience of war and exile helped to create the very national sense of belonging that might help to construe a basis for legitimacy for an efficient central administration.¹⁰⁸ But the probably most important factor furthering acceptance of the Afghan constitutional process is the fact that the drafting and the enactment of the constitutional text was – apart from the advice of a handful of international experts to the Constitutional Drafting Commission

¹⁰³ A. Cottey, "Afghanistan and the new dynamics of intervention: counterterrorism and nation building", in: SIPRI (ed.), *Armaments, Disarmament and International Security*, 2003, 167 et seq. (169-171).

¹⁰⁴ R. Grote, "Separation of Powers in the New Afghan Constitution", *ZaöRV* 64 (2004), 897 et seq. (904-914).

¹⁰⁵ For structure and history of the Loya Jirga see B. Shah, "Loya Jirga and the Present Day Afghanistan," *Strategic Studies* 20 (2000), 146 et seq.

¹⁰⁶ See Afsah/ Guhr, see note 101.

¹⁰⁷ B.R. Rubin, *The Fragmentation of Afghanistan*, 2nd edition, 2002.

¹⁰⁸ For this proposition and the following analysis of the Afghan constitutional process, see Afsah/ Guhr, see note 101.

– indigenous. The Bonn Agreement between the major Afghan political factions (with the notable exception of the Taliban themselves) abstained from making material prescriptions and relied on procedural regulation of the political settlement in Afghanistan, taking into account the national traditional instrument of *Loya Jirga* as a forum for the provision of constitutional legitimacy. Although the *Loya Jirga* itself was not directly partaking in much of the drafting process, lively and publicized debates among the delegates helped to foster the impression of substantive involvement in the process.¹⁰⁹

Hamid Karzai's selection as head of the interim administration and subsequent election as president of Afghanistan in 2004 can also be interpreted as indicating the emergence of a basis of acceptance and legitimacy for the new constitutional order. As his biography demonstrates, Hamid Karzai indeed might combine multiple features of Afghan national coherence, but whether he really can therefore be acceptable both to the majority of the Afghan people and in the international sphere remains an open question.¹¹⁰ That said, acceptability does not equate to being the symbolic head of national re-organization. The specific impetus that a moral-spiritual figurehead can add to the process of constitutional politics is certainly still missing in Afghanistan.¹¹¹

c. The Cypriot Constitution

A different situation can be found in Cyprus. An attempt to constitutional settlement was initiated by a neutral outside approach of the United Nations Secretary-General in 1999.¹¹² The latest version of the United Nations plan for a comprehensive settlement of the Cyprus problem (Annan plan)¹¹³ entails a draft constitution whose institutional structure seeks to accommodate the contradicting interests of the opposing groups. The result was the model of a 'bizonal and bicomunal

¹⁰⁹ A. Saikal, "The United Nations and Democratization in Afghanistan", in: Newman and Rich, see note 53, 320 et seq. (329-332).

¹¹⁰ See Afsah/ Guhr, see note 101.

¹¹¹ See Saikal, see note 109, 332 et seq.

¹¹² S. Anstötz, "Zypern: Vor EU-Beitritt und "Wiedervereinigung"?", in: D. Blumenwitz/ G. Wehner (eds), *Völkerrechtliche Fragen der Friedenssicherung* (Pol-educ 3), 2003, 149 et seq.

¹¹³ See also the Report of the Secretary-General of 1 April 2003, Doc. S/2003/398.

federation' whose two constituent states should retain strong features of autonomy and internal 'sovereignty'.¹¹⁴

In this draft constitution, article 15 allocates all governmental competencies to the constituent states as long as they are not explicitly transferred to the common state by the constitution itself. Common state competencies are restricted to core features of a national administration expressly provided for in article 14 of the draft constitution. These entail external relations, defense, monetary policy, federal finances, natural resources, communications, citizenship, combat of terrorism and organized crime, and the administration of antiquities. According to article 30, federal administration is to be composed on a proportional basis by Cypriots of both constituent states, with at least one third of its public servants coming from each constituent state.

The federal bi-cameral parliament is composed of an equal number of senators and a proportional number of deputies with at least one quarter of the seats for each constituent state (article 22). The voting procedure requires a majority in both houses of parliament including at least one quarter of senators of each constituent state, or, in matters of special importance, two fifths of senators of each constituent state (article 25). Executive authority is vested in a presidential council composed of six voting members elected by parliament with special majority. At least one third of the members of the presidential council must come from each constituent state and at least one member from each constituent state must be part of the voting majority (article 26).

The rejection of the proposed settlement by a majority of Greek Cypriots on 24 April 2004 seems to make a future development along these lines unlikely. Nevertheless, any comprehensive settlement for Cyprus in the future must take regard of specific necessities of constitutional design in the absence of symbolic and national coherence among the participating communities.¹¹⁵

¹¹⁴ B. Schoch, "Zypern wird EU-Mitglied – und der Konflikt?", Hessische Stiftung für Friedens- und Konfliktforschung 14/2003, 9 et seq.

¹¹⁵ R. Wolfrum, "Föderalismus als Beitrag zur Friedenssicherung: Überlegungen zu einer Verfassung für Zypern und den Sudan", in: M. Brenner et al. (eds), *Der Staat des Grundgesetzes – Kontinuität und Wandel*, 2004, 1245 et seq. (1251-1253, 1262-1263).

4. The Institutional Aspect: Strong Leadership or Consensual Democracy?

Any state-building process and even more so any nation-building process requires huge efforts in order to be successful. It is often assumed that strong leadership might help a country to mobilize the necessary resources.

In the South African case there was a widely accepted moral-spiritual figurehead. The most important partner for the Apartheid government in these negotiations was its long-term political prisoner Nelson Mandela. He was chosen not because of his actual political influence at the time, but because he was deemed the “natural” political leader for the black majority in a following transition process. Mandela’s conciliatory role in the negotiation process and his presidency of the ANC and the Republic made him an acceptable figurehead for the transitional process and also for a majority of the white population.

This figurehead also proved to be a very able and pragmatic politician re-establishing international cooperation and internal stability by using the traditionally strong position of a president in South Africa’s newer constitutional history. Far from reforming this major institutional feature of the old Apartheid system, the new leadership made use of the opportunities of this institutional structure, thereby further reinforcing the moral-spiritual figurehead role of the president. Under circumstances like this, the strong-leadership model in constitutional nation-building can be a success.

However, endowing a politician with broad competencies does not automatically lead to a successful transformation. There was no such natural figurehead in Afghanistan. Recourse to the former King Zahir Shah was not regarded as an option by the majority of the Afghan participants in the Bonn negotiations and discouraged by the United States.¹¹⁶

Even under circumstances like this, the strong leadership model can be a success as an instrument of constitutional nation-building if the reliance on effective state-building policies is embedded by instruments of national coherence as well. The Afghan case seems to demonstrate some early successes of this strategy.

An elaborated alternative is provided by the draft constitution for Cyprus, as developed in the context of the United Nations plan for a

¹¹⁶ See Cottey, see note 103, 184.

comprehensive settlement of the Cyprus problem of March 2004. As illustrated above, the draft constitution does not rely on any of the features of constitutional policy prominent in the South African and the Afghan example. Special circumstances of deep divisions between the constituent groups of one state seem to forbid any reliance on the promising elements of nation-building processes. Accordingly, the draft constitution for Cyprus relies neither on the integrative powers of a strong leader (but replaces it with a Swiss-model collective organ), nor on historical reminiscences of a common past. It rather counts on the powers of procedural inclusion of both constituent groups under the constitution.

In order for constitutional politics to contribute in a meaningful way to a process of state- and nation-building, a number of characteristics have to be in place, as has been discussed in reference to the developments in South Africa, Afghanistan, and Cyprus.

South Africa has met criteria for a successful constitutional nation-building: a moral-spiritual figurehead acceptable to a majority of the different groups in society and a largely indigenous process of constitution-making that either included the relevant 'elites' or took due regard of the interest of groups not represented in the process. All of this was based on an institutional arrangement that provided the president with strong competencies, thereby mutually reinforcing his symbolic and political potencies. The policy of constitutionalization of the South African Constitutional Court could provide a further basis for a workable imagination of shared national identity.

Afghanistan has met only a limited number of criteria. However, the available possibilities of tapping traditions of nationhood have been made use of and supplemented by the installation of a political order based on the idea of strong personal leadership. Under the current circumstances this would appear to be a reasonable line to have been taken.

Cyprus still lacks successful constitutional nation-building. Although there is no lack of national identities in Cyprus, they are, however, largely mutually exclusive. It remains to be seen, whether the Annan-Plan is ever adopted by both national communities, and if so, how strong and durable a constitution which is not the result of a largely indigenous nation-building process will prove to be.

III. Conclusion

To make a distinction between state-building and nation-building is relevant to the discussion of post-conflict reconstruction efforts. State-building and nation-building in foreign countries are difficult foreign policy objectives since state-building denotes the erection of public institutions not necessarily enjoying acceptance, and nation-building is to a large extent an indigenous process of identity formation. At the same time, both processes are important components in any post-conflict rebuilding process. Constitutional politics might be an instrument suited to accommodate both institutional requirements and the needs of identification with any public order. By making use of components of the indigenous nation-building process, constitution-making can provide some legitimacy for state-building.

Drawing on indigenous culture and identity calls for a careful phasing of promoting democracy in post-conflict situations. There are circumstances in which a strengthening of a *habitus* of obedience to law would appear to be more pressing and promising, at least initially. Providing help for a process of constitutionalization which would not automatically have to reflect every element of a fully-fledged democracy might be more successful and beneficial for democracy in the long run.

