

# **International workshop on human rights and state-building – a new paradigm for development assistance in fragile settings?**

**Workshop organised by the Ministry of Foreign Affairs, Denmark and the Overseas Development Institute, London**

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## **Concept Note**

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### **1. Background**

With the advent of the new millennium, human rights and state fragility have emerged as two leading concerns in the international development community. However, until very recently, these two agendas have each constituted their own separate sphere. The set of principles for ‘good international engagement in fragile states’ approved by the OECD DAC in 2007 constitutes what is perhaps the most explicit effort to link these twin priorities at the policy level.<sup>2</sup> Principle 3 emphasises state-building as the central objective of international involvement in fragile settings, and lays out an ambitious agenda of state-building based on a strong focus on state-society relations. Principle 6 on non-discrimination includes a specific focus on human rights (see Box 1). However, for the most part, current thinking and practice about the nexus between human rights and state fragility – especially in conjunction to state-building – is still relatively new and requires further exploration.

#### **Box 1: OECD DAC Principles for Good International Engagement in Fragile States & Situation**

##### **Principle 3:**

**Focus on state-building as the central objective.** States are fragile when state structures lack political will and/or capacity to provide the basic functions needed for poverty reduction, development and to safeguard the security and human rights of their populations. International engagement will need to be concerted, sustained, and focused on building the relationship between state and society, through engagement in two main areas. Firstly, supporting the legitimacy and accountability of states by addressing issues of democratic governance, human rights, civil society engagement and peacebuilding. Secondly, strengthening the capability of states to fulfil their core functions is essential in order to reduce poverty. Priority functions include: ensuring security and justice; mobilizing revenue; establishing an enabling environment for basic service delivery, strong economic performance and employment generation. Support to these areas will in turn strengthen citizens’ confidence, trust and engagement with state institutions. Civil society has a key role both in demanding good governance and in service delivery.

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<sup>1</sup> The Danish Ministry of Foreign Affairs commissioned this Concept Note from ODI to help frame the discussion for the workshop, and the author drafted it in close communication with Christian Lotz, Karin Poulsen, Ivan Munk, and Maria Ana Petrera at the Danish Foreign Ministry.

<sup>2</sup> These principles were piloted in eight countries, and were approved by the DAC High-Level Meeting in April 2007.

**Box 1 (cont'd)**

**Principle 6:**

**Promote non-discrimination as a basis for inclusive and stable societies.** Real or perceived discrimination is associated with fragility and conflict, and can lead to service delivery failures. International interventions in fragile states should consistently promote gender equity, social inclusion and human rights. These are important elements that underpin the relationship between state and citizen, and form part of long-term strategies to prevent fragility. Measures to promote the voice and participation of women, youth, minorities and other excluded groups should be included in state-building and service delivery strategies from the outset.

(For a full list of the principles, see <http://www.oecd.org/dataoecd/61/45/38368714.pdf>)

This is the main objective of the workshop jointly organised by the Danish Ministry of Foreign Affairs and the Overseas Development Institute (ODI) on human rights and state-building: to stimulate debate among academics and development practitioners on the linkages between these two agendas from the general perspective of international engagement in situations of state fragility. The workshop is not aimed at policy development but rather should be seen as a first step towards more in-depth policy research and guidance in these areas. As such, it intends to facilitate an open and frank discussion on a very complex set of issues without having a preconceived notion of what the conclusions should be.

This concept note should serve as introduction and background to the workshop. Clearly, the fields of human rights and fragile states/state-building each addresses an extensive set of issues, and the note does not seek to be comprehensive. Rather, it aims to highlight a few key questions of interest for further discussion among workshop participants. The note begins by providing a brief overview of the evolution of a human rights concern and a state-building agenda in international development. It then highlights some of the contributions, particularly at the normative level, that a human rights approach can make to a state-building agenda, and problematises some of the linkages between these two concepts from a historical perspective. Moving beyond a normative focus, the note also seeks to identify the potential for complementarities by looking at issues related to political settlements in the new millennium as well as questions related to state legitimacy. The note ends by outlining a number of questions that emerge from the analysis that may be used as the basis for further dialogue and debate at the workshop.

## **2. Human rights and development: providing a normative framework for international assistance based on universal values**

### *Linking the international human rights and development agendas*

Until the end of the Cold War, human rights and development were kept as separate domains. The 1993 Vienna World Conference on Human Rights was a turning point, recognising that '[d]emocracy, development and respect for human rights and fundamental freedoms are interdependent and mutually reinforcing'. The Conference also reaffirmed that 'extreme poverty and social exclusion constitute a violation of human dignity' and that urgent steps were necessary 'in order to promote the human rights of the poorest'.<sup>3</sup> The 2000 Millennium Summit and the 2005 World Summit

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<sup>3</sup> United Nations (1993) *Vienna Declaration and Programme of Action*, A/CONF.157/23.

have further stressed that development and human rights are interdependent and mutually reinforcing, while the concept of ‘in larger freedom’ elaborated by former UN Secretary General Kofi Annan captures the inter-linkages between development, security and human rights. From the late 1990s onwards, a number of bilateral and multilateral development agencies as well as other international organisations have attempted to integrate human rights into their programmes or have officially adopted human rights-based approaches to development.

The UN system has been a pioneer in this area, elaborating an interagency common understanding of a human rights-based approach to development programming in 2003.<sup>4</sup> Among other things, such an approach entails:

- Drawing a relationship between development cooperation, the Universal Declaration on Human Rights and international human rights instruments;
- Emphasising the relevance for development programming of human rights standards and principles derived from these instruments (e.g. equality and nondiscrimination; participation and inclusion; accountability and the rule of law); and
- Highlighting the contribution that development cooperation can make to building the capacities of ‘duty-bearers’ and ‘rights-holders’ to realise and claim rights.

Thus, human rights (including civil, political, civil, economic, social, and cultural rights) embody a universal or fundamental set of values. As such, they provide a normative framework that sets out clear international standards and clarifies both the rights of individuals and the obligations of states, based on an international consensus. They are inalienable rights that people have as individuals, not as citizens of particular states, and that the international community regards as a matter of international, and not just domestic, concern. States have obligations to respect, protect and fulfil these human rights, and are regarded as ‘duty bearers’, whereas individuals are ‘rights-holders’ with entitlements.

#### *Regional and national mechanisms to protect human rights*

These international standards to protect and promote human rights as a fundamental set of values at the global level very often find expression at the regional and national levels as well. In the case of Latin America, for example, the Organisation of American States (OAS) has a long history of codified human rights and has a well developed human rights system that consists of an Inter-American Commission of Human Rights, an Inter-American Court of Human Rights, and various other institutions, including an Institute of Human Rights. Regional human rights mechanisms in Africa, including the African Commission for Human Rights, are newer and perhaps relatively less well-established, but since the 1990s the region has seen some progress in codifying human rights protections. The establishment of a functioning African Court on Human and People’s Rights represented a considerable struggle, but it finally came into being in 2004 (it is now in the process of being

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<sup>4</sup> See LH Piron and F. Watkins (2004) ‘DFID Human Rights Review: A review of how DFID has integrated human rights into its work’. London: ODI.

merged with the African Court of Justice, which has yet to be established).<sup>5</sup> Asia as a region has the most limited codification of human rights norms. As will be discussed in further detail below (Section 4), the international human rights framework is also often expressed at the national level. Fundamental rights and freedoms find protection in Constitutions as well as other domestic legislation.

### **3. State-building and development: engaging with fragile states**

Over the past decade, state-building has become a leading priority for the international development community. Today, almost every major donor identifies state-building as one of its key objectives, particularly in fragile states. There is no firm consensus within the international community on exactly what constitutes a ‘fragile’ state (see Picciotto 2007 for a variety of donor definitions<sup>6</sup>). However, there is general agreement on some key characteristics, including weak institutions and fundamental lack of state capacity and/or political will to fulfil basic functions, often as a result of conflict.<sup>7</sup> A significant number of developing countries are characterised by some degree of state fragility along different dimensions. Some of these countries represent entrenched and systemic state fragility while others represent local and temporary fragile situations. Donors have come to understand state-building as being much broader and more complex than their more traditional work on development challenges in more ‘normal’ settings. The intensity of donor engagement with state-building can be seen in the expanding sets of activities being carried out in settings ranging from Afghanistan and Iraq to countries in sub-Saharan Africa (SSA), Asia, the Pacific and Latin America.

There has not always been such concern about the need to build capable, effective and responsive states. In fact, the (re)discovery of the state as one of the keys to development and poverty reduction is relatively recent.<sup>8</sup> The renaissance of the state contrasts sharply with the anti-statist stance of the development paradigm that was dominant during the 1980s and early 1990s under the aegis of the Washington Consensus. The shift in emphasis, and the growing awareness of the need to build more effective states, surfaced from the confluence of several factors. Over the past two decades, new states (the Balkans, the former Soviet Union, East Timor, and, most recently, an independent Kosovo) have come into being, and some of them have remained weak and unstable. Many others have experienced severe conflict and are attempting to lay the foundations for peace and (re)construction, often with the support of the international community.

There is also a growing recognition that an exclusive focus on the Millennium Development Goals (MDGs) – themselves a central rallying point for the international community but devoid of any conflict awareness or of an understanding of the central

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<sup>5</sup> For a more detailed analysis about the evolution of human rights mechanisms in Africa, see C. Shaw (2007) ‘The Evolution of Regional Human Rights Mechanisms: A Focus on Africa’, *Journal of Human Rights*, vol. 6, no. 2.

<sup>6</sup> R. Picciotto (2007) ‘[Conflict prevention and development co-operation: Joint Project of JICA and UNDP - State fragility and human security in Africa](#)’, Background note prepared for the Wilton Park conference on Conflict Prevention and Development in Africa (November).

<sup>7</sup> The World Bank and the Fund for Peace are now publishing widely quoted indicators, which may be used as a basis for assessing state fragility.

<sup>8</sup> V. Fritz and A. Rocha Menocal (2007) ‘Developmental States in the New Millennium: Concepts and Challenges for a New Aid Agenda’, *Development Policy Review* (September).

role that the state may play in development (or lack thereof) – is insufficient to address complex development challenges. As the Commission for Africa emphasised in its 2005 report, the way states function is increasingly seen as one of the most important factors affecting development in the poorest countries: institutions are crucial to promote development, and states are a critical hinge in achieving the transformations necessary to achieve and sustain the MDGs. In addition, there is growing concern about the negative impact of fragile states, in terms of not only domestic issues but also conflict, instability, terrorism, trafficking, organised violence and other undesirable spill-over effects. Thus, capable and effective states are seen as essential both to promote development and prosperity as well as to counter terrorism and other security challenges.

#### **4. What a human rights approach can contribute to a state-building agenda – and a cautionary note from historical perspective**

Despite the prominence of both a human rights and a fragile states/state-building agenda within the international community, explicit efforts to understand and assess the linkages between them are relatively new (see the work of Frances Stewart and Graham Brown as one such example). The OECD Principles for Good International Engagement in Fragile States constitute an important attempt to combine these two agendas, but much more thinking is still needed to address the question of whether and how a human rights perspective can be used as a foundational hinge for successful state-building in the new millennium.

##### *Complementarities between the two agendas*

At a normative level, a human rights perspective can make a considerable contribution to a state-building agenda in fragile states, and there are significant complementarities between the two. Reconfiguring state-society relations and the nature of the social compact between rulers and ruled is an essential component of state-building. As noted in Section 2, human rights provide a set of normative standards about the nature of this link that has strong international legitimacy. Defined in terms of ‘duty-bearers’ and ‘rights-holders’, they sit at the core of the social compact between state and society, and they combine a focus on developing the capacity of states to deliver on human rights commitments with the awareness and capacity of different social groups and individuals to claim their entitlements. A human rights framework thus puts issues such as politics and power relations, state accountability, state-society relations, and genuine participation at the centre of state-building efforts. A focus on vulnerable and excluded groups and the principles of universality, equality and non-discrimination, as well as participation and inclusion, are particularly relevant here.

As was discussed above, the international human rights framework is also often reflected at the regional and the national levels. Mechanisms such as national Constitutions provide the basis for establishing benchmarks and minimum standards to hold state actors and others accountable for their actions. In particular, individuals claiming that their fundamental rights have been infringed or threatened should be entitled to apply for redress. By setting minimum, internationally recognised standards and highlighting basic dignity for all people, these regional and national mechanisms establish intrinsic norms for national development processes and international assistance.

*Human rights and state-building in the new millennium: can all good things go together?*

Despite the complementarity between a human rights approach and state-building efforts highlighted above, especially at the normative level, it is also important to recognise that these two agendas have not always gone hand in hand in actual practice. The current vision of the OECD DAC on state-building seems to be based on the assumption that the process can be very consensual, inclusive, bottom-up and democratic. However, historical experiences with state formation and state-building suggest otherwise. State formation and state-building have emerged as long-term, non-linear, tumultuous, inherently violent and conflict-ridden processes that are also deeply political. Such efforts have historically been top-down, heavily driven and controlled by (national and international) elites. Civil society has at best played a very weak or limited role. Historical cases of states that have been democratic and based on the respect of human rights since the moment they were founded are exceptional. In general, some kind of functioning state is in place before democracy is established. This is as true for early modern European states as it is for Germany and Japan after World War II, the successful state-building experiences of East Asian countries like Taiwan and South Korea, and countries in the developing world that have undergone transitions to democracy during the so-called ‘Third Wave’. Democratisation, when it has happened, has taken place only afterwards.

Clearly, contemporary state-building efforts are qualitatively and contextually different from earlier state formation processes. Whereas historically such processes were much more organic, in current parlance, state-building is more often used to refer to explicit and pro-active efforts at the construction of states and the engineering of institutions, with various and sometimes far-reaching degrees of external involvement, especially since the 1990s.<sup>9</sup> As leading actors in contemporary state-building attempts, international players (and for the purposes of this workshop especially donors) assume particular responsibilities, and they confront the difficult task of constructing a *domestic* basis of legitimacy for the interventions they undertake in different fragile settings.

As such, it is perhaps not surprising that the vision of state-building that donors have come to espouse in the new millennium (most recently captured in the DAC Principles) is based on the establishment of a functioning and effective democratic state that is representative, upholds human rights, and has the capacity to address the needs/demands of its population and to provide social services. This ideal is indeed laudable – and in particular it is difficult to imagine that, with the global triumph of democracy and a rights-based approach to development (at least at the rhetorical level), the international community could legitimately advocate an alternative model. The challenge, of course, lies in how to get there.

There are no easy or ready-made answers as to how best to proceed. A number of scholars have begun to highlight the perils of promoting political liberalisation and democratisation too quickly in post-conflict and other fragile settings, before

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<sup>9</sup> I am grateful to Vijay Nagaraj for the comments he made during the workshop, which helped me nuance this argument.

institutions are in place that are strong and effective enough to channel new rights and freedoms peacefully.<sup>10</sup> But postponing democratic reforms (especially elections), as well as institutional responses to the respect of fundamental human rights (including freedom from torture and other civil and political rights) until strong and perfectly functioning state institutions are fully in place is also unrealistic. Institution-building is not a linear process and an ‘end point’ as such may never be reached. Moreover, institutions vested to protect human rights (e.g. ombudsmen), as well as elections and other participatory features are essential to endow state-building efforts and the emerging (new) state with some sense of legitimacy in the eyes of the population.

What this tension may point to is the need for donors to recognise more fully that all good things do not automatically go together, especially in the short-term. As such, realistic expectations and a greater awareness of the overall timeframe for state-building need to be much more thoroughly internalised. Among other things, as highlighted by the OECD DAC principles, donors need to be prepared to make a sustained commitment to institution-building over the long term, even though securing such a commitment itself may represent a fundamental challenge and raise questions regarding the legitimacy of such intrusive operations (this may mean, for instance, that there should not be a rush to hold ‘founding’ elections too early, that such elections should not be seen as an ‘exit’ strategy by the international community but rather as an important step in a broader state-building process, or that constitutional assemblies should not be compressed into a timeframe that ends up being too tight).

## **5. Inclusive political settlements as statecraft in contemporary state-building efforts?**

As highlighted above, an awareness of historical trajectories and challenges matters, especially for providing a sense of the magnitude, scale and duration of the multiple change trajectories that are expected to happen. Historical perspectives may also provide an understanding of what sets of actors and processes have been most important at different times. Yet, as also discussed, contemporary state-building efforts (involving international actors as key players) are taking place under very different (global and national) conditions, and this may point to different opportunities and entry points (as well as challenges, of course).

A crucial question that is worth considering in this regard is the following: is it possible that the current context in which fragile states are being (re)built and transformed itself offers opportunities for ‘a new beginning’, one based on more inclusive and non-discriminatory state-building efforts grounded on a human rights approach – especially in post-conflict settings?

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<sup>10</sup> In Rwanda, political liberalisation before institutionalisation led to the strengthening of an ‘independent’ but also highly irresponsible and polarised media that did much to deepen social divisions and incite the genocidal violence that ensued (R. Paris (2004) *At War’s End: Building Peace after Conflict*, Cambridge: Cambridge University Press). Where political competition is not properly institutionalised, it can lead to renewed conflict in the form of ethnic nationalism (J. Snyder (2000) *From Voting to Violence: Democratization and Nationalist Conflict*. New York: Norton Books). In such cases, elections are ‘less an exercise of democracy than a census of loyalties commanded by previously warring groups’ (J. Putzel (2007) ‘Governance Challenges in Post-War States: Security, Democratic Politics and Economic Management’, presented at a conference on ‘Engaging with Fragile States: Challenges and Opportunities’, Addis Ababa, 24-25 July).

In such settings, political settlements reached through negotiated (peace and other) agreements sit at the heart of the state-building process, and they have the potential to lay the foundations for inclusive and rights-based statecraft. A political settlement is the expression of a negotiated agreement (at least in principle) binding together state and society and providing the necessary legitimacy for those who govern over those who are ruled. It is thus essential in helping to create and sustain an effective and responsive state. As Ghani and Lockhart (2007) have noted, such settlements at their core attempt to reconstitute state-society relations and create a new social contract based on mutual rights and obligations.

Since the 1990s in particular, there has been a broad consensus (at least in principle) that political settlements need to be inclusive and representative, and need to incorporate those who have traditionally not had a voice (e.g. women, ethnic minorities, etc). In addition, a majority of contemporary negotiated agreements invoke human rights and a desire to end genocide, ethnocide, exclusion and violation of rights of people.<sup>11</sup> Key elements of a political settlement include institutions and mechanisms such as constitution-making processes, elections and, in some cases, transitional justice mechanisms.

Yet, considerable tensions emerge here as well that need to be taken into account. It has come to be widely accepted in the literature that a political settlement is more likely to ‘stick’ if one side has won an outright victory. A significant challenge in many post-conflict situations is precisely that there are no clear winners and losers (possibly because of an external intervention into a conflict), so difficult compromises need to be made. Among other things, there may be a need to incorporate unsavoury actors responsible for considerable human rights atrocities into the negotiating table, and there is also a danger that different parties will refuse to enter into negotiations unless a general amnesty is granted.<sup>12</sup>

In some contexts, bringing individuals to account too early may compromise a political settlement. Conversely, failing to bring individuals to justice may undermine people’s trust in the political process. Further, a culture of tolerance of political actors’ actions may lead to further perpetration of violence or criminality in an unaccountable climate. Thus, it is not always obvious that the goals of achieving peace and those of achieving justice can be easily reconciled – and a careful and context-sensitive balance between these twin needs is an essential component (and challenge) of successful statecraft. Different societies have attempted to experiment with different methods and mechanisms in search of such a balance. South Africa’s use of so-called ‘restorative justice (first through the Truth and Reconciliation

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<sup>11</sup> See, for example, A. Ghani and C. Lockhart (2007) ‘Writing the History of the Future: Securing Stability through Peace Agreements’, *Journal and Intervention and State-Building*, vol. 1, no. 3. Available at <http://www.effectivestates.org/resources.htm>; and International Council on Human Rights Policy (2006) *Negotiating Justice? Human Rights and Peace Agreements*. Available at: [www.ichrp.org](http://www.ichrp.org).

<sup>12</sup> As one observer has put it, warring factions in Sudan may disagree about everything except calling for a general amnesty.

Commission and more recently through the justice system) offers one such creative, if not entirely unproblematic, example.<sup>13</sup>

In addition, while negotiated agreements and the political settlement thus reached (including constitutions) may look good on paper, translating their often times high rhetoric into reality is a completely different matter. In the context of fragile states, characterised among other things by weak formal institutions, reduced state capacity, and limited resources, this is a particularly acute problem. For instance, as Ashraf Ghani and Clare Lockhart (2007) point out,<sup>14</sup> peace agreements are often infused with a rights-based approach to economic and social development, containing detailed lists of rights for individuals in general and indigenous people, refugees, internally displaced people, former combatants, and women in particular. But living up to those standards in actual practice is extremely difficult, and part of the state-building effort needs to be about establishing priorities and sequencing interventions.

## **6. Using a human rights approach to build state legitimacy in fragile states?**

*What does legitimacy mean?*

The issue of legitimacy is at the core of state-society relations and the nature of the ‘social pact’ between state and society. It refers to acceptance of a governing regime deemed to have the right and capacity to exercise its authority. Without a minimum degree of legitimacy, states have difficulty functioning.<sup>15</sup> The need to build state legitimacy is therefore at the core of a state-building effort in fragile states and is a primary requirement for stability over the long term.

One of the fundamental questions that arises for both national and international actors is how this challenge can best be addressed. For the purposes of this workshop in particular, it is essential to explore whether and how a human rights focus can contribute to the building of more legitimate states: what is the relationship between human rights, accountability mechanisms and legitimacy in state-building processes?

An important step in beginning to tackle this question is to ask what is meant by legitimacy in the first place. Legitimacy is a very complex concept which includes many different dimensions. As Margaret Levi has put it, ‘no one – including Weber himself – has successfully sorted out which of the various elements [of legitimacy] are necessary or how to measure indicators or their interaction’.<sup>16</sup> Historically, states have relied on a combination of one or more methods to establish their legitimacy and authority over those they rule.

A few of the most common ways of establishing and sustaining legitimacy over time include one or more of the following:

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<sup>13</sup> See M. Batley (2005) ‘Restorative Justice in the South African Context’. In T. Maeppa, ed. *Beyond Retribution – Prospects for Restorative Justice in South Africa*. Pretoria: Institute for Security Studies. Available at <http://www.iss.org.za/pubs/Monographs/No111/Chap2.pdf>

<sup>14</sup> A. Ghani and C. Lockhart (2007).

<sup>15</sup> D. Brinkerhoff (ed.) (2006) *Governance in Post-conflict Societies: Rebuilding Fragile States*, London: Routledge.

<sup>16</sup> M. Levi (2006) ‘Why We Need a New Theory of Government’, *Perspectives on Politics*, vol. 4, no. 1.

- Provision of public goods and services, including social security (e.g. the modern welfare state).
- Economic performance (e.g. the so-called East Asian Tigers – South Korea, Taiwan, Singapore and Hong Kong – as well as China and Vietnam).
- Ideology and/or nationalism (e.g. Cuba and Iran).
- Populism (e.g. Perón in Argentina and, more recently, Chávez in Venezuela).
- Neopatrimonialism (much of Sub-Saharan Africa).
- Liberal democratic representation, which includes respect for fundamental civil and political rights, and accountability (namely, advanced/highly developed industrial countries, but Costa Rica and India. More recently, with the advent of the ‘Third Wave’ of democratisation since the 1980s, many countries throughout Africa, Asia, Latin America and elsewhere in the developing world are attempting to strengthen this form of legitimacy, though as discussed below this remains a challenge).

As can be appreciated from the list above, some of these methods have been more inclusive than others, and many of them can be considered to be imperfect and considerably problematic (e.g. populism and neopatrimonialism) depending on who is included in and who is left out of the social compact thus established between state and society.

#### *Fragile states and democratic legitimacy*

Since the 1990s, with the global triumph of democracy, the form of legitimacy that tends to be emphasised is that based on democratic representation and accountability.<sup>17</sup> Human rights are of essential importance in this conception of state legitimacy, and, again, from a normative perspective, it seems imperative to link a fundamental respect for human rights and democratic accountability to any contemporary notion of state legitimacy. In fragile states in particular, as Frances Stewart and Graham Brown have argued, establishing a legitimate government based on inclusive democratic governance ‘is arguably the most important precursor of corrective policies...., as groups experiencing historical social exclusion or deprivation of human rights are unlikely to respond favourably to corrective policies if they continue to regard the state as illegitimate’.<sup>18</sup>

Yet, in practice, it seems essential to problematise a democratic legitimacy perspective of human rights in state-building efforts in fragile states, since (as argued in Section 4 above) there has been a tendency in the part of the international community to assume that ‘all good things’ naturally go together. For instance, it would be misleading to suggest that states that are not democratic and lack a fundamental respect for civil and political rights are automatically fragile. This may be true of some states, but is not true of others. Some states may well derive their legitimacy and effectiveness from sources other than democratic representation (think of Burma vs. China and Vietnam, for example). As John DiJohn has put it, the idea that a lack of democracy is a necessary indicator of a fragile or even failed state is ‘an

<sup>17</sup> See Brinkerhoff 2007, among others.

<sup>18</sup> F. Stewart and G. Brown (2006) ‘Fragile States’. CRISE Policy Paper. Oxford: CRISE.

ahistorical proposition given the construction of many developmental states before democracy became a source of legitimate government rule'.<sup>19</sup>

In addition, as a growing number of academics has documented, legitimacy based on democratic processes and accountability can be extremely difficult to achieve, especially in early phases of state-building where democratic political as well as state institutions are weak and/or malfunctioning.<sup>20</sup> This kind of legitimacy is meant to be normative rather than instrumental. That is, the legitimacy of the state should not derive from its ability to produce outcomes (including economic growth and service delivery), but rather rest on a principled commitment to the democratic process (Przeworski 1991). However, at times, a population may come to prefer order and performance over the perceived disorder that can accompany processes of state-building-cum-democratisation (e.g. Russia since 2000). As the recent experiences in Latin America and elsewhere in the development world further illustrate, whether warranted or not, there is a growing disenchantment with democracy in these settings regarding what is perceived as a failure to produce tangible economic benefits. The effect has been a further undermining of democratic institutions that are quite weak to begin with, and the considerable erosion of state legitimacy.<sup>21</sup>

*Fragile states and the fulfilment of basic state functions as a source of legitimacy*

Another important entry point for human rights to contribute to building/strengthening state legitimacy in fragile states is through an emphasis on the fulfilment of essential state functions. This kind of legitimacy is based on effective state performance (or at least the perception of it). While there is as yet no firm international consensus on what indispensable state functions should be, there has been a proliferation of ideas about what such a list should include (DFID, OECD, NEPAD, Millennium Declaration etc). Ghani et al. (2005), for instance have proposed a list of 10 state functions which has received considerable attention.<sup>22</sup>

Human rights lie at the heart of many fundamental state functions, and as such a focus on human rights seems particularly useful to the task of building state legitimacy in fragile states. For example, issues related to security, the rule of law, access to justice, and the provision of basic services are intimately related to a human rights agenda. The fulfilment of different human rights – including civil, political, social, economic and cultural – cannot be achieved if the state lacks the institutions necessary to meet its obligations as duty-bearer and protect those rights. At its core, then, a human rights

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<sup>19</sup> J. DiJohn (2008) 'Conceptualising the Causes and Consequences of Failed States: A Critical Review of the Literature', Background Paper for the Crisis States Research Centre, London. Available at <http://www.crisisstates.com/publications/wp/WP25.2.htm>

<sup>20</sup> See Snyder (2000) and Paris (2004), among others.

<sup>21</sup> See A. Rocha Menocal (2008) 'Hybrid Regimes and the Challenges of Deepening and Sustaining Democracy in Developing Countries.' *South African Journal of International Affairs* (July – forthcoming).

<sup>22</sup> A. Ghani, A., C. Lockhart and M. Carnahan (2005) *Closing the Sovereignty Gap: An Approach to State-Building*, Working Paper No. 253, London: ODI. These functions include: i) legitimate monopoly on violence; ii) administrative control; iii) management of public finances; iv) investment in human capital; v) creation of citizenship rights and duties; vi) provision of infrastructure; vii) market formation; viii) management of state assets; ix) effective public borrowing; and x) maintenance of rule of law.

<sup>23</sup> Another interesting example has to do with the provision of justice, an area where not the state but rather local justice systems and alternative networks tend to provide the bulk of such services.

agenda is an institution-building agenda, emphasising the need to build strong, effective, and responsive state institutions from a long-term perspective.

But here again, it may be useful to think about the fulfilment of such state functions in more disaggregated terms. It is essential to realise that not all basic needs can be met and all human rights fulfilled at once. This may indeed be one of the starkest challenges confronting fragile states and the international community: what basic state functions should be prioritised in settings where everything is a priority, and what entities or actors are best suited to carry them out?

A growing body of research has begun to focus on these issues, highlighting different perspectives for international engagement in fragile states. Some analysts argue in favour of a ‘sequencing’ approach, suggesting that it is essential to establish basic security and order (through strengthening institutions like the military, the police, the rule of law, and basic administrative organs) before other important functions (like provision of social services and access to justice) can be adequately addressed. This view also suggests that such sequencing should not be considered only *among* different state functions but also *within* them. Others stress the importance of incorporating issues such as access to justice, social reconciliation, the promotion of integrity, and the fight against corruption into state-building efforts early on, especially if these are to prove sustainable over time. From this perspective, a focus on security as a first priority may be too narrow and may overlook other important areas that are essential to build state legitimacy. A key question that emerges from these different perspectives and that needs to be further explored is how an adequate balance can be achieved so as to ensure that important functions are fulfilled and basic needs met while at the same time fragile states are not overburdened with an agenda that may seem too ambitious (and even unrealistic).

#### *Tensions between meeting short-term goals and building state legitimacy over the long term*

Another dilemma that is closely related to the fulfilment of basic state functions and social needs has to do with what actors or entities are best suited to carry them out. In principle, the state itself should play a leading role in this regard – the successful undertaking of such functions is not only an important source of legitimacy for the state, but is also an obligation under different international, regional, and national laws and a key characteristic of statehood. But in fragile settings the state’s institutional capacity to do so is likely to be considerably limited. This entails certain dilemmas that need to be addressed.

The provision of basic social services provides a useful illustration.<sup>23</sup> Confronted with the need to generate a ‘peace dividend’ in terms of quick and visible improvements of social and economic conditions, donors have often opted to put service delivery in the hands of international and local NGOs. This is an extremely valid concern, especially given the decrepitude if not outright absence of state institutions that can fulfil basic functions. And yet it has to be managed very carefully, because of potentially negative consequences on other important priorities that may be more long term – namely state-building.

In many ways, as Francis Fukuyama has put it, ‘there is a conflict in donor goals between building institutional capacity and providing end-users with the services that

the capacity is meant to produce'.<sup>24</sup> As highlighted by a recent UNDP/USAID study, international NGOs (NGOs) are very good at service delivery.<sup>25</sup> This may be extremely useful in the short term, but it can also reduce the incentive to build national systems and invest in strengthening local capacity over the long term. Moreover, the contracting out of tasks such as service delivery, which should be provided by a functioning public service responsible for realising social and economic rights, detracts considerable legitimacy from the state. The state comes to be perceived by the population as not being able to provide basic services, which then have to be provided by the international community.

## **7. Questions for further reflection and discussion**

As highlighted in Section 1, the fields of human rights and fragile states/state-building are both very rich and they each address an extensive set of very complex issues. This concept note cannot claim to be comprehensive. Rather, the note has been purposely focused on a limited set of key issues, with the expectation that the analysis may provide the basis for further dialogue and debate at the workshop. A number of questions to encourage discussion among workshop participants are worth emphasising – and hopefully these will stimulate further thinking among participants on other related areas of interest.

- Human rights are a set of normative standards with strong international legitimacy. To what extent does a concern with human rights provide a useful framework to ground contemporary state-building efforts? What are some of the conceptual and empirical complementarities and tensions between a human rights approach and a state-building agenda? What are the normative, analytical and operational implications of human rights in fragile states and state-building efforts? To what extent are human rights standards open with regard to different state models?
- To what extent do the OECD DAC Principles provide a realistic roadmap to engage with fragile states? To what extent are current international efforts to promote state-building normatively driven and to what extent do they reflect needs and priorities on the ground?
- To what extent can historical experiences of state formation and state-building help inform contemporary state-building processes? What are some of the tensions, challenges and opportunities embedded in current international state-building efforts?
- What is the relationship between civil and political rights, economic, social and cultural rights and state-building?
- To what extent can a human rights edifice help address some of the very complex trade-offs and compromises that state-building may require?

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<sup>24</sup> F. Fukuyama (2004) *State-Building: Governance and World Order in the 21<sup>st</sup> Century*, Ithaca: Cornell University Press.

<sup>25</sup> UNDP/USAID (2007) *First Steps in Post-Conflict Statebuilding: A UNDP-USAID Study*, Washington, DC: USAID.

- To what extent can negotiated (peace) agreements lay the foundations of an inclusive political settlement and successful statecraft over the long term? Is there a role for the international development community in facilitating such settlements?
- What is the role of transitional justice in contributing to sustainable state-building efforts in fragile states over time, especially those emerging from violent conflict? What are some of the main dangers, opportunities, and trade-offs that need to be kept in mind?
- Can a human rights focus contribute to the building of more legitimate states? How? What is the relationship between human rights and different forms of legitimacy in state-building processes?
- Can human rights standards play a role in promoting inclusiveness and non-discrimination in contemporary state-building processes?
- What role can civil society play in contemporary state-building efforts? Many of the demands and tasks associated with such processes tend to be state-centric and top-down in nature (e.g. the need to build effective state institutions). What mechanisms for participation and consultation can be useful in promoting more inclusive state-building? What kinds of experiences with and lessons from such mechanisms can be shared from different fragile settings?
- In fragile states, characterised among other things by very weak state capacity, the list of tasks to take care of may be overwhelming. What basic state functions should be prioritised in settings where everything is a priority, and what entities or actors are best suited to carry them out? How can fragile states be best supported to fulfil their responsibilities under international, regional and/or national laws to protect human rights? Should international interventions be sequenced, or does such sequencing undermine attempts at developing a more holistic approach to state-building and to promote and respect human rights as an indivisible whole?
- For instance, should institution-building be promoted prior to political liberalisation and the holding of elections? If so, how? If political liberalisation needs to be delayed, how can accountability be promoted so as to attempt to begin addressing problems related to state legitimacy, integrity, and trust early on?
- Are bilateral donors well placed to promote a human rights approach in state-building? What are some of the main incentives and constraints that they face in such work? What about regional human rights mechanisms and multilateral organizations like the UN and the EU?
- How can donors operationalise their commitment to promote human rights in state-building interventions as well as their own responsibility to respect human rights? What are some of the main opportunities/entry points to do so,

and what are some of the most considerable challenges? (e.g. political dialogue and conditionalities vs. programming?).