Meeting 7: Protecting rights in conflict situations and fragile states

Speakers: Andy Carl, Conciliation Resources
Christine Chinkin, London School of Economics and Political Science

Chair: Frances Stewart, University of Oxford

Meeting Summary

The first speaker, Andy Carl, began by talking about the different roles that are at play within the field of conflict resolution and then briefly outlined the work of Conciliation Resources (CR). He used three of CR's projects to illustrate some of the dilemmas involved in thinking about both human rights and conflict resolution. These included consideration of the possibility of either political or military solutions to conflict, the role of the International Criminal Court, the complexities of transitional justice and the potential role of legal and constitutional reform in promoting conflict resolution. Carl concluded by stressing the importance of the principle of 'non-subordination' and the need for meaningful engagement with armed groups.

The second speaker, Christine Chinkin, focused on the role of human rights in post-conflict reconstruction. She discussed the higher profile of human rights in peace settlements since the end of the Cold War and the role of external actors. Chinkin also addressed the question of who exactly are the duty-bearers in post-conflict environments. She then moved to the primary focus of her presentation: the human rights obligations of post-conflict governments and, in particular, the question of whether derogation from these obligations is possible. She concluded by stressing that a gender approach to post-conflict reconstruction is needed and that the state also has a duty to not prevent people from undertaking self-help measures.

The question of the complementarity between human rights and peace-building provided a focus for the discussion, in particular in relation to the concepts of non-subordination between human rights and conflict resolution and non-derogation of fundamental rights. The importance of participation and local ownership was stressed, both with respect to possible trade offs and in terms of making the international human rights system more demand led. The need for organisations to respond to the potentially increased level of risk that can result from adopting a rights-based approach in conflict environments was noted.

Andy Carl

I am the Director of Conciliation Resources (CR), a conflict resolution organisation working in a number of countries. Firstly, I am going to look at a few concrete areas of experience from my own work. Secondly, I will offer some reflections on the challenges arising from the tensions that result from working at the interface between conflict resolution and human rights.

Roles within conflict resolution

I began thinking about this issue by broadly sketching out an idea that there are a number of roles within the field of conflict resolution, and that these are undertaken by multiple actors in the different phases of the conflict cycle:

i. The primary focus is usually on the role of mediator, who controls the process. I think that most conflict resolution organisations and interventions are not actually about mediation but they are talked about as if they were.
ii. The second type of role is that of facilitator. This is someone who shares responsibility for the process with the negotiating parties and is best exemplified by the Norwegian role in Sri Lanka.
iii. Finally, there are a number of different experts and resource persons who play various roles at different parts of the conflict cycle. I have bunched these together under the title 'multiple other roles'. I would situate CR's work within this final group.

The work of Conciliation Resources

CR's mission statement states that we 'support groups working at community, national and international levels to prevent violence or transform armed conflict into opportunities for development based on more just relationships'. The organisational goals are to:

i. support people in developing innovative solutions to social, economic and political problems related to armed conflict;
ii. provide opportunities for dialogue and improved relationships across conflict divides and at all social levels including marginalised groups;
iii. influence governments and other decision-makers to employ conflict transformation policies that limit militarisation and include effective mechanisms for public participation; and
iv. improve peacemaking practice and policies by promoting learning from the experiences of peace.

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CR works in the following areas of the globe: the Caucasus; Fiji, Northern Uganda, West Africa and Colombia and Angola, where we have the Accord programme, which is different from the other programmes in that it documents peace processes in partnership with local organisations to try to promote learning. The reason why we work in such varied areas is because one of the principles underlying our work is that there is no off-the-peg way of doing conflict resolution. Instead, we recognise that there is value in learning from comparative experience and it is therefore important for us to have a range of work.

Conflict in Northern Uganda: Is political or military resolution possible?

One region where we are working is Northern Uganda. (My discussion about the areas in which we work is going to be relatively superficial and will, broadly speaking, assume that there is an understanding about some of the issues in these conflict areas.) You will know that there has been a war in Uganda for 18 years or so, during which time a large amount of the population in the North has been displaced and it is the civilians who are paying the price for the conflict. There is also a problem concerning child soldiers.

There have been a number of attempts to end the war. One currently underway involves a semi-detached representative of the Uganda government who has been trying to reach a ceasefire with the Lord's Resistance Army (LRA). We have been working with a number of different actors who have been playing various third-party roles in the dialogue, including religious and traditional leaders. The Ugandan case raises all kinds of important questions for us. I will highlight some of the broad questions that are asked in relation to Uganda, and which we ask ourselves.

Is a political resolution of the Ugandan conflict possible? Our work is premised on the notion that it is but there are many problems:

i. There is a successful conflict system in place that serves the interests of all that are part of it – Joseph Kony and the LRA, and President Museveni and the UPDF. This means that there is no particular incentive for them to engage with the other parties to seek an end to the conflict.
ii. There is the concept of the 'hurting stalemate'. The LRA have not yet reached this point and therefore the question that the Ugandan government and external actors ask is whether the LRA can be tempted with enough carrots or beaten with enough sticks in order to push them into a process that may lead to settlement. This is a real dilemma – how do you make peace when the main protagonists are not really interested in it?
iii. Is a military solution actually possible? I think that we see the conviction from the UPDF, and also a number of international NGOs, that military action is the only way to defeat the LRA. They measure their success in terms of the number of combatants who come out of the bush, particularly if they catch a big one (of which they have been a number).

There are two broad dilemmas relating to a military solution, however:

i. The people who you are fighting are themselves abducted child soldiers. This terrible paradox leads Uganda to challenge the logic of

militarism more profoundly than any other current conflict.

ii. Placed in the context of the history of this and other conflicts, even if the Ugandan government were able to kill all the members of the LRA high command, would this be a solution? Is there what the Americans like to call a 'one bullet solution'? I think that we only need to look at the situation and challenges in Angola today to realise that militarism is actually a lost opportunity for dialogue rather than a solution.

The role of civil society

In Uganda, civil society plays an important role in engaging and supporting the parties as best they can, in particular the LRA, and in calling on them to respect international law. They also lobby for international intervention and are relatively well known for the Amnesty Law that was passed by the Ugandan Parliament and which they like to talk about as being based on the Acholi traditions for reconciliation. In reality, I think the extent to which reconciliation is central to their culture is exaggerated. There are important studies about how this actually works in reintegrating ex-combatants that demonstrate that this is not an easy process. While these communities do have a fantastic capacity for cohesiveness, not all ex-combatants are forgiven. Furthermore, the role of the traditional leaders is more one of putting a stamp on the fact that a conflict has been resolved or that a community has forgiven a combatant, than of mediator.

The International Criminal Court: a disincentive to peace?

As we also know, the International Criminal Court (ICC), at President Museveni's invitation, has taken the Ugandan conflict as one of its first interventions. This is causing certain problems, the biggest of which is its potential impact on the engagement of the LRA in a peace process. As a member state, the Ugandan government is using the ICC as an instrument of war, as another way of defeating the LRA militarily and politically. The problem, however, is not simply one of justice or impunity but also of timing because the ICC intervention is proving to be a disincentive for the LRA high command to even sign up to a cease fire.

The involvement of the ICC raises the question of what comes next. The Ugandan government have privately said to the LR high command that they will be able to find a way to suspend the involvement of the ICC. However, whilst it may be deferred, it cannot be suspended and, whilst the LRA high command may be psychopaths, they are not stupid and they will also know this. They are therefore looking for countries where they might be able to seek refuge and there are not that many obvious contenders in the region.

The principle of non-subordination

This story, which is very much in the public domain, is probably one of the most important illustrations of the potential clashes in pursuing both a human rights and conflict-sensitive approach. This leads me to the first observation that I would like to make. There is not only a strong need for sensitisation between humanitarian, human rights and conflict-resolution approaches, but also for accepting the principle of non-subordination. Peace is not subordinate to human rights, human rights should not be subordinate to peace-making, and neither should be subordinate to protection of the civilian population. I think therefore that we should accept the principle that none of the approaches should be compromised because otherwise we find ourselves in impossible inter-disciplinary discussions. I think there is also need for recognition that these approaches are different and therefore there is a need for dialogue before important decisions are taken. This is, of course, a symptom of the broader problem of the total lack of communication, coordination and coherence between the convenors in a conflict situation.

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The need for meaningful engagement

It is also important for us to acknowledge that most civil wars end through some form of dialogue, which requires some mediation with the combatants. This requires an increased understanding of what such a process actually involves. It is not enough to simply issue indictments and hope that they will somehow result in a resolution. Rather, we must think through the importance of engagement and what this actually means in practice. And I would start by stating the obvious. In order to engage meaningfully, there is a need for the parties to understand each other and for us to develop a greater understanding of the non-state actors involved and the choices that they make in engaging in peace initiatives.

The question of how we, as external actors, move beyond the use of blunt instruments and conditionalities – the sticks and carrots – is a key peace-keeping challenge in Uganda. We need to be more creative in thinking about the tools that we have to influence processes. We also need to recognise that a process is created and that steps, opportunities and capacities can be supported that lead the parties in a conflict towards a settlement. This has logic of its own.

Sierra Leone: experiments in transitional justice

As we do not have much time, I will just highlight some of the key issues in some of the other countries in which CR is working. Sierra Leone raises a different set of issues to Uganda. When I was there recently I again heard about problems relating to the experiments in transitional justice. Another example is the disconnect between the lack of reparations for many of the victims of the war and the housing and resettlement privileges enjoyed by those who enter the witness protection programme. A final example is that the report of the Truth and Reconciliation Commission was withdrawn soon after it was published and there is uncertainty about when it will be seen again. It is a tragedy that the process is in such disarray.

I would like to make a quick point about the notion

'How can the human rights system be reformed so that it has a more demand-led approach?'

of how actors in a conflict deal with their past. People obviously begin dealing with their past the moment they have been traumatised. This process is not something that begins after five or ten years when the development industry is prepared to start a programme on it. I also think that we must be careful when we talk about transitional justice issues and not refer to state and society interchangeably. There are things that a state and a government are able to do but there are things that only society can do and I think that we are often sloppy in terms of our language. The Truth and Reconciliation Commission and the special report in Sierra Leone last year highlight that an outsider is unable to deal with your past for you.

Fiji: using the legal framework to promote conflict resolution

Fiji is another area where we have worked for some time. We began by supporting a group of people doing conflict-prevention work, highlighting options for constitutional reform in Fiji, an ethnically-divided society. After a series of coups, however, the role of this group shifted from conciliation to more forceful human rights advocacy, which narrowed the space of their work enormously. While both the role of convenor and human rights advocate has proved exceptionally important in Fiji, unsurprisingly, it is not possible to do both at the same time. If the roles are combined, it is the role of conciliator that becomes untenable. In this particular case, the group we were working with lost the power to convene across sectors of society.

This was an interesting project in terms of framing a conflict resolution project within a legal framework of constitutional reform, which consequently reaffirmed the rule of law rather than challenging it. However, there is a question about whether, if you do human rights education work in the context of such gross injustice, further division with be promoted in the absence of positive political change. In Fiji there was a coup but further division did not occur because the Indo-Fijian community did not rise up.

Fiji also exposed me to some of the enormous challenges that still remain in terms of the reform of the UN system, in particular the need to strengthen it and make it more accessible to local communities, which is crucial if human rights are to have a place within conflict resolution. In Fiji, it was particularly clear that local communities lacked somewhere to turn when the situation did explode. How can the human rights system be reformed so that it has a more demand-led approach?

To conclude, I would like to emphasise a number of the points I have made. Firstly, the point about the principle of non-subordination should be reiterated because it is something that I think we must develop further. Secondly, I would stress the importance of there being diverse roles in peace-making and the value of complementarity between the role of conciliation and of advocacy. Thirdly, we need to think more about the case for engaging with armed groups (which is not made any easier by proscribing them and branding them as terrorist groups). Finally, local participation in, and ownership of, these processes is of paramount importance.

Christine Chinkin

I am an academic and, probably even worse, a lawyer. I think there is a problem in that lawyers can sound absolutist and, perhaps, impracticable, although of course the law is itself not always certain because there are many grey areas and even areas where the law is incoherent and contradictory.

I was asked to look in particular at the post-conflict context and thus, unlike the previous speaker, I am now assuming that there has been some sort of peace agreement or settlement and that we are now looking at the role of human rights in post-conflict reconstruction. More specifically, I was asked to look at the issue of whether the state is allowed to derogate from its human rights obligations during the initial post-conflict stage because its other priorities mean that it cannot be expected to conform fully with those obligations. I would like to note at the outset that to break a conflict into discrete categories of pre-, during and post-conflict is clearly to distort reality. What is post-conflict can become pre-conflict or, if successful, it can be a pre-emptive stage that prevents a further cycle.

Before I talk about derogation, I would like to make three preliminary points about:

i. the role of human rights in peace settlements;
ii. the degree of international intervention in the post-conflict context; and
iii. the complications that arise from the existence of more than one applicable international legal regime in post-conflict situations.

The role of human rights in peace settlements

Human rights have been given a much higher profile as part of peace settlements in the numerous peace processes across the world since the end of the Cold War. There has been a repeated commitment within peace processes to the mantra of the rule of law, human rights and democracy, especially when international mediators/facilitators have been involved. This is the framework that is supposed to form the basis of the future post-conflict society but of course it is really part of a particular vision of reconstruction in accordance with free market principles and the provision of a basis for foreign investment.

There are a number of examples but the Dayton Peace Agreement is the perhaps the clearest. Some 15 human rights treaties were annexed to the General Framework Agreement and introduced as part and parcel of the constitution of the highly-fragile state of Bosnia-Herzegovina. Further internal structures were specifically created by the international community, for instance a national Human Rights Commission with a chamber and ombudsperson, and the European Convention on Human Rights was given formal status as supreme law. There was therefore an enormous formal commitment to human rights but essentially this was an imposed commitment originating with the international mediators at Dayton (however thousands of miles they might be from Sarajevo) and with no reference to civil society groups or people within the society of the newly-constituted state.

We see this process over and over again. I was looking through some peace agreements this morning and the agreements from places as distinct as Guatemala, El Salvador, Cambodia and Liberia all contain references to human rights obligations. We also see a similar situation when conflicts are, at least formally, ended by a Security Council Resolution. For example, in 1999 UNTAET was established as the transitional administration in East Timor. Among its priorities was the requirement that it be responsible for human rights issues in East Timor, including the creation of independent Timorese human rights institutions. It was a similar situation in relation to UNMIK in Kosovo.

To follow up on what has just been said by the previous speaker, it is important to acknowledge that this is not just about transitional justice and ensuring accountability for human rights violations that took place during a previous regime, it is also about providing the basis for the reconstructed/reconstituted state. Therefore, at the formal level at least, there is the notion that there is a transitional moment, a pivotal moment, where there is a peace agreement and there is going to be a newly reconstructed state and the opportunity has to be seized to entrench human rights within the future structures of that state, otherwise this moment may not arise again.

International intervention in the post-conflict context

This leads on to my second point, which is that the post-conflict situation is a moment of extraordinary international intervention into the affairs of another territory, involving a large number of international agencies. This raises the question of whose duty it is to ensure respect for human rights in the post-conflict period? Clearly, the government remains the duty-bearer (and, incidentally, as a matter of international law, a government is bound by the international obligations of the previous government). If we again take the example of East Timor, independence was gained in May 2002 and by December 2003 it had entered into a large number of international agreements, which means that the government is bound by those obligations.

But what about the mass of international bodies that is also involved? There are major issues that we could explore but it should be first noted that the international organisations themselves do not always give priority to the human rights obligations that they are supposedly operating under. This creates an impression that, in practice, these are things that can be negotiated

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away, that they are not necessarily the highest priority and that other imperatives can displace human rights obligations. There are a number of examples where the international community's commitment to human rights is less than one might of thought from the terms of the particular peace agreement.

To take the example of the establishment of a police force, the capacity building and training of which is often seen as absolutely fundamental to reconstruction, along with the other basic institutions of law and order. In the case of East Timor, the Regulation for the Police Service included a clause making it obligatory for the police to comply with international standards only as far as practicable. This is therefore an example of the international agencies creating an open-ended exception that basically undermines any sort of long-term commitment to human rights.

An even worse situation is of course when the international agencies themselves violate human rights standards. There are many examples, including in relation to peace-keeping and international police forces, but also more broadly, relating to the sexual abuse of children and women within a post-conflict area. The trafficking of people is also becoming an all-to-frequent accompaniment to post-conflict reconstruction and this also, and not infrequently, involves international personnel. In the context of such adverse examples, it is difficult to say that human rights are supposed to be respected in a post-conflict territory.

There are also issues around the accountability of international bodies and personnel (or frequently, in practice, the lack of accountability). This is extremely counterproductive when these are the very agencies that are also claiming that there should be accountability through the International Criminal Court (ICC) or through some other form of international criminal process for offences that were committed during a conflict. I think therefore that there is a huge issue around the accountability of international agencies, whether they are able to ensure a genuine commitment to human rights during the post-conflict stage and their relationship with the local population. There is far too much of the notion that the international representatives are imposing top-down standards that they do not always respect themselves and that there is not enough attention given to grassroots building of human rights standards coming from the local population.

'... there is not enough attention given to grassroots building of human rights standards ...'

Multiple international legal regimes

Complications result from the fact that there is more than one applicable international law regime in post-conflict societies. International humanitarian law may still be applicable. If there is situation of occupation, as there was in Iraq for example, certainly up to 2004 and arguably later, obligations exist vis-à-vis the role of the occupier and the local population. Furthermore, obligations can exist in relation to refugee law and from obligations in respect of internally-displaced persons. Therefore there may be a host of different international obligations alongside the human rights ones.

Derogation and the obligations of post-conflict governments

To turn more specifically to the human rights obligations of a post-conflict government.

- Whoever forms the government is bound by the human rights obligations to which the state is a party;
- Under international law, derogation from these rights is strictly limited. The government cannot say that it wants to derogate human rights standards because it has other priorities; only certain human rights treaties allow for any form of derogation. So, for example, Article 4 of the International Covenant on Civil and Political Rights (ICCPR) does allow derogation but only where 'there is a public emergency threatening the life of the nation that has been publicly announced'. Such an announcement would clearly be completely at odds with the assertion that a country is now in the stage of post-conflict reconstruction in which, presumably, the emergency of the conflict has ended. It is therefore unsurprising that states do not announce an emergency at this point. Even if they did make such an announcement, it would be unlikely that it would be accepted as fitting within that particular definition.
- Any derogation would need to be proportionate to the exigencies of the situation – a government cannot simply derogate across the board – and certain rights are non-derogable. Whilst the Human Rights Committee has been quite rigid on what constitutes derogation in the past, it is nevertheless a problem that it is highly unlikely that a state in this position will carry out its reporting commitments to the Human Rights Committee and so it is equally unlikely that there will in fact be any follow up to a particular situation. For instance, Rwanda has made derogations of this sort but failed to report in 1995, which has meant that there has been no analysis or response by a monitoring body.

There is a further paradox that needs to be highlighted. Whilst there has been a heavy emphasis on human rights within peace treaties, this has, in reality, meant civil and political rights, particularly in relation to elections, rather than a commitment to economic and social rights, which is what is in fact most needed in post-conflict situations. Under the economic and social rights instruments no derogation is generally allowed but, within the treaties themselves, economic and social rights are made subject to availability of resources under the requirement of progressive realisation. States are therefore able to say that they have not got the available resources and so are unable to realise these rights at this point in time.

Minimum core obligation

I think that it is important to note that, within the UN Committee on Economic, Social and Cultural

Rights, there has been an assertion that there is what is called a minimum core obligation that is applicable at all times. This minimum core obligation is, at the very least, the provision of the minimum essential levels of each of the various rights in the International Covenant on Economic, Social and Cultural Rights (ICESCR) and any significant denial of the basic attributes, such as essential foodstuffs, primary healthcare and basic shelter and housing, etc., is a violation of the obligations under the Covenant. Furthermore, and I think importantly, the Committee has also said that certain economic and social rights are immediate and can not in fact be delayed by reference to progressive realisation because they are not dependent on relevant resources. An example would be the principle of non-discrimination in the fulfilment of various economic and social rights and, in particular, that there should be non-discrimination in access to whatever provision is being made in the immediate post-conflict situation.

I would like to make two final points:

i. I think that it is also important that, under the ICESCR, the obligation to respect and protect the rights of the Covenant also requires the state not to deprive people of the measures they themselves are taking to enjoy these particular rights. The state should not therefore prevent access to self-help measures, which are frequently built up during a conflict, without providing viable alternatives.

ii. This issue is particularly important in the context of discrimination against women. One of the major features of post-conflict society is demographic change. Frequently in post conflict societies there are large numbers of women-headed households and, of course, it is often women who have had to maintain essentials during conflict through self-help measures. I would argue that any formal process that interrupts these is a violation of the ICESCR. It would seem that ultimately what we are really talking about at the post-conflict stage is the requirement of security, whether this means legal, physical, human, economic, or gender security, and I think that it is absolutely essential that we take a gender approach in looking at ways that human security can be maintained across all of these different dimensions. This will ensure not only the overall post-conflict reconstruction but also that the rights of women are given a high priority within that post-conflict reconstruction model.

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Protecting rights in conflict situations and fragile states

*Clare Lockhart**

1. Introduction and summary

The concept of human rights has a range of potential applications in conflict situations and weak institutional environments. In conflict situations, wherever civilians are at risk, there is by definition an infringement of the individual's right to personal security, and in most cases infringements of a number of other rights. Post-conflict situations and weak institutional environments are also defined largely by the state's inability to meet the basic needs of its population. In this paper, two sets of questions will be examined concurrently: how rights can best be protected in conflict and post-conflict situations; and the extent to which a rights framework can help guide policy interventions in these contexts.

Protection of civilians and provision of basic services during conflict

Although the infringement of human rights on a widespread scale is a given in conflict situations and fragile states, there remains a debate as to what extent rights-based approaches[1] or policy frameworks provide useful tools in these contexts for guiding policy formulation and design of interventions by the international community. First, a rights-based approach is implicit in the set of principles established for guiding the protection of civilians. Secondly, a rights-based approach is often claimed to underlie the provision of humanitarian assistance to meet basic needs for the population in conflict situations.

Focus and sequencing in a post-conflict phase

A more challenging set of conceptual issues arises during situations of transition from war to peace. In such circumstances, there is general agreement that it is necessary to focus and sequence interventions, given the limited capacity for implementation. There are thus choices that must be made regarding different sets of policy issues, which may put different sets of rights in tension with each other. The 'peace before justice' imperative may lead to the prioritisation of the political process, with political compromises, above bringing perpetrators of atrocities to justice or the satisfaction of basic needs.

Who should provide state functions to fulfil and protect rights in transition phases?

A second set of questions relates to the question of the resumption of the capacity of the state to carry out a range of functions, from the provision of health and education services, to regulation of the private sector and the environment, to public borrowing and financial management. In transition situations where state institutions are inherently weak after years of conflict, there will be a question as to how to sequence the building of state capacity to deliver these services, and how or whether external agents should substitute for these functions in the short run. Trade-offs may become apparent if the provision of services by other actors in the short run will undermine the state's capacity to carry out these functions in the future. Here, a useful approach could be to agree on roles and responsibilities over an agreed-upon timeframe, in order to fulfil basic needs among actors.

A rights-based approach can be useful in identifying which functions should be allocated to which actor. In a rights-based framework, the primary duty-bearer for the realisation of rights is the state. Accordingly, under a rights-based approach, the state has primary responsibility for the formulation and implementation of policy. Where other actors are assigned responsibility for the provision of state functions in a transitional context, such as policing or the delivery of health services, a strategy for the transfer of these functions back to the state should be devised from the start.

Rights or citizenship

An alternative to a rights-based framework is one which focuses on the construction of citizenship – in terms of both rights and duties – as central in a transition situation. The restoration of the bonds of citizenship and the trust of the citizens in the state might be seen as an overarching goal in a post-conflict situation. In this framework, it becomes essential that the state recovers the ability to deliver certain services to its citizens, in an even-handed way and on the basis of transparent criteria.

This approach argues for a very different approach to a post-conflict situation than recently employed in a number of countries; it is the formulation and implementation of a small number of carefully sequenced national programmes as managed by the government, rather than the delivery of a number of small 'quick impact projects' by external actors, that will foster the trust of the citizen in the state as an impartial and fair agent in allocation of resources. The approach would also argue for the use of the budget as the instrument of resource allocation and policy design. First, this allows for a connection to be made at a fundamental level between revenue and expenditure, or duties and rights. Secondly, it allows for allocations to be made on a transparent basis on a national scale.

The above approach argues for the state to carry the right and responsibility for implementing policy, unless another actor is assigned this responsibility for a defined period with a clear handover strategy. It then becomes incumbent on the international community to support the strengthening of state capacity to carry out these functions. Here, a viable model could be one whereby a state contracts the private sector or NGOs to implement policies to increase its capacity.

Policing the red lines

In a fragile context, especially with a newly established government or policy flux, policing the 'red lines' of acceptable governance becomes a critical role for the international community. There exist various configurations and models for the allocation of monitoring and policing functions, for the exercise of power and authority across different international actors.

2. Rights in a conflict situation: protection of civilians

The 'protection of civilians' agenda has been developed over the past few years in recognition of the need to identify new approaches and strategies for the international community to ensure protection of civilians during and after conflict. In 1999, the Security Council, recognising the different vulnerabilities of civilians during and after conflict, turned its attention to ways in which the international community could better ensure the protection of civilians during conflict.[2] This focus grew in part out of the identification of civilians as deliberate targets of warfare rather than incidental victims.

The concept of protection of human rights is at the centre of this agenda. 'Protection' was defined by the ICRC in 1999 as encompassing 'all activities aimed at ensuring full respect for the rights of the individual in accordance with the letter and spirit of relevant bodies of law i.e. human rights law, international humanitarian law and refugee law' (ICRC, 1999). Accordingly, protection is defined in terms of upholding human rights as well as preventing death.

Protection of civilians after war covers protection from a range of threats to security and well-being, including kidnapping, looting, siege, mutilation, rape and gender-based violence, forced migration, ethnic cleansing and genocide, environmental damage, landmines, unexploded ordnances (UXOs) and small arms, and the secondary effects of conflict, such as disease, malnutrition, starvation and denial of basic services.

International humanitarian law prohibits attacks on civilians, forced displacement, use of certain weapons, and practices of torture, through the Geneva Conventions and the Additional Protocols of 1977. While the law is comprehensive and unambiguous, protection of civilians is not ensured, as breaches result from the flouting of these provisions by state and non-state actors.

In its protection agenda, the UN Office for the Coordination of Humanitarian Affairs (OCHA) identifies a series of areas for intervention or monitoring. The first of these is humanitarian access, whereby access of humanitarian actors to a civilian population should be attained, through agreement with parties to the conflict. The second area identified is justice and reconciliation, whereby standards of protection should be upheld by the force of law, and violations regularly and reliably sanctioned, for example through the establishment of ad hoc tribunals. Other areas identified are forced displacement, land mines, small arms, and women and children.

OCHA recognises that the primary responsibility for protection of civilians lies with the relevant states and their government, and that the role of the international community can only be complementary to this. However, it recognises that where governments do not have the resources, will or capacity to do this unaided, armed groups, the private sector, member states, international organisations, civil society and the media can all play a role.

The role envisaged for the international community here includes: the delivery of humanitarian assistance; the monitoring and recording of violations of international humanitarian and human rights law, and reporting of such violations to those responsible and other decision-makers; institution-building, governance and development programmes; and, ultimately, the deployment of peacekeeping troops.

The key challenge in realising the protection agenda lies in the efficacy of implementation, in identifying the priorities and areas for intervention, assigning roles and responsibilities to actors, and developing strategies for implementation. A series of reports, most notably the Brahimi report (UN, 2000), stressed the need in any particular context to focus on a small number of realistic and achievable goals, through the use of a carefully wrought strategy. The 'light footprint' doctrine developed subsequent to the report's completion by Ambassador Brahimi further emphasised the need to maintain a focus on a small number of achievable goals. Here, it might be useful for analysts to distinguish between the role of the UN as a political facilitator – where increasing capacity for analysis and strategic planning within the UN is paramount – and as implementer of services, which often carries a heavier footprint.

A primary need in terms of protection in the aftermath of war (or to facilitate the cessation of war), is the deployment of

peacekeeping forces. A hierarchy of needs approach states that the priority in terms of citizens is protection of lives and provision of basic security. The Brahimi report recognises that the (lack of) willingness of the international community to commit and deploy forces is often the critical constraint in ending civil wars or protecting civilians; it states that no amount of good intentions can substitute for the fundamental ability to project credible force if complex peacekeeping is to succeed. However, recent conflicts and post-conflict situations have been marked by a failure of the international community to deploy either sufficient or indeed any forces, even though analysts agreed that this would be the single most significant intervention for the protection of civilians and saving of lives. This raises policy questions: first, as to how to increase the availability and commitment of peacekeeping forces (perhaps through the creation of a standing peacekeeping force and pooled financing for such operations); and secondly, as to whether there are alternative effective strategies for peacekeeping, where international forces are not available. These might include community policing, domestic reconciliation strategies, and political pressure.

The development of the protection of civilians agenda over the last years has marked a change in policy orientation, putting a rights framework at the heart of the UN agency response to crisis. While it provides a useful and appropriate goal, there is a question as to whether the framework of protection of civilians is currently adequate, as it has so far failed to provide guidance on hierarchies of civilians' needs, on locus of responsibility, or on implementation methodologies.

3. Conflict mitigation and prevention

An interesting issue is whether a rights-based approach has any value in seeking to prevent or mitigate conflict. Some argue that the provision of aid in some conflict situations may serve to perpetuate conflict and/or shore up otherwise unsustainable regimes. Another dimension relates to the need, in conflict negotiations, to interact with parties to the conflict, who may themselves be responsible for violations of human rights; an agreement may serve to endorse or legitimise their positions.

4. Rights in a post-conflict context. Peace, justice or service delivery: prioritisation and sequencing interventions in post-conflict situations and fragile states

Human rights considerations and principles are often given high priority and embedded within the text of peace agreements, particularly those facilitated by the UN. These hold newly established governments to their international human rights obligations, reiterate principles of human rights to which the new government must adhere and, in some cases, establish human rights obligations.

In reaching an agreement and in holding the peace thereafter, there arises a potential conflict between the political process, and the imperative of reaching political compromise between actors, and a rule-of-law or justice-based approach which would prioritise the bringing to justice of perpetrators of atrocities. In some contexts, bringing individuals to account too early may compromise a political settlement. Conversely, failing to bring individuals to justice may undermine the trust of citizens at large 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. Reflections on recent conflicts have led to the conclusion by some that dealing with a narrow group of stakeholders without according sufficient attention to justice and the rule of law has resulted in the takeover of the state by a narrow elite with a stranglehold on the economic and political power of the state, leading to criminalisation of politics and the economy. Some have commented that fundamental principles are breached in the negotiation process because of the compromises that the negotiators perceive as necessary, and call for the need for negotiators to work more closely with the human rights community. It is clear that there needs to be considerable further reflection on strategies to balance the imperatives of peace and justice, and the identification of mechanisms to promote rule of law.

A peace agreement on paper requires practical implementation, and choices as to hierarchy of goals and priorities will need to be made. A second tension can arise between the political and rule of law processes on the one hand (including restoration of security institutions, DDR processes) and the perceived need, on the other hand, to deliver reconstruction activities and restore functioning social services, regulatory functions, and a private sector. Even from a purely practical perspective, sequencing will be necessary, particularly when it comes to positive obligations to set up organisations and processes. Here, sequencing activities over a period of several years, rather than the annual budget cycles of the aid system, could help to delineate a realistic timeframe.

These tensions – between the political imperative of making a peace agreement hold at any cost, the imperatives of bringing individuals to justice for past human rights abuses, and the need to meet economic and social rights through provision of services – give rise to a set of difficult choices that needs to be managed in a post-conflict environment. Given that the UN has institutional responsibility for safeguarding the last of these, and responsibility for one or both of the first two, tensions will arise within the UN itself, where difficult compromises between its own institutions will need to be made.

5. Meeting human rights in a weak institutional environment

Which rights must be met and which should be met: priorities and sequencing?

- The International Bill of Human Rights – comprising the Universal Declaration of Human Rights, the International Covenant on Economic, Social and Cultural Rights (ICESCR), and the International Covenant on Civil and Political Rights (ICCPR) – sets out the primary human rights obligations of member states of the UN; a series of other treaties and instruments have also been ratified.
- This set of legal instruments provides a framework for determining which needs must be met, and which should be met. However, they provide little guidance as to determining sequence or hierarchy of rights.
- Non-derogable rights: Article 4 (2) of the ICCPR sets out those groups of rights which can never be restricted nor derogated. These include the rights to be free from: arbitrary deprivation of life; torture and other ill-treatment; slavery; imprisonment for debt; retroactive penalty; non-recognition of the law; and infringement of freedom of thought, conscience, and religion. Article 4 provides for derogation from other rights during periods of national emergency, under strictly limited circumstances.
- Progressive realisation: In a transition environment, it is not possible to restore services and meet all needs immediately. To determine which rights must be met and determine which are desirable over which timeframe in a post-conflict transition context, the concept of progressive realisation of economic and social rights may be of particular use. The ICESCR allows for the progressive realisation of those rights over time, subject to some limitations. First, the principle of non-discrimination still applies to ensure access to each right is being fulfilled. Secondly, there are some rights that must be met at all times, including basic requirements for food and shelter. Thirdly, the state is required not to deprive people of their own strategies for obtaining access to basic goods. Fourthly, the state is obliged to take steps towards implementation of the Covenant. These principles provide a useful framework for assisting the government and international community in determining priorities for restoration of state capacity to meet needs.
- Minimum standards: the Sphere standards: In terms of meeting economic and social rights, the Sphere standards, established in 1997, provide a normative guide to a minimum set of standards that should be met in a disaster context (including both natural disasters and conflict contexts), in five sectors: water supply and sanitation; nutrition; food aid; shelter; and health services. While the standards are a useful tool for providing consensus on a level of intervention, they assume that the provider will be the humanitarian community (through provision of supplies), rather than the government or the communities themselves. Here, it would be useful to make the distinction between meeting needs directly and equipping individuals and communities to meet their own needs through provision of cash alternatives.
- In terms of reaching agreement on a hierarchy of rights, no standardised tools have emerged; a hierarchy of rights will be context specific. Further work may be useful to agree on an assessment methodology to determine when a government is failing to fulfil human rights obligations in a given context, which would allow for entry of humanitarian actors on a transparent and clear basis where necessary. A second tool that might be useful would be a framework to determine a hierarchy of rights and set of minimum standards over time in a given country context. Such approaches could equip donors, UN agencies and NGOs with valuable tools for providing input to planning and budgeting processes, to influence the efficacy of project and programme design.

Who has the responsibility for provision of rights?

The issue of implementation of strategy and policy raises the question of location of responsibility for delivery of economic and social rights.

- The state, under its human rights obligations enshrined in the ICESCR, has the primary duty to fulfil the rights of its citizens.
- As fragile states may not have institutional capability to meet obligations in the short term, the practice of substitution of functions by other actors in the aid community has become common. This involves trade-offs: consideration will need to be given as to whether substitution is necessary in the short term to deliver a specific right or service, as against the impact in undermining state institutions to carry out the function over the longer term.
- Several different parts of the UN system are allocated responsibility for protection of rights, including the Security Council,[3] the General Assembly, the Economic and Social Council, Human Rights Rapporteurs, ad hoc Commissions of Inquiry established by the Commission on Human Rights, and ICRC. The UN, through specially created missions or one of its more than 30 agencies, can intervene to carry out a particular function for a limited duration – either to assume administrative authority in all areas of the state (e.g. Kosovo, East Timor) or to substitute for a particular function, e.g. policing. The Brahimi report cautioned against affording the UN responsibility for implementation of major complex operations without substantial reform, particularly in its approach to recruitment.
- An alternative model is the use of the military in carrying out reconstruction or humanitarian efforts, e.g. in Iraq and Afghanistan and, most recently, the tsunami. An understandable and valid reaction from the humanitarian community has been to stress the importance of keeping a clear line between military intervention and humanitarian activity; however, it is already clear that the military possess significant resources and capabilities, including access to logistical support and strategic planning, and increasingly articulated interest in pre- and post-war planning. While it is a fait accompli that the Pentagon is investing a substantial proportion of its annual US$550bn budget into humanitarian and

reconstruction activities through bodies such as the PRTs, it would seem necessary to examine how synergies can be developed between military intervention and post-conflict state-building activities.
- NGOs have adopted rights-based frameworks in planning their own interventions. A key challenge in this area is the capability of NGOs to meet the criteria of universality or non-discrimination; NGOs will rarely be able to meet all the needs of a population on an equitable basis. Although the NGO community has built up significant capacity in implementation of projects, when planning operations NGOs as service providers will compete with the government for financial and human resources. It should also be remembered that it is not only donors that can contract NGOs; there are also examples of the government entering into the same type of service delivery contracts with NGOs.

A useful tool in weak institutional environments might be a map which sets out over a 5-10 year framework a strategy for increasing state capacity to carry out essential functions. This would have a clear delineation of alternative actors to carry out those functions in the short term, and sunset clauses and strategies to ensure handover to the state. Joint planning operations, as set out in Framework for Cooperation in Peace-Building (UN, 2001b), can be helpful in this regard. A clear framework regarding which actor provides which service to which group of stakeholders over what timeframe could offer clarity for the humanitarian community in transition situations. It would also help in avoiding unhealthy competition for resources and duplication of service delivery. This approach could be reflected in a government- international community compact, monitored over time.

How: a programmatic, rights-based approach to social policy or quick impact projects?

There are two different mental models of delivery of aid in weak institutional environments. One assumes a weak state, and prioritises the imperative of delivering services and realising the human rights of the poor and vulnerable by establishing projects and programmes to deliver aid in the short term. The second posits that in the longer term the state must assume the functions of managing the implementation of policy for its citizens, and prioritises the restoration of capacity of weak state institutions. It is becoming clear that it is necessary to strike a balance between these two models, providing for the long-term strategy of strengthening state institutions, while allowing substitution of functions where required, within delimited areas and timeframes.

The rights-based approach might argue for either model. On the one hand, where it is imperative for basic human needs or rights to be met, a compelling case can be made for intervention in the form of quick impact projects. On the other hand, it is acknowledged by human rights theories that for every right there is a duty-bearer; in the case of the set of human rights acknowledged by the UN system, the duty-bearer is the state. This argues for prioritising investments in the state in order that it may fulfil the rights of its citizens.

There is a question as to whether the provision of aid through multiple projects to deliver a peace-dividend after war in short timeframes is an appropriate strategy in all contexts. First, delivery of aid in such contexts is extremely expensive and may not represent value for money over the longer term. Secondly, delivery of aid in dangerous contexts may divert scarce security resources away from protection of national citizens to protection of aid workers, again increasing the cost of aid. Thirdly, delivery of aid by external actors may serve to undermine the bond between citizen and state. An urgent current issue regards formulating approaches to the delivery of essential services that are cost effective, efficient and support the peace-building process rather than undermine it.

In post-conflict situations, a compelling case can also be made as to there being an overarching need to restore the trust of citizens in their state, and to re-establish the social contract between citizens and the state that will underpin the creation of stability, security and sustainability. Economic inequities and allocation of resources to one group rather than another can cause or exacerbate conflict. A perspective that prioritises citizenship rights would argue for a policy-based, programmatic approach to the allocation of resources. Here, the budget process plays a central role in creating a transparent, accountable mechanism for the allocation of assistance. It also acts as an instrument in bringing transparency to the process of linking the level of revenue collected to the level of public expenditure and standards of service delivery provided, reinforcing the citizen-state relationship.

How much? Cost-effective approaches to realisation of rights in conflict situations

Where large sums of resources are being programmed, whether or not rights are realised will be determined by the efficacy of the implementation process. Here, two factors emerge as important: first, the cost effectiveness of interventions – the more cost effective interventions are, the more people can be reached. The creation of public value will be determined by the efficiency of the delivery process. The second factor is the fairness of allocation. Here, to support the formation of citizenship rights, the allocation of resources must take place against principles of even-handedness, according to criteria across different social, ethnic, geographical, gender and racial divides.

Many of the existing implementation modalities used by the aid business are extremely cost ineffective, sometimes costing more than 90 cents in the dollar in overhead and delivery costs. The inefficiencies are caused by layers of contractual chains, with sub-contracting from agency to agency, each obliged to support head offices and small project units. The project approach, whereby small quick impact projects are delivered on an ad hoc bottom-up basis, can also exacerbate

tensions and conflict, undermining the trust of the citizens in the resource allocation process.

Both these factors argue for the use of policy-based approaches using national programmes. Such approaches mean that the state must either implement or manage through sub-contracting the provision of basic services, such as health or education. Another vehicle for this is the use of community-driven development approaches, whereby the government allocates block grants according to a criteria-based formula to groups of citizens, usually on a geographic basis. Against the allocation of grants, there is a series of simple rules whereby citizens are required to form groups, elect representatives, and account transparently for expenditure. This modality for implementation of resources in a post-conflict situation has the advantage of reducing overheads significantly, enfranchising all citizens in the development process, and ensuring that efficient choices of expenditure are made.

6. Rights and the private sector

Another perspective on the concept of rights in fragile states and post-conflict situations concerns the issue of the private sector. A rights-based approach is potentially relevant for at least two reasons. First, if a model of enfranchising citizens in the state through distribution of expenditure is adopted, increasing the size of the economic pie becomes important. Emphasis is rarely put on the creation of wealth as a priority in fragile state conditions, even though this can have the effect of providing a 'peace dividend' far more effectively and potentially sustainably than redistribution through humanitarian aid alone. Policy prescriptions for creating jobs on a large scale to realise the right to work would require the establishment of labour schemes or instruments to catalyse the growth of industry.

Secondly, the creation of a regulatory regime for the private sector which, follows principles of open and fair competition and allows access to the market regardless of affiliation or identity, is important in any circumstances; it is particularly important for generating the trust of the citizenry. However, it is precisely in fragile states environments that regulatory capacity will by definition be low; in a time of political flux, the propensity for lack of transparency or fair processes may be higher. Fair rules for the allocation of economic and land rights will be especially important to the shape of society and relative power and wealth of different groups.

7. The 'red lines': holding the state to account for protecting human rights

In a conflict or fragile state context, the state is by definition not able to protect or deliver on all the rights of its citizens. However, once a transition path is articulated as a matter of government policy, and/or agreed with the international community, the latter can play a crucial role in holding the government accountable to its promises and to international standards of human rights across many areas of governance.

It can do this through a number of mechanisms, e.g. reviews and analysis through government or non-governmental channels; increasing transparency through issuing such reports publicly; issuing public statements through its officials and rapporteurs; imposing conditionalities on its aid against certain 'non-derogable' standards; and political pressure.

Roles and responsibilities, for monitoring different aspects of state performance or fulfilment of human rights through implementation of policies and protection of citizens, can be assigned to an array of international organisations. These include the Office of the High Commissioner for Human Rights and its rapporteurs and ad hoc Commissions of Inquiry, as well as rapporteurs from a number of other UN agencies. Non-governmental watchdogs, such as Human Rights Watch, Transparency International and Amnesty International, can also play a valuable role in monitoring adherence to human rights standards. Investigative journalism and media reports can also play a useful accountability role.

A challenging set of questions arises as to which sets of standards should be applied and enforced in a conflict or fragile state situation. Political and civil liberty standards are sometimes afforded a higher priority than economic and social rights, when the state is beginning to reacquire the capacity to deliver social services. The concept of a minimum set of standards to apply can be useful.

8. Conclusion

In terms of seeking to protect rights in conflict and post-conflict situations, it is clear that a number of tools have emerged and are being deployed by the international community, ranging from military intervention and diplomatic pressure through to humanitarian activities.

The uses of rights-based frameworks or approaches may have some value in some contexts. First, they can help enforce a minimum set of standards for protection of civilians' rights, although it is clear that there needs to be further work on defining what constitutes a minimum set of rights in a particular context. Secondly, a rights-based framework could lead analysis towards a concept of citizenship rights that would inform the need to programme aid on an equitable basis across

a given territory, through national mechanisms. Thirdly, an emphasis on rights might also focus attention on the state as the primary duty-bearer of those rights and, accordingly, on establishment of state capabilities in post-conflict situations. Lastly, given resource scarcity, rights-based approaches might highlight for policy-makers the need to make trade-offs between implementation mechanisms and cost effectiveness in delivery, in order to increase the collective ability to satisfy rights.

Endnotes

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1 A 'rights based approach to development', according to OHCHR, is a conceptual framework for the process of human development which is normatively based on international human rights standards and operationally directed to promoting and protecting human rights.

2 The Report of the Secretary General of 30 March 2001 on the Protection of Civilians in Armed Conflict called for the establishment of a 'culture of protection' (UN, 2001a).

3 The Security Council must play a leading role in protecting civilians in wartime, by urging belligerents to adhere strictly to the recognised standards of international humanitarian and human rights law. It also has responsibility for providing the necessary resources for life-saving aid and assistance, by ensuring that peacekeeping mandates provide for the protection of civilians. The General Assembly plays a role in reaffirming and advancing the normative framework upon which the international system is built, and urging its individual member states to ensure and promote compliance with these norms.

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