

**International workshop on human rights and state-building -
A new paradigm for development assistance in fragile states?**

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

Copenhagen, Monday 21 April 2008

Workshop Report

Alina Rocha Menocal¹

¹ I am very grateful to Henrik Nielsen from the Danish Institute for Human Rights for the excellent notes he prepared on the workshop proceedings, which were very useful in informing this report. I would also like to thank Timothy Othieno for his inputs, which were also very helpful.

Executive summary: Key messages from the workshop

Linkages between HR and SB: norms

- Current thinking and practice exploring the complex nexus between human rights and state fragility – especially in conjunction to state-building – is still relatively new and requires further exploration.
- 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.
- For much of the second half of the 20th century, there was a tendency to separate human rights and development (including state-building), both in theory and practice, leading to the creation of false distinctions and hierarchies among rights, the distortion of the nature of fundamental rights, and the creation of different disciplines or discourses with competing priorities and sometimes even contrary purposes.
- However, there may now be a policy and organizational base in place to support the integration of human rights in state-building in fragile settings.
- A human rights framework provides not only a moral vision but also a normative base – both conceptual and practical – to guide approaches and priorities in state-building.
- Firstly, the principle of the universality of human rights implies that human rights define the nature and role of the modern state rather than vice versa.
- Human rights are also normative in that they establish a set of core principles to guide the relations between state and society. These include equality and non-discrimination; participation and empowerment; and accountability.
- In addition, human rights standards provide a clear set of criteria for determining priorities for implementation of state duties. These are, primarily, deprivation; exclusion; vulnerability; and justice.

Linkages between HR and SB: practice

- The normative approach can impose an extremely high standard on what the state *ought to be*.
- The devil is in the detail and how that normative framework translates into practice and what empirical experiences can tell us about that.
- It is also not clear that the evidence base exists to support the normative claim that HR is an indispensable component of successful (and inclusive) SB. In fact, there is no real evidence that promotion of HR can turn fragile states around, although there is considerably more evidence that violations of HR can lead to state fragility. This is also particularly clear in the case of what Frances Stewart defines as ‘horizontal inequalities’, whereby targeted discrimination and exclusion tend to be strongly associated with fragility.

- In addition, there may be competing visions and moralities to the Western discourse on HR and democracy. This raises the issue of where the demand for HR comes from.
- On the other hand, at least at the level of international discourse, some considerable ground had been gained in terms of recognising the centrality of HR: there is no longer a debate on the legitimacy of an international HR framework, even if there is increasing recognition that the fulfilment of such a framework remains a distant goal in actual practice.

Concepts and definitions:

- There is a need for greater conceptual clarity about many of the terms being used and discussed in relation to SB and HR.
- Frances Stewart's work on state fragility attempts to do this by disaggregating the concept along three different dimensions: authority failures, service delivery failures, and legitimacy failures.
- Still, the concept of legitimacy itself can be interpreted in many different ways, and how different conceptions of legitimacy have come to be understood both internally and externally is an issue of recurrent debate. An enduring point of contention is whether legitimacy should be defined primarily in terms of its democratic attributes (which is the definition that currently dominates international discourse), or whether other attributes are equally (or more?) important (e.g. delivering on economic growth).

Priorities and trade-offs: do all good things go together?

- Issues related to setting priorities, sequencing activities, and managing trade-offs remain a considerable challenge in SB, especially from a HR perspective.
- For instance, from a normative perspective, civil, political, social, economic, and cultural rights are meant to be indivisible, inter-dependent, and equal among them. Thus, as noted by some observers, within the HR field there can be an inbuilt resistance to sequencing/prioritisation.
- In practice, however, working towards the fulfilment of all these rights at once represents a particularly daunting task.
- The field of transitional justice (TJ) provides an interesting example: thus far, TJ processes have proven much more successful in incorporating civil and political rights than social and economic rights, in part because addressing the latter may threaten the interests of powerful elites whose engagement is crucial if the peace process is to be successful.
- Regardless, priorities must be identified based on contextual factors and needs, rather than derived from fixed hierarchies.

I. Introduction

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. 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. 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.

This was 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 a carefully selected group of academics and development practitioners on the linkages between these two agendas from the general perspective of international engagement in situations of state fragility. As can be seen from the list of participants, the group of people convened was very diverse and strong, consisting of approximately 50 experts from a wide variety of organisations in both the North and the South. The workshop was 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 intended 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 workshop report highlights some of the main points and issues that were raised during the workshop proceedings, including the presentations and the discussion among participants. The workshop agenda, framing paper, concept note, list of participants and copies of all the power point presentations that were submitted by the speakers have been made available as separate documents as well.

II. Opening remarks

Martin Bille Herman opened the workshop and welcomed participants. He argued that Human Rights (HR) are a fundamentally political question and that both diplomats and development practitioners need to recognize this. In this respect Human Rights (HR) is an instrument for change – an asset rather than a liability.

Martin said that this workshop was of fundamental importance because HR and whether and how they can be incorporated into a SB agenda merit close attention. Denmark in particular is in the process of developing strategic documents on these issues that will undoubtedly have to deal with controversial and political questions. Therefore, it is important to be very clear about what is at stake. Herman therefore hoped for frank discussions and clear statements.

Alina Rocha Menocal welcomed all participants and briefly outlined the objectives of the workshop and presented the organisers. She also mentioned that one of the goals of the

day's proceedings was to produce a stand-alone publication, and urged those interested in contributing articles to approach ODI and/or the MFA to discuss the issue further.

III. Session 1: Laying the conceptual foundations of Human Rights and State-Building, and identifying potential linkages

Speakers: Derek Evans (Associate, Centre for Dialogue, Simon Fraser University; Principal, Evans & Associates; former Deputy Secretary General, Amnesty International)
Human Rights & State Fragility: Conceptual Foundations and Strategic Directions

Rahul Chandran (Program Coordinator, Peacebuilding as Statebuilding project, Center on International Cooperation, NYU)
State Building: Core Concepts and Institutions

Discussant: Alina Rocha Menocal (ODI)

Presentations

Derek Evans made a presentation based on the Framing Paper that the Danish MFA had commissioned in preparation for the workshop. In his presentation, he laid out a normative framework to integrate a human rights approach into a state-building agenda, and discussed a few ways in which such a normative framework can be applied in practice. Some of the points worth highlighting from his talk include the following:

- The conjuncture of human rights and state-building is a significant and timely issue that brings into focus the challenge of developing a truly integrated approach to human rights as set out in the Universal Declaration of Human Rights.
- Human rights should be understood broadly as encompassing civil and political rights as well as economic and social rights, the right to freedom and justice, and the right to dignity and development, and they are indivisible, inter-dependent, and equal among them.
- For much of the second half of the 20th century, there was a tendency to separate human rights and development (including state-building) both in theory and practice, leading to the creation of false distinctions and hierarchies among rights, the distortion of the nature of fundamental rights, and the creation of different disciplines or discourses with competing priorities and sometimes even contrary purposes.
- This began to change in the 1990s, but the substantive integration of human rights and development concerns has been hampered by the effects of 9/11 and the War on Terror, especially the tendency to give primacy to security issues.
- To a considerable extent, the policy and organizational base is now in place to support the integration of human rights in state-building in fragile settings.

- A human rights framework provides not only a moral vision but also a normative base – both conceptual and practical – to guide approaches and priorities in state-building (see Table 1 below).
- Yet, despite their considerable normative position, human rights rarely feature as a core factor or even an ancillary component of either the analytical framework or the strategic response to state fragility.
- In the first place, the principle of the universality of human rights implies that human rights define the nature and role of the modern state rather than vice versa.
- Human rights are not granted by or derived from the state; rather, as ‘duty-bearer’, the state exists in order to ensure that the rights of the population (‘rights-holders’) are respected, protected and fulfilled.
- Human rights are also normative in that they establish a set of core principles to guide the relations between state and society. These include equality and non-discrimination; participation and empowerment; and accountability.
- In addition, human rights standards provide a clear set of criteria for determining priorities for implementation of state duties. These are, primarily, deprivation; exclusion; vulnerability; and justice.
- Although human rights standards do not mandate a specific form of democratic governance, the goal of state-building efforts guided by human rights should clearly be the creation of a politically and economically inclusive form of government – a major challenge in settings characterized by ethnic or other identity-based tensions or exclusions.
- Building on these normative dimensions, a human rights-based approach to state-building offers a framework for moving beyond the analytical paradigms based primarily on analyses of either conflict or poverty. A human rights-based approach is less oriented to treating conflict or poverty as independent or causal factors, but rather to understand them as key elements in a specific co-relation within a particular context that bear critical impacts on human rights performance.

Table 1: *Towards a human rights based approach to state fragility and state building*

<i>Fundamental Rights</i>	<i>State Obligations</i>	<i>Core Principles</i>	<i>State Needs / Properties</i>	<i>Strategic Directions</i>
Freedom from Fear	Duty to Protect	Equality & Non-Discrimination	Authority	Ensure Security
Freedom from Want	Duty to Fulfil	Participation & Empowerment	Service Delivery	Strengthen Capacity
Freedom to Live in Dignity	Duty to Respect	Accountability	Legitimacy	Support Democratic Governance

- Thus context needs to be taken as the starting point.

- Carlton University's Country Indicators for Foreign Policy (CIFP; www.carleton.ca/cifp/) and the Centre for Research on Inequality, Human Security and Ethnicity (CRISE; www.crise.ox.ac.uk/) based at the University of Oxford offer a useful approach to understand fragility along different dimensions and in different contexts. Their focus is on how horizontal inequalities (be they economic, political social, ethnic, etc) lead to systemic and institutionalised discrimination, which in turn causes state fragility along different dimensions (including lack of legitimacy, weak accountability, increased social divisions and conflict, endemic HR violations, etc).
- Strategic directions for state-building based on a HR approach should include ensuring protection, supporting democratic governance, and strengthening capacity, and they should place the poorest and most vulnerable at the centre.
- The critical question remains how to apply normative standards to the life and death of ongoing challenges in fragile states.

Rahul Chandran's presentation focused on the conceptual and institutional foundations of state-building, legitimacy, and their relation to HR, drawing on a framing paper he and other colleagues from the Center on International Collaboration at NYU prepared for the OECD DAC's Fragile States Group.² Some of the key points he raised included the following:

- SB is not a normative response to state fragility, but one based on pragmatic concerns and realpolitik.
- There is a broad (if ill-defined and intangible) agreement that the goal of SB is to build legitimate, effective and resilient states, through an emphasis on 'good governance'.
- But there is still little agreement within the international community about how SB should be done, and on what the central issues are, despite the considerable resources (monetary and otherwise) that have been invested in such efforts.
- As currently practiced, SB is not a serious and coordinated response either, and it lacks a coherent set of tools politically, developmentally, as well as militarily.
- There is also a tendency to ignore the fact that SB is a highly political endeavour.
- The state is a solution to collective action based on:
 - Capital
 - Coercion
 - Legitimacy
- The basis of the state rests on a social contract linking those who govern with those whom are ruled, which is why the question of legitimacy is so fundamental.

² 'From Fragility to Resilience: Concepts and Dilemmas of Statebuilding in Fragile States', November 2007.

- The monopoly on violence is still an essential characteristic and driver of the state - but it has to be legitimate. Force is applied to ensure the rules of the game are followed.
- Legitimacy is a broad term and consists of many elements, including:
 - Embedded legitimacy (based on shared historical experiences and interactions from within)
 - International legitimacy (based on the concept of sovereignty, and international treaties, but growing concern about 'ungoverned' spaces)
 - Self-legitimation (this is the most important and lies at the basis of the social contract. It has to do with the incentives of the state to behave/respond to the needs and demands of its population, the rules of the game, etc.)
- The interaction between these different forms of legitimacy, state capacity, and the political processes through which state and society form expectations about each other is complex and dynamic and can fluctuate considerably over time.
- There are multiple triggers that can lead to a (re)definition of the relationship between state and society and of their mutual expectations. These may include elections, disasters, etc.
- For instance, at any given point in time, the disenchantment of a particular group with the current social contract can be directly linked to the history of the state (e.g. India/Pakistan borders at partition), the history of the group within the state (e.g. Rwanda), the level of ethnic cohesion (e.g. Cote d'Ivoire) and the other factors. Where the legitimacy of a state's use of authority is reduced by one of these factors, the social contract is at greater risk.
- How a state copes with changing conditions and challenges defines its resilience: a state that can respond effectively becomes more legitimate, while a state that does not becomes increasingly more fragile.
- There is also a distinction to be made between process legitimacy (based on the process through which decisions are made – e.g. is decision-making inclusive, participatory, and responsive?) and output legitimacy (based on outcomes like the delivery of public goods irrespective of the process used to provide such outcomes). However, both of these rely on some minimum of state capacity.
- Where do HR fit in all of this?
- A rights-based discourse is fundamental to the idea of some form of social contract, while institutions are a central mechanism for structuring and embedding a HR (and other) discourse(s).
- Institutions can be both formal and informal, but the international community tends to focus on formal institutions because informal institutions are much more difficult to penetrate, understand, and alter.

- Institutions are essential in terms of boosting the legitimacy of the state (if they can respond and adapt to changes/crises/etc), but failed institutions can also endure.
- Formal institutions are not portable, because their functioning depends on their complex interaction with informal institutions, processes, and rules.
- Importantly too, rights can be understood in different ways – which may challenge the point raised by Derek about the universality, indivisibility, and irreducibility of HR.
- A rights-based approach is at the heart of the process of state formation, especially as it links to the elaboration of a social contract.
- However, the world has changed: images from Abu Ghraib etc have given the West a bad image as an advocate of HR. There is still scope for international HR as means of governing interventions, but these may have become less credible.

In her response to both Derek's and Rahul's presentations, **Alina Rocha Menocal** highlighted a few key issues:

Derek's case as to why a HR approach is essential to any state-building project from a normative and moral perspective is a very solid one, and it would be difficult to query his argument in terms of ideals and principles.

- But the normative approach also imposes an extremely high standard on what the state *ought to be*.
- Here, the role and function of the state are defined in terms of the state's ability to promote and protect the civil, political, social, economic and cultural rights of members of society.
- The devil is in the detail and on how that normative framework translates into practice and on what empirical experiences can tell us about that.
- Rahul's understanding of state-building as an essentially domestically-driven process, and one that focuses on the dynamic interaction between state and society especially in terms of negotiating mutual demands (and presumably rights and obligations), is very useful.
- So state-building is much more than constructing the formal edifice of the state. It is about bargaining and about the process through which mutual expectations are shaped. The interaction between formal and informal relations is essential to this process.

Alina then discussed complementarities and tensions between a HR approach and a SB agenda based on the concept note she developed for the workshop. Her key points focused around the need to recognise i) that, while from a normative perspective HR and SB are highly complementary, historically these two agendas have not gone hand in hand in

practice, and ii) that historically states have relied on different methods to build their legitimacy, and democratic representation is only one of them. She then discussed whether and how a HR approach can contribute to build the legitimacy of the state, looking at both democracy and the fulfilment of basic state functions as sources of such legitimacy.

Discussion

The presentations were followed by an animated discussion among workshop participants, and in fact it proved difficult to limit comments within the one hour that had been originally allotted.

A lot of different issues were raised during the discussion, some picking up on ideas/questions brought up by the speakers and/or other workshop participants, and some bringing up new points for debate. Many of these issues also kept coming back at different sessions of the workshop. Below is a summary of some of the main points that were touched upon, organised around a few themes.

Concepts and definitions:

- While ‘state building’ may have become a concept that has gained considerable currency in the international community from 2000 onwards, it is not a new international endeavour as such and has been around for some time. The Central American peace processes (e.g. El Salvador and Guatemala) are examples of ‘state building’ efforts in which the international community got heavily involved and in which HR were intimately linked both to the causes of conflict and to (re)construction processes – even if they were not called ‘state building’ as such (Teresa Whitfield).
- There were also many calls from the floor for greater conceptual clarity about many of the terms being used and discussed. For example, as commented by Prof. Baregu and many others, it is important to disaggregate what is meant by ‘the international community’ – what actors, organisations, and institutions does that include? By the same token, what is the relationship between state-building and nation-building (Vijay Nagaraj)? Can states be strong and have weak nations (e.g. Belgium)? What does state ‘fragility’ mean?
- Legitimacy too can be interpreted in many different ways, and how different conceptions of legitimacy have come to be understood both internally and externally was an issue of recurrent interest and debate among workshop participants throughout the course of the day.

Interests behind SB

- State-building efforts are driven by a wide range of social and political interests that are not always complementary. For instance, for state-building to have any chance to succeed, the interests of national elites (which may not be homogeneous) need to be taken seriously into account, as they may define the scope of what is feasible/possible.
- Among other things, the above has important implications for the fulfilment of economic rights and what the international community may (or may not) be able to

do to push for such rights. What if what is needed is land reform, for example, which national elites are likely to oppose?

- By the same token, it is also important to recognise that donors themselves have their own interests, and the question was raised as to whether the international community has genuine interest in supporting autonomous, independent states rather than states that are likely to remain aid dependent for the foreseeable future. In addition, as noted by a recent report by Oxfam, many of the funds intended to support state building efforts do not reach the supposed beneficiaries, but rather help to support an entire industry of (donor) interests (including technical assistance, tied aid, etc.).
- This led some to ask how donors can go about at least ‘doing no harm’ in fragile settings, and it was mentioned that the OECD DAC is intending to commission a study on this very topic.

Do HR as the basis for the state constitute a universal vision?

- The problem of articulating HR as a model practice was also raised, given that there are many competing visions and moralities (Vijay Nagaraj) to the Western discourse on HR. This is an issue that was brought up at several different points during the workshop.
- Among other things, participants questioned the degree to which the normative idea of the state based on a fundamental respect for human rights had lost credibility as a result of misguided practices by the US and others in Iraq and Afghanistan.
- Others suggested that it is important to be flexible about how human rights are defined so that they respond to domestic (rather than externally imposed) demands.
- In an attempt address this issue, Derek Evans asked whether normative standards are idealised goals or whether they in fact have content (e.g. is there such a thing as torture or is it all relative?), and he suggested that the Vienna Convention provided a common basis of basic rights that are universal regardless of context (including, for example, women’s rights).
- Jon DiJohn, for his part, suggested that, in historical perspective, democracy was not a regime type that was bestowed on people as a policy (which is much of what SB is about – implementing policies), but rather something that had to be fought for and won. Thus, he asked, where is the demand for human rights going to come from? (According to DiJohn, economic development is an important precursor for this – an argument that seems to support modernisation theory.)
- Other participants also commented that, at least at the level of international discourse, some considerable ground had been gained in terms of recognising the centrality of HR: there is no longer a debate on the legitimacy of an international HR framework, even if there is a recognition that the fulfilment of such a framework remains a distant goal in actual practice.

Evidence that HR can contribute to SB?

- Many participants raised the issue of what evidence is available to support the normative claim that HR is an indispensable component of successful (and inclusive) SB.
- Paul Gready suggested that HR may not always have the necessary tools to collaborate with other fields and that it can prove to be a difficult partner.
- He also argued that there is much more evidence to suggest that HR may be part of the problem rather than the solution: there is no real evidence that the promotion of HR can turn fragile states around, but considerably more evidence that HR problems are linked to state fragility. But even here it is important to recognise that not all states that violate (some) HR are fragile.
- This discussion led many participants to emphasise the need for the international community to be modest in expectations and honest in motivation in pursuing SB efforts through a HR angle.

Basis for the social contract linking state and society

- Taxation was discussed as one of the crucial lenses of SB and state-society relations. In most fragile settings, the fiscal basis of the state is rather low (if it exists at all). This raises difficult issues of what the state can do, and for whom, since it is unlikely to have sufficient (or even minimal) capacity to provide welfare protection and fulfil basic (economic) rights.
- It was also noted that aid as an instrument can often have a perverse effect on the social contract binding citizen and state, because it weakens the need for accountability and for raising taxes domestically (Sakiko Fukuda-Parr).
- But aid can also be useful in buying capacity to secure a political agreement and strengthen the social compact – though one should be aware this comes with risks (Rahul Chandran).

Priorities and trade-offs: do all good things go together?

- The issue of priorities and how these are set was a recurring topic throughout the day.
- For example, based on the discussion of the weak fiscal basis of many fragile states, DiJohn asked whether there are difficult trade-offs between different types of rights, given that it is important to recognise that all good things do not necessarily go together. He gave South Korea as an example where a highly effective developmental state was based on an exclusionary bargain with an industrial elite, while the state also undertook extensive land reform.
- Do all rights pose the same existential questions, or do some HR violations pose bigger threats (Fergus Kerrigan)? Several participants seemed to agree that questions related to both human security and inclusion / exclusion were of fundamental importance because they got to the core of the legitimacy of the state.

- The issue of participation and inclusion in particular emerged as central in terms of how the rules of the game are shaped, and by whom.
- However, as emphasised by Graham Brown, issues of inclusion and exclusion are not straightforward either, as state legitimacy is often built on the basis of including some at the expense of others.

Taking context as the starting point

- There seemed to be broad agreement among participants that context matters and needs to be taken as initial point of reference for donor interventions. The concept of ‘fragility’ also needs to be understood in a more nuanced manner that is context-sensitive.
- However, this is more easily said than done. John Bevan gave the example of East Timor, where the formation of the East Timor police was very poorly suited to conditions on the ground.

IV. Session 2: Exploring the linkages between state fragility, human rights, social exclusion and state-building more deeply

Speaker: Frances Stewart (Director, Centre for Research on Inequality, Human Security and Ethnicity, Queen Elizabeth House, University of Oxford)
Dimensions of Fragility

Frances Stewart’s presentation focused on the linkages between state fragility, human rights, social exclusion and state-building. She began by noting that, although there are various opinions and views as to what constitutes ‘fragility’, the inability, amongst academics and development practitioners to reach a working and generally accepted definition of fragility is in part what is largely responsible for the confusion that exists in the fragility debate. She distinguished, in particular, between different conceptions of fragility as understood by DFID, CIDA, and the World Bank. She also cautioned participants of the need to differentiate between failing countries and those at risk of failing; and those that had undergone absolute failure vs. progressive failure.

Stewart identified three key aspects/dimensions of state fragility that should help in providing a more nuanced understanding of the different ways in which a state may be fragile which goes beyond an exclusive focus on territorial control and security issues. These include:

- **Authority failure:** the state lacks the authority to protect its citizens from various kinds of violence and includes the presence of significant organised political violence (Iraq and Afghanistan); a situation in which state authority does not extend to a significant portion of the country; periodic political or communal violence that leads to deaths and destruction (Nigeria and Indonesia); and extremely high levels of criminality that have almost no state actions or institutions to regulate them (including a working justice system) (Guatemala and Haiti).

- **Service failure:** where the state fails to ensure access to basic services (health, basic education, water and sanitation, basic transport and energy infrastructure as well as the reduction in income poverty) to all its citizens.
- **Legitimacy failure:** characterised by the absence of democracy; a strong role for the military; the acquisition of power by force; suppression of opposition; control of the media; exclusion of significant groups as well as the absence of civil and political liberties.

Frances argued that the causal connections between all three of these aspects of fragility are complex and multi-dimensional. For instance, a lack of authority may impede service delivery, which in turn can imply a lack of legitimacy. Lack of service delivery, for its part, may undermine both authority and legitimacy, especially if horizontal inequalities are reinforced. To further understand the interrelation between authority, service delivery and legitimacy, Frances discussed some of the empirical findings from ongoing research on state fragility. A few points worth highlighting from her analysis include the following:

- **Authority failure** can be observed through two lenses: i) failure that leads to civil war and ii) the risk of failure that can lead to serious violence.
- Failure in **service delivery** can be classified using the following measures: absolute failure where countries fall below two standard deviations below average performance of all countries with a GDP per capita of UUS\$1,500 or less; those absolutely at risk that fall one standard deviation below; and progressive failure = one or two standard deviations below regressions.
- Failure in **legitimacy** entailed using the democracy index from Polity IV.
- In using the above empirical frameworks and sources, Frances and her collaborators have arrived at the following results:
 - 0 countries fail on all 3 dimensions
 - 5 countries fail on 2 dimensions (Burundi, DR Congo, Iraq, Cambodia and Saudi Arabia)
 - 2 countries are at risk on 3 dimensions (Uganda and DRC)
 - 5 countries at risk on 2 dimensions (Uganda, Cameroon, Rwanda, Angola and Gambia)
 - 43 countries fail on 1 dimension
 - 39 countries are at risk on 1 dimension
- Certain correlations can be identified based on the above analysis:
 - There is a high correlation between absolute and progressive services failure, as well as between absolute and progressive legitimacy
 - However, the correlation between authority and services is low
 - There is also a low, negative correlation between legitimacy and authority and legitimacy and services delivery. This suggests that democratic legitimacy does not automatically go hand in hand with increased state authority and/or better service delivery, which may run counter many of the assumptions made by the international community about the ability of ‘all good things’ to go together.

- Frances also made linkages made between authority, services and legitimate governance; and human rights failures, horizontal inequalities and MDGs in the following format:

Relationship to fragility	Authority	Services	Legitimate Governance
Human Rights failure= strong	Failures on authority = failures with respect to the 'security of persons'.	Failures on economic and social rights = failures on service access	Failures on civil and political rights = lack of legitimacy
Horizontal Inequalities (HI)= fairly strong	Significant: HIs raise risk of conflict	Significant HIs = failed service entitlements; fragility may occur without significant HIs,	Significant political HIs imply lack of legitimacy.
MDGs = modest	Probable connection with conflict due to failure of social contract	Failures on MDGs imply service failures -- service failures may still occur with realisation of MDGs	Not relevant

From this empirical analysis, Frances outlined the following policy implications:

- It is important to identify the sources of state fragility/weakness along the three dimensions outlined.
- Authority failure is a serious issue because of its connection with service delivery.
- Horizontal inequalities are crucial because of their connection with services, authority, and possibly legitimacy (expressed mostly in terms of political exclusion).
- Legitimacy (democracy) may be a luxury because of the possible negative impact on other dimensions.
- Although the HR approach is highly desirable, how can it be implemented in practice? Among other things, HR needs to be incorporated into local norms and legal systems (e.g. constitutions), and they need to be claimed and reclaimed because there is always a danger of sliding back.

Discussion

Frances' presentation again led to a lively discussion where many of the points raised in the previous session were touched upon as well.

State legitimacy

- Much of the conversation focused on the issue of legitimacy and the way in which it is defined. The main point of contention was whether legitimacy should be defined

primarily in terms of its democratic attributes (as currently defined in the work outlined by Frances).

- Adrian Leftwich, for instance, suggested that in Frances' exposition, there was an unusual absence of other types of legitimacy that were equally important in the discussion of the interface between HR and state fragility, which included:
 - Geographic legitimacy – over the territory controlled
 - Constitutional legitimacy – agreement about the formal rules of governance
 - Political legitimacy – has the government assumed its power legitimately (though elections are not the only criterion here)?
 - Delivery capacity – is the government able to achieve this?
- Echoing Leftwich, Jon DiJohn and Vijay Nagaraj argued that different forms of legitimacy are important at different times. Just like state fragility itself, legitimacy has multiple dimensions. One of the problems with defining legitimacy in terms of democracy is that all of the East Asian developmental states from the 1950s to the 1980s would be considered as fragile or failed. Many rather undemocratic and coercive states can have a different basis for legitimation – such as the improvement of basic living standards (e.g. jobs and purchasing power). Land reform is a highly egalitarian and pro-poor political intervention, but it has historically only been undertaken under undemocratic regimes.
- Frances Stewart agreed with the limitations that defining legitimacy in terms of democratic features gives rise to, but suggested that it was an important criterion to look at given that the international community places so much emphasis on democratic governance.
- Stephan Massing also mentioned that, while SB efforts undertaken by donors tend to define legitimacy in normative terms related to democracy, there is a growing awareness that this can be problematic because it may not be consistent with realities on the ground.
- Going beyond a normative appreciation of state legitimacy to one based on the provision of basic services, Birgit Lindsnæs also suggested that it is essential to keep in mind that responsibility for the provision of such services should not fall on the state alone, and that the private sector has an important role to play in this respect. What the state is responsible for is ensuring that those services are in fact provided, either publicly or privately.

Underlying causes of fragility

- There was also a discussion about what the underlying causes of fragility may be, and whether and how globalisation processes may contribute to such fragility.
- For instance, Prof. Baregu argued that globalization may lead to marginalization, which in turn leads to exploitation, which leads to impoverishment, the loss of legitimacy, and, eventually, the disintegration of national societies and political polarization. The globalisation of drug-trafficking also lies at the heart of state fragility in countries like Guatemala (John Bevan). Frances Stewart mentioned that the impact of globalisation seems to produce inequality, and to accentuate the potential for conflict around resource extraction.

- On the other hand, as was also suggested earlier, globalisation can make international states and norms more relevant, giving human rights greater emphasis and legitimacy (Christian Lotz).

V. Session 3: Analysing whether and how transitional justice mechanisms may contribute to state-building efforts in fragile states

Speaker: Paul Gready (Director, Centre for Applied Human Rights, University of York)
Transitional Justice, human rights and state-building in fragile states

Paul Gready began his presentation by providing a definition of HR along 4 characteristics:

- as rules providing guidance to problem solving and legitimising outcomes (laws, codes of conduct)
- as structures and institutions to operationalise HR (e.g. courts, commissions and policies) - well functioning institutions also build trust in the state, and hence its legitimacy (see also concept note)
- as relationships (between state and society; between different societal groups; between rights and responsibilities; etc)
- as processes (e.g. equality, non-discrimination, participation, accountability) intended to enhance the validity and sustainability of outcomes. Rights-based approaches to development adopt a rights as process approach.

Several challenges shape the parameters of possibility for contemporary TJ:

- Peace agreements, which are often the starting point of TJ processes, can both enable and constrain the safeguarding of human rights. They are enabling in the sense that they can include provisions for constitution-making, institutional reform, TJ mechanisms, etc. But they can be constraining through other mechanisms, like the inclusion of amnesty provisions and prisoner releases; weak HRs enforcement/implementation mechanisms; a focus on civil and political rights and rarely to the exclusion of economic, social and cultural rights, etc.
- Current democracies, and transitional justice, are embedded in two dominant strands of contemporary globalisation that together constitute the liberal peace. The liberal peace thesis maintains that political democracy and market economics are the foundations of sustainable peace. Terrorism and counter-terrorism or security measures provide a further layer, weakening civil and political (C-P) rights and adding little to economic and social (E-S) rights provisions. According to Gready, TJ fits almost too neatly into this paradigm. Contemporary transitional justice discourse too rarely extends to an analysis of the liberal peace that ultimately shapes local realities far more than transitional justice itself. With democracy reduced to a liberal template, the question is whether transitional justice has become the conscience of transitional globalisation without troubling its essential characteristics.
- The emergence of ‘disjunctive democracies’, where the formal procedures of democracy are in place, but crime, violence, inequality and segregation

predominate, undermines the promise of the new democratic era. HRs have gained a secure purchase in certain areas (political rights) but simultaneously barely feature in others.

- Transitions and democracies are characterized by continuity as well as change. Very often, structures of inequality and patterns of conflict are recreated and persist even if a new regime or system of rule emerges. This undermines the prospects for genuine democracy and contributes to state fragility
- Liberalization during processes of transition is itself conflict-generating, exacerbating social tensions and competition at a juncture when a country is ill-equipped to contain them within peaceful limits.
- Civil society-state relations: many human rights activists are almost genetically anti-state. Thus, while a HR focus places the state centre-stage, there can be a tension between HRs and a state-building approach. In addition, during transitions, there is an expectation that NGOs should engage more constructively with the new government/state; but such engagement requires a set of skills that NGOs may need to sharpen. Beyond this, civil society itself can be profoundly fragile: It can be virtually non-existent, internally divided, mired in clientelistic relationships with power holders and service delivery functions, dependent on the state or international donors, partisan, undemocratic and uncivil.
- Human rights, state building and transitional justice can all be perceived to be, and often are, intrusive, externally driven interventions. TJ, for example, has become something of an industry. Repeated calls for local control and adaptation should not overlook the power that an industry such as this can hold over the repertoire of options imagined and on donor purse strings.

On the other hand, TJ can also provide opportunities to SB:

- Legitimacy: TJ can contribute to building the legitimacy of the state in terms of providing justice, acknowledging violations of rights by previous regimes, and/or providing a forum for the victims to speak out and for the state to listen.
- Institution-building: trials, truth commissions, and 'hybrid institutions' that combine international and domestic law and staff can make an important contribution to state-building. The potential of local level institutions to contribute to SB should not be overlooked, which has been a weakness within TJ efforts to date.
- Indivisibility (CP-ES rights; past and present): TJ has lagged behind the human rights mainstream in operationalising the interdependence/indivisibility of human rights. Though recent truth commissions (Sierra Leone; Timor Leste) and trials have begun to address E-S-C rights, these rights remain secondary within TJ. However a greater focus on ESC rights could help address the root causes, as well as the symptoms, of conflict and state fragility, and would bring structural change within the remit of TJ. In addition, there is a tendency for TJ to draw too easy and superficial a line between the past and the present. However, if TJ is about addressing the HRs legacy from the past, it is increasingly clear that some of the most enduring ways in which the past affects the present (poverty and inequality;

weak states) remain on the margins of TJ. TJ must retain its focus on the past, but in such a way that maximises its relevance to the problems of the present (interventions have to insert themselves into a rapidly changing political and policy context; in which governments rapidly lose patience with TJ, a focus on the past, and want to move on). Put another way, TJ is not just about justice, but is also about politics. Thus, in order to maximise its impacts, supporters need to be more astute politically.

- Sequencing and prioritization: how should interventions be prioritised so that they are sequenced rather than permanently traded off against one another? These are issues that TJ grapple with continuously. Within the HR field, there remains an inbuilt resistance to sequencing/prioritisation. However, as Paul Alston has noted, if every possible human rights element is deemed to be essential or necessary, then nothing will be treated as though it is truly important. A list of requirements that is too demanding or ignores trade-offs and dilemmas is unlikely to be taken seriously by practitioners who are operating under major resource and time constraints and are faced with competing priorities and the need to make difficult choices. On the other hand, it is essential to note that the call for prioritizing is not to suggest that any obvious violation of rights can be ignored. In addition, priorities must be identified based on contextual factors and needs, rather than derived from fixed hierarchies. Moreover, momentum needs to be preserved so that the possibility of change (even if sequenced) is not stalled.
- Revisiting participation: participation in official consultative forums does not work, especially for the poorest and most marginalized. Much of the participation with TJ mechanisms has been of this kind – but can HR, in a TJ setting, add anything to established participatory practices? Official truth commission (TC) methodologies may contain the seed of an alternative approach. For example, truth-telling can be linked to human rights consciousness raising. Experiencing rights can be key to the process of claiming rights. Truth Commissions have also launched (perhaps unintentionally) a number of social movements which can be transformative in that they are creating active citizens who call the state to account outside of electoral processes. In this sense, TJ is creating political processes and institutional arrangements through which new relationships between state and society can be negotiated

In conclusion, Paul Gready stressed that short term legitimacy gains need to be linked to institution building; indivisibility needs to be operationalised along sequencing and prioritisation; and state building needs HR as guidance. TJ and HR can contribute to all this, but they will need help. They need to address structural issues so as to make them more meaningful/substantive, and they need to go beyond symbolic gestures.

Discussion

Priorities and trade-offs

- This issue once again generated substantial discussion among participants.
- John Bevan mentioned that the unwillingness to establish priorities may often come from the HQ level, where there is an insistence to develop a cross-cutting approach to HR (e.g. Haiti), and in the end very little may be done. (On the other hand, if

there was no attempt to mainstream HR but rather see them as a discreet form of intervention, donors would also come under criticism for not developing a holistic approach to development – so this too presumably needs to be taken into account...)

- In addition, the antipathy of HR activists towards the state so as not to be contaminated has led to a failure to conduct the necessary political analysis that is needed to establish priorities.
- Phil Clark also argues that it is important to ask what TJ is for and what can be expected of such processes. In the DRC, for instance, the TJ agenda was too ambitious (bringing democracy, peace, stability, etc), and TJ mechanisms may simply not be able to cope with everything at once.
- TJ can have negative effects on SB and reconciliation – but the impetus behind TJ efforts may often come from the donors’ own political agenda (Louise Anten).
- Rauno Merisaari raised a question related to vetting: what can be done when perpetrators are being reinstated in office after peace agreements? What kinds of trade-offs are involved here? Paul Gready answered that, in the case of Iraq, de-Baathification seemed to have been a mistake, and that vetting can be a difficult process to handle. There needs to be clarity about what institutions are being vetted and why.
- On the other hand, Fergus Kerrigan noted that focusing on relatively ‘small’ issues like loss of birth certificates can be extremely important, especially for marginalised groups. Thus, as other participants also agreed, there is a need to focus on the banal/everyday and not just on spectacular cases of HR abuses.
- Echoing a point that had already been raised several times, Lucia Whithers suggested that context must be taken into account when setting priorities. For instance, TJ efforts in Timor and Indonesia may have resulted in some tension and ambiguity that has not necessarily contributed to SB, but the absence of TJ mechanisms in Afghanistan has proven detrimental to SB (the population has become deeply disillusioned about the ability of the government to tackle impunity, for instance).
- Priscilla Hayner also warned against assuming too easily that HR concerns will necessarily complicate the prospects for peace – the granting of general amnesties, for example, has been an exception rather than a rule in peace negotiations.
- There was a discussion on Rwanda that echoes this debate on priorities and trade-offs. Participants seemed to have different perspectives of what the post-genocide state in Rwanda has been able to achieve. While participation has been limited and there has been a tendency to centralise power and authority, it can also be argued that democracy has made important progress in some areas (Fred Golooba-Mutebi).

Timing of TJ

- There is a question of what the window of opportunity and attention related to TJ mechanisms is. Is the window as short as some have suggested?

- Frances Stewart brought up the examples of Pinochet in Chile and the current problems in Northern Uganda to suggest that TJ mechanisms may be more prolonged than has been suggested and that the claiming of justice may take some time. Paul Gready pointed out that a negotiated solution has been found in the case of Northern Uganda.

National ownership

- Priscilla Hayner emphasized that, while some TJ mechanisms are in fact externally driven, in general the field of TJ emphasizes domestic ownership – if national/local actors do not buy into such efforts, then TJ will not be able to be achieved.

C-P rights vs. ESC rights

- Erin McCandless pointed out that it is well known that HR abuses are both CP and ESC during conflict, but that TJ has not been able to address this properly (e.g. South Africa). Thus, TJ has not been well suited to address the horizontal inequalities discussed by Frances Stewart during her presentation. Derek Evans suggested HR concerns were being integrated into PRSPs, but this has not had a great impact.
- Priscilla Hayner suggested that, in fact, the issue of incorporating ESC rights into TJ is very much alive (e.g. focus on ‘economic crimes’ in Kenya), but that clearly there is still a long way to go on this front. George Kegoro also mentioned that including economic rights in the Kenyan reform process is absolutely essential. Civil society organisations have expressed their concern about the stalling of the fundamental ESC TJRC process.
- TJ efforts may have particular trouble incorporating ESC rights because addressing such rights involves antagonising the interests of key actors such as economic and political elites whose engagement is crucial if the peace process is to be successful (e.g. Guatemala).

DAC HR Task team

- Before this session came to a close, **Sylvia Bluck** from DFID gave a brief update on the ongoing work of the DAC HR Task Team. One of the aims of this task group is to integrate HR concerns with conflict work. Part of this effort has entailed a mapping of what donors are currently doing in this respect and to identify whether there are structural barriers to a more integrated approach (which apparently there are not). The working themes include TJ, Children and Conflict; Demilitarisation; and Economic and Social Rights. The task team is working in the following states: DRC, Bosnia and Herzegovina, East Timor, Colombia and Uganda.

VI. Session 4: Challenges (and opportunities) to a human rights and state-building agenda in Africa

Speakers: Prof. Mwesiga Baregu (University of Dar-es-Salaam)
George Kegoro (International Commission of Jurists, Kenya)

Prof. Baregu’s presentation focused on three key issues:

1. Globalization and state fragility
2. Managing transitions as central to state building in post-conflict societies
3. Types of transitions – focusing on process and institutions

1. Globalization (GL) and State Fragility

- There are differences in perception on how people view globalization and its effects on state fragility
- GL has an integrating / centralising tendency in the North but a disintegrating effect in the South
- Evidence of this (integration/disintegration) effect of GL is clear on the EU (integrative effect) and Economic Partner Agreements with Africa (disintegrative effect)

2. Transitions

- Defined as the move from one stage or type of regime to another – and they could be negative or positive
- There are three main forms of transitions:
 - Imposed – by groups and other powerful players (both internal and external)
 - Negotiated – between different parties/ stakeholders (external and internal)
 - Controlled – emerges between the imposed and negotiated forms
- The management of any transition process has to take into account four key processes:
 - Players: strategic actors and internal/external actors; who is included/excluded and why
 - Pathway of the transition
 - Process: constituent assembly, referendums, etc.
 - Pace: speed and timeline of a transition
- There are also other issues that need to be taken into consideration such as phasing and sequencing: what comes first and in what order?
- Four types of actors/interests in transition environments:
 - Those who favour peace – peacemakers
 - Peace spoilers and blockers
 - Peace opportunists
 - Conflict entrepreneurs

3. Issues to consider in constitution making and constitutionalism which need to be in place:

- There is a need to identify organic institutions that are suited to the African context and can address the current crises afflicting the continent.
- In terms of elections, there is a need to reconsider proportional vs. winner takes all models to avoid situations like the recent crisis in Kenya (and Zimbabwe?).
- It is also important to assess the role that institutions like electoral commissions can play in either alleviating the preponderance of state fragility or contributing to it (again, Kenya and Zimbabwe are examples).
- The rules of administrations need to be clearly defined and broadly accepted.

- Civic education represents an important type of intervention because it can help the population become more aware of their rights and demand a response from the state.

Prof. Baregu concluded by questioning whether political parties worked in Africa and whether they were adequate in addressing the continent's challenges. In general, part of the problem is that many countries in Africa are suffering from a legitimacy deficit that state institutions (in particular representative ones) are ill equipped to address.

George Kegoro began his presentation by providing a few socio-economic and political indicators that suggest the magnitude of the developmental challenge the region confronts. He then identified several different types of crises that many countries in Africa are currently undergoing that echo many of the points Frances Stewart brought up in her conversation about state fragility. These include:

- An identity crisis – whereby groups within a number of African states are not able to identify with the state and are seeking to break away (e.g. Eastern DRC).
- A crisis of legitimacy – whereby armed insurgency groups threaten the legitimacy of the state (e.g. Uganda and Somalia).
- A crisis of participation – whereby women, youths and minorities remain considerably marginalised.
- A crisis of access – whereby the population lacks access to basic facilities and services (partly as a result of very harsh and poorly connected terrain, partly because of limited state capacity and political will).
- A crisis of integration – whereby those in the fringes of society experience acute challenges of integration.
- A crisis of production – whereby most states cannot feed themselves and have to import food.
- A distribution crisis – the gap between the rich and the poor is second only to Latin America. These disparities, which often take the form of the horizontal inequalities discussed by Stewart, have created resentment and conflict between the wealthy and poor.

Kegoro also outlined some of the opportunities that exist in Africa:

- The era of the 'big man' syndrome may be slowly receding.
- There is growing emphasis on the need to promote accountability coming from within.
- Improved access to education can make a difference in terms of making citizens more aware of their rights and obligations.
- Civil society participation in political processes is increasing and may be a force for good in terms of integrating HR and SB. This is exemplified by the role that civil society groups played in the recent crisis in Kenya: as political leadership vanished and violence mounted, a group of Kenyans advocating for both peace and justice came together and put pressure on the political leadership to work towards a negotiated settlement.

Discussion

A number of questions and issues for further reflection were raised by participants. Some of the most significant ones include the following:

- How can aspects of African tradition be better integrated into modern processes – that is to say, how can formal institutions work with the grain of informal ones to promote development? What is the role of tradition in justice systems, for example?
- However, it is important not to romanticise traditional methods of justice and governance, as these can be manipulated and exploited for political purposes (e.g. community councils in Uganda have not been particularly successful).
- Importing alien institutions to make states more effective without taking contextual issues and informal institutions into account is bound to produce poor results (if not run counter to intention).
- How can countries that suffer from the different legitimate deficits outlined by Kegoro emerge from this?
- Is it true that the era of strongman politics is beginning to decline? In fact, strongmen may well be taking advantage of the general (international and national) commitment to avoid conflict to centralise their power even more.
- What can we do when the very leaders that are elected do not ‘deliver the goods’ that society demands such as in Cameroon and Uganda?
- How can we bring societies back into the political, economic and social mainstream?
- There has been a tendency in Africa to assume that because elections resolve the democracy question they also resolve the legitimacy question – but this cannot be assumed or taken for granted.
- Where is the HR angle in PRSPs? What about distributional issues and ethnic divisions?
- What role can freedom of information laws play to improve the quality of democratic governance in Africa?
- Where is the HR angle in all of the above discussion?

VII. Session 5: Case study Presentations

Nepal

Speakers: Rhoderick Chalmers (International Crisis Group)
John Bevan (former UNMIN civil affairs, Nepal)

Rwanda

Speakers: Fergus Kerrigan (Danish Institute for Human Rights)
Phil Clark (Centre for Socio-Legal Studies, University of Oxford)

By the time we got to the two case studies, we were considerably behind schedule, so we requested that the speakers keep their presentations strictly to the time allotted (10 minutes), and we had to keep the discussion on each of the case studies brief. All four speakers presented on the basis of prepared notes, therefore copies of their presentations are unavailable.

Nepal

Rhoderick Chalmers provided a background of the ongoing problems in Nepal. Donors have been involved in Nepal over the past 60 years, and the Nepalese state has in many ways always been fragile and highly exclusionary. A Maoist insurgency broke out in the

1990s, but it took both the government and the international community a long time to acknowledge the power and appeal of the Maoist political agenda, which was based on the premise that Nepalese state and society had to be radically transformed. The Maoists were not taken seriously as a political force until 2002. The immediate international response to the Nepalese state's inability to deal with the Maoist insurgency was to 'strengthen the state' and provide security, rather than work with the relevant stakeholders from both the state and society to attempt to reform it. Thus, there was no real effort to explore the root causes of the conflict in Nepal and attempt to address them.

For a long time, there was a lack of international agreement or coherent strategy on how to deal with the political crisis in Nepal. The situation further deteriorated in 2005 when the King performed a coup against his own government. This led to the establishment of a High Commissioner's office on HR. This office allowed increased dialogue between Maoists and government.

However, HR have not been incorporated into the political process of peace-building in a meaningful way. In some instances, moreover, the HR agenda has actually been manipulated to serve broader political goals. For instance, the strength of the Maoist ideology is very valid for some, and the Maoists have used elements of the HR discourse to justify the use of political violence.

Nepal finally held elections for a Constituent Assembly earlier in April 2007, which the Maoists won by a considerable margin. Voting was not coerced: people actually voted for the Maoists, whom donors for a long time have perceived and described as 'savages', 'criminals', and, especially since 9/11, as 'terrorists'. Thus, the Maoist victory was not something that the donors had expected – which points once again to the need to have a much fuller understanding of the context within which the international community operates. But the Nepalese population has expressed a clear mandate for change, and the restructuring of the state has always been an essential part of the Maoist project (which as stated above was something the international community preferred to stay away from). Thus, donors will need to re-evaluate their programmes and priorities – but the fact that this pressure for change has come from the bottom up also offers some opportunities and the possibility that it will provide legitimacy to the process.

John Bevan supplemented Rhoderick's presentation by making the following points:

- The fragility of the Nepalese state is rooted in the country's painfully delayed transition from feudalism to the 21st century.
- The very rationale in which the Nepalese state was based was a system of discrimination and exclusion that echoes Frances Stewart's discussion on horizontal inequalities.
- The Maoist insurgency can be seen as a result of this complex transition.
- As reflected by the way in which the donors have handled police reform in Nepal (whereby the police force remains the same as that responsible for the violent suppression of a people's movement in recent history), the international community has failed to adequately address many key issues related to SB.
- The need to tackle impunity is essential to build the legitimacy of the state in Nepal, but very little progress has been achieved in this area.
- Human rights should be seen as key to accountability and transparency, as well as an objective measure of government performance.

- However, it is also important to keep in mind that a state can remain stable despite the violation of HR, therefore international discourse needs to be amended to reflect this.
- Converting the documentation of HR violations into advocacy and impact requires astute political leadership.
- Moments of transition provide an opportunity to introduce HR issues. The question is how to take advantage of such a window?
- Moral authority needs to be integrated into the DNA of the state, so there is a considerable need to strengthen civil society organisations so that they can push for such accountability and responsiveness from the state.
- There is a strong antipathy towards donors among Nepalis. Aid is seen as a business that works within the aid system but not others. In addition, earlier means of national integration have been highly discriminating and exclusionary, and the international community is identified with it. Hence the question remains as to whether there is a positive atmosphere for a HR discourse in Nepal.
- Part of the answer again may lie with the need to strengthen CSOs and their advocacy capacity.
- But CSOs have also become corrupted by irresponsible donor action and lack of coordination. They have become politicised, and they are often inundated with money that they can't always properly absorb.

Discussion

The discussion on Nepal touched on a few different issues. One was whether and how a transition can be seen as a window of opportunity, given that it may also be challenging and risky given the shifting nature of the context. Several participants also emphasised that focusing on civil society is not enough and that the institutions of the state itself also need to be taken into account (as Vijay put it, an exclusive emphasis on civil society would be to undertake SB on a neoliberal agenda).

Participants also asked whether the peace agreement in Nepal had been adequate. John Bevan responded that the agreement was inadequate in certain important respects: it failed to include security reform, and the land issue, which is intimately linked to the conflict, was also missing. In addition, despite the limited HR provisions included in the agreement (including a Truth and Reconciliation Commission), these have yet to be implemented.

On the other hand, Roderick noted that, at the very least, there is greater awareness about rights among the Nepalese population than there was in the past. Donors have played an important role in introducing this rights-based discourse, and sometimes their actions have had positive unintended consequences (e.g. NGOs they have funded have become political parties).

Rwanda

Fergus Kerrigan provided a brief overview of the post-genocide justice system in Rwanda. He stressed that Rwanda differs from other FS in that it is in many ways a strong nation: there is a single national language³, no significant regional competition, and no

³ Though this may not be entirely correct: as Timothy Othieno points out, in addition to Kinyarwanda, French, English, and Kiswahili (Swahili) are widely spoken.

considerable religious divisions. There are also strong mechanisms of social control based on known (informal) rules and social norms. This can be detected by the way the pre-existing state has managed to reproduce itself in the prisons. In fact, scholarly studies confirm that the genocide that gripped Rwanda is a testament of the power of authority and obedience, and not of anarchy and lack of compliance. (Still, all this makes it much more difficult to understand why the genocide took place in the first place, a point that Fergus did not discuss.)

Rwanda has been aid dependent for a long time, and in fact donor pressure to promote a democratic opening in the early 1990s contributed to the destabilisation of the country. The state reconstruction project in the post-genocide period has focused on the rule of law and individual responsibility as the antidote to violence and ethnic distinctions. There is a new discourse of national unity as well as claiming that 'we are all Rwandans'. Yet, the extent to which a 'new Rwanda' is emerging remains the topic of considerable debate.

There is a perception that the Rwandan government is highly authoritarian, centralised and exclusionary, with power concentrated in a small circle of people. In addition, it is not clear that ethnic divisions have been erased – even if this cannot be said openly as ethnicity is supposedly no longer a problem. There are also accusations that the government has been complicit in HR violations while the international community turns a blind eye. The space for autonomous civil society mobilisation has been shut down (the 2006 elections were heavily controlled and critical NGOs were shut down).

In terms of justice, all those responsible for the genocide are supposed to be punished as part of the emphasis on individual responsibility, but the task to do so is monumental. The justice system does not have the capacity to handle this, and it may be that the international community is expecting too much. The truth and reconciliation process remains flawed despite the generous support from donors (confessions have not been forthcoming, for example), and crimes committed by the RPF government have been looked at through an unaccountable process. Nevertheless, there has been some success in terms of establishing the legitimacy of the justice process – even if the broader long-term impact remains unclear.

Phil Clark's presentation focused on the Gacaca, a community based justice / truth and reconciliation mechanism in Rwanda, and on its HR implications. Before launching into that discussion, however, Phil mentioned that the reality in Rwanda was not necessarily as gloomy as Fergus had portrayed it.

The Gacaca involves approximately 9,000 community based courts intended to investigate, punish, and sentence genocide crimes. These are communal justice practices that have existed in Rwanda for a very long time and have been adapted to the genocide context, which has not always been easy. In essence, the Gacaca was a response to the need to seek justice in the post-genocidal system that was driven both by resource constraints and by the perceived inefficiency of international systems (like the one in Arusha) to help bring about truth and reconciliation.

The Gacaca is intended to be based on a high level of public participation. Both the state and the population should be actively involved in all phases (e.g. collecting evidence, etc). The Gacaca incorporates some key HR due process provisions, though some HR concerns

with process remain. For example, it does not include lawyers, which is very controversial among HR groups.

In practice, the Gacaca is an organic and highly fluid process that needs to be analysed community by community. There has been large international involvement in the creation of these community-based courts, including the Danes. There had been fears from the international HR community that Gacaca would degenerate into mob justice and legitimate further violence, but this has not been the case empirically. On the other hand, the romanticised view of the Gacaca as a community-owned process of reconciliation grounded in traditional practices has not borne out in practice either, as the process has not been nearly as participatory and inclusive as had been envisioned. It has also transpired that donors may not be well placed to address community issues inhibiting local participation, and there is a need to further investigate how and why a population may take part in TJ processes.

In terms of the limitations and successes of the Gacaca, Phil highlighted the following points:

- The Gacaca's record as a justice mechanism is mixed: there has been a lack of participation and only limited prosecution of suspects.
- The Gacaca may be expected to do too much (which is a recurring theme) – for instance, the Gacaca should most likely not have been adapted to deal with RPF crimes, as this was not its intent.
- There has been a re-traumatisation through truth, so the Gacaca may not always be a healing process.
- The Gacaca lends itself to perverse incentives to confess to crimes that may not have been committed.
- The Gacaca can also be quite a confrontational process.
- Despite the above limitations, however, the Gacaca has produced a dialogue between victims and perpetrators.
- It also represents an attempt (if flawed) to work with existing/traditional institutions rather than importing mechanisms from the outside.

Discussion

A few comments and questions arose from the floor that the speakers then sought to address. One of the points made is that here are two conflicting images of Rwanda (Fred Golooba-Mutebi), one of inclusion and based on the notion that 'all are Rwandans', and one that is more authoritarian, exclusionary, and continues to be ethnic-based despite the official discourse to the contrary. The truth is probably in between the two. But again, Rwanda today helps to highlight the difficult choices that are embedded in SB and brings to the fore the issue of sequencing and prioritisation – Fred asked whether the Rwandan government was right to shut down CSOs in the light of all the other tasks it has to undertake – how is the democratic process best sequenced?

To questions related to the impact and future of the Gacaca, Fergus replied that, with the benefit of hindsight, the international community should have used this community process as a hearing mechanism and as a process to collect evidence, not as trial. Phil emphasised that, in his view, a war crimes tribunal should have been established to deal with RPF crimes. The issue is that the role of the International Criminal Court (ICC) in Africa has been problematic because it has tended to avoid difficult cases. However, for the Court to

remain relevant and legitimate, it needs to make a much more serious effort to deal with crimes of the state. As for the future of the Gacaca, Phil said that President Kagame is eager to wrap it up as quickly as possible. The Gacaca was the product of a serious political compromise that was driven by the well-connected and well-educated Tutsi Diaspora who believed it was not possible to have direct retribution. But this is not the position of the Kagame government. In this sense, the Gacaca represents a more moderate perspective on justice, a leak in the RPF monolith.

VIII. Closing remarks

Christian Lotz thanked participants for their contributions and concluded by saying that the discussion had been overwhelming and very thought-provoking. Two crucial questions were raised:

- Are HR relevant in FS work?
- How do we integrate HR issues in FS?

These questions still need to be answered more fully, and the conversation needs to continue. However, there is no doubt that HR have a place in the SB agenda, and while the aftermath of 9/11 may have weakened the resonance and legitimacy of the Western discourse on HR and democracy, HR are not the monopoly of the West. In this respect, the genie is out of the bottle, and the pertinent question is not whether but rather how HR issues can best be incorporated into SB.

Adrian Leftwich also made a few closing reflections based on the day's proceedings. He suggested that the day had started by referring to state building and HR discourses. Have these discourses been bridged? Yes, to some extent, and the link bringing them together is politics/ the political process. Neither states nor HR are natural phenomena that just happen to emerge, but they are constructed through an intense political process that can be resisted and contested.

He highlighted a few key issues that emerged from the discussion:

1. There is a need for greater conceptual clarity. Donors need to know what the building blocks for state building are, and big concepts like fragility, legitimacy, TJ, etc. need to be disaggregated into more discreet and manageable units. In a way Margaret Thatcher may have been right when she proclaimed there is no such thing as 'society'. What we need to look for are the different forces, elements, groups, etc that constitute society. Frances Stewart's work on FS constitutes one important step in defining terms in a more nuanced manner.
2. Not all is doom and gloom. The costs of SB (which has historically been violent and conflict-ridden), even if painful, may pay off. We were saddened by the events that transpired in Kenya, but they may also contain the seeds of an opportunity – such events may generate demand for better states.
3. We should talk more about political agency/ groups/ players (e.g. the RPF moderates). We need to know more about political coalitions and interests and how these interact with structures and institutions to make change possible (or not).

With this, the workshop came to a close, somewhat later than had been anticipated, and participants were invited to a small drinks reception.