

Protecting Rights in Conflict Situations and Fragile States
28 February 2005, Overseas Development Institute, London
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I am looking the post-conflict stage – rather than pre-conflict/preventive action – but would like to make the point that these stages do not fall into neat categories – what happens post-conflict may be vital for prevention of a further round of crisis and conflict.

I am also talking as a lawyer – which on the one hand may be seen as impracticable – on the other also grey areas – and also of conflicting rights as well as priorities. In short time refer to some general points – then to look very briefly at the two separate categories of rights – civil and political and economic and social from the perspective of derogation.

Three preliminary points: The first is that in the numerous peace processes, attempts to bring conflict to an end in all continents since the end of the cold war there has been a focus on human rights as part of the settlement. Especially where there have been international mediators/facilitators there has been a commitment to rule of law/democracy and human rights as the basis for commitment to opening the territory to free market/foreign investment reconstruction. Numerous examples – Dayton Peace Agreement is perhaps the clearest for the extremely fragile post-conflict B-H – some 15 Human rights treaties were annexed to the Agreement – internal structures created (national HR Commission – comprising a Chamber and ombudsperson) and ECHR given

status as supreme law. In numerous other post-conflict situations hr are referred to as one of the underlying concepts of a peace agreement – for example Guatemala, El Salvador, Cambodia, Liberia or a SC Resolution - Among the priorities for UNTAET in ET was the creation of an independent Timorese human rights institutions and UNMIK in Kosovo was required to promote and protect human rights. Interestingly have become independent in May 2002 Timor-Leste became a party to a slew of UN human rights treaties by December 2003. Thus it is clear that at the formal level at least human rights is integral to post-conflict reconstruction – see the peace agreement as a pivotal moment for societal reconstruction and human rights as part of this. There is perhaps also a feeling that if this moment is lost the right time doesn't too easily return. But this does have the major disadvantage that peace agreements are negotiated by the internationals, far from the conflict area and typically with no, or minimal, input from local people other than those from the warring factions. Thus human rights are essentially part of a top down process.

Second point – a post-conflict state is subject to massive intervention – international and regional agencies – possibly international administration – peacekeepers – NGOs – so there is a question about the human rights obligations of these entities as well as those of the state. This is a complex question – but just to make a couple of points: if the international administration ignores issues of human rights it sets a bad example and undervalues their importance in the post-conflict reconstruction – but there are numerous examples where the international administration itself asserts higher priorities – for example in the passage of legislation

or provision for training. As an example, in 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*. Capacity building/police training are seen as key to social rebuilding but such an exception allows human rights guaranteed to be nullified – without any guidance as to what constitutes ‘as far as practicable’ and without any other principled basis. It is worse still where the internationals themselves violate human rights – for example through involvement in trafficking, sexual abuse of children and women. Legal accountability of international bodies and international personnel are far from adequate and extremely worrying in this context.

Third – human rights are not the only applicable legal regime – depending on the circumstances international humanitarian law may still be applicable (Iraq - law relating to occupation), refugee law – rules relating to Internally Displaced Persons etc. These must all be applied.

Turn now more directly to the human rights obligations on the government of the state. First – most obviously – state is bound by human rights obligations it has accepted. It does not matter if these obligations were accepted by an earlier government. Secondly derogation from those rights is strictly limited. Only certain human rights treaties allow for any derogation – basically the ICCPR, article 4. under article 4 derogation is only allowed where there is a public emergency threatening the life of the nation that has been publicly proclaimed. As declaration of a public emergency runs counter to the assertion of peace it is unlikely to

be made and in any case the circumstances may not fit the definition. Further, any measures taken must be proportionate to the exigencies of the situation and certain rights are non-derogable. While the Human Rights Committee has taken a strict line on derogations through its General Comment No. 29 and through criticism of states that have impliedly derogated without proclaiming the emergency or justifying their actions in this light, the reality is that the Committee has little impact. Reporting to the Committee is unlikely to take place at this time. For example Rwanda has not reported on the ICCPR since 1995 so its derogation has not been scrutinised by the monitoring Committee.

As well as derogation the ICCPR distinguishes in effect between absolute rights – those from which no derogation allowed and which allow no leeway in their applications – and others that can be made subject to certain restrictions (called ‘claw-back’ provisions), for example freedom of assembly, freedom of association. Typically such restrictions must be made according to law and are such as are necessary in a democratic society for the protection of national security, public order, public health or morals. These do give quite some considerable margin of appreciation to the state and it is an especially nice question how the exception of what is necessary in a democratic society applies when what one is looking to is the building of that society.

Although peace agreements etc focus on human rights, in reality these are civil and political rights, especially elections, and less attention is given to economic and social rights. However these are most important in attempting to rebuild a state after conflict.

Economic and social rights are not made subject to derogations within the treaties, nor such claw-back provisions. However states' obligations are limited by resources considerations and the commitment to progressive realization of rights not immediate compliance (see ICESCR, article 2). ICESCR, article 4 goes further :

The States Parties to the present Covenant recognize that, in the enjoyment of those rights provided by the State in conformity with the present Covenant, the State may subject such rights only to such limitations as are determined by law only in so far as this may be compatible with the nature of these rights and solely for the purpose of promoting the general welfare in a democratic society.

Article 4 was primarily intended to be protective of the rights of individuals rather than permissive of the imposition of limitations by the State (Limburg Principles).

The ESCR Committee has considered the nature of states' obligations under the Covenant and in its General Comment No. 3 stated that there is a minimum core obligation which includes that the state must take some steps towards implementation of the Covenant. The concept of progressive realisation of rights does not allow for doing nothing. The minimum core obligation under the Covenant requires at the very least, minimum essential levels of each of the rights. For example, a State party in which any significant number of

individuals is deprived of essential foodstuffs, of essential primary health care, of basic shelter and housing, or of the most basic forms of education is, prima facie, failing to discharge its obligations under the Covenant. Further some obligations are immediate and are cost neutral, the most important of which is non-discrimination. It might also be noted that CERD, article 1 (4) does allow for special measures to be taken 'for the sole purpose of advancing adequate advancement of certain ethnic or racial groups'. CEDAW, article 4 also allows for temporary special measures. Such steps may be necessary to redress past discriminations, which may have fuelled, or been exacerbated by the conflict .

Another important point is that the typology of the layers of obligation that has become widely accepted – the obligation to respect, protect, fulfil and promote Covenant rights is also relevant. The obligation to respect Covenant rights requires states to respect self-help measures people may have taken for example to provide food – and to protect against intrusions from other actors against this. The ESCR Committee has asserted that 'even in times of severe resources constraints whether caused by a process of adjustment, of economic recession, or by other factors the vulnerable members of society can and indeed must be protected by the adoption of relatively low-cost targeted programmes.' A significant aspect of this may be to protect the informal measures and networks women have typically set up during the conflict to provide basic food, shelter,

education for children – these should not be displaced without alternatives being provided.

Leads me to a final point. One aspect that is invariably given too little attention in considering human rights in post-conflict situations is the gendered dimensions. Conflict leads to demographic change and in many post-conflict situations there may be a considerable imbalance of women and of women headed households. The inevitable focus on DDDR of men and often positive discrimination in favour of men – for example in healthcare and employment ignores the needs of such women. Post-conflict imposes changed but very real security threats for women in the form of domestic violence, street violence and vulnerability to prostitution and trafficking – become increasingly a scenario in post-conflict. Seems to me that the priority in post-conflict is security – human security requires legal security, physical security, economic security and gender security. SC Resolution 1325 has emphasised that human rights is integral to this objective: it requires a gender perspective in adopting measures that ensure the protection of and respect for the human rights of women and girls especially as they relate to the Constitution, the police, elections and the judiciary. This also reasserts the importance of human rights in these issues more generally and should not be allowed to give way to what might seem to be more pressing short term imperatives.

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