Report on Development, Fragility, and Human rights

Commissioned by the Nordic Trust Fund
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Foreword

As the international community focuses resources in fragile and conflict-affected situations, the role of human rights in development and state-building efforts in these contexts arises as an important issue. This report discusses the merits and challenges of working with human rights in the context of fragility and conflict-affected situations. Drawing on 2011 *World Development Report on Conflict, Security and Development*, it examines how human rights can play a role in institutional processes and socio-political dynamics in supporting transitions out of fragility and conflict.

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Abbreviations

CDD	Community-driven development
CEDAW	Convention on the Elimination of All Forms of Discrimination Against Women
CSO	Civil society organization
DAC	Development Assistance Committee (OECD)
DFID	UK Department for International Development
FCAS	Fragile and conflict-affected situations
HIV	Human Immunodeficiency Virus
HRBA	Human rights-based approach
IACHR	Inter-American Court of Human Rights
ICC	International Criminal Court
ICHRP	International Council on Human Rights Policy
ICISS	International Commission on Intervention and State Sovereignty
IDP	Internally displaced person
ILO	International Labor Organization
NGO	Nongovernmental organization
OECD	Organization for Economic Co-operation and Development
OHCHR	Office of the High Commissioner for Human Rights
R2P	Responsibility to Protect
UK	United Kingdom
UN	United Nations
UNDP	UN Development Program
US	United States
USAID	US Agency for International Development
WDR	World Development Report

Executive summary

As the international community focuses resources in fragile and conflict-affected situations, the role of human rights in development and state-building efforts in these contexts arises as an important issue and raises a key question:

Even in contexts where it may be legally and politically difficult to enforce human rights, can and/ or does a human rights perspective contribute to identifying developmental blockages that inhibit transitions from fragility and conflict and opportunities to support such transformative change?

The relationship between human rights, security, and development is by now well established. Translating international human rights commitments into domestic implementation also remains a challenge, not least because this is an inherently political process, and one which relates largely to context-specific dynamics of socio-political change.

The World Development Report (WDR) 2011 describes the negative impact of violence on development and highlights the contribution of justice and security (and job creation) to the building of inclusive, responsive, and accountable states (World Bank, 2011a). In taking this discussion further, it is useful to examine some of the institutional processes and socio-political dynamics through which human rights can come to be both a constitutive and an enabling element in supporting transitions out of fragility and conflict. In this respect, fragile and conflict-affected situations present particular sets of recurrent challenges.

Recurrent challenges in fragile and conflict-affected situations

- Fragile and conflict-affected situations are often *weak and/or illegitimate states*, which may themselves be the principal violators of human rights. Moreover, they may lack authoritative presence in territorial, administrative or law enforcement terms, or have weak control over the use of violence.
- *Institutional hybridity and legal pluralism* may be the reality of competing norm systems, either reflecting or resulting from the above-mentioned levels of weak state presence.
- Underlying causes of fragility and conflict may be the result of *contested political settlements* and unresolved grievances among conflicting parties.

- Societies in fragile and conflict-affected situations are often fractured and divided and have *weak levels of social cohesion*.

Findings

Five interrelated thematic areas of policy recurrently feature on the current international agenda for supporting transitions out of conflict and fragility, and a human rights lens is relevant (and in some cases central) to all of these. These five themes are considered significant in shaping the conditions for the development of inclusive, responsive, and accountable states. Their selection here is in keeping with the views of the WDR 2011 and current approaches on the international agenda on fragility in terms of the need to

look more closely at the quality of state-society relations. Crucially, both the interconnections between these themes and the ways in which they relate to wider processes of social and political change are relevant in shaping development outcomes.

Some of the key findings in relation to the five themes addressed in this report include the following:

1. *Legacies of violence and transitional justice*
- How legacies of violence, conflict, and human rights violations are addressed influences short-term peace processes and longer-term state-building and development ambitions.
- If human rights violations remain invisible, there is a real risk that drivers of conflict and fragility will be perpetuated, thus undermining development objectives.

2. *Violence and conflict, and security sector policy responses*
- There is growing recognition of the multiple forms of violence in fragile and conflict-affected situations, and the varied and negative impact of these on human rights and development outcomes.
- Even where donors are not involved in security programming, conflict sensitivities are necessary to ensure interventions are in keeping with the principle of "do no harm".
- Assessing security issues from a human rights perspective can inform analysis of the political economy dynamics of conflict and violence and have implications for other development objectives.

3. *Rule of law and justice sector reform*
- How justice and entitlements are conceived and disputes resolved has consequences for the distribution of power and resources and hence for development outcomes.
- Where legal pluralism is prevalent, working with non-state actors is an additional entry point for providing access to justice and security. This approach is not risk free from a do-no-harm perspective.

4. *Social exclusion, constitutional reform, and legal empowerment*
- Social exclusion can entrench uneven patterns of development, and exacerbate conflict. Groups and individuals suffering from exclusion and discrimination are most likely to face barriers to accessing key resources and entitlements.
- Constitutional reform, which aligns domestic law with international human rights norms, can contribute to addressing social exclusion.

- This requires the activation of commensurate mechanisms of social and legal accountability, including through legal voice regarding rights claims

5. *Service delivery*
- A rights-based analysis can help in unpacking the power dynamics and fault lines of exclusion and discrimination that present barriers to service delivery to ensure programming does not exacerbate these.
- A human rights-based approach to service delivery can provide benchmarks against which to assess service delivery programs' outcomes and policies, including where services are delivered by non-state actors supported by international interventions.
- More inclusive and accountable processes of decision-making on resource allocation, service delivery, and infrastructure provision can contribute to building trust and social cohesion within society and in state-society relations.

In sum, analysis of the five thematic areas reveals how different aspects of human rights-based approaches can inform international support to inclusive state-building and development.
- First, a human rights lens can help in addressing the legitimacy deficit of fragile states by making visible the grievances and legacies of rights abuses that might be at the root of conflict and fragility.
- Second, human rights articulate a vision of social justice that can reduce the risk of conflict but which usually demands reshaping the terms of the political settlement—a process which itself may be a source of contestation and resistance.
- Third, a human rights approach can enhance the voice and agency of marginalized or excluded groups in ways that matter for the quality of state-society relations, but this is unlikely to be achieved without resistance.

Recommendations for practitioners

These findings point to a need for a context-appropriate approach to integrating human rights into development interventions in fragile and conflict-affected situations. This should involve assessing the prevailing structural conditions and institutional systems (both formal and informal) that define legal obligations, entitlements, and power relations and how different actors are situated in relation to these. This requires developing a *politically informed diagnostic framework* that draws on political economy analysis and other social and political diagnostic tools and that integrates particular components of human rights-based analytics. Such

a framework would identify how key actors stand to gain or lose from progress toward improved human rights standards and application of human rights principles, and how this might shift (incrementally) over time.

Implications for operations include the following:

- **The need to identify relevant institutional entry points and actors.** Unpacking the relevant institutional levels (subnational, national, and/or international) should inform decisions on how human rights can be used. A dynamic approach to working across the spectrum of potentially relevant institutions (including informal institutions) requires deep understanding and continual assessment of how they interrelate, what interests they serve, and which actors and coalitions are the most relevant to engage.

- **Appropriate skill sets.** Working in contexts of institutional hybridity remains a difficult policy space for some donors who remain more comfortable working with the state. In part, addressing this requires rethinking personnel requirements in terms of both their analytical skills and their ability to engage a range of actors.

- **Flexibility in programming.** Programs need to be designed so they can adapt to whatever new opportunities or risks emerge from an ongoing diagnostic analysis of the dynamic and rapidly changing contexts in which they are implemented. But it is also crucial to heed the do-no-harm principle, which may be imperilled by quick decision-making in the name of flexibility.

- **Potential tensions and dilemmas.** Development partners need to ensure there is strategic thinking in relation to the potential tensions and dilemmas that may arise.

- **Realism about ambitions and the role of international actors.** It is important to remain realistic about the transformative potential of human rights-based approaches, especially given ongoing challenges in fragile and conflict-affected situations, and the role of international actors in achieving human rights-based goals.

1. Introduction

This report examines the interface between human rights and development in the context of fragile and conflict-affected situations (FCAS). It aims to inform development partners on the merits and challenges of working with human rights in these contexts and to provide practical guidance on how they can do so more effectively. Toward this aim the report reviews the state of knowledge regarding two questions:

- What is the nature of the correlation between human rights violations, fragility and/or conflict?
- How can integrating human rights in development contribute to more effective international support to more inclusive patterns of social, political, and economic development and therefore to processes of change from fragility and conflict toward resilience?

The report has three main parts.

The relationship between human rights, law and development has long been a matter of debate and controversy. **Section 2** briefly reviews intellectual and policy developments relating to rights, human rights and human rights-based approaches (HRBAs). A key issue for the international community is whether and how to integrate human rights into peace-building and state-building efforts in post-conflict countries. This section therefore examines the benefits and challenges of working at the interface of human rights, development, and fragility, before setting out some key questions that need consideration if human rights are to be integrated more strategically into development interventions in fragile and conflict-affected situations.

The World Development Report (WDR) 2011 describes the negative impact of violence on development and highlights the contribution of justice and security (and job creation) to building inclusive, responsive, and accountable states (World Bank, 2011a). **Section 3** unpacks some of the institutional processes and socio-political dynamics through which human rights can be both a constitutive and an enabling element in the formation of more resilient state-society relations. It focuses on five interrelated thematic areas that feature on the current international agenda for addressing conflict, violence and fragility: (1) transitional justice; (2) violence, conflict, and security; (3) rule of law and justice sector reform; (4) social exclusion and building inclusive political settlements; and (5) service delivery. The selection of these themes is in keeping with the view in 2011 WDR that they are relevant in shaping the conditions for the development of inclusive, responsive, and accountable states. Moreover, international interventions would benefit from understanding this relevance and how these themes interconnect and link to wider development objectives.

There are no blueprint approaches in a human rights-based approach. Nevertheless, how human rights feature in each thematic area (as a factor which either drives or results from conflict and fragility, or which contributes to inclusive state-building) does matter for the prospects for legitimate and resilient

state-society relations. Again, the selection of the five thematic areas is relevant in this regard as raised in the 2011 WDR. They are also extremely interconnected, for instance, in how justice sector institutions develop matters for how mechanisms of redress for human rights violations might take shape in service delivery. Section 3 draws on academic and policy sources to review emerging knowledge and experiences across the five thematic areas and considers lessons learned from policy practice on the ground in fragile and conflict-affected situations. However, note that there are major gaps in knowledge on the impact of integrating human rights into development in fragile and conflict-affected situations.

Drawing on the thematic issues reviewed in Section 3, **Section 4** concludes with concrete recommendations about how development practitioners can use human rights more strategically in, for example, operational planning and implementation, to forward their objectives of supporting transitions from fragility to resilience through more inclusive, resilient, and accountable state-society relations.

2. Human Rights, Development and Fragility

The international human rights framework enjoys an unparalleled level of global acceptance (Alston and Robinson, 2006). Every member of the United Nations has ratified at least one of the nine main international human rights treaties.[1] Human rights now feature more prominently as a normative benchmark against which to assess how a state treats its citizens within its jurisdiction.[2] Human rights also appear more regularly in how development processes and outcomes are reasoned and how development assistance is provided.

This report takes as given that fulfillment of the normative aspirations of the international human rights framework is a desirable goal and that international treaties entail legal obligations to respect, protect, and fulfill human rights standards for the states that are a party to them. At the same time, it takes seriously the fact that the translation of these commitments into concrete domestic arrangements and implementation is an inherently political process and mainly the outcome of country-specific dynamics of socio-political change. The report also notes that the debate about the effectiveness of donors using human rights to leverage change in support of development outcomes is far from settled.

Nevertheless, there is historical evidence that contestation over rights, at both the international and domestic levels, has had an instrumental role in altering power relations and redefining the legitimate distribution of entitlements and resources—and therefore in shaping socioeconomic outcomes (Alsop and Norton, 2004). Human rights in their modern shape are the product of a concrete moment in international political history following World War II. The content of the Universal Declaration of Human Rights of 1948, in turn, reflects a longer-standing political and intellectual history of state-society relations predominantly in the United States and Europe in which rights became a meaningful site for contesting power and the distribution of resources.[3]

2.1 The Normative Rise of Human Rights Since the 1990s

Four main factors explain the normative rise of human rights and the expansion of constitutional rights in keeping with international human rights norms over the past three decades.

First, the end of the Cold War enabled a narrowing of the ideological divide between civil and political versus economic, social, and cultural rights, paving the way for a 'thickening' of the normative framework at the international, regional, and domestic levels.[4] The 1993 Vienna Declaration established international consensus on the universality, indivisibility, and interdependence of *all* human rights, including both civil and

[1] See http://www.ohchr.org/en/hrbodies/Pages/HumanRights-Bodies.aspx.

[2] Where the term 'citizen' is used in this report, it includes all people within a country's jurisdiction.

[3] The relationship between rights and social transformation has a much older pedigree than the modern international human rights framework. For recent discussions (of an older theme) regarding the relationship between (different types of) rights and development outcomes, see North and others (2009) on rule of law and elite support for protecting property rights and de Sousa Santos (2002), Epp (1998) and Nussbaum (2003) on bottom-up struggles using rights to alter power structures in ways that lead to more equitable and inclusive societies and polities.

[4] On economic, social and cultural rights as both normative goals and instrumental to development outcomes, see Gargarella and others (2006), Gauri (2005), Gauri and Brinks (2008), Langford (2008) and Yamin and Gloppen (2011).

political, and economic, social, and cultural rights. From this, the relationship between peace and security, human rights, and development was established.

Second, constitutional rights became a key element in shaping more legitimate state-society relations during the so-called third wave of democratization that began in the 1970s. With the return to civilian government, democratic rule of law was intended to (re-)establish state commitments to honor constitutionally defined rights of citizens (O'Donnell, 1993). Constitutional reform over the past 30 years has further expanded the rights obligations of states to their citizens, and in ways that increase compliance with international human rights norms (Yashar, 2004). Concretely, constitutionalism in the South has pioneered giving unprecedented weight to social and economic rights, in contrast with the political history of the North, where civil and political rights have tended to have a higher status.

Third, nongovernmental organizations (NGOs), civil society organizations (CSOs), and social movements have, in different ways, appropriated the language of rights and used legal mobilization strategies across a range of issues. These have included using rights to address transitional justice, the claiming of indigenous people (especially in Latin America), and women's rights (Molyneux and Kraske, 2002; Sieder, 2002) and, in latter years, claiming social and economic rights through litigation (e.g., Colombia, India, South Africa).

Fourth, human rights have become much more prominent in international development discourses and, consequently but variably so, in donor policy statements and practice. Several factors are responsible for this shift, including donor support to democratization programs, new consensus on concepts of (human) development and (multidimensional) poverty[5] and renewed interest in state qualities and their relationship with their citizens, most recently formulated in terms of the importance of good governance for sustainable development (Alsop and Norton, 2004; Alston and Robinson, 2006; Molyneux and Lazar, 2003; Moser and Norton, 2001; Nyamu-Musembi and Cornwall, 2004).

2.2 HRBA to Development

Since its inception, the United Nations has played a leading role in progressively building an international human rights framework. This system is founded on a body of normative declarations, legally binding treaties, and an organisational network of bodies mandated with overseeing and monitoring state compliance with their human rights obligations. States that have signed and ratified these treaties have a legal obligation to respect, protect, and fulfil the relevant human rights standards, but enforcement remains a challenge. (Appendix 1 summarizes the key international human rights and humanitarian law norms.)

In addition to these specific norms and standards, the body of human rights law also establishes a set of core human rights principles, which include the following: universality and inalienability; indivisibility; interdependence and inter-relatedness; equality and non-discrimination; participation and inclusion; and accountability and rule of law (UN, 2003). The Vienna Declaration of 1993 marked an important step forward in terms of international recognition of the role of human rights in development and security (Piron and Watkins, 2004). From this, the notion of a human rights-based approach to development began to take root in the late 1990s, leading to the UN Program of Reform in 1997, which called for the mainstreaming of human rights through the work of *all* UN agencies. Further consolidation of the human rights-based approach came with the UN's 2003 Interagency Common Understanding on the HRBA to Development, which set out concrete guidelines for using a human rights-based approach with the intention of using the approach more consistently across all UN agencies. In 2009, the UN Development Group's Human Rights Mainstreaming mechanism was established and tasked with institutionalizing the mainstreaming of human rights in the UN's development work.

Since the late 1990s, most traditional bilateral and multilateral development agencies have adopted some form of human rights policy statement.[6] However, much variation exists in the precise way that human rights feature in their policy and practice (Nyamu-Musembi and Cornwall, 2004; OECD-DAC, 2006; OHCHR, 2006; O'Neil, 2006). For the purposes of this report, the term *human rights-based approach* refers to the range of approaches that use human rights norms and principles to achieve transformative change and development outcomes. They share, among others (albeit in different ways and with different weighting), the following components:

- **A normative anchor in human rights norms and standards**, the *substance* of which reflects a view of rights as a desirable normative end goal that is intrinsically connected with human development goals;

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[5] On capabilities, rights, and development, see Nussbaum (2003) and Sen (1999).

[6] Some donors have a standalone human rights policy (e.g., DFID, 2000), some incorporate human rights as an aspect of their good governance policy (e.g., CIDA, 1996) and others reference human rights within their sector policies (e.g., USAID, 2005; and World Bank, 2005).

- **Commitment to human rights in the development process**, based on the notion that the *process* of realizing human rights and applying human rights principles is in itself conducive to the achievement of human development goals;
- **Identification of rights holders and their entitlements and corresponding duty bearers and their obligations as defined by binding international legal commitments and constitutional rights in keeping with human rights norms**, and working toward strengthening the capacities of rights holders to make their claims and of duty bearers to meet their obligations; and
- **Recognition that the realization of rights is a political process**, which depends on a change in power relations and in the distribution of resources.[7]

Human rights-based approaches take the unequal distribution of power and entitlements to be underlying causes of poverty, inequality, and discrimination, so that power analyses are important in order to identify opportunities to address these. This assumption is relevant in fragile and conflict-affected situations where the power dynamics of exclusion and inequalities are often at the root of conflict and violence.[8] Thus, even in contexts where leveraging legal rights may not be politically feasible, a rights-focused analysis can contribute to identifying developmental blockages arising from the political economy of power relations that contribute to fragility.

Human rights-based approaches in fragile and conflict-affected situations can contribute to ensuring the "do-no-harm" principle. This is the very minimum standard that international actors should ensure in relation to the protection of human rights, both in international humanitarian and development interventions. The OECD-DAC Principles for Good International Engagement in Fragile States or Situations (OECD-DAC, 2007) consolidates the need to consider human rights in relation to the do-no-harm principle (OECD-DAC 2010).

A key challenge for human rights-based approach advocates is that, despite growing consensus on the impact of governance and institutional quality on human development, the empirical evidence on the contribution of human rights to development outcomes remains mixed (Hafner-Burton, 2008; Uvin, 2004). Addressing this challenge entails recognizing that top-down normative approaches to rights, alone, are unlikely to achieve their objectives.

Historical analysis reveals how rights battles have featured in the development and negotiation of state-society relations over time. By unpacking institutional and socio-political, and legal processes of change, it is possible to identify the transformative potential of rights—both constitutional and human rights (Epp, 1998). And, concretely, human rights norms and principles are more likely to contribute to achieving transformative change, in the degree to which they are embedded in particular social, political, and cultural histories of development and contestation about structures of power and resource allocation (Uvin, 2004).

2.3 Human Rights and Fragility

The research and evidence regarding the relationship between fragility and human rights remains underdeveloped (Evans, 2009; Parleviet, 2010), and there are no clear guidelines on how human rights-based approaches may be used to support state-building and other development efforts in conditions of fragility. Taking account of the knowledge gaps on the relationship between human rights, fragility, and conflict, this paper addresses two questions:

1. *How can the international community support inclusive, accountable and legitimate development and state-building in fragile and conflict-affected situations in ways that contribute to protecting and respecting human rights and that do not jeopardize conditions for peace and security?*

2. *How does integrating human rights and human rights principles add value to international efforts to support such transformative processes of change that can support transitions from fragility and conflict to resilience?*

Defining fragility and resilience

There are no definitive definitions of fragility or resilience in development discourse. In this report, the definitions from the Organization for Economic Co-operation and Development (OECD) Development Assistance Committee (DAC) and World Bank are used:

- **Fragility** is where "states or institutions lack the capacity, accountability or legitimacy to mediate relations between citizen groups and between citizens and the

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[7] The report here draws mostly on Gauri and Gloppen (2012), Goodhart and others (2011), OECD-DAC (2005), OHCHR (2006), UNDP (2006) and Uvin (2004). OECD-DAC (2005, currently being revised) provides an overview of the different ways that donors have integrated human rights into their development work.

[8] On the connection between power and rights, see Alsop and Norton (2004).

state, making them vulnerable to violence" (World Bank, 2011a: xvi).

- **Fragile states** "have weak capacity to carry out basic functions of governing a population and its territory, and lack the ability to develop mutually constructive and reinforcing relations with society […] [thus] trust and mutual obligations between the state and its citizens have become weak" (OECD-DAC, 2011: 21).

- **Resilience** is where the state is "capable of absorbing shocks and transforming and channelling radical change or challenges while maintaining political stability and preventing violence. Resilient states exhibit the capacity and legitimacy to govern a population and its territory" (OECD-DAC, 2011: 21).

Thus, fragility and resilience are multidimensional categories that form a spectrum along which states and societies move, but in non-linear ways. Conflict and violence may feature in different ways along this spectrum. The report focuses on contexts in which different forms of fragility occur, including (but not only) where conflict is recent or ongoing. It is not intended that the scope of the report will be limited to any set of characteristics of fragility and/or conflict, but rather to cover a range of diverse settings that fall within the broad category of fragile and conflict-affected situations. Moreover, the thematic areas addressed in this report will feature in different ways and levels of intensity within this category of settings.

Development agencies now pursue a diverse range of objectives in fragile and conflict-affected situations. Their agenda has expanded from its initial focus on the protection of civilians, stabilization, and peacekeeping to include peace-building, state-building, and longer-term development goals, resulting in a policy space that encompasses extremely different agendas and priorities. The question of how to (re)build robust institutions is at the fore of this shared policy space, which has led to a focus on state-building and delivering core state functions (e.g., security, justice, service delivery, public resource management, and economic stability) in fragile and conflict-affected situations (OECD-DAC, 2011).

Increasingly, however, consensus is emerging that development agencies need to look beyond the state if they are to successfully support reductions in critical deficits in legitimacy, accountability, inclusion and well-being. At a minimum, state institutions must be embedded within societal processes (Evans, 2009). There is now growing recognition of the need to work not only with state institutions but also with societal resources and at the interface of state-society relations. Frequently, in fragile and conflict-affected situations, this means working with societal realities characterized by contested state legitimacy and hybrid and informal institutions, and where the bonds of social cohesion, interpersonal trust, and shared values between groups are weak, often as a result of systemic exclusion and pervasive "horizontal inequalities" (Stewart and Brown, 2009).

Human rights abuses and fragility

As noted in the WDR 2011 (World Bank, 2011a), there are strong correlations between fragility and structural and systematic human rights abuses. This is especially so where there is a history of recent or ongoing violence. The point is that fragility may be related to violence and human rights violations, and understanding the nature of this relationship is thus important for development interventions in fragile and conflict-affected situations. Moreover, even in the absence of strong empirical evidence regarding the causal relationship between human rights violations and fragility, where there are rights violations in fragile and conflict-affected situations (as elsewhere), there is a strong moral imperative for the international community to focus resources and efforts on preventing and addressing these.

More specifically, there are two main ways in which human rights violations are interconnected with conflict and fragility. First, **violence**, in the different forms that it takes in fragile and conflict-affected situations, is intimately related to different forms of human rights abuses. This includes violence of armed conflict and other types of violence found in post-conflict and other fragile settings. The concrete dynamics of the interface between different types of violence, rights abuses, and context-specific histories of political, social, and economic development are an important part of the landscape in which development interventions take place in fragile and conflict-affected situations and need to be taken into account. Second, **social exclusion** and related grievances can make societies more vulnerable to conflict and fragility. As noted in the literature on horizontal inequalities, social exclusion is also often intimately related to human rights abuses in the form of structural discrimination and systematic restriction of basic services and goods to concrete groups.

Human rights and resilience

While the realization of human rights is a desirable goal, making the empirical case that human rights and human

rights-based approaches concretely help practitioners address development challenges in fragile and conflict-affected situations is more challenging. This report does not make causal claims given the state of knowledge but rather explores five thematic areas of international involvement in fragile and conflict-affected situations where using a human rights lens is important and may be relevant for the wider development goals of supporting transitions out of fragility and conflict toward resilience. These thematic areas are developed further in Section 3. Here, some key issues are noted that are recurrent in policy discussions on development policy strategy in fragile and conflict-affected situations.

First, there is a connection between unresolved legacies of human rights violations and the ongoing risk of future conflict. To the extent that legacies of violence and related trauma undermine transitions toward resilience, there is a case for ensuring that development interventions are at least cognizant of the place that past transgressions play in the political economy of post-conflict/transition settings.

Second, this is related to considerations about ongoing security risks and diminished state capacity to protect society from threats of conflict and violence. The human rights dimension of security provision may be an important component of rebuilding societal trust in the state's capacity to provide protection to the population.

Third, this relates to the role of *rule of law* and the *justice sector* in protecting the human rights of the population (enshrined as constitutional/legal entitlements and/or through international legal commitments), in terms of how disputes are resolved and rights claimed. The organizational and institutional aspects of the rule of law and dispute resolution mechanisms thus arguably matter in shaping the quality of state-society relations based on the protection of a social contract that sets out the rules of political, social, and economic engagement.

Fourth, there is the question of how development interventions can use a human rights lens to address issues of exclusion that fuel conflict and fragility. The realization of human rights as specific legal entitlements has an impact on the distribution of power and resources and is thus deeply political, as it affects the nature of the *underlying political settlement*. In the end, it is likely to involve the development of a more inclusive political bargain, which might be supported by foundational constitutional reforms that reframe the social contract and associated rules regarding inclusion and non-discrimination—where they are in keeping with human rights norms.

Fifth, a relevant question for the broader international state-building agenda is *To which extent can a human rights lens inform policy on service delivery in ways that address issues of inclusion and social cohesion?* This is based on the premise that state-society relations founded on human rights and human rights principles can contribute to reducing levels of social risk associated with social and political violence and conflict. New bills of rights and international legal commitments to human rights matter only to the degree that implementation is plausible, and mechanisms of redress are effective. Thus, a question for development interventions in this area relates to the extent to which human rights-based approaches can contribute to enabling the realization of inclusive social contracts in practice.

These issues are a matter of empirical observation, but they speak to the issue that there is a relationship between how human rights and human rights principles evolve in fragile and conflict-affected situations and the prospects for improved state-society relations. Causal directions are hard to establish, but a human rights lens may contribute to informing development interventions where the goals of legitimacy, inclusion, non-discrimination and accountability in state-society relations are taken as meaningful long-term development objectives.

Challenges in applying a human rights-based approach in fragile and conflict-affected situations

There are a number of recurrent difficulties in many fragile and conflict-affected situations that make supporting human rights realization and/or using a human rights-based approach especially challenging. These difficulties may occur in other contexts. Moreover, within fragile and conflict-affected situations, their weighting will vary. In varying measure, they include the following:

- **Weak and/or illegitimate states.** In a human rights framework, states are the principal duty bearer; but in a fragile and conflict-affected situation, states may themselves be the *principal violators of rights*. Moreover, elite behavior may be characterized by impunity, leading to the systematic undermining of the rule of law. States may also lack territorial, administrative, or legal presence in large parts of the country and may have limited control over the legitimate use of violence in the presence of different categories of armed groups (including organized crime). The particular configuration of *weak state presence* varies greatly.

- **Legal pluralism and the dynamics of non-state actors and institutions.** As a consequence of uneven state presence, state-produced law may be competing with other systems of norm production under conditions of *legal pluralism*

or *institutional hybridity.*[9] In other words, multiple levels of norm systems and political-institutional logics, with varying levels of social acceptance and complementarity or tension, coexist within the same territory and structure authority and decision-making processes in state-society relations. These multiple "socio-legal spheres" exist (and overlap) at the international (e.g., international rights regimes), national (e.g., Constitutions), and subnational (e.g., customary norms) levels. (Appendix 2 illustrates the relevant normative and institutional levels for analyzing rights.)

Legal pluralism is not necessarily problematic from a human rights perspective, but it can reflect fundamental disagreement about which systems of authority and entitlements are perceived as being legitimate and binding; in some cases, non-state socio-legal spheres (such as community justice mechanisms) may enjoy more legitimacy than formal institutions. Where the state is weak, as is often the case in fragile and conflict-affected situations and where other norm systems are dominant, a variety of non-state actors may administer justice and security provision, deliver services, allocate resources, and dictate political and developmental outcomes. Such multiplicity makes the task of defining the roles of rights holders and duty bearers more difficult.

- **Contested political settlements and ongoing grievances.** Patchy state presence and legal pluralism may also reflect an unstable or contested political settlement among key elite groups.[10] Moreover, in fragile and conflict-affected situations, powerful domestic actors will typically resist progress on both substantive rights and the rule of law and on human rights principles (e.g., accountability, inclusion, and participation), precisely because their ability to benefit from entrenched interest structures and power relations rests on their weakness or absence. This considerably reduces the policy space, particularly where concerns about stabilization and peacekeeping remain high on the agenda of international actors. At the same time, legacies of unresolved grievances or related ongoing patterns of exclusion, human rights violations, and perceptions of social injustice can undermine state legitimacy and fuel ongoing conflict and violence.

- **Fractured societies, weakened social cohesion.** Societies in fragile and conflict-affected situations are often fractured and divided and have weak bonds of social cohesion, whether as a result of specific legacies of violence (related to histories of armed conflict or other forms of violence) or because of longstanding patterns of social exclusion and discrimination. Capabilities associated with voice and agency may be especially weak.

These recurrent challenges in fragile and conflict-affected situations, discussed further in Section 3, may mean that international actors could have limited impact on human rights implementation, and a measure of realism is important.

Summary: working with human rights in fragile and conflict-affected situations

This report examines the relevance of bringing human rights perspectives into development practice. The protection of human rights is a legitimate goal in itself. If adapted to context-specific conditions and histories of state-society relations, supporting human rights, it can be argued, may also be an effective development strategy; this is the premise of human rights-based approaches. Integrating human rights in development may be particularly relevant in fragile and conflict-affected situations where human rights violations are likely to be connected intrinsically to conflict and fragility. Human rights-based approaches may be instrumental not only in addressing concrete drivers of fragility but also in providing benchmarks against which to assess transitions from fragility to resilience through more inclusive state-building.

Such transformations are deeply political processes, however, anchored within concrete histories of political, social and cultural development. Conditions prevalent in fragile and conflict-affected situations, such as high levels of volatility and conflict, weak institutions, and fractured societies, pose important obstacles to progress toward more resilient state-society relations. Therefore, while establishing a correlation between human rights violations and fragility (as the WDR 2011 does) is relatively straightforward, the realization of human rights on the ground and the translation of human rights-based approaches into clear operational choices are much more challenging.

Section 3 looks at the relevance of human rights to five thematic areas thought to be central to transitions from fragility to resilience in fragile and conflict-affected situations. Section 4 then turns to the practical question of how to use a human rights-based approach to design development interventions, recommending the creation of a diagnostic tool and concrete guidance for working with rights in fragile and conflict-affected situations.

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9 The international policy world is now actively engaging with legal pluralism. See Albrecht and others (2011), Assies and others (1999), Chirayath and others (2005), Chopra and Isser (2011); Couso and others (2010), de Sousa Santos (2002), de Sousa Santos and Rodríguez-Garavito (2005), Faúndez (2003), ICHRP (2009), Isser (2011), Sieder (2002), Tamanaha (2000; 2008) and USIP (2009).

10 The political settlement is the terms of the elite bargain underpinning the real rules of the game about political, social and economic engagement, and the balance of power through which resources and entitlements are distributed (di John and Putzel, 2009).

3. Applying an HRBA to Thematic Issues in Fragile and Conflict-Affected Situations

This section looks at the relevance of human rights in five thematic areas of policy and strategy, which currently feature largely on the international agenda in relation to fragile and conflict-affected situations. The five areas are (1) transitional justice; (2) violence, conflict, and security; (3) rule of law and justice sector reform; (4) social exclusion and inclusive political settlements, including through constitutional reform; and (5) service delivery and support to infrastructure.

The thematic areas in their own right are each relevant to the international agenda of support to (re)building inclusive state-society relations (OECD-DAC, 2007; World Bank, 2011a). They are also interconnected in complex ways and are weighted differently in country histories of state formation and political development. The starting premise is that the five areas in different ways have a bearing on the aspirations and challenges of building inclusive states, and concretely in relation to achieving the implementation of human rights.

The analysis presented here claims neither linear nor clear-cut causal explanations as to the role of human rights-based approaches in development interventions in fragile and conflict-affected situations. Rather, the objective of Section 3 is to assess in connection to the five thematic areas—because they are important in how trajectories in and out of fragility and conflict evolve—the potential role of human rights and human rights-based approaches in international efforts to support development and state-building in fragile and conflict-affected situations. The section also notes that the intersection between these five thematic areas is crucial to understanding some of the challenges that characterize fragile and conflict-affected situations.

- Section 3.1 considers how legacies of violence can be addressed through transitional justice and the consequences of different policy choices in this area for human rights, rule of law and development outcomes. The short-, medium-, and long-term consequences of these choices are important (albeit variably so) in shaping how political settlements evolve.

- Section 3.2 reviews the impact of different forms of violence on development and strategic policy choices for reining in violence, with a focus on the security sector. Understanding the nature of violence and conflict and its implications for social cohesion and exclusion can inform broader development interventions.

- Section 3.3 examines policy options within the justice sector and how these relate to the rule of law. Justice mechanisms are important for peaceful dispute resolution and oversight of state and government actions. Ultimately, the quality of rule of law matters for the realization of human rights and state-society relations premised on rule-bound and accountable government.

- Section 3.4 looks at systemic patterns of social exclusion and discrimination as drivers of fragility

and human rights deficits. It also addresses the potentially transformative impact of recent trends in constitutional reform and expanded bills of rights (increasingly in keeping with international human rights norms) in terms of reshaping underlying political settlements and creating new redress mechanisms for rights.

- Section 3.5 looks at how human rights might help in meeting the challenges of service delivery and infrastructure in fragile and conflict-affected situations. Much of the analysis on the dilemmas of service delivery in these situations involves discussion of state versus non-state provision. Given that state provision of services and the regulatory capacity of the state are compromised in many fragile and conflict-affected situations, a human rights-based approach may seem especially challenging.

3.1 Transitional Justice

Transitional justice, as a means to address legacies of violence, human rights abuses, and fragility, is firmly entered on post-conflict policy agendas.[11] Understanding the implications of transitional justice is therefore relevant to development practitioners in fragile and conflict-affected situations. The WDR 2011 acknowledges that transitional justice is not just about looking at the past (World Bank, 2011a). How legacies of violence, conflict, and human rights violations are addressed also influences both short-term peace processes and longer-term state-building and development ambitions. Transitional justice can contribute to (re)building the rule of law and restoring citizen trust in the state's capacity (and political will) to give meaning to the protection of the rights of its population.

Key messages

- Addressing legacies of violence and human rights abuses has consequences in the short, medium and long term for development, the quality and legitimacy of state-society relations, issues of inclusion and accountability, and basic trust in the protection the state is expected to provide.
- If legacies of violence are not addressed and human rights remain invisible, there is a real risk that drivers of conflict and fragility will be perpetuated, undermining development objectives.

- The tension between peace (and security) and justice is overstated. Options and opportunities for addressing legacies of past grievances change over time.
- Transitional justice processes and options vary, depending on the prevailing balance of power, legacies of violence, and particular political and social conditions. They feature at international, national, and subnational levels, including through non-state mechanisms. Their credibility and legitimacy should not be treated uncritically and must be assessed on a case-by-case basis.

Objectives and means of transitional justice

The Nuremburg and Tokyo trials after World War II were mid-20th-century mechanisms for addressing mass crimes against humanity. However, it is only in the past 30 years that transitional justice has emerged as a recurrent feature of transitional processes. Although the UN was engaged with transitional justice processes during the 1990s, such as through the International Criminal Tribunal for the former Yugoslavia, the UN first formally acknowledged the connection between the rule of law and transitional justice in conflict and post-conflict environments in 2004, defining transitional justice as:

> The full range of processes and mechanisms associated with a society's attempts to come to terms with a legacy of large-scale past abuses, in order to ensure accountability, serve justice and achieve reconciliation. These may include both judicial and non-judicial mechanisms, with differing levels of international involvement (or none at all) and individual prosecutions, reparations, truth seeking, institutional reform, vetting and dismissals or a combination thereof (UN, 2004).

Four concrete forms of transitional justice have evolved:
- **Truth-telling exercises**, such as truth commissions. These aim to establish the facts of past events and give voice to victims and their relatives; create an official record of the causes of the conflict and make recommendations for institutional reforms to prevent future violations; and

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11 There is much research on transitional justice. For earlier works, see Barahona de Brito (2001), Hayner (2001), Kritz (1995), Roht-Arriaza and Marriezcurrena (2006), Sikkink and Walling (2006) and Skaar and others (2006). On post-conflict settings, see Clark (2010), Clark and Kaufman (2009), de Greiff (2011), Shaw and Waldorf (2010), Sriram and Pillay (2009) and Sriram and others (2009; 2011b).

support any criminal investigations conducted at a later, less politically risky, time.

- **The criminal prosecution of human rights violations.** Trials may serve a number of purposes, including providing victims and their relatives with a sense of justice and catharsis; producing official records of the facts; ending impunity as a means to deter potential future perpetrators; and, if a trial is seen as legitimate, demonstrating state commitment to principles of rule of law, due process, and human rights, thus bolstering its credibility (Kritz, 1995; Méndez, 1997).[12]

   In some cases where domestic trials are not possible, the international community has stepped in. First, hybrid international courts were put in place to deal with genocide and crimes against humanity (e.g., Rwanda and Yugoslavia). Then the Pinochet case in London in 1998 set a precedent for universal jurisdiction for some human rights crimes. Finally, in 2002, the Rome Statute of the International Criminal Court (ICC) came into force, establishing a permanent international tribunal to judge crimes of genocide and war crimes.[13]

- **Reparations for victims and their families:** These are actions where the state takes responsibility for past crimes and carries out acts of restitution for the losses incurred by victims and their families. Such actions can include rehabilitation programs for victims, symbolic measures (e.g., official apologies or commemorative ceremonies or monuments) and material compensation (e.g., compensatory funds, as in Chile and Honduras). The restoration of property rights is a particularly challenging issue to deal with and is likely to be met with (often violent) resistance, although donors can play a role even here. For example, in Colombia, the World Bank has provided support to internally displaced persons (IDP) to claim back land from which they have been displaced during conflict (see Section 3.4).

- **Mechanisms to vet or purge the security forces and other state offices** of individuals who were perpetrators of crimes (or who had some degree of complicity with them) (Roht-Arriaza, 2006).

There is now significant evidence about the factors that shape transitional justice policy options. Some of the key political factors include the nature and scope of the crimes committed; the balance of power between social, political, and armed forces or groups at the time of regime transition or end of conflict; the voice and mobilizing capacity of human rights organizations and victims' associations; and

the acceptability of amnesty options in exchange for peace among key actors. Key legal factors include the credibility and capabilities of justice mechanisms at the domestic, regional, and international levels.

Transitional justice, human rights, and the politics of state building in fragile and conflict-affected situations

Transitional justice analysis has evolved toward a more layered and nuanced conception of justice in post-conflict processes, and now encompasses different levels and socio-political spaces of retribution, restitution, reconciliation, and forgiveness. There is now also a more sophisticated analysis of the interaction between different levels of action and their impact on each other and on wider political and social processes of reconciliation and (re)construction of social cohesion and trust in institutions (e.g., Clark, 2010; Shaw and Waldorf, 2010; Sriram 2009b).

Fragile and conflict-affected situations present particular challenges for transitional justice; but, if legacies of violence are not addressed and human rights violations remain invisible, there is a real risk that crucial drivers of conflict and fragility will be perpetuated. This more nuanced and dynamic analysis of the place of transitional justice in the political economy of fragile and conflict-affected situations is borne out in the following reasoning, as indicated by concrete examples.

First, one reading of transitional justice experiences suggests that the progressive thickening of the normative framework of human rights and general accountability mechanisms at domestic, regional, and international levels increases the possibility of redress for human rights violations (Lutz and Sikkink, 2001; Sikkink, 2005). Arguably, this multiplies the opportunities for transitional justice, with action at one level having the potential to trigger and influence events at another (Box 1). The arrest of General Pinochet in 1998, for instance, not only sped up domestic trials in Chile but also changed perceptions about what measures of accountability

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[12] Transitional justice and rule of law are inter-related but not unproblematically so (Collins, 2008; de Greiff, 2009; Skaar, 2010). Since 2004, they have featured together in the UN strategy and, to a lesser degree, its practice. Other donors have tended not to make this direct connection.

[13] See the Rome Statute of the International Criminal Court (UN, 1998), which a total of 117 countries have ratified to date. The ICC has not been uncontroversial in how it has proceeded, however. On ICC and other international spheres, see Sriram (2009b) and Waddell and Clark (2008).

Box 1: The Interconnections between Different Legal and Institutional Spaces of Transitional Justice Action

Action at regional or international levels can alter transitional justice options at the domestic and sub-national levels. Cases before the Inter-American Court of Human Rights (IACHR), for example, have resulted in landmark rulings that influence decision-making in transitional justice cases at the national level. In 1992, the IACHR concluded that pardons and amnesty decisions in Argentina were incompatible with the American Convention. This position was further advanced by an IACHR decision in 2001, in connection with the Barrios Altos case, that amnesty laws in Peru were invalid and incompatible with the American Convention (Sikkink, 2005). These decisions, and the jurisprudential body they gave rise to, have an impact on domestic judicial reasoning and jurisprudence in the region. Domestic courts are increasingly expected, and inclined, to take note of the Inter-American system; and, in some cases, this has changed patterns of judicial decision-making.

are possible by exploring different levels of justice, influencing the strategy and action of human rights organizations worldwide. This resulted in other cases being taken to court in countries where crimes were not committed (Davis, 2003).

At the same time, it is important to qualify this "cascading" argument: transitional justice processes are neither inevitable nor linear. Indeed, international human rights norms and transitional justice are unlikely to cascade down to the national and subnational levels in an unimpeded fashion. Nevertheless, ongoing analysis of both societal and political legacies of violence and any political and institutional changes at the domestic and international levels can enable the identification of new windows of opportunity as they emerge.

Box 2: How Transitional Justice can Contribute to more Inclusive Political Settlements

Recognition. Public acknowledgement of the scale of crimes and the suffering of victims can be transformative because it recognizes individuals or groups affected by violence as rights-holders as well as victims. This recognition can help redefine the basis of state-society relations, providing the foundation for a new social contract founded on mutual recognition of rights and obligations.

Civic trust. Transitional justice mechanisms can reaffirm commitment to a system of norms on which substantive understandings of justice are premised. They can demonstrate the seriousness of governing elites' commitment to a new political settlement, which may involve more inclusive and widely agreed terms than in the past. Of course, this presupposes that the new political settlement is in keeping with broad consensus about the new rules of the game. Nevertheless, the key point is that emerging social contracts depend on the legitimacy of new institutions, and transitional justice can affirm the trustworthiness of these.

Rule of law. This should be understood as the substantive agreement between elites that they will be bound by the terms of a political agreement in which rights feature as the basis for state-society relations, rather than simply a formal set of legal institutions. To the extent that transitional justice contributes to establishing a practice of holding power-holders (and others) to account for violating the normative underpinnings of that agreement, the rule of law may be strengthened. For this to occur, it is important that the law (or the prevailing normative order) is not only binding in practice but also perceived as legitimate by the majority of the population.

Rights-based citizenship and social integration. Following the above, some argue that transitional justice mechanisms can contribute to social integration and ultimately social cohesion. Therefore, they can contribute to the process by which an inclusive-enough political settlement is constructed.

Source: Adapted from de Greiff (2009).

Second, transitional justice is not only about addressing the past or focusing on victims; it can also have a positive impact in terms of shaping broader development objectives and outcomes. Concrete transitional justice achievements—for example the implementation of measures recommended by truth commissions, such as justice sector reforms or reparations—can contribute to strengthening the rule of law, civic trust, and/or social cohesion. Box 2 describes recent analysis on wider impact of transitional justice processes.

Third, the issue of transitional justice often sparks debates about justice versus peace because the pursuit of accountability, and the possibility that it will unleash renewed conflict if perpetrators seek to preserve their impunity, can be seen as a risk to delicate peace processes. However, as Sriram (2009a) notes, the peace/justice dichotomy is often oversimplified. Decisions are not fixed in time, and opportunities can evolve. Shifts in the balance of power may mean initial amnesty is later displaced by renewed attempts at justice (Domingo 2012). Political economy analysis tools can help in identifying changes in incentive structures and the opportunities these present.

Fourth, the weakness of state institutions, and formal justice mechanisms in particular, raises questions about the usefulness or credibility of domestic trials and the need to look instead at other institutional levels (e.g., regional or international, or subnational levels). International tribunals have the benefit of being removed from the politics of the post-conflict moment. They may better serve the interests of impartiality and due process. At the same time, experience with hybrid international tribunals has been mixed, with some seen as being overly bureaucratic and far removed from the societies on whose behalf justice is being carried out, as in the case of Sierra Leone (Penfold, 2009).

Fifth, community justice mechanisms have become a feature of transitional justice in some fragile and conflict-affected situations. These "localized" forms of transitional justice are the outcome of societies—and political actors—seeking to address legacies of violence from different positions (including different levels of power and influence) and using those institutions that are available on the ground (Shaw and Waldorf, 2010). Box 3 discusses Rwanda's *gacaca* experience.

One advantage of using local, subnational forms of reconciliation to deal with past legacies is that, when anchored in prevalent norm systems, they can be perceived as more legitimate by affected communities than more distant and, in some cases, contested formal systems of justice. In such cases, local-level justice can offer a broader array of conceptions of justice, memory, forgiveness, and punishment. Using existing forms of legal pluralism has the merit of multiplying the layers of justice mechanisms that can be activated to address legacies of violence (Box 4). This can contribute to longer-term goals of reconstituting social cohesion.

Box 3: Gacaca and Transitional Justice

Gacaca courts were set up in Rwanda to support post-conflict reconciliation following the genocidal violence. This has been described as a "participatory process where individuals or communities in conflict (victim and perpetrator) can submit their grievances to a jury of their peers for adjudication. Individuals participate by electing representatives, acting as judges, locating and adducing information and giving evidence about the crime. Where a guilty verdict is reached, punishment involves reparations and contrition as a necessary condition for reconciliation and closure. Localising justice and dealing with impunity ensure that justice is visible to the victims, linking retributive justice and reconciliation in a way that is critical to recovery" (UNDP, 2008: 81).

There are different views about the successes and limitations of *gacaca*. Some argue that this localized form of transitional justice activates local socio-legal mechanisms that are relevant to local context, and that Rwandans mostly prefer the *gacaca* to the formal courts as a means of addressing the genocide. In this view, local institutions close to the affected communities are seen as an effective and legitimate site for channeling the legacy of grievance and loss.

Others argue that the *gacaca* does not involve a sincere process of reconciliation because its decisions can be contradictory and mirror the balance of power between the ethnic groups in the community where the courts are held. It has also been shown that the assumed participatory component of *gacaca* is not always voluntary. These findings suggest that, as other political dynamics take shape, victims are not always assured voice and truth is not necessarily privileged in *gacaca* proceedings.

Sources: Clark (2010); Ingelaere (2008); UNDP (2008); Waldorf (2010).

Box 4: The Magamba Spirits and Transitional Justice in Mozambique

In Mozambique, following the political decision to resolve the dilemmas of transitional justice through a discourse of reconciliation and non-retribution for the violence of the civil war, the institution of spiritual healing, as a form of mediation between the dead and the perpetrator of the violence, has emerged as one form of dealing with the divisive legacy of trauma and violence. Studies by Igreja (2009; Igreja and Lambrace, 2008) signal the potential benefits of this approach, where the healer embodies the spirit of the deceased and, through a collective ritual act of accusation and confession, as well as forgiveness by the family of the deceased, restorative justice is achieved. This can contribute to a process of reconciliation and reconstruction of bonds of trust and social harmony at the community level. Taking the justice process down to the community and individual level also has the intention of neutralizing the potentially conflictive consequences of transitional justice mechanisms that take place in a more centralized and confrontational setting such as a court of justice.

However, localized justice is also a product of local power structures. This is important for understanding how these local experiences fit into the broader process of "resettling" of political settlements, state-building, and other long-term objectives of development. It also means there is nothing intrinsically good or bad about localized transitional justice: its merits need to be assessed on a case-by-case basis.

3.2 Violence, Security, and Human Rights

This section looks at the challenges that multiple forms of violence present for inclusive development, and reviews recent trends in security sector reform. The security sector is the state function primarily involved in containing violence and corresponding human rights violations. Recent trends in international development acknowledge that security is important for development. Moreover, ensuring a human rights lens in security provision is in keeping with the 'do-no-harm' principle and can contribute to cultivating more legitimate state-society relations based on due process and oversight in the protection from threat of persons within a state's jurisdictions. The challenges presented to security by realities of institutional multiplicity and non-state security actors are also highlighted here.

Key messages

- There is growing recognition of the multiple forms of violence in fragile and conflict-affected situations, and the varied and negative impact on human rights and development outcomes.
- This recognition has prompted a variety of policy responses, including the opening up of approaches in security sector reform and disarmament, demobilization, and reintegration to human rights considerations.
- The full range of institutions and mechanisms for reining in and controlling the use of violence, including both state and non-state actors in security provision, need to be considered.
- Even where donors are not involved in security programming, conflict sensitivities are necessary to ensure donor interventions are in keeping with the do-no-harm principle.

'New' forms of violence

In fragile and conflict-affected situations, the development community has generally understood violence in battle-conflict terms. More recently, however, there has been recognition that violence exists in a multitude of forms, and a broad catalogue of policy responses is required to address it (OECD-DAC, 2009; World Bank, 2011a; 2011b).[14] In addition, there is growing consensus on the need to consider the root causes of violence and its impact on development outcomes (including human development capabilities) and to tailor interventions to the political economy of context-specific conditions of violence.

In the 1990s, the understanding of security threats was broadened beyond interstate conflicts to include issues such as intrastate wars, lack of access to basic resources and rights protection, crime, people flows, and environmental disasters (Krause and Williams, 1997). The WDR 2011 took this further, highlighting the multidimensional nature of violent threat and the difficulties this presents for the state and its ability to protect its citizens and persons within its

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14 On the treatment of violence in WDR 2011, see Jones and Rodgers (2011) and Suhrke and Samset (2011).

jurisdiction (World Bank, 2011a). Conflict-related violence is no longer perceived as being the main security threat to most people. As the OECD (2009) notes, most deaths are the result of homicide and interpersonal violence.

The following represent some of the diverse forms of that violence that are now acknowledged as featuring in fragile and conflict-affected situations:

- **Violence is deeply gendered.** Young males are the main perpetrators and victims of armed violence (OECD-DAC, 2009). The perpetrators of sexual violence, which is often endemic in war zones, are mostly men (against men and women) (Leatherman, 2011).

- **Violence is connected to transnational networks** through drugs, crime, the arms trade and terrorism, as well as some private sector investment practices. International networks that sustain violence cut across both the legal and the illegal spheres.

- **Urban-based violence generates its own dynamics of fragility.** In contexts of rapid urban growth, inner cities and slums have above-average rates of armed violence and increases in the number of youth gangs and militia groups (OECD-DAC, 2009).

- **Violence in spaces where the state has weak presence represents a particular challenge**. Where the state has limited presence, non-state actors control the use of violence, including in ways that drive fragility.

- The potential to address violence may be restricted by **collusion between state actors and non-state criminal groups**, including through networks of patronage that represent shared interests. In these instances the security sector typically protects the elite as well as criminal interests, with results that may lead to state (or state-sanctioned) violence being used against the population.

The negative impact of violence on human rights protection is both severe and long lasting. In turn, human rights violations increase the risk of future insecurity, with the potential to create stubborn cycles of violence, conflict, and further abuse (Box 5).

Using an HRBA to guide security sector reform and address violence

These newly recognized forms of violence have prompted a variety of policy responses, particularly since the 1990s. The focus of international assistance efforts on police and military functions has shifted over time, reflecting changing strategic, security, and development agendas, as well as different priorities within regional contexts. Dominant understandings of security shifted toward a broader conception of *human* security in response to the proliferation of intrastate wars in the early 1990s, the repositioning of geopolitical interests at the end of the Cold War and changing global perceptions of threats. Human security defines security at the level of the individual, who is only secure if free from both fear of harm or persecution on the one hand, and want of access to basic resources on the other (UN, 2005). This perspective acknowledges that the state itself may violate the security of its citizens.

In line with this broader human security approach, recent international instruments use a more explicit human rights perspective to address security challenges, especially for marginalized groups. For example, the 2001 formulation of the Responsibility to Protect (R2P) sees states as being collectively responsible for upholding the principles of human dignity, equality, and equity at the global level (Evans, 2009). (Refer again to Appendix 1 for summary of the key international human rights and humanitarian law norms).

Box 5: Linkages between Conflict and Human Rights Abuses

Conflict ⇨ human rights violations. The Physical Rights Integrity Index measures respect for four human rights (indicators measuring incidence of torture, extrajudicial killing, political imprisonment and disappearance). Using a scale of 0–8 (with a score of 0 indicating no government respect for human rights), it shows that countries drop by an average of 3.6 points over the course of a major civil war and that, once the conflict has ended, they take on average a further 10 years to return to pre-conflict levels (World Bank, 2011a).

Human rights violations ⇨ conflict. The Political Terror Scale measures arbitrary detention for non-violent political activity, torture, disappearances, and extrajudicial killings. Each one-step deterioration on the scale results in a more than twofold increase in the risk of civil war in the subsequent year: "Holding large numbers of political prisoners makes a renewal of civil war twice as likely, while significant numbers of extrajudicial killings make it three times more likely" (World Bank, 2011a: 82).

And UN Security Council Resolution 1325 of 2000 is viewed as a catalyst for greater consideration of gender in situations of violent conflict and peace-building.

Crucially, the international community, at least at the level of strategic thinking on security sector reform, has increasingly taken on board the following assertions, which are congruent with a human rights approach:

- Combating violence is a governance and human rights challenge and requires civilian control and oversight over security provision.
- Building a legitimate security function is a long-term process.
- Local ownership of reform processes is the key to success.

Moreover, donor strategies in the security sector now also routinely include concerns with participation, accountability, and non-discrimination.[15]

In practice, the lessons of security sector reform increasingly reflect the need for integrated policy approaches that, at a minimum, take account of do-no-harm principles.[16] The programming areas discussed below indicate an evolving security sector agenda in fragile and conflict-affected situations that is increasingly taking on board human rights; it is also the case that integration of human rights is not always straightforward.

First, **disarmament, demobilization, and reintegration** and arms control have changed over time in fragile and conflict-affected situations. These measures seek to remove two threats to peace (combatants and weapons) and normalize the lives of former combatants and the communities in which they live. This process lends itself to a human rights-based approach, focusing both on the rights of former combatants and on the rights of communities that have lived through conflict to live in peace. Disarmament, demobilization, and reintegration have evolved from more technical arms control programs to interventions that engage with the structural, institutional, and social factors, fuelling the demand for arms and recourse to violence (OECD-DAC, 2009).

Second, **security sector reforms** now address a wider range of issues, some of which are attuned to a human rights-based approach (to varying degrees). Whereas early forms of security sector reform tended to focus on reform of state militaries, they now also include other state institutions such as policing, prisons, intelligence services, and customs/border officials (OECD, 2005; Albrecht and others, 2011). Inevitably, with its focus on violent conduct and the coercive function of the state, much of security sector reform remains at the "sharp" end of development work. This makes human rights implications of this work all the more pressing,

particularly the need to build up civilian oversight and guard against harm being done to due process and respect for and protection of human rights in the name of security. These concerns are especially pressing where security provision is susceptible to elite capture.

Third, **armed-violence reduction and prevention** and other strategies for addressing non-conflict violence reflect new approaches to violence and conflict. Increasingly development agencies are seeking to address multiple forms of non-conflict violence, often within broader security sector reform programs but increasingly under the rubric of armed-violence reduction and prevention measures (OECD, 2010). These tend also to be informed by a more explicit human rights-based approach (Box 6).

Given the overlapping concerns of security, justice, and violence-reduction programs and development objectives, recent lessons in security sector programming are relevant for some of the work that sits on its fringe. Such a broader violence prevention approach is built into some World Bank programming, with an implicit human rights concern (Box 7).

Fourth, a particular challenge in security-related programming relates to the presence of local **non-state security actors** (Schmeidl and Karokhail 2009). Up to 80 percent of the population is estimated to rely on non-state policing and justice actors in some African countries (Baker 2008). However, engaging with non-state security actors is worrying for donors because of the heightened risks of human rights violations in this policy area. Existing outside of the state, it is also especially challenging to assess whether non-state security actors are captured by local elites or contribute to discriminatory or harmful practices. Typically, risks for women are particularly high. The use of coercion by chiefs across West Africa to support female circumcision and punish those who seek to avoid this cultural practice is a case in point. Nevertheless, there are also examples of non-state community policing that service security needs in the absence of the state, and do so with the assent of the community; and where forms of accountability and participation, congruent with human rights principles, may be operating (Box 8).

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15 For example, Ball and others (2007), OECD-DAC (2001; 2005; 2007; 2009), USAID (2009), and Wulf (2011).

16 The concept of 'do no harm' has its origins in Anderson's (1999) definition of humanitarian work, which emphasises the need for donors to ensure their interventions are sensitive to context in ways that ensure they do not exacerbate drivers of conflict, violate human rights or worsen societal divisions. OECD-DAC (2010) addresses these issues in relation to state building, and the do no harm principle is included as one of the ten principles for international engagement in fragile states (OECD-DAC, 2007).

Box 6: World Bank support to municipal-led armed violence reduction

The World Bank's Small Grants Program for Violence Prevention supports municipal-level initiatives that advance community-based perspectives to reduce armed violence. Initiatives focus on reducing the number of weapons in circulation, altering the attitudes and behavior of the agents who might potentially use them, and strengthening public and private institutions for enhanced security and good governance.

Lessons emerging from this experience [include the importance of]:

Multi-sector strategies grounded in a common vision of the risks affecting citizen security;

Focusing on those at risk of following a criminal career path;

Reinforcing existing security mechanisms. Promoting local customs and minimally shared social rules to generate a sense of belonging, facilitate peaceable coexistence, and encourage respect for common heritage, civic rights, and duties;

Seeking local solutions in neighboring and targeted "hot spots", together with initiatives that bring the police and community closer together in designing participatory strategies;

Upholding law and order through the accountable punishing of those who harm public wellbeing, while supporting those who foster peace, solidarity, respect, and community cohesion.

Source: OECD (2009: 100).

Box 7: Human rights considerations in programs to combat non-conflict violence

Policing gender-based violence: The Family Support Units in Sierra Leone

Family support units are police stations dealing solely with crimes against women and children. They were set up in Sierra Leone at the end of the civil war in response to increases in crimes against women, particularly domestic and gender-based violence. Now rolled out countrywide, the family support units are partnered by Rainbo Centres, which are operated by the International Rescue Committee and provide complainants with free medical and psychological support. This approach to policing is helping to protect the rights of women and their children. Similar programs have since been set up in Liberia and the Democratic Republic of the Congo (Denney, 2011).

Addressing the challenge of crime: Community policing in Brazil

The transition to democracy in Brazil coincided with an increase in crime and violence and complaints about police complicity. Years of authoritarian rule had weakened police accountability, responsiveness to the law, and relationship with citizens. To address these failures, community policing models were adopted across Brazil, involving training for police officers (particularly in human rights) and setting up committees with members of the public to build trust and share information. While its success in reducing crime rates is varied, community policing has developed as a response to criminal violence that seeks to bring police practice in line with human rights standards and foster greater accountability to those they are tasked to protect (Mesquita Neto and Loche, 2003: 179–199).

Non-state security mechanisms are a reality in many fragile and conflict-affected situations, and the potential benefits and efficacy of existing traditional or other non-state systems should not be overlooked, especially where the state lacks the capacity to undertake basic security provision. Do-no-harm imperatives are particularly important however when working with subnational dynamics, institutions, and actors involved in security. Effectively applying these requires

Box 8: *Sungusungu* in Tanzania

Sungusungu was a vigilante group formed in the 1980s in Northwestern Tanzania to conduct night patrols in response to violent cattle raiding. Given their limited capacity, the Tanzanian police actively encouraged this non-state policing mechanism. *Sungusungu* was popular because of its effectiveness in deterring cattle raiding and was given legal backing in 1989, leading to the roll out of *sungusungu* across the country and the compulsory participation of adult males in patrols. Yet, over time, the legitimacy of *sungusungu* deteriorated, as patrols used excessive levels of violence in extracting confessions and punishing offenders, at times resulting in death. In some cases, the decline of *sungusungu* was due to the arrest of its leaders over cases of torture. New forms of community policing have since emerged, such as the *ulinzi shirikishi*; but Tanzanians indicate that this is different from *sungusungu*. Principally, they claim, "now we have human rights" in differentiating the two forms of community policing.

Source: Cross (2011).

a deep understanding of local power politics, the interests that are served by local security actors, the groups that are at risk of discrimination or outright oppression, and how factors connect to broader national dynamics of conflict and fragility.

Fifth, and most significantly to wider development interventions, assessing security issues from a human rights perspective can add value by supporting analysis of the implications of the dynamics of conflict and violence for other development objectives. Most development assistance programs in violence-affected countries would benefit from the incorporation of **conflict sensitivity**.[17] Given the correlations between poor human rights records and the prevalence of violence set out earlier, an awareness of the human rights implications of poor security conditions would also add value to programming in all sectors. A human rights lens on the interface between security challenges and development can help practitioners to understand the potential security risks of programming choices and avoid potential conflict. Moreover, failure to develop sufficient context analysis can lead to "doing harm", including in terms of aggravating vulnerability to human rights violations or violating human rights. An understanding of local causes and dynamics of violence and its consequences is thus crucial for all development actors, even those not explicitly involved in direct security programming.

3.3 Justice Sector and Rule of Law Reform

The above sections have already signaled the relevance of justice mechanisms in (re)establishing a sense of order and the possibility of rule of law in fragile and conflict-affected situations: transitional justice in relation to supporting the capacity and commitment of the state to end impunity on human rights abuses, and the security sector regarding the state's ability to rein in violence, protect citizens, and enforce the law. This section looks at justice sector institutions, discussing their central importance for the realization and protection of human rights, for resolving disputes peacefully and for contributing to the foundations of rule of law in fragile and conflict-affected situations.

Key messages

- How justice and entitlements are conceived, and disputes resolved, has consequences for the distribution of power and resources and thus for the nature of state society relations and for development outcomes.
- Donors have supported justice sector reform for decades, including in post-conflict settings; but, despite critiques, practice on the ground is still top-down and too technical in many cases.
- Newer and more politically nuanced approaches to justice reform are supporting bottom-up processes of legal empowerment and access to justice, which may contribute to better voice through rights claims on issues of social justice and equality. This could enhance the social accountability capabilities of social actors.
- Where legal pluralism is prevalent, working with non-state actors is an additional entry point for providing access to justice. As with non-state actors in the security sector, this approach is not risk free from a rights perspective and requires analytical skills and operational approaches that take account of existing norm systems and power relations. A human rights perspective can contribute to this.

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[17] Conflict-sensitive approaches (like do no harm) involve developing sufficient context awareness and taking measures to ensure that interventions do not contribute to aggravating conditions of conflict.

Rule of law, justice, and human rights

Rule of law has typically been associated with three features.

First, it is the *outcome* of the process by which key actors (elites) choose to abide by a set of commonly agreed rules regarding political, economic and social engagement because it is in their interest to do so (Holmes, 2003; North and others, 2009; Tamanaha, 2004). This agreement by powerful elites to be rule bound is the basis for an accountable state (Schedler, 1999). Such strategic bargains are historically contested and redefined over time by groups who feel excluded. This seemingly conflictual process may be resisted by ruling elites but may result in transformative processes leading to more inclusive polities.

Second, rule of law is associated with *regulation* and dispute resolution and the corresponding institutional capacity of the state to enforce law-abiding behavior. This relies on the ability of the state to rein in violent conduct (security function) and to resolve conflict in peaceful ways.

Third, rule of law is also about the state having the capacity and political will to honor the existing *social contract*. Whether these qualities are present depends on how state-society relations have been politically negotiated over time, including through different generations of "rights revolutions". In histories of constitutionalism, constitutionally agreed rights tend to reflect the dominant normative discourses (and not necessarily the realities) of their time, including whether they are consistent with international human rights commitments. Rule of law occurs then through institutional capacity (such as judicial review) and societal agency (such as through legal mobilization) to oversee the protection and realization of these rights (Epp, 1998; Gloppen, 2006).

Different definitions of rule of law place different emphases on these three elements. A distinction worth drawing for the purposes of this report is between two dimensions:
- **Substantive dimension** of rule of law (that is, the content of the law), which establishes the normative vision of social justice and entitlements within a political system, and through the social contract; and
- **Procedural dimension** of rule of law, which refers to the organizational and institutional arrangements that support the realization of the content of laws, including through the rights protection and law enforcement capacity of the state and the workings of the justice sector.

The justice sector plays a central role in the realization of rule of law and human rights. On the procedural side, key functions of the justice sector in mediating state-society relations are to administer the criminal justice system, resolve disputes, and provide judicial review to protect the realization of rights of citizens and hold public officials to account over the legality of the exercise of power.

However, what each of these general functions looks like in practice is the product of the substantive dimension of the rule of law. This results from particular histories of state formation and contestation over power and resource allocation. It ultimately reflects the normative underpinnings of the political settlement and the prevailing value system that underpins state-society relations. For instance, how due process and the rights of the accused are weighted in different settings depends on existing legal codes and norm systems, as well as on prevailing legal cultures and socio-political attitudes toward crime and punishment. Finally, the degree to which justice mechanisms are formalized or take the shape of non-state mechanisms of dispute resolution varies considerably. This is particularly true in many fragile and conflict-affected situations where legal pluralism is often the norm and different conceptions of justice coexist within the same domestic context.

Therefore, justice mechanisms in any polity reflect deeply political choices about institutional design. Despite this, development practice in this area continues not to engage with this more politically nuanced understanding of justice institutions.

The justice sector and the international rule of law agenda

Support to rule of law and the justice sector has been on the international agenda for several decades but has enjoyed a renaissance since the late 1990s and is now seen as relevant to many development objectives. First, rule of law is understood to enable development when it leads to the stabilization of property rights and contract law, which increases trust and reduces transaction costs in economic activities.[18] Second, from the perspective of human rights, rule of law allows the state to be held to account for how the rights of citizens are realized and protected. Third, the good governance agenda has tended to focus on the accountability dimension of rule of law in relation to corruption and probity in the exercise of public office.

International approaches to rule of law support have been criticized on several counts however (Carothers, 2001, 2006;

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[18] This concern with property rights in development discourse is not new, but academic scholarship in recent decades has followed North's (1990) analysis on the connections between institutions and economic development. This underpinned much international (and World Bank) rule of law support in the 1990s.

Dezalay and Garth, 2002; Domingo and Sieder, 2001; Faúndez, 2005; Golub, 2006a; Wade, 2006). First, the justice functions that are prioritized often do not reflect context-specific needs and realities. Second, top-down approaches have focused mostly on formal institutions (such as courts and criminal justice procedures), often with a bias toward technical and infrastructural support. Third, where legal change has been the focus of support, it has often resulted in legal transplants that are not critically assessed and are poorly embedded in local legal cultures and practices. This creates difficulties for building up legitimacy where foreign systems are perceived as alien, including among the domestic legal communities. Finally, reforms to strengthen judicial independence and the constitutional review function of courts have been less prominent on justice sector donor agendas.

More recently, there has been broader recognition that the construction of the rule of law is a political process and the product of particular legal, political, and socio-cultural histories. It is also now better understood that rule of law is never an absolute; rather, it is a broad and multi-level spectrum that is experienced differently according to factors such as class, culture, gender, and ethnicity.

This more nuanced understanding of rule of law is influencing how development agencies are approaching the justice sector. One important development is that there is more support to the legal empowerment of marginalized groups across a range of rights to facilitate bottom-up processes of using the law to achieve pro-poor social change (Commission on Legal Empowerment of the Poor, 2008; Golub, 2006b). This relatively recent international interest in engaging with legal empowerment objectives has notably translated into efforts to improve access to justice, legal aid, and legal mobilization strategies and capabilities.

Working with bottom-up processes has also involved engaging with non-state forms of dispute resolution because these can involve local institutions that are more accepted by the communities that they serve and may be more effective in resolving disputes at the local or community level.

Thus, the focus of the international agenda, at least at a strategic level, is increasingly turning to what justice systems mean for society, and to how (different groups in) society can use the justice system not only for protection but also for redress and for making claims, for instance, around human rights.

Justice sector reform, rights and fragility

Fragile and conflict-affected situations are particularly challenging environments for justice sector reform. First, the weak territorial presence of the state—whether as cause or effect of fragility—reflects in many cases a limited capacity to either adjudicate or enforce the law of the land (O'Donnell, 1993). Second, the meaning and narratives of rights and social justice among the population may be highly heterogeneous, uneven and fragmented, or simply absent. Third, states may themselves be the main perpetrators of human rights violations or lack the organizational and institutional capacity to protect the population from different forms of rights abuses and violence perpetrated by others.

At the same time, international discourse on fragile and conflict-affected situations increasingly notes the importance of justice sector reform as the foundation of rule of law and for building resilient state-society relations where accountability has a place (World Bank, 2011a). To date, however, there has been a recurring mismatch between more sophisticated understandings of the potential importance of justice sector reform and the types of programming found on the ground. Key points made in the literature include the following:[19]

- Policy documents increasingly give prevalence to the importance of (re)constructing the justice system to achieve peace and reconciliation, but still tend to hold partial and compartmentalized understandings of what the justice sector entails.

- Recourse to inappropriate legal transplants continues to feature in rule of law support (as the case of Afghanistan in Box 9). At the same time, international pressure on states to sign up to international human rights norms can have a positive impact, as in the case of the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), which has enabled the agency and rights of women.

- In practice, there remains a disconnect between human rights programs—including those focusing on transitional justice objectives and strategies—and parallel programming in justice and broader rule of law reform interventions. Moreover, tensions between these and security sector reform are not sufficiently considered, with potentially problematic consequences for human rights. Instead, "security and justice" reforms are often presented together with non-problematized assumptions that all good things go together.

- This oversight is connected to insufficient attention to the fact that law and justice are political constructs that serve

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[19] There is limited research on the justice sector in fragile and conflict-affected situations, with a few exceptions (see Albrecht and others, 2011; Isser, 2011; Scheye, 2009; Sriram and others, 2011a and 2011b).

Box 9: Afghanistan on competing sources of law

International interventions in justice sector and rule of law reform in Afghanistan illustrate how well-intended programming can do harm because of insufficient attention to context, prevailing systems of norms, and histories of legal culture. Formal evaluations cite the early interventions in the justice sector reform by the Italian aid agency and then USAID as problematic because of insufficient consideration of existing legal systems and limited understanding of the particularities and subnational features of legal pluralism (including the distinction between Sharia law and customary norms). This failing led to a top-down import of legal institutions that did not resonate with domestic norms of justice and structures of adjudication, which are mostly derived from Islamic law. Most Afghan legal professionals trained in Islamic law saw the codes, systems, and capacity development programs as an alien imposition, particularly the early stages of criminal justice reform.

Such mistakes led the UN Human Development Report of 2007 (UNDP, 2007) to make the case for a more synergistic approach in Afghanistan, based on a hybrid model of justice that connects existing domestic national and subnational institutions of justice and dispute resolution (*jirgas* and *shuras*) to formal justice mechanisms. The merits of involving local communities has reportedly been integrated into more recent thinking on how to build more resilient institutions of justice and security under the National Solidarity Program..

Sources: Suhrke and Borschgrevink (2009); UNDP (2007); Suhrke (2011).

particular constellations of power and elite settlements, with varying degrees of broader acceptance. Thus, providing technical assistance to politically captured justice mechanisms may do more harm than good.

These challenges are significant, but the justice sector can still constitute a useful entry point and contribute to a process of change whereby judicial institutions help shift power structures toward more inclusive settlements. Entry points and some related experiences include the following.

First, a particularly underdeveloped area of justice sector support that has the potential to support transformation relates to judicial activism regarding rights claims, including through the social accountability function of courts on rights issues. This is being addressed to an extent through legal empowerment movements, which involve supporting rights-holders to make strategic use of the law and legal mechanisms to pursue rights claims (Gargarella and others, 2006; Gloppen and others, 2004; 2010). The politics of transformative constitutionalism and the role of courts in adjudicating on rights claims to make them effective are explored further in Sections 3.4 and 3.5.

Second, and related to increased awareness of rights and legal mobilisation, in fragile and conflict-affected situations as elsewhere, donors are increasingly concerned with bottom-up approaches, such as access to justice and legal aid. Legal mobilization from below in the pursuit of human

rights protection is in this regard increasingly supported. The *quality* of justice institutions that are being accessed is important, however, as is the degree to which they are supported by an inclusive political settlement (Gloppen 2006). Poor quality justice institutions can undermine efforts to improve access to justice.

Third, institutions related to the justice sector, such as human rights ombudsmen and other oversight and complaints mechanisms (in addition to the courts), can add to the range of redress mechanisms for citizens in support of improved social accountability for rights. These bodies have become formidable mechanisms of oversight in some contexts of conflict and fragility. For example, human rights ombudsmen in Bolivia and Peru have used rights discourses to empower citizens, and supported concrete mechanisms of redress even in moments of fragility and conflict during the 1990s (Domingo, 2010).

Fourth, the "discovery" of customary justice by international actors is generating new thinking on how to engage with non-state dispute resolution mechanisms (Albrecht and others, 2011; Isser, 2011; USIP, 2009. Stronger analytical skills are now needed in operations to identify the concrete power relations and patterns of exclusion (or inclusion) that non-state justice institutions either perpetuate or address.

In some cases, non-state forms of justice may provide strategic entry points for working with what may be more legitimate mechanisms of dispute resolution than the formal

Box 10: Entry points for constructive engagement with non-state justice mechanisms

Analyzing the ways that power structures affect how people use justice mechanisms can be a useful starting point and may suggest that enhancing the strategic capabilities of marginalized groups to use "forum shopping" strategies is an effective way of increasing access to justice. Interventions that enhance this choice can have an empowering effect. Legally plural settings vary considerably however, and in some cases this element of choice may be fundamentally limited.

Marginalized groups can also be supported to contest exclusionary and discriminatory attitudes and practices embedded in both formal and informal mechanisms of justice at the domestic level through recourse to regional or international human rights conventions. For example, in some cases women have effectively used CEDAW at the local level to promote attitudinal shifts in gender inequality.

Source: Chopra and Isser (2011); Sieder and Sierra (2010).

system. A context-tailored, human rights-based approach can help in identifying entry points and opportunities to reduce human rights violations and promote the use of human rights principles and discourses to support more inclusive mechanisms of justice for marginalized groups (Box 10).

Lessons can also be learned from working with the grain of existing institutions to develop what in Bolivia has been called "intercultural" dialogue between systems. This form of dialogue recognizes that different levels of norm production continually interact with and affect each other; therefore, rather than being fixed, customary institutions are also susceptible to contestation and change. This fluidity creates opportunities for human rights principles and norms to inform evolving narratives of social justice at the different domestic levels (Box 11).

3.4 Addressing Social Exclusion

Human rights approaches also involve addressing systemic social exclusion by reshaping the distribution of power and resources within society. Contestation about the patterns of distribution is often a root cause of fragility. Efforts to redress social exclusion through translating human rights principles and norms into practice are deeply political and thus likely to be resisted by powerful actors who benefit from the status quo. A good measure of realism is therefore

Box 11: The politics of intercultural dialogue and indigenous rights in Latin America

The politicization of demands by local indigenous movements during the 1990s for customary justice mechanisms to be formalized in Latin America was reinforced by International Labor Organization (ILO) Convention 169 in 1989, which called on states to recognize indigenous rights and legal pluralism, and, more recently, by the Inter-American system, which recognizes community rights. At the same time, global human rights discourses have responded to local events, particularly in Latin America, by incorporating the language of legal pluralism and recognizing identity-based community rights.

Therefore, at the regional and global level, the principle of legal pluralism now features in different legal texts in ways that mark a paradigmatic shift in the ability of formal justice mechanisms to accommodate the realities of culturally plural societies. There is also a process of iterative exchange between different socio-legal spheres, which can lead to power relations becoming more inclusive. For instance, at the subnational and community level, human rights discourses are reshaping views about entitlements and how individuals and communities should be positioned in relation to structures of authority. Where patriarchal structures prevail, this can have a positive impact on gender relations and the role of women at the community level.

Sources: Assies and others (1999); Domingo (2009); Sieder (2002); Yashar (2004).

required in terms of what external actors can achieve and over what timescales.

Key messages

- Social exclusion can be a particular stress factor in fragile and conflict-affected situations that heighten the risk of social and political violence and reflect patterns based on discrimination, inequality, and the denial of human rights.
- Constitutional reform, which aligns domestic law with international human rights norms, can in some cases contribute to transformative distributional change but depends on legal voice and commensurate mechanisms of accountability and redress.
- This strategic use of a range of redress mechanisms, such as public interest litigation combined with legal empowerment, can contribute to the realization of related (social and economic) entitlements and improved social accountability.
- A context-specific, human rights-based approach can contribute to identifying opportunities and entry points for supporting changes to institutions, incentives structures, and capabilities that address patterns of social exclusion and corresponding human rights violations.

Why social exclusion matters in fragile and conflict-affected situations and for human rights

Social exclusion reflects social, political, and cultural constructs about social justice and dominant narratives about who gets what (that is, who the winners and losers in society should be). By examining the root causes of social exclusion, it is possible to better appreciate the likely obstacles to more inclusive state-building based on the protection of human rights against discrimination and exclusion.

Social exclusion is a complex phenomenon that operates at different social, political, and economic levels, from the individual to the household and up to the state level. It is an expression of multiple and overlapping disadvantages, which are often the result of direct or indirect discrimination. These disadvantages determine the position of an individual or group within the social order; their access to economic opportunities, development, and other resources; and their ability to participate in the political process and exercise their rights (Beall and Piron, 2004; Kabeer, 2006; Stewart and Brown, 2009). As a *group* phenomenon, social exclusion is the product of social interactions characterized by unequal power relations.

There are four ways in which social exclusion can represent a particular stress factor in fragile and conflict-affected situations:

- **Social exclusion and social cohesion.** State and societies function better where ties of trust and reciprocity and a rich associational life bind intra- and inter-group relations and link state and society (World Bank, 2011a). The resilience of state-society relations is influenced by the degree of cohesion in a society and the extent to which the reigning political settlement reflects a collective vision of a shared national project. Social exclusion can contribute to fragility where it undermines societal bonds of reciprocity and trust between groups in society and between societal groups and the state (Ghani and Lockhart, 2008; Varshney, 2001; World Bank, 2011a).
- **Social exclusion and the state.** Patterns of exclusion can be entrenched in the arrangements that underpin a given social and political system. Where the state reflects exclusionary political arrangements—based on discrimination, inequality, and the denial of rights—there is a heightened risk of social and political violence. Groups that are discriminated against and suffer on the basis of their identity may mobilize against the state and its ruling elites to contest existing political arrangements (DFID, 2005a; Stewart and Brown, 2009). However, this process can also lead to a redefinition of the political settlement and result in human rights gains (as in the resistance to apartheid in South Africa).
- **Social exclusion and institutional hybridity.** Institutional multiplicity interacts with social exclusion and horizontal inequalities in complex ways. Often, as in the case of indigenous populations in much of Latin America, socially excluded groups do not enjoy equal access to formal state institutions and their own practices and institutions may not be recognized. Historically, the "invisibility" of their systems of authority has been a driver of exclusion and fragility, as in Bolivia, Ecuador, and Guatemala. Recourse to justice and redress has therefore remained highly uneven and flawed, with formal rules competing with, and transforming, informal norms and practices. The experience with vigilante justice in Guatemala illustrates this (Box 12).
- **Social exclusion and development.** Social exclusion can entrench uneven patterns of development. Groups and individuals suffering from exclusion and discrimination are most likely to face barriers to accessing key resources, developmental opportunities, vital needs and basic services, and rights such as food, water, health, and education (Evans, 2009; Stewart and others, 2005). Such

Box 12: Understanding the causes of vigilante justice in Guatemala

The proliferation of vigilante justice (*linchamientos*) in rural areas in Guatemala results from a complex set of circumstances, including the increased vulnerability of peasants (especially indigenous communities), fundamental concerns about absence of security and violence at the hands of both state and non-state actors, revulsion at the corruption and ineptitude of formal judicial institutions, and a generalized distrust of the national police. *Linchamientos* also reflect conflicts between the official judicial apparatus in Guatemala and customary justice. Vigilante justice is far removed from idealized visions of customary law (nor is it representative of it), but the conditioned control exercised by customary law in rural communities in the country has been challenged since the early 1980s. Violence and the imposition of military control in highland communities disrupted mechanisms of local control and fostered intense conflict within many communities, fracturing social cohesion. The reweaving of the social fabric within communities has remained a real challenge. From the 1980s onwards, there has also been a determined attempt to impose national judicial structures. The combination of internal unrest and an ongoing challenge to customary law helps explain the wave of *linchamientos* afflicting post-conflict Guatemala.

Source: Handy (2004).

disadvantage undermines prospects for agency and the emergence of the capabilities needed to develop societies.

Access to land in particular has been a marker of inequality and marginalization and is instrumental in shaping entrenched patterns of exclusion and (violent) conflict. In Guatemala, for example, land issues underpin unequal power relations and an exclusionary, discriminatory, and repressive process of state formation, and were at the heart of the country's 30-year civil war (Rocha Menocal, 2008). An uneven land structure has driven social exclusion and conflict in Colombia also. Given the alignment of key political, economic, and social interests that support both these political settlements, neither country has undertaken meaningful land reform (Rocha Menocal, 2007).

Using an HRBA to tackle social and political exclusion in fragile and conflict-affected situations

Given the diverse nature of fragile and conflict-affected situations, there can be no blueprint for using a human rights-based approach to change structures of political and social exclusion. The strategic use of human rights norms and principles in some contexts has contributed to making political settlements and rules of political and social conduct more inclusive—but each context will demand a different solution. The following ways of working with human rights in development (not presented in order of hierarchy, priority, or sequencing) are examples of how rights may be instrumental to transitions from fragility to resilience in

different dimensions of political and social exclusion and discrimination.

First, **the international human rights framework can shape debates on social justice**. In addition to being legally binding, the framework contains a set of standards against which states that have ratified human rights instruments can be judged. Over the past 50 years, international covenants and treaties have specifically addressed dimensions of inequality, discrimination, and vulnerability, notably through the International Covenant on Civil and Political Rights; the International Covenant on Economic, Social, and Cultural Rights; and, more recently, CEDAW, the UN Convention on the Rights of the Child, and the Convention on Rights of Persons with Disabilities.

If international (or domestic) public opinion is an important source of legitimacy, the incentives for new governing elites to sign up to international human rights treaties can be strong. Even when new governing elites make insincere commitments, their agreement to new standards can empower rights-holders (for example, by increasing the visibility of human rights norms) and contribute to the "socialization" of narratives of inclusion, equality, universality, and non-discrimination.

In addition, international or regional frameworks establish mechanisms of oversight or redress that can be used to claim rights or advance human rights principles of equality and non-discrimination. CEDAW, for instance, has become an important hook on which the women's movement can anchor their strategies for social transformation (Byrnes and Freeman, 2011; Sieder and Sierra, 2010) Box 13 expands

Box 13: The impact of CEDAW on women's rights in fragile and conflict-affected situations

Political participation and representation are areas where CEDAW has had an impact on women's rights. Despite concerns that higher numbers of women in public office do not necessarily translate into a gender equality agenda, more women in public office, as in Burundi, marks an important shift. It reflects country-level responses to pressure both from the CEDAW review process and from women's organizations working from within to push for legislative change. Burundi, following the electoral reform of and the elections held in 2010, now holds one of the highest percentages of women in elected office at national and subnational level, with over 50 percent of the Senate taken by women.

Kenya's 2010 Constitution makes direct reference to commitments embarked on under CEDAW in relation to gender equality issues, as noted in the State Delegation Report. The new Constitution (in Article 27) addresses CEDAW's definition of discrimination against women (Article 1). It includes the basis for affirmative action by securing that no single gender should hold more than two-thirds of public or elected office at all government levels. It also makes provisions relating to equality in the family using similar language to that in the Universal Declaration of Human Rights and CEDAW Article 16. The impact of CEDAW is a result of international advocacy, the official review mechanisms of the Optional Protocol and the mobilization of key stakeholders in Kenya, notably the active legal aid of women's organization FIDA.

Source: Byrnes and Freeman (2011); CEDAW Committee (2011); Domingo and Wild (2012).

on the impact of CEDAW on women's rights in fragile and conflict-affected situations.

Regional human rights frameworks have also influenced domestic legal and political dynamics and wider social narratives of inclusion. A number of cases have been taken to the Inter-American Court involving claimants holding states accountable to the American Convention on Human Rights, particularly in relation to issues of inequality, deprivation, and discrimination resulting from conflict (Box 14). Enforcement remains a challenge, but the fact that legal forms of redress beyond the state exist and that they have the potential to contribute to concrete issues of resource allocation should not be underestimated.

Second, **there may be opportunities to use constitutional reform processes to support new political settlements**, but these are fundamentally political processes in which donors often have a limited role. Kenya's post-conflict political dialogue following electoral violence in 2008, which resulted

Box 14: Addressing horizontal inequalities in fragile and conflict-affected situations through regional human rights instruments: the Inter-American Court Judgment on the Plan de Sánchez Massacre in Guatemala

In 1982, a massacre took place in the village of Plan de Sánchez in Guatemala during which over 250 villagers, mostly of Achi Maya origin, were abused and murdered by members of the security forces. This was one of many incidents that took place during the conflict and was an example of the government's scorched earth methods, which principally targeted indigenous communities, in this case under the pretext that the village was supporting guerrilla groups.

After exhausting domestic legal remedies, survivors of the massacre took the case to the Inter-American System and the court ruled that damages be awarded to the victims and their families. Notably, the judgment also ordered the Guatemalan state to undertake remedial action to compensate for systemic discrimination against the Mayan community, which had restricted access to basic services. The court ruled that the state was to implement a number of programs in the affected community, in addition to public works financed by the national budget.

Source: IAHRC (2004).

Box 15: The Kenyan National Dialogue and Reconciliation Initiative

The Kenyan National Dialogue and Reconciliation Initiative set the pace for the process of constitutional reform, agreed to by the competing political leaders of the post-electoral violence. The ensuing constitutional reform process and referendum were nationally driven but the international community, in this case led by former UN Secretary-General Kofi Annan, had played a key role in mediating the power-sharing agreement among opposing parties. Kenya's political elites were ushered along by the timetable set during the peace and reconciliation process. This in turn was used as a political opportunity to ensure the culmination of a constitutional reform process that had been underway since 2000.

The peace process, thus, created a moment of opportunity, which in turn gave rise to a Constitution that can be characterized, alongside many new constitutions in countries emerging from conflict and fragility, as being transformative in its ambitions of social justice reflected in the Bill of Rights. The Constitution also contains provisions that should facilitate litigation on socioeconomic rights through a newly empowered judicial branch. It is crucial that the new text has been received and supported by the majority of Kenyans as a legitimate text.

Source: Akech (2010); Domingo and Wild (2012).

in a potentially transformative Constitution, illustrates how peace processes and subsequent endeavors to reshape relevant institutions can generate moments of opportunity for international support (Box 15). Crucially, these are dynamic, fast-moving, and unpredictable processes of change. They require ongoing analysis to capture emerging opportunities to support progress toward human rights and embed human rights principles as processes and relationships between key stakeholders are reshaped and redefined.

The (re)writing of constitutions can be an opportunity to alleviate and transform conflict (Babbitt, 2010; Samuels, 2006). The process itself may transform relations between erstwhile enemies and serve as a means for developing a working relationship—and even a degree of trust—between key actors. An additional function of constitution-making is to domesticate international human rights norms and make them authoritative for the exercise of political power (Deng, 2008).

Constitutional reform, which includes the expansion of constitutional rights—including to be better aligned with international human rights norms—has featured increasingly in developing countries. When this has also included the establishment of new accountability institutions and mechanisms of rights redress (such as empowered and independent courts or autonomous human rights ombudsmen), it has in some cases led to new forms of rights litigation and progressive judicial activism, through new jurisprudence for rights. Constitutional tribunals in South Africa and Colombia are key examples of this. In Colombia, this has also acted as a restraint to human rights abuses resulting from ongoing conflict challenges. This makes constitutional reform a

potential entry point for development agencies seeking to apply a human rights-based approach (see Gauri and Brinks, 2008; Gloppen et al., 2010).

Third, in relation to using support for the realisation of constitutional rights as an entry point, **donors can make strategic choices to position themselves at the most relevant institutional level**, selecting ones where legal mobilization is most likely to be effective. In the case of internally displaced persons in Colombia, for instance, the World Bank has been involved in supporting displaced persons to claim back property through a number of challenges using existing legal frameworks and governance institutions and invoking a language of property rights. This is an example of World Bank support for rights in a fragile and conflict-affected situation that contributes to rebalancing power relations in favor of a particular marginalized group, even if it is not explicitly framed in this way (Box 16).

Fourth, **the legal empowerment of marginalized groups can help to address social exclusion**. This includes working with victims or marginalized groups to improve their awareness of existing or emerging entitlements (from constitutional processes or international or regional human rights commitments) and/or their capacity to act. Such work can include research about the current status of the rights of certain groups or persons belonging to such groups, to help place a spotlight on neglected issues (Box 17).

Fifth, **where legal pluralism is a reality, international action may be most effective through engaging with non-state and informal institutions**. In some fragile and conflict-affected situations, new constitutionalism has

Box 16: World Bank Research on Women's Legal Rights in Kenya

The World Bank's Justice for the Poor program in Kenya funded a qualitative study investigating the factors preventing women from accessing their rights in the formal and informal systems. The study found the juxtaposition of the formal and informal systems under weak institutions had led to a general disorganization where all avenues could easily be misused to deny women access to land instead of upholding their rights. This, coupled with the erosion of safety nets, has led to wider acceptance of the self-serving behavior of individuals seeking to acquire land at the expense of women. The study recommended working with community elders and provincial administration officials to change attitudes at community level.

Source: Harrington and Chopra (2009).

resulted in efforts to formally acknowledge legal pluralism, including as a mechanism to resolve past issues of exclusion and discrimination. The new Bolivian Constitution of 2009, for example, gives equal position to different norm systems, including both formal institutions of the state and indigenous norms of self-governance, justice, and administration of territory. This constitutes an innovative shift in the normative premises and symbolic representations of law and legality, citizenship, and rights, which could have a lasting effect in terms of redefining power structures (Domingo, 2010). It should be noted, however, that the new Constitution also establishes a hierarchy of norms in that all dispute resolution mechanisms must be subordinated to respect for human rights. The Interim Constitution of South Sudan makes similar provisions for recognizing legal pluralism. In this case, the formalization of legal pluralism has raised concerns among women groups that this will entrench gender inequalities, given that some customary norms discriminate against women.

Informal institutions and community systems of governance should not be idealized however. Social exclusion is a problem not only between different (identity-based) groups but also within them, and there are legitimate concerns that communal/informal systems of authority can reinforce social exclusion, for example, by marginalizing or discriminating against women, children, or lower-caste groups. Therefore, recognition of legal pluralism is not free of tensions vis-à-vis human rights, and these need to be recognized and acknowledged. In Bolivia, for instance, an intercultural dialogue has been ongoing over the past 10 years exploring different ways in which human rights can be made compatible with indigenous systems of rule.

3.5 Service Delivery and infrastructure Interventions

In countries affected by ongoing conflict, concerns about supporting political settlements and peace processes are often insufficiently connected to those about attending to the

Box 17: Project on Protection of Land and Patrimony of Internally Displaced Persons

In 2003, the World Bank funded a project to assist internally displaced persons to reclaim land in Colombia through the Post-Conflict Fund, which formulated the Protection of Patrimonial Assets of Internally Displaced Persons Project, implemented between 2003 and 2005. The project used a participative, decentralized and inclusive approach, and included (a) the participation of national and local governmental organizations, local authorities, affected communities, and NGOs; (b) alliances among the different stakeholders involved; and (c) ethnic and cultural strategies that reflected the diversity of the country.

Two procedures were designed to protect internally displaced persons rights to land: one for those already displaced (the "individual route") and another for municipalities and territories with massive displacement or risk of displacement (the "collective route"). Through the first procedure, any displaced person could request the protection of his/her abandoned or disposed property. Through the second, the Municipal Committee for Comprehensive Assistance of Internally Displaced Persons could declare an area as affected by displacement or at risk of displacement, thereby protecting all properties.

Source: Acción Social (2010).

immediate needs of the population. Where the state cannot or will not provide basic services or rights, non-state actors and institutions become the dominant arbiters of developmental processes. *Can human rights in development and a human rights-based approach add value to donor sectoral and infrastructure programming in these contexts?* Systematic research in this area remains scarce, but there are some positive examples that suggest that a human rights-based approach can contribute to service delivery in fragile and conflict-affected situations. The human rights-based approach element that appears most relevant to this question is the embedding of human rights principles of accountability, inclusion, and non-discrimination in decision-making processes about resource allocation.

Key messages

- A human rights-based approach to service delivery can provide benchmarks against which to assess service delivery programs and policies, including where services are delivered by non-state actors.
- Human rights analysis can also help in unpacking the power dynamics and fault lines of exclusion and discrimination that inhibit equitable access to services.
- More inclusive and accountable processes of decision-making on resource allocation, service delivery and infrastructure provision, including by enabling marginalized groups to have more voice, can contribute to building trust and social cohesion within society and in state-society relations.

Service delivery and inclusive state-building

Service delivery is a core dimension of state-society relations. States that are able to provide their populations with basic services and rights such as in health, education, water, and sanitation are more likely to foster conditions of resilience and build state-society relations founded on trust and reciprocity, which are at the core of a social contract.

Services are delivered in multiple ways however. From a human rights perspective, it matters whether this is in keeping with international human rights norms and whether they are framed as constitutional entitlements or not. In practice, there is a range of institutional and constitutional arrangements, political choices, and capabilities (including fiscal) that define and condition the mode and quality of service delivery. In the long term, however, the sustainability and legitimacy of state-building processes, and the resilience of state-society relations, depend on the extent and quality of service delivery and the degree to which it addresses patterns of exclusion and entrenched biases across social, ethnic,

cultural, geographical, or other cleavages. To achieve such outcomes, the state must be able to monitor the quality of its service provisions. Therefore, its regulatory capacity does matter (e.g., through the rule of law), as does how citizens exercise accountability (OECD, 2008).

In all countries, service delivery options are conditioned by the political economy of state-society relations. However, conditions of fragility and conflict are particularly disruptive in terms of meeting the basic needs and rights of the population, and service delivery is typically poor in conflict-affected settings. In turn, lack of access to basic services undermines the state-society compact and may be a key driver of fragility and conflict. Just as fragility erodes state capacity to provide services, poor service delivery undermines the legitimacy of the state and destroys capabilities and resources in the population (Baird, 2011; OECD, 2008).

Therefore, attending to service delivery is a matter of urgency in fragile and conflict-affected situations because improved service delivery can contribute to social and economic recovery by creating a virtuous upward spiral that can facilitate transitions from fragility to resilience (OECD, 2008). In addition, different services have different potential impacts in terms of the building-up of capabilities and societal resilience. Access to education, for instance, is thought to be important for enhancing the agency and capabilities of affected populations (Box 18).

In fragile and conflict-affected situations, policy responses to weak service delivery have often not been based on long-term development strategies. In some cases, they reflect rapid responses to the urgency of dealing with situations where the humanitarian logic of addressing emergency and life-threatening needs is still prevalent, or where the "peace dividends" of stabilization take precedence. Therefore, the emphasis in interventions may be less on how services get delivered (e.g., an interest in whether they are part of a broader rights commitment) and more on whether they respond to the need to get things done as quickly as possible. However, there is growing recognition that, at times, the logic of rapid responses has neglected issues of equity in service provision (Buchanan-Smith and Fabbri, 2005; Vaughn, 2006). Human rights-based approaches may therefore offer a conceptual framework that helps agencies better integrate their relief and development efforts (Darcy, 2004).

Entry points for engaging with service delivery from a human rights perspective

Donors have several potential entry points for supporting service delivery from a human rights perspective, with choices

Box 18: The importance of education in providing protection and enabling agency

There is evidence that education contributes to (re)building capabilities in fragile and conflict-affected situations in the following ways:

1. "Safe schools" programs can protect children from conflict and are thus bundled with issues of security provision.

2. Schools can help prevent children from being recruited into activities related to combat, forced labor, or drug trafficking.

3. Education is a powerful tool of intergenerational change. It has an impact on wider society by contributing to the understanding of public issues, supporting women's empowerment, and raising awareness about rights and entitlements.

Source: OECD-DAC (2008); Vaux and Visman (2005).

influenced by the governance level they prefer to focus resources on and the types of actors they wish to engage. Evidence about how human rights-based approaches have effectively informed service delivery programming in fragile and conflict-affected situations is underdeveloped however. In some cases, donors are using human rights principles (including transparency, accountability, and more inclusive modes of participation) to inform decision-making processes at different governance levels. A rights-based analysis can also help in unpacking the power dynamics and fault lines of exclusion and discrimination to ensure programming does not exacerbate these. Finally, judgments on how to use different aspects of human rights-based approaches for service delivery must be based on context-specific analysis of the potential entry points (DFID, 2005a).

Below are reviewed some service delivery methods that represent potential entry points for development partners in fragile and conflict-affected situations and how a human rights-based approach is relevant. But context-specific conditions will dictate appropriateness of focus.

First, **in some post-conflict states (notably where there is some degree of state and legal capacity in place), supporting rights claims through the courts might be relevant.** Colombia and South Africa provide examples of how constitutional rights in keeping with human rights norms can make a difference to service delivery when combined with effective redress mechanisms, notably rights claims through the courts. For instance, rulings of the Constitutional Tribunal in Colombia draw on the 1991 Constitution to use a human rights-based approach to order and follow up on more inclusive social policies and policymaking processes related to service delivery. One example is the judgment regarding internally displaced persons (already noted in Section 3.4).

Systematic efforts to attend to the needs of internally displaced persons came only after the court declared their conditions to be unconstitutional. As a result of this and of other rulings that issued orders to remedy budgetary and administrative capacity shortfalls and establish minimum levels of protection of IDP rights in an effective and timely manner, funding for IDP programs has increased and permanent evaluation mechanisms have been established on service delivery.

In South Africa, where social rights were enshrined in the Constitution as part of the post-apartheid political settlement, human rights activists have used the Constitutional Court to obtain services for marginalized groups that included, for example, prisoners, informal settlements, and HIV-positive pregnant mothers (Berger, 2008; Gloppen 2011; Yamin and Gloppen, 2011). The 2000 Grootboom case on the right to housing for people in emergency situations pioneered the court's use of judgments that, rather than ordering specific actions, require the state to publish a new policy to remedy rights violations. These examples illustrate how political settlements, and constitutional rights arising from these, can support better service delivery by creating benchmarks for policy and ordering authorities to make service delivery, policy development, and implementation a priority. Thus, focusing on legal empowerment in such contexts may be effective.

Even in contexts where the justiciability of social and economic rights is not part of the normative, institutional, or constitutional fabric of a society, a human rights-based approach can still influence service delivery in other ways, as suggested in the following example.

Second, **where the state is fragile, government service provision is likely to be weak.** This means that, in many fragile and conflict-affected situations, it is predominantly non-state (and often informal) actors who are in charge of

service delivery, such as private entrepreneurs, NGOs, communities, and households (Batley and McLoughlin, 2010). The use of non-state service provision is common to many developing (and developed) countries but poses particular challenges in contexts where processes of state-building are underway because it risks undermining the process by which regulatory capacity is built up and can preclude the possibility of a social compact based on state-assured entitlements. Examples that have been put forward of the use of non-state service provision, such as the case of Afghanistan, arguably served to undermine the accountability and legitimacy of the state (Ghani and others, 2007).

In these cases, a key challenge in fragile and conflict-affected situations lies in reconciling two, potentially competing, objectives: how to use whatever limited capacity is available to deliver core functions (such as providing basic services, even if through non-state providers) in the short term without undermining the broader institutional capacity of the state over the medium term (Baird, 2011; Pavanello and Darcy, 2008). Recognition of this tension can produce multiple track approaches, whereby parallel systems are tolerated in extreme cases where the state has no ability to provide services but governments are gradually supported to play greater roles in policymaking and regulation as they transition out of fragility (Batley and McLoughlin, 2010). Some of these non-state actors (such as international NGOs) also adopt aspects of a human rights-based approach to service delivery, particularly in terms of promoting human rights principles in their work.

Third, **some interventions have taken service delivery and development programming closer to the subnational and community levels.** For example, Community-driven development (CDD) programming emphasizes principles of empowerment, participation, and accountability at the community level in relation to planning decisions and investment of resources across a range of service and infrastructure issues. It supports local management of resources and decision-making to create opportunities for poor and marginalized groups to gain greater voice and control over these (World Bank, 2006a).

Using CDD programming to support service delivery and the reconstruction of infrastructure can be appropriate in fragile and conflict-affected situations where conflict legacies mean that state institutions are particularly weak or unviable. Moreover, it can contribute to the rebuilding of interpersonal trust and social cohesion by engaging members of the community in the organization of resources. It does this by supporting community interaction and facilitating networking and institutional relationships that shape decision-making for resource allocation, service delivery, and the definition of infrastructure priorities.

Therefore, community-driven development can invoke human rights principles that contribute indirectly to improving forms of inclusive and participative decision-making about how resources are channeled and services prioritized. The effectiveness of programming is further enhanced if this approach is complemented by a politically informed, ongoing context analysis.

Box 19: CDD programming—the National Solidarity Program in Afghanistan

The National Solidarity Program is a nation-building exercise focused on local governance in Afghanistan. Since its inauguration in 2003, it has established over 22,500 Community Development Councils in all 34 provinces and financed over 50,000 development projects. Emphasizing democratic and gender-balanced councils, there is a focus on building representative institutions for village governance. Typical projects construct or improve critical infrastructure, such as communal drinking-water facilities, irrigation canals, local roads and bridges, and electrical generators, and offer vocational training or literacy courses to villagers. Economic evaluations show consistently high rates of return across all sectors. One mid-term evaluation found evidence of greater public faith in the national government, along with better community relations.

Lessons learned are that community-centered programs can be effective when they take account of the following: the importance of context-specific dynamics of fragility and conflict and the implications of these for unresolved grievances and social divisions, the need to understand key actors in the community, the need for a flexible approach that can be adapted to changing needs and circumstances, and an appreciation of the limitations of what can be achieved.

Sources: World Bank (2006a; 2011a).

Fourth, **one of the overarching objectives of interventions in fragile and conflict-affected situations is to facilitate a transition from fragility to resilience.** Therefore, approaches that are able to capture the dynamics of change and shift the focus of service delivery from the local to the national contribute to the long-term state-building goal of consolidating a state-society compact based on reciprocity and to the possibility of a sustainable social contract that respects, protects, and fulfills human rights.

In part, this involves reconnecting programming that has been taken to the local level back to the national level as state capabilities improve. This is the experience of health care provision in Timor Leste where, in the early transition period, service delivery programming initially focused on the emergency re-establishment of services using non-state delivery mechanisms, but in the context of a longer-term plan to build the capacity of the Ministry of Health so it could take over responsibility for health care provision within two years (Brinkerhoff, 2007, in OECD-DAC, 2008).

The DFID guidance on using a rights-based approach to reducing maternal deaths takes a comprehensive view of human rights-based approaches (DFID, 2005b). It draws on different aspects of human rights to underline the power dimension of service delivery challenges and how a human rights lens might improve program effectiveness in service delivery for maternal health. This approach has four key components: (a) It stresses the value of using human rights standards as benchmarks against which to assess service delivery programs and policies. (b) It highlights the relevance of invoking the range of human rights principles at different levels of service delivery. (c) It advocates the value of engaging in power analysis from a rights perspective in order to identify issues of inequality and discrimination. (d) It suggests the need for ongoing political and social analysis to identify changing conditions and emerging opportunities for change at different national and subnational levels, and among different actors.

Thus, different fragile and conflict-affected situations contexts present different opportunities for service delivery to be informed by an human rights-based approaches. In some cases, donors work in conditions of sparse institutional and societal capabilities and where political settlements are only weakly, if at all, structured to integrate more equitable rules of power and resource allocation. In other cases, emerging institutional mechanisms and new social contracts between state and society premised on social and economic entitlements can create different entry points for donor work on service delivery and rights. A human rights-based approach that is able to identify such opportunities can add value to development interventions designed to promote inclusion, participation and social equity. Ultimately, however, the regulatory capacity of the state needs to feature as a medium-term (and integrated) objective so short-term gains in delivering services at the local or subnational level can be harnessed as a resource for longer-term state building.

4. Toward an Operational Framework for Applying HRBAs in Fragile and Conflict-affected Situations

The five thematic areas addressed in this report relate to different policy challenges in supporting state-building processes and long-term development goals in fragile and conflict-affected situations. These themes feature prominently on current international agendas for addressing conflict and fragility. The report suggests that human rights norms and principles can contribute to the achievement of development objectives in fragile and conflict-affected situations, including with the renewed focus on state-society relations.

The report began with a discussion of the connections between (and legacies of) violence, security, and justice deficits, and the implications of these deficits for the prospects for rule of law and broader development outcomes. Supporting reform in these policy areas involves especially addressing the *process dimension* of how human rights norms and principles can inform state-building objectives in fragile and conflict-affected situations. From a human rights perspective, this should include supporting processes of change that integrate inclusion, accountability, and non-discrimination into the relevant institutions and norm systems that resolve disputes and provide security and protection. The aim is to limit the scope for impunity, embedded structures of discrimination, and outright vulnerability to violent threat, all of which may be driving conflict and fragility. The process dimension of human rights therefore matters for building inclusive and legitimate states, because it is about *how* societies engage with governance institutions and decision-making processes, and how participation and oversight takes place.

But the resilience and inclusiveness of state-society relations also depends on the underlying understanding of social justice. This is fundamentally about how contestation over the distribution of political power and resources unfolds, is resolved over time, and shapes state-society relations. Embedded patterns of social exclusion and discrimination, or biased, inequitable, or deficient provision of basic services may be root causes of fragility and conflict. In order to address these root causes, it matters how the *substantive* and *normative dimension* of human rights informs and contributes to the terms of the political settlement. Therefore, state-building and development interventions that advance social justice goals as reflected in legally binding human rights norms are relevant to supporting more inclusive state-society relations. International actors can use human rights norms and principles in different ways to support processes such as more inclusive constitutional reform, strengthened legal and social accountability over entitlements, or more equitable service delivery, at the same time acknowledging that these are deeply political processes.

Respect for and promotion and fulfillment of human rights is a legitimate goal in itself. The different sections of this report also have shown how different aspects of human rights can contribute to reshaping the dynamics of state-society relations in ways that enhance inclusivity. First, using a human rights lens can help

to address the legitimacy deficit of fragile states by making visible the grievances and legacies of rights abuses that might be at the root of conflict and fragility. Second, human rights articulate a vision of social justice that can reduce the risk of conflict, but which usually demands reshaping the terms of the political settlement—a process that may itself be a source of contestation and resistance. Third, a human rights approach can enhance the agency of marginalized or excluded groups in ways that matter for the quality of state-society relations, including through enhanced levels of legal voice and social accountability. But this is unlikely to be achieved without resistance.

However, this report also highlights that, while a human rights lens has the potential to support transitions from conflict, identifying concrete ways in which a human rights-based approach can be used to guide donor interventions and achieve transformative change on the ground is much less clear. A human rights-based approach can be challenging in all contexts, but the extreme conditions of fragile and conflict-affected situations such as ongoing conflict, severe resource constraints, a contested political settlement, and entrenched patterns of social exclusion and discrimination make the operational difficulties of using a human rights-based approach even more challenging, just as for all other development work in fragile and conflict-affected situations.

In part the challenge lies in the difficulty in establishing a clear empirical connection between human rights-based approaches and transformative change. Human rights-based approaches have already tended to move away from standardized ones that assume that the legitimacy of human rights norms and principles, in and of itself, means they have transformative potential toward recognition that their realization can be the result only of national political dynamics (Uvin, 2006). This shift has led to an acknowledgment in human rights-based approaches of the need to work with context-specific realities (OCHRC, 2006). Nevertheless, there sometimes remains a prescriptive tone in human rights-based approaches that does not always sufficiently engage with the constraints and realities of specific socio-political contexts, or with the de facto norms and incentive structures that shape the conduct of key actors.

The development debate has moved beyond a one-size-fits-all approach to working with human rights norms and principles. A context-appropriate strategy to integrating human rights is needed—one grounded in an assessment of the prevailing norm systems (both formal and informal) that define entitlements and power relations and how different actors are situated in relation to these. Such an analysis includes identifying how key actors stand to gain or lose from progress toward improved human rights standards and application of human rights principles, and how this might shift (incrementally) over time. Section 3 showed that, where international actors have had a deeper understanding of context and worked across the range of relevant institutions and actors, human rights perspectives have tended to be more effective.

Going forward, new diagnostic tools are needed that can help unpack the "black box of context" from a human rights perspective. This requires not only having a deep understanding of context but also using this knowledge to critically review assumptions about what concrete actions (informed by a human rights perspective) can lead to intended outcomes. The processes of transformative change are not linear. Using ongoing analysis to unpack the black box of context can improve the design of interventions that contribute to iterative and incremental change by shifting the balance of power and altering existing interest and incentive structures, as well as enhancing capabilities of key actors.

Such an analysis will help practitioners to identify entry points that are more relevant to context. It can also provide guidelines for addressing ongoing operational challenges to ensure that international action, at a minimum, heeds the obligation to do no harm and, at best, uses appropriate dimensions of human rights-based approaches to embed human rights norms and principles in ways that are meaningful to context and add value to broader development goals.

Engaging with the black box of context is of course not new to development policy; different forms of social and political analytics now feature among most development actors in some form. More recently, there has been a focus on problem-specific political economy analysis (see, e.g., Booth and Golooba-Mutebi, 2009;

Figure 1: HRBAs and the black box of context-specific challenges
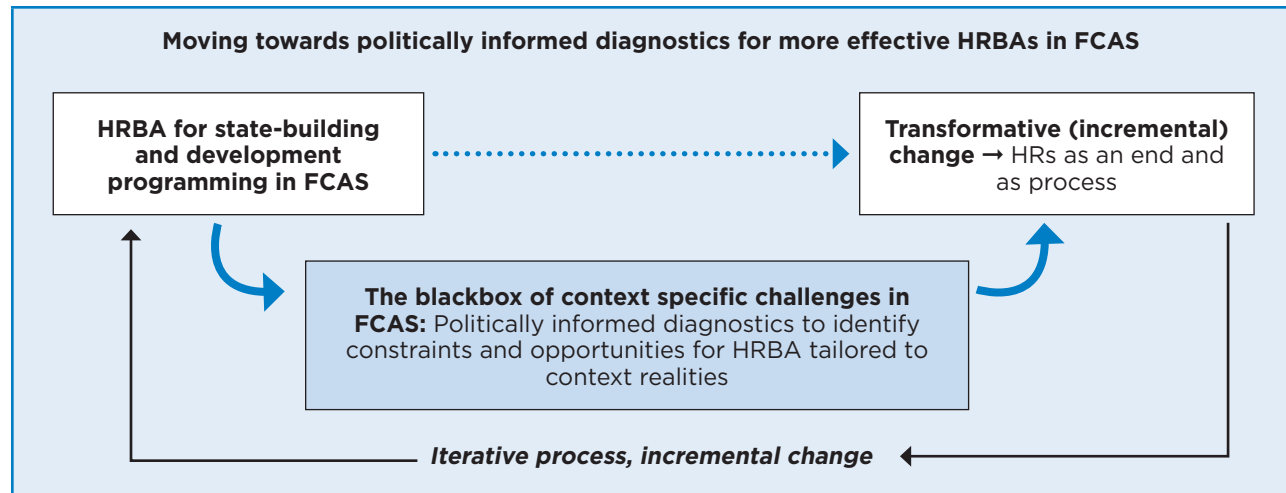
DFID, 2009; Fritz and others, 2009; World Bank, 2006b). But work still needs to be done in terms of adapting these to human rights perspectives and approaches.

This report concludes with an outline of what a *politically informed diagnostic framework* for using human rights-based approaches might look like. See Table 1 below for a synthesis of the possible components of such a diagnostic framework.

A: Diagnostics phase

While this should be part of the strategic, planning, and design phase, the five elements identified here should also be embedded in implementation phases to ensure ongoing attention to changing dynamics and to build in the ability to adapt to significant change.

- **Identifying the nature of problem.** This involves not only identifying a concrete objective but also unpacking and questioning underlying assumptions about expected outcomes from interventions that address a particular problem. It is also important to assess how action in relation to one problem can affect other policy spheres, including with unintended consequences for human rights.

- **Understanding systemic and structural conditions.** This involves identifying the constraints that condition the nature of the problem (e.g., historical legacies of state formation, the nature and legitimacy of prevailing—formal and informal— institutions, prevailing social norms, drivers of conflict such as ethnic, class or regional divides, discriminatory patterns, and dynamics of social

exclusion). This analysis is crucial for identifying relevant entry points. For instance, where legal pluralism is the norm or where formal state institutions are weak, it may be more realistic and productive to work with prevailing (non-state) institutions and social norms where principles of accountability, inclusion, and non-discrimination can be articulated in terms of local narratives of social justice and entitlement.

- **Key actors and the interests and motivations that shape their conduct.** This requires forms of stakeholder mapping that also examine the interest and incentive structures that relevant stakeholders respond to and how they are positioned in relation to the intended outcome. This includes unpacking the nature of the interface between duty bearers and rights-holders.

- **Using human rights analysis to ensure "do no harm".** The particular focus of a rights-based analysis, which emphasizes issues of exclusion and discrimination, can unveil those blockages and resistance to change arising from the particular features of prevailing power and interest structures and where donors can avoid perpetuating these.

- **Tracking the dynamics of change.** This is crucial in helping identify windows of opportunity as they arise. *Ongoing analysis* can also track shifts in incentive structures. For instance, it may not always be possible to motivate "buy-in" for intended change among spoilers but, over the medium term, the balance of power might change, creating new incentive structures and opportunities for support. For example, processes of constitutional reform,

as in Kenya, provide moments of opportunity that can unleash positive synergies across a range of policy areas relevant to advancing human rights norms and principles.

B: Implications for entry points and ongoing operational challenges

The above diagnostics should contribute to identifying both relevant entry points and the socio-legal or institutional sphere where international engagement is likely to be most effective. This potentially includes engaging with non-state institutions and working with non-state actors.

Such analysis should also identify issues that should inform operations and risks that need to be considered. Examples of such issues and risks were discussed in Section 3 and are highlighted in the following:

- **Identifying institutional level and actors.** Unpacking the relevant institutional levels (subnational, national, and/or international) will inform decisions about how rights may be used. It is critical that institutions (both formal and informal) are themselves dynamic and changing spaces, not least because of the way in which they interact and different actors move within and across them. For instance, women's groups working at a community level where formal rights are precarious for women may under some conditions invoke international commitments under CEDAW to shift attitudes about entitlements at the community level.

  It is important to be aware of the risks involved with working with different institutions. For instance, while there are good reasons to focus on non-state actors or institutions where these are relevant, this report has noted that there are legitimate concerns about whether communal or informal systems of authority perpetuate social exclusion, for example by marginalizing or discriminating against women, children, or lower-caste groups. But focusing only on formal institutions where these are absent or captured by elites may also do more harm than good.

  A dynamic approach to working across the spectrum of potentially relevant institutions requires deep understanding and continual assessment of how they are interrelated, how they are embedded in different sectors of the population, which interests they serve, and which actors and coalitions of actors at different (international, national, and subnational) levels are the most relevant to engage.

- **Appropriate skill sets.** Despite widespread acknowledgment of the need to understand and engage a variety

of institutional levels and non-state actors, especially in fragile and conflict-affected situations, this remains a difficult policy space for some donors who remain more comfortable working with the state. In part, this requires rethinking personnel requirements, in terms of both analytical skills and ability to engage a range of actors. This is especially relevant in contexts of institutional hybridity.

- **Flexibility in programming.** Programs need to be designed so they can adapt to whatever new opportunities or risks emerge from an ongoing diagnostic analysis of the dynamic and rapidly changing contexts in which they are implemented. At the same time, it is crucial to heed the do-no-harm principle, which may be imperilled by quick decision-making in the name of flexibility.

- **Potential tensions and dilemmas.** This is often challenging in fragile and conflict-affected situations, but development partners need to ensure there is strategic thinking in relation to the potential tensions and dilemmas that may arise. For instance, rushing transitional justice objectives can jeopardize the buy-in of key elites around peace-building or constitutional reform processes, which may lay the foundations for more inclusive political settlements in the medium and short term. At the same time, failure to address legacies of violence and human rights violations can embed negative synergies in emerging post-conflict political settlements, with the potential for conflict-related violence to be transformed into other forms of violence. Ongoing analysis would be attentive to such risks, while also capturing windows of opportunity to address legacies of impunity as these arise. All good things do not go together however, and prioritization cannot be avoided.

- **Realistic ambitions.** It is important to remain realistic about the transformative potential of human rights-based approaches. For instance, while community-driven development in Afghanistan may be obtaining good results on the ground in some subnational contexts (and this should not be underrated), its impact on broader national processes is not yet clear. At the same time, positive change at the community level or among marginalized groups is important and matters for concrete populations. Moreover, it constitutes part of the incremental change that can be realistically aspired to.

- **Realism about the role of impact of international actors.** It is important to be realistic about the role of international actors in advancing transformative goals of human rights-based approaches.

Table 1: Politically informed diagnostics framework to inform context-specific HRBA in FCAS programming for state-building and development interventions

Merits of an HRBA to inclusive state-building and long-term development in FCAS	Nature of challenge	In FCAS, there is a need to identify blockages that impede transition processes from conditions of conflict and fragility to resilient and legitimate state-society relations through inclusive state-building.	Identifying entry points and working with ongoing operational challenges
		Diagnostic framework ⟶	
• There is a strong normative case for supporting progress on human right as an end. • Integrating a human rights lens can improve a legitimacy deficit by addressing past rights abuses and grievances driving fragility. • Increasing social justice reduces the risk of conflict by promoting inclusive development. • Human rights norms and principles may contribute to agency of marginalized and excluded groups.	What is the problem?	What is the specific problem? What is the intervention goal? How does it affect related policy areas and development objectives?	*Policy area entry points.* • Support to *process dimension of rights:* • Security and protection of citizens (capacity for law enforcement and prevention of violent conduct) • Justice mechanisms (dispute resolution and rights protection and judicial review) • Accountability (including in transitional justice) and mechanisms of redress for rights, also at international and regional levels, through rule of law and regulatory capacity of the state • Human rights principles of inclusion, participation, accountability, and non-discrimination, including when feasibility of norms to enhance agency is weak Support to *substantive* dimension of human rights: • Facilitate and incentivize inclusive political settlements and corresponding norms of social justice • Support to inclusive constitutional reform and expanded constitutional rights in alignment with international human rights norms • Support to equitable service delivery (including among non-state providers) • Support advocacy and socialization of human rights norms
	What are systemic/structural legacies and constraints?	• Longstanding structural legacies, histories of state formation, and political regime • Evolution of political settlement and corresponding rules of power and resource allocation • Nature of conflict and related grievances • Nature of institutional realities (formal and informal), including institutional hybridity and legal pluralism, and interface between international, national and subnational rights and justice institutions • Prevailing belief and value systems and social norms • Features of ethnic, cultural, class, regional, and other cleavages relative to conflict and fragility	
	Who are the key actors and the interests and motivations that shape their conduct?	• Who are the key actors? • How do they stand to lose or gain from integrating human rights norms or enabling human rights principles? • What is the prevailing balance of power, and how is resistance to transformative change manifested? • What leverage do actors have to obstruct or support transformative change and to change incentive structures? • What are the features of agency and voice of different actors, and how might these change over time?	*Working with relevant actors and at the relevant institutional level:* • Identify relevant socio-legal sphere for international engagement, including non-state institutions, and work with non-state actors where these can advance human rights principles and norms • Support positive synergies between institutions and actors to enhance incentives for change *Engaging with dynamic (incremental) processes of change and shifting balance of power:* • Be attentive to changing moments of opportunity, such as constitutional reforms and human rights trials, which can shift perceptions about accountability or entitlements

Table 1: Politically informed diagnostics framework to inform context-specific HRBA in FCAS programming for state-building and development interventions *(continued)*

Merits of an HRBA to inclusive state-building and long-term development in FCAS	Nature of challenge	In FCAS, there is a need to identify blockages that impede transition processes from conditions of conflict and fragility to resilient and legitimate state-society relations through inclusive state-building.
	What are the dynamics of change that alter opportunity structures?	• What dynamics of change need to be considered? • How does the logic of different timescales across different policy spheres relate to the problem at hand (e.g., peace vs. justice)? • Be attentive to balance of power and interest structures and shifting coalitions of change • Engage in ongoing context analysis for dynamic engagement with changing conditions • Ensure flexibility in programming to adapt to changing conditions *Risk factors:* • Consider risks to human rights of unintended consequences of programming (do no harm) • Be aware of and explicit regarding tensions and dilemmas as these arise across programming areas and development agendas—all good things do not always go together • Be realistic regarding transformative potential of HRBAs • Be realist about role of international actors in advancing transformative goals of HRBA

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Appendix 1: International Human Rights and Humanitarian Norms and Key Concepts

International human rights norms, conventions

The *Universal Declaration of Human Rights* signed in 1948 sets out fundamental rights to be universally protected.

There are nine core international human rights treaties. Each has established a committee of experts to monitor implementation of the treaty provisions by its States parties. In addition, some of the treaties are supplemented by optional protocols dealing with specific concerns.

The Rome Statute for the establishment of the International Criminal Court

The Rome Statute was signed in 1998 and entered into force in 2002. It established the **International Criminal Court** as a permanent *tribunal* mandated to prosecute individuals for *genocide*, *crimes against humanity*, *war crimes*, and the *crime of aggression* (although the latter cannot be subjected to trial until 2017)

Nine core international human rights treaties				
			Date	Monitoring Body
1	ICERD	International Convention on the Elimination of All Forms of Racial Discrimination	21 Dec 1965	CERD
2	ICCPR	International Covenant on Civil and Political Rights	16 Dec 1966	CCPR
3	ICESCR	International Covenant on Economic, Social and Cultural Rights	16 Dec 1966	CESCR
4	CEDAW	Convention on the Elimination of All Forms of Discrimination against Women	18 Dec 1979	CEDAW
5	CAT	Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment	10 Dec 1984	CAT
6	CRC	Convention on the Rights of the Child	20 Nov 1989	CRC
7	ICRMW	International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families	18 Dec 1990	CMW
8	ICPED	International Convention for the Protection of All Persons from Enforced Disappearance	20 Dec 2006	
9	ICRPD	Convention on the Rights of Persons with Disabilities	13 Dec 2006	CRPD

Source: OHCHR, at http://www2.ohchr.org/english/law/

International humanitarian law

Whereas international human rights law is about the rights for individuals and corresponding obligations for states, international humanitarian law regulates the behavior of combatants in contexts of armed conflict. It provides rules regarding the treatment of prisoners of war, sick and wounded combatants and civilian populations. International humanitarian law has a number of sources, which include customary law, the 1899 Hague Conventions, and the 1949 Geneva Conventions.

Since September 11, 2001, there is a growing concern with addressing the challenges of how to regulate non-state armed conflict, as non-state armed groups have acquired greater salience in global concerns with conflict.

Geneva Conventions of 1949 and additional protocols

- First Geneva Convention: deals with the treatment of sick and wounded in the armed forces
- Second Geneva Convention: deals with the treatment of sick and wounded at sea
- Third Geneva Convention: deals with the treatment of prisoners of war
- Fourth Geneva Convention: focuses on the protection of civilians

Two additional protocols of 1977

- Protocol I: protection of victims of international armed conflicts
- Protocol II: protection of victims of non-international armed conflicts

Responsibility to Protect

The Responsibility to Protect (R2P) is a principle aimed at the protection of the world's most vulnerable populations from heinous international crimes. International discussion in response to the Rwanda and Srebrenica genocide, and within the forum of the International Commission on Intervention and State Sovereignty (ICISS), resulted first in a report by the ICISS and then a UN initiative of 2005 which was presented at the UN 2005 World Summit. It presents the notion that sovereignty involves a responsibility to protect the population from four identified crimes or mass atrocities. These concretely include genocide, war crimes, ethnic cleansing, and crimes against humanity.

R2P is not a legally binding principle but represents an emerging set of principles based on three key notions: (1) that states have a responsibility to protect their populations; (2) that the international community has a responsibility to help states where they are unable to protect the population; (3) where the state is unwilling to protect the population such, the international community has the responsibility to intervene, although military intervention is considered the last resort.[1]

Do-no-harm Principle

The concept of "do no harm" has its origins in Anderson's (1999) definition of humanitarian work. It stresses the need for international actors to ensure that their interventions are sensitive to context in ways that ensure they do not exacerbate drivers of conflict, violate human rights, or worsen societal divisions. Concretely it is intended to "minimize the harm they may inadvertently be doing by being present and providing assistance. Humanitarian actors need to be aware if aid is used as an instrument of war or if aid is an indirect part of the dynamics of the conflict" (Anderson 1999).

Do no harm has increasingly been taken up by development practice and concretely in relation to international interventions in fragile and conflict-affected situations. OECD-DAC (2010) specifically addresses the issue in relation to state building, and the do-no-harm principle is included as one of the ten principles for international engagement in fragile states (OECD-DAC, 2007).

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1   UN 2005 World Summit, http://www.who.int/hiv/universalaccess2010/worldsummit.pdf

Appendix 2: Relevant Normative and Institutional Levels for analyzing Rights

Multiple socio-legal spheres	Forms of rights and normative domain	Institutional level for action/reform
International human rights law	• Range of human rights norms, treaties, and conventions (economic, social, cultural, political, civil, labor standards) • Universal application, but subject also to levels of signing and ratification of international commitments • International customary norms on gross human rights violations (increasingly codified in international law)	• International level • Mostly implemented and monitored through UN intergovernmental processes, such as the treaty-based bodies. • International Criminal Court • On crimes against humanity, since the arrest of Pinochet in 1998, new international jurisprudence on cross-border adjudication for some crimes against humanity, including through domestic court jurisdictions
Regional law	• Human rights as defined through regional treaties and conventions • Applies to regional populations	• Regional level • Increasingly with statutory powers of enforcement, e.g., IACHR; Inter-American Commission; European Court of Human Rights
Constitutional law	National constitutional rights	• National level • Enforced through constitutional courts, national legal mechanisms • Oversight for enforcement or realization of rights may include human rights ombudsman
Statutory law	Statutory rights (conferred by the national framework of criminal, commercial and other law)	• National or local level (through devolved local government enacting by-laws) • Enforced through formal legal system, courts, arbitration panels, and formal alternative dispute resolution mechanisms
Religious law	Attitudes toward and norms about entitlements as derived from religious norms (mostly operating in the domestic and private sphere but under some conditions considerably extended)	• Religious systems of law can operate at multiple levels—global, regional, national, and local • Forms of authority and enforcement depend on relation with the state

(*continued*)

Multiple socio-legal spheres	Forms of rights and normative domain	Institutional level for action/reform
Community/ customary norms	Community justice mechanisms, mostly refering to community-level forms of dispute resolution, but also defining claims to resource and group rights through recognition of cultural diversity; mostly specific to localities and social/ethnic groups	• Mostly community level (but not exclusively so) • Often unwritten rules or laws • Tradition often plays an important role, but this may be invented or reinvented, as in the case of *sungusungu* community policing in Tanzania • Enforced through community structures of authority (e.g., chiefs or elders) • May be protected in constitutional law (e.g., Malawi)
Informal institutions or de facto rules of the game	Informal rules of political, social and economic exchange (such as kinship or informal resource allocation rules). Informal rules also have a bearing on how notions of entitlements are forged, including through such structures as the bonds and duties of patrimonialism or clientelism, for instance. These informal rules shape attitudes about entitlement, authority and the allocation of power and resources.	• National and subnational levels. • No formal incorporation into national legal systems; nonetheless, local or national elites may be able to co-opt elements of the state to help enforce elements of prevalent informal institutions • Informal institutions can also be taken as describing the (informal or de facto) norms of behavior operating within bureaucracies or state institutions

Note: No normative hierarchy is intended. This table serves a descriptive purpose only.
Source: Adapted from Moser and Norton (2001).

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