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The Case for Action on Transitional Justice and Displacement

Strategies During and After Conflict

As many European countries were beginning to emerge from the depths of the financial problems caused by the 2008 global crash, a new crisis emerged threatening to envelop the continent: the displacement of huge numbers of people fleeing humanitarian disasters in the Middle East and Africa and a slew of related political, financial, and security problems.

A huge number of the people coming to Europe originate in Syria and Iraq, but significant numbers come also from Afghanistan, Eritrea, and Ukraine, among others.¹ In most of these countries the crises that provoked the exodus are ongoing.

Mass displacement causes problems that have to be dealt with when a conflict is at an end. This includes aiding the return of people back to their home countries, developing plans for reoccupying houses and land, and other measures of reintegration and reparations. Traditionally it has been thought that resolving issues related to mass displacement (especially from a transitional justice perspective) has to wait for the end of a conflict: the issue is either seen as a second-order priority or one that can only be dealt with when peace comes. This paper challenges that notion. While it reflects on what can be done after a conflict, it argues that waiting for peace misses opportunities that allow for processes to develop even while conflict continues.

Technology has advanced: people can report on the events of their towns and villages instantaneously through smart phones and ever more sophisticated approaches to documenting and recording information. Experience teaches us that time can be used profitably without waiting for the end of a war to begin to address the causes and consequences of displacement. From developing accurate and credible accounts of violations and property and land holdings to creating DNA databases, concrete steps can be taken among displaced populations that have three advantages: they save time; they can inform the political discourse in which peace processes and negotiations take place, alerting participants to issues that have to be solved if durable peace is to be found; and they allow victims of displacement to play an active role in helping to shape their future.

It is in the interests of the states hosting the millions who have fled in fear to use the time and the presence of the migrants and refugees now to help shape the discourse and solutions for safer futures and allow for their return as quickly as possible.

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¹ See Lauren Parater, UNHCR, “10 Infographics that Show the Insane Scale of the Global Displacement Crisis,” UNHCR Innovation, <http://innovation.unhcr.org/10-infographics-that-show-the-insane-scale-of-the-global-displacement-crisis/>

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Integrating Transitional Justice Approaches into the Displacement Crisis

Transitional justice aims to promote peaceful and inclusive societies, provide access to justice (in various forms) for massive and serious human rights violations, and build effective, accountable, and inclusive institutions. Addressing the legacies of serious violations can be attempted through many different means. These include criminal prosecution, truth-telling initiatives, reparations and restitution processes, institutional reform, and social and cultural interventions. Transitional justice is about the pursuit of justice in exceptional circumstances constrained by politics and resources.

The numbers of displaced persons in the current crisis may be unprecedented. At least 12 million people are thought to be displaced internally or externally in Syria alone. There is no doubt that the primary generator of the current crisis is related to people fleeing war and violations, especially in Syria, Iraq, and Afghanistan.

Displacement is a concern of transitional justice because it is often integrally linked to human rights violations. First, violations such as mass killing, arbitrary arrest, torture, and rape, and the threat of their repetition, often cause displacement. Second, violations such as the destruction of homes and property are aimed at preventing people from ever returning home. Third, forced displacement is often a deliberate strategy of the parties to conflict and can constitute a war crime or a crime against humanity. Finally, displacement often leaves people vulnerable to a range of other violations, as they go months or years without the protection usually provided by their homes, livelihoods, communities, and governments.

Transitional justice should, therefore, be integrated into a comprehensive approach to resolving displacement crises. For the most part, this will occur once a conflict has ended, a political settlement has been reached, and internally displaced persons (IDPs) and refugees begin the long-term process of return and reintegration. Waiting for conflicts to be over to begin thinking about such a comprehensive approach is shortsighted and may miss contributions that can be made to peace processes directly or indirectly.

This brief note² considers two things: first, the contribution transitional justice approaches can make in relation to massive displaced populations and refugee communities while a conflict is ongoing and, second, the different ways in which transitional justice can be used after conflict ends to address injustices associated with displacement and contribute to “durable solutions”—voluntary repatriation, local integration, or resettlement in a third country or community. Potential challenges are highlighted along with recommendations of what can be done.

Contributions During Conflict

Given the choice, most refugees would return to their home countries as soon as it is practicable. But this requires minimum guarantees of security, the prospect of making a living, and having a home to go to. Peace processes in countries like Syria and Colombia, where the numbers of displaced are well into the millions, need to listen to the voices of the displaced and help ensure their safe and viable return. Positive efforts to understand the nature of the problem and the prospects of return are in the interests of not only refugees but also those hosting them.

Effective consultations about justice issues can and should take place with displaced populations even before return can be realized. This has three key advantages: First, it demonstrates not only that their plight is being taken seriously, but also that they are

² This note is partially based on a report by ICTJ and the Brookings-LSE Project on Internal Displacement, “Transitional Justice and Displacement: Challenges and Recommendations,” which highlights the findings of a multiyear research project. See also Roger Duthie, ed., *Transitional Justice and Displacement* (New York: Social Science Research Council, 2012); *Journal of Refugee Studies* 27, no. 2 (2014), special issue on “Accountability and Redress for the Injustices of Displacement”; and Megan Bradley, ed., *Forced Migration, Reconciliation, and Justice* (Montreal and Kingston: McGill-Queen’s University Press, 2015).

being engaged as agents in reflections on what should be done down the line. This can be an important step in developing a practice of participation in contexts where large swathes of the population have never been involved. Second, the results of such discussions and consultations can help frame the narrative in which peace processes take place. Analyses of peace processes over many years have documented the risks of elite deals that may end a war but lack the legitimacy to sustain a durable peace. Third, effective consultation and involvement of refugees and internally displaced populations can help frame responses to the atrocities themselves in terms of measures of acknowledgement, accountability, and redress.

In practical terms, accounts can be taken of what has been lost, DNA databases can be developed to help identify the remains of relatives in the future, and preliminary mappings of violations can be made to help prioritize appropriate responses when conditions allow.

Colombia is an example of a country that has engaged in both truth-telling initiatives and criminal prosecutions related to displacement even as that displacement and the conflict behind it are ongoing. In Syria, a number of initiatives have been at work during the conflict to document human rights violations in the interest of future redress and accountability measures. These initiatives have also recommended working with Syrian refugees to gather evidence in the form of documentation, testimonies, and photographs and to conduct outreach for such efforts with refugees in camps.³

This kind of work can help to reduce marginalization and develop practices of peaceful politics. There is also an opportunity cost in not investing in such practices. Expecting to deal with the massive nature of injustices only after the conflict has ended wastes time and capital. Further, displaced populations tend to be very politically engaged: politics for them is a matter of life and death. Experience shows that organizers in camps and in IDP and refugee communities often take up significant local and national political positions in the future in their countries of origin. It is better to engage with them early on.

Responding to Displacement After Conflict

Once conflict has ended, transitional justice measures can be part of the overall response, particularly if the displaced have already been engaged on the matter. Restitution of housing, land, and property, for example, is a justice measure clearly connected to displacement. Reparations programs can provide material and symbolic benefits to victims of violations that led to displacement, for the harms suffered while displaced, or for being a victim of displacement itself. In postwar Bosnia-Herzegovina, the restitution program processed approximately 200,000 claims issued by displaced claimants for lost homes. Guatemala, Peru, and Colombia are among the few examples of countries with reparations programs that included displacement as a crime meriting reparation. At a broader level, state attempts to support the resolution of displacement through repatriation, resettlement, or local integration may have reparative value if they are undertaken as an expression of the state's responsibility for generating, or failing to prevent, displacement crises.

Other transitional justice measures can address displacement as well. Truth commissions in countries such as Liberia, Sierra Leone, Timor-Leste, and Guatemala have increasingly examined the role of displacement in conflict, as well as the suffering and stigma endured by the displaced, and made recommendations. Criminal prosecutions can target the perpetrators of both the violations that caused displacement and forced displacement as a crime

³ See, SJAC website, "Refugees in Europe: An Opportunity for Justice," September 25, 2015; "Securing Archives at Risk: Event Hosted by Swisspeace," October 23, 2015, www.syriaaccountability.org; and Mark Lattimer, Shabnam Mojtahedi, and Lee Anna Tucker, "A Step towards Justice: Current Accountability Options for Crimes under International Law Committed in Syria," Ceasefire Centre for Civilian Rights and SJAC, April 2015.

in itself. An international legal framework allows for the latter, including the statutes of the International Criminal Tribunal for the former Yugoslavia (ICTY) and the International Criminal Court (ICC) as well as the Geneva Conventions.

Humanitarian, development, and peacebuilding actors have in certain cases participated in transitional justice efforts that address displacement. Restitution, for example, often involves a range of actors, such as UN Habitat, UNHCR, the International Organization for Migration (IOM), and the Norwegian Refugee Council (NRC). IOM also provides technical assistance and advice on reparations, while Médecins Sans Frontières (MSF) has helped to establish people's status as victims, which, along with other information gathered by governments and humanitarian agencies when registering displaced persons, can be useful in determining who should receive reparations. Humanitarian actors such as UNHCR have supported truth-telling processes, assisting the commission in Sierra Leone to facilitate refugee participation and the commission in Timor-Leste in return, reintegration, and reconciliation efforts. UNDP and UNHCR have both helped to set up national police units to protect displaced persons, and humanitarian organizations such as UNHCR also generally support efforts to fight impunity.

Contributing to the Resolution of Displacement

The most important long-term contribution that transitional justice can make to resolving displacement may be in facilitating the integration or reintegration of displaced persons, whether in their home, host, or resettlement communities and countries. Reintegration is critical to all three, but it is often significantly hindered by the legacies of past abuses, at both the individual and societal levels. Humanitarian interventions usually do not focus on these legacies, which means there is space for transitional justice to make a difference at the political, security, economic, and social levels. Politically, transitional justice may facilitate reintegration by reaffirming basic norms that were systematically violated, strengthening displaced persons' rights as citizens, and helping to empower the displaced by including their voices in the development of narratives that help societies move forward.

In terms of safety and security, criminal justice and security sector reform (SSR) may facilitate reintegration in the short term by providing protection and making it more durable in the long term by helping to prevent the recurrence of the abuses that led to displacement in the first place. They can do this by removing the individuals responsible for such abuses from the police, military, and judicial system, ensuring transparent and fair processes for judicial and senior police appointments, and establishing effective oversight mechanisms to limit the scope for abuse and corruption. In Bosnia-Herzegovina and Kosovo, for instance, the removal of perpetrators from police and the recruitment of underrepresented minority groups contributed to enabling the return of displaced populations.

Economically, restitution is often seen as a precondition for return because it enables reintegration by increasing access to shelter and land for agriculture or other economic activities, while financial compensation can help displaced persons to access resettlement or local integration opportunities by supporting the construction of new homes and businesses. Reparations and restitution may be especially crucial to the well-being of households headed by female returnees.

Socially, truth telling can, in certain circumstances, help reduce tensions between those who were displaced and those who stayed, revealing and validating the experiences of the different groups. Truth telling can also bring low-level offenders among the displaced together with communities to determine what steps may lead to their re-acceptance. Timor-Leste's truth commission facilitated a process through which displaced perpetrators could acknowledge their crimes, undertake reparative actions, and return home. Even where truth-telling processes do not have the direct impact of reducing tensions or building consensus, the practice of impartial investigation into such large social and political questions has an

important role in developing the idea of truth as a social value. It is a practice that says that even where parties continue to disagree or hate on the basis of past differences, it is better to try to establish objective accounts than to perpetuate sectorial narratives.

Political and Technical Challenges

Responding to the injustices associated with displacement faces a particular set of challenges, which mix both politics and questions of capacity and resources. Transitional justice and efforts to resolve displacement can sometimes be in tension. Criminal justice, for example, is often seen to jeopardize the neutrality, access, and safety of humanitarian actors; it may also create disincentives for those accused of complicity in violence among the displaced to return home, and increase authorities' resistance to recognizing their own involvement in abuses related to displacement or to disclosing information that may be necessary for restitution processes. Actors who benefited from displacement may try to impede return if they think this will reverse their previous gains. Advocates for the return of land and other rights in some cases face targeted harassment and violence, as in Colombia. Reparations can create divisions or competition among displaced groups and other victims over issues like the determination of victim status and qualification criteria for benefits. Diaspora communities can make a valuable contribution to transitional justice, but they can also be highly politicized and discordant with those who remained in the country.

The scope and complexity of displacement can also create resource and capacity constraints. Providing financial compensation to thousands or millions of people, for instance, may be impossible in many, if not most, countries. Technical and institutional challenges include assessing the needs of the displaced, distributing appropriate benefits, and determining who qualifies as a victim, as many displaced are not registered as such. There is a risk of overloading justice measures, as in Peru, where a lack of resources has seriously limited the actual distribution of benefits. Criminal justice is also constrained by international jurisprudence that is less developed for forced displacement as it is for other crimes and by resource, political, and evidentiary challenges that often lead prosecutors to prioritize other crimes. Victims may face obstacles to participation, access, and mobilization because they lack information, identity and property title documents, resources, and organizational capacity. In some contexts, such as Afghanistan, Democratic Republic of the Congo, and Timor-Leste, the appropriateness of restitution is unclear because restoring the property-distribution patterns that existed prior to displacement would not be just or practicable.

Recommendations

During Conflict

1. Develop robust consultative processes, maximizing the use of data already gathered, to engage with internally displaced and refugee populations on the causes and impact of the conflict and their views on how to secure measures of redress and restoration of what has been lost. Beginning such processes while conflict is ongoing will increase the likelihood that future transitional justice measures will engage with displaced persons through outreach programs.
2. Restitution and SSR programs may be feasible during conflict and may even contribute to stability and return. In such cases, programs such as legal empowerment in refugee camps can be a step toward increasing the capacity of refugees to make justice claims both during and after displacement.
3. Prior to a conflict ending, it may be possible to develop concrete measures of inquiry, including through interviews and even public hearings, if security permits, to help those who have suffered to articulate their experiences directly. These need not be "full-blown" commissions but can be more modest, given constraints.

4. The wisdom of pursuing criminal prosecutions against those responsible for causing displacement and related violations will depend on many complex factors. In some cases, it may provide a disincentive in the short term to end a conflict or seek a negotiated settlement. Efforts that assist future prosecutions, including data collection and mapping processes, however, can help to ensure effective prosecutions are carried out at a later stage, if necessary.

After Conflict

5. Transitional justice measures can be designed specifically to address displacement and respond to the justice claims of the displaced. The extent to which different measures can be taken, and the speed and order in which they are implemented, will depend on a detailed understanding of the context at the time. The recommendations below reflect experience but do not suggest that the only way to approach transitional justice will be by trying to establish four specific processes of prosecution, truth seeking, reparations, and reform measures. Some of these may be practicable and others not. Other issues, such as institutional and political corruption, may be deemed more urgent. Transitional justice experiences, processes, and methods may, of course, be of value in such areas as well.
 - a. Material reparations can be based on the needs and priorities of displaced populations, targeting benefits at overcoming social exclusion, reducing socioeconomic vulnerability, and improving self-sufficiency; education and mental health assistance in particular may be valued by displaced beneficiaries. Given the scale of displacement, symbolic reparations may be particularly appropriate.
 - b. Criminal justice and truth-seeking measures can examine displacement and engage refugees and IDPs. Criminal prosecutions can establish investigative methodologies for the crime of forced displacement, draw on demographic and statistical evidence, and engage with displaced and formerly displaced persons as victims and witnesses.
6. A gendered perspective on justice for displacement is critical in order to respond to gender-based violations, often an important factor in generating displacement, and the frequently marginalized concerns of displaced women.
7. Transitional justice measures after massive displacement are likely to be more effective in addressing displacement if they form part of a coherent overall response to the issue and a broader set of structural reforms—such as land reform policies. This means identifying complementary approaches with humanitarian, development, and peacebuilding actors.
8. Adopt a context-sensitive response to the injustice of displacement.
 - a. Justice efforts should employ careful political strategies and try to avoid reinforcing prior discrimination and marginalization.
 - b. Where unofficial or customary justice and security mechanisms are among the only accessible institutions for displaced or formerly displaced persons, international support can facilitate engagement and promote respect for human rights standards.
 - c. Where displacement crises spill across borders, transitional justice measures should consider taking regional approaches.