

Research Brief

Restitution at the Juncture of Humanitarian Response to Displacement and Transitional Justice

June 2013

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While contemporary understandings of restitution have been shaped by international responses to displacement and are primarily humanitarian in nature, restitution has its conceptual roots in traditional rules governing remedies for breaches of international law and is related to transitional justice measures involving reparations for victims of human rights abuses. In this paper, I argue that while the operational challenges presented by restitution are susceptible to practical solutions, the conceptual challenges go to the heart of a fundamental question hanging over both transitional justice initiatives and humanitarian responses to displacement: whether such measures can and should attempt to deal with the root causes or merely the immediate results of systematic human rights violations. A related, and more functional, question is whether restitution, as conceived of in humanitarian settings, can contribute to the transitional justice goals of retrospectively redressing violations and prospectively facilitating transitions to democracy.

Evolving Approaches to Post-Conflict Property Restitution

The prominence of restitution in post-conflict settings is a function of its embrace by humanitarian actors interested in addressing displacement. Humanitarian responses primarily focus on the protection of internally displaced persons' (IDPs) and refugees' rights against immediate threats during displacement, but they have also consistently included a remedial element in the form of calls for restitution, particularly as humanitarian concerns shifted to focus more strongly on IDPs after the end of the Cold War. This evolution was reflected by restitution's prominence in the 1998 *Guiding Principles on Internal Displacement*, as well as its espousal in the 2005 *Pinheiro Principles*.

During the 1990s, repatriation was emphasized as the new preferred durable solution for refugees, and restitution of homes was one of the most obvious means of re-anchoring displaced persons in a social fabric that might prevent them from being uprooted again. A watershed moment came with the 1995 General Framework Agreement for Peace (GFAP) that ended the conflict in Bosnia, which established restitution as a practical mechanism for achieving the sustainable return of displaced persons to their homes of origin and reconstituting a multiethnic country. In pursuing this goal, international actors initially ignored provisions allowing for monetary compensation under some circumstances and protecting the right of displaced persons to make voluntary decisions

Research Project

Transitional Justice and Displacement

From 2010–2012, the International Center for Transitional Justice and the Brookings-LSE Project on Internal Displacement collaborated on a research project to explore the relationship between transitional justice and displacement. It examined the capacity of transitional justice measures to address displacement, engage the justice claims of displaced persons, and support durable solutions, and analyzed the links between transitional justice and the interventions of humanitarian, development, and peacebuilding actors. For more information on the project, please visit www.ictj.org/our-work/research/transitional-justice-and-displacement and www.brookings.edu/idp.

on return. As the lessons learned from this experience began to sink in, restitution came to stand for two principles: first, that decisions on durable solutions should be made in an informed and voluntary manner by the displaced rather than imposed by national elites or international administrators, and second, that restitution was to be prioritized over compensation and other alternative remedies on the theory that restitution alone creates the conditions for meaningful choice of durable solutions.

Despite the progress represented by this new assertiveness on housing, land, and property issues in humanitarian settings, practice on the ground remained thin and inconsistent. In 2007, an initiative to provide restitution to IDPs in Colombia collapsed, and a promising restitution program in Iraq began to stall. The utility of restitution was also questioned in a number of settings. For instance, in Timor-Leste, property relations had been contested for such a long time that no clearly mutually agreeable “status quo ante” was left to restore, while in Afghanistan, many of the displaced had been landless prior to displacement. Critics therefore argued from a distributive viewpoint that justice might be best served in such cases by transforming pre-conflict land relations rather than restoring them, particularly where unjust or unsustainable land relations constituted a chronic source of conflict. Thus, restitution programs have evolved from being understood as a mere mechanism for bringing about the aim of durable solutions (and particularly return), to being recognized as a *per se* right, to being considered one policy option among many in response to post-conflict property disputes that may require either distributive or corrective approaches.

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Restitution in Transitional Justice and Responses to Displacement

Much of the current debate surrounding restitution arises because it impinges simultaneously on the aims of humanitarian, transitional justice, and development actors. As a retrospective, remedial effort to at least partially address the causes as well as the consequences of displacement, restitution stands out from other humanitarian responses, which tend to focus on alleviating the symptoms of vulnerability. Restitution “came of age” in a humanitarian context, but presents a fit with the retrospective concerns of transitional reparations as well. However, while restitution can serve as an important means of achieving the remedial aims of both fields, it can also come into tension with the responsive goals of humanitarians and the emphasis placed on environment-building in transitional justice settings. In development practice, restitution has periodically been promoted as a means of restoring respect for property rights—or discouraged as inimical to necessary reforms. As a significantly remedial field, transitional justice has a legitimate role in shaping the future of restitution as a response to violations involving displacement. Most notably, transitional justice actors may be best placed to find a way out of the current impasse between humanitarian actors, who have forcefully and successfully promoted restitution as an adjunct to their responsive activities against displacement, and development actors, who have evinced skepticism about restitution’s effects on their environment-building goals.

Justice claims related to land and property may be remedial without being corrective in the strict sense. For instance, financial compensation is remedial in that it addresses the direct effects of wrongful property confiscations without being strictly corrective in the sense of undoing them. In either case, such claims have the potential to not only transform society but also to disrupt both political and economic life. The level of complexity and political calculation that distributive measures such as land tenure reform entail may argue for leveraging immediate-term transitional justice mechanisms to facilitate longer-term distributive change rather than conflating the two. However, in cases where land and property claims are essentially remedial, and relate to broader patterns of violations that are the subject of transitional justice measures, it is hard to conceive of a principled reason for failing to seek their resolution through reparation measures.

Challenges to Restitution in Transitional Settings

The practical challenges to designing and implementing property restitution programming in post-conflict settings are numerous and frequently context specific, but a good deal of guidance already exists on how such problems can be overcome, and a number of key issues stand out. Among these are (1) the issue of addressing massive numbers of claims rooted in common and historically specific patterns of rights violations, and (2) the need to develop a reliable evidentiary base in support of “programmatically” responses to such violations. In both cases, the potential exists to provide redress in a manner that promotes the transitional justice goals of civic trust and recognition. Administrative restitution initiatives may be able to address mass claims, and an evidentiary base for such programs may be fashioned through the use of precedent judicial decisions to establish common patterns of facts, or legislative inquiries and fact-finding efforts, including truth-seeking processes, that allow general determinations to be made.

However, restitution may also destabilize the perceived wartime gains of the parties to a conflict, giving rise to (3) sustained political resistance. Such resistance to restitution and return frequently fuels protracted displacement; the Israeli-Palestinian conflict provides a virtually paradigmatic example of this problem. Another significant political challenge is the potential for official determinations of fact made in support of such programs to fuel other, more politically charged transitional justice claims such as calls for prosecution. From the point of view of transitional justice, such investigations and prosecutions are a natural part of responding to systematic violations. However, the perceived or real risk of prosecution may prevent state actors from supporting restitution programs. For example, past efforts to promote restitution and reparations in Colombia demonstrate the extent to which such efforts may face obstacles due to their potential to implicate state responsibility. On one hand, restitution and reparations programs that are not built on a degree of acknowledgment and disclosure are likely neither to be effective in their own terms nor to contribute to the broader norm-restoring goals of transitional justice. On the other hand, where the state refuses to cooperate at all for fear of accountability, displaced persons and other victims may be denied redress and left without the prospect of durable solutions.

About the Author

Rhodri C. Williams is a consultant and researcher on human rights, humanitarian, and forced migration issues. He has lectured, published, and provided technical advice on issues related to the return of displaced persons, reparations for human rights violations, and property restitution in a number of post-conflict settings.

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On a conceptual level, two questions pose important challenges: to what extent is it possible for restitution programs to address root causes of displacement, and to what extent can they mitigate the risk of perpetuating patterns of group exclusion from equal access to and exercise of property rights? While there is no denying the attraction of an appeal to completely redress underlying patterns of discrimination and marginalization, fully addressing root causes is beyond the scope of responsive humanitarian goals as well as the remedial aims of transitional justice, as both are currently understood, and the political and technical complications inherent in land reform issues may counsel against their inclusion as central mechanisms for transitional justice programming. However, addressing land-related root causes is of specific concern for two groups rendered particularly vulnerable to the effects of displacement—namely, women, who tend to face discrimination in accessing land and property, and indigenous peoples and ethnic minorities, who have typically suffered specific historical injustices such as dispossession and lack of recognition of their rights to their lands. Indeed, for these groups as well as others that suffer from similar vulnerabilities, addressing root causes related to land may not only be a precondition for durable solutions but also constitute a crucial form of recognition for transitional justice purposes.

Conclusion

Restitution is a point of overlap between transitional justice discourses and humanitarian responses to displacement. While the human rights aims of both fields presume the need for effective redress of past violations, humanitarian thinking has shifted toward accepting that justice may in some cases be better served by transforming the unjust or unsustainable conditions that prevailed prior to displacement rather than restoring them. This shift may allow more focused attention on how durable solutions to displacement can facilitate the longer-term processes of equitable development and political transformation that will be crucial to preventing its repetition. It may also reduce the likelihood that restitution will be treated as an entirely separate category from reparations or needlessly divert resources from other transitional justice measures.

ICTJ and the Brookings-LSE Project on Internal Displacement wish to thank the Swiss Federal Department of Foreign Affairs and the Canadian Department of Foreign Affairs and International Trade, which provided the funding that made this project possible.

Research Brief Series

ICTJ Research Briefs summarize longer studies prepared as part of research projects conducted by ICTJ's Research Unit. This set of briefs on transitional justice and displacement summarizes the chapters of *Transitional Justice and Displacement* (Social Science Research Council, 2012), edited by Roger Duthie.



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