

Research Brief

Criminal Justice and Forced Displacement: International and National Perspectives

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This paper examines the crime of forced displacement from the perspective of both international and national legal frameworks. The crime of forced displacement is a notion that comes from international law. Indeed, an international legal framework has developed with the instruments and jurisprudence to criminally prosecute forced displacement as a war crime or a crime against humanity, whether the displacement in question is internal or across international borders. When it constitutes a serious crime under international law, forced displacement should be prosecuted for the same reasons as other serious crimes. Failure to prosecute this crime invites impunity, which in contexts of mass displacement undermines the goals of transitional justice, which include accountability for perpetrators and recognition of victims, fostering civic trust, and strengthening the rule of law. However, in contrast to “classic” crimes such as murder and torture, legal traditions do not exist in national systems around the world to tackle the crime of forced displacement.

The nature of this particular crime and its emergence entirely from international law create challenges that must be addressed by lawyers, judges, and investigators. These include legal challenges stemming from inaccurate definitions of forced displacement at the national level as well as difficulties in assessing the unlawfulness of acts of displacement, and political challenges, such as resistance from the wide array of powerful actors that may be implicated in these crimes. At this juncture, there is sufficient international jurisprudence to prosecute the crime of forced displacement, but it is not as strong as it is for other serious crimes. National criminal justice systems, on the other hand, are generally not familiar with the crime of forced displacement. Often, their focus is on the crimes connected to displacement rather than displacement itself, which is frequently seen as a “natural” consequence of other crimes or as an inherent effect of armed conflict, and so the criminal responsibility of the actors involved in these crimes is not investigated.

The International Legal Framework for the Crime of Forced Displacement

Forced displacement is recognized as a crime under international customary law; the International Committee of the Red Cross (ICRC) concluded that the prohibition of the deportation, forcible transfer, and forced displacement of civilian populations—unless

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.

the security of the civilians involved or imperative military reasons so demand—is a rule of customary international humanitarian law, applicable to both international and internal armed conflicts. UN bodies including the General Assembly, Security Council, and former Commission on Human Rights have reaffirmed this, and called for alleged perpetrators to be brought to justice. The crime of forced displacement first emerged closely linked with the crimes of deportation and transfer of populations; deportation was considered a crime against humanity in agreements as early as the Nuremberg Charter and the IMTFE Charter immediately following World War II, and the Fourth Geneva Convention in 1949 prohibited individual or mass forcible transfers, as well as deportations of protected persons from occupied territory regardless of motive. However, the crime of forced displacement was initially limited to international armed conflict.

The treatment of forced displacement—especially internal displacement—as a crime is the result of a long process in which the jurisprudence of international tribunals has played an essential role. Despite the absence of the crime of forced displacement from its statute, the International Criminal Tribunal for Rwanda (ICTR) addressed displacement through the crime against humanity of “inhuman acts,” while the International Criminal Tribunal for the former Yugoslavia’s (ICTY) statute did include deportation and the transfer of civilians as war crimes, and deportation as a crime against humanity. Additionally, the jurisprudence of the ICTY, the ICTR, and the Special Court for Sierra Leone, the work of the UN International Law Commission on the Draft Code of Crimes against the Peace and Security of Mankind, the *travaux préparatoires* of the Rome Statute, and the International Committee of the Red Cross (ICRC) Commentaries on the Fourth Convention and its Protocols, all constitute relevant legal sources for the interpretation and understanding of the scope of the crime of forced displacement. However, the development of international jurisprudence on this particular issue is not as rich as it is for other crimes. To date, the International Criminal Court (ICC) has had only a few cases in Sudan and Kenya—all at early stages of proceedings—that refer to the crime of forced displacement.

Nevertheless, three approaches for criminalizing the forced displacement of civilian populations have been retained under international law, depending on the context: crimes against humanity, war crimes in the context of an international armed conflict, and war crimes in the context of a non-international armed conflict. In the case of a crime against humanity, the forced displacement has to be committed as part of a widespread or systematic attack directed against a civilian population, regardless of the existence of or connection with an armed conflict. In the case of a war crime, the displacement has to take place in the context of and be associated with an international or internal armed conflict. However, forced displacement is not *necessarily* a crime under international law. According to the ICRC, an exception to the prohibition of displacement exists where the security of the civilians involved or evacuation is required for imperative military reasons. Indeed, for forced displacement to be considered a crime at all, it has to be “arbitrary displacement”—that is, it has to have been ordered or committed without grounds permitted under international law. This requires judges, prosecutors,

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and judicial investigators to undertake a rigorous and detailed assessment of the circumstances of forced displacement to determine if it was unlawful.

In addition, in certain contexts, crimes of forced displacement have been committed as part of the commission of other crimes, such as genocide, apartheid, or collective punishment—which means, importantly, that they can be criminalized under these other crimes.

National Criminal Jurisdiction and the Crime of Forced Displacement

The crime of forced displacement raises significant issues for national criminal justice systems. Given the fact that this crime is historically a construct of international law, there is no legal tradition within individual countries to tackle it. Domestic legal workers face major challenges when they try to integrate into their judicial practice notions and rules of international law, especially when those notions and rules are not fully incorporated into national law. That said, national judicial systems around the world are increasingly likely to use international law in domestic criminal cases, a trend seen most clearly in Latin America. In addition, many national laws have by now introduced the crime of forced displacement, but in general, national judges, prosecutors, and judicial investigators are not very experienced in dealing with it. Too frequently, they focus their attention on connected crimes rather than developing a methodology to investigate the crime of forced displacement itself, or its rationale and purpose, which opens an avenue to impunity. For example, the Colombian Constitutional Court has repeatedly called for the country's investigative authorities and Office of the Attorney general to develop such a methodology.

Of the states that have incorporated the crime of forced displacement into their criminal legislation, the great majority have done so over the past 13 years, following the adoption of the Rome Statute. Most of these national definitions do reflect the provisions of the Rome Statute, but do not necessarily accurately capture the criminal phenomenon of forced displacement. For example, in some countries the definition is limited to situations of armed conflict or occupation, while in others the definition requires that the purpose of the forced displacement was to submit the civilian population to slave labor. Furthermore, in several countries, forced displacement had occurred before this type of criminal behavior was incorporated into national criminal law. This raises serious problems related to the application—and particularly the retroactive application—of laws regarding forced displacement. The non-retroactivity of criminal law is a fundamental principle of contemporary criminal law and a key safeguard of international law. However, nothing in the principle of non-retroactivity shall prejudice the trial and punishment of any person for any act or omission that, at the time it was committed, was criminal according to an international treaty or international customary law. International law, then, can authorize the retroactive application of domestic criminal law, a notion that has been reiterated by the UN Human Rights Committee, the European Court of Human Rights, and the Inter-American Court of Human Rights.

About the Author

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Conclusion

From a justice perspective, displacement is very often linked to human rights abuses in a number of ways. When harms of this sort take place, criminal justice measures represent one of the ways in which transitional justice can respond. However, transitional justice measures are more likely to achieve their aims if they are designed and implemented in a coherent fashion. Furthermore, in contexts of mass displacement, which often overlap with post-conflict or ongoing conflict contexts, some level of coherence is required not just between justice measures but between them and other types of policy interventions, including those of humanitarian, peacebuilding, and development actors. From the perspective of criminal justice efforts, there may be opportunities for direct cooperation with humanitarian organizations, whose members often likely to have useful information about crimes, but who may, for good reason, resist associating with such processes out of concern for their access to displaced populations and the safety of their staff.

At another level, criminal justice measures may reinforce or be in tension with efforts to achieve durable solutions to displacement, depending on the context. Prosecuting those responsible for crimes of forced displacement or other abuses may facilitate return and sustainable reintegration processes by improving returnees' sense of safety and reducing the likelihood that displacement will recur. On the other hand, though, the threat of criminal prosecution may hinder return processes by creating a disincentive for those who think they may be implicated, perhaps falsely, in past crimes, especially when criminal justice processes are perceived to be one sided or lack adequate due process. In any event, it is important from a broader perspective to consider the ways in which criminal justice and other transitional justice processes may interact, directly or indirectly, with other types of interventions addressing displacement.

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Research Brief Series

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