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**Reconceiving Refugees and Internally Displaced Persons as
Transitional Justice Actors**

Dr Susan Harris-Rimmer

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CIGJ Issues Paper

Dr Susan Harris Rimmer

Reconceiving Refugees and Internally Displaced Persons as Transitional Justice Actors

Abstract

This paper will explore the idea of whether refugees and internally displaced persons (IDPs) could or should become actors in the transitional justice processes taking place in their country of origin. It seeks to engage with the question of how has the existence of numbers of people in prolonged internal displacement or refugee camps affected the resolution of the situations that forced them into displacement?

Introduction

I contend that current discussions about transitional justice tend to ignore the issue of who is included in and excluded from transitional justice decisions, including women, children, the elderly and disabled, who also make up the majority of displaced persons and refugees. The 1951 Refugee Convention¹ deliberately excludes all mention of civil and political rights once a person has attained refugee status, although a person accorded refugee status thereby holds economic, social and cultural rights such as housing, education and access to work.² Conversely though, the conferral of refugee status is confined to those individuals who suffer breaches of civil and political rights.³ Other motivations for forced migration, such as hunger, lack of education prospects or generalised oppression, are not recognised grounds for refugee status.

Against this asymmetric refugee law backdrop, I argue that new research is needed to foreground the ethics of if, how, and when the international community could include

¹ Convention relating to the Status of Refugees, adopted on 28 July 1951, as amended by the 1967 Protocol. See Articles 17 to 24.

² Guglielmo Verdirame and Barbara Harrell-Bond (with Zachary Lomo and Hannah Garry). *Rights in Exile: Janus-Faced Humanitarianism*. New York, Oxford: Berghahn Books, 2005.

³ Article 1 of the Convention as amended by the 1967 Protocol provides the definition of a refugee as: *a person who owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it.*

refugees and IDPs in transitional justice decisions, including constitution drafting, new parliaments, trials, and truth commissions, but also broader state-building and governance issues such as legislative agendas, security sector reform, justice sector reform, national development plans, budgets and so on.

There is no existing study of refugees and IDPs and their relation to transitional justice, but it could be a rich area of research. I argue innovative programs in refugee and IDP camps are necessary and could also lead to improved sustainability of peace-building efforts in the country of origin. The first question to be answered is: do refugees and IDPs have a right to be consulted about peace agreements in their country of origin? Populations are often surveyed about their attitudes to transitional justice options, such as the recent major surveys of Afghans,⁴ Ugandans,⁵ and Bosnians;⁶ but not one survey has ever asked refugee or IDP populations their views, even those in neighbouring countries. If there is no right to be consulted, would it be useful from a practical point of view? Would there be any long-term benefit by preparing refugees and IDPs to participate in governance decisions in a broader post-conflict development context?

There are two reasons why such an exercise should be considered, which have practical and ethical foundations. In practical terms, most would acknowledge that refugees have a primary interest to be actively involved in processes that improve the conditions in their countries of origin. Participation is the foundational principle of most applied research in the development studies field. We know that most refugees will return to their country of origin at some point, as voluntary repatriation is the durable solution which still generally benefits the largest number of refugees around the globe. However, there are still considerable democratic and practical issues to be examined if a general principle of democratic inclusion to this group while they are outside the border. This is particularly important when considering caseloads in protected situations, such as Sri Lanka, the Thai-Burma border, Somalia, Palestine or

⁴ Afghanistan Independent Human Rights Commission, *A Call for Justice - A National Consultation on past Human Rights Violations in Afghanistan*, 25 January 2005. Online. UNHCR Refworld, available at: <http://www.unhcr.org/refworld/docid/47fdad50.html> [accessed 26 February 2009].

⁵ International Center for Transitional Justice and the Human Rights Center, University of California, Berkeley, *Forgotten Voices: A Population-Based Survey On Attitudes About Peace And Justice In Northern Uganda*, July 2005.

⁶ Stephan Parmentier, *Restorative Justice: exploring the missing link between transitional justice and peace-building*, RegNet Seminar, ANU, Canberra, 23 September 2008.

Pakistan. Moreover, from a moral or human rights viewpoint, refugees and IDPs represent a cohort that have been most adversely affected by the conflict and therefore deserve to be consulted. We also know that women, children and the elderly comprise 80 percent of a 'normal' refugee population, and so there is an equity question at the heart of this issue.

One challenge for any such engagement, similar to refugees seeking to participate in elections in the home country, is that the refugee would need to forego their anonymity and expose the fact that they have sought refuge elsewhere. This makes refugees sometimes reluctant to engage as the lack of transitional justice is the very reasons they continue to fear return. Is there a way around this problem? Could training and participation in transitional justice processes, or even designing them for future opportunities be something of great value to those in protracted situations, such as on the Thai-Burma border, or could such activities be destabilising? For IDPs there is a clear link to human rights obligations to allow participation of citizens in political processes. Better research could help overcome some of these challenges.

A useful point of entry to this discussion is the case study of the Timorese Truth Commission, which had a unique 'reception' function. There were some serious difficulties reconciling the desire to bring refugees from West Timor home, with the legal demands for exclusion screening of militia from the camps. There was a heavily gendered impact in that exercise that went largely unnoticed. There were also significant numbers of Timorese granted refuge in third countries since 1975. I argue that transitional justice processes where there has been significant displacement of the population must tailor their operation to reflect the needs of that population. This seems straight-forward but in fact has been extremely difficult in the Timorese context.

Case study: The CAVR and displaced persons

East Timor's Commission for Reception, Truth and Reconciliation (CAVR) was established in 2001 as an independent authority with a mandate to investigate violations of international law from 1974 to 1999. The Final Report entitled *Chega!* ('Enough' in Portuguese) was released in 2006.⁷ The CAVR had three core

⁷ Commission for Reception, Truth and Reconciliation (CAVR). *Chega! Final Report of the Commission for Reception, Truth and Reconciliation*. Dili: Commission for Reception, Truth and Reconciliation, 2005.

programmes: truth-seeking, community reconciliation, and reception and victim support. A novel aspect of the CAVR mandate compared to most truth commissions was to focus on the reception of up to 85 thousand refugees from West Timor (part of Indonesia), displaced or forcibly deported during the 1999 violence, especially during the month of September. The UN found that most of these refugees were forcibly evacuated by armed militia and Indonesian troops. The approximately 250,000 refugees who fled or were forcibly evacuated to West Timor were accommodated in several large refugee camps, such as Noelbaki, Tuapukan and Naibonat in Kupang, two camps in Kefamenanu as well as about 200 other smaller camps or shelters. They represented about one third of East Timor's population at the time.⁸

Proper exclusion interviews were never conducted under the 1951 Refugee Convention by the UN refugee agency UNHCR,⁹ which may have prevented those individuals who had committed war crimes from being considered refugees deserving of protection in West Timor at all. This is only barely acknowledged in the *acolhimento* section of the *Chega! Report* (roughly translated as 'reception').

The 'reception' function of the CAVR

The UN refugee agency UNHCR had a presence in Kupang from May 1999 to try to provide emergency relief and protection to the refugees, and coordinate returnees to East Timor.¹⁰ UNHCR's efforts were hampered by Indonesian soldiers and East Timorese militia, who tightly controlled the refugees' movement in and out of these camps, as well as their access to humanitarian aid.¹¹ Conditions in the camps were very difficult, both in terms of living standards and human rights standards.¹² Refugees returned to East Timor in phases, with 60 000 still remaining when the CAVR began its mandate in 2002. Many had been supporters of integration before

⁸ Chris Dolan, Judith Large and Naoko Obi, *Evaluation of UNHCR's repatriation and reintegration programme in East Timor, 1999-2003*, EPAU/2004/02, February 2004, p. 1 and 88.

⁹ 1951 Convention relating to the Status of Refugees, 189 U.N.T.S. 150, entered into force April 22, 1954, as amended by the 1967 Protocol 606 U.N.T.S. 267.

¹⁰ United Nations High Commissioner for Human Rights, 'UNHCR News, Timor Emergency Update', 25 November 1999. Of the 110,000 initial returns in late 1999, over 65,000 were reportedly spontaneous, the rest assisted by UNHCR. The mandate of UNHCR is contained in the Statute of the Office of the United Nations High Commissioner for Refugees, Annex to UNGA Res. 428(V), 14 Dec. 1950.

¹¹ Extracted from Commission for Reception, Truth and Reconciliation (CAVR). *Chega! Final Report of the Commission for Reception, Truth and Reconciliation*. Dili: Commission for Reception, Truth and Reconciliation, 2005, Part 10, p. 6. See also 'Indonesia: UNHCR Asks Government to Control Militias', *Refugees Daily*, 10 November 1999.

¹² Human Rights Watch, *Indonesia/ East Timor: Forced Expulsions to West Timor and the Refugee Crisis* Vol. 11, No. 7 (c), December 1999.

the Popular Consultation and some had been active members of the militia in their communities.

After the referendum violence, then President Xanana Gusmão felt that the first priority should be securing East Timor's stability and literally rebuilding the new nation, which required the majority of the population in the West Timor camps (including the former militia leaders) to return. Gusmão believed the former militias would pose less of a threat back in Timor.¹³ While there were debates about this strategy, in the end militia were encouraged to return with the understanding that those responsible for serious crimes would be prosecuted at a later date once the judicial system was up and running. UNTAET's Chief of Staff, in close co-operation with Xanana Gusmão, and with the full endorsement of the Special Representative of the Secretary General, took the lead on pursuing this approach from October 2000 onwards. Some of Gusmão's strategies, notably the 'wining and dining' of militia leaders in expensive Dili restaurants, were controversial within various parts of the UN mission.¹⁴

The problem was that some of these militia were almost certainly involved with violence and forced deportations during 1999 and ongoing violations of women and children in West Timor camps. The head of the UNHCR office Bernard Kerblat informed the world that refugees were in 'a hostage-like situation, with women and children tightly controlled by extremist elements'.¹⁵ The most well-known example of a person in this situation was Juliana dos Santos, kidnapped as a 'war prize' at age 16 by Igidio Mnanek, the deputy leader of the notorious Laksaur militia after a massacre in the Suai church. Under the 1951 Refugee Convention, persons who fulfil the definition of a refugee under Article 1A can be excluded from that status if there are serious reasons that person could be found 'not deserving of international protection' under Article 1F. These reasons include having committed war crimes or crimes against humanity, serious non-political crimes, or acts contrary to the purposes

¹³ Fabrizio Hochschild, 'It is better to leave, we can't protect you': Flight in the first months of the United Nations Transitional Administrations in Kosovo and East Timor. (2004) *Journal of Refugee Studies* 17 (3):286-300.

¹⁴ Chris Dolan, Judith Large and Naoko Obi, *Evaluation of UNHCR's repatriation and reintegration programme in East Timor, 1999-2003*, EPAU/2004/02, February 2004, p. 1 and 88.

¹⁵ Victoria Brittain, 'Traumatized Timorese Women', *The Guardian*, Dili, 30 July 2001.

and principles of the UN.¹⁶ Armed combatants are meant to be separated from civilian asylum-seekers.¹⁷

However, one of the reasons the full extent of the treatment of women in the camps is not known, not even by the CAVR process, is due to this political policy of encouraging returns, even of excludable militia. Even where protection interviews were undertaken, UNHCR focused on a very gendered idea of ‘protection needs’. As the guidelines for the reception of returnees from West Timor indicated, ‘Persons who might face protection problems are: those suspected of past criminal militia activities, those formerly affiliated to militia groups, persons who were active in the pro-autonomy movement, former TNI, former POLRI, former civil servants, persons belong to an ethnic or religious minority group or persons married to such a person’.¹⁸ Most of these criteria were assumed to apply principally to men, and there were relatively few female interviewers.¹⁹

The UNHCR evaluation report states:

The structure of the assessment forms and the assumptions which framed them, the gender of the interviewers and their lack of training all meant that a number of issues relating to women’s and children’s needs and vulnerabilities – which would have been much more relevant to the majority of returnees – were not picked up in any systematic fashion. This was despite reports that sexual violence was a serious concern in the camps in West Timor. ‘The emphasis on identifying such militia involvement in the assessment process thus seems disproportionate’.²⁰

¹⁶ UNHCR Guidelines on International Protection: Application of the Exclusion Clauses: Article 1F of the 1951 Convention relating to the Status of Refugees, HCR/GIP/03/05, 4 September 2003.

¹⁷ According to international standards governing the protection and assistance for refugees, the strictly civilian and humanitarian nature of refugee camps and settlements must be upheld in order to preserve the peaceful character of asylum. These principles are clearly stipulated in various UNHCR Executive Committee (ExCom) Conclusions, including the Conclusion on Safeguarding Asylum, No. 82, (1997), para d (vii), which reiterates ‘the responsibility of host States, working, where appropriate, with international organizations, to identify and separate any armed or military elements from refugee populations, and to settle refugees in secure locations at a reasonable distance, to the extent possible, from the frontier of the country of origin, with a view to safeguarding the peaceful nature of asylum.’

¹⁸ Chris Dolan, Judith Large and Naoko Obi, *Evaluation of UNHCR’s repatriation and reintegration programme in East Timor, 1999-2003*, EPAU/2004/02, February 2004, at p. 32.

¹⁹ Chris Dolan, Judith Large and Naoko Obi, *ibid*, at p. 1 and p. 88.

²⁰ Chris Dolan, Judith Large and Naoko Obi, *ibid*.

Impact on participation in transitional justice process

This had a negative impact on the ability of women in particular to participate in the CAVR process. Chapter 7.7 of the report by the CAVR recorded 853 cases of sexual violence but concluded:

[t]he Commission notes the inevitable conclusion that many victims of sexual violations did not come forward to report them to the Commission. Reasons for under-reporting include death of victims and witnesses (especially for earlier periods of the conflict), victims who may be outside Timor-Leste (especially in West Timor), the painful and very personal nature of the experiences, and the fear of social or family humiliation or rejection if their experiences are known publicly. These strong reasons for under-reporting and the fact that 853 cases of rape and sexual slavery, along with evidence from about another 200 interviews were recorded lead the Commission to the finding that the total number of sexual violations is likely to be several times higher than the number of cases reported. The Commission estimates that the number of women who were subjected to serious sexual violations by members of the Indonesian security forces numbers in the thousands, rather than hundreds.²¹

In the camps in West Timor where tens of thousands of women were forcibly deported, a fact-finding team in one study alone found 163 different cases of violence against 119 women, and noted serious impacts of sexual violence on women's health.²² The *Chega! Report* is almost silent on this larger context, but adds that the attitudes of female refugees to voluntary return and reconciliation issues were also not well known. At paragraphs 71-72 of Part 10, the *Chega! Report* states:

Women were especially constrained in their freedom to engage with the NGO Coalition by the power structures that existed within the camps. The positions women took on reconciliation and repatriation were almost entirely determined by their husbands, fathers and uncles who had brought them to West Timor. They were economically and physically dependent on these male figures, who often both intimidated them and acted as their ultimate protection from other men.²³

²¹ Commission for Reception, Truth and Reconciliation (CAVR), *ibid.*

²² Tim Kemanusiaan Timor Barat, 'Violence against IDP/refugee women – Report of TKTB (Tim Kemanusiaan Timor Barat) findings in IDP/Refugee Camps in West Timor', August 2000.

²³ Commission for Reception, Truth and Reconciliation (CAVR). *Chega! Final Report of the Commission for Reception, Truth and Reconciliation*. Dili: Commission for Reception, Truth and Reconciliation, 2005, Part 10, p. 17.

The combination of the political imperative to receive refugees back from West Timor by the Timorese leadership, with the gendered application of protection needs by UNHCR, mean that the violence perpetrated against women in West Timor is still little known. This context is not acknowledged by the Final Report in its summary of the 'reception' function of the CAVR, although some examples of women returning from West Timor are included in the reconciliation hearings.²⁴

This silence was compounded by the finding by the Special Panels in 2001 that the serious crimes process had no jurisdiction over crimes committed in West Timor. The situation of refugees in West Timor represented almost a complete failure of international protection, but also had consequences for the integrity of the transitional justice process. The UN itself became a victim in West Timor when several UNHCR staff were murdered in Atambua in September 2000, leading to the complete withdrawal of humanitarian actors.²⁵

Conclusion

Where there has been significant displacement of the population, in theory states should tailor their transitional justice processes to reflect the needs of that population. However, this has rarely occurred and did not occur in Timor.²⁶ UNHCR does take an interest in rule of law and transitional justice issues but they are not part of its core mandate of refugee protection.²⁷ The new UN Peacebuilding Commission could play a role in this process but has not as yet done so.²⁸

UNHCR also attempts to focus on protecting female refugees from gender-based violence.²⁹ In concert with a UN Transitional Administration, one would expect that this part of the UNHCR mandate would have been easier to fulfil. For a series of

²⁴ Commission for Reception, Truth and Reconciliation (CAVR), *ibid*, Part 10, p. 23.

²⁵ ABC TV, 'UN aid workers killed in West Timor', *Lateline*, 6 September 2000.

²⁶ See in contrast the Afghanistan Independent Human Rights Commission. *A call for Justice: Conclusion of National Consultation on Transitional Justice in Afghanistan*. Kabul: Afghanistan Independent Human Rights Commission, 2005

²⁷ Steven Wolfson, 'Refugees and Transitional Justice.' (2005) *Refugee Survey Quarterly* 24(4): 55-59. Senior UNHCR official Erika Feller stated in 2006 that UNHCR has shifted to a 'responsibility to protect' framework, replacing the idea of right of humanitarian intervention in the 1990s: '[r]esponsibility should lie on need, not mandates or artificial legal categorisations'.

²⁸ The Commission did consider transitional justice and IDPs in separate Working Group meetings in 2008.

²⁹ See further Alice Edwards, 'Overview of International Standards and Policy on Gender Violence and Refugees: Progress, Gaps and Continuing Challenges for NGO Advocacy and Campaigning'. Paper delivered at the Canadian Refugee Council International Refugee Rights Conference, Toronto, Canada, 17-19 June 2006. Amnesty International, AI Index: POL/33/004/2006.

complex operational and political reasons, it was not possible. New research is required to make it more possible in any future interventions.

This case study of the CAVR highlights the idea that international definitions of democracy typically take a minimalist or 'thin' form in post-conflict societies, simply associating democracy with regular elections. This forms an inadequate basis for building democracy in post-conflict societies or pursuing transitional justice strategies. A principle of 'democratic inclusion' can usefully guide attempts to develop better processes. To test the boundaries of this idea of democratic inclusion, this paper has conducted an exploration of the difficult case of refugees located outside transitional justice processes, and what can be done to better address their needs. However, it is a complex political and legal challenge. It is clear that more research and thinking has to be done in this area.

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