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**Property Compensation: Observations on Turkey's Compensation Law No. 5233  
In International Context**

Internally Displaced Persons Conference

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I would like to begin by recognizing the significance of Turkey's *Law No. 5233 on Compensation of Losses Resulting from Terrorist Acts and Measures Taken against Terrorism* (Compensation Law). There are many countries which, like Turkey, have suffered from the effects of internal displacement. However, few of these states have taken steps as practical as the passage of this law.

As a second point, I would like to underscore the critical importance that the Compensation Law succeeds in its aims. This is necessary not only in light of the amount of resources and planning that Turkey has already put into the Compensation Law, but also because of its potential as a positive model for other situations of displacement. Most important, however, is the potential this legislation has to improve and normalize the lives of people who have suffered from a decade of internal displacement.

It is possible to place Turkey's Compensation Law in context by comparing it with other similar types of programs seen in displacement settings in other parts of the world, particularly those providing for restitution and reparations.

*Restitution programs:*

In contemporary post-conflict settings, restitution programs typically focus on tangible harms incurred by people in the course of displacement. Typically, as in Turkey and many other settings, displaced persons lose possession of homes, lands and other assets. When peacetime conditions resume, displaced persons are often unable to return to their homes and lands because they are being used by other people.

In such situations, it is advisable to identify measures necessary to provide for *restitution* of such assets. Restitution programs have become an increasingly standard component of efforts to end displacement. In part, this is because restitution provides an important legal remedy for people whose rights to homes, lands and property have been violated. However, at a broader level, restitution can also be an important precondition for providing *durable solutions* to displacement.

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<sup>1</sup> This statement was also presented at a Ministry of Interior Colloquium in Ankara, Turkey, February 24, 2006.

As set out in Principle 28.1 of the Guiding Principles on Internal Displacement, states have a primary responsibility to help internally displaced persons end their state of displacement through either return or resettlement elsewhere:

“Competent authorities have the primary duty and responsibility to establish conditions, as well as provide the means, which allow internally displaced persons to return voluntarily, in safety and with dignity, to their homes or places of habitual residence, or to resettle voluntarily in another part of the country. Such authorities shall endeavour to facilitate the reintegration of returned or resettled internally displaced persons.”

By helping displaced people to repossess their homes and lands, or providing compensation if they were destroyed, the state can assist displaced persons to regain self-sufficiency and take an informed choice about whether to return to their original homes or permanently resettle somewhere else.

In the Turkish context, it is generally assumed that internally displaced persons can return and resume possession of their former homes and lands without practical or legal obstacles. By way of contrast, the situation was quite different in Bosnia, where properties left behind by fleeing displaced persons were often legally allocated to other users. In Turkey, the homes and lands of internally displaced persons were not, as a rule, transferred to the ownership of other people. In some cases, such homes and lands appear to have been illegally occupied by other people. However, as early as Francis Deng’s 2002 visit to Turkey, the Turkish authorities were committed to return such property to its lawful owners under existing domestic law (UN Doc. E/CN.4/2003/86/Add.2, ¶ 31).

As a result, traditional restitution is not likely to be the primary concern in Turkey. However, the Compensation Law does include one aspect that is typical to restitution programs – where property has been destroyed and therefore cannot be repossessed by returning owners, compensation is to be provided:

**ARTICLE 7:** The damages to be compensated by this Law through peaceful settlement are as follows: (a) All damages given to the animals, trees, - products and other movable and immovable properties.

However, restitution and compensation are often only first steps in providing durable solutions for internally displaced persons. In order for displaced persons to be able to choose between return home or resettlement elsewhere in a truly free and informed way, both choices must be truly possible. In this regard, one of the less typical and more innovative aspects of the Turkish Law is the fact that it provides compensation for the time during which internally displaced persons were unable to access their homes and lands, under Article 7 (c).

**ARTICLE 7:** The damages to be compensated by this Law through peaceful settlement are as follows: ... (c) Material damages due to the reason that people could not reach their assets because of the activities carried out under the fight against terrorism.

Article 7(c) recognizes the fact that one of the reasons many internally displaced people need assistance is that the conditions of their displacement denied them the ability to provide for themselves.

In the Turkish context, internally displaced persons were typically farmers or stock breeders who were separated from the lands that had provided their livelihoods. As a result, providing compensation in some relation to the revenues displaced persons lost during their displacement will contribute directly to helping such people end their displacement, whether through return or resettlement.

In this respect, the Turkish Law goes well beyond most restitution programs, which seek simply to restore displaced persons' possession of their former homes and lands, usually without compensating them for the time they were denied access to them.

#### *Reparations programs:*

In other international settings, so-called *reparations programs* tend to focus on primarily non-property harms to people resulting from human rights violations. Because of the fact that Turkey's Compensation Law aims to provide a remedy for damages resulting from harms such as "injury, physical disability and death and the expenses made for medical treatment and funerals," (Article 7b) it shares certain elements of reparations programs.

In fact, the Turkish Compensation Law may have more in common with reparations than restitution in terms of its substance. The primary concern is not restoring possession of property, as displaced people in Turkey rarely face legal or practical obstacles in this area. Instead, the focus of the law is on providing compensation for harms arising during the state of emergency and the ensuing period of displacement.

On the other hand, the Turkish Compensation Law does share two important features with restitution as seen in other international settings. First, like many restitution programs, one of the aims of the Turkish compensation programs is to facilitate durable solutions to displacement. The second resemblance involves the procedures set out under the Compensation Law rather than its substance: like many restitution programs, implementation of the Compensation Law involves processing a high number of claims in a short period of time under a special, provisional legal regime. From this perspective, the examination of restitution programs such as those carried out in places such as Bosnia, South Africa and Kosovo may offer useful insights.

#### *Observations on the provisions of the Turkish Compensation Law*

I would like to begin a more detailed discussion of the Compensation Law and its implementation to date by stating plainly that the Turkish authorities should not rule out the possibility of making changes based on their own observations of what has worked and what has not. Such changes might merely involve new or amended regulations on implementation of the law. However, in some cases they may require consideration of amendment of the Compensation Legislation itself.

Obviously, any changes should not be undertaken lightly, given the importance of this legislation both for the state and for the individual displaced persons involved. However, it is worth pointing out that there have been few serious mass-claims processes that have not experienced course corrections. For instance, in both Bosnia and South Africa's restitution programs, significant amendments were made

to restitution laws within the initial years after their passage based on a comprehensive review of their implementation.

Any changes deemed necessary should be undertaken with caution. In particular:

- they should be arrived at based on a process that includes appropriate consultation with persons affected by the law, as well as civil society groups and academic institutions that have developed expertise in the implementation of the Compensation Law.
- they should be retroactive, in the sense that claims decided or rejected on the basis of the old rules should be eligible for reconsideration under the new rules. This consideration argues for making any changes sooner rather than later, so as to minimize the potential administrative burden of having to re-open cases and re-examine claims.
- they should be coherent, in the sense that the resulting legal framework avoids vague, contradictory or unclear relations between the law, its implementing regulations and other relevant legislation.
- they should be widely disseminated so that all affected parties understand their rights. If necessary, the implementing authorities should be given appropriate training and guidance.

#### *Issue of administrative discretion*

In moving to the substance of the Compensation law, I would like to begin with a fundamental consideration, namely the issue of administrative discretion. As I understand it, some questions have been raised regarding the formal independence of the provincial commissions implementing the law (Compensation Commissions), in light of the fact that six out of their seven seats are filled by civil servants.

One reasonable response to these circumstances might be to change the composition of the commission in order to increase the representation of people and groups who are not in state employment. Another possibility would be to further professionalize the Commissions by ensuring that some or all of their members were civil servants dedicated solely to processing compensation claims specifically hired, trained and paid for this task. This is the approach that was taken in Bosnian and South African restitution programs. However, I would like to suggest that a complementary or alternative approach would be to minimize the amount of *de jure* and *de facto* discretion the Commissions exercise in deciding individual cases.

The less room the Law and implementing regulations leave for interpretation, the less of a concern the formal independence of the Commissions is likely to be. Clear legal expectations protect all sides – they protect the implementing authorities from accusations of partiality or undue influence and they protect applicants from concerns that ambiguities in the legal framework could prejudice the resolution of their claim.

Initial reports appear to indicate some degree of inconsistency in the application of the law between provincial Commissions. Although these inconsistencies result in all likelihood from Commissions' good faith disagreements over interpretation of the law, they increase the risk that internally displaced people will perceive partiality in processing. Such a perceived lack of independence is likely to undermine public trust in the ability of the Compensation Law to provide justice and help resolve displacement.

In this context, I would like to pose the question of whether the problem is the lack of independence of the Commissions on one hand, or the need for clearer and more binding guidance to assist the Commissions at arriving at fair and consistent decisions on the other.

In examining this question, it may be worth revisiting some of the basic questions about how the compensation process works.

#### *How should claims be made?*

In order to ensure that the compensation process achieves legal finality, it is important to ensure that all potential claimants have had an opportunity to prepare and file claims. This has several implications.

While the extension of the deadline to file claims is a welcome development, there may yet be issues about how claims are filed. For instance, it will presumably be easier for the Commissions to apply the law consistently and expeditiously if claims have been well-prepared prior to filing. This argues strongly for more formal provision of information and legal aid to applicants. Legal aid should be made affordable or free for displaced persons in light of their lack of legal knowledge and difficult economic circumstances. It may be worth considering the role that civil society organizations with legal expertise could play in this regard.

In addition, greater public information should also be made available to persons whose rights are likely to be affected by the Compensation Law. In the context of Bosnian restitution, which affected virtually the entire population of the country, several nationwide information campaigns were undertaken. These campaigns explained people's legal rights and obligations through TV and radio spots, local public meetings, newspaper inserts and even highway billboards. Similar public information campaigns in Turkey could be targeted toward areas with high concentrations of displaced persons. This would need to be done in a manner respecting the extreme marginalization of some displaced persons and the fact that they might not have access to media outlets such as radio, television or newspapers.

Finally, concerns have been raised about high rates of rejection of claims for inadmissibility in some provinces. As a general rule, inadmissibility findings should be very cautiously made and should also possibly be subject to appeal (more on appeals will be said later in this presentation). Generally speaking, the facts of displacement related to the state of emergency are well-known. It should therefore generally be assumed that internally displaced persons are eligible to apply for compensation unless it can be shown that they are not.

Moreover, compensation claims should not be rejected as inadmissible merely because the applicant has received some form of prior state assistance. Prior assistance may be deducted from compensation awards, but only after consideration of the full merits of each claim including calculation of compensation for other harms not addressed by any prior assistance.

Another issue that should be carefully monitored is the extent to which particularly vulnerable groups are able to participate in the process. Examples include women, including female heads of households, unaccompanied children, persons suffering from mental illness and the elderly and handicapped. These groups require help to find a durable solution most urgently but may have the hardest time accessing the compensation process.

#### *What can be claimed for?*

Both Commissions and claimants should be given clear guidance on what types of harms can be claimed for. For example, if the goal of the legislation is to provide a degree of compensation proportional to the actual losses suffered by claimants as a result of their displacement, then there should be a standard way of taking into account some of the less obvious but very common costs displacement imposed.

Examples include lost revenues from property or assets that claimants did not hold formal title to but which they possessed and used legally in accordance with longstanding local customs and practices. Another example is the cost of living in displacement, including private rental payments.

#### *How should claims be verified?*

Commissions should continue to be given clear instructions on what types of evidence is admissible. Here, the September 2005 amendment to the implementing instruction broadening the categories of admissible evidence is a very welcome development. In light of the difficulty internally displaced persons have in maintaining and accessing documentation, strict application of formal rules on documentary evidence would not be appropriate. The Turkish government has taken a very important step by broadening the categories of acceptable evidence for the compensation procedure.

#### *How should claims be processed?*

The current requirement that claims be processed within six months from their receipt reflects good intentions but is likely to be unachievable. This was the case in Bosnian restitution where processing deadlines became impossible to meet and were ignored. While it is important to ensure that claims are processed without unjustified delay, I would argue that the most weight should be given to the *order* in which claims are processed, rather than the speed.

A central lesson from Bosnian restitution was the helpful effect of increasing transparency through chronological processing of claims. Put simply, the first claim received should be the first claim resolved and the last claim received should be the last resolved. This approach allowed lists of claims to be made, updated and regularly published, showing applicants precisely where their claim stood in the order of processing and approximately when they might expect a decision. Strict adherence to

chronology also shielded the administrative authorities from any accusation that they could be manipulating the order of claims processing for inappropriate reasons.

### *How should damages be calculated?*

Several considerations apply to damages. The first is the general amount. Clearly, the Turkish authorities are not obliged to match every cost imposed by displacement lira for lira. However, the guiding consideration in calculating damage levels should be the need to provide durable solutions. Many displaced persons enjoyed economic self-sufficiency prior to displacement and are capable of providing for themselves and their families again if the poverty caused by their displacement is alleviated. In order for the compensation law to provide a real durable solution, as well as a formal remedy, damages should be calculated to allow displaced persons to restart their economic lives.

A second important consideration is consistency. Although some guidelines have been provided for calculating damages, initial reports indicate inconsistent awards of damages across the provinces applying the Compensation Law. Further guidance may be necessary. However, it may be possible for such guidance to benefit from greater reliance on general knowledge about the nature and costs of displacement in Turkey.

As an example, it appears to be an unfair burden to claimants to force them to document precise costs such as what they paid for rent over the course of years of displacement. The necessity of seeking and evaluating such evidence in each individual case also imposes a high administrative burden on Commissions. Given that it is possible to calculate the average cost of rent to displaced persons in all regions of the country, such individual evidentiary proceedings are arguably unnecessary. They could be substituted with a system in which a claimant simply establishes their residency in certain places at certain times. In response, the Commissions could calculate compensation for costs based on pre-determined formulas for average expenses in different regions of the country. The same principle could clearly be applied to other areas of the damage calculation process where general information is readily available.

A final point relates to the argument that some discretion in granting damages might be useful in order to allow the Commissions to take into account the particular circumstances of some cases. Here, I would point out that granting such discretion to the Commissions would increase the risk of inconsistent damage calculations between the provinces. Another possibility might be to introduce the concept of non-pecuniary damages, as awarded by the European Court on Human Rights, to the law. However, it would be necessary to include clear criteria for when such damages could be awarded and how much money the awards should comprise. In other words, any such change to the law should be made in a way that provides guidance instead of discretion.

### *Appeals process*

Providing the Commissions with clearer and more comprehensive rules will go a long way toward preventing any inconsistencies in application of the law in Turkey's provinces. However, although well-drafted legislation and regulations can anticipate and prevent many problems, new and unforeseen questions will inevitably come up during the implementation of the law.

Although it is currently possible for applicants who dispute the Commissions' decisions to seek a remedy in court, this procedure cannot be thought of as an appeal. Such court proceedings represent an entirely new cause of action and do not give unsuccessful compensation applicants an opportunity to receive a hearing on whether the Compensation Law was correctly applied in their case.

In order to be absolutely sure that the law is applied consistently and fairly countrywide, it is worth considering a centralized administrative appeals procedure. An appeals body with the power to rule directly on the issue of whether Commissions have applied the law correctly (both in admissibility decisions and on the merits of damage calculation) would be able to ensure that all displaced persons faced the same conditions in seeking their legal rights in all parts of the country.

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