In Lieu of an Introduction

*Orbis Tertius as Vantage Point*

Nergis Canefe

This edited volume aims to foster an in-depth understanding of the nexus of transitional justice and forced migration studies in a comparative framework, with a particular emphasis on debates emanating from the Global South. Each of the contributions to this volume adheres to a multidisciplinary and multi-sectorial approach, incorporating academic, practitioner, and activist work, in tandem with both global and local perspectives. In order to achieve such a synthesis, the authors build upon the knowledge accrued by collaborative networks, their involvement in both scholarly and activist organizations, and their experience as practitioners in select locale. Normatively or politically speaking, the study of human suffering, induced by mass political violence and at the hands of states turned against their own peoples, is not an easy one. This volume is a collective effort in examining the underlying social disfranchisement, socioeconomic predicaments, and normative challenges pertaining to the remembrance of violence and the restoration of the rights of the displaced, in the context of transitional justice projects being enacted in postcolonial/neocolonial landscapes of nationhood. As such, establishing connections between documentation, deliberation, and research, together with an overall awareness of ethics of witnessing, are essential components of this project.

Forced migration and transitional justice are two areas of scholarship that are often attended to by different academic communities; similarly, the causes and strategies pertaining to each are addressed by separate activist and victims’ groups, policy-makers, donors, and agencies. Is it possible to bring together the work done by these various actors and groups and to make sense of their

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*Orbis Tertius,* Latin for “World Three” or the Third Orb, is used after the Jorge Luis Borges short story “Tlön, Uqbar, Orbis Tertius.” Orbis Tertius connotes the realm of imagination, a collective vision of what is yet to come.
approaches and experiences pertaining to human displacement and its links with transitional justice at a global level? This is the question that brought us together in penning our respective contributions. Concomitantly, the volume is divided into three sections. The first section is devoted to theoretical exercises that identify patterns, as well as unique approaches that have emanated from the practices and debates in the Global South since the post-1945 period. The second section engages with post-conflict restorative justice projects and the specificities of their undertaking in select regions. It has often been powerful postcolonial states that had to deal with mass political violence and the related displacement. Of these, pieces in this volume reflect on the post-conflict experiences of displaced populations in India, Turkey, Uganda, Sri Lanka, and Colombia. The last section is dedicated to a debate on key concepts that pertain to the nexus of forced migration and transitional justice studies. In particular, the contributors examine notions such as nonconventional approaches to forced migration, conundrums pertaining to statelessness, the ethics of witnessing, and intersections between qualitative and quantitative research. Each of the participants in this conceptual roundtable start from an acute awareness of the disparity, disjuncture, or perhaps abyss that exists between the coded and charted waters of transitional justice studies in the Global North and the cumbersome, puzzling, and shaded realities of post-conflict histories in the Global South.

“Unwanted peoples,” refugees, exiled and displaced populations, stateless peoples, and other subjects of forced migration have always played a significant role in the economic, political, and social agendas of sovereign states. Since 1945, millions of people have been uprooted and subjected to partitions, forced population exchanges, purges, and cleansing as part of the nation-building process in the postcolonial, and later on neocolonial, world orders. However, the people who suffered and continue to suffer such a fate are not captured by the legal definition of refugeehood alone. Forced migration studies must broaden its scope of analysis and incorporate some of the foundational debates pertaining to postcolonial and neocolonial statecraft, as well as practices denoted under the umbrella term “transitional justice.” In international law, a refugee – as enshrined in the 1951 Refugee Convention and subsequent protocols – is someone who “is unable or unwilling to return to their country of origin owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion.” What has emerged at the global scale from state-induced displacements is a much more complicated picture than this codification can capture. Statelessness, the permanent limbo of internal displacement, dispossession of partitioned populations, dispossessed minorities, and forcibly
resettled returnees are also part of the equation. The multifaceted nature of displacement-related human suffering shows itself best when viewed from the vantage point of transitional justice. Meanwhile, developing an understanding of the causes and consequences of displacement, forced migration, and statelessness, and gaining the intellectual and practical skills to deal effectively with the challenges posed by these recurrent and cyclical phenomena are essential endeavors often left on the margins of transitional justice scholarship. In other words, both fields suffer from a dangerous short-sightedness concerning the structural causes of long-term human suffering related to internal, state-induced, or state-condoned conflict and related mass violence. This lacuna is most curious when one considers the fact that since the end of the Cold War the number of internally displaced persons (IDPs) has far outnumbered the world’s refugee population. By 2010, according to the UN Refugee Agency United Nations High Commissioner for Refugees’ (UNHCR) estimates, there were some 11 million refugees and asylum seekers and a further 27.5 million IDPs worldwide. Needless to say, these numbers at least doubled since the Syrian exodus starting in 2011. Figuratively speaking, they make a permanent country in no man’s land.

The volume at hand attempts to establish tangible links between lack of societal peace, structural causes of human suffering, recurrent patterns of political violence – all of which constitute the traditional subject matter of transitional justice – and forced migration in the Global South. However, its subject matter is not just the postcolonial states caught up in this web of entanglements, but international agencies, NGOs, and scholars of transitional justice and forced migration studies located in the Global North – where the big donors are located, fueling and shaping much of the resettlement or reconciliation efforts.

Since the 1970s, transitional justice has largely been associated with victims’ advocacy movements and a special set of legal mechanisms that are expected to reinforce efforts at moving forward in the aftermath of mass societal and political violence. This is what is commonly seen, in the Canadian context, in the work endorsed by the SSHRC and IDRC, and in the American context in work encouraged and funded by think tanks, institutions, and research hubs. European involvement in these issues take a similar format as well, mostly endorsed by independently funded civil society/sponsor organizations and research institutes, with Germany, Austria, and Scandinavian countries taking the lead in these matters.

Here, in a somewhat contrarian vein, our tenet is to question this confining definition of transitional justice, and its often heavily prescriptive presumptions about sociopolitical and historical change. We do this from the point of view of debates on transitional justice taking place in the Global South,
through the lens of forced migration, displacement, and related forms of human suffering. In order to evaluate the long-term political significance and deep-seated socio-ethical dimensions of these movements, one has to look beyond the traditional transitional justice arsenal of policy measures and legal arrangements. Reform, reconciliation, restitution, resettlement, and reparation do not exist in a vacuum. In this regard, right of return for the displaced, select and targeted use of amnesties, governmental and social orchestrations of political amnesia, as well as countermeasures against the forgetting of the experiences of traumatized groups, legal and pseudo-legal accountability measures, restorative justice schemes including compensation and redistribution programs, sociocultural projects for recovery from societal trauma, and calls for collective responsibility must be examined based on long-term successes and failures in four regional hubs of forced migration and displacement.

The methodological approach we have chosen for this volume is heavily informed by the work of critical legal scholars and political theorists who have drawn attention to the dual role of law – in this case, administrative, criminal, and constitutional law as they pertain to transitional justice – in relation to violence: protective of the status quo, on the one hand, and regenerative of a new sociopolitical order, on the other. This kind of analysis is often not undertaken outside the immediate regions where mass political violence takes place. We question the reasons behind these restrictive choices that lock us into area studies modalities, as they often amount to something much more than simple methodological preferences. Conceptually guided comparative work allows for across-the-board pattern recognition in statecraft and maintenance of legitimacy in postcolonial and postimperial settings. Lack of it, on the other hand, locks us in perpetuity into regional local informant status.

While law can be a tool for responding to violence and exposing abuses of power, it is also utilized to obfuscate and legitimate abuses of political authority. In this regard, it is puzzling that for many decades scholarship emanating from the Global North concentrated mainly on the “corrective” aspects of legal and semi-legal practices associated with transitional justice measures and movements in the Global South. This led to widespread instrumentalization of a particular understanding of sociopolitical change at times of war and in the aftermath of mass conflict. Rarely has enough attention been paid to the desire to create new forms of justice, capable of questioning the legitimacy of the prior political – and, at times, legal – practices that led to the institutional and societal commission and subsequent denial of mass violence.

In contradistinction, the transitional justice–related work presented in this volume transform the terms of the debate regarding past abuses of power. The
contributors are keen to acknowledge that governments often use transitional justice programs and projects as a framework to reestablish their legitimacy. In this context, there is major concern about the co-option of transitional justice projects by governments for political gain. The challenges and demands concerning reinterpretations of a traumatic past by a “new regime” are not limited to practical ones related to the application of transitional schemes. There are real politico-ethical clashes and confrontations that take place, since what is at stake is imagining the future of the society as a whole while coming to terms with its past. Until very recently, these concerns have largely been missing in the scholarship that habitually emanates from the Global North, including research centers and international think tanks engaged with the issue, such as the well-respected and well-endowed International Center for Transitional Justice located in New York, USA; the Peace Research Institute in Oslo, Norway; and special programs organized by the MacArthur, Carnegie Endowment or Ford Foundations, the Hans Böckler Foundation in Germany, or the Open Society Institute and Helsinki Citizens’ Assembly chapters across Europe. Projects funded in these circles often solely concentrate on “solid criteria” to prove to the outside world that “transition to democracy” is complete or at least underway in a given constituency.

This volume begs to differ. Not only will it shed light on “alternative realities” of transitional justice, but the authors are collectively committed to developing a critical understanding of the tension in the production and dissemination of knowledge pertaining to the nexus of transitional justice and forced migration. The expertise and work of scholars, activists, and legal practitioners located in the Global South, with decades-long experience in several regional hubs of forced migration movements, allow us to unpack the problematic assumptions and unacknowledged trade-offs associated with canonized claims about transitional justice projects, institutions, and practices. Furthermore, focus on nonconventional measures and policies that advance not just institutional but genuine political reconciliation and on the societal acknowledgement of responsibility for mass atrocities is paramount. Such a hybrid approach could establish a much-needed platform for comparative work and exchange among scholars situated in the Global South and institutions and research centers in North America. Based on regional cases related to the Middle East, South East Asia, Latin America, and Africa, it is important to pay attention to the implications of the historical trends, shown in these studies, for the funding and institutionalization of transitional justice projects and programs at a global scale as they relate to human displacement. As that work is done, we can start asking new questions and put the older, repetitive ones to rest.
PART I

THE PAST AS THE MEMORY OF THE FUTURE
1

Borderlands of Independent India

Transition, Violence, and Justice

Ranabir Samaddar

INTRODUCTION

When the British left India, they left the country in ruins. The mutual killings had started in 1946 in Kolkata with the infamous Great Calcutta Riot. The riot left an estimated 10,000–15,000 dead in five days and 200,000 displaced. The government had to call the army to quell the riot, and this became the pattern

The actual figures of the dead and displaced may never be finally known. We have various reports of unaccounted bodies being recovered in the following days and months. On deaths: it was difficult to distinguish between deaths occurring between 16 and 20 August and in the following week. Thus, for instance, between 22 and 29 August, when sporadic murders were continuing, about twenty dead bodies in various stages of decomposition were recovered from the streets. From the morgue, 100 bodies were recovered in this period, from the streets 20, and from other places 12 (File no. 398/46, Home Political, Government of Bengal [hereafter GoB], West Bengal State Archives [hereafter WBS]), p. 8). Decomposed bodies also meant that the figures of Hindu deaths and Muslim deaths may not be correct. One note in the police file spoke of asking the Hindu Satkar Samity to recheck whether the bodies it cremated were those of Hindus, in view of the high state of decomposition (File no. 398/46, Appendix A, Home Political, GoB, WBSA). We also do not have any comprehensive account of displacement, relief, and rehabilitation. In many cases Hindu and Muslim charity organizations, as well as the Hindu Mahasabha, the Congress, and the Muslim League, ran their own efforts to help the distressed. On the displaced, we have this particular news item: ‘The total number of destitute in Government centers in Calcutta was during the last week of November 13,800, of whom 5,000 were refugees from Bihar. In addition about 1,500 refugees had passed through Government camps to their destinations in Calcutta and elsewhere. This information was given by Sir Walter Garner, Relief Commissioner, Bengal. Sir Walter said that the relief Department was anticipating increased pressure on its organization in Calcutta during the next few weeks, partly as a result of the influx of refugees from Bihar and partly on account of general economic conditions. The Bengal Government had made no representations to the refugees arriving from that province.’ See Calcutta Municipal Gazette (CMG), XLV, no. 1–2, 30 November–7 December 1946, 5–6. In another issue, the Gazette reported on the rehabilitation situation and the works by the then Bengal government regarding rehabilitation of the citizens displaced from the city due to riots. See CMG, XLV, no. 4, 21 December 1946, 7f. The government also put ‘emphasis on rehabilitation of the displaced citizens from the bustees in...
both in the Punjab and Bengal. As the hour of independence approached, communities attacked each other in the entire northern, western, and eastern parts of the country. Acts of killing, burning, ransacking, rape, looting, maiming, and displacing spread like wildfire. The army had to be rushed to several places. What did independence mean, what was signified by freedom, and what was political power to be used for? What was sovereignty? If people were sovereign, did this mean Hindus exercising sovereignty over everyone else, or Muslims, or autonomous regions? What did the term ‘nation’ actually mean when everyone was talking of the nation gaining sovereignty, all at the same time? For the British, the main thing was getting out of India as quickly as possible and until then maintaining the minimum of law and order. For the Indian National Congress, this meant ruling India by preventing further anarchy, re-establishing order, giving the country a constitution, and holding elections to legitimize nationalist rule; for the Muslim League, the task was to build a Muslim Pakistan (that is, the Muslim-majority parts of India in the east and the west) out of the ruins it had inherited.

The way the country was partitioned, however, left Jammu and Kashmir’s fate undecided – a fate that today tells a story through thousands of deaths and four wars between India and Pakistan. Independence also meant the obligation to define what would happen to areas not ruled by the British – for instance, the Naga Hills and other areas in the north-east. Yet again, there was little agreement between the parties concerned on these ‘other’ claims to independence, and whatever consensus was reached quickly broke down in less than a decade. The dialogue between the imperial ruler and the colonized parties was never inclusive and federal. Ultimately, the British left amidst the mess and the principle of the ‘white man’s burden’ was formally over. Responsibility for the loss of lives, massive destruction, and wars fell on none. Transition had no element of justice. Natives were to fight it out among themselves. The age of transitional justice was at least four decades away. Instead, this was the age of transitional violence in the subcontinent, which in some sense continues to this day.

On the issue of displacement and refugees, lack of responsibility will become particularly clear. We do not have any exact figure for the deaths their previous homes’. Bihari refugees were accommodated in the Talah Park previously occupied by the military. CMG, XLV, no. 18–21, 26 April 1947, 407.

2 The three Roundtable Conferences (in 1930, 1931, and 1932) held by the British were marked by bickering and abstention. The Roundtable Conferences led to the Government of India Act of 1935. The Act was evidence of the contentious nature of the deliberations and extremely limited the nature of power to be devolved on the Indians through the Act, which became in several aspects the model for the Indian Constitution.
and displacements that occurred in the wake of the Partition – perhaps half a million died, nearly fifteen million were displaced, and many were internally displaced.3 The two young nation states – India and Pakistan – accommodated refugees as far as possible, but differentially. Thus, for instance, refugees from East Pakistan to India were less fortunate than those from West Pakistan. Similarly, mohajirs from northern parts of India were less fortunate on arrival in Pakistan than the refugees from the eastern part of the Punjab. But the most scandalous part of the transition scenario was that the colonial rulers, the British, exited without even acknowledging any responsibility for the ruin in which they were leaving the country and did nothing in terms of the protection and care of

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3 Estimates of death varied – from a low of about 500,000 to a high figure of 2,000,000. Massive population exchanges took place between the two countries in the months following Partition. The population of undivided India in 1947 was approximately 350 million. At the time of Partition, 350 million people were in India, 30 million in West Pakistan, and 30 million people in East Pakistan (now Bangladesh). Once the borders were established, about 14.35 million people crossed the borders. The 1951 Census of Pakistan identified the number of displaced persons in Pakistan at 7,226,600, presumably all Muslims who had entered Pakistan from India. Similarly, the 1951 Census of India enumerated 7,295,870 displaced persons, apparently all Hindus and Sikhs moving to India from Pakistan after the Partition. Since both censuses were held about 36 years after the Partition, the enumeration included net population increase after the mass migration. About 11.2 million (77.4 per cent of the displaced persons) were in the west, with the Punjab accounting for most of it: 6.5 million Muslims moved from India to West Pakistan, and 4.7 million Hindus and Sikhs moved from West Pakistan to India; thus the net migration in the west from India to West Pakistan (now Pakistan) was 1.8 million. The remaining 3.3 million (22.6 per cent of the displaced persons) were in the east: 2.6 million moved from East Pakistan to India and 0.7 million moved from India to East Pakistan (now Bangladesh); thus net migration in the east was 1.9 million into India. On this there is a considerable amount of literature, with estimates varying. See as instances, Ishtiaq Ahmed, The Punjab Bloodied, Partitioned and Cleansed: Unravelling the 1947 Tragedy through Secret British Reports and First-Person Accounts (Karachi: Oxford University Press, 2012); Prasant Bharadwaj, Asim Khwaja, and Atif Mian, ‘The Big March: Migratory Flows after the Partition of India’, Economic & Political Weekly 43, no. 45 (30 August 2008): 39–49; Paul R. Brass, ‘The Partition of India and Retributive Justice in the Punjab, 1946–47: Means, Methods, and Purposes’, Journal of Genocide Research 5, no. 1 (2003): 71–103; Anita Inder Singh, The Partition of India (Delhi: National Book Trust, 2006); Leszek A. Kosinski and K. Maudood Elahi, ‘Introduction’, in Population Redistribution and Development in South Asia, ed. L. A. Kosinski and K. M. Elahi (Dordrecht: D. Reidel Publishing Co., 1985), 3–14. Bharadwaj and his colleagues said: ‘The Partition of India in 1947 along ostensibly religious lines into India, Pakistan, and what eventually became Bangladesh resulted in one of the largest and most rapid migrations in human history. In this paper district level census data from archives are compiled to quantify the scale of migratory flows across the subcontinent. We estimate total migratory inflows of 14.5 million and outflows of 17.9 million, implying 3.4 million “missing” people. The paper also uncovers a substantial degree of regional variability. Flows were much larger along the western border, higher in cities and areas close to the border, and dependent heavily on the size of the “minority” religious group. The migratory flows also display a “relative replacement effect” with in-migrants moving to places that saw greater outmigration’ (Bharadwaj et al., ‘The Big March’, 39).
the displaced. The United Nations likewise did nothing, though for a disaster that affected the soul of Europe it set up a special relief agency, the United Nations Relief and Works Agency (UNRWA), in 1948 as part of its involvement in the creation of Israel, to be followed by the foundation of the United Nations High Commissioner for Refugees (UNHCR) three years later. The nations of South Asia thus began their journey to independence without any international mechanism of transitional justice. In those heady days of decolonization they had thought, perhaps, that national independence was an accomplishment by itself.

In the end, postcolonial national independence left many areas of citizenship unclarified. Who were full citizens, who were denizens, and who were stateless? For how long could refugees come in from their erstwhile mother countries? Would they automatically get citizenship? Would the sons and daughters and the survivors of the indentured labour system be able to come back to India from the West Indies, Guyana, countries in Africa, Surinam, or the Fiji Islands? As we know, many were not allowed to return. Many remained stateless, including Indian returnees from Burma, Indian plantation workers from Sri Lanka, and Chakmas from East Pakistan who resettled in Arunachal Pradesh in India. The missing aspect of justice in the Citizenship Act (Citizenship Act, 1955; a Bill in 2016 sought to amend it to make Hindu, Sikh, Buddhist, Jain, Parsi, and Christian illegal migrants from Afghanistan, Bangladesh, and Pakistan eligible for citizenship, while Muslims or minority Muslim sects were left out) and the Foreigners Act, 1946, are noteworthy in this regard. As if these were not enough as markers of system-wide political and social injustice, citizenship in India was increasingly veering towards the jus sanguinis principle and away from the jus soli principle. Blood (and thus descent, racial features, etc.) started to play an increasingly important role, and citizenship politics became biopolitics.

The Indian story of transition from colonialism to independence raises the following question: Is not violence (and injustice connected with this) an integral part of transition, unless we link transition with social transformation? In the latter case, justice – political and social – provides the site in which the mortal combat between the violence of the colonial powers and ruling class and the violence in defence by the subjugated plays out. Transitional violence is caused mostly by an absence of justice. This absence characterizes the very nature of transition, which is full of compromises, marked by the domination of violence.