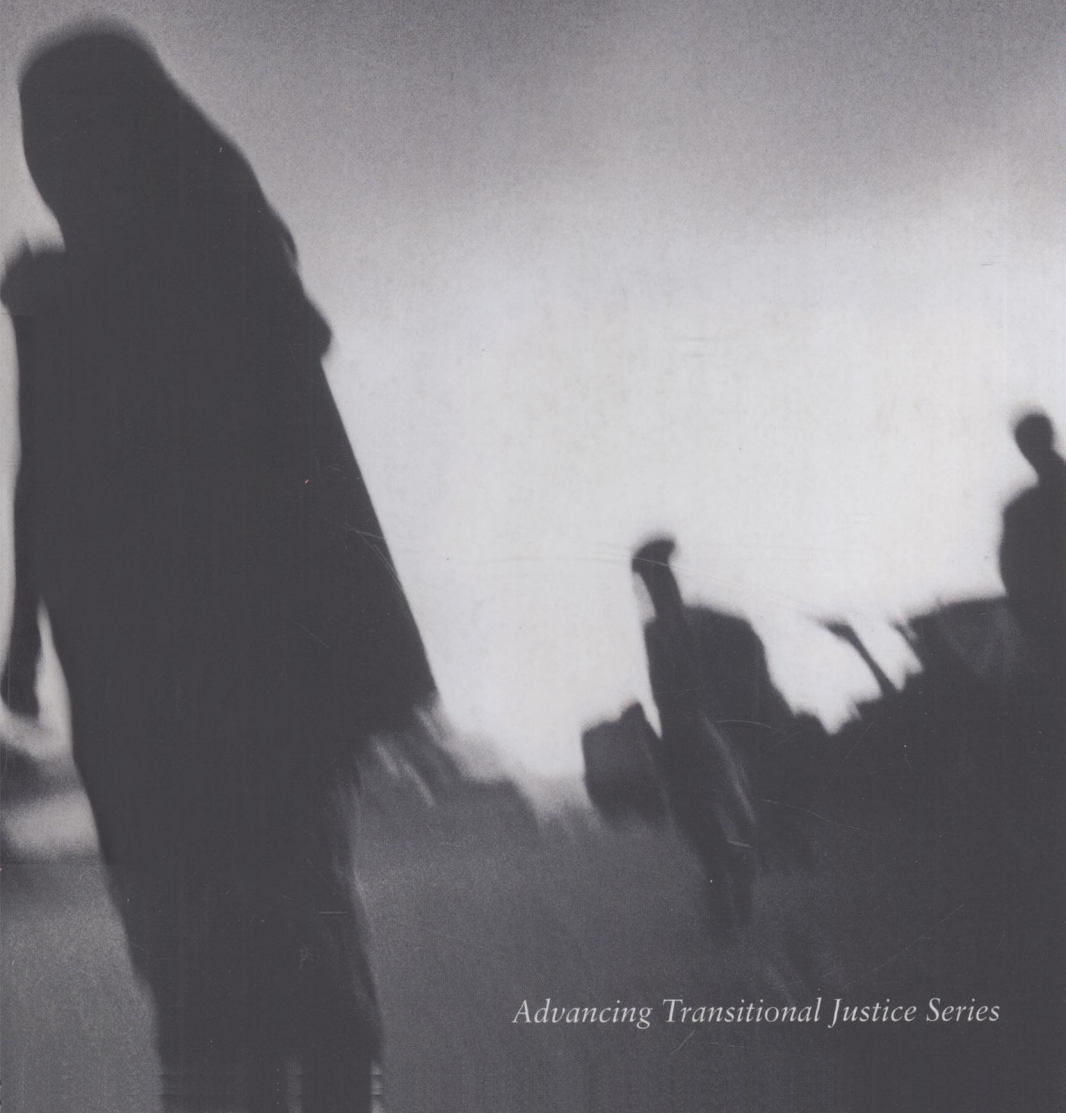


TRANSITIONAL JUSTICE AND DISPLACEMENT

EDITED BY ROGER DUTHIE

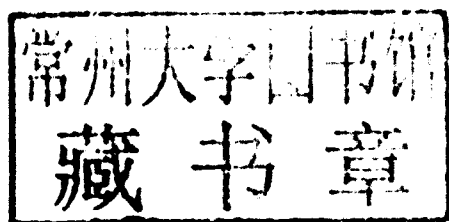
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TRANSITIONAL JUSTICE AND DISPLACEMENT



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TRANSITIONAL JUSTICE AND DISPLACEMENT

EDITED BY ROGER DUTHIE

INTERNATIONAL CENTER FOR TRANSITIONAL JUSTICE

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SOCIAL SCIENCE RESEARCH COUNCIL • NEW YORK • 2012

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Roger Duthie
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INTRODUCTION

Incorporating Transitional Justice into the Response to Displacement

Roger Duthie

Transitional justice is often pursued in countries where massive numbers of people have been displaced from their homes and communities by armed conflict and human rights abuses.¹ Displacement is very much a human rights-related problem, and these contexts present significant challenges for the implementation of effective transitional justice measures. Transitional justice, however, has not addressed the issue of displacement as squarely as it has other types of abuses. Furthermore, large-scale displacement is a problem whose complexity and scope clearly make it unfeasible for transitional justice interventions to adequately address it on their own, and which therefore requires responses that draw closer links between the actions of a range of different actors, including those in transitional justice, human rights, humanitarianism, development, and peacebuilding. Yet practitioners, policymakers, and researchers who work on displacement in these fields are just beginning to consider the interactions between their activities. Little systematic research has been conducted on the ways in which transitional justice relates to displacement, to the justice claims of displaced persons, or to the actors that seek to resolve displacement.

In response to this knowledge gap, the International Center for Transitional Justice (ICTJ) and the Brookings-LSE Project on Internal Displacement collaborated on a research project to examine the relationship between transitional justice and displacement, both within and across national borders.² This edited volume is one of the products of that research. Taken together, the chapters in this book make a compelling case for incorporating transitional justice into the overall response to the problem of displacement in post-conflict and transitional contexts. In order to frame the arguments that lead to this conclusion, in this introduction I consider three initial sets of issues: (1) the reasons why displacement is a concern of transitional justice in the first place, (2) the ways in which transitional justice measures can address displacement and respond to the justice claims of displaced persons, and (3) the links that exist between transitional justice and interventions aimed more directly at resolving

displacement. In thinking through the potential contributions that transitional justice can make to the resolution of displacement, I emphasize the challenges and tensions that may affect the implementation of transitional justice measures and consider how these may be faced. In the final section, I introduce each of the chapters in more detail.

DISPLACEMENT AS A CONCERN OF TRANSITIONAL JUSTICE

Displacement has not as yet figured prominently in the literature or practice of transitional justice. Nor has transitional justice been a focus of research and policymaking on displacement. To begin with, then, it is worth asking why transitional justice should be concerned with the issue. *Transitional justice* refers to the set of measures that are designed and implemented to redress the legacies of massive human rights abuses that occur during armed conflict and under authoritarian regimes, and redressing these abuses entails, primarily, giving force to human rights norms that have been systematically violated.³ The different measures that together make up a holistic approach to transitional justice (that is, one whose constituent elements are complementary both practically and conceptually) seek to provide recognition for victims, foster civic trust, and promote possibilities for democracy. They include criminal prosecutions of those most responsible for violations; reparations programs that distribute a mix of material and symbolic benefits to victims (such as compensation and apologies); restitution programs that seek to return housing, land, and property to those who were dispossessed; truth-telling initiatives that investigate, report, and officially acknowledge periods and patterns of past violations; and justice-sensitive security sector reform (SSR) that seeks to transform the military, police, and judiciary responsible for past violations through processes such as vetting.⁴

The term *transitional justice* emerged in the 1990s as a particular way of addressing serious human rights violations and facilitating the political transitions to democracy underway at that time in Latin America and Eastern Europe. As such, the particular violations it dealt with were civil and political and not economic and social (even though economic and social inequalities existed in such contexts). Since then, the measures associated with transitional justice have been increasingly applied in post-conflict contexts (as opposed to post-authoritarian ones) and in countries that have not undergone significant political transition, as well as in those that are still experiencing conflict. This expansion of the contexts in which transitional justice is applied means that it

is more and more likely to be implemented in situations where problems such as massive displacement of people—linked to both civil/political and economic/social violations—are of significant concern.⁵

Displacement occurs when a person or group has been forced or obliged to flee or to leave their homes or places of habitual residence. The 1951 Refugee Convention defines a *refugee* as someone who flees across a border to avoid persecution,⁶ but a broader definition has emerged since then, as reflected in the 1969 Organization of African Unity (OAU) Refugee Convention⁷ and the 1984 Cartagena Declaration on Refugees, as someone trying to avoid the effects of armed conflict, situations of generalized violence, or violations of human rights. As laid out in the 1998 Guiding Principles on Internal Displacement, an “internally displaced person” (IDP) may be uprooted by similar causes as well as natural or human-made disasters.⁸ “Durable solutions” to displacement include voluntary return, local integration, and resettlement in a third location or country.⁹

Displacement is integrally linked to massive human rights violations in several ways. Serious and widespread rights violations, such as mass killings, arbitrary arrests, torture, and rape, often cause displacement, while some violations, such as the destruction of homes and property, can be aimed at undercutting the possibility of a return home. Furthermore, when it is the result of intentional policy, displacement by itself can constitute a war crime or a crime against humanity.¹⁰ In addition, displacement often leaves its victims vulnerable to other human rights violations; the displaced, without the basic protection provided by their homes, livelihoods, communities, and authority structures, are “especially vulnerable to acts of violence and human rights violations, including round-ups, forced conscription and sexual assault.”¹¹

Since transitional justice seeks to redress the legacies of massive human rights violations, it has reason to concern itself with displacement. Indeed, the achievement of its objectives would be undermined in certain contexts if it did not address displacement. Given these links, policymakers, practitioners, and researchers in the field of transitional justice have begun to address the issue.¹² Similarly, it is increasingly acknowledged in displacement discourse and practice that truly resolving displacement often requires not just a rights-based approach but also that *past* human rights abuses be specifically addressed. The actors that work most directly to achieve durable solutions—humanitarian, development, human rights, and peacebuilding actors—are realizing that they may not be able to achieve their aims without engaging the justice claims of the displaced.¹³

TRANSITIONAL JUSTICE RESPONSES TO DISPLACEMENT

International discourse in recent years has referenced the need for societies and actors struggling to resolve large-scale displacement crises to respond to the justice concerns these crises entail. The 2004 Report of the Secretary-General on the Rule of Law and Transitional Justice in Conflict and Post-conflict Societies, for example, calls for transitional justice to pay special attention to abuses committed against displaced persons, among other conflict-affected groups, and to “establish particular measures for their protection and redress in judicial and reconciliation processes.” The 2011 report of the same title contains multiple mentions of displaced persons as well.¹⁴ The UN Inter-Agency Standing Committee (IASC) 2010 Framework on Durable Solutions for Internally Displaced Persons also includes a section on access to effective remedies and justice—including transitional justice measures.¹⁵ Asserting the importance of securing justice for displaced persons, the Framework argues that in some situations it is “necessary in order to achieve durable solutions to formally address past violations by holding perpetrators accountable, providing victims with reparations in a formal sense (including compensation), and/or providing information on the causes of displacement.”¹⁶

Furthermore, and as is discussed in several of this book’s chapters, contemporary understandings of a rights-based approach to humanitarian protection include a typology of three different types of action—responsive, remedial, and environment building. In distinguishing between these categories of action, the IASC’s 2002 report *Growing the Sheltering Tree: Protecting Rights through Humanitarian Action* emphasizes the importance of the humanitarian community’s support for remedial activities related to justice and reconciliation, including the work of truth commissions and the cultivation of “the concept of individual responsibility for serious crimes under international law.”¹⁷ Similarly, the 2009 African Union Convention for the Protection and Assistance of Internally Displaced Persons in Africa calls for the criminalization of acts of arbitrary displacement and the provision of effective remedies for the displaced, including “just and fair compensation and other forms of reparations.”¹⁸

In practice, a number of transitional justice measures have directly addressed displacement. While earlier truth commissions did not, for the most part, include displacement in their mandates or focus on the issue in their reports, the trend among more recent commissions has been to depict displacement as a serious human rights problem. Commissions in Liberia and Sierra Leone, for example, reported that displacement was the most pervasive

human rights violation in the armed conflicts in those countries. Timor-Leste's commission found that displacement caused more deaths than any other factor during Indonesia's occupation. And Guatemala's truth commission recognized the massive suffering and stigma endured by the displaced and the negative effect of state discrimination on their return and reintegration. Truth commissions have also made recommendations that respond to or are at least relevant to the specific concerns of displaced persons, such as the need for property restitution and land reform.¹⁹

Reparations programs can also respond to displacement by distributing benefits for the human rights violations that caused people to flee their homes, for the abuses they suffered while displaced, or for the crime of displacement. There have been only a few examples, though, of reparations programs providing compensation for displacement itself. Following the 1990–91 Gulf War, the UN Compensation Commission provided financial compensation to those who fled Kuwait and Iraq as a result of the latter's invasion of the former.²⁰ In Turkey, the 2004 Compensation Law provided compensation to IDPs for pecuniary losses, but while it has been described as a significant step toward addressing the country's displacement problem, serious problems of design and implementation have undermined its reparative effects.²¹ In Timor-Leste, compensation was provided for property damage sustained in the 2006 displacement crisis, but the program specifically avoided using the term *reparations* because of its political implications.²² In Guatemala and Peru, reparations programs treat displacement as a crime that merits reparation, and in Colombia the administrative reparations program recently established by the 2011 Victims' Law anticipates providing redress for displacement as such, but in none of these countries has compensation for displacement yet reached those who were displaced.²³ Reparations can also be tailored specifically to the needs and experiences of displaced persons. For instance, awarding benefits in the form of educational opportunities or health care may be particularly helpful to those who lacked adequate access to such services while displaced, and symbolic and collective forms of reparation may be appropriate when entire communities or groups were displaced because of their identities.²⁴

Restitution of housing, land, and property in transitional contexts is a reparative measure that is clearly linked to displacement. After emerging as a practical tool for correcting injustice in Eastern Europe and South Africa at the end of the Cold War, restitution rose to prominence in the 1990s following the rash of armed conflicts involving ethnic cleansing campaigns; it was seen as "an integral response" to displacement-related human rights violations.²⁵ In postwar Bosnia, for example, as "an overtly human rights based remedy for

resolving displacement,” the restitution program processed two hundred thousand housing claims and supported the return of approximately half of those displaced by the armed conflict.²⁶ The utility of the “Bosnia model,” however, has since been questioned in contexts such as Afghanistan, the Democratic Republic of Congo, and Timor-Leste, where restoring the property distribution patterns that existed prior to displacement would not necessarily be just. As Rhodri Williams explains in chapter 3, restitution has evolved from being seen as a mechanism meant to bring about return, to being recognized as a right in itself, to more aptly being considered one reparative but context-sensitive policy option among many in response to post-conflict property disputes.²⁷

Criminal prosecutions can target the perpetrators of human rights violations that lead to the displacement of civilians, or they can target displacement as a crime itself. When it is the result of intentional policy, displacement can constitute a serious human rights violation.²⁸ According to the statutes of the International Criminal Tribunal for the former Yugoslavia and the International Criminal Court (ICC) and the Elements of Crimes of the Rome Statute, deportation and forcible transfer can constitute crimes against humanity, and unlawful deportation or transfer of a civilian is also a grave breach of the Geneva Conventions.²⁹ Displacement has also been the subject of prosecution by the Extraordinary Chambers in the Courts of Cambodia and in the Colombian judicial system.³⁰ The UN high commissioner for human rights has argued that criminal prosecution, through its potential deterrence effect, is “a very important aspect of the long-term solution to the problem of human rights and forced displacement.”³¹

Some transitional justice measures, then, have in practice addressed the issue of displacement in various ways. The efficacy of any transitional justice response to displacement, however, may depend on the extent to which its processes are able to meaningfully engage with displaced persons through avenues such as outreach, consultation, and participation. Such engagement is important in ensuring that justice measures actually respond to the particular experiences, needs, and justice claims of the displaced.³² Furthermore, given the prevalence of women and children among displaced populations, such engagement may be particularly important in redressing gender-based injustice and incorporating an overall gender perspective into transitional justice efforts.³³ If transitional justice processes do not engage with these groups, their concerns may not be adequately addressed.³⁴ Certain truth commissions, for example, have made specific efforts to involve displaced persons in their activities. Guatemala’s commission was “one of the more successful in terms of integrating the perspectives of displaced persons,” with investigators traveling