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Transitional Justice and Its Discontents

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At a military base outside Phnom Penh, two elderly defendants have been refusing since October 2014 to cooperate in the second stage of their trial for presiding over mass killings during the 1975–79 Khmer Rouge regime. A third defendant died in early 2013, a few months after a fourth was ruled unfit to be tried. So far only one case at the Tribunal has run its full course, that of a former torture center chief who is currently serving a life sentence. Cambodia's authoritarian government (it has long been rated Not Free by Freedom House) is blocking any further arrests, and the US$200 million that the international community has spent so far on a flawed "hybrid" tribunal (it is considered both Cambodian and international) will probably result in just three convictions.

Next door in Thailand, the Truth for Reconciliation Commission that was set up to investigate the deaths of 92 people during April and May 2010 demonstrations has failed to offer any strong criticism of the military officers who ordered most of the killings. Instead, the commission has blamed armed elements within protest ranks for precipitating the violence. The Royal Thai Army, its longstanding impunity unchecked, went on to stage yet another coup (Thailand's twelfth since 1932) in May 2014.

Over the past two decades, "transitional justice"—a catch-all phrase that refers both to truth commissions such as the one in Thailand and special courts with criminal-sentencing powers such as the one in Cambodia—has become a vast global industry that employs tens of

thousands of people. Kathryn Sikkink lists transitional human-rights prosecutions relating to 48 countries, mainly since the mid-1990s, along with 28 truth commissions.[1] Much of the funding for these activities comes via the United Nations, or as donations from Western countries and Japan. In 2014, the UN spent more than $200 million on the Rwandan and former Yugoslavia tribunals alone. Like any such industry, the transitional-justice enterprise has promoters who make optimistic claims about what it is and what it can accomplish.[2] Two key milestones mark the rise of transitional justice. The first was the 1995 establishment of South Africa's postapartheid Truth and Reconciliation Commission (TRC), and the second was the creation in 2002 of the International Criminal Court (ICC), with its headquarters at The Hague. These two institutions have served as oft-imitated models, while the principles and ideals that they are meant to embody have been widely praised and exported.

The ICC symbolizes the idea that those responsible for genocide, war crimes, or other crimes against humanity should face trial, not simply in normal domestic courts—which often are too limited in capacity or too politicized to act against political elites or senior security officials—but in specially created international tribunals. By trying these defendants outside ordinary courts and under the highest international standards of justice, such tribunals are meant to exert a potent moral authority that will deter current and future leaders from engaging in terrible criminal acts. These tribunals' warmest supporters also claim that the principles thus demonstrated can help to improve local judicial systems while also laying some of the groundwork for transitions toward more open and democratic political orders.

The South African TRC captured the notion that a transition to democracy must often confront "unfinished business": histories of human-rights abuses, crimes committed by former regimes, and violent incidents that have gone uninvestigated, sometimes for decades. In many

cases, pressing criminal charges against perpetrators (who may also be victims) proves impractical or undesirable. Truth commissions offer a less adversarial means of righting wrongs. Documents and other evidence are collected, witnesses are interviewed, reports are published—but legal immunity is often given, and generally nobody goes to jail. This nonpunitive, quasi-judicial process aims to heal emotional wounds and promote comity between old enemies.

The current vogue for transitional justice seems, on its face, eminently reasonable and indeed laudable. Those who have committed atrocities or crimes against humanity deserve to be tried and (if convicted) punished, by an international tribunal if necessary. Societies torn by violence should have a chance to remember, reflect, and pursue reconciliation. The rise of transitional justice has given rise to a huge industry of lawyers, UN staff, NGO activists, consultants, and fellow-traveling academics who are busy setting up tribunals and truth commissions around the world. And always, of course, all is done in close collaboration with local "partners." A main argument of the industry is that it helps to create "justice cascades" through which norms of fair trials and accountability begin to take hold in national and local contexts.

Accountability is an important concept. As Ricardo Blaug argues, it has two core components. The first is scrutiny (who can be made to explain their actions?), and the second is sanction (what consequences will they face?).[3] While truth commissions emphasize scrutiny, trials emphasize sanction. Evaluating the success of accountability involves establishing criteria for the effectiveness of transitional-justice initiatives. Much depends on the aims that the mechanisms are meant to serve. These aims may not always be obvious: They could include punishing criminality, asserting morality, creating an "expressive" example, resolving conflicts, aiding political "transitions," achieving "closure," enhancing "transparency" and community

cohesion, or crafting historical memory. Some of these aims may contradict one another. In some cases, for instance, transitional-justice mechanisms may end up preventing scrutiny—key actors may never testify, commission reports may become exercises in evasion—or they may even obstruct rather than promote the imposition of effective sanctions.

Transitional justice, whether brought by tribunal or truth commission, would be great if it worked. Likewise, if its results were unproven but fairly harmless, there would be little to worry about. Money has often been wasted on much worse things. But what if transitional justice all too often proves counterproductive? What if it raises unrealistic hopes, stirs up fears and hatreds, hijacks transition processes, and even strengthens corrupt elites? If the transitional-justice industry spawns new nightmares instead of banishing old ones, then the tribunals and commissions have gone too far.

Another oft-heard term in the transitional-justice world is "holistic approach." The idea is that criminal prosecutions, truth commissions, reparations, gender justice, security-sector reform, and efforts to memorialize victims should often be deployed together. Nevertheless, the syncretism involved in such complementarity is analytically quite confused. Throwing in, for example, promoting more enlightened gender policies and cutting the number of army generals serves to blur the legalistic character of transitional justice—since these are policy measures that can be undertaken by any society.

Tribunals on Trial

The idea of charging people with crimes against humanity in international courts goes back to the tribunals convened by the victors at the end of the Second World War. As was

recognized at the time, it implied no sympathy for the Nazis to point out that the retrospective legal basis on which they were tried was extremely problematic. Radhabinod Pal, the dissenting Indian judge at the Tokyo war-crimes trials (1946–48), condemned that process as a "victor's charter."[4] Although Pal was moved by his personal hostility to Western imperialism, his closely reasoned dissent became a landmark in international law, making the case for an "even justice"[5] grounded in an international "impartial court" with universal jurisdiction. Pal praised moves dating back to a 1920 meeting at The Hague to create an International Court of Criminal Justice, hailing it as a "wise solution to the problem."

By excluding from the dock Allied leaders themselves (who might have been arraigned for the mass bombing of civilians) as well as Emperor Hirohito and his relatives (who were exempted from prosecution by wary occupation authorities), the Tokyo Tribunal proved highly selective in its choice of targets. Telford Taylor, one of the U.S. Nuremberg prosecutors, saw the dangers of selectivity and called upon the United States and other leading nations to create a "permanent international penal jurisdiction" in order to avoid the German perception that Nuremberg "was for Germans only."[6]

Does the ICC, which was finally brought into being by the Rome Statute of 2002, fulfill Pal's hope for "even justice," or does it continue the Nuremburg tradition of "expressive" trials—procedures legal in form, but with questionable legal bases, that are held for "higher" emotional or moral reasons? And do "expressive" trials not drift perilously close to becoming show trials? Is the ICC supporting international norms and values, or has it come to serve mainly the interests of Western powers? How far is the broader rise of international tribunals, symbolized by the ICC, helping to promote liberal notions of justice? And is there a risk that the proliferation of such tribunals could perversely end up undermining the promotion of justice?

Housed at The Hague, the ICC currently has 122 state parties, while a further 31 countries have signed the Rome Statute without ratifying it. A novel feature of the Rome Statute is that the ICC can act without the authorization of the UN Security Council or any particular state; rather, the ICC is deemed to create a parallel form of jurisdiction which is said to "complement" that of the nation-state.

To date, the ICC has acted with regard to eight "situations," opening 21 cases and indicting 36 people. Of those, it has so far convicted just two, while spending a growing budget that in 2009 alone added up to almost $118 million, all of it contributed by the court's "state parties." Although preliminary proceedings have begun in cases from Afghanistan, Colombia, Georgia, Honduras, Ukraine, and Venezuela, all those indicted so far have been African, as have been both of those convicted (they are from the Democratic Republic of Congo). This record has caused the African Union to threaten mass withdrawal from the Rome Statute, and to demand that serving heads of state be exempted from ICC indictment while in office.

Two major ICC debacles stand out. The first was its ineffectual 2008 indictment of Sudan's President Omar al-Bashir for crimes against humanity in relation to Darfur. A defiant Bashir retains his post and travels the region with no fear of arrest. The second was the December 2014 decision by the court's chief prosecutor to drop a case against Kenyan president Uhuru Kenyatta for fomenting 2007 postelection ethnic violence. Kenya, an ICC state party, had covertly sabotaged the investigation.[7] The ICC's limits in dealing with sitting heads of state and ongoing conflicts are painfully clear, and raise the question of how a transitional-justice model can work when there has been no real transition.

China, India, Israel, Russia, and the United States are all nonparties to the ICC, and the Arab states (except Jordan) have stayed out as well. The United States, critics charge, prefers

special UN-sponsored tribunals, such as those that the Security Council set up to deal with Rwanda and the former Yugoslavia, to the more freewheeling ICC. Although the United States has refused to ratify the Rome Statute, since 2005 it has shifted from an adversarial position and begun working as an ally of the ICC, leading detractors to charge that the court has become "an instrument in the toolkit of major powers responding to instability and violence in weaker states."[8] Thus has an institution founded to pursue impartial justice become a means of managing political problems under the rubric of impartial justice's moral authority. If this is how the flagship project of "transitional justice" operates, then we might wonder if the adjective—which refers to the political project of promoting certain kinds of regimes over others—outweighs the noun.

The ICC's recent travails underline Victor Peskin's idea that courtroom trials run parallel with—and may be overshadowed by—"virtual trials," which are in fact political struggles between the international community and the states where war crimes took place, as well as factional fights within those states. Virtual trials often loom large because international tribunals so frequently represent attempts to lay a scrim of morally superior judicial ritual atop stubborn, messy political realities. Simply put, international tribunals have been created to solve political problems that lie well beyond their capacity to fix. What is needed instead is not more tribunals, but rather more scope for creative political fixes of the sort that legal experts are unlikely ever to generate.

Peskin concludes that tribunals (often meaning their chief prosecutors) have sometimes been able to win greater cooperation from targeted states through the use of strategies "ranging from shaming to negotiation."[9] In other words, a tribunal's ability to deliver justice hinges on how politically skilled its leadership is. If chief prosecutors closet themselves with piles of

documents, their courts are likely to fail. Peskin argues that such prosecutors must be good at conciliation and deal-making, even if this risks the appearance of "an exercise that has more to do with politics than with law."[10] In the end, tribunals and truth commissions are quasi-legal processes that have as their goal a stable and fair political settlement. Former International Criminal Tribunal for Rwanda legal advisor Kingsley Chiedu Moghala's extensive research leads him to argue that "using international war crimes trials as a frontline approach to preventing or deterring genocide is a failing policy."[11] Since all supranational transitional justice arrangements are essentially political, they lack the legitimacy to effect real change.

Replacing Politics with Legalism

In addition to the paucity of evidence that transitional-justice solutions are effective, there is the problem that the entire transitional-justice edifice—whether in its tribunal or its truth-commission form—rests on dubious claims of moral superiority that are used to trump all criticism of transitional justice's underlying ideological project, which is to replace politics with legalism.[12]

> The matter was set forth most clearly a half-century ago in a seminal book by the political theorist Judith N. Shklar.[13] A Harvard academic who as a child fled to North America from her native Latvia in order to escape the Nazis, Shklar was deeply skeptical about the ethical underpinnings of the Nuremburg trials. She became convinced that those who sought to emphasize the priority of justice over politics were quietly subscribing to an ideology—almost always kept implicit—that she called "legalism." Advocates of legalism liked to insist that the pursuit of justice was somehow suprapolitical and even beyond criticism. Contending that legalism does not stop at merely separating law from politics Shklar charged that legalism looks down on politics [14]

> The divorce of law from politics is, to be sure, designed to prevent arbitrariness, and that is why there is so little argument about its necessity. However, ideologically legalism does not stop there. Politics is regarded as not only something apart from law, but as inferior to law. Law aims at justice, while politics looks only to expediency. The former is neutral and objective, the latter the uncontrolled child of competing interests and ideology. Justice is thus not the policy of legalism, it is treated as a policy superior to and unlike any other.[15]

Shklar set out to make a countercase for the indispensability of politics. Only by engaging in the give-and-take of sharing and competing for power, she insisted, can a society thrash out its conflicts and disagreements. Political problems need political solutions. Yet once the "crimes against humanity" designation is applied, such solutions are displaced by legalistic steps that invoke the rhetoric of "justice" while failing to solve the irreducibly political problems that troubled societies continue to face.

In a 1986 preface to the second edition of her book, Shklar noted that the original edition had "offended virtually all of the lawyers who read it" by treating legalism as a political ideology. Most of them much preferred to assume that legal ideas and institutions are "highly discrete practices" immune from politics. Although the questioning of such assumptions has become more common since Shklar's time, the problem of regarding law as morally superior to mere politics persists—and is particularly acute in the world of transitional justice. Shklar observed that legalism reveals itself most clearly "at the margins of normality," as in the Nuremburg and Tokyo tribunals, and noted with some apparent satisfaction: "There have been many wars since then and endless crimes against humanity, but there has been no repetition of the trials that followed the Second World War."[16]

Shklar saw Nuremburg as a broadly successful intervention, but largely because the tribunal formed part of a clear and well-crafted political project, and was hence far more than a

legalistic exercise. She seemed to view the lack of new international tribunals up to 1986 as betokening a grasp of their shortcomings and hence vindicating her arguments. She died in 1992, before the vogue for transitional justice that came on the heels of the South African Truth and Reconciliation Commission, and would later produce the ICC.

What would Shklar have made of this vogue? Her 1986 preface includes an important defense of something she calls "tribunality." By this, she means that law is an extension of politics, rather than a moral high ground towering somewhere above political life. Tribunality, says Shklar, is "inherent in functioning assemblies, bureaucracies, mediators of all kinds and extends even down to parents as they try to be fair in distributing rewards and penalties'.[17]

Shklar's support for the creative legalism found at Nuremburg, which can be justified 'as an act of legalistic statesmanship and on the basis of its immediate effects on German politics' (170) offers the lineaments of a blueprint for tribunality: the use of power to promote fairness, which may be done through courts, or through more overtly political institutions. Tribunality is an extension of politics, rather than a moral high ground floating somewhere above the earthly realm; war crimes trials proved worthwhile in the case of the Nazis precisely because of the existing legalistic tradition of German jurisprudence."[18] Law and politics thus form part of what we might term (after Shklar) the "tribunality continuum." This means that complex political problems can best be addressed by the considered use of tribunality, rather than by merely legalistic solutions. Nuremburg, in her view, showed how tribunality can use power to promote fairness. Yet Shklar warned that international courts can work only in certain cultural and geopolitical circumstances. The Nazi war-crimes trials proved worthwhile precisely because of the existing tradition of German jurisprudence. The Tokyo trials, by contrast, "achieved nothing

whatever." In short, "one could justify the Nuremburg trials only on political grounds, and the Tokyo ones not at all."[19]

While the U.S. occupation of Japan achieved much success despite the Tokyo tribunals' failure, this success was not juridical. It was political. A defeated aggressor was brought back into the family of nations, with new-minted or remodeled institutions that remain largely unchanged seven decades later. The Constitution of 1947, written by General Douglas MacArthur's staff, has yet to be amended. In large measure, the enduring character of the occupation-era reforms reflects the Japanese people's sense that they are relatively fair.

The transitional-justice industry does not, as a rule, pay much attention to the messy particularities of history. Instead, it seeks to generalize an approach that is only likely to work under tightly circumscribed conditions. Moral grounds, never political ones, are used to justify all transitional-justice interventions. What should be done in cases such as Cambodia or Rwanda, where tens of thousands of perpetrators may have killed hundreds of thousands of victims? Are criminal proceedings a useful response to such terrible events? Would convicting some perpetrators amount to a form of justice? Does such justice serve the purposes of "transition"? Does it support moves toward a more open and liberal-democratic political order?

The logical conclusion from Shklar's analysis is that the world needs less transitional justice, and more use of judicious tribunality. In order to right wrongs, to punish the cruel, and to secure some tentative gains for liberalism—albeit Shklar's ever-watchful "liberalism of fear"—real politics and not some putatively suprapolitical legalism must openly take center-stage.
As the case of Cambodia illustrates, the notion of transitional justice is based on an implicit moral hierarchy, with "justice" at the top, politics below, and security measures at the bottom.

This might be summarized as "*Justice:* Try Khmer Rouge leaders. *Politics:* Craft a democratic polity. *Security:* Remove Khmer Rouge from power."

Note that the last item on the list must be the first to happen on the ground. The Khmer Rouge were toppled from power in January 1979, but this has not become an action imbued with much prestige or importance. That is mostly because it was carried out by the army of communist Vietnam, an adversary of the United States and the pro-Western regional grouping, ASEAN. The recrafting of the Cambodian polity by the UN Transitional Authority in Cambodia (or UNTAC, 1992–93), based upon a long process of peace talks, has by contrast been seen as an important moral mission of the international community and a prototype for UN-brokered political transitions since. Yet simply installing some form of elected government in Cambodia was insufficient to complete this moral project: At least partly because of Western guilt at having failed to act against the murderous Khmer Rouge regime in the 1970s, there were persistent demands for an international tribunal to prosecute its leading figures.

I am not suggesting that those responsible for mass murder should go unpunished, but only noting that the pressing of criminal charges in such a situation will inevitably run into moral, political, and practical problems. Up to two-million people were killed in Cambodia between April 1975 and January 1979– almost a quarter of the country's population.[20] The number of perpetrators was huge as well, and some perpetrators had become victims. The first trial was that of Khaing Guek Eav (better known as Duch), the commandant of the S-21 detention and interrogation center. This former school became the place where Khmer Rouge cadres were locked up once the paranoid movement began to turn on its own. Many of the thousands who were held in unspeakable conditions, tortured, and executed at S-21 had themselves taken part in the torture or execution of others. Indeed, many guards at S-21 met the

same fate as those whom they had interrogated. The distinction between victims and perpetrators was not just blurred, it was often nonexistent.

Much of the motivation for the Khmer Rouge tribunal is political. There is collective international regret that UNTAC came and went without loosening the authoritarian grip of Prime Minister Hun Sen and his Cambodian People's Party (CPP), which has been in power since 1979. The tribunal represents an implicit attempt to destabilize Hun Sen and promote regime change, in keeping with the longstanding Western desire for a "noncommunist opposition" that can transform Cambodia for the better.[21] The problem with this game is that two can play. While donors to the Extraordinary Chambers in the Courts of Cambodia (ECCC) may privately hope to delegitimize Hun Sen by taking on Cambodia's "culture of impunity," the premier and his aides skillfully point to the trials to highlight their own pet themes. They love to dwell on how their government freed Cambodians from the killing fields, and has since rebuilt the country "from scratch." If the source of Cambodia's problems lies in the Khmer Rouge past, they are in effect saying, then the solution to them lies with Hun Sen and the CPP.

If, as looks extremely probable, Hun Sen's government will be able to bar any suspects beyond the original five from being indicted, then liberal ideals of global justice will have taken a hard hit. The Khmer Rouge tribunal may then stand exposed as a high-water mark, showing where the real-world effectiveness (if not the lingering popularity) of the transitional-justice trend began to recede. Some of the tribunal's problems have been procedural and technical, but the basic shortcoming has been the inability of the UN and major donors such as Japan, Australia, the United States and Germany to resist the CPP regime's endless game-playing. In truth, a fully Cambodian court with UN technical support would have been a more viable option – albeit more transparently under Hun Sen's control .[22] The ECCC has been termed a 'black

sheep' among UN-backed tribunals,[23] but that does not let "hybrid" justice off the hook: The problems of the Cambodian case, like others at the "margins of normality," are simply more visible than those elsewhere.

Prosecuting Heads of State

Take the more straightforward case of an elected leader who apparently abuses her authority. In an electoral democracy, should the voters decide her fate at the next ballot? Or should she face impeachment and formal removal from office by a constitutional, political process? Or street protests and demands for resignation? Or should she be hauled up on domestic criminal charges, and possibly sentenced to jail? In the twenty-first century, recourse to judicial measures to address all manner of abuses of power has become a kneejerk reaction, one which testifies to the inexorable rise of legalism. Ellen Lutz and Caitlin Reiger cite Shklar's criticism of political trials as legal proceedings in which powerful actors seek to eliminate their political enemies, but then argue that such cases are now in the minority.[24] They distinguish, in effect, between "bad" political trials, in which politics gains the upper hand over justice, and "good" political trials, which reflect a desire for public accountability. But the distinction may not always be so clear. But the distinction is not as straightforward as this narrative suggests. Lutz takes as her starting point a campaign to pursue former Philippine dictator Ferdinand Marcos through the courts on corruption charges. Yet parallel campaigns to indict another Philippine president, Joseph Estrada, were hijacked by his political opponents: In countries where corruption is ubiquitous, just about anyone who has ever held public office can be hit with corruption charges. Under such conditions, too much legalism may bring not greater order, but deadlock or even chaos.

However superficially attractive it may seem, criminalizing political leaders for their bad behavior or questionable decisions risks devaluing or undermining the political process. This tendency has assumed an extreme form in Thailand, where no fewer than three prime ministers

were judicially ousted between 2008 and 2014, spawning strife, instability, and a military coup. Samak Sundaravej, was thrown out in 2008 on a technicality for having hosted a televised cooking show—an example of legalism gone mad. There are times when invoking judicial mechanisms in order to bring down a controversial figure or resolve a political contention may backfire and rouse rather than settle passions.

Truth Commissions

Although the transitional-justice industry is best known for the ICC and other criminal tribunals, the exponential growth of truth commissions has been a parallel development over the past two decades. A classic truth commission belongs to the time after a transition away from authoritarianism has occurred, when a more open political order is being built. The task is to investigate (but not prosecute) the misdeeds of the old, unfree regime. Truth commissions typically seek to make an accurate public record of the past, to give victims some sense of acknowledgment and "closure," to "name and shame" (but not jail or fine) perpetrators, to promote society-wide reflection and reconciliation, and to suggest partial remedies such as reparations for documented victims.[25] In some cases, truth commissions are a second-best recourse for those cases where there are too many perpetrators to try, or where putting former regime officials in the dock might be too explosive. But increasingly, such commissions are promoted as morally desirable projects in their own right, unrelated to questions of criminal prosecution.

Much as the shadow of Nuremburg looms over the ICC and other hybrid courts, the South African TRC is the model for truth commissions. It had various quasi-judicial features

including extensive witness hearings, and it was empowered to issue amnesties. Most of the scholarly attention paid to truth commissions has gone to what Patricia Hayner terms "strong" versions of them (her use of "strong" versus "weak," we should note, allows her to avoid harder discussions about "successful" versus "failed"). In the strong category she places not only the South African TRC, but commissions in Guatemala, Morocco, Peru, and Timor Leste.[26] Strong commissions typically combine a potent sense of purpose with extensive public engagement, and come up with well-crafted recommendations that are broadly well-received.

Hayner has offered a checklist of desirable features for strong commissions, including a wide mandate, investigative powers, a term of two to three years, a sizeable budget, and a staff numbering at least a hundred people.[27] Other assets for commissions include a sharply defined time period to examine, considerable public buy-in, sympathetic media coverage, strong domestic and international political support, and lack of national-government interference. Of the more than forty truth commissions that have been created to date, only a small share have met Hayner's technical criteria for strength. But we need to work with a much broader set of accountability criteria: To what extent did these commissions bring about genuine forms of scrutiny? How far did they lay the groundwork for appropriate sanctions? Most commissions are flawed, many are weak, and some border on outright dysfunction. The prospect of finding fault with an enterprise that holds up as its guiding ideals such universally praised concepts as justice, truth, and reconciliation does not appear to be an appetizing one in many eyes. Hence the stealthy mushrooming of second- and third-rate truth commissions has drawn remarkably little critical scrutiny.

For the sake of argument, let us assume (even if we doubt this to be the case) that the rare "strong" commissions are relatively unproblematic. We must still ask: Is there any evidence that

weak commissions do any good? Could some of them actually prove harmful, by stirring up dark memories, exacerbating conflicts, destabilizing regimes, or even generating fresh rounds of violence? In short, can one say that any truth commission is always better than no truth commission?

A brief discussion of two failed Thai inquiries may help to illustrate some of the problems faced by truth commissions. In 2005, the Thai government established a National Reconciliation Commission (NRC) to examine the resurgence of separatist violence in the country's Muslim-majority southern provinces. It was chaired by distinguished former prime minister Anand Panyarachun.[28] After commissioning an impressive series of research projects, the NRC put out in mid-2006 a 132-page final report that contained many airy references to justice, but no serious discussion of either the perpetrators of violence or the underlying questions of governance and representation facing the country. This anodyne document swiftly sank without a trace while the premier who had commissioned it, Thaksin Shinawatra, was ousted in a September 2006 military coup. In the 2011 edition of her standard book on truth commissions, Hayner does not even mention the NRC.

Like many such bodies, Thailand's NRC was not intended simply to promote truth or reconciliation. Rather, it was a political project initially designed to deflect attention from Thaksin's botched handling of the southern conflict. Soon enough, however, the commission's proceedings became a focus for opposition to the Thaksin government led by a group of liberal royalists, and so helped create the conditions for the coup. The southern conflict was not a transitional-justice problem; it was a political problem, in need of a political solution.

Much the same was true of the Thai Truth for Reconciliation Commission mentioned at the outset of this essay. By far the greatest number of those killed in the 2010 violence had been

pro-Thaksin civilian protestors shot by the military, but the commission's report blamed mainly the demonstrators.[29] Leading commission members were known allies of the anti-Thaksin movement, and their report studiously avoided talking about the longstanding policy of impunity for state officials that allows the Royal Thai Army to be so free in its use of force. This unwillingness to criticize the military helped to create the conditions for yet another coup, this time in May 2014. As window-dressing, the commission even invited Hayner and other transitional-justice luminaries to visit Bangkok. The commission deployed the rhetoric of transitional justice despite a patent lack of the powers, resources, or political support that a strong truth commission requires.

These two Thai cases illustrate a disturbing trend: the rise of half-baked truth commissions that "talk the talk" of transitional justice to disguise serious shortcomings. For more than a century, commissions of inquiry have investigated matters of grave public concern without overdoing claims regarding justice and truth. Outstanding examples in the English-speaking world include the two inquiries into the sinking of the Titanic, the Warren Commission, and the Franks Commission on the Falklands War. All had their shortcomings, but at least none came cloaked in the specious moralism of many recent transitional-justice exercises. For the most part, we need more (and better) public inquiries, and fewer truth commissions.

Transitional Justice and History

In *Postwar,* his magisterial survey of Europe since 1945, Tony Judt argues that institutional efforts to expose past injustices (such as the construction of Holocaust memorials and museums) proved less important than the fostering of regular historical inquiry. Such history can contribute to disenchantment and disruption, and as Judt warned, "it is not always politically

prudent to wield the past as a moral cudgel with which to beat and berate a people for its past sins." Yet even bearing this in mind, he still believed that the historian's "rigorous investigation and interrogation" of the past remained of central importance.[30]

The relationship between transitional justice and history is a complex one. The Khmer Rouge tribunal, for example, cannot function without research and evidence provided by professional historians. Yet international tribunals are concerned with securing legal outcomes and not with exploring messy historical debates. As such, they may easily become moral cudgels of exactly the kind that Judt warns against. Catalyzing public discussion about the Khmer Rouge period was arguably one of the Cambodia tribunal's greatest contributions, but was "only tangentially related to its mandate."[31] Would funding and disseminating high-quality historical studies of the Khmer Rouge era have accomplished more than holding trials?

The 1983–84 Argentinian National Commission on Disappeared People (CONADEP), which pre-dated the South African TRC, was too much like a classic presidential commission of "the great and the good" to satisfy most transitional-justice specialists. Yet in under a year CONADEP produced the *Nunca Más* (Never Again) report, which became a best-seller and has shaped subsequent historical memories and understandings of the thousands of "disappearances" and other rights violations committed by the military dictatorship that ruled Argentina from 1976 to 1983. CONADEP's successes were based on strong political will and widespread popular support, while *Nunca Más* was crafted by Commission president Ernesto Sabato, a brilliant novelist, who included poignant verbatim quotations from witness statements on virtually every page.[32]

The recent flounderings of the ICC, the manifest shortcomings of the Khmer Rouge tribunal and other ad hoc international or hybrid courts, the proliferation of mixed-quality truth

commissions—all illustrate the failures of global legalism and undermine the claims to moral superiority that underpin the transitional-justice industry. It is time to curb our well-intentioned celebratory impulses and recognize that, just as earlier waves of democratic transitions are now faltering, so has transitional justice passed its peak.

Redressing matters will involve acknowledging that transitional justice is ultimately politics in the guise of legalism, and that the problems of postconflict and posttransition societies are essentially political ones. It is time to desist from the impulse to laud every transitional-justice initiative and instead carefully assess what seems viable, realistic, and unlikely to do further harm . Law does not exist on a higher moral plane above politics, but is simply part of a continuum of solutions. Let us instead dust off Shklar's too-long-neglected idea that representative assemblies (including parliamentary committees) or even benevolent bureaucracies can perform much of the work that transitional justice assigns to trial chambers and truth commissions: justice can best be achieved through the appropriate use of political power to promote fairness, what Shklar terms tribunality Solutions to complex political problems need to be more creative, sometimes deploying legal mechanisms, but never in purely legalistic ways. By and large, the international community should get out of the business of putting people on trial. Let fact-finding go forward, by all means, but do not lard it with overreaching talk of "truth and reconciliation." Above all, we need good historical research into deadly conflicts, in accessible formats, widely disseminated and debated in the very places where the violence has taken place. The goals of accounting for the past and of preventing future mass violence are shared by all: the only question is how best to pursue these noble ideas.

NOTES

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[1] Kathryn Sikkink, *The Justice Cascade* (New York: Norton, 2011), 266–70. Sikkink's figure for the number of truth commissions is rather conservative; Hayner names forty (pp. 256-64), and even her list is arguably not complete.

[2] See, for example, Kathryn Sikkink's claims that "a world without any accountability for major episodes of human rights violations is receding," *Justice Cascade,* 262; or Geoffrey Robertson's assertion that "war crimes jurisprudence has an epic quality which is beginning to be to be cited in national courts around the world," in his *Crimes Against Humanity: The Struggle for Global Justice* (New York: New Press, 2006), xxxii.

[3] See Ricardo Blaug, "Direct Accountability at the End" in Stuart White and Daniel Leighton, *Building a Citizen Society: The Politics of Republican Democracy* (London: Lawrence and Wishart, 2008), 101–11.

[4] Radhabinod Pal, *Crimes in International Relations* (Calcutta: University of Calcutta, 1955), 195–229 and 403.

[5] Timothy Brook , "The Tokyo Judgment and the Rape of Nanking," *Journal of Asian Studies* 60 (2001): 696.

[6] Telford Taylor, *Final Report to the Secretary of the Army on the Nuernberg War Crimes Trials under Control Council Law No. 10*, (Washington DC: US Government Printing Office, 1949), 112.

[7] For a discussion see Karen J. Alter, "The Trials and Tribulations of Prosecuting Heads of States: Kenyatta and the ICC," *www.washingtonpost.com/blogs/monkey-cage/wp/2014/12/19/the-trials-and-tribulations-of-prosecuting-heads-of-states-kenyatta-and-the-icc*.

[8] David Bosco, *Rough Justice: The International Criminal Court in a World of Power Politics* (New York: Oxford University Press 2014), 187.

[9] Victor Peskin, *International Justice in Rwanda and the Balkans: Virtual Trials and the Struggle for State Cooperation* (New York: Cambridge University Press, 2008), 236–37.

[10] Peskin, *International Justice*, 243.

[11] Kingsley Chiedu Moghala, *Global Justice: The Politics of War Crimes Trials*, (Stanford CA: Stanford University Press, 2008), 178.

[12] These are closely linked to what Kent terms the "celebratory impulse." See Lia Kent, *The Dynamics of Transitional Justice: International Models and Local Realities in East Timor* (Abingdon: Routledge 2012), 205–6.

[13] Judith N. Shklar, *Legalism: Law, Morals, and Political Trials* (Cambridge: Harvard University Press, 1964; 2nd ed. with new preface, 1986).

[14] Shklar, *Legalism,* 111.
[15] Judith N. Shklar, *Legalism* (Cambridge MA: Harvard 1964), 111 (second edition with new preface, Harvard 1986).

[16] Shklar, *Legalism,* 1986, xiii.
[17] Shklar, *Legalism*,1986, viii–xi

[18] Shklar, *Legalism,* viii–xi

[19] Cited in Andreas Hess, *The Political Theory of Judith N. Shklar, Exile from Exile* (New York: Palgrave-Macmillan, 2014), 69.

[20] For a detailed discussion of this contentious question, see Bruce Sharp, "Counting Hell", 2008, *www.mekong.net/cambodia/deaths.htm.*

[21] See John D. Ciorciari, "History and Politics Behind the Khmer Rouge Trials," in John D. Ciorciari and Anne Heindel, eds., *On Trial: The Khmer Rouge Accountability Process* (Phnom Penh: DC-CAM, 2009), 20–21; and the discussion in Duncan McCargo, "Politics by Other Means? The Virtual Trials of the Khmer Rouge Tribunal," *International Affairs* 87 (2011): 613–27.

[22] For an argument along these lines, see John D. Ciorciari and Anne Heindel, *Hybrid Justice, The Extraordinary Chambers in the Courts of Cambodia* (Ann Arbor MI: University of Michigan Press, 2014), 274–77.

[23] Ciorciari and Heindel, *Hybrid Justice*, 10.

[24] Ellen L. Lutz, and Caitlin Reiger, "Introduction" in Ellen L. Lutz and Caitlin Reiger, eds., *Prosecuting Heads of State* (New York: Cambridge University Press, 2009), 10-11.

[25] See Ernesto Verdeja, *Unchopping a Tree: Reconciliation in the Aftermath of Political Violence* (Philadelphia: Temple University Press 2009), 112–13.

[26] Patricia Hayner, *Unspeakable Truths: Transitional Justice and the Challenge of Truth Commissions* (New York: Routledge, 2011) 27–44.

[27] Hayner, *Unspeakable Truths*, 285–86.

[28] See Duncan McCargo, "Thailand's National Reconciliation Commission: A Flawed Response to the Southern Conflict," *Global Change, Peace and Security* 22 (February 2010): 75–91.

[29] Duncan McCargo and Naruemon Thabchumpon, "Wreck/Conciliation: The Politics of Truth Commissions in Thailand," *Journal of East Asian Studies* 14 (2014): 377–404.

[30] Tony Judt, *Postwar: A History of Europe Since 1945* (New York: Penguin, 2005), 830.

[31] Ciorciari and Heindel, *Hybrid Justice*, 258.

[32] The whole book may be read online at *www.desaparecidos.org/nuncamas/web/english/library/nevagain/nevagain_000.htm.* For an excellent

discussion, see Emilio Crenzel, *Memory of the Argentina Disappearances: The Political History of Nunca Más* (New York: Routledge 2012).