

The Limits of Trials in Dealing with the Past: Seeking Holistic Transitional Justice Approach towards Proactive Genocide Prevention¹

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Transitional justice seeks to address the legacy of systematic and grave human rights abuses, to recognize and acknowledge victims, and to contribute to the processes of peace-building and democratization in post-conflict societies. Transitional justice mechanisms and processes can assist a society with its attempt to come to terms with its traumatic past, in order to ensure accountability, to serve justice and to achieve reconciliation so that, first and foremost, genocide and mass atrocities never recur.

Among the diverse strategies developed since the end of the Cold War, bringing justice through trials has gained widespread consensus as one of the major mechanisms to achieve transitional justice. Despite its advancement, the limits of trials have been revealed in terms of its retributive and deterrent function. Since the end of the Cold War, given the rise of internal conflicts and civil wars around the world, there has been a growing need to follow a delicately balanced strategy between accountability and reconciliation.

This paper traces back to the Tokyo Trials (1946-1948), one of the origins of contemporary international criminal justice, and argues that the failure of the trials to address collective responsibility and foster reconciliation by admission of the atrocities has had a lasting effect on the relationship between Japan and its neighbouring countries right up to the present day. Reconciliation has been recognized as indispensable element in post-conflict societies suffering from internal conflicts; however, international reconciliation as such tends to be underestimated or associated primarily with economic ties. This paper argues that international reconciliation based on dialogue at the population level for mutual understandings of the past needs to be fostered in the same as between warring parties under domestic conflicts.

Defining transitional justice

Transitional justice is a multidisciplinary theory and a set of practices which seek to reckon with the legacy of mass atrocities in restoring public order and contributing to long-term reconciliation. Transitional mechanisms have been applied as components in a major political transition, from war to peace or from authoritarian rule to democracy, in order to establish and sustain peace. Established democratic societies, however, may apply transitional justice measures wishing to address systematic abuses in their past. Thus, the term “transitional justice” does not merely refer to “justice during transition”; rather, it defines a holistic response

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to widespread violations of human rights.

Post-conflict attempts at transitional justice can be traced back as far as the Nuremberg and Tokyo war tribunals held after World War II. While these trials were primarily international legal responses designed to address the question of accountability for individual violations of international criminal law,² the current scope of transitional justice encompasses the perspectives of strategic peace-building approaches. They have been developed through the various attempts and experiences in societies where serious human rights violations have occurred. These frameworks have reflected the changing characteristics of the conflicts in the late twentieth century, and have consequently broadened the concept and measures of transitional justice. Whereas previously the dominant view was characterized by the dichotomy between prosecution and amnesty, today there is recognition of the wide range of tools and mechanisms available between these two extremes. The United Nations Secretary General defines the notion of transitional justice as “the full ranges of processes and mechanisms associated with a society’s attempts to come to terms with a legacy of large-scale past abuses, in order to ensure accountability, serve justice and achieve reconciliation.”

Development of transitional justice

Transitional justice has seen two major developments in the last two decades.³ The first one is the establishment of international criminal justice. With many UN resolutions and actual practices to hold individuals accountable for international crimes such as genocide, crimes against humanity and war crimes, the eradication of impunity for these serious crimes now has been accepted as an international accountability norm.⁴ This global trend of dealing with the past through legal settings has become mainstream and highly institutionalized in the practices of international trials such as ICTR, ICTY and ICC. As mentioned above, the Tokyo Trials are believed to have contributed to the establishment of principles of international criminal law, especially with regard to command responsibility.⁵

The other development is the conceptualization and application of practices of reconciliation. The term “reconciliation” has been associated primarily with amnesty. However, many different kinds of mechanisms and processes to foster “reconciliation” have been created. For example, the South African Truth and Reconciliation Commission is well-known for its championing of reconciliation and restorative justice. Restorative justice seeks to achieve indirect accountability by way of admission of truth and expression of redemption by perpetrators. As Villa-Vicencio has noted; reconciliation is in the modest sense encountering and

2 Ruti G. Teitel, “Transitional Justice Genealogy,” *Harvard Human Rights Journal* 16 (2003), 70-74.

3 Its strategies include prosecuting perpetrators, establishing truth commissions or other inquiry mechanism concerned with the past, initiating formal reparation programs for victims, reforming security sectors, vetting, and remembering and valuing victims.

4 Aaron p. Boesenecker and Leslie Vinjamuri, “Lost in Translation? Civil Society, Faith-based Organization and the Negotiation of International Norms,” *The International Journal of Transitional Justice* 5 (2011), 346.

5 Kirsten Ainley, “Excesses of Responsibility: The Limits of Law and the Possibilities of Politics,” *Ethics and International Affairs* 25:4 (2011), 417-425.

engaging an opponent, exploring in dialogue with former enemies and visioning a new kind of future by joint decision making, civic respect and self-criticism.⁶ Indeed, in the case of the internal conflicts, importance in achieving reconciliation at the community level is recognized as essential since people need to live together again. Thus, in many post-conflicts societies, dialogues among once hostile parties through reconciliation meetings, ceremonies and rituals have been encouraged. Moreover, the limits of trials, which have been revealed in the application to recent internal conflicts in terms of efficacy and practice, have pushed this aspect.

However, in the case of international conflicts, reconciliation is regarded as a vague concept to achieve and its necessity is not clearly identified. As is often the case, international reconciliation is urged for political demand and in pursuit of economic exchange. In fact, Japan has been a driving force in the economic development in the regions in which it perpetuated war, and its economic ties with the neighboring countries in East and South East Asia have been expanded over the years and become intimately connected. Despite this close economic relationship and the fact over sixty years have passed since the end of the Second World War, there still exists a perception among countries in these regions that Japan is a potential enemy or threat. It is undeniable that these countries still harbor a continuing deep distrust towards Japan. I argue that it is fundamentally because Japan has still not achieved reconciliation with its neighbors regarding past war crimes and abuses.

Trials and reconciliation

Currently, judicial trials are expected to satisfy the need for retribution and deterrence. Some commentators argue that trials have some positive effect on the behavior of countries towards repression.⁷ Nonetheless, judicial mechanisms have not manifested their efficacy and feasibility in achieving the goals of retribution (to punish because the criminal deserves it) and those of deterrence (to punish in order to prevent future crime).⁸ Especially in case of civil war, where a great number of civilians become involved directly or indirectly, in most cases, formal justice systems cannot accommodate the sheer number of perpetrators. In addition, the boundaries tend to become blurred and so it becomes difficult to distinguish between those who are liable for criminal responsibility and those who are not. A lot of people could be both victims and perpetrators. Thus, trials inevitably result in selective justice. Only some extremely evil individuals, or those who are most responsible, get punished, whereas many escape their liabilities.

Against this background, the promotion of reconciliation through trials has been increasingly advocated in facing the growing number of internal conflicts. For instance, great aspirations were expressed by diplomats, the media and supporters of the tribunals that the ICTY

6 Charles Villa-Vicencio, *Walk with Us and Listen: Political Reconciliation in Africa*, Georgetown University Press, 2009, Chapter 3.

7 Hunjoon Kim and Kathrin Sikkink, "Explaining the Deterrence Effect of Human Rights Prosecutions for Transitional Countries," *International Studies Quarterly* 54:4 (2010), 939-963.

8 Mark A. Drumbl, *Atrocity, Punishment, and International Law*, Cambridge University Press, 2007, 149-172.

would foster reconciliation among warring parties, by healing psychological wounds.⁹ Its rationale is that criminal justice, which places responsibility on individuals, will serve to counteract collective blame and so advance collective reconciliation. In reality, it is often the case that other reconciliation mechanisms such as truth commissions accompany the trials as their function as reconciliation is rather wishful. Indeed, as Fletcher and others dismiss it as a “large, more ill-defined, and unrealistic objectives,” the tribunal itself has far from promoted reconciliation, rather it could be said to have incited tension between hostile parties.¹⁰

At the time of war crimes tribunals after the Second World War, however, they were primarily punitive and thus reconciliation was hardly their aim at all. As the Chief Prosecutor Robert Jackson at the Nuremberg Trial stated, those who were tried were “living symbols” to represent “racial hatred” and “fierce nationalism.”¹¹ The role of such war crimes trials was to give the political and military leaders the punishment that they supposedly deserved. Thus a great deal of effort would have been required in order to break the cycle of hatred and to promote mutual understanding. It cannot be taken for granted that reconciliation will occur naturally. Time might ease pain and fade the memory of the past, but reconstructing a kind of “new” relationship for sustainable peace needs the vigorous efforts of encounter and dialogue.

Establishing Japan’s War responsibility

The mechanisms employed to deal with Japan’s war responsibility were the Tokyo Trials, or the International Military Tribunal for the Far East, the purge of military and political leaders, and the bilateral reparation policies. On the one hand, the Trials and the purge were imposed by the Allies for the purpose of punishment as well as the transformation of Japan into a more democratic state. On the other hand, the reparations programs were initiated by the Japanese authorities as a part of policies of war settlement after its independence in 1952. With respect to the reconciliation aspect, as mentioned above, the Allies obviously had no intention of nurturing reconciliation between Japan and the victim countries. Furthermore, there was no initiative from the Japanese government to ask for reconciliation.

The Tokyo Trials were established in 1946 by the allies to try the Japanese imperial leaders. 28 Japanese military and political leaders were charged with Class A crimes, alleging crimes against peace. Class A charges were applied to the top leaders who had planned and directed the war. Seven of them were sentenced to hanging including the former Prime Minister Hideki Tojo. Meanwhile, 5700 military personnel and Japanese civilian personnel were charged with Class B and C crimes, alleging war crimes and crimes against humanity. About 920 Class B and C war criminals were executed for these crimes. Class B and C trials were established outside Japan. Therefore, the Japanese population at the time had little chance

9 Laurel E. Fletcher and Harvey M. Weinstein, “A World unto Itself? The Application of International Justice in the Former Yugoslavia,” in Eric Stover and Harvey M. Weinstein, eds., *My Neighbor, My Enemy: Justice and Community in the Aftermath of Mass Atrocity*, Cambridge University Press, 2004, 34-37.

10 *Ibid.*, 30.

11 Robert H. Jackson, “Opening Statement before the International Military Tribunal,” November 21, 1945. Available at <http://www.roberthjackson.org/the-man/speeches-articles/speeches/speeches-by-robert-h-jackson/opening-statement-before-the-international-military-tribunal/>

to know about these trials abroad.

While the Tokyo Trials are believed to have contributed to the development of international criminal law,¹² there was a lot of criticism directed towards the trials. Many scholars have maintained that the Trials were flawed by procedural misconduct, omissions and hypocrisy.¹³ In particular, many scholars criticized the United States' political decision not to try the Emperor and to condone certain crimes such as the notorious medical experiments conducted by Unit 731. However, the most controversial aspect of all was to prosecute individuals for the wrongful acts of an entire country, which arguably was retroactive in nature.¹⁴ In many aspects, the Trials cannot escape from the criticism that they were a form of victor's justice.

At the time of the Tokyo Trials, the purge process was also enforced by GHQ. From 1946 to 1952, more than 20,000 individuals, who were alleged POWs, cooperators of war, members of militaristic or nationalistic groups, were prohibited from engaging in public service and some private enterprises. GHQ tried to remove any influence from the imperialism and to democratize Japan in a preparation to form an ally against the Soviet.

As for the reparation programs, Japan compensated about 1 billion US dollars in total at that time to neighboring countries in East Asia since its independence in 1952. However, these reparations were offered in the form of Japanese grants, loans and products, so that the Japanese companies could build economic foothold in the region.¹⁵ These funds were not linked to specific wrongdoings.

The Japanese Historical Account of the Second World War at the time of the Tokyo Trials

The Japanese historical account of World War Two, which had been formed though the Trials, have countered generating initiatives for reconciliation. It was based on the claim that the population was misled by military and political leaders, with the result that most Japanese have perceived themselves as victims. In fact, soon after the defeat there were movements among the Japanese to pursue those responsible for the "defeat" rather than for the war itself even before the start of Tokyo Trials.¹⁶ As a matter of course, these attempts were never realized, but the trials fueled this direction even more. Thus, the veterans who had returned from the war were often despised for what was perceived as their responsibility in siding with the military.

The Tokyo Trials tried to hold the imperial leaders to criminally account, but also it uncovered some horrific crimes which the members of Japanese armies had perpetrated during the war. The number of mass atrocities which had been concealed from the public was revealed for the first time, including the Nanjing Massacre and the slave labor of the POWs working at

12 For the balanced analysis of the Tokyo Trials, see Yuma Totani, *The Tokyo War Crimes Trial: The Pursuit of Justice in the Wake of World War II*, Harvard University Asia Center, 2008.

13 Jennifer Lind, *Sorry States: Apologies in International Politics*, Cornell University Press, 2008, 30.

14 John W. Dower, *Haiboku wo Dakishimete*, Vol.2, 259-261, (translated from *Embracing Defeat: Japan in the Wake of World War II*, 1999)

15 Lind, *op.cit.*, 34.

16 Dower, *op.cit.*, 274-285.

the Thailand-Burma railroad. Despite the shocks caused by these disclosures, those people who were killed, raped and enslaved by the Japanese army were beyond the reach of the people's imagination. For many Japanese, the victims were themselves and their loved ones who had been injured or killed in the air raids, notably the dropping of the atomic bombs on Hiroshima and Nagasaki, and on the battlefields of this misguided war. One could point out that compared with the visible ravage in the country directly caused by the war, the extent of damage caused by Japan's aggression and colonization in its East Asia neighbors was not so known to the ordinary population. Thus, many Japanese have built up a rationale that the Tokyo Trials were victors' justice because it was unfair that the American atomic bombing and the destructive air raids on major Japanese cities were never questioned as war crimes.¹⁷ Without any doubt, this served to support the view of the victimization of Japan.

The Trials placed a focus on who was responsible on what. This individual criminalization was acceptable and rather favorable to the Japanese so that they could avoid collective responsibility. In other words, the public blamed the individual persons, not the crimes they had committed. A decade or so later, however, this blaming of former leaders and soldiers caused a sense of guilt among many people for having mistreated those who fought for the country.

The Japanese Historical Account of the Second World War During the Cold War

We also need to take into account the influence of the Cold War when we think of the way Japanese narratives of the Second World War have been formed. The geopolitical dynamics of the Cold War not only shaped tension between Japan and its surrounding Communist countries, but also had an impact on the course of Japanese "transitional justice".

One of the greatest influences was that the trials and the purge were left incomplete. Faced with the need to create a strong anti-Soviet ally, the United States urged the Japanese government to de-purge and reinstate war criminals. This corresponded to the sentiments of amnesia raised in Japan after the executions of the Class A prisoners in December 1948. In fact, soon after concluding the Treaty of Peace with Japan in 1952, there were massive movements in Japan to release remaining war criminals still kept in the prisons.¹⁸ Those imprisoned war criminals gathered sympathy as the victims of war. Moreover, the restoration of honors for the war criminals that had been executed was undertaken around this time.

In addition, during the Cold War any liberal movement to recall and remind the population about war crimes committed by the Japanese military was associated in postwar Japan with leftists, who were thus identified as dangerous or treacherous elements.

These geopolitical dynamics generated vagueness about the responsibility for the war among the Japanese population. As mentioned above, the unclear view of war responsibility as being identified with and limited to certain guilty individuals has been reflected in Japan's

¹⁷ Judge Pal raised this issue and criticized the Trials was unfair in his lone dissent.

¹⁸ Dower, *op.cit.*, 324-335.

reparation policies since 1952.

Backlash against the Competing Truth after 1990's

After the end of the Cold War, however, Japan was forced to face the legacy of its past. In the 1990s a number of lawsuits were filed against the government of Japan by some of the individual victims of Japanese atrocities, particularly victims of forced labor, "comfort women" and former POWs with assistance from civil societies both domestic and abroad. This reflects the world-wide, growing attention casted upon injustice and urge to restore human rights after the end of the Cold War. Although most litigation was unsuccessful, their testimonies led to some admission of Japanese guilt by the courts.¹⁹ One of the most notably rulings was made in 2002 at the Fukuoka District Court, which described the policies of the Mitsui company as "evil" and ordered it to pay compensation.²⁰ This decision, though subsequently reversed by the higher courts, it was significant in that the voices of the victims were heard and acknowledged for the first time in almost sixty years.

However, these direct narratives of former victims caused controversy among the Japanese population. In some cases, such as the "comfort women" and the Nanjing Massacre, profound denials were issued by some scholars and journalists. So far the disputes over historical facts have never been settled either by legal settlements nor academic research. Questions are raised whether this endless contention, especially by using litigations with regard to the government's legal liability, could lead to real justice which would satisfy aging victims in need.²¹

Another important reaction that emerged from these human rights movements was that the official Japanese remembrance was initiated. This was caused by the continuous criticism and pressure from other countries about the Japanese reluctance to admit and show remorse for past wrongs. Japanese leaders have started to issue numerous apologies, especially since the end of the Cold War, from Prime Minister Kaifu in 1990 to the most important ones from Prime Minister Murayama in 1994 and 1995.²² These official statements contained expressions such as "profound remorse" and "heartfelt apology." Nevertheless, these apologies were denounced by conservative political groups in Japan. Even though Japanese political leaders apologized officially, remarks denying responsibility for the war or glorifying Japanese imperialism made by certain high-ranking government officials diminished the government's sincerity. It should be noted that those denouncements were not only politicians' individual opinions, but were also supported by many ordinary Japanese.

19 For example, in September 2004, the courts mediated settlement between former slave labors and the corporation Nippon Yakin Kogyo.

20 Lind, *op.cit.*, 66.

21 Yasuaki Oonuma, *"Ianfu" mondai toha nani dattanoka: media, NGO, seifu no kozai, (What was "Ianfu" Issue? Merits and Demerits of media, NGO and Government.)* Chuo-shinsho, 2007, 85-91.

22 Roy L. Brooks, ed., *When Sorry isn't Enough: The Controversy over Apologies and Reparations for Human Injustice*, New York University Press, 1999, chap.17.

Conclusion

From the analysis of post-war justice in Japan, I conclude that there were adverse effects of legalistic justice approach on the population level. The attempt here is not to undermine their normative function in international criminal laws; however, too much emphasis on individual accountability and factual truth could not only obstruct reconciliation at the population level, but also could create future friction. Individualization of guilt has provoked guilt among the population against former soldiers, and this pervasive guilt could be said to have fertilized the soil in which the seed of nationalism have taken root.

Although individualization of crimes is anticipated to foster collective reconciliation in principle, relying excessively on judicial systems has brought about an opposite result. We tend to focus on individual perpetrators and their criminal acts, but we often fail to understand their behaviors were not isolated from society, but they were positively supported or ignored by the population. Trials cannot address this issue of by-standers and direct or indirect beneficiaries. In addition, the attempts to settle competing truths in legal settings have been proved ineffective, especially in those situations in which both parties cannot even agree that there are different perspectives. Thus it is important to employ a holistic approach so that justice, accountability and reconciliation could be pursued from different angles.

What was missing in the case of postwar Japan were dialogues in the early stage between Japan and the victim countries. Unlike the cases of internal conflicts, where the perpetrators and their acts are known, a great effort is needed to make known and acknowledge the facts in the case of international conflicts. In this sense, international reconciliation needs to be nurtured among the general population in order to encourage healthy dialogue. I wish to stress that a trigger of future conflict would lie at the population level if there is not enough reconciliation. We need to cultivate the soil to absorb collective guilt. Moreover I argue that a lack of strong political leadership to condemn the crimes rather than individuals responsible, which resulted in general amnesia, once temporary hatred was over.²³

I argue precisely for this reason that civil society could play a vital role to facilitate the groundwork for reconciliation in order to reflect the voices of the voiceless. In fact, in the case of Japan, there have already been individual attempts, such as reconciliation initiatives between the former POWs forced to work on the construction of the Thai-Burma railway and the former Japanese soldiers²⁴. I conclude with assertion that reconciliation based on dialogue at the population level is necessary to foster international reconciliation. I propose, therefore, that transitional justice needs to be designed in a more holistic way even for international conflicts so that justice and reconciliation could be within the reach of the people who are desperately in need of closure.

23 Yuji Ishida points out four elements to encourage Germany to overcome the past; the demand for compensation and restoration of honor of the victims to Germany; the pressure from international society, especially by countries like the US, to support the demands of Nazi victim; the existence of political leaders who could judge it in national interest to carry out the processes to settle the legacy of the Nazi, in spite of opposition among the population; the revelation of truth of the crimes in details by historians, which is shared by former victims and perpetrators. Yuji Ishida, *Kako no Kokufuku: Hitler go no Doitsu* (*Overcoming the Past: Germany after Hitler*), Hakusuisha, 2003.

24 Eric Lomax, *The Railway Man*, London: Vintage, 1996.