



Memorialisation of grave international crimes

Expert meeting, September 15th 2010

CHGS, Amsterdam

Report

impunity 
watch

Memory, Truth, Justice

An expert meeting on the relationship between criminal justice, impunity and memorialisation Amsterdam, 15 September 2010

On 15 September 2010, Impunity Watch, the Anne Frank House and the Centre for Holocaust and Genocide Studies¹ hosted an expert meeting on 'Memory, Truth and Justice', seeking to explore the relationship between criminal justice, impunity and memorialisation. This was the second in a series of events on memorialisation and the combat of impunity for international crimes, which forms part of a joint research-for-policy project of Impunity Watch² and the Anne Frank House.³ Attended by 45 experts from different fields and backgrounds, the expert meeting provided a forum for experts, students and policymakers based in the Netherlands to further develop understanding and analysis of memorialisation as an element of post-conflict societies, and pinpoint areas in need of further study.

Dealing with a violent past characterised by gross human rights violations and violations of international law in an inclusive and sufficiently comprehensive manner is crucial to breaking cycles of violence and combating impunity. Within processes and strategies of transitional justice that seek to achieve this, criminal accountability has assumed an increasingly central role in attempting to lay the foundations for lasting peace and stability. Nevertheless, it remains unclear whether these mechanisms can realise all of the objectives that transitional justice is intended to achieve, and little is understood about the role of 'memory initiatives' alongside such tribunals.

The central question that the expert meeting sought to examine was therefore:

What is the relationship between criminal proceedings involving the prosecution of international crimes and memory initiatives in post-conflict or transitional societies?

Six experts from a range of relevant disciplines were asked to prepare, present and discuss their analyses of different aspects of this topic, which included domestic and international legal proceedings, truth-finding, writing history, collective memory and reconciliation. The experts taking part were:

- Professor Stephan Parmentier, Professor in Criminology at Leuven University, an expert on transitional justice and human rights;
- Mr. Herman von Hebel, Registrar at the Special Tribunal for Lebanon (STL), an international criminal lawyer with experience at the International Criminal Tribunal for the former Yugoslavia (ICTY) and Special Court for Sierra Leone (SCSL);
- Professor Ton Robben, Professor of Anthropology at the University of Utrecht, who has researched political violence and collective trauma in Argentina;
- Mr. Solomon Moriba, Outreach/Press and Public Affairs Officer at the SCSL;

¹ www.chgs.nl

² www.impunitywatch.org

³ www.annefrank.org

- Dr Dienke Hondius, Associate Professor at the Free University in Amsterdam and employee at the international department of the Anne Frank House, who is an expert on oral history and memory of the Second World War;
- Dr Anja Mihr, Associate Professor at the Netherlands Institute for Human Rights (SIM), a specialist in human rights education.

The meeting was moderated by Dr Nanci Adler, Associate Professor and Researcher at the Center for Holocaust and Genocide studies.

The first two speakers reflected on the meeting's theme more generally, while the next four considered the cases of Argentina, Sierra Leone, World War II and Spain to illustrate different aspects of the relationship between transitional justice processes and memorialisation.

The presentations pointed overwhelmingly to the view that memorialisation and criminal justice can be complementary in the combat of impunity. Moreover, they can be mutually enforcing factors - memorialisation can grow out of criminal proceedings, but can also demand prosecution of perpetrators; in turn, material and awareness generated in the course of court proceedings can provide a basis for memory initiatives in post-conflict societies.

This report summarises the most important and interesting points made by each speaker:

Professor Stephan Parmentier, Professor in Criminology at Leuven University, and expert on transitional justice and human rights, was asked to discuss the potential shortcomings and pitfalls of international criminal justice from a victim's perspective, particularly whether memory initiatives offer a means for filling the gaps.

Criminal justice is seen as the main response to the perpetration of criminal acts and, in the case of grave violations of international law, may take place at national and international level, as well as in third states applying the principles of universal jurisdiction.

Memory is a very complex concept on which academic discourse is now booming. By memory, we mean different approaches concerned with recalling the past, giving it a place and reconstructing it into the future, such as historical accounts, narratives and remembrance. There is a distinction between individual and collective memory; 'common memory', on the other hand, is impossible, as memory is never shared by all. Professor Parmentier referred to the discourse of French sociologists, Emile Durkheim and Maurice Halbwachs to explain that the memories shared by groups are social constructs, the outcomes of negotiation.

To exemplify the way in which collective memory is constructed, Professor Parmentier cited the Nuremberg trials of German leaders responsible for World War II atrocities: although only 24 individuals were prosecuted, the trials have come to be perceived as having ended Nazi impunity. He also cited the reconstruction of the famous Ottoman bridge in Mostar, Bosnia-Herzegovina, as a symbol of the necessity of coexistence of communities estranged by the brutal war waged there in the 1990s. In the same way, the image and diary of Anne Frank, the German/Dutch Jewish girl murdered during the Second World War, have become symbolic of all six million European Jews killed during this period of history.

Asked if memory initiatives have a role to play in criminal justice, or perhaps even to compensate for its shortcomings, Professor Parmentier described four crucial elements that should be taken into account:

1. memory involves the search for truth, but goes beyond just recalling facts, since it relates to expectations, assumptions and hope;
2. memory can serve as means of producing information and seeking accountability;
3. memory can also result from the achievement of accountability, and serve as an instrument for questioning institutions and society as a whole, seeking emotional satisfaction;
4. memory can both serve and hinder reconciliation, where groups need to overcome the abuses of past conflict to live together in a stable society.

The audience was interested in different understandings of 'truth' in the contexts of court proceedings and memory. Where courts deal with forensic truths, memory initiatives can concern themselves more with social truths.

Professor Parmentier pointed out that, just as there is no single version of the truth, neither is there a single version of memory, and so all perspectives should be taken into account. The relationship between memorialisation and criminal justice is therefore characterised by plurality and multiperspectivity; both concepts are dynamic, and so is their interaction.

Herman von Hebel, Registrar at the Special Tribunal for Lebanon, was asked if memory initiatives could assist in the process undertaken by such courts of creating a historical record of a violent past, and where court proceedings have not yet begun, if memory initiatives can be useful in building a case for future prosecutions.

Ad hoc tribunals dealing with gross human rights violations face certain limitations, in that they can only convict a small number of perpetrators. Decisions have to be made on where to focus: the SCSL, for example, chose to focus on those with the greatest responsibility for crimes, meaning it did not investigate low-ranking perpetrators, including child soldiers. The fact that such tribunals do not cover every crime of an entire conflict causes frustration for the victims, but also for the tribunals themselves, as they realise the cases heard are just the *tip of the iceberg*.

International tribunals are based on Anglo-Saxon legal practices, which means they are not *per se* concerned with finding truth, as in the Continental system, but are primarily directed to the winning of cases. Memory, on the other hand, is dynamic, meaning it is open-ended and can never be closed.

Courts have also proven themselves unwieldy mechanisms for establishing complete historical records – this was attempted in the trial of former Serbian president, Slobodan Milosevic at the ICTY, with the result that he died before the hugely complex case could be completed. Moreover, strict rules apply to the introduction of evidence, meaning trials are not always the best medium through which to build an historical record. If evidence is too extensive, for example, it will not be accepted in court.

Nevertheless, court proceedings can be enormously important in terms of their effect on perceptions of the past among the general population. For this reason, outreach programmes have been set up by the international courts to include local people and engage in dialogue with them. For example, in Sierra Leone, footage of court cases is shared with local people, and has been shown to have a significant impact. Documentation is extremely important for the memory of a conflict, and these videos form a huge archive, as well as bringing the tribunal to the local people.

Professor Ton Robben, Professor of Anthropology at the University of Utrecht, was asked if memory initiatives played a role for local communities in Argentina during the 1980s, and if they stimulated the eventual search for criminal justice. From the perspective of affected communities, do the cases still being tried and the possibility of convictions add to a wider sense of justice, or was this already achieved by memory initiatives?

There is an underlying assumption that a society that remembers past conflict is more likely to demand accountability for perpetrators of crimes committed therein, and that prosecutions can help it to reconcile and come to terms with its past.

The Dirty War in Argentina was a period of state-sponsored violence from 1976 until 1983, with estimates for the number of people killed or "disappeared" ranging from 9,000 to 30,000. Victims of the violence included several thousand left-wing activists, including trade unionists, students, journalists, and Marxist and Peronist guerrillas and sympathizers.

After the amnesty laws of 1989 were passed in Argentina, the human rights movement was in shock. They transferred their focus from legal prosecution to memory, through the medium of film, protest marches and mass demonstrations at the Plaza del Mayo. Younger generations started to ask questions and shame suspected perpetrators publicly, hoping they would be cast out from society. With repressive elements still present, Baltasar Garzón, a Spanish judge, brought the case of Argentina to the attention of the international community.

The efforts of the human rights movement and victims' relatives built pressure for criminal prosecutions, and in 2005 the amnesty laws were overturned by the Argentine Supreme Court. In 2009, 625 individuals were investigated on suspicion of having committed human rights violations during the so-called Dirty War and 280 were put on trial.

Crimes began to be seen in a different light, and discourse on them changed - what was first called state terrorism, implying injustice was done by and on the orders of the state, became genocide. Thus, historical interpretation of past events changed, altering the identity of perpetrators. There was a shift in vocabulary, derived from the holocaust.

Professor Robben stressed that memorialisation and transitional justice, and their interaction, are dynamic. People will remember differently directly after the conflict than after twenty years have passed, while their memories will certainly be influenced by court proceedings. It is possible, therefore, that what is now considered a crime was not always seen that way.

Solomon Moriba, Outreach/Press and Public Affairs Officer of the Special Court for Sierra Leone, was asked whether there has been a role for memory initiatives alongside the mandate of the Special Court, or if such initiatives have followed a separate track. Does he think there should be a relationship between the prosecution of perpetrators in the courtroom and memory initiatives in the communities where the violence was perpetrated?

The SCSL was one of the first hybrid war crimes tribunals, established in an agreement between the United Nations and Government of Sierra Leone after the 11-year civil war, which officially ended in 2002. The Court is composed of a majority of international judges and an international prosecutor, but with partly Sierra Leonean staff, and operating under Sierra Leonean law. It held sessions in Freetown, with the trial of Charles Taylor moved to The Hague for security reasons.

So far, the court has convicted eight individuals. Despite the ostensibly low number, research shows that 80% of the population sees the court as having ended impunity, according to Moriba. The tribunal has made contributions to international jurisprudence, especially when it comes to protecting children and women in conflict - for the first time, individuals were tried for the use of child soldiers, sexual slavery and forced marriages as crimes against humanity.

The SCSL has an outreach programme that focuses on the population of areas affected by the crimes under its jurisdiction. Representatives of those local communities are given the opportunity to attend trials in Freetown and in The Hague.

Moreover, the SCSL has a specific goal for the court's materials, in that these will be housed in a Peace Museum to be built in Sierra Leone. Trial recordings will be shown and the archives opened for research.

The SCSL has already created a memorial in Freetown, at a location known as Base Zero. The memorial symbolises reconciliation.

Impunity Watch's Burundi Programme Coordinator, Klaas de Jonge, asked about the relationship between the tribunal and the country's truth commission, which was set up around the same time. Mr Moriba said they had stimulated each other: since the court has only targeted relatively few people with the highest responsibility, perpetrators from the lower ranks were willing to share their stories through the truth commission. This allowed a great deal of information to be collected for the purposes of building an historical record.

Dienke Hondius, Associate Professor at the VU University in Amsterdam, was asked about the role of oral history in making history visible, and if it can have a role in criminal prosecutions and memory initiatives. What are the differences between interviewing eye-witnesses for the purpose of creating a historical record or memory initiative, and for criminal investigations leading to the prosecution of a case or evidence at trial?

There is a distinction between oral history used for historical research and witness testimonies in court. For the former, oral history provides proof of historical facts and serves as a reminder of the past within public memory and education, and so the

whole story, including personal accounts, is important. In court, only facts are counted. For the purposes of criminal prosecution, therefore, oral history is most effective in the preparatory phase before a trial begins, to help with investigations and the collection of evidence.

When a trial offers an opportunity to hear personal accounts, those stories can later be used in memory initiatives, offering high quality documentation. Court proceedings can also stimulate other witnesses to tell their stories, and stimulate memory initiatives in general.

Criminal proceedings can furthermore provide a starting point for archive building, and therefore the creation of an historical record. The contribution of recent technical developments in this regard has yet to be fully explored.

The collection of oral history is more attuned to context than the gathering of evidence. It gives importance to life history as a whole, that is, fact and experience, rather than just factual testimony.

Dr Hondius recommended carrying out two interviews when a person acts as a witness in a court case, one for the purposes of historical record, and the other for trial evidence. This way, no historical information is lost, and the account is appropriate for criminal proceedings. It is important to save the full footage of an interview and to be aware of twists, and in some cases denial.

Different factors need to be taken into account when conducting interviews - anonymity can be crucial, as can timing, while there has to be an atmosphere of trust. Interviewing perpetrators and bystanders requires special technique and one has to be aware that an interview could create empathy or identification.

Oral history is often used for educational purposes, for example, when a survivor of a conflict speaks to a school class. A significant age difference between survivors and pupils works very well, in that the naïve questions of a young or less-informed audience often lead to more open exchange of information.

With new possibilities such as YouTube and social media, oral history can have a broader audience.

Dr Anja Mihr, Associate Professor at the Netherlands Institute for Human Rights, was asked what effect Judge Garzón's ordering of exhumations had on public memory in Spain, and the silence that otherwise prevailed regarding past atrocities. To what extent, and how, is the subject of past violations committed by the Franco regime dealt with in Spain? Given the 1977 Amnesty Law, can memory initiatives take the place of criminal prosecutions in delivering a sense of justice and combating impunity?

Spain suffered a devastating civil war in the early 1930s and the long dictatorship of its victor, General Francisco Franco, resulting in the deaths of an estimated 300,000 soldiers, the arbitrary killing of 200,000 civilians and the displacement of a further 500,000 people. Although there is general agreement on the advantages of transitional justice, with the European Union encouraging Spain to address its past, silence reigns when it comes to these crimes.

Thus, amnesty laws were enacted in 1997, two years after the demise of the Franco regime, and any attempts to consolidate the past were put aside. The process of looking for mass graves in rural areas, for example, was halted in 1981. It is difficult to find a Spanish history book that addresses the crimes of the Franco period. Moreover, ordinary people are reluctant to break the silence for fear of drawing attention to their role.

Spain appears to be a stable country, despite the fact that it has not gone through any formal process of transitional justice. However, many still honour Franco to this day - in every town and village, pictures and statues of the dictator are shown - which speaks of strong political divisions, and a need for reconciliation. Dr Mihr also suggested that the terrorist crimes committed by ETA, the Basque separatist group, might have been less severe had processes of transitional justice been developed, as these would have made people more aware of historical circumstances.

However, 2007 marked a significant turning point in Spain. Street names were changed, crimes on both sides acknowledged, and local commemorations organised.

Nevertheless, the process remains difficult - Judge Baltasar Garzón is a prominent figure in international justice, having used the principles of universal jurisdiction to push for accountability in Latin America; when he attempted to seek accountability for crimes committed in Spain, however, he was forced to flee the country.

This experience begs the question: is Spain's experience unique, or is this the way that all Western European states deal with their past? In other words, is transitional justice something we are happy to see taking place *elsewhere*?

Plenary discussion:

The plenary discussion began with a consideration of perceptions of truth, and how this can influence the development of memory and its usage for the purposes of criminal justice. Professor Robben explained that there is no such thing as 'one truth', citing the existence of transgenerational trauma and transgenerational perpetratorhood.

Mr. Moriba commented that collective memory depends on what people know, which can often be limited. This is why courts always rely on evidence. Mr. Von Hebel pointed out additionally that people have a tendency to justify their criminal acts, and that when this becomes part of a collective memory, it creates impunity for the perpetrators.

For this reason, Professor Hondius stressed that it is essential that a persistent group of researchers demand justice and create an accurate collective memory in post-conflict countries. Dr Mihr illustrated this using Germany as an example: it took until 1985, when federal president, Richard von Weizsäcker made a speech claiming 'we are not victims', for collective memory in West Germany to change from one centred on having lost the war.

Dr Adler mentioned that stories change through generations. In Russia, for example, crimes of the Soviet period are being downplayed by erasing, for example, mention of the labour camps of the 'Gulag Archipelago' from history books. Unless younger

generations ask their parents and grandparents about their experiences, they could be forgotten. Dr Wichert ten Have, Director of the Center for Holocaust and Genocide Studies, stressed that whenever a regime changes, new myths are fed.

Frederiek de Vlaming, legal researcher at the University of Amsterdam, asked if the international community is impatient when it comes to international tribunals. Mr. Von Hebel responded that you can never be too early in seeking justice, as *justice delayed is justice denied*. A tribunal is in some ways an act of powerlessness, in that it recognises failure to stop the conflict and its abuses.

Teyo van der Schoot, Human Rights Programme Manager at Hivos, added that external intervention in memory activities leads to a more consolidated truth. Here, though, he criticised the Dutch, in that they seem good at helping others, but fail to acknowledge appropriately their own issues, for example, the police actions in the Dutch Indies in the 1940s.

Dr Mihr commented that memory will count eventually, and so people cannot start early enough to collect evidence. The problem is how to channel debate on this, since memory can also be used by dictators for dishonourable ends.

Closing remarks:

Marlies Stappers, Director of Impunity Watch, closed the meeting with the remark that memory can never be a static concept, but rather one that is transforming all of the time. There must therefore be room for social debate over different versions of the truth, which allows all cards to be put on the table and for dialogue to take place among perpetrators and victims. Our challenge is to help those countries where there is no social debate by analysing how to mobilise transitional justice mechanisms towards this promotion.

Meeting Conclusions:

- **Memory and justice are complementary factors in the process of coming to terms with the past.**
- **Memory can derive from justice processes (legal documents, criminal proceedings, products of tribunals etc).**
- **Memory initiatives can demand justice.**
- **Criminal proceedings have limitations and shortcomings, and memory initiatives can fill those gaps.**
- **Memory is dynamic, and ever-changing. This can and will be influenced by criminal proceedings.**
- **Common memory does not exist, but collective memory does. This is the result of social negotiation.**
- **Memory and justice both deal with truth, but in a different way.**
- **Memory should leave room for social debate.**
- **Timing is crucial for both memory and justice.**