

Reflections on International Justice as a Commemorative Process

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Legal scholars Shea Esterling and Michael John-Hopkins explore the strengths and pitfalls of international criminal justice in producing historico-legal narratives which serve to commemorate abuses and atrocities.

Bearing Witness

In modern times the international community has attempted to come to terms with legacies of large-scale abuses through international justice, albeit in a rather piecemeal and sporadic fashion. Examples include state accountability under international human rights law and individual accountability in international criminal law processes. Both processes attempt to end impunity and to promote reconciliation. In particular, the former seeks to promote individual human rights as a way of enabling effective political democracy, and the latter seeks to facilitate the restoration of the rule of law and peace and security in post-conflict situations. A by-product of these processes is that they bear witness to, and therefore commemorate abuses and atrocities.

The Quandary of Memory Laws

The following two examples indicate that we may conceive a broad and slightly indeterminate notion, namely the human right to memory and truth. Arguably, this arises from the invocation of discrete rights within the context of human rights proceedings. Firstly, states have the procedural obligation to carry out effective investigations into human rights violations as a way of determining accountability and combating cultures of impunity. Secondly, human rights mechanisms may serve to regulate the state-sanctioned law and politics of memory by either condoning or censuring state-approved historical interpretations and narratives. For instance, where individuals claim that their freedom to express alternative historical accounts has been denied or unduly restricted. Here, it is to be determined whether any such state interference is legitimate, or in other words, necessary in the interests of public safety, order and morals, as well as the rights and freedoms of others within a democratic society.

One approach here is to be deferential to a state's 'memory laws', anti-negation laws for example. These stem individual freedom of expression in relation to certain ideologies, historical interpretations or narratives. Curtailing civil liberties in this regard is seen, on balance, to be a legitimate way of commemorating the victims of past atrocities, or the historical struggles or events of a people or a nation, and of protecting their descendants or successors from a resurgence of those ideologies which caused harm in the past. Another approach is to be interventionist, and in so doing, to promote the fight against impunity by condoning the criminal repression of historical wrongs, by debunking official histories and cant, and by exposing the abuses and atrocities they are intended to conceal or censoring attempts to do so.

These two examples demonstrate the utility of human rights law in both developing and scrutinising historical interpretations and narratives for the benefit of present and future generations. They also indicate that human rights interventions may serve to exacerbate the very tensions and divisions they seek to mitigate – they say that the path to hell is paved with good intentions. Striking the right balance is always a sensitive and highly contingent process. Two examples in this regard. Firstly, where state-sanctioned historical interpretations or narratives are questioned by 'foreign judges'. Despite the legal merits of doing so, this may unwittingly provoke a backlash, e.g. where it is deemed to constitute an existential threat to a

nation's identity or hegemony, as in Russia's response to *Kononov v Latvia*. Secondly, where anti-negation laws are condoned in one context, e.g. Holocaust/Shoah denial, but condemned in another, e.g. Armenian genocide denial, as in *Perinçek v Switzerland*.

Dealing with such historical grievances on a case-by-case basis, and in view of the likelihood of future harm is commendable. However, it also risks inadvertently prioritising the historical memory and status of one victim group over another, especially where particular victim groups have more clout than others.

Commemoration in the Court Room

International criminal justice serves primarily to mete out individual retribution for the commission of war crimes, crimes against humanity and genocide. In so doing, it strives to serve as a deterrent. The fact-finding processes that undergird these primary functions, during investigations and trial proceedings, result in judicial verdicts. These authoritatively and rigorously contribute to the historical record, and thus bolster and safeguard the process of commemoration.

The narrative function of international criminal justice is strong. This is because, from time to time since Nuremburg, there has been the political will and creative endeavour to develop the concepts and procedures, as well as the underlying investigative and analytical techniques for understanding and exposing system criminality and its effects. Without the tools to diagnose system criminality, often involving complex and diffuse organisational networks and forms of raw power, high-level offenders would be able to appear at arm's length from the direct perpetration of collective violence and criminal activity arising from it.

The process of gathering and testing evidence, of scrutinising competing narratives in order to reconstruct crimes within an adversarial procedure, and then producing a systematic and forensic normative narrative of the organisations behind the abuses or atrocities, the individuals behind the organisations, and the motivations behind the individuals serves to illuminate the structures and processes of raw power behind atrocity crimes. This forensic ability to expose individual and system criminality, as well as to acknowledge and validate the emotional and economic impact of atrocity crimes helps to break the silences necessary to sustain forms of raw power. In turn, this may assist victim communities overcome any sense of dislocation, or any wretched feelings of fear or alienation that fester in silence. It may accordingly provide a form of closure for victim communities, e.g. one which reconnects the present with the past, one which distances the present from the past, or in a paradoxical way, both. Understanding the causes of common plights may foster solidarity between victim communities and thus social progress.

The primary functions of criminal proceedings demonstrate an inherent methodological individualism, i.e. assessing individual culpability within the immediate milieu. Nevertheless, when it comes to attributing responsibility in the context of mass atrocity crimes, contextualisation is often a necessary feature. Situating individual acts, or agency, within their broader cultural, social, political, or historical milieu may greatly assist with the immediate questions of causation and culpability. How wide and deep the net is cast in this regard, and the extent to which it is feasible, at a given point in time, to build-up an authoritative record of atrocity crimes in a way that satisfies multiple stake-holders are questions which reveal tensions between principle and pragmatism.

Pursuing historical grand narratives in the courtroom may be unfeasible within the budgetary and time constraints that necessarily have to be imposed within international criminal proceedings. Furthermore whilst historical inquiries may provide useful background or explanatory information, they risk being regarded as being beyond the scope of the narrow confines of a criminal indictment, and therefore tangential. At worst, introducing broader

historical issues risks opening the door to political and historical grievances or grandstanding which may unfortunately serve to exacerbate existing intercommunal or sectarian tensions.

A consequence of the pragmatism and procedural propriety associated with criminal proceedings may be that crime-base evidence is not comprehensively established, and that criminal acts are not labelled to the satisfaction of all victims. Justice and the historical record may only see what is absolutely necessary to determine liability for specific criminal acts to a high evidential threshold, namely beyond reasonable doubt, which is akin to certainty.

Where questions of command responsibility for the indirect perpetrators are concerned, for example the civilian and military leaders who plan, control, organise, instigate, etc., weight may necessarily be given to high level insider witnesses who can attest to atrocities being committed through structures of power that are hidden or otherwise difficult to discern, rather than direct eye-witness testimony of the acts committed by the direct perpetrators. For this reason, direct eye-witness testimony, including the testimony of victims, may often be regarded as having little weight as far as superior responsibility for the acts of subordinate organisations and individuals is concerned. However, the demands of the merits stage are different from the sentencing stage. At this latter stage, the voices of victims are a necessary part of the process of determining the gravity of criminal acts, i.e. the emotional and economic impact they have had on victims, through their eyes and on their terms.

Nevertheless, rules of criminal law and procedure combined with political and fiscal constraints may mean that the process of international criminal justice may not be wholly commemorative of the wide-ranging voices of victims. While victim communities may justifiably perceive that genocide or crimes against humanity have been perpetrated against them, the evidentiary difficulties, and thus the risk of acquittal, associated with respectively proving beyond reasonable doubt genocidal intent or a widespread and systematic pattern and policy of persecution may preclude the labelling, prosecution and commemoration in such terms. To increase the likelihood of a conviction, and thus an authoritative judgment that establishes at least some of the facts against a broader historical backdrop, prosecuting lawyers may press charges for what may be perceived as less serious war crimes. War crimes tend to focus more narrowly on relatively isolated criminal activities such as killing or destroying protected objects. From the standpoint of victims, this approach may not reflect their perceived reality that they faced systematic annihilation or persecution on account of their particular group identity.

No Peace without Justice and No Justice without Truth

Whilst international criminal justice by no means produces definitive historical or commemorative accounts, it is nevertheless one of the most rigorous and authoritative mechanisms that we have for these purposes. Whilst they may provide little in the way of consolation, judicial verdicts, together with their supporting documents and evidence have the potential to serve as valuable educational and historical resources for both present and future generations. The narratives produced by criminal proceedings and jurisprudence are one of our defences against atrocity crimes. Collective memory of abuses and atrocities is an important by-product in this regard. It helps us to understand the patterns and dynamics behind the abuses of raw power. It gives us the foresight to forestall any re-emergence, as long as we are vigilant enough.

Being able to defeat an ideology, a geopolitical strategy, an economic target by linking them, in no uncertain terms, to the commission of atrocity crimes is arguably the *pièce de résistance* of international criminal justice. If we make it happen, this is the major contribution it can make towards the commemoration of victims of atrocity crimes and abuses, both for transitional justice and for the historical record. As historian Peter Steinbach noted, it

‘epitomises ... for all intents and purposes ... an achievement of historical science that is possibly without comparison, but certainly one of a kind’.

Ultimately, today, we still face the dilemma facing the drafters of the 1648 Treaty of Westphalia that sought peace and reconciliation following the Thirty Years’ War, namely, do we arc towards the commemorative aspects of justice, or do we arc towards ‘a perpetual Oblivion ... of all that has been committed ... all that has pass’d ...in Words, Writing ... shall be entirely abolished [and] be bury’d in eternal Oblivion’?

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