International Journal of Conflict and Violence

urn:nbn:de:0070-ijcv-2013142
IJCV: Vol. 7 (1) 2013, pp. 36 – 49

# Transitional Justice: History-Telling, Collective Memory, and the Victim-Witness

Chrisje Brants, Willem Pompe Institute for Criminal Law and Criminology, Utrecht University, the Netherlands
Katrien Klep, Department of Cultural Anthropology and Sociology, Utrecht University, the Netherlands

# Vol. 7 (1) 2013




ISSN: 1864-1385

# Transitional Justice: History-Telling, Collective Memory, and the Victim-Witness

Chrisje Brants, Willem Pompe Institute for Criminal Law and Criminology, Utrecht University, the Netherlands
Katrien Klep, Department of Cultural Anthropology and Sociology, Utrecht University, the Netherlands

This article examines the complex, inherently political, and often contradictory processes of truth-finding, history-telling, and formation of collective memory through transitional justice. It explores tensions between history-telling and the normative goals of truth commissions and international criminal courts, taking into account the increasing importance attributed to victims as witnesses of history. The legal space these instruments of transitional justice offer is determined by both their historical and political roots, and specific goals and procedures. Because the legal space that truth commissions offer for history-telling is more flexible and their report open to public debate, they may open up alternative public spaces and enable civil society to contest the master narrative. The legal truth laid down in the rulings of an international criminal court is by definition closed. The verdict of a court is definite and authoritative; closure, not continued debate about what it has established as the truth, is its one and only purpose. In conclusion, the article calls for a critical appraisal of transitional justice as acclaimed mediator of collective memories in post-conflict societies.

In connection with modern society and the construction of a common core of memory, it has been observed that: "[H]istory and legal institutions supersede and replace rituals and traditions; archives …, and bureaucracies provide stores of memory; museums and memorials celebrate the past. Modern societies need a wide range of different institutions that store and construct collective memories, and do so in differing ways' (Karstedt 2009, 4). This article is concerned with two such legal institutions: international criminal courts and truth commissions. Both are instruments of transitional justice, employed in (post)conflict societies to support the transition from conflict to peace, but their manifest purposes are very different. An international criminal trial aims to *bring to justice perpetrators* of atrocities by determining what they have done through due process of law; the primary concern of truth commissions is to *bring justice to victims* through publicly establishing what happened to them. But this obvious difference hides a significant similarity: such truth-finding also promotes the development of a collective memory by establishing a version of history that informs, and is informed by, the memories of those involved – a shared truth about crime and injustice that allows sense to be made of a traumatic past and is a prerequisite for a stable future. Truth, collective memory, and history-telling have become buzzwords in the transitional justice debate, conceptual keys to reconciliation, democracy, and peace in conflict-ridden nations.

Mark Osiel (1997, 6) maintains that international criminal trials are "often a focal point for the collective memory of whole nations"; even "secular rituals of commemoration. As such, they consolidate shared memories with increasing deliberateness and sophistication." Martha Minow (1998, 60) has argued that truth commissions "undertake to write the history of what happened as a central task," and that "a truth commission may be a more effective mechanism than litigation for devising a new national narrative" (Minow 2008, 180). Truth Commissions then, flatten-out, so to speak, complex memories and understandings of the past into an inclusive nation-building narrative which they envision as a collective memory. And, discussing the current (academic) interest in "memory," Jay Winter (2006, 1) refers to "the memory boom … – a wide array of collective

mediations on war and the victims of war." However, he takes issue with the ease with which the term "collective memory" is employed, as if there were "one national 'theatre of memory' which we all inhabit" (2006, 185). While he makes this point about film as a cultural practice and source of collective memories, it is equally true of transitional justice.

According to Winter (2006, 185), it is more constructive to see film as "one of the mediators of the memories of particular groups." Transitional justice also (re)produces memories but aspires to more than that. "Justice" requires that the different theatres of memory are collected into one "truth" (Osiel's "coherent collective memory," Minow's "national narrative"). This means that transitional justice can be understood as a mediator between different collective memories. Moreover, unlike film, this mediator embodies the voice of (legal) authority. The version of past events that courts and truth commissions produce in their verdicts and reports is an authoritative claim of truth.

However, while history-telling and the formation of collective memory in the name of justice may result in a coherent narrative, they are neither neutral nor objective. They are dynamic processes grounded in social, cultural, and power relations in (international) society at any given time; they are coloured by the moment at which the past is considered, and by how a preferred narrative is promoted. History and memory change as time goes on, and are never "finished." At the same time, the "truth" established by a court or truth commission is based in no small part on the testimony of victims, but the flattened, often truncated narrative that combines their memories and stories is, almost by definition, unlikely to do justice to their suffering.

This makes the authoritative truth claim of courts and truth commissions particularly problematic, given the parameters of their establishment, the limitations of their remit, and the other goals of transitional justice: just retribution, redress for victims, reconciliation, deterrence, and the establishment of democracy and the rule of law. The complex, inherently political and often contradictory process of truth-finding, history-telling, and the formation of collective memory through transitional justice are the concern of this article. In particular, we explore whether and where tensions exist between history-telling and the normative aims of truth commissions and international criminal courts and ask how their goals and procedures shape the "truth" they produce.

We pay particular attention to the increasing importance attributed to victims as witnesses of history and the impact this has on transitional justice. We maintain that, given the liberal political aspirations of transitional justice and the central position of the victim-witness, we would do well to take Jay Winter's warning seriously and adopt a cautious and critical stance towards history-telling in transitional justice, especially in the case of international criminal courts. While truth commissions are by no means without problems, we argue that, compared to criminal trials, they are by their very nature more open-ended. Although they too may fall short in the justice they provide for victims, they are also able to pave the way for the development of other collective memories and alternative histories.

First we will delve into the historical development of international criminal justice and the changing position of the victim-witness, to reveal tensions between the goals of criminal justice and the need for history telling by the courts to ensure that what has happened is not forgotten. Then we will take a closer look at the position of the victim-witnesses in truth commissions, and show how victims' testimonies are shaped into an official narrative by the mandates of the commissions. At the same time, victims and social organizations contest these official narratives and open up spaces for ongoing public debate. Finally, we examine the potential and limitations of both instruments of transitional justice when it comes to history-telling and the scope for autonomous action they afford to the victim-witness.

## 1. International Criminal Justice: Doing Justice, Making History

### 1.1. From Arbitrary Vengeance to Due Process of Law

Dealing with the aftermath of conflict through legal process was discussed from the post-Waterloo period onward, but in particular after the First World War when the Allies envisaged that the German Kaiser would face an international tribunal with a view, among other things, to vin-

dicating "the validity of international morality" (quoted in Bass 2002, 76). Although the trial never materialized, the very idea reflects the notion, if embryonic, that war is governed by an international legal order transcending customary rules. The specific goals of this undertaking were not entirely clear. Retribution and deterrence certainly figured in the background. Victims other than the allied nations themselves – as they saw it, viciously and illegally attacked by an aggressor-state bent on self-aggrandizement – were not part of the scheme. The British solicitor-general did remark that there "would remain for all time a record of German brutality" (quoted in Bass 2002, 302), but history-telling was not recognized as significant in itself until it came to dealing with the crimes committed under Nazi rule.

Much has been written about the Nuremberg trials from many different perspectives. Most legal scholars now seem to agree that their greatest achievement was the recognition of crimes against humanity.[1] But this is with hindsight. Bass (2002) comes much closer to the contemporary mindset in regarding Nuremberg as the victory of liberalism, the acceptance of the civilized fair trial as better (and more effective) justice than arbitrary vengeance. Although Nuremberg revealed a mountain of information about crimes against humanity these were secondary considerations. The needs of individual victims figured not at all, while a form of collective victimhood was reserved for (the peoples of) the nations attacked by Germany. As in 1919, the Allies regarded themselves as victims of a brutal war of aggression, during which there had "also" been a programme to exterminate the Jews. Nuremberg was about retribution for the war in general. It was also about deterrence through "education" of the German populace. Punishing the leaders "in a dignified manner consistent with the advance of civilization" served that end,[2] but also implied producing a collectively shared version of history in the face of the disparate theatres of memory inhabited by Germans immediately after the war.

While we should not try to read too much into Nuremberg, there is no doubt that it is part of the ideological legacy of the Second World War and as such played a significant role in the development of international criminal justice. That legacy included the concepts of human rights and crimes against humanity as the concern of the international community and the legal and organizational infrastructure needed to ensure that "never again" would such a catastrophe befall the world – the United Nations, the Geneva Conventions, and, later, the European Convention on Human Rights and Fundamental Freedoms and the European Court of Human Rights. However, although the notion of a permanent international criminal court, whose jurisdiction would transcend the sovereignty of the nation state, was mooted after the Second World War, it was soon shelved in the hostile climate of the Cold War. The idea re-emerged in the 1990s, partly as a result of the momentum created by the ad-hoc tribunals for the former Yugoslavia and Rwanda.

The International Criminal Court (ICC) is a both political and idealistic venture in cosmopolitan liberalism and human rights (Brants 2011), and global criminal justice has become the "new paradigm of the rule of law" (Teitel 2005, 839).

> International criminal justice is said to establish the rule of law (therefore easing and legitimizing transition to democracy), because it also brings reconciliation, conflict resolution, rehabilitation, deterrence, retribution, and because it provides a platform for victims, exposes mass-victimization and lends a voice to the millions who would otherwise go unheard …, preventing history from being either forgotten or repeated.
>
> (Brants 2007, 185)

Its ultimate aim is therefore "the domestication of violence by law, by the establishment of a just peace where the wounds of history can, at last, be healed" (Hazan 2010, 54–55).

1 The very title of the volume *From Nuremberg to the Hague* (Sands 2003) posits direct continuity between Nuremberg and prosecutions by the international ad hoc tribunals and the permanent International Criminal Court.

2 Henry Stimson, American secretary of war, quoted by Bass (2002, 165).

### 1.2. The Victim-Witness and History-Telling

International criminal justice is often lauded as the triumph of idealism and civilization over cynicism and barbarism. At the same time, international courts have come in for a deal of criticism as well. While Osiel (2008) contends that international criminal trials, through the history-telling that is part of the legal construction of a case, not only are but *should* be geared towards the development of a coherent collective memory as a means of coming to terms with a divisive and painful past, others emphasize the essentially political nature of international trials and warn that the history-telling involved in the truth-finding process is open to abuse for political ends (Alvarez 2004; Teitel 2005).

Drumbl (2005, 2007) takes issue with the Western bias of the principles of due process and maintains that sentencing according to individualized guilt fails to address the collective nature of international crimes – this being more damaging now that international criminal law is increasingly seen as *the* legitimate response to mass atrocities; other context-specific or traditional ways of responding (such as reintegration and reconciliation rituals) are accepted only as subordinate to international criminal law, which alienates victims from the process.

A third approach, closely related to Drumbl's criticism, holds that international trials cannot provide justice for victims and highlights contradictions with the other goals of international criminal justice. Demands for justice for victims played an important part in the negotiations leading up to the establishment of the ICC. Especially France, Human Rights Watch, and Amnesty International pushed for the incorporation of victim participation in the Rome Statute.[3] In the words of the French Minister of Justice, "The *raisons d'être* of our fight are the victims."[4] However, although victims may also appear as interested parties before the ICC, not only to receive reparation but also to tell their story, this does not resolve the problem that due process traps witnesses between the precise and quantifiable evidence required for establishing facts beyond reasonable doubt and the emotive memories inherent in victims' narratives, preventing them from relating their experiences in their own words (Haslam 2004, 328) or even recognizing them. The narrative of law is inevitably reductive, not only because of stringent evidential requirements but also because, in practice, it is impossible to put the combination of every person and factor that contributed to the victim's suffering on trial (Brants 2007).

These criticisms come together in a three-way tension between truth-finding through due process that is concerned with establishing the guilt of the accused fairly; politically expedient history-telling and developing a collective memory to exorcise the ghosts of the past and make a shared future possible; and the needs of victims to share, have recognized and redressed their individual experiences of suffering. That tension is nowhere more obvious than in the role of the victim-witness as it has developed in international criminal justice, although it has a precedent in the trial of Adolf Eichmann.

The secondary role of the Holocaust at Nuremberg was an important incentive for Israel to find the masterminds who had evaded justice.[5] Adolf Eichmann was kidnapped, brought to Jerusalem, and charged under Israeli law with, inter alia, crimes against the Jewish people, war crimes, and crimes against humanity. He was found guilty and hanged. The intention of the Israeli government and the prosecutor was, of course, to hold accountable a top Nazi who was personally responsible for genocide, but behind that lay related aims of putting the Holocaust on the map of remembrance, influencing (inter)national public awareness, strengthening the state of Israel politically, and giving Jewish victims a voice. Where the Allies relied predominantly on documentary evidence at Nuremberg, the Israeli prosecutor sought a "living record of a gigantic human disaster" (Hausner 1966, 303–304), live testimony

3 On victim participation under the Rome Statute, see amongst others Groenhuijsen and De Brouwer (2008); De Beco (2009); McGonigle (2009).

4 Opening address of Paris Seminar "Access of Victims to the International Criminal Court," Paris, April 27, 1999, cited in Haslam (2004).

5 On the Eichmann trial: Hannah Arendt ([1963] 2003); Gideon Hausner (1966); David Cesarani (2005); Harry Mulisch (2005, original in Dutch, 1961); www.nizkor.org/hweb/people/e/eichmann-adolf/transcripts/Judgment.

from survivors selected to give the broadest possible historical picture. Eichmann's judges, however, were resolute in what they saw as their core business – and that was not history-telling:

> [I]t is the purpose of every criminal trial to clarify whether the charges in the prosecution's indictment against the accused who is on trial are true, and if the accused is convicted, to mete out due punishment to him … [This does] not mean that we are unaware of the great educational value, implicit in the very holding of this trial, for those who live in Israel as well as for those beyond the confines of this state. … Without a doubt, the testimony given at this trial by survivors of the Holocaust, who poured out their hearts as they stood in the witness box, will provide valuable material for research workers and historians, but as far as this Court is concerned, they are to be regarded as by-products of the trial.[6]

Despite this clear declaration of purpose, the lasting legacy of the Eichmann trial for international criminal justice has been the importance of history-telling and its demonstration that "memory [is] moral in character, and that the chief carriers of that message [are] the victims themselves" (Winter 2006, 30). Increasingly, the testimony of victim-survivors is not only a source of moral memory but also the basis for the historical narratives that international trials produce. But, while many criticize the failure of international criminal law to provide justice for victims, the advent of victim participation at the ICC notwithstanding, few have been willing to problematize the *role* of victims in relation to truth and history. As if, given the gravity of the crimes and the memory of the Holocaust, inquiring into whether a victim-based approach is wholly appropriate in the context of international criminal law, somehow implies a negation of those crimes and their victims.

Winter (2006, 49) distinguishes between three levels of witnessing: legal, as in giving evidence before an (international) court against specific perpetrators; moral, implying that testimony about specific crimes against humanity frames a much wider narrative about absolute evil; and the witness as spokesperson for humanity, emphasizing that we not only have a duty to remember, but also that we forget at our moral peril. All three levels occur in trials where crimes against humanity are the issue, and their significance lies in their influence on the historical and narrative value of investigation and verdict, and the production of collective memory. That is the theoretical, idealistic view. But historical narrative and collective memory are constructions that depend on their specific input. The way a case is constructed and presented by a prosecutor can influence historical and collective memory in several ways and, paradoxically, undermine the very significance of witnessing.

The Eichmann-trial made some contemporary commentators uneasy (Cesarani 2005). It was true that it reversed the process of "collective world amnesia," gave victims a voice, demonstrated that bearing witness can be a reparative act in itself, and that the rule of law triumphed over lawlessness.[7] But the narrative it produced ignored the role of collaborators and bystanders, and the (lack of) response by the outside world, including the Jews themselves. The Israeli government instructed the prosecutor to go easy on West Germany and avoid insulting Chancellor Adenauer, and suggested he downplay the failure of the Allies to rescue Jews from Europe and highlight the role of Arab countries in providing a safe haven for fugitive Nazis (Cesarani 2005, 256). The prosecutor relied heavily on survivors' testimony, but, heartrending though it was, it was piecemeal and inconclusive as victims struggled to remember or became confused under cross-examination. Although many victims felt vindicated in finally being able to tell their story, others were traumatized by the experience or felt that the court, however empathetic towards the witnesses, had not needed their personal memories – which was true in the sense that they were often irrelevant to the matter in hand: Eichmann's personal guilt under criminal law.

Similar concerns and complaints have been voiced with regard to the ad hoc tribunals. Unlike the ICC, victims have no particular standing under the International

6 Judgment, *supra*, opening passage.

7 Contrary to the defence's protestations that a fair trial was impossible, the court's handling of the case is generally considered exemplary.

Criminal Tribunal for the Former Yugoslavia (ICTY) and International Criminal Tribunal for Rwanda (ICTR). They appear simply as witnesses, although special measures may be taken to protect them if necessary and to prevent, as far as possible, revictimization through the trauma of testifying or being confronted with their tormentors. Nevertheless, they are a tool in the prosecutor's strategy to deliver both proof beyond reasonable doubt of who was responsible and a (political) history of what happened to them.

Extending the aims of the truth-finding process beyond the question of the defendant's guilt to the much broader purpose of making sure what happened is not forgotten, with victim testimony the primary vehicle of collective memory, sets the trial agenda to re-reading the meaning of victims and justice and retelling history rather than fair truth-finding by the court. That the essence and purpose of the trial, of fairness even, becomes to accommodate the victim's, rather than the defendant's day in court is procedurally unacceptable in the context of due process (and only a trial that is scrupulously fair can demonstrate that civilized values should and can prevail over barbarity). If the counter-argument were that it should indeed be the victim's day, then the question arises as to why we should have a trial at all and worry whether it is fair. But, even if we accept that the magnitude of suffering involved in international crimes justifies this new victim paradigm, trials can only be brought to a successful conclusion by reducing the selection of both defendants and charges – and therefore victims' experiences – to manageable proportions that need not, probably do not, reflect reality.

Sandvik (2009) points out that there has been a shift from collective political struggles seeking agreements on social, civil, and political justice at the national level, to judicial and individualized formats in the international sphere, where individual agency has come to be seen as intrinsic to the legitimacy of cosmopolitan justice, namely its ability to achieve not only reconciliation at a personal and national level, healing and dignity, but also to pave the way for a truly moral, cosmopolitan world-society. This coincides with Winter's third level of witnessing, but is often so at odds with the other goals of international criminal justice, including reconciliation and justice for victims, that Haslam has called for honest acknowledgement (also by victims) of the limitations on the ability of the legal process to restore a victim's sense of self-respect, and for alternative platforms to meet such ends (2004, 319). So, how do history, memory, and the interests of victims fare under one such alternative: truth commissions?

## 2. Truth Commissions: Nation-Building and Collective Memory

Deeply entwined with the political transition process, truth commissions are highly political instruments negotiated between countless actors. In recent decades many countries have used them to confront the aftermath of violent conflict and atrocity.[8] In the wake of the authoritarian regimes of the 1970s and 1980s, the debate on transitional justice in Latin America was driven by intertwined demands for justice and truth, and the need to legitimize the new governments. "Truth" in this context was understood as the obligation of the successor state to investigate and establish the facts about past violations. Although questions about whether there was a duty to punish human rights violators were debated (Arthur 2009, 353), in the Latin America of the 1980s transitional justice centred on achieving two aims: some measure of justice for the victims and a more just democratic order (Arthur 2009, 355–56). Behind this lay the need to establish a nation-building narrative. According to Posel, these "previously bitterly and brutally divided polities" sought to "refashion themselves as spaces of unity and democratic stability." Here the problem of history-writing presented itself in a particular way: how to create an "imagined community" of the new democratic nation on the strength of an account of the past to which previously warring groupings – with disparate, even incommensurate, versions of events – would now consent" (Posel 2008, 120–21).

**8** Worldwide, there have been forty truth commissions, from 1974 (Uganda) to the beginning of 2010 (Kenya) (Hayner 2011, 256).

In 1995 the South African Truth and Reconciliation Commission was installed, with according to Hayner (2011, 26) "the most complex and sophisticated mandate for any truth commission to date." A key feature that set it apart from earlier truth commissions (besides its much larger reach in terms of mandate, personnel, and funds) were the public hearings of both victims and perpetrators and the possibility to grant individualized amnesty. For the first time, a truth commission's work took place in front of live, television, and radio audiences. "For many, these public hearings were the commission" (Cole 2007, 167–68).

### 2.1. Victims, Testimony, and Collective Memory

The primary function of a truth commission is to collect testimony and publish an official record of the past, a public recognition of past (state) violence, while also offering recommendations to the transitional or successor government (Laplante and Theidon 2007, 235). This approach aims to present the nation with a history that places past events in an understandable story, a master narrative of the conflict (Phelps 2004, 79). The place of the victim is central. According to Joseph Slaughter (1997, 407), "human rights violations target the voice, and therefore, the voice should be the focus of international human rights instruments." There is a general consensus in the literature that the importance of a truth commission lies in providing an official arena and producing a report that acknowledges victims' voices and endows them with official authority vis-à-vis the nation and the world.

The many critical questions that have arisen concern the limitations of that platform. Wilson (2001) and Grandin (2005) for example show how the human rights discourse shapes both form and content of the testimonies given before it and the official identity of the testifiers, while truth-finding can also become subordinated to "the overriding nation-building objective" of the new regime (Wilson 2001, 34). Questions about the historical and political context of the conflict, the parties and groups involved, and past and present socio-economic differences and power relations are left out. The discourse on individual human rights violations and the focus on the "victim" obscure stories of social and political agency and the collective dimension of the repression; Robben (2010a, 52) has argued that TRCs should take care not to neglect "antagonistic social identities." Others maintain there is little scientific evidence for the assumption that truth-telling before a truth commission is either healing or cathartic (Hayner 2011, 5) and that there is a need for reparations after the act of truth-telling (Laplante and Theidon 2007; Shaw 2007).

Some authors take issue with the phenomenon of "testimony." "Society wants to use witnesses' accounts as evidence, and testimonies are condemned in case they do not match evidence collected by other means" (Strejilevich 2006, 703). The academic and legal apparatus requires systematization of testimonies to make them legible, to literally make them make sense, corresponding with the idea that a testimony is a fixed and repeatable story based on facts. In the legal context of evidence, this is of crucial importance. However, a survivor's testimony is expressed before multiple audiences. Testimonies do not exist in "a primordially 'authentic' form" (French 2009, 98). Inevitably there will be disjunctions between the narratives of those who testify before a truth commission and what the commission eventually relates in its report.

Phelps argues that truth commissions can help give voice to those who were muted and excluded during the period of repression, depending on *how* those voices are used in relation to what she calls the master narrative. She asks how individual stories can be contextualized without reducing them to "examples" or "evidence." Her answer is that individual voices should be allowed to compete. "We can only know the past through many competing narratives, and we can only envision the future by incorporating this polyphony into the new national story" (Phelps 2004, 127). This goes against the grain of many truth commissions which seek a coherent and unequivocal official narrative.

We now turn to the Chilean National Truth and Reconciliation Commission (1991) and the National Commission on Political Imprisonment and Torture (2004), which each had a distinct legal focus and attempted to derive an objective official narrative on the dictatorial past while recognizing persons who were assassinated or disappeared, or suffered political imprisonment and torture as individual

victims. Neither of the commissions held public hearings and, in that sense, they lacked the performativity and public, emotive dimension that the South African TRC so clearly had (although the 1991 Chilean Truth and Reconciliation Commission served as an example and inspiration for the TRC). Nevertheless, we believe that in their wider social impact they are highly illustrative of a more general effect of truth commissions on collective processes of memory-formation and history telling.

### 2.2. The Chilean Truth Commissions: Contesting the Official Narrative

After seventeen years, the Chilean dictatorship was narrowly defeated at the ballot box in 1988.[9] Although the theme of human rights violations loomed large at the time, a political and legal reality still dominated by actors and laws of the dictatorship made thorough investigation of the crimes difficult. Truth and "national reconciliation," not criminal justice, became the stepping stones from violent past to new democracy. In April 1990, newly elected President Aylwin created the Chilean National Truth and Reconciliation Commission (also known as the Rettig Commission after its president, lawyer Raúl Rettig).[10]

The Commission's mandate was to establish the most complete picture possible of the grave human rights violations committed between September 11, 1973, and March 11, 1990. It recognized individual victims "on both sides": the detained-disappeared,[11] the executed, and those who died under torture, at the hands of state agents or people in its service (2,025 persons), and those who were kidnapped or suffered an attack on their lives carried out by "individuals acting under political pretexts" (90 cases). Moreover, the Commission recommended reparations and measures to ensure "never again." Its mandate prohibited the Commission from pronouncing on possible individual (criminal) responsibility. For an entity with no judicial powers, the Rettig Commission operated with remarkably rigorous legal criteria and legal tone. It was to be neutral and objective, emphasizing its position of impartiality in an attempt to forge political and social consensus on the recent past.

In June 1990, members of the victims' families were invited by the commission to testify. They were also asked to present persons who had witnessed what had happened to their relatives, and written proof of the actions they themselves had undertaken before the courts and human rights organizations to find their loved ones. The Commission received around 3,400 cases (CNVR 1991, 5–6) and heard all family members who so requested. Due to time constraints it was only possible to interview those witnesses considered most relevant and not included in other sources (CNRV 1991, 9).

The Rettig Report described the development of the regime's repressive tactics chronologically, presenting the individual cases throughout the text and recognizing in total 2,298 victims. The Commission's mandate, however, severely limited the official narrative: it did not focus on perpetrators, and recognized a specifically defined group of individual victims of human rights violations by the dictatorship, those who either died or were disappeared. Phelps has argued that because there were no living victims included in the report the victims' stories were necessarily told by the Rettig Report's authors, and became subsumed into the master narrative (Phelps 2004, 93) which was geared at "national reconciliation."[12] As a result, no perpetrators were named and victim-survivors were neither recognized as victims nor given a voice. As an expression of the power relations in the early 1990s, the mandate shows the limits of what was possible at the time in a careful balancing of demands, interests, and restraints.

Although the Rettig Report was crucial in officially acknowledging the repression and suffering under the military regime, family members and human rights organizations found its "truth" unsatisfactory. In countless commemorative acts, meetings, and protests, and by con-

**9** This section is based on doctoral research by Katrien Klep in Santiago de Chile.

**10** *Comisión Nacional de Verdad y Reconciliación*, Supreme Decree 335. The Report was published in March 1991. Ley de Reparación 19.123 (8 February 1992) granted reparation payments to the families of victims recognized by the Report.

**11** In Chile the term *detenidos desaparecidos* is used to refer to those who fell in the hands of the military dictatorship and literally disappeared without any information about their fate or whereabouts. See also CNVR 1991, 22–23). We use "the detained-disappeared" as the closest English equivalent.

**12** For a comparison of the position of the victims and their testimonies in the Argentinean and Chilean truth commissions see Robben (2010b).

tinuous efforts to bring perpetrators to justice, they presented their own demands for truth and justice. They not only had a truth *to tell* that had been obscured and denied under the dictatorship they helped bring to light, they also needed *to know* the truth, or at least that part of the truth to which they had no access: what happened to the detained-disappeared, and where were they now? They also wanted criminal justice for those responsible. Moreover, the Rettig Report, although mentioning torture as an element of repression, did not individually recognize the tens of thousands of Chileans who had suffered political imprisonment, torture, dismissal on political grounds, and exile.

In a drastically changed political landscape, President Lagos created the National Commission on Political Detention and Torture in 2003 (also known as the Valech Commission after its president Monsignor Sergio Valech), with a view to reparation of the victims.[13] Its mandate was "to determine, based on the antecedents presented, who suffered deprivation of liberty and who was tortured for political reasons by agents of the state or persons in the service of the state, during the period between September 11, 1973, and March 11, 1990" (translated from CNPPT 2004, 21).

The Valech Report, like the Rettig Report, describes the periods of repression and includes a chapter listing the different torture methods in detail; testimonies are not reproduced completely although there are anonymous quotes and excerpts. An important part of the report is dedicated to listing 1,132 precincts where people were detained throughout Chile during the dictatorship: precincts of the different branches of the armed forces, quarters of the (civil) police, boats, sport stadiums, prison camps, jails, and secret detention and torture centres of the secret service (CNPPT 2004, 261–466). Of the almost 35,000 persons who applied to the Commission, 27,255 were recognized as having been imprisoned and tortured for political reasons; their names are all mentioned in the report.

The Valech Report broadened the official narrative of the military dictatorship in that it offered more detail than the Rettig Report on the specific forms of repression of imprisonment and torture. Moreover, it delved deeper into the victims' political and social engagement, making it explicit that they were persecuted for their political and social ideas. It recognizes the victim-survivors of political imprisonment and torture individually but, like the Rettig Report, names no perpetrators; testimonies will remain secret for fifty years to come, even for the courts.

There is no doubt that both the Rettig and Valech Commissions, through their carefully constructed narratives, were of crucial importance in promoting broad acknowledgment of the predicament of the victims in Chilean society and in bringing their testimonies into the public sphere. Yet, it is exactly this shaping of witness-testimonies into an authoritative narrative of individual victims of human rights violations that has also led victim-survivors, human rights organizations, and others to press on for truth and justice. With their strict mandates, legal language, and focus on hard facts, the reports led victim-survivors to seek to establish a different kind of collective memory of the dictatorship, in which witnesses are not just victims but also political and social agents. These processes have led to many public manifestations of memory in memorials, monuments, and the creation of visitors centres in former torture and detention centres, while survivors and human rights lawyers continue their fight against impunity (perpetrators of crimes during the military regime are still being brought before the Chilean courts).[14]

### 3. History-Telling and the Limitations of Legal Space

Per definition, both courts and truth commissions engage in history-telling: the establishment of an authoritative narrative of past events is part and parcel of their remit. The creation of a truth commission and the historical narrative related in its report reflect the power relations in the

**13** *Comisión Nacional sobre Prisón Politica y Tortura*, Supreme Decree 1.040. The Report was published in November 2004. Ley de Reparación 19.992 (24 December 2004) granted reparation payments to the victim-survivors recognized by the Report.

**14** Collins (2008, 20) argues that "[T]he transitional school of thought, which grew out of the Latin American experiences of transition in the 1980s, underestimated the extent to which questions of criminal and civil responsibility for state crimes of torture, disappearance, and genocide would persist and eventually resurface in postconflict societies", see also Collins 2010.

country concerned, for the public debates surrounding the installation, functioning, and results of a commission are part and parcel of the truth-finding exercise with which it is concerned. That is perhaps more obvious in the case of a national truth commission, where there is a closeness and immediacy that is absent in the context of international courts. But there too, the political-historical roots involve many actors and produce mandates that shape not only proceedings and outcome, but also the "historical truth" that is globally disseminated through the verdict.

History-telling, however, is not only determined by the historical events and political processes that gave rise to the particular instrument of transitional justice concerned, but also by the goals and procedures of those instruments that make up the legal space in which history-telling takes place. Here, victim-witnesses have become a crucial source of history and collective memory. From the person who experienced a crime and can testify to the identity of its perpetrator and the manner and circumstances of its occurrence, "the victim" – an abstract entity – has become the spokesperson for humankind whose testimony is a moral necessity: "lest we forget." From the ubiquitous perspective of human rights discourse which informs the goals of transitional justice and is moreover transitional in another sense – namely a step on the cosmopolitan road to a truly human, global society – this is precisely as it should be.

However, the construction of victim-testimony in verdicts and reports is also the message that an international criminal court or truth commission broadcasts, and transitional justice selectively and deliberately endows victims of human rights violations with differentiated forms of subjectivity, envisioning a certain type of survivor (Sandvik 2009). Cosmopolitan imageries of suffering are both created and used by international courts, to establish their legitimacy and to underline their message to the world. Likewise, national truth commissions shape victim-testimony to "fit" what they (or their remit) regard as the demands of a viable national future. In both cases, victim-witnesses (and perpetrators) are constructed procedurally as a category from whom a certain legal performance is expected. But that is to ignore the contradictions and problems inherent in the legal space that procedures of transitional justice provide.

As legal instruments, both truth commissions and international criminal courts (must) regard the victim-witness as instrumental to their own processes and goals. Victims see those processes as instrumental in the alleviation of their own suffering and/or as means to recover the voice lost in victimhood. The latter may or may not overlap with the discourse of the victim as spokesperson for humankind, about which Winter (2006, 241–42) has remarked that, ethically it is the testimony that matters, not the instrumental uses to which it is put. That is a succinct description of the problem of history-telling through witness testimony in the context of what, after all, are instruments of a legal process of justice in which testimony is, by definition, instrumental. There is however a difference between the legal space that international criminal courts allot to the testimony of victim-witnesses and the legal space for testimony allotted by truth commissions, and the manner in which that space is restricted by the other goals of these different instruments of transitional justice.

#### 3.1. International Criminal Courts: Doing Justice to Mass Atrocity

If the aims of international criminal justice are "as ambitious as they are contradictory" (Alvarez 2004, 321–22) and are discussed and criticized at length, the primary purpose of an international criminal trial (any criminal trial for that matter) – to establish the guilt of the perpetrator beyond reasonable doubt in a fair manner – is often overlooked. Yet this is precisely what delineates the legal procedural space of an international trial, within which all other goals must be achieved. This will remain inherently problematic unless we relinquish either the idea that crimes against humanity deserve to be punished under criminal law, or that such punishment is legitimate only after the establishment of guilt according to due process. Otherwise, there are limits – whatever the needs of victims.

Inevitably the narrative of crime will be reduced to a few provable sound-bites, in many ways devaluing the victim's experience by taking individual culpability out of the context of the historical reality. No trial of an individual mur-

derer can ever do justice to the experience of mass atrocity. Indeed, an individual does not "commit" such crimes in any normal sense of the word. They are collective, political, and social-psychological events involving a society as a whole. What any individual did personally is only a very small part of how such events developed and essentially unimportant in explaining or understanding them; but it is the only thing that matters in a criminal trial. Eichmann's final defence that he was expatiating "the guilt of the epoch" was in a sense true, but irrelevant.

That truth-finding by an international criminal court is, of necessity, related to personal guilt, also has repercussions for the value of that "truth" as history and its contribution to reconciliation. Even if the court manages to create "a coherent and judicially manageable narrative," international trials can only stop denial; they cannot impose shared remembering. "Justice will also serve the interests of truth. But the truth will not necessarily be believed, and it is putting too much faith in truth to believe that it can heal" (Ignatieff 1997, 15). Indeed, the very form of an adversarial trial, with its primary aim of establishing individual guilt, puts victims and perpetrators on either sides of a black and white divide that – given the shades of grey that characterize the collective nature of mass atrocities – is neither a "true" version of events nor a promising starting point for reconciliation and a tenable future.

#### 3.2. History-Telling Beyond Truth Commissions

It has been argued that truth commissions are more suited than criminal trials to make possible a detailed analysis of the past and creating a national narrative that can be used broadly in society (Minow 2008, 180). It is true that they can publicly acknowledge and condemn the violent past. They can also examine the role of multiple sectors and actors, and stimulate debate. However, while they do not "suffer" from the overwhelming constraint of having to establish individual guilt within the strict limits of due process, whether or not they succeed in promoting peace, justice, and reconciliation depends on the commission's mandate and procedures, the way testimonies are woven into the official narrative, and the interaction between the way that the narrative is presented to, and received in, society.

The very public South African TRC as well as the much more closed Chilean National Truth and Reconciliation Commission (Rettig Commission) and National Commission on Political Imprisonment and Torture (Valech Commission) can all be said to have a "cultural afterlife" (Robins 2007) in which their narratives, ambiguities, and silences are engaged and contested. In Chile, the reports of both commissions strove for an objective, abstract, and closed narrative, framed in terms of the international human rights discourse. Family members, victim-survivors, and others engaged tirelessly in cultural, social, legal, and political contestation and negotiation of the official narrative, broadening the understanding of the military dictatorship and opening up other spaces for a much wider range of testimonies and memories in Chilean society. Here, not before the commissions, we find a public emotive and performative dimension of the Chilean processes of memorialization. This is the more remarkable given that the hearings before the Chilean commissions were closed to the public, while those of the South African TRC were broadcast on national radio and television.

As in Chile, the South African TRC did not reveal "the whole truth" nor reconcile the entire nation. "The TRC's successes as a state ritual were largely a result of the creative tension between its ambitious efforts to establish a totalising, nation-building discourse, and the contestations, ambiguities and contradictions that this process unleashed" (Robins 2007, 146). Cole (1997, 187) concludes that, "[I]n the disjunctions between participants' performances of truth they wished to perform and the commission's public iteration of the truth it wished to perform, we come closest to perceiving the complexity of the knowledge the TRC brought into being." That complexity is also evident in the space created in South African literature and art to touch upon silences and unspoken aspects of the past and to critique the TRC and its truth production (Gready 2009). Lisa Laplante (2007, 435) underlines the importance of both voice and agency when she draws attention to the act of truth-telling in the context of the Peruvian TRC: "Importantly, this desire *to tell* is accompanied by a need to be protagonists *in telling*. … it is the change in personal and political status as truth-tellers, and not just the content

of this truth, that makes memory projects important endeavours" (italics in the original).

### 3.3. Conclusion

The current victim-oriented paradigm of transitional justice asserts that the (hi)story of the suffering of victims is paramount to establishing a shared – moral – memory that serves the demands of a stable and democratic future and at the same time does justice to the victims themselves. Yet, precisely because this historical narrative is couched in terms of gross violations of individual human rights and also aims at nation-building, in practice it inevitably distorts the historical "reality" of collective mass atrocities and the victims' remembered experiences of it. That is true of both international criminal courts and truth commissions.

However, because the legal space that truth commissions can provide for history-telling is flexible and their reports, though authoritative, open to public debate, they also encourage competing public and private discourses in alternative public spaces where that debate can be conducted and the master narrative contested. It is perhaps this aspect that completes their role as history-tellers and allows them to promote a shared memory of the past: history-telling and the promotion of collective memory is not the prerogative of historians, but takes place in all of the public and private spheres of society.

A truth commission's report opens opportunities for victims that the verdict of a court would be expected to close. In that sense, truth commissions offer empowerment in ways in which an international criminal court never can; they also allow for the development of competing theatres of memory, leaving room for other voices that may differ and even oppose the official historical narrative. The legal truth, laid down in the rulings of an international criminal court is, by definition, *not* open-ended. The verdict of a court is definite and authoritative; in this context, closure, not continued debate about what it has established as the truth, is its one and only purpose – indeed, on this its legitimacy depends. But then, also by definition, its contribution to history-telling, collective memory, and justice for victims is limited indeed. All of this is not to say that truth commissions are better than international criminal trials, for it should not be forgotten that trials offer an end to impunity and retribution in ways that truth commissions never can. Only that they are different, and that each has its own, limited role to play in transitional justice.

## References

Alvarez, José E. 2004. Trying Hussein: Between Hubris and Hegemony. *Journal of International Criminal Justice* 2 (2): 319–29.

Arendt, Hannah. (1963) 2003. *Responsibility and Judgment*. New York: Random House.

Arthur, Paige. 2009. How "Transitions" Reshaped Human Rights: A Conceptual History of Transitional Justice. *Human Rights Quarterly* 31 (2): 321–67.

Brants, Chrisje. 2007. Some Reflections on the Significance of International Criminal Justice. In *The Organized Crime Community: Essays in Honour of Alan A. Block*, ed. Frank Bovenkerk and Michael Levi, 183–208. New York: Springer.

Brants, Chrisje. 2011. Guilty Landscapes: Collective Guilt and International Criminal Law. In *Cosmopolitan Justice and Its Discontents*, ed. Katja Aas and Cecilia Baillet, 53–68. Oxford: Routledge.

Bass, Gary J. 2002. *Stay the Hand of Vengeance: The Politics of War Crimes Tribunals*. Princeton and Oxford: Princeton University Press.

Cesarani, David. 2005. *Eichmann: His Life and Crimes*. London: William Heinemann.

Cole, Catherine M. 2007. Performance, Transitional Justice, and the Law: South Africa's Truth and Reconciliation Commission. *Theatre Journal* 59:167–87.

Collins, Cath. 2008. State Terror and the Law: The (Re)judicialization of Human Rights Accountability in Chile and El Salvador. *Latin American Perspectives* 35 (5): 20–37.

Collins, Cath. 2010. Human Rights Trials in Chile during and after the "Pinochet Years." *International Journal of Transitional Justice* 4 (1): 67–86.

CNPPT. 2004. *Informe de la Comisión Nacional sobre Prisión Política y Tortura*. Santiago de Chile: Ministerio de Interior.

CNVR. 1991. *Informe de la Comisión Nacional de Verdad y Reconciliación*. Santiago de Chile: La Nación.

De Beco, Gauthier. 2009. Victim Participation in Proceedings Before the International Criminal Court: Resolving Contentious Issues. *Human Rights and International Legal Discourse* 3 (1): 95–112.

Drumbl, Mark A. 2005. Collective Violence and Individual Punishment: The Criminality of Mass Atrocity. *Northwestern University Law Review* 99: 539–610.

Drumbl, Mark A. 2007. *Atrocity, Punishment, and International Law*. Cambridge: Cambridge University Press.

French, Brigittine M. 2009. Technologies of Telling: Discourse, Transparency, and Erasure in Guatemalan Truth Commission Testimony. *Journal of Human Rights* 8:92–109.

Grandin, Greg. 2005. The Instruction of Great Catastrophe: Truth Commissions, National History, and State Formation in Argentina, Chile, and Guatemala. *American Historical Review* 110 (1): 46–67.

Gready, Paul. 2009. Novel Truths: Literature and Truth Commissions. *Comparative Literature Studies* 46 (1): 156–77.

Groenhuisen, Marc, and Anne-Marie de Brouwer. 2009. Commentary Participation of Victims. In *Annotated Leading Cases of International Criminal Tribunals*: The ICC 2005–2007, ed. André Klip and Göran Sluiter, 273–80. Antwerp: Intersentia.

Haslam, Emily. 2004. Victim Participation at the International Criminal Court: A Triumph of Hope over Experience? In *The Permanent International Criminal Court: Legal and Policy Issues*, ed. Dominic MacGoldrick, Peter Rowe, and Eric Donnelly, 315–34. Oxford: Hart.

Hausner, Gideon. 1966. *Justice in Jerusalem*. New York: Harper & Row.

Hayner, Priscilla B. 2011. *Unspeakable Truths: Transitional Justice and the Challenge of Truth Commissions*. New York: Routledge.

Hazan, Pierre. 2010. *Judging War, Judging History: Behind Truth and Reconciliation*. Stanford: Stanford University Press.

Ignatieff, Michael. 1997. The Elusive Goal of War Trials. *Harper's Magazine* 294 (1762): 15–18.

Karstedt, Susanne. 2009. *Legal Institutions and Collective Memories*. Oxford: Hart.

Laplante, Lisa J. 2007. The Peruvian Truth Commission's Historical Memory Project: Empowering Truth Tellers to Confront Truth Deniers. *Journal of Human Rights* 6 (4): 433–52.

Laplante, Lisa J., and Kimberly Theidon. 2007. Truth with Consequences: Justice and Reparations in Post-Truth Commission Peru. *Human Rights Quarterly* 29:228–50.

McGonigle, Brianne N. 2009. Bridging the Divides in International Criminal Proceedings: An Examination into the Victim Participation Endeavor of the International Criminal Court. *Florida Journal of International Law* 21 (1): 93–151.

Minow. Martha. 1998. *Between Vengeance and Forgiveness: Facing History after Genocide and Mass Violence*. Boston: Beacon.

Minow. Martha. 2008. Making History or Making Peace: When Prosecutions Should Give Way to Truth Commissions and Peace Negotiations. *Journal of Human Rights* 7 (2): 174–85.

Mülisch, Harry. 2005. *Case 40/61, Report on the Eichmann Trial*. Philadelphia: University of Pennsylvania Press. First published in Dutch, 1961.

Osiel, Mark J. 1997. *Mass Atrocity, Collective Memory, and the Law*. New Brunswick: Transaction.

Osiel, Mark J. 2008. In Defense of Liberal Show Trials – Nuremberg and Beyond. In *Perspectives on the Nuremberg Trial*, ed. Guénaël Mettraux, 704–25. Oxford: Oxford University Press.

Posel, Deborah. 2008. History as Confession: The Case of the South African Truth and Reconciliation Commission. *Public Culture* 20 (1): 119–42.

Phelps, Teresa. 2004. *Shattered Voices: Language, Violence, and the Work of Truth Commissions*. Pennsylvania: University of Pennsylvania Press.

Robben, Antonius C. G. M. 2010a. Commentary on Avruch: Group Dynamics in Social Reconciliation Processes during Transitional Justice. *Transcultural Psychiatry* 47 (1): 50–55.

Robben, Antonius C. G. M. 2010b. Testimonies, Truths, and Transitions of Justice in Argentina and Chile. In *Transitional Justice: Global Mechanisms and Local Realities after Genocide and Mass Violence*, ed. A. Hinton, 179–205. New Brunswick: Rutgers University Press.

Robins, S. 2007. Can't Forget, Can't Remember: Reflections on the Cultural Afterlife of the TRC. *Cultural Arts: African Journal of South-North Cultural and Media Studies* 21 (1): 125–51.

Sands, Phillippe, ed. 2003. *From Nuremberg to the Hague: The Future of International Criminal Justice*. Cambridge: Cambridge University Press.

Sandvik, Kristin B. 2009. The Politics and Possibilities of Victimhood, A Cosmopolitan Perspective. Paper presented at the Cosmopolitan Justice and its Discontents Interdisciplinary Conference in Oslo, Norway, 15–16 October 2009.

Shaw, Rosalind. 2007. Memory Frictions: Localizing the Truth and Reconciliation Commission in Sierra Leone. *International Journal of Transitional Justice* 1 (2): 183–207.

Slaughter, Joseph. 1997. A Question of Narration: The Voice in International Human Rights Law. *Human Rights Quarterly* 19:406–30.

Strejilevich, Nora. 2006. Testimony: Beyond the Language of Truth. *Human Rights Quarterly* 28:701–13.

Teitel, Rudi. 2005. The Law and Politics of Contemporary Transitional Justice. *Cornell International Law Journal* 38 (3): 836–62.

Wilson, Richard A. 2001. *The Politics of Truth and Reconciliation in South Africa: Legitimizing the Post-Apartheid State*. Cambridge: Cambridge University Press.

Winter, Jay. 2006. *Remembering War: The Great War Between Memory and History in the Twentieth Century*. New Haven and London: Yale University Press.

**Chrisje Brants**
c.h.brants@uu.nl

**Katrien Klep**
k.f.m.klep@uu.nl