Articles

Category: Vol. 5, 2013

Memorialization: An International Law Strategy

Written by Anja Matwijkiw* & Bronik Matwijkiw**

The South Shore Journal, Vol. 5, 2013, pp. 85-109.

Introduction

This article presents the philosophical context for the accountability-securing strategy which post-conflict justice experts refer to in terms of "memorialization." More precisely, the two authors concentrate on a document the significance of which has already gained momentum within the realm of international law, namely *The Chicago Principles on Post-Conflict Justice* (2007). After an account of the general premises, which can be treated as ethics derivatives, the authors focus attention on the strategy of memorialization while accommodating the progressive legal doctrine that underpins it. However, concerning the components that the document lists as integral aspects of memorialization, these do not amount to a fully developed theory of public memory. Given that elaborate and exhaustive conceptualization was not a project or a goal which the drafters originally had in mind, the assessment of *The Chicago Principles on Post-Conflict Justice* has to be shifted to memorialization as an alternative to prosecution and punishment under international law, to memorialization as a non-strict strategy. As such, it forms part of a holistic approach to justice. In the course of the discussion of the assumptions that are made and the implications that follow from these, it will become clear that whatever else can be said, one conclusion stands: memorialization is a bold and thought-provoking step.

The State Next Door: The Post-Conflict Justice Initiative Out of Chicago

In 2007, *The Chicago Principles on Post-Conflict Justice* was published as an attempt to create a set of international guidelines for failed states in the transition phase between conflict as a result of war (civil or interstate armed conflict) or a tyrannical regime (political totalitarianism) and optimal legitimacy through performance as a civilized, stable, and democratic society that recognizes and protects economic, social, and cultural human rights as well as civil and political human rights, as set forth by the United Nations.[1] After almost ten years of international collaboration between a large number of experts, *The Chicago Principles on Post-Conflict Justice* summarize the essence of modern nation-building and, as a part of this, of balancing morality and reality. The reconstructive effort, so it is assumed, would remain unsuccessful without due consideration of the moral or ethical aspects of law,

business, administration, and government.[2] That said, the document in question does not go into detail about morality or ethics per se. The fact that the majority of the experts, who assisted in the formulation of the various articles that form the basis for the guidelines, were recruited from the legal field probably explains the absence of any in-depth attention. For the same reason, cooperation with professional ethicists in the implementation phase appears to be a necessity, especially since post-conflict managers are expressly required to possess "a high moral character."[3] People who lack integrity are bound to influence the new system in a bad way and, as a consequence, do the citizenry a(nother) disservice. One example of this is corruption. If those in charge of the transitional government abuse the trust invested in them for the purpose of promoting their own personal agenda *as opposed to* the public interest, progress will be halted in proportion to the seriousness of the ethics violation. Post-conflict justice managers with a bad character are neither able nor willing to secure justice in the aftermath of conflict or tyranny. Instead, they contribute to the continuation of state failure. Needless to say, this reinforces the assumption that ethics really matter.

Human rights derive, in the final analysis, from fundamental moral principles. On scrutiny, there are at least four principles in force at the meta-level. Asking what it means to be the holder of human rights, the first part of the answer is that human rights are both claims to something and claims against somebody, although that somebody may constitute a collective entity, such as an institution, an organization, or a government. Thus, with claim-rights come duties that are correlative to the rights in question.

Furthermore, rights operate as reasons for the duties of other people or entities. This is to say that rights exist analytically prior to the duties, and that the duties exist as consequences of these rights. Concerning theory, therefore, it is the rights, the human rights, which manifest themselves as the single most substantial materials of morality. To declare that human beings have human rights is tantamount to declaring, inter alia, that humanity is a source of worth or value, and that this worth or value is an intrinsic entitlement key, something that makes its key-holder deserving. After this, the worth or value of humanity is paired with the notion of dignity as a matter of good treatment that is owed to all individual members of the species or, citing international law, "the human family."[4] The further qualification of good treatment consists in equal and universal consideration of needs and interests, together with respect for others as ends in themselves, meaning that human beings should not be treated as means nor inflicted with serious harm. Thus, the logic of human rights reasoning is such as to make it impossible to argue, on the one hand, that human beings should be respected on the basis of their worth and dignity and, on the other hand, try to enslave them. That would be a contradiction in terms.

Finally, the declaration of human rights as a matter of principle, entails that human rights should not be sacrificed for the sake of social utility. It is unfair, for example, to deprive any member of a minority of his right to "a standard of living adequate for the health and well-being of himself and of his

family," (again citing international law) just because this would benefit society as a whole.[5] To use the few as means for the good of the many is a wrongful act even if a civilized, stable and democratic society is also often one that swears allegiance to utilitarianism as a position in public policy-making. Under international law, individual human rights trump considerations having to do with social utility.

At the same time, it is also true that international law sometimes allows non-fulfillment of human rights. For example, in circumstances where a state does not have the resources that are necessary in order to give people the things that they are otherwise entitled to by virtue of their worth and dignity as humans, their humanity, the unfortunate ones are left with no choice but to await an improvement of the situation. Humanitarian intervention may be the remedy or strategy that accomplishes full justice in the end, thereby securing that people receive the objects of their rights in reality *in addition to* being recognized as entitled in principle, but this course of action, however morally compelling, cannot be guaranteed either. The broader point is that non-fulfillment of human rights is always unacceptable and, consequently, the core philosophy of human rights is a constant call for action.

So, from the point of view of the ethics of international law, recognition of human rights is unconditional. Human rights are, therefore, ascribed status as so-called "inalienable" rights.[6] Protection, on the other hand, is a category and indeed a consideration that, as a starting point, has to be distinguished. The fact that it may be practically impossible here and now at time to fulfill human rights is not something that entails that "people have no human rights" (for that reason). If this were the case, famines would immediately disqualify people as holders of human rights. As it happens, every time human rights were violated, it would follow (if fulfillment were a criterion for recognition) that people – as a consequence of the violations – would lose their human rights; which of course is absurd. This is also why international law uses non-protection, including non-fulfillment of rights, as an *incentive* to do something about a bad state of affairs rather than an excuse for inaction.

As a rule, philosophers are experts on the tacit assumptions of the law, that is, the ethics of human rights, whereas jurists and international human rights attorneys make contributions to the interpretation of the law. However, this presupposes consensus or agreement with the values that the existing body of legal norms reflects at the level of ethics. The point is that *The Chicago Principles on Post-Conflict Justice* are perfectly consistent with the above kind of account. In actual fact, the relevant document would not be meaningful without it.[7] By omitting an explication, though, the drafters are taking too much for granted. After all, ethics is a complex discipline which, in some cases, involves technical subsumption challenges by analogy to the law. If, for example, post-conflict managers are unaware of the different philosophical perspectives on the separation of deontological ethics (individual human rights) and teleological ethics (utilitarianism) or, for that matter, of law and morality, they cannot make as much sense of human rights as is actually required for the purpose of assisting failed states that are trying to find ways of preventing a repetition of the past.

Here it should be observed that, in one important sense, a repetition is not an option. This is to say that

The Chicago Principles of Post-Conflict Justice concede that the seriousness of human rights violations may be such as to fall under the branch of international criminal law that addresses crimes against humanity, mass killings, genocide, ethnic cleansing, and similar systematic and widespread violations or, more to the point, atrocities. Once the lives of human beings have been taken, they cannot be returned to their owners, however rightfully deserving and entitled on the basis of principles. For the same reason, a repetition is precluded beforehand. Talk about prevention, therefore, has to be interpreted as a need for a future-oriented effort to prevent a similar crime (against new victims) from happening again. In terms of human rights, the essence of this insight is distilled in the post-World War II slogan "Never Again!"

It goes without saying that the famous slogan, which also captures the cautious optimism of the United Nations' notion of the conscience of mankind, depends upon the implementation of strategies that preserve information about the past. Furthermore, it does so in a format that is readily accessible by all parties that have a stake in the collective within which the human rights violations occurred. Given the nature of the information, it amounts to an instance of public memory. Interestingly enough, *The Chicago Principles on Post-Conflict Justice* include guidelines that subsume the process of data collection and coupled with the public display of materials that function as testimonies as well as records for posterity, under so-called "memorialization."[8]

Before embarking on a more thorough investigation of memorialization – a project that partly entails making explicit the jurisprudence doctrine that guides the relevant strategy's conceptualization – brief mentioning of a couple of other important meta-premises has to be made. The premises, which pertain to considerations to do with justice, are needed for a full comprehension of the general ethics that go into human rights.

One of the main objectives with *The Chicago Principles on Post-Conflict Justice* is to, as indeed the name of the document clearly suggests, secure justice in the wake of conflict; a responsibility that befalls post-conflict managers who have to make public policy decisions that, by definition, affect many stakeholders. This is not, however, a simple and straightforward task. As it happens, the drafters were motivated by the hope of being able to address some of the major concerns of the United Nations, including the difficulty in distributing relative and subjective measures of freedom to, respectively, groups (be they defined as countries or subsections of a society) or individuals while at the same time imposing limits in the form of equal and universal human rights that apply to everybody everywhere irrespective of contingent facts, such as race, origin, gender, age, skin color, religion, and even more controversially, criminal record.[9] It isn't just different people and cultures that ground a claim for tolerance or, in humanistic terms, respect for diversity, up to the point where the subjective or relative preferences conflict with the fundamental stakes of other individuals or groups. Perpetrators of human rights violations have human rights, too. Human rights function as protections against the harmful, undignified and disrespectful actions of other human beings, but because their recognition is

unconditional, there is a moral and legal "braking device" on punishment or, more generally, the utilization of enforcement strategies, namely (equal and universal) observance of human rights. From its very inception, the United Nations was confronted with this challenge. The first official declaration of human rights in 1948, the Universal Declaration of Human Rights, tied the organization's hands through its own self-commitment to a type of justice which is not done or, more to the point, which *should not be done* at the expense of the human rights of anybody, not even the criminals who are guilty of heinous wrong-doing. In this way, a fair trial must be interpreted as much more than a democratic right, just as the international ban of the death penalty expresses a philosophy that is substantiated by ethical arguments rather than the requirements of political ideology or, for that matter, religion.

Consequently, it is hardly surprising that, *The Chicago Principles on Post-Conflict Justice* are premised on the assumption that there is a distinction between justice and revenge. In other words, it is unfair or unjust to equalize the relationship between victims of past human rights violations and their perpetrators by engaging in retaliation in accordance with the Lex Tallion Principle, a principle that considers "an eye for an eye" counter-action as morally permissible, if not required on behalf of the affected citizens or, in the event that the victims are dead, their relatives. If anything, such an analogy to private law enforcement re-fuels the conflict, thereby creating more and more victims, in principium ad infinitum. A modern and civilized state, therefore, has to be sufficiently rational and moral to implement third-party representation as a minimum for due process. In return, as it were, victims should be secured satisfaction in the sense that the cause of their original degradation or loss of dignity must, as a condition for adequate justice, be addressed in ways that they themselves or, alternatively, their relatives deem appropriate and, for the same reason, effective.[10] In other words, while revenge has been eliminated from the post-conflict equation, it is nevertheless accommodated *implicitly* because it holds that if victims are not satisfied, then additional measures or strategies have to be applied until the victims are able and willing to declare, "Now we are satisfied…justice has been done."

Without this response, there cannot be long-term peace and, ipso facto, no stability, no social cohesion, no order, and so forth. Like revenge, resentment is conflict-oriented, loaded with negativity and hostility which easily mutates into a dehumanizing aversion toward others. The point is that victim-satisfaction is very much about pragmatic considerations. A purely idealist approach to justice would imply retribution in kind or degree, so as to give rise to the strategy that restoration of humanity, respect and dignity should be matched with directly proportionate deprivations (qualitatively or quantitatively) on behalf of perpetrators. Without such "pay back," victims face secondary victimization, which adds to the accumulation of humiliation. However, while considered morally appropriate by some (non-applicable) standards, the demand for directly proportionate deprivations is considered by others as unreasonable with a reference to the need to balance morality and reality.[11] As a policy, "Never Again!" raises the bar, meaning that if accountability-securing strategies or

measures potentially tilt the weight-scales, then a prohibition follows as a "Better Safe than Sorry" precaution.

Where Do Considerations Having To Do With Public Memory Fit In?

As alluded to in the previous section, the drafters of *The Chicago Principles on Post-Conflict Justice* formulate guidelines for post-conflict managers. In doing so, they draw on a particular and progressive jurisprudence doctrine. The contents of the relevant legal position will be outlined in the following paragraphs, with a specific view to classifying memorialization as a post-conflict accountability-securing measure.

The doctrinal premises for the document's jurisprudence are so radical as to preclude impunity for jus cogens crimes. That is to say, duties that protect basic human interests in life, liberty, personal safety and physical integrity are deemed absolute. It follows that the prototype for wrongdoing is defined by crimes against humanity, war crimes, genocide, ethnic cleansing, slave-related practices, extra-judicial executions, torture, and systematic rape.[12] As "the compelling law," jus cogens constitute preemptory norms, which occupy the highest hierarchical position. Jus cogens implies non-derogable obligatio erga omnes, meaning that the obligations "flow to all" *irrespective of* context, circumstances and legal characterization. Belonging under customary law, jus cogens norms and corresponding obligatio erga omnes bind all members of the international community or society.

In practice, jus cogens norms are intended to secure accountability through (1) prosecution/punishment or extradition, (2) non-applicability of statutes of limitations, (3) non-applicability of immunities up to and including heads of states, (4) non-applicability of the defense of "obeying orders," (5) universal application of (1) to (4) whether in times of peace, war, or states of emergency, and (6) universal jurisdiction over perpetrators of jus cogens crimes, so as to secure prosecution/punishment or extradition, etc. Thus, jurisdiction is applicable irrespective of where the crimes were committed, by whom they were committed (including heads of states), against whatever category of victims, and irrespective of the context of their occurrence (whether they occurred in times of peace, etc.), circumstances (whether they were the result of "obeying orders"), and legal characterization (whether they were made part of treaty law).[13]

Jus cogens criminality and, mutatis mutandis, immorality define the minimum security parameters de jure and de facto. From the point of view of recognition, the criteria make use of the concept of right reason in the sense that the interests in life, liberty, personal safety and physical integrity are assumed to translate into entitlements by virtue of their very nature. Furthermore, from the point of view of protection, effective enforcement goes far beyond the traditional measures, in reality requiring that "something must be done!" by analogy to a categorical imperative. In terms of ethics, this means that the jurisprudence of human rights and correlative duties should adhere to the basic tenets of Immanuel Kant's (deontological) philosophy, at least in spirit. More precisely, *The Chicago Principles on Post-*

Conflict Justice require non-negotiable adherence to the principle of doing justice, of securing accountability as opposed to impunity at the level of morality and/or law where the question of guilt or blame is decided. Conversely, the way in which criminals are, as it were, made to pay for their crimes (beyond the point where they have formally assumed the responsibility for their wrongdoing) is a much more open-ended area and issue, to be negotiated and settled with the active participation and input of, first and foremost, the victims of the relevant crimes. In short, while remaining reasonable, victims still have different options to choose from.

By transferring the above jus cogens jurisprudence insights to a model of accountability-securing measures, two main types of post-conflict justice can now be accommodated, namely non-strict justice and strict and legal justice. Furthermore, in the case of *The Chicago Principles on Post-Conflict Justice*, the typology translates into seven practical principles that in some instances crisscross the distinction between non-strict and strict and legal.

The principles are: (1) combating impunity through (criminal or civil) prosecutions; (2) truth-telling and investigations of past atrocities; (3) acknowledging victims' rights and providing remedies and reparations; (4) ensuring accountability through vetting and administrative measures; (5) encouraging memorialization, education and the preservation of historical memory; (6) respecting traditional, indigenous, and religious approaches to justice and healing; and; (7) enabling institutional reform and effective governance.[14]

By defining a holistic approach, the seven principles cover three main areas of action-oriented interest, namely justice, truth, and redress which, in turn, constitute the special rights of victims, as indeed acknowledged under (3).

Although practical in nature, the seven principles are linked with conceptual as well as normative considerations that also influence priorities. For example, concerning peace, *The Chicago Principles on Post-Conflict Justice* agree with the axiom which the United Nations' Secretary-General advanced in his 2004 report, namely that peace, justice and democracy are mutually reinforcing imperatives.[15] That said, the drafters of the document qualify the interconnectedness by emphasizing the fact that long-lasting peace is not possible without first securing justice, *as a minimum*, in the case of jus cogens crimes.[16] In this manner, *The Chicago Principles on Post-Conflict Justice* provide "a valuable reference for those directly engaged in peace processes, national reconstruction, peacekeeping operations, and the development and implementation of policies to defend and protect fundamental rights."[17]

In the light of this account of the doctrinal jurisprudence premises that underpin *The Chicago Principles on Post-Conflict Justice* and the seven principles cum guidelines that go into the model of accountability-securing measures or strategies, memorialization has to be listed as a non-legal and non-strict justice provision, which cannot be separated from education and the preservation of

historical memory. In so far as it is supposed to operate as an alternative to criminal (law) punishment, memorialization should be void of effects that reverse the original equality between victims and their perpetrators. Hence, perpetrators *should not* be depicted or described in terms of inferior or, worse still, sub-human beings who are not worthy of any dignity and respect.

Remembering the past must imply a fundamental ethics element because while victims should be "lifted" as far as reverence is concerned, the weight-scales should not be tilted to the extent where perpetrators are unjustly or, per political ideology, undemocratically pushed out of the image of the species all together. Theoretically speaking, this would be an analogy to revenge, if "only" at the level of myth-creation (i.e., depicting or describing perpetrators as sub-human beings or "animals"). The right to truth cannot be monopolized by the primary victims, especially not in the event where they take the illegitimate step of victimizing their perpetrators.

What is more, education is not just a matter of disseminating information; it entails a duty to convey the facts about a particular event. Education that distorts the distinction between falsehoods and the truth negates its own value, just as it too easily becomes counterproductive as a measure. Who is to say that the next generation would not feel the need to come to the defense of those whose names and reputations were damaged in an objectively unnecessary manner in the process of "doing justice" through public memory strategies? If so, memorialization is likely to backfire in the worst possible way, namely to result in the creation of martyrs, however undeserved on the basis of an assessment of the serious human rights crimes they, as a matter of fact, committed.

It is implications like these that seem to have prompted the drafters of *The Chicago Principles on Post-Conflict Justice* to propose a non-punitive constellation that is implicitly sensitive to a discussion of fact versus fiction and image versus imagination. While it may be rather naïve to expect complete objectivity, memorialization can certainly be more or less historically correct. Checked facts (facts that are verified in empirical investigation) are the only ones that should be allowed in education, which in turn, constitutes the community's mental reservoir of knowledge, that is, the public memory. However, given that "preservation of historical memory" may involve more than an effort to collect, store, conserve and disseminate facts within the affected society, the possibility of resorting to other means in order to secure memorialization becomes a goal (e.g., measures or strategies that do not rely on literacy for their success). As it happens, memorialization is a much broader phenomenon than first assumed, encompassing a variety of auxiliary strategies for the purpose of securing post-conflict justice as an outcome. Aiming at the kind of dignity-restoration which at the same time serves as a "warning" to present and future members of humanity, memorialization may, for example, make use of photography.

A Closer Analysis of Memorialization: A Principle and a Paradox

Memorialization is mentioned at least fourteen times in *The Chicago Principles on Post-Conflict*

Justice.[18] Its importance is emphasized to the extent that it is used as a paradigm to illustrate the dynamic nature of international law. In other words, memorialization is ascribed status as an evolutionary vehicle, that is, something that has contributed to the very development and trend-setting (normative) direction of enforcement strategies. In this way, it also functions as proof against critics and skeptics who argue that alternative accountability-securing measures or strategies have no place within a system with a long-standing tradition of courts or court-like forums, such as the ad hoc arrangements like the Nuremberg International Military Tribunal following World War II, which culminated in the International Criminal Court.

What is more, although memorialization is a rather recent innovation, it is already possible to look in the rear view mirror and detect a number of unique features that serve to explain why progressive human rights theorists and practitioners take the measure seriously. Historically speaking, memorialization can be traced back to the mid-1980s when, according to the drafters of *The Chicago Principles on Post-Conflict Justice*, there was a surge of interest in post-conflict justice associated with political transitions from authoritarian to democratic regimes. This, in turn, led the new (democratic) governments to implement mechanisms of memorialization, "often motivated by popular pressure, civil society, and local human rights groups."[19] Furthermore, at the same time there was a high degree of geo-political consensus in South and Central America and in Eastern and Central Europe as countries in these places gravitated toward memorialization combined with a general policy of transparency, such as the emergence of public debate and the opening of security archives.

As a bottom up phenomenon, memorialization first and foremost manifested itself as a response to local experiences and local demands, thereby also providing an empirical answer to the United Nations' concern cum challenge regarding subjectivism and relativism.[20] In other words, memorialization expressed a real-world preference in post-conflict situations that could be characterized as "neighbor traumas," meaning that the human rights violations were committed against people who had previously co-existed with the perpetrators or had belonged to the same people albeit as a religious or cultural minority. In the case of Eastern Germany, for example, it was intolerance toward political diversity that put compatriots at risk of being persecuted as "traitors" or "enemies of the people" even if all that these fellow Germans had done was to disagree with the ruling communist party. Perhaps the saddest fact, again in the case of Eastern Germany, was that the person who informed the authorities sometimes belonged to the victims' closest circles, including his or her family. After "the Wall" came down and the archives were opened, victims were, of course, so shocked and horrified to learn the truth that the trauma became almost unbearable at the level of humanity. In particular, it was difficult to heal emotionally and psychologically if the reason for one's own oppression and mistreatment owed to nothing more than the informant's personal gain (e.g., money or a promotion). Conversely, it proved easier to feel whole again in circumstances where the informant turned out to be a reluctant collaborator, that is, somebody who had been blacklisted at an earlier point in time and, as a consequence of his or her own misfortune, had been forced to inform on

other people in order to avoid further reprisals (e.g., imprisonment).

In the light of this, neighbor traumas call for context-specific conflict-resolution that neither trivializes the wrong-doing of the past nor makes it practically impossible to reunite victims and perpetrators in the future. Because memorialization attempts to secure that the past be not forgotten and, in this way, defends the interests of the victims while at the same time calling for their forgiveness (for why else utilize such a non-punitive strategy?), it cannot but appeal to the mindset of progressive human rights theorists and practitioners who primarily are concerned about equality in the justice equation. As an alternative to (criminal) prosecution/punishment, memorialization is a common value enforcer, something that functions to confirm all stakeholders' humanity. This is part of the reason why memorialization is a non-strict type of accountability, as previously pointed out.

However, to reduce memorialization to an effort to collect, store, conserve and disseminate facts would be to overlook the complexity implied by both the causes and the effects of human rights abuses. This is exactly why *The Chicago Principles on Post-Conflict Justice* state that "the larger objectives of post-conflict justice are best served through a coordinated, coherent, and comprehensive approach."[21] It is not enough to merely remember and share, in one form or another, a painful past. The memory also has to be processed, through therapy if necessary. In addition, memorialization is more effective if mixed with vetting and reparations. The need to compensate victims is not, however, just a question of past socio-economic losses (income, property, land, etc.); it also extends to strategies like a public apology for the sake of dignity-restoration in the eyes of the community where the victim now has to live as a survivor. Vetting is connected with this point in that the removal of public officials who have been found guilty of human rights violations is necessary for the purpose of securing peace and reconciliation in the future. Certainly, an apology from past perpetrators of jus cogens crimes (genocide, ethnic cleansing, etc.) is not likely to be perceived as a sincere one. That granted, resorting to a truth commission as another measure may in fact result in the remorse that is needed for a return to the United Nations' conscience of mankind requirement. If successful, memorialization is pragmatically enhanced, just as accountability is maximized through the fact that the wrong-doers have truly (read: sincerely) accepted responsibility for the human rights violations they committed.

Consulting *The Chicago Principles on Post-Conflict Justice*, memorialization obligates states in a variety of ways, all of which seem to presuppose that tyranny or totalitarianism is the typical source of the conflict. In addition to education and preservation of historical memory, states should – according to Principle 5 of *The Chicago Principles on Post-Conflict Justice* – "support official programs" and "popular initiatives" (to memorialize victims).[22] The last-mentioned entails that it is the majority which should be allowed to determine the format of the memorialization. In the event of mutually incompatible preferences, the government must (to do justice in a reasonable way) listen to the people's voice, the demand of the many. Consequently, the tension between deontological and

utilitarian reasoning may become morally problematic unless, of course, compromises are made.

For the purpose of practical implementation, the drafters of the relevant document specify the various components of memorialization with a view to utilization by post-conflict managers. It appears that although *The Chicago Principles on Post-Conflict Justice* advance the trinity-constellation of memorialization, education and preservation of historical memory, the drafters nevertheless provide three separate sets of explanations and instructions. The full wording is as follows:

5.1 Memorialization

Goals of Memorialization

Memorialization honors the dignity, suffering, and humanity of victims, both living and dead, and commemorates the struggles and suffering of individuals, communities, and society at large. On an individual and national level, memorialization may contribute to healing and reconciliation.

Types of Memorialization

Memorialization may involve formal state-sponsored actions that vary in scope, impact, and visibility, as well as informal actions that reflect individual, group, and community needs. These processes include: built memorials such as monuments, statues and museums; sites of memorialization, such as former prisons, battlefields or concentration camps; and commemorative activities including official days of mourning, renaming streets, parks, and other public sites and various forms of artistic, social and community engagement with past violations.

Victim Participation and Context-Specific Memorialization

States should engage in memorialization with the assistance of victims, victim's organizations, and others in a manner that displays great sensitivity toward local culture, context, and values.

Active Engagement in the Process of Memorialization

Memorializing is a social and political process that includes the memorial itself, the creation of the memorial, and shifting social engagement with the memorial over time. Memorials should be designed within a context of civic participation, taking into account responses of victims, their families, civil society organizations, and others.

5.2 Education

Responsibility to Educate

States have a responsibility to ensure that information about past violations is adequately and appropriately communicated to broad sectors of society. States should integrate the documentation and analysis of past violations into national educational curricula.

Goals of Education About Past Violations

States should work with victims, communities, civil society organizations, and others to ensure that the public is aware of past violations as a means of preventing their recurrence and building a culture of respect for fundamental human rights and the rule of law.

5.3 Preservation of Historical Memory

Responsibility to Preserve Historical Memory

States have a basic responsibility to ensure that information about past violations is accurately preserved.

Goals of Preserving Historical Memory

The preservation of historical memory ensures that history is not lost or re-written so that societies may learn from their past and prevent the recurrence of violence and atrocity.

Strategies

Measures aimed at preserving historical memory include the public dissemination of truth commission findings, public educational curricula focusing on past violations, archives, and state and community efforts aimed at promoting awareness within the larger society.[23]

On the premises of *The Chicago Principles on Post-Conflict Justice*, the memorialization program does not end until a new and better society has become a reality, that is, until the citizens of a particular state actually are able to enjoy their fundamental human rights. Without this end-goal, memorialization misfires.

At the lower or less utopian ambition level, it is evident that some of the auxiliary measures or strategies have already been implemented prior to the mid-80s, although they were not thought of as "memorialization strategies under international law." For example, the Anne Frank Museum in Amsterdam dates back to May 3, 1960. Furthermore, one of the earliest post-World War II measures is from 1947, namely the Auschwitz-Birkenau State Museum in Poland. Building museums, erecting statues and monuments that commemorate particular events, turning battlefields into memoralization sites, renaming streets, and so forth do not constitute unfamiliar responses for members of homo sapiens, not even in the wake of conflict. The assassination of Martin Luther King was perceived by many as an analogy to murder of a head of state and, therefore, the introduction of Martin Luther King, Jr. Day (signed into law in 1983) can be interpreted as a public memory strategy that remembers the oppression in the USA of the African-American population in particular, and poor people in general.

That said, there is a difference of substance, of course, between a voluntary effort to preserve historical memory for society as such and, as is the case with *The Chicago Principles on Post-Conflict Justice*,

imposing duties on states to make certain that particular events are not forgotten, at least not if there is a popular demand to remember them. For commentators who do not wish to take too much for granted, one obvious criticism is, therefore, that the tyranny of the majority may not just have caused pain and suffering in the past, but may also be allowed to continue in the future in the form of a veto against memorialization. For example, on condition that it is true that racism is a legacy of slavery, then there is no reason to expect democratic consensus for the idea of public memory strategies that respect the autonomy of minorities that continue to be unpopular among the members of the majority group. If so, secondary victimization is inescapable. Furthermore, the fact that the state may have been the culprit is inconsistent with ascribing duties that entail trust unless, that is, a new government is in place at the point in time when public officials, elected as well as appointed, assume their responsibilities in a professional capacity. Otherwise the post-conflict justice project degenerates into a public farce. Finally, while it may very well be true that those who do not learn from the past are bound to repeat it (cf. 5.3 of *The Chicago Principles on Post-Conflict Justice*), the most common "learning disability" throughout history has been and continues to be the lack of will to learn from history. If it is not possible to cure this unwillingness, memorialization will soon be rendered an empty and shallow gesture, nothing but a burial site for the United Nations' "Never Again!" slogan. – Unfortunately, that is the ultimate and most painful paradox pertaining to memorialization.

Concluding Remarks

The Chicago Principles on Post-Conflict Justice are global in scope and application, but this does not prevent us from asking questions and entering into international, national, regional and indeed local dialogue and discussion about the assumptions that are made and the implications that follow. Memorialization is still in the making; it is a justice strategy that synthesizes premises from ethics and legal doctrine but, on scrutiny, it is not a phenomenon that entails a fully developed theory of public memory. The task of turning the implied rudimentary framework into more than what *The Chicago Principles on Post-Conflict Justice* has to offer is a monumental one, first and foremost because it cannot be executed adequately without incorporating a multitude of disciplines, inter alia, anthropology, sociology, political science, and psychology. At the same time, it is equally reasonable to conclude that the various components that *The Chicago Principles on Post-Conflict Justice* list as integral aspects of memorialization suffice, as they stand, as general guidelines for post-conflict managers. (As it happens, the drafters' own original intention did not go further than that.) Any assessment should take the goal of the international analogy to founding fathers into consideration. Consequently, the final verdict has to be that whatever else there is to say about the relevant document (i.e., the framework and conceptualization of memorialization), the drafters definitely took a bold and thought-provoking step by advocating an accountability-securing strategy that transcends the traditional paradigm regarding responses to human rights violations.

[1] *See generally* M. Cherif Bassiouni et al, The Chicago Principles on Post-Conflict Justice (2008).

Note that all citations are from the internet version of the document. *See The Chicago Principles on Post-Conflict Justice*, *available at* http://www.law.depaul/edu/centers_institutes/ihrli.html (last visited July 19, 2012) [hereinafter, *The Chicago Principles on Post-Conflict Justice*].

[2] *Id*. at 7-8.

[3] *Id*. at 39.

Professional ethicists may either have to screen the various candidates for a particular post-conflict rule or transitional government with a view to discovering inherent character flaws or, alternatively, teach ethics in the hope that all candidates - regardless of their current dispositions - will internalize the relevant standards and principles, so as to (eventually) become morally motivated to engage in socially responsible action. Needless to say, some commentators are more optimistic than others. In agreement with philosophers like Aristotle, some believe that virtue can be taught, whereas skeptics argue that people either have or do not have what it takes to be ethical. Unfortunately, the last-mentioned continue, some are sociopaths who lack the capacity to care about others and, for this reason alone, they cannot enter the territory of ethics where it is required to, inter alia, consider the needs and interests of others.

[4] International Covenant on Civil and Political Rights, G.A. Res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16), at Preamble, U.N. Doc. A/6316 (1966); 999 U.N.T.S. 171 [hereinafter, ICCPR]; International Covenant on Economic, Social and Cultural Rights, G.A. Res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16), at Preamble, U.N. Doc. A/6316 (1966); 993 U.N.T.S. 3 [hereinafter, ICESCR].

[5] Universal Declaration of Human Rights, G.A. Res. 217A (III), at art. 25, U.N. Doc A/810 (1948).

[6] ICCPR, *supra* note 4, at Preamble; ICESCR, *supra* note 4, at Preamble.

[7] Besides the frequent use of key human rights terms like “dignity,” “respect,” and “humanity,” the document also acknowledges their interdependency. *See The Chicago Principles on Post-Conflict Justice, supra* note 1, at 34.

[8] *The Chicago Principles on Post-Conflict Justice*, *supra* note 1, at 2.

[9] *Id.* at 7.

[10] This is referred to in terms of a “victim-centered approach.” *See id*. at 8.

[11] For reasonableness as a requirement, *see id.* at16.

[12] M. Cherif Bassiouni, The Protection of Human Rights in the Administration of Criminal Justice: A Compendium of United Nations Norms and Standards, xxvi (1994).

For an analysis of M. Cherif Bassiouni’s doctrine, *see* Anja Matwijkiw & Bronik Matwijkiw, *A*

Modern Perspective on International Criminal Law: Accountability as a Meta-Right, in The Theory and Practice of International Criminal Law: Essays in Honor of M. Cherif Bassiouni 19-79 (Leila N. Sadat & Michael P. Scharf, eds., Martinus Nijhoff Publishers, 2008).

[13] Bassiouni, *Accountability for Violations of International Humanitarian Law and Other Serious Violations of Human Rights*, I The Global Community Yearbook YILJ 14-25 (2001); Bassiouni, *The History of Universal Jurisdiction and Its Place in International Law, in* Universal Jurisdiction: National Courts and the Prosecution of Serious Crimes under International Law 39-64 (Stephen Macedo ed., University of Pennsylvania Press, 2004).

[14] *The Chicago Principles on Post-Conflict Justice*, *supra* note 1, at 3, 31-64.

[15] The Secretary-General, *Report of the Secretary-General on The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies*, delivered to the Security Council, at 1, U.N. Doc. S/2004/616 (Aug. 23, 2004) (prepared by Kofi A. Annan).

[16] *The Chicago Principles on Post-Conflict Justice*, *supra* note 1, at 30.

[17] *Id.* at 4-5.

[18]*Id.* at 2, 5, 7, 23, 51-53.

[19] *Id*. at 5-6.

[20] *Id.*

[21] *Id*. at 22.

[22] *Id.* at 17.

[23] *Id*. at 51-53.