# THE (RE)COLLECTION OF MEMORY AFTER MASS ATROCITY AND THE DILEMMA FOR TRANSITIONAL JUSTICE

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*In societies where the state is implicated in mass violence, questions of how such unspeakable brutality could occur and vows of "never again" abound. Many advocates view the development of an enduring and shared memory of events as an essential step to healing the wounds of a rattled national conscience and preventing the recurrence of mass atrocities.*

*While legal scholars have extolled the cathartic and formative role that legal processes (in particular trials) play in establishing collective memory in periods of transition, holding trials in the immediate aftermath of mass violence is frequently infeasible due to the political instability and judicial insecurity that precipitates such heinous crimes. In the vacuum created by state inaction, those most intimately affected by mass violence often band together and through discussion and ritual merge their fragmented recollections into a holistic narrative. Through these communal conversations, their memories are reframed so they no longer belong to the individual, but the collective.*

*Given the legal tradition's emphasis on individualism and autonomy, when justice finally does come, victims must provide an individual recount of their experience in written statements or at a hearing. As a consequence, lawyers must deconstruct the collective memory of their clients, possibly undoing the healing that has been accomplished through dialog and community identification. During this process, there is a grave risk of re-traumatization.*

*This article argues that human rights mechanisms and lawyers should instead endeavor to incorporate collective memory into judicial proceedings seeking to address mass violence. There are several reasons why a nuanced approach is warranted. First, recent psychological studies have found collective memory to be more accurate than individual memory, casting doubt on the judicial proceedings' preference for individual memory. Moreover, justice in the face of systematic mass violence perpetrated and normalized by the state has very different objectives than justice in societies where such crimes*

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*are anomalies. Aims such as promoting reconciliation, creating a historical record, nation-building, and instituting legal reform, may take precedence over the traditional goals of retribution and deterrence. The consideration of collective memory by tribunals would further these goals by facilitating a better understanding of the collective nature of the harm suffered, and contributing to remedies that are more narrowly tailored to the needs of recovering communities.*



## I. Introduction

When a government engages in the mass killing of its own citizens, how can a nation ever recover? These atrocities destroy the moral fabric that binds a nation. To recover, this fabric must be remade. Many social scientists and legal scholars believe that developing a collective memory—an enduring

and shared memory of events that help to heal the wounds of a tattered national conscience and prevent the recurrence of mass atrocities—is essential to such reconstruction.[1] However, the preservation of collective memory is in tension with another impulse that follows mass atrocity: the desire for justice. Because notions of individualism and autonomy heavily influence legal institutions worldwide, they risk the destruction of collective memory. This friction constitutes a central dilemma in facilitating transitional justice.

In this article, I urge a fundamental reconceptualization of the law's preference for individual memory in the context of transitional justice. I argue that the inclusion of collective memory will facilitate a better understanding of the collective harms that characterize mass atrocities. In turn, this approach will better serve the distinct goals of transitional justice, including reconciliation, the creation of a historical record, nation-building, and legal reform. I further argue that human rights lawyers should act as preservers and promoters of collective memory. In doing so, they may be able to help heal the wounds that traditional justice tribunals fail to address—while at the same time providing essential assistance to these tribunals if and when legal proceedings do finally occur.

I also seek to engage with the existing literature on collective memory and the law, and to question some of the underlying assumptions present in this scholarship. Legal scholars such as Mark Osiel have extolled the cathartic and formative role that legal processes (in particular criminal trials) play in establishing collective memory during times of transition.[2]

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1. MARK OSIEL, MASS ATROCITY, COLLECTIVE MEMORY, AND THE LAW 6 (1997) ("Many have thought, in particular, that the best way to prevent recurrence of genocide, and other forms of state-sponsored mass brutality, is to cultivate a shared and enduring memory of its horrors – and to employ the law self-consciously toward this end."); Jody Lyneé Madeira, *When It's So Hard to Relate: Can Legal Systems Mitigate the Trauma of Victim-Offender Relationships?*, 46 HOUS. L. REV. 401, 404 (2009) ("Dramatic and tragic deaths are cultural traumas that require explanation. In their wake, understandings are formed collectively through such processes as interpersonal discussion and media coverage.").

2. OSIEL, *supra* note 1, at 211 ("[I]t has been clear that criminal prosecutions can contribute significantly to collective memory of major events in a nation's history and that collective memory of such proceedings can thereby influence national identity."); CARLOS SANTIAGO NINO, RADICAL EVIL ON TRIAL 147 (1996) ("The disclosure of the truth through the trials feeds pub-

They argue that trials facilitate the formation and articulation of a shared narrative by fostering a dialogue about the meaning of mass violence and its implications for the national conscience.[3] Their work presumes that trials occur contemporaneously with the development of collective memory and therefore alter and aid in its formation. Given the political instability and judicial insecurity that frequently precipitates such heinous crimes, holding trials is often not the immediate response to crimes perpetrated by the state, even when the prior regime has been unseated. Indeed, justice often comes much later and is delivered by international tribunals and commissions, not domestic judiciaries.

In the vacuum created by state inaction after mass atrocity, those most intimately affected by the mass violence often band together either formally or informally. Through discussion and ritual they merge their fragmented recollections into one holistic narrative. The communal conversations and rituals among such groups, which can continue for decades, reshape the group members' memories so that they no longer belong to the individual, but the collective.[4] This process of developing collective memory allows victims to heal and start to rebuild their lives.

With the rise of international legal responses to mass atrocities over the last two decades, injustices formerly without consequences increasingly face the scrutiny of courts and other legal bodies for the first time, often long after these abuses were perpetrated. This is possible because the gravest violations of human rights have no statute of limitations.[5] Yet,

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lic discussion and generates a collective consciousness and process of self-examination . . . ."); DAVID GARLAND, PUNISHMENT AND MODERN SOCIETY 67 (1990) ("In doing justice, and in prosecuting criminals, these procedures are also giving formal expression to the feelings of the community—and by being expressed in this way those feelings are both strengthened and gratified.").

3. OSIEL, *supra* note 1, at 282–83.

4. Madeira, *supra* note 1, at 404 ("Dramatic and tragic deaths are cultural traumas that require explanation. In their wake, understandings are formed collectively through such processes as interpersonal discussion and media coverage.").

5. *See generally* KATHRYN SIKKINK, THE JUSTICE CASCADE: HOW HUMAN RIGHTS PROSECUTIONS ARE CHANGING WORLD POLITICS (2011). The Convention on the Non–Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity provides that "[n]o statutory limitations period

due to the Western legal tradition's emphasis on individual testament, these legal proceedings present formidable challenges to preserving pre-existing collective memory. To be found credible by a fact finder, victims and witnesses must recount only those events for which they have a personal basis of knowledge.[6] In order to be effective advocates before these tribunals, lawyers inevitably dismantle the collective memory of their clients.[7] Below is a hypothetical drawn from the experiences of human rights practitioners of what can occur during this process:

> *In order to obtain testimony that would be documented in affidavits for a case before the Inter-American Commission on Human Rights, lawyers for survivors of a massacre that occurred in the early 1990s separate their clients to interview them individually. Over the course of the interviews, the survivors have varying responses to being separated. Some refuse the separation, breaking the interview to confirm their*

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shall apply" to war crimes, crimes against humanity, and genocide. Convention on the Non–Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity art. 1, Nov. 26, 1968, 754 U.N.T.S. 73, 75 (entered into force Nov. 11, 1970); The Rome Statute of the International Criminal Court provides, "[t]he crimes within the jurisdiction of the Court shall not be subject to any statute of limitations." Rome Statute of the International Criminal Court art. 29, July 17, 1998, U.N. Doc. A/Conf. 183/9 (entered into force July 1, 2002) (hereinafter Rome Statute). The United States' Genocide Convention Implementation Act of 1987, 18 U.S.C.A. § 1091(e) (2000 & Supp.2004), provides that there is no statute of limitations to indict a person who commits genocide.

6. Frank R. Herrmann, *The Establishment of A Rule Against Hearsay in Romano-Canonical Procedure*, 36 VA. J. INT'L L. 1, 49 (1995) (describing how the requirement that a witness only testify from a personal basis of knowledge was adopted in the Western legal tradition during the twelfth-and thirteenth-century revival of Roman and canonical legal studies); *see, e.g.,* Fed. R. Evid. 602 (providing that "[a] witness may not testify to a matter unless evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter.").

7. MARTHA MINOW, BETWEEN VENGEANCE AND FORGIVENESS: FACING HISTORY AFTER GENOCIDE AND MASS VIOLENCE 58 (1998) ("Victims and other witnesses undergo the ordeals of testifying and cross-examination, usually without a simple opportunity to convey directly the narrative of their experiences. The chance to tell one's story and be heard without interruption or skepticism is crucial to so many people, and nowhere more vital than for survivors of trauma. So, too, is the commitment to produce a coherent, if complex, narrative about the entire nation's trauma, and the multiple sources and expression of its violence.").

> *version of the facts with others in their group. Others recount stories that could not have been witnessed by one single individual. When pressed they are unable to remember which memories are theirs and which belong to others in their group. As one lawyer tries to whittle down a firsthand account from one woman's story, she breaks down into tears of frustration and despair, unable to continue the interview.*

The memory that lives in the minds of these survivors is distinct from individual memory because it cannot be reduced to personal accounts of the event; instead, it represents a particular subset of memories that all members of the group share.[8] Efforts to deconstruct collective memory have the potential to undo the healing accomplished through dialogue and community identification. At worst, it could re-traumatize them.

Human rights attorneys should instead endeavor to preserve and promote collective memory in their efforts to address mass violence. At the same time, tribunals that adjudicate related claims should accommodate the admission of collective memory into their proceedings. A nuanced approach in times of transition after mass atrocity is warranted. First, when a society is recovering from systematic mass violence perpetrated and normalized by the state, the objectives of justice may be different than in societies where those crimes are anomalies. Aims, such as promoting reconciliation, creating a historical record, providing a forum for victims' voices, and instituting legal reform, often take precedence. The traditional goals of deterrence and retribution have diminished relevance and effect in the context of mass atrocity. Second, although resistance to the use of collective memory centers on suspicions as to its accuracy, studies in clinical psychology have actually found group memory to be more accurate than individual memory.[9] At the same time, scholars, courts, and psychologists

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8. EVIATAR ZERUBAVEL, SOCIAL MINDSCAPES: AN INVITATION TO COGNITIVE SOCIOLOGY 95-97 (1997).

9. N. K. Clark et al., *Memory for a Complex Social Discourse: The Analysis and Prediction of Individual and Group Recall*, 25 J. MEMORY & LANGUAGE 295, 297 (1986) ("Generally group recall has been found to be superior to that of individuals."); N. K. Clark et al., *Social Remembering: Quantitative Aspects of Individual and Collaborative Remembering by Police Officers and Students*, 81 BRIT. J. PSYCHOL. 73, 80 (1990) (summarizing the results of tests of individual versus group recall that demonstrated that "collaboration led to a consistent and

have increasingly suggested that the reliance on individual eyewitness accounts in criminal proceedings is a deeply flawed practice.[10] Third, the inclusion of collective memory could aid international bodies to prescribe more appropriate remedies aimed at addressing collective harm. For instance, it could illuminate the need for reparations intended to redress injuries to communities or measures intended to address the root causes of systematic violence, such as legal reform and educational initiatives.

What form collective memory takes during legal proceedings may well depend on the forum. In criminal proceedings, be they international or domestic, concerns over due process rights for the accused are considerable. In this context, admitting collective statements as evidence may be impractical even if possible, since it would be difficult to vet a collective's articulation of events through cross-examination or impeachment. Still, even in this context, there may be room for collective narratives. For instance, the group's story could take the form of a victim impact statement made from a community perspective. In regional human rights mechanisms such as the Inter-American Commission on Human Rights, the goal is to achieve state accountability, not individual criminal punishment.[11] While some due process concerns exist in these forums, they are lessened when an individual's liberty is not at

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significant increase in the number of accurate responses made by all subjects, with four-person groups producing the highest levels of accuracy . . ., individuals the lowest . . . and dyads falling between the two"). *But see* Stephen J. Ceci & Elizabeth F. Loftus, *"Memory Work": A Royal Road to False Memories?*, 8 Applied Cognitive Psychol. 351 (1994).

10. *State v. Delgado,* 902 A.2d 888, 895 (2006) (citations omitted) ("Misidentification is widely recognized as the single greatest cause of wrongful convictions in this country."); Brandon L. Garrett, Convicting the Innocent: Where Criminal Prosecutions Go Wrong 8–9, 279 (2011); Amy Bradfield Douglass & Nancy Steblay, *Memory Distortion in Eyewitnesses: A Meta–Analysis of the Post-identification Feedback Effect,* 20 Applied Cognitive Psychol. 859, 864–65 (2006).

11. For instance, in *Lenahan v. United States*, Case 12.626, Inter-Am. Comm'n H.R., Report No. 80/11, P 136 (2011), the Inter-American Commission on Human Rights held the United States accountable for its failure to take reasonable measures to prevent the deaths of Ms. Lenahan's three daughters and to undertake a proper investigation into the systemic failures and the individual responsibilities for the non-enforcement of the protection order that Ms. Lenahan had obtained against her husband.

stake. In this setting, just as the state is able to present its unified account of events, so should community groups.

Above all, in this Article, I seek to cultivate a conversation amongst scholars and human rights lawyers about how best to incorporate collective memory in the unique context of transition after state supported mass violence. In Part I, I define collective memory and explain its therapeutic benefit to victims of mass violence. In Part II, I discuss the relationship between collective memory and justice, and outline the prevailing argument that legal proceedings facilitate the creation of collective memory. I further analyze why this argument is flawed and how the so-called justice cascade presents a considerable dilemma for the preservation of collective memory. In Part III, I explore how the goals of justice in societies that are recovering from mass violence perpetrated by state actors differ from those of stable societies where violence is the exception not the norm. I argue that admitting collective memory could further the objectives of transitional justice. I also address concerns about the comparative accuracy of collective memory versus individual memory. In Part IV, I suggest forms that collective memory could take within legal proceedings and explore the role that human rights lawyers could play in promoting and protecting collective memory.

## II. Collective Memory

In order to fully flesh out what I mean by collective memory, in this first part, I examine the origins of the concept, review how scholars and researchers in various disciplines have defined it, create a taxonomy of the diverse types of collective memory, and elucidate what forms it takes in communities affected by mass violence.

### A. *The Philosophy of Collective Memory*

French philosopher and historian Maurice Halbwachs first coined the phrase "collective memory" or "*la mémoire collective*" in the early 1920s in his seminal book *Les cadres sociaux de la mémoire* (On Collective Memory).[12] According to Halbwachs, memories are not merely imprints in the human mind that we

12. Maurice Halbwachs, Les cadres sociaux de la mémoire (On Collective Memory) (Lewis A. Coser ed. and trans., 1992) (1925).

recount at will. Instead, "[a]ll memories, however personal they may be and even if witnessed by only one person . . . are linked to ideas we share with many others, to people, groups, places, dates, words and linguistic forms, theories and ideas, that is, with the whole material and moral framework of the society of which we are part."[13] In essence, no memory lives in a vacuum free from external influence. Our interactions with the world deeply color what we perceive our past lives to be and how we remember important events.[14] Social and cultural aids, including the media, rituals, and reports of memories from other people, all help to form our memories.[15]

Above all, Halbwachs (and others) stress how membership in a group can influence collective memory: "What makes recent memories hang together is . . . that they are part of a totality of thoughts common to a group . . . ."[16] Groups may be brought together by a common language, culture, ethnicity, or experience. Sometimes a startling event binds and defines a group.[17]

Through dialogue and continual evaluation, members of the group place themselves and their memories within a broader collective framework.[18] Scholars evoke the term "memory work" to describe this "process of working through and narrating experiences."[19] The term "memory work" is apropos in that collective memory functions "more like an endless conversation than a simple vote on a proposition."[20] This

13. Erika Apfelbaum, *Halbwachs and the Social Properties of Memory*, *in* MEMORY: HISTORIES, THEORIES, DEBATES 86 (S. Radstone and Bill Schwarz eds., 2010) (citing MAURICE HAWLBACHS, LES CADRES SOCIAUX DE LA MÉMOIRE 38–39 (1925)).

14. *Id.* at 85.

15. Henry L. Roediger, III, Franklin M. Zaromb & Andrew Butler, *The Role of Repeated Retrieval in Shaping Collective Memory*, *in* MEMORY IN MIND AND CULTURE 138–70 (Pascal Boyer and James V. Wertsch eds., 2009); *see also* Sharon K. Hom and Eric K. Yamamoto, *Collective Memory, History, and Social Justice*, 47 UCLA L. REV. 1747, 1764 (2000) ("[M]emory is 'collective,' because it emerges from interactions among people, institutions, media, and other cultural forms.").

16. HALBWACHS, *supra* note 12, at 52.

17. IWONA IRWIN-ZARECKA, FRAMES OF REMEMBRANCE: THE DYNAMICS OF COLLECTIVE MEMORY 47 (2007).

18. Apfelbaum, *supra* note 13, at 90.

19. Madeira, *supra* note 1, at 418–19.

20. OSIEL, *supra* note 1, at 47 (quoting John Thelen, *Memory and American History*, 75 J. AM. HIST. 1117, 1127 (1992)).

type of memory is "not found, but rather [is] built and continually altered."[21] In undertaking this "work," individuals gather, share, collaborate, and interpret events that are common to the group with whom they are relating. These communal exchanges reframe their personal recollections.[22] As a result of sharing and collective identification, the group engaging in memory work forms important social bonds amongst its members.[23]

### B. *The Manifestations of Collective Memory*

Since Halbwachs first evoked the term "collective memory," it has been used to refer to vastly different phenomena whose form varies depending on the individual's relationship to the collective.[24] While collective memory broadly refers to all the ways that groups of different sizes share understandings of the past, psychologists, sociologists, philosophers, and legal scholars who have studied it all have very different notions of what constitutes collective memory.[25] Still, across these disciplines three principal categories of collective memory emerge.

First, collective memory sometimes forms between members of a group of people who share a common experience or tradition, but were not all present at the same event. Sociologist Michael Schudson described how collective memory can arise from experiences shared by all group members, even where the exact nature of the experience differed between group members.[26] These individuals form collective memory through dialogue, ritual, and collective identification, instead of through experiencing the same event.[27] For instance, *La Asociación Madres de Plaza de Mayo*, a group of mothers united

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21. Hom, *supra* note 15, at 1764.

22. Madeira, *supra* note 1, at 418–19.

23. *Id.*

24. Celia B. Harris, *Collaborative Recall and Collective Memory: What Happens When We Remember Together?*, *in* FROM INDIVIDUAL TO COLLECTIVE MEMORY: THEORETICAL AND EMPIRICAL PERSPECTIVES 213 (2008).

25. *See generally* ASTRID ERLL, CULTURAL MEMORY STUDIES: AN INTERNATIONAL AND INTERDISCIPLINARY HANDBOOK V (2008).

26. *Id.* at 215.

27. William Hirst and David Manier, *A Taxonomy of Collective Memory*, *in* ASTRID ERLL, CULTURAL MEMORY STUDIES: AN INTERNATIONAL AND INTERDISCIPLINARY HANDBOOK 258 ("Rituals and traditions, or more generally, procedural memories, can serve as mnemonic tools that share the collective identity of their practitioners, collectively reminding them of declarative memo-

by the experience of having their children "disappeared" during the military dictatorship in Argentina, formed over the course of trying to find and advocate for their missing children. These women met at the Plaza de Mayo every Thursday afternoon wearing white scarves embroidered with the names of their sons and daughters.[28] For these women, sharing the collective memory of losing a child allowed them to feel a sense of solidarity and solace. It also provided them with a strong political voice, which they effectively used to advocate for the investigation into the forced disappearances of their loved ones in Argentina.[29]

At other times, collective memory reflects what sociologist Émile Durkheim called the collective conscience, which is a nation's or society's collective understanding of its own history.[30] Another sociologist, Barry Schwartz, eloquently described this type of collective memory as "the representation of the past embodied in both historical evidence and commemorative symbolism."[31] Iwona Irwin-Zarecka conceived of "collective memory – as a set of ideas, images, [and] feelings about the past – . . . best located not in the minds of individuals, but in the resources they share."[32] The collective conscience can be reflected in memory artifacts like museums, murals, books, libraries, and language.[33] The creation of cultural artifacts and texts helps to preserve collective conscience as it passes from one generation to the next.[34] In Egypt, collective memory took the form of murals created in tandem with the revolution and

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ries. . .The actions entailed in ritual or procedural memory can also create a collective feeling or attitude.").

28. Donald Hodges, Argentina's "Dirty War": An Intellectual Biography 254 (1991).

29. James Bacchus, *The Garden*, 28 Fordham Int'l L.J. 308, 312 (2005) ("It has been said that the weekly demonstrations of the mothers of the 'disappeared' in the Plaza de Mayo on behalf of their lost children did more than anything else to expose the wickedness of the Argentinian junta.").

30. Emile Derkheim, The Division of Labor in Society 79 (George Simpson trans. 1933).

31. Harris, *supra* note 24, at 214.

32. Irwin-Zarecka, *supra* note 17, at 4.

33. *Id.* (describing the formation of collective memory as being accomplished with the help of "public offerings," like history books and movies); Eviatar Zerubavel, Time Maps: Collective Memory and the Social Shape of the Past 5–6 (2003).

34. Hirst, *supra* note 27, at 261.

the ongoing struggle for democracy there. Across Cairo, graffiti art documented the collective horrors that the state perpetrated.[35] For instance, stencils of a blue bra appeared across the city after a video was posted capturing the brutal beating of a Muslim woman by Egyptians soldiers who ripped off her abaya exposing her blue bra and kicked her repeatedly until she was unconscious.[36] For Egyptians, this incident and the symbols replicated across Cairo became a reminder that, even though President Mubarak had resigned and turned power over to the military, the revolution was not over and the military was not their ally.[37]

Collective memory can also form among individuals who were all present at the same (often traumatic) event and developed a shared recollection of the event.[38] Legal scholar Jody Lyneé Madeira encountered this phenomenon when she interviewed survivors of the Oklahoma City bombing.[39] She described deeply felt bonds between members of this community, which were "as strong as those of blood kinship" and "a key source of healing energy."[40] Within this group, there was a "need to transform fragmented emotions and recollections of the bombing and its aftermath into more holistic narratives."[41] Cognitive psychologists sometimes refer to this subcategory of

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35. *Cairo artists sustain revolution with graffiti*, CBS NEWS (Mar. 29, 2012, 12:05 PM), http://www.cbsnews.com/news/cairo-artists-sustain-revolution-with-graffiti/; *see also* Daniel Finnan, *Cairo's Street Artists Defy Authorities With Graffiti Protest*, RFI ENGLISH (May 23, 2012), http://www.english.rfi.fr/africa/20120525-cairo-street-artists-defy-authorities.

36. *Egypt: Graffiti to say no to virginity test for women*, ANSAMED (Mar. 5, 2012, 7:00 PM), http://ansamed.ansa.it/ansamed/en/news/sections/politics/2012/03/05/visualizza_new.html_127471215.html; *see also* David Kirkpatrick, *Tahrir Square, Walled In*, N.Y. TIMES BLOG (Dec. 23, 2011, 5:16 PM), http://thelede.blogs.nytimes.com/2011/12/23/tahrir-square-walled-in/.

37. Kainaz Amaria, *The 'Girl In The Blue Bra,'* NATIONAL PUBLIC RADIO, Dec. 21, 2011, *available at* http://www.npr.org/blogs/pictureshow/2011/12/21/144098384/the-girl-in-the-blue-bra.

38. Hirst, *supra* note 27, at 257.

39. Madeira, *supra* note 1, at 430.

40. *Id.*, at 405 ("The rapport that developed between members of prominent task-oriented community groups formed in the aftermath of the bombing was a key source of healing energy. These bonds were often felt to be as strong as those of blood kinship.").

41. *Id.* at 418.

collective memory as collaborative memory[42] or collective episodic memory.[43] Psychologist William Hirst defined this memory as "shared rendering of the past."[44] His study demonstrated how the act of experiencing an event together alters the individual memory of that event.[45]

These variations of collective memory cannot always be neatly separated. For instance, the weekly rituals of *La Asociación Madres de Plaza de Mayo* are credited with raising the collective conscience of Argentina regarding forced disappearances and challenging collective tolerance for such acts.[46] When I advocate for the admission of collective memory into judicial proceedings in this article, I am referring to the collective memory of groups of victims who were present or directly affected by the same event or experience, and not the collective conscience—though, as the example of *La Asociación Madres de Plaza de Mayo* illustrates, the three variations often influence each other.

### C. *The Development of Collective Memory after Mass Atrocity*

As the above examples highlight, collective memory is especially likely to develop in societies coping with mass atrocity. In these societies, the impetus to make sense of systematic

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42. Suparna Rajaram, *Collaborative Memory: Cognitive Research and Theory*, PERSP. ON PSYCHOL. SCI. 649, 650 (2010).

43. Hirst, *supra* note 27, at 257.

44. Alin Coman & William Hirst, *Cognition Through a Social Network: The Propagation of Induced Forgetting and Practice Effects*, 141 J. EXPERIMENTAL PSYCHOL. 321, 323 (2012); *see also* William Hirst & David Manier, *Towards a Psychology of Collective Memory*, 16 MEMORY 183 (2008).

45. Hirst, *supra* note 27, at 257 ("Many collective memories are of events in the personal past of members of a mnemonic community. When a group of friends go to a World Cup match and see their national team play beautifully, they may form a collective memory of the game that they will share with each other for years to come. As a result, each individual memory, as well as the collective memory shared by the friends, will be clothed in a spatial-temporal context. The memory of the experience will not only be shared, but it will also contribute to their identity as a group of friends. Of course, the nature of the remembering community may vary substantially: Fans of a sports team are one kind of community, members of a family are another, and people who lived in New York on 9/11 are a third. . .But no matter the composition of the community, shared memories of a community's experience can be constituted as a collective episodic memory.").

46. Margareth Etienne, *Addressing Gender-Based Violence in an International Context*, 18 HARV. WOMEN'S L.J. 139, 163 (1995).

murder and ruthless violence make the healing power of collective memory all the more essential. In the wake of tragic deaths, there is a societal need for an explanation about what occurred and for collective understandings of the root causes of violence.[47] Legal scholar Martha Minow has gone as far as to question "whether theories and evidence of individual recovery from violence have much bearing" when a nation or society must heal after mass atrocity.[48]

By their very definition, crimes against humanity and genocide result in a large number of victims who may come together to grapple with traumatic events. The Rome Statute, the treaty that created the International Criminal Court (ICC), provides that in order for a crime to be classified as a crime against humanity it must be part of a "widespread or systematic" attack.[49] An attack is considered "widespread" either because of the large number of victims in a single incident, or the cumulative effects of a number of incidents.[50] To be "systematic," it must have occurred as part of an organized plan to commit violence against a collective.[51] Consequently, victims of crimes against humanity will be numerous and fear a common threat. The common instrumentality and methodology used by perpetrators provides a shared experience from which victims can form a basic narrative of what happened to them. Similarly, perpetrators of genocide target populations based on some common characteristic such as race or ethnicity.[52] Thus, victim groups are often composed of members of an existing community that is marginalized and may already have a shared narrative from which to draw.

## III. The Tension between Justice and Collective Memory

The impulse for victims to gather together and formulate a collective narrative, which expresses the wrongs they endured, is frequently met by another significant impulse: the desire for justice. Victims, in particular those of mass atrocity,

47. Madeira, *supra* note 1, at 404.

48. Minow, *supra* note 7, at 63.

49. Rome Statute, *supra* note 5, at art. 7.

50. Laurel E. Fletcher, *From Indifference to Engagement: Bystanders and International Criminal Justice,* 26 Mich. J. Int'l L. 1013, 1046 (2005).

51. *Id.*

52. Rome Statute, *supra* note 5, at art. 6.

seek justice as a path to validate and affirm their feeling that they were wronged and deserve redress.[53] This section describes the challenges that arise at the intersection of collective memory and justice. The scholars across many disciplines that have theorized about the relationship between collective memory and justice tend to agree that legal proceedings play a role in strengthening a shared understanding of the past, which in turn facilitates reconciliation and societal healing.[54] As will be further explained below, despite this assertion, the delay of justice after mass atrocity means that collective memory forms in the absence of official legal proceedings. When justice finally comes, it is often disruptive to this pre-existing collective memory.

### A. *Collective Conscience and the Law*

The notion that trials contribute to social solidarity and cohesion originated with sociologist Émile Durkheim.[55] In contrast to his student Halbwachs, for whom "there are as many collective memories as there are groups and institutions in a society," Durkheim viewed what he labeled the collective conscience as a society's unified understanding of the past.[56] Durkheim's principal philosophical inquiry centered on understanding the sources of solidarity in modern society, which he believed were fragmented by the rise of individualism, the specialization of labor, and the decline of universal religion.[57] According to Durkheim, law plays a central role in connecting individuals to society because it evokes the collective conscience, which he defined as "[t]he totality of beliefs and sentiments common to average citizens of the same society."[58] The

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53. Minow, *supra* note 7, at 60 ("Pumla Gobodo-Madikizela, a psychologist . . . reports that many victims conceive of justice in terms of revalidating oneself, and of affirming the sense 'you are right, you were damaged, and it was wrong.'").

54. *Id.* at 61 (detailing how trials, truth commissions, and other rituals provide the memory work that helps the healing process).

55. *See generally* Émile Durkheim, The Elementary Forms of Religious Life (Joseph Wardswain trans., 1947).

56. Halbwachs, *supra* note 12, at 22; Susanne Karstedt, Legal Institutions and Collective Memories 5 (2009).

57. Garland, *supra* note 2, at 24.

58. Émile Durkheim, The Division of Labor in Society 79 (George Simpson trans., 1933).

law and its instrumentality accomplish this by creating an all-important public space in which the feelings of a community gain formal expression.[59]

Specifically, Durkheim viewed punishment as "a tangible example of the 'collective conscience' at work" because society's values are both expressed and regenerated through the process of punishing.[60] Strong bonds of moral solidarity create a sense of communal wrongs that deserve punishment and in turn the act of punishing reaffirms and fortifies those same social bonds.[61] As such, Durkheim believed that every law was intrinsically linked to social solidarity because an act could only be criminal when it offended strong and defined values within the collective conscience.[62] In other words, crimes are only crimes when they reach a certain intensity in our collective understanding of right and wrong.[63] Pursuant to Durkheimian theory, the state is the benevolent protector of social values and its "primary and principal function is to create respect for the beliefs, traditions, and collective practices; that is, to defend the common conscience against all enemies within and without."[64]

### B. *The Role of Trials in Establishing Collective Memory after Mass Atrocity*

However, when a state commits mass atrocities against its own citizens, it undermines the very project it should nurture. Typically in such circumstances, the state identifies one sector of society as a threat due to its political, economic, ideological, or ethnic identity and seeks to destroy or suppress it. For instance, during the thirty-six-year armed conflict in Guatemala, the state killed over 200,000 of its citizens, mostly unarmed indigenous civilians.[65] The Historical Clarification Commission,

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59. GARLAND, *supra* note 2, at 67.

60. *Id.* at 23.

61. *Id.* at 28.

62. DURKHEIM, *supra* note 58, at 70, 80; *see also* Scott Grinsell, *Caste and the Problem of Social Reform in Indian Equality Law*, 35 YALE J. INT'L L. 199, 222–23 (2010) (describing how the narratives that collective memory helps form find expression in the law).

63. DURKHEIM, *supra* note 58, at 77.

64. *Id.* at 84.

65. THE GUATEMALAN COMMISSION FOR HISTORICAL CLARIFICATION, GUATEMALA MEMORY OF SILENCE: REPORT OF THE COMMISSION FOR HISTORICAL

Guatemala's truth and reconciliation commission, reported that the state viewed the indigenous "Mayan population as the collective enemy of the state" and thus sought "to destroy the cultural values that ensured cohesion and collective action in Mayan communities."[66] By targeting members of the society for administrative murder based on their identity, the state actively ruptured the common conscience.

In an attempt to adjust Durkheimian theory to circumstances where the state murdered its own people, as occurred in Guatemala, recent legal scholarship has focused on the importance of judicial institutions in creating new iterations of collective memory to facilitate reconciliation, reintegrate victims into society, and restore the broader collective conscience after mass atrocity.[67] Susanne Karstedt describes how legal institutions "give space and voice to the countless individual stories [and] contribute to forging new collective memories out of common and shared experiences of the many victims, and thus redraw group boundaries."[68] Ruti Teitel described trials as "the long-standing ceremonial forms of collective history making."[69] Similarly, Robert Cover, Scott Grinsell, and Jody Lyneé Madeira emphasized the law's ability to reflect and reshape a society's culture and values by creating shared understandings of the past.[70] Many other scholars have also argued that "the best way to prevent recurrence of genocide,

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CLARIFICATION. CONCLUSIONS AND RECOMMENDATIONS 17 (2009), *available at* http://www.aaas.org/sites/default/files/migrate/uploads/mos_en.pdf.

66. *Id.* at 23.

67. While existing scholarship tends to use collective memory and collective conscience interchangeably, they are distinct, though deeply related, concepts. As described above, collective conscience is the common understanding of social norms and values that compose the fabric of society. Collective memory on the other hand is a communal interpretation and narrative of past events formed through group interaction and dialog. Collective memory informs the collective conscience in that it is a society's shared understanding of the past that forms a common set of values. Consequently, collective conscience draws from collective memory in order define clear lessons of wrong and right.

68. KARSTEDT, *supra* note 56, at 2.

69. RUTI TEITEL, TRANSITIONAL JUSTICE 72 (2000).

70. Grinsell, *supra* note 62, at 222–23 ("[C]ollective memory engages with memories that are present in the broader culture; ones that it must address in order to meaningfully reshape society."); *see also* Madeira, *supra* note 1, at 425–26. ("After prosecution, imposing punishment 'signals the greater or lesser presence of collective memory in a society' because it is the

and other forms of state-sponsored mass brutality, is to cultivate a shared and enduring memory of its horrors – and to employ the law self-consciously toward this end."[71]

In particular, legal scholar Mark Osiel has been an adamant proponent of using trials as a means to establish collective memory and facilitate reconciliation.[72] According to Osiel, administrative massacre, defined as the "large scale violation of basic human rights to life and liberty by the central state in a systematic and organized fashion, often against its own citizens, generally in a climate of war," deeply ruptures the moral solidarity that binds a society.[73] At such times, there is a special need for a critical reassessment of social norms and collective representations of the past.[74] Osiel asserts that prosecuting wrongdoers is a central strategy for rebuilding the social values destroyed by mass violence. Accounting for evil deeds in a public forum awakens a sense of collective horror and moral outrage amongst the citizenry. This public reckoning in turn evokes feelings of belonging to a community whose members are united by this common sentiment.[75]

Like Durkheim, Osiel believes that legal proceedings offer an important venue for renegotiating the collective conscience.[76] Yet, while Durkheim asserted that trials facilitate collective memory and social solidarity by developing consensus within society, Osiel focuses on legal proceedings as a venue for civil discourse and "dissensus."[77] Legal proceedings, he argues, facilitate a public debate that cannot be replicated through other means.[78] Because of trials' adversarial nature, the courtroom becomes "a privileged site for conflicting ac-

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punishing of those who commit the most unacceptable acts that reinforces our awareness of what those acts are.").

71. OSIEL, *supra* note 1, at 6.

72. *Id.* at 3. ("A traumatized society that is deeply divided about its recent past can greatly benefit from collective representations of the past, created and cultivated by a process of prosecution and judgment, accompanied by public discussion about the trial and its result."); *see also id.* at 39.

73. OSIEL, *supra* note 1, at 9.

74. TEITEL, *supra* note 69, at 69 (describing how collective history making is essential for establishing a "new democratic order" after mass atrocity).

75. OSIEL, *supra* note 1, at 28–29.

76. Mark Osiel, *Ever Again: Legal Remembrance of Administrative Massacre*, 144 U. PA. L. REV. 463, 481 (1995).

77. OSIEL, *supra* note 1, at 35–36.

78. Osiel, *supra* note 76, at 472.

counts of *recent* history and the memories of it that citizens should preserve."[79] Law-related activities are able to channel dissenting opinions into a civil discourse and reestablish the rule of law by awakening a dormant collective legal consciousness.[80]

At the forefront of Osiel's argument is his belief in the dramatic power of trials.[81] According to Osiel, "[t]he judicial task . . . is to employ the law of evidence, procedure, and professional responsibility to recast the courtroom drama in terms of the 'theater of ideas,' where large questions of collective memory and even national identity are engaged."[82] Osiel further argues that the debate that occurs within the courtroom encourages public discussion outside of the courtroom. His aspiration is that a society traumatized by administrative massacre will become captivated by the process of prosecution, and that public discussion about the trial will ensue.[83] He envisioned trials as "a sort of national group therapy" or "a cathartic theater" for a deeply divided society.[84]

Other legal scholars also tend to intimately tie the development of collective memory during trials to conceptions of healing. As Martha Minow put it, "[t]he language of healing casts the consequences of collective violence in terms of trauma; the paradigm is health, rather than justice. Justice reappears in the idea that its pursuit is to heal victims of violence and to reconcile opposing groups."[85] Madeira similarly believes that the process of formulating and enunciating stories during legal proceedings facilitates a shared understanding of the past and the healing that accompanies it.[86] She describes how the "act of imposing punishment reflects the process of working through an event which threatens the conscience collective."[87] She argues that "legal decisions thus

79. OSIEL, *supra* note 1, at 41 (emphasis added).

80. Osiel, *supra* note 76, at 484.

81. *Id.* at 481.

82. OSIEL, *supra* note 1, at 3 (explaining the cathartic role of collective memory in the face of tragedy and the role of criminal trials in its formation).

83. *Id.* at 39.

84. Osiel, *supra* note 76, at 471, 473.

85. MINOW, *supra* note 7, at 63.

86. Madeira, *supra* note 1, at 425.

87. *Id.*

become touchstones for the formation of collective memory, as they set the tone for the public's response *at the very moment* that they claim to express it and prefigure popular sentiment and give it a degree of definition which it would otherwise lack."[88] Further, she asserts that articulating stories in legal frames can become an important source of power for victims.[89]

### C. *The Slow Demise of Impunity*

These scholars' assessments turn on the assumption that trials occur at the same moment as the development of collective memory. Yet, trials and other justice mechanisms often do not address wrongdoing until long after the atrocities have occurred, and therefore collective memory often takes shape in the absence of legal proceedings. This is in part because, until relatively recently, the tradition of sovereign immunity allowed state officials to literally get away with murder.[90] In the immediate aftermath of mass violence, trials are often infeasible due to the political instability and judicial insecurity that frequently accompanies these types of crimes. As a result, perpetrators of grave human rights violations across the globe went unpunished. Indeed, some of world's most brutal authorities who ordered the murder of hundreds if not thousands of people, such as Idi Amin of Uganda and Jean-Claude ("Baby Doc") Duvalier of Haiti, led comfortable lives in exile without fear of accountability for their crimes.[91]

While criminal accountability for human rights violations finds its roots in the Nuremberg and Tokyo trials after World War II, such trials were not replicated for decades.[92] In recent times, there has been a resurgence of accountability for human rights violations. Kathryn Sikkink describes this as the "justice cascade," which is "a shift in the legitimacy of the

88. *Id.* (internal quotations marks omitted).

89. *Id.* at 425–26.

90. Louis Henkin, *International Law: Politics, Values, and Functions*, 216 COLLECTED COURSES OF THE HAGUE ACADEMY OF INTERNATIONAL LAW 12, 208; Lorna McGregor, *Torture and State Immunity: Deflecting Impunity, Distorting Sovereignty*, 18 EUR. J. INT'L L. 903, 913 (2007); SIKKINK, *supra* note 5, at 14.

91. SIKKINK, *supra* note 5, at 12.

92. STEVEN RATNER & JASON ABRAMS, ACCOUNTABILITY FOR HUMAN RIGHTS: ATROCITIES IN INTERNATIONAL LAW: BEYOND THE NUREMBURG LEGACY 3–7 (3d ed. 2009).

norm of individual criminal accountability for human rights violations and an increase in criminal prosecutions."[93] According to Sikkink, since the mid-1970s when Greece put several past state officials on trial for torture and murder for the first time since the Holocaust, trials of human rights abusers have become increasingly common, signaling a gradual evolution away from the default of impunity.[94]

This steady rise of trials and accountability for human rights violations means that crimes that took place many years ago are being prosecuted for the first time years, even decades, after they were committed. The examples are numerous. In 2012, ex-President Rios Montt in Guatemala was hauled into court on charges of genocide and crimes against humanity for his role in the massacre of a village in 1982.[95] In 2006, ex-President of Uruguay Juan María Bordaberry and his foreign affairs minister were convicted and sentenced to thirty years in prison for ordering extrajudicial killings in 1976.[96] In 2009, ex-President Alberto Fujimori of Peru was convicted of crimes against humanity and sentenced to twenty-five years in prison for human rights violations that occurred during his government's battle against leftist guerrillas in the 1990s.[97]

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93. SIKKINK, *supra* note 5, at 5.

94. *Id.*

95. *Guatemala ex-leader Rios Montt faces massacre trial*, BBC NEWS (May 22, 2012), http://www.bbc.co.uk/news/world-latin-america-18157517. Rios Montt was convicted of genocide and crimes against humanity by a trial court on May 10, 2013, but ten days later the Guatemalan Constitutional Court in a contentious and divided ruling annulled part of the proceeding on procedural grounds and rolled the trial back to a month earlier. *See generally* OPEN SOC'Y JUSTICE INITIATIVE, JUDGING A DICTATOR: THE TRIAL OF GUATEMALA'S RIOS MONTT, *available at* http://www.opensocietyfoundations.org/publications/judging-dictator-trial-guatemala-s-rios-montt. On January 5, 2015, the trial reopened, but was again suspended due to a defense challenge that led to the recusal of one of the presiding judges. Emi MacLean & Sophie Beaudoin, *Eighteen Months After Initial Conviction, Historic Guatemalan Genocide Trial Reopens but is Ultimately Suspended*, INT'L JUSTICE MONITOR (Jan. 6, 2015), http://www.ijmonitor.org/2015/01/eighteen-months-after-initial-conviction-historic-guatemalan-genocide-trial-reopens-but-is-ultimately-suspended/.

96. SIKKINK, *supra* note 5, at 2–3.

97. Joshua Partlow & Lucien Chauvin, *Peru's Fujimori Gets 25 Years*, WASH. POST, May 8, 2009, http://www.washingtonpost.com/wp-dyn/content/article/2009/04/07/AR2009040701345.html.

In addition to the rise of criminal trials, the unprecedented growth and expansion of regional human rights mechanisms, such as the Inter-American Court of Human Rights (IACtHR) and the European Court of Human Rights (ECtHR), signals that victims are also increasingly seeking state accountability as a way to obtain redress.[98] Since 1990 the number of states that have ratified the European Convention on Human Rights (ECHR) has more than doubled, stewarding a rise in both the number and types of petitions the court received.[99] In 2007, the ECHR handed down more than twice as many judgments as it did during the entire forty-two-year span from 1955 to 1997.[100] Likewise, the IACtHR's caseload has grown exponentially in recent years, with over half of its total cases arising since 2001.[101] The dramatic rise in the number of countries that are party to these regional human rights mechanisms as well as the rapid, almost unwieldy, growth of their caseload evinces the increased resort to these bodies by individuals seeking justice.

### D. *Judicial Proceedings Disrupt Collective Memory*

Unlike common criminal acts, crimes against humanity, war crimes, and genocide have no statute of limitations.[102] Thus, with the rise of both state and international criminal ac-

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98. Andrea K. Schneider, *Bargaining in the Shadow of (International) Law: What the Normalization of Adjudication in International Governance Regimes Means for Dispute Resolution*, 41 N.Y.U. J. INT'L L. & POL. 789, 793 (2009).

99. DAVID C. BALUARTE & CHRISTIAN M. DE VOS, OPEN SOC'Y JUSTICE INITIATIVE, FROM JUDGMENT TO JUSTICE 35 (David Berry et al. eds., 2010) ("The convention, to which 22 states had previously been party, has been ratified by 25 new state members since 1990.").

100. Schneider, *supra* note 98, at 793.

101. *Id.*

102. The Convention on the Non–Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity provides that "[n]o statutory limitation shall apply" to war crimes, crimes against humanity, and genocide. Convention on the Non–Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity, art. 1, Nov. 26, 1968, 754 U.N.T.S. 73, 75 (entered into force Nov. 11, 1970); The Rome Statute of the International Criminal Court provides that "The crimes within the jurisdiction of the Court . . . shall not be subject to any statute of limitations." Rome Statute, *supra* note 5, at arts. 5, 29. The United States' Genocide Convention Implementation Act of 1987, 18 U.S.C.A. § 1091(e) (2000 & Supp.2004), provides that there is no statute of limitations to indict a person who commits genocide in the form of killing members of a specified group.

countability, victims of gross human rights violations have been called to share their stories in judicial proceedings years if not decades after the atrocities occurred. This moment exposes a significant tension between collective memory and justice.

As documented by researchers and practitioners alike, collective memory and identity grow organically amongst groups that have suffered mass atrocities, even in the absence of trials.[103] Thus, those victims from communities that developed a shared understanding of the events that befell them must prepare their testimony for court. Many legal systems worldwide, especially international criminal tribunals, have developed rules and guidelines that reflect an understanding of lawyering built on an individual representation model, which originated in the Western (and in particular the American) legal tradition but has been replicated in legal systems across the globe.[104] This presents formidable challenges for lawyers

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103. *See, e.g.*, Laura Jeffery, *Historical Narrative and Legal Evidence: Judging Chagossians' High Court Testimonies*, 29 POLAR: POL. & LEGAL ANTHROPOLOGY REV. 228, 231 (2006) ("Judith Binney has suggested that, among Maoris in New Zealand, the oral transmission of hearsay by individuals as if they were eyewitnesses reinforced a 'kinship I' of shared experiences. Diana Kay's research among Chilean political exiles in Scotland revealed that the men recounted a kind of collective history of shared suffering [such as political intimidation and imprisonment in Chile] through what she called a 'collective voice,' saying that 'we' rather than 'I' had such-and-such experiences. My research among Chagossians in Mauritius indicates that both collective memory and collective voice are central features of Chagossian historical narratives.") (internal citations omitted); *see also supra* Part I(B).

104. The tenets of the American and other Western legal systems are also heavily influenced international legal institutions like the ICC, because many international lawyers that lead these institutions are from Western countries and have built the international law mechanisms in the image of their home legal systems. Scholars argue that the predominance of Western-generated theories and processes in international law has resulted in an inability to meet local demands and fit local contexts. Mark A. Drumbl, *Collective Violence and Individual Punishment: The Criminality of Mass Atrocity*, 99 NW. U. L. REV. 539, 596 (2005) (quoting scholar Rama Mani who "remarks that international justice evidences a predominance of Western-generated theories and an absence of non-Western philosophical discourse [which] leads to a troubling imbalance or injustice in the study of justice, insofar as international lawyers have largely referred to and replicated their own legal systems, rather than catered to and built on local realities and needs.") (internal quotation marks omitted); William Tetley, *Mixed Jurisdictions: Common Law v. Civil Law (Codified and Uncodified)*, 60 LA. L. REV. 677, 701 (2000) ("Common law and

who must fit their clients' narratives, deeply embedded with collective understandings of events, into legal systems heavily influenced by notions of individualism and autonomy.[105]

The rules that guide professional ethics may be particularly problematic for communities that derived strength and purpose from collective memory. These rules exhibit a single-minded focus on individual representation by replicating models of interviewing and counseling that assume a single client who autonomously makes legal decisions without consulting their community.[106] In particular, rules concerning confidentiality and attorney-client privilege "discourage lawyers from plu-

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civil law legal traditions share similar social objectives [individualism, liberalism and personal rights] and they have in fact been joined in one single family, the Western law family, because of this functional similarity."); Susan D. Bennett, *Creating a Client Consortium: Building Social Capital, Bridging Structural Holes,* 13 CLINICAL L. REV. 67, 71–72 (2006) (lamenting that the representation of community is "cloud[ed] [by] the convention in legal ethics of one lawyer with exclusive and undivided loyalties to one client, the model that has monopolized our conceptualization of the attorney-lawyer relationship"); Paul R. Tremblay, *Counseling Community Groups*, 17 CLINICAL L. REV. 389, 389 (2010) ("The training of lawyers for years has established ethical and practice protocols based upon an individual representation model, or, if the protocols contemplated a form of collective representation, they have envisioned formal, structured entities with powerful constituents.").

105. Paul Tremblay points out that the client-centered approach to lawyering, which has become the predominant model taught in law schools in the United States, emphasizes that one of the goals of the attorney/client relationship should be to foster individual autonomy. Tremblay, *supra* note 104, at 398–404 (2010) (citing D. BINDER & S. PRICE, LEGAL INTERVIEWING AND COUNSELING: A CLIENT-CENTERED APPROACH (1977)). Elizabeth Fox-Genovese, *Women's Rights, Affirmative Action, and the Myth of Individualism*, 54 Geo. WASH. L. REV. 338 (1986) (discussing the promotion of individual autonomy in the Anglo-American legal system); Robin West, *Jurisprudence and Gender*, 55 U. CHI. L. REV. 1 (1988); R. POUND, THE SPIRIT OF THE COMMON LAW 37 (1921) (describing the American legal tradition as characterized by an "ultra-individualism, an uncompromising insistence upon individual interests and individual property as the focal point of jurisprudence.").

106. Bennett, *supra* note 104, at 80 ("Historically, legal ethics rules consistently have reinforced this conception of the one-on-one, exclusive attorney-client relationship as the norm, and have penalized any divergence from that conception."); *see also* Paul R. Tremblay, *Interviewing and Counseling Across Cultures: Heuristics and Biases*, 9 CLINICAL L. REV. 373, 400 (2002) ("The dominant culture models are largely individualistic, reflecting quite understandably the individualistic themes of the legal profession's ethics generally. Most interviewing and counseling models assume a single client describing his or her legal issue, making decisions for himself or herself, and grounding those decisions on the client's personal values.").

ralizing the attorney-client relationship."[107] Indeed, the very concept of the "attorney-client" relationship reveals a normative preference for a legal model in which there is one lawyer and one client.[108] The preference for individual representation is also reflected in professional ethics rules that make representation of a group an exceptional case worthy of its own distinct rule.[109] Additionally, lawyers may hesitate to represent more than one client at a time for fear that their interests may not exactly align and thereby create a conflict of interest.[110] These rules have been incorporated into international human rights and criminal law mechanisms by their explicit adoption, but also by human rights lawyers from western legal traditions who integrate them subconsciously in their practice.[111] For instance, many forums, including the International Criminal Court, provide that the attorney-client privilege is waived if a third party, including a friend or relative, joins a meeting between the lawyer and the client.[112] Imposing such rules can

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107. Tremblay, *supra* note 106, at 400.

108. John Leubsdorf, *Pluralizing the Client-Lawyer Relationship*, 77 CORNELL L. REV. 825, 826 (1992).

109. Thomas L. Shaffer, *The Legal Ethics of Radical Individualism*, 65 Tex. L. Rev. 963, 973 (1987); *see also* Rules of Procedure of the Inter-American Court of Human Rights art. 25, Aug. 1, 2013 (hereinafter IActHR Rules) ("When there are several alleged victims or representatives, these shall designate a common intervener, who shall be the only person authorized to present pleadings, motions, and evidence during the proceedings, including the public hearings."); International Criminal Court, Rules of Procedure and Evidence, U.N. Doc. PCNICC/2000/1/Add.1, Rule 90 (2000) (hereinafter ICC Rules of Procedure) ("Where there are a number of victims, the Chamber may, for the purposes of ensuring the effectiveness of the proceedings, request the victims or particular groups of victims, if necessary with the assistance of the Registry, to choose a common legal representative or representatives.").

110. *See* MODEL RULES OF PROF'L CONDUCT R. 1.7(a) (forbidding allegiances to several persons whose interests are not congruent).

111. *See generally* Makau Mutua, *Savages, Victims, and Saviors: The Metaphor of Human Rights*, 42 HARV. INT'L L.J. 201, 240–41 (2001) (describing how the staff of most non-governmental human rights organization are mostly well-educated Western lawyers); Makau Mutua, *The Ideology of Human Rights*, 36 VA. J. INT'L L. 589, 613–16 (1996).

112. Rule 73 of the International Criminal Court's rules of evidence states that "communications made in the context of the professional relationship between a person and his or her legal counsel shall be regarded as privileged, and consequently not subject to disclosure, unless: (a) The person consents in writing to such disclosure; or (b) The person voluntarily dis-

fragment communities who, prior to their encounter with legal proceedings, drew strength from sharing their collective experience as victims of mass violence, developing a single narrative, and speaking together in solidarity.

Evidentiary and procedural rules also pose significant challenges for collective memory. In many legal systems, for instance, testimony by lay witnesses must be based on personal knowledge.[113] This means that testimony in the form of both written and oral statements must be made by individuals, not groups, in order to be admissible. In order to be considered credible by a fact-finder, testimony must be subject to confrontation via cross-examination.[114] Consequently, lawyers are required to deconstruct the collective memory of their client, potentially undoing the healing accomplished through the process of memory work. As a result, the collective loses the power derived from speaking in one voice. Community consciousness, once a source of great strength, becomes an obstacle. The law's confrontation with collective memory thus risks erasing it all together along with the power that accompanied it.[115]

In the next section, I argue that the ability of a community to formulate its own vision of the past should instead be preserved and promoted. While legal proceedings may inevitably alter the vision of the past through the presentation of evidence that is contrary to the collective, to deny its existence

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closed the content of the communication to a third party, and that third party then gives evidence of that disclosure." ICC Rules of Procedure Rule 73; *see also* FED. R. EVID. 503(a)(4); United States v. Evans, 113 F.2d 1457, 1464 (7th Cir. 1997) (holding that privilege is inapplicable absent showing that third party's presence was necessary to accomplish the object of the consultation).

113. Frank R. Herrmann, S.J., *The Establishment of A Rule Against Hearsay in Romano-Canonical Procedure*, 36 VA. J. INT'L L. 1, 49 (1995) (describing how the requirement that witnesses only testify from a personal basis of knowledge was adopted in the Western legal tradition during the twelfth-and thirteenth-century revival of Roman and canonical legal studies); *see, e.g.*, FED. R. EVID. 602 (providing that "[a] witness may not testify to a matter unless evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter.").

114. Madeira, *supra* note 1, at 427.

115. In *The Book of Laughter and Forgetting*, Milan Kundera wrote that "[t]he struggle of man against power is the struggle of memory against forgetting." MILAN KUNDERA, THE BOOK OF LAUGHTER AND FORGETTING 4 (Aaron Asher trans., 1999).

and exclude a community's version of the facts from consideration is to further disenfranchise a community already alienated from society at large. Collective memory's exclusion from the law is akin to forced forgetting.

## IV. Collective Memory in Service of Justice

If we endeavor to protect victims' pre-existing collective memory as an important source of healing after mass atrocity but also wish to obtain justice for wrongdoing, then scholars and human rights lawyers must struggle to find a way for them to complement each other. One way would be to incorporate collective memory into the legal process. In this Part, I examine the existing forums for the adjudication of human rights claims involving mass atrocity in order to assess their compatibility with collective memory. As will be fully illuminated below, the purposes of justice in societies undergoing transition after mass administrative murder are significantly different from those where peace and stability are the norm. They include, inter alia, fostering reconciliation, re-integrating victims into society, creating a historical record, recalibrating societal notions of right and wrong, facilitating nation building, and recommending systematic reform. The admission of collective memory may actually contribute to achieving these broader goals by aiding legal bodies to better appreciate the systematic nature of the harm suffered. Consequently, the remedies can be more finely tuned to the collective needs of communities uprooted by mass violence.

### A. *The Forms and Forums of Human Rights Accountability*

An understanding of the legal mechanisms and remedies available to victims of gross human rights violations is imperative to understand how collective memory and justice can work in concert. As a general rule, these mechanisms can be divided into two families, those that seek state accountability and those that seek individual criminal accountability.

To obtain state accountability, victims of mass human rights violations can seek justice within the regional human rights mechanisms, such as the African Commission on Human and Peoples' Rights, the Inter-American Commission on Human Rights, the IACtHR, and the ECtHR, whose juris-

dictions are geographically limited as their names suggest.[116] These mechanisms adjudicate claims of human rights violations against member states brought by individuals or communities. For instance, in *Plan de Sanchez Massacre v. Guatemala*, the IACtHR found that Guatemala violated the rights to humane treatment, personal liberty, freedom of conscience and religion, equal protection, and judicial protection because its agents massacred 268 people in a market in the village of Plan de Sanchez, Rabinal.[117] In the *Dos Erres* case, the government of Guatemala came to a friendly settlement with the victims of a state sponsored massacre in Petén province in 1982, during the Ríos Montt presidency.[118]

These mechanisms can order a variety of remedies that more closely resemble civil remedies than criminal punishment.[119] For instance, in addition to making declaratory judgments, the IACtHR, which has the broadest remedial powers of any international tribunal, can order a state to pay monetary reparations through the establishment of trust funds monitored by the court, require symbolic measures, such as the erection of memorials or community centers, recommend training and educational programs for state officials, request an official acknowledgement of wrongdoing in a public ceremony, and suggest legal or judicial reform.[120] Recently, the

116. PHILIP ALSTON & RYAN GOODMAN, INTERNATIONAL HUMAN RIGHTS: TEXT AND MATERIALS 889-91 (2012).

117. Plan de Sánchez Massacre, Inter-Am. Ct. H.R. (ser. C) No. 105 ¶ 52(3).

118. Las Dos Erres Massacre, Inter-Am. Ct H.R. (ser. C) No. 211 ¶ 1.

119. *See* BALUARTE, *supra* note 99, at 11; *see also* RATNER, *supra* note 92, at 256.

120. Dinah Shelton, *Remedies in the Inter-American System*, 92 AM. SOC'Y INT'L L. PROC. 202, 203 (1998); BALUARTE, *supra* note 99, at 66–67; Marcie Mersky & Naomi Roht-Arriaza, *Guatemala*, *in* VICTIMS UNSILENCED: THE INTER-AMERICAN HUMAN RIGHTS SYSTEM AND TRANSITIONAL JUSTICE IN LATIN AMERICA, DUE PROC. OF L. FOUND. 7, 15 (2007) ("In the Court cases and in those settled by the Commission before referral to the Court, the remedies agreed to and/or imposed on the state have fallen into four general categories: (a) investigation and prosecution in domestic jurisdictions; (b) individual and collective reparations; (c) actions to dignify the memory of the victim and other moral reparation; and (d) legislative and/or administrative reform."); *see also* Organization of American States, American Convention on Human Rights art. 63, Nov. 22, 1969, O.A.S.T.S No.36, 1144 U.N.T.S. 123 ("If the Court finds that there has been a violation of a right or freedom protected by this Convention, the Court shall rule that the injured party be

court has also ordered the governments of member states to investigate human rights violations and punish those responsible.[121] These mechanisms do not, however, have jurisdiction to adjudicate cases seeking individual criminal accountability for human rights abuses.[122]

On the other hand, individual criminal accountability can be sought against individuals responsible for mass atrocities in a variety of other forums, including domestic courts, foreign courts, international courts, and hybrid tribunals. Domestic prosecutions constitute the majority of total prosecutions.[123] However, many countries undergoing political transitions have judiciaries that are so compromised and/or unwilling to undertake prosecutions that the international community steps in to prosecute the crimes. Initially, international criminal tribunals, such as the International Criminal Tribunal for the former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR), were created with limited jurisdiction on an ad-hoc basis to prosecute high-ranking officials who committed egregious crimes in a particular region or country during a discrete period of time.[124] Over time, it became clear that these tribunals were incredibly expensive and slow, so the international community formed a permanent criminal court called the International Criminal Court (ICC) in 1998 that could address international crimes across the globe.[125] The

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ensured the enjoyment of his right or freedom that was violated. It shall also rule, if appropriate, that the consequences of the measure or situation that constituted the breach of such right or freedom be remedied and that fair compensation be paid to the injured party.").

121. BALUARTE, *supra* note 99, at 68–69.

122. RATNER, *supra* note 92, at 256 ("These courts are not, however, fora for determining individual accountability for international crimes, as they enjoy neither jurisdiction over individuals nor criminal or penal jurisdiction in the traditional sense. Instead, they possess jurisdiction only over states and adjudicate state (civil) responsibility for violations of international law.").

123. Hunjoon Kim & Kathryn Sikkink, *Explaining the Deterrence Effects of Human Rights Prosecutions for Transitional Countries*, INT'L STUD. Q. 939, 948 (2010).

124. William W. Burke-White, *A Community of Courts: Toward a System of International Criminal Law Enforcement*, 24 MICH. J. INT'L L. 1, 11–12 (2002).

125. *See generally* Matthew A. Barrett, *Ratify or Reject: Examining the United States' Opposition to the International Criminal Court*, 28 GA. J. INT'L & COMP. L. 83, 88–89 (1999) (discussing the historical background behind the creation of the International Criminal Court); Rome Statute, *supra* note 5.

ICC came into force in 2002, began hearing its first case in 2009, and handed down its first verdict in 2012, convicting Thomas Lubanga of crimes committed in the Democratic Republic of the Congo.[126]

A select few transitioning countries with weak justice systems have undertaken trials of former top officials and war criminals with assistance from the international community. These countries formed hybrid tribunals combining the law and personnel of both the domestic and international legal systems.[127] The Special Court for Sierra Leone and the Extraordinary Chambers in the Courts of Cambodia are two of the most well known examples of hybrid tribunals.[128] In these models, the international community builds the capacities of local judicial systems by providing funding, expertise, oversight, and training.[129]

In addition, some countries have laws on their books that allow for universal jurisdiction, which is the principle establishing that certain crimes are so heinous that states are obliged to bring proceedings against perpetrators, regardless of the location of the crime and the nationality of the perpetrator or the victim.[130] This principle allows the perpetrators of human rights violations in one country to be prosecuted within the domestic judicial system of another even when there is no link

126. Prosecutor v. Thomas Lubanga Dyilo, Case No. ICC-01/04-01/06, Judgment pursuant to Article 74 of the Statute (Mar. 14, 2012), *available at* http://www.icc-cpi.int/iccdocs/doc/doc1379838.pdf; Nada Ali, *Bringing the Guilty to Justice: Can the ICC Be Self-Enforcing?*, 14 CHI. J. INT'L L. 408, 430 (2014) (citing the Lubanga conviction as the first in the ICC).

127. Laura A. Dickinson, *The Promise of Hybrid Courts*, 97 AM. J. INT'L L. 295, 295 (2003) (explaining that in hybrid courts foreign and domestic judges apply a law that is a combination of the international and the domestic law).

128. For a description of these hybrid tribunals, *see* Milena Sterio, *The Future of Ad Hoc Tribunals: An Assessment of Their Utility Post-ICC*, 19 ILSA J. INT'L & COMP. L. 237, 240–42 (2013).

129. Etelle R. Higonnet, *Restructuring Hybrid Courts: Local Empowerment and National Criminal Justice Reform*, 23 ARIZ. J. INT'L & COMP. L. 347, 354 (2006).

130. Michael P. Scharf, *Application of Treaty-Based Universal Jurisdiction to Nationals of Non-Party States*, 35 NEW ENG. L. REV. 2, 363, 368 (2001) (explaining that states have universal jurisdiction over crimes that are so "threatening to the international community or so heinous in scope and degree that they offend the interest of all humanity.").

between that state and the crime.[131]This principle was put into practice was when Spain indicted former Chilean President Augusto Pinochet for international crimes, including systematic torture, and British authorities placed him under house arrest while he was seeking medical care in the United Kingdom.[132] Pinochet was ultimately released and returned to Chile because he was deemed incapable of standing trial due to his medical condition.[133] Still, upon return to Chile, he was stripped of his immunity and charged by Chilean courts. This case had a ripple effect across the word. Thus, in recent times, those parties who are unable to obtain justice in their home countries increasingly look toward foreign and international courts for redress.[134]

### B. *The Goals of Justice after Mass Atrocity*

These assorted methods of pursuing accountability for human rights abuses vary in the degree they resemble traditional domestic mechanisms for criminal accountability, and in how closely their goals align with them. In critical ways, the norms and constructs of conventional legal systems may be ill suited to grapple with the many challenges and diverse needs that emerge following state sanctioned mass murder. This is particularly true during the historical moment of transition from repressive regime to a more democratic one. In this section, I will examine whether the traditional theories of punishment hold any weight after mass atrocity.

At first blush, the goals of international criminal accountability appear to be similar to those of domestic criminal accountability, but there are important nuances that I explore

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131. Luc Reydams, Universal Jurisdiction: International and Municipal Legal Perspectives 5 (2003) (describing how universal jurisdiction "means that there is no link of territoriality or nationality between the State and the conduct or the offender, nor is the State seeking to protect its security or credit.").

132. For a lengthy discussion of the universal jurisdiction case against Augusto Pinochet, *see* Naomi Roht-Arriaza, *The Pinochet Precedent and Universal Jurisdiction*, 35 New Eng. L. Rev. 311 (2001).

133. Philip Alston & Ryan Goodman, International Human Rights 1128–30 (2013).

134. *See generally* Ellen Lutz & Kathryn Sikkink, *The Justice Cascade: The Evolution and Impact of Foreign Human Rights Trials in Latin America*, 2 Chi. J. Int'l L. 1 (2001).

below. In contrast, both the goals and remedies of judicial mechanisms that assess state accountability for human rights violations are quite distinct from criminal accountability, more closely resembling civil liability.

Two of the traditional justifications for punishment are retribution and deterrence.[135] Retributive justice is the oldest theory of punishment.[136] The underlying principle of retributive justice is that the infliction of punishment restores the moral balance between the victim and the offender that the crime distorted. For justice to be effectively achieved, punishment cannot overcorrect and must be proportionate to the nature and extent of the crime.[137] In order to strike the right balance, punishment must be allocated "according to the offender's personal blameworthiness for the past offense, which takes account not only of the seriousness of the offense, but also the full range of culpability, capacity, and situational factors that we understand to affect an offender's blameworthiness."[138] Retributive justice offers stronger protections for defendants than deterrence, because it takes into consideration mitigating factors like the defendant's upbringing and any mental disabilities.[139] For instance, in *Atkins v. Virginia*, 536 U.S. 304, 321 (2002), the U.S. Supreme Court concluded that the execution of intellectually disabled criminals did not serve the goal of retribution, because they are less culpable due to their dismissed capacity to understand and weigh the consequences of their actions.[140]

After mass violence, retribution can be one of the principal motivating factors for individual criminal accountability. Like victims of crimes committed in times of peace and stability, those victimized by mass atrocities may feel a compulsion to see their persecutors get their "just desserts." Yet, some legal scholars have raised the question of whether those who commit atrocities are less blameworthy when they are responding to the orders of superiors or when violence is not considered

135. O. C. Snead, *Memory and Punishment*, 64 VAND. L. REV. 1195, 1245 (2011).

136. *Id.* at 1246.

137. Drumbl, *supra* note 1044, at 559–60.

138. Snead, *supra* note 135, at 1246–47.

139. *Id.*

140. *Id.*

to be aberrant behavior.[141] Legal scholar Mark Drumbl posits that the theories of retributive justice in the domestic criminal law may not be an easy fit in the international context, because "[w]hereas for the most part ordinary crime deviates from generally accepted social norms in the place and at the time it was committed, extraordinary crime has an organic and group component that makes it not so obviously deviant in place and time."[142] In some cases, such human rights abusers are actually conforming to social norms by violating human rights. They may be even considered heroes.[143] Furthermore, the sheer number of crimes committed during armed conflict makes punishment of every perpetrator very difficult, if not impossible. Indeed, many transitioning countries have provided amnesty for certain perpetrators, particularly low-level state actors.[144] Despite the impulse to punish for punishment's sake, in the context of transitional justice, others goals, such as reconciliation and nation building described below, may take precedence.[145]

In legal mechanisms designed to access state accountability for human rights violations, retribution is not a central goal. Indeed, the leadership of the country may have changed

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141. *See* Mark Drumbl, *Collective Violence, Mass Atrocity, and Individual Punishment*, *in* ACCOUNTABILITY FOR COLLECTIVE WRONGDOING 23 (Tracy Isaacs & Richard Vernon eds., 2011); Michael Reisman, *Legal Responses to Genocide and Other Massive Violations of Human Rights*, 59 L. & CONTEMP. PROBS. 75, 77 (1996) ("In many of the most hideous international crimes, many of the individuals who are directly responsible operate within a cultural universe that inverts our morality and elevates their actions to the highest form of group, tribe, or national defense. After years or generations of acculturation to these views, the perpetrators may not have had the moral choice that is central to our notion of criminal responsibility.").

142. Drumbl, *supra* note 1044, at 567.

143. *Id.* at 568. Payam Akhavan, *Beyond Impunity: Can International Criminal Justice Prevent Future Atrocities?*, 95 AM. J. OF INT'L L. 7, 10 (2001) ("The delicate fabric of interethnic coexistence was gradually torn apart and otherwise shameful and reprehensive behavior elevated to the status of heroism and group solidarity.").

144. Carsten Stahn, *Accommodating Individual Criminal Responsibility and National Reconciliation: The UN Truth Commission for East Timor*, 95 AM. J. INT'L L. 952, 958 (2001) (describing how East Timor adopted a limited approach to amnesty prohibiting immunity for those that committed "serious criminal offenses," while South Africa allowed all individuals to seek amnesty).

145. *See infra*, section on "Collective Memory Furthers the Goals of Justice after Mass Atrocity."

since the atrocities occurred, making the pursuit of retributive justice moot.[146] Moreover, culpability in these institutions closely resembles civil liability. As described above, when a state is held accountable, the penalty is not criminal sanction, but rather remedies that compensate the petitioner or attempt to address the root causes of the violation.[147] Also, the petitioner may believe that the State was involved, but lack concrete proof. In such circumstances, they may proceed under the legal theory that the state failed to exercise duty of due diligence to protect human rights. Under international law, states have a duty to prevent, investigate, punish violations of human rights, and, when possible, ensure adequate compensation to victims.[148] Even when human rights violations are not the result of governmental action, responsibility for these violations can be imputed to a country that fails to fulfill these duties. For instance, in the seminal case of *Velasquez Rodriguez v. Honduras*,[149] the IACtHR held the Honduran government accountable for the kidnapping and disappearance of Honduran student Manfredo Velasquez by unknown assailants because of its failure to carry out a meaningful investigation into his disappearance, to punish those responsible, and to pay compensation to Velasquez's next-of-kin.[150] The Court stated that

> [a]n illegal act which violates human rights and which is initially not directly imputable to a [country] (for example, because it is the act of a private person or because the person responsible has not been iden-

146. For instance, in *Las Dos Erres Massacre v. Guatemala,* the massacre occurred in 1982 under the presidency of Rios Montt, but the judgment was rendered in 2009 under the presidency of Alvaro Colom. Las Dos Erres Massacre, Inter-Am. Ct H.R. (ser. C) No. 211 ¶ 1.

147. *See supra*, section on "The Forms and Forums of Human Rights Accountability."

148. The obligation to exercise due diligence is found in the American Convention on Human Rights, Organization of American States, American Convention on Human Rights arts. 1–2, Nov. 22, 1969, O.A.S.T.S No. 36, 1144 U.N.T.S. 123, the International Covenant on Civil and Political Rights art. 2, Dec. 16, 1966, 999 U.N.T.S. 171, and the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment arts. 2, 4, Dec. 10, 1984, 1465 U.N.T.S. 85.

149. Velásquez Rodríguez v. Honduras, Merits, Reparations, and Costs Judgment, Inter-Am. Ct. H.R. (ser. C) No. 4, ¶ 174 (July 29, 1988).

150. *Id.* ¶ 178.

> tified) can lead to international responsibility of the country, not because of the act itself, but because of the lack of due diligence to prevent the violation or to respond to it as required by the American Convention.[151]

Questions of intentionality, blameworthiness, and culpability relevant to retributive theories of justice have less salience in this context, because governments may be held liable for their acquiescence to human rights violations.[152]

The goal of deterrence, another conventional justification for punishment, is to decrease future incidence of crime. A statute that revokes the driver's licenses of repeat driving-while-intoxicated offenders, regardless of whether they have ever harmed anyone, is an example of a law aimed at deterrence. Unlike retributive justice, "[t]he purpose is not to punish because punishment is deserved; rather, the purpose is to punish because punishment builds a safer world."[153] Deterrence is forward facing, while retribution looks backward. There are two types of deterrence: specific deterrence and general deterrence. The purpose of specific deterrence is "to deter the criminal himself (rather than to deter others) from committing further crimes, by giving him an unpleasant experience he will not want to endure again."[154] In contrast, general deterrence aims to dissuade the criminal activity of people other than the sanctioned offender because of their fear of similar punishment.[155]

General deterrence is a significant goal of accountability for violations of international human rights. In fact, some scholars designate it as the most important goal.[156] However,

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151. *Id.* ¶ 172.

152. *See id.* ¶ 178.

153. Drumbl, *supra* note 104, at 589.

154. Snead, *supra* note 135, at 1257.

155. *Id.*; *see also* Kim, *supra* note 123, at 943.

156. Scholars and human rights activists have trumpeted deterrence as perhaps the most important justification for prosecution in transitional justice. Orentlicher, for example, writes that "[t]he fulcrum of the case for criminal punishment is that it is the most effective insurance against future repression." Diane Orentlicher, *Settling Accounts: The Duty to Prosecute Human Rights Violations of a Prior Regime*, 100 YALE L.J. 2537, 2542 (1991). Neil Kritz shares Orentlicher's confidence in the effectiveness of trials as a deterrent, noting that the failure to prosecute at least key figures "can be expected not only to encourage new rounds of mass abuses in the country in question but

the deterrent effect of accountability for human rights abuses is largely unknown in the international arena.[157] Miriam J. Aukerman writes, "it is virtually impossible to assess whether or not the threat of prosecution has ever prevented genocide and war crimes."[158] Minow agrees, stating that "[n]o one really knows how to deter those individuals who become potential dictators or leaders of mass destruction . . . . One hopes that current-day prosecutions would make a future Hitler, or Pol Pot, or Radovan Karadžic change course, but we have no evidence of this."[159] Robert Jackson, the lead prosecutor in the Nuremberg trials, questioned whether theories of deterrence play any role in wartime, because the architects of war rarely imagine themselves losing and being held accountable for their actions.[160]

Kathryn Sikkink and Hunjoon Kim posit that those who have already committed human rights violations will not be deterred from committing future violations, because they know that if trials come to pass they will already be subject to prosecution.[161] Instead individuals who fear prosecution may radicalize to prevent accountability, threaten coups, or block peace processes.[162] For this reason, scholars, like Samuel

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also to embolden the instigators of crimes against humanity elsewhere." Neil J. Kritz, *Coming to Terms with Atrocities*, 59 LAW & CONTEMP. PROBS. 127, 129 (1996). M. Cherif Bassiouni adds that "[t]he relevance of prosecution and other accountability measures to the pursuit of peace is that through their effective application they serve as deterrence, and thus prevent future victimization." M. Cherif Bassiouni, *The Discipline of International Criminal Law*, *in* 3 INTERNATIONAL CRIMINAL LAW 20 (M. C. Bassiouni ed., 3d ed. 2008).

157. Drumbl, *supra* note 1411, at 33 (reporting that "no systematized or conclusive evidence of discernible deterrent effect [of international criminal justice] has yet been proffered.").

158. Miriam J. Aukerman, *Extraordinary Evil, Ordinary Crime: A Framework for Understanding Transitional Justice*, 15 HARV. HUM. RTS. J. 39, 66 (2002).

159. MINOW, *supra* note 7, at 146.

160. *Id.* at 50 ("[P]ersonal punishment, to be suffered only in the event the war is lost," Robert Jackson stated, "is probably not [enough] to be a sufficient deterrent to prevent a war where the war-makers feel the chances of defeat to be negligible."); Akhavan, *supra* note 143, at 9 ("The threat of punishment – let alone an empty threat – has limited impact on human behavior already intoxicated with hatred and violence.").

161. Kim, *supra* note 123, at 943.

162. *Id.*; *accord* Reisman, *supra* note 1411, at 77 ("On the one hand, international criminal tribunals may serve to deter violations in future cases, but may increase the costs of suspending ongoing violations if violators conclude

Huntington, Jack Snyder, and Leslie Vinjamuri, argue that criminal accountability for past human rights abuses not only has no deterrent effect, but may in fact result in increased repression and human rights abuses.[163] Deterrence may also have limited effect in the context of mass atrocity because, as Payam Akhavan put it, "individuals are not likely to be easily deterred from committing crimes when engulfed in collective hysteria and routine cruelty."[164]

Other scholars question whether those who engage in extraordinarily heinous human rights abuses are even capable of making the rational assessment of costs and benefits that deterrence requires.[165] The fact that a number of sitting officials who have been indicted for war crimes have not been deterred from committing future abuses lends credence to this argument. For instance, although the ICTY indicted Milosevic for crimes in Bosnia, he still committed further violations in Kosovo.[166] Similarly, the current President of Sudan, Omar al-Bashir, whom the ICC indicted for war crimes, continues to persecute and murder Sudanese civilians.[167]

However, there is at least some evidence that punishment of human rights offenders results in general deterrence in the long term. Sikkink and Kim compiled data on 100 countries in transition to explore whether prosecuting human rights violations decreases repression.[168] They found strong quantitative evidence that prosecuting human rights violations lessens repression within a country over time.[169] There are several potential explanations for this. First, prosecution of human rights abusers develops a sense of law and order in society that dissuades would-be repressors from using brutal means to con-

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that continued resistance is preferable to facing a judgment by the tribunal.").

163. Kim, *supra* note 123, at 941.

164. Akhavan, *supra* note 143, at 12.

165. Aukerman, *supra* note 158, at 68.

166. Kim, *supra* note 123, at 943.

167. *C.f.* Isma'il Kushkush & Nicolas Kulish, *Civilians Flee as Violence Worsens in South Sudan*, N.Y. Times, Feb. 27, 2014 http://www.nytimes.com/2014/02/27/world/africa/civilians-flee-as-violence-worsens-in-south-sudan.html?src=recg; *see also* Vijai Singh, *Sudanese President Dances in Darfur*, N.Y. Times (July 24, 2008), http://www.nytimes.com/video/world/1194822672091/sudanese-president-dances-in-darfur.html?ref=omarhassanalbashir.

168. Kim & Sikkink, *supra* note 123, at 951.

169. *See id.*

solidate power during times of transition. Second, criminal prosecution heightens the political costs of associating with human rights abusers and removes the leadership of groups who have engaged in violence.[170] Their research also indicated that criminal prosecutions of human rights violations in one country can have a deterrent effect in neighboring countries.[171]

When state accountability is sought, the deterrent effect on the state as an institution is similarly uncertain. Perhaps the agents of a State, fearing the reputational costs of sanctions by a body like the IACtHR, may collectively seek to improve its infrastructure to protect human rights. However, states are composed of multiple actors, institutions, and political interests and for that reason are amorphous, faceless, and lack cohesive rationality, so there is a legitimate question of whether states can be deterred from committing human rights abuses at all. The IACtHR has explicitly rejected the notion that deterrence should play any role in its decisions to grant reparations, stating:

> The expression "fair compensation," used in Article 63 (1) of the Convention to refer to a part of the reparation and to the "injured party," is compensatory and not punitive. Although some domestic courts, particularly the Anglo-American, award damages in amounts meant to deter or to serve as an example, this principle is not applicable in international law at this time.[172]

Still, legal scholar Morse Tan asserts that if states followed the orders of the IACtHR to prosecute and punish violators of human rights then this could contribute "to the fall of impunity and to the specific and general deterrence of human rights violations in this hemisphere".[173] At present, states are usually noncompliant with such orders. Only one state (Peru)

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170. Akhavan, *supra* note 143, at 14 (explaining how the prosecutions in the ICTY made association with the leadership responsible for ethnic cleaning a serious political liability).

171. Kim & Sikkink, *supra* note 123, at 956–57.

172. Godínez Cruz v. Honduras, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 8, ¶ 36 (July 21, 1989).

173. Morse Tan, *Member State Compliance with the Judgments of the Inter-American Court of Human Rights*, 33 INT'L J. LEGAL INFO. 319, 329 (2005).

has fully implemented an order to investigate and punish those responsible for human rights violation.[174] Even taking both the IACtHR and Inter-American Commission into account, one study found that member states only implemented decisions requiring investigation and punishment ten to fourteen percent of the time.[175]

### C. *Collective Memory Furthers the Goals of Justice after Mass Atrocity*

During times of transition, law-related activities have other important societal functions that are distinct from the conventional theories of punishment employed in times of peace and stability. In this section, I identify these non-traditional goals of accountability and explore how the incorporation of collective memory into judicial proceedings could serve them. Specifically, the inclusion of collective memory could facilitate nation-building, re-integration of victims into society, reconciliation, recalibration of societal norms, "structural deterrence," and the creation of a historical record.

*Nation-building*. A central goal of punishing the wrongdoing of a prior regime is to advance nation-building. Holding trials aids nation-building by establishing a renewed faith in the rule of law. When trials occur in domestic forums, they also foster a belief in the legitimacy of that country's legal institutions. During times of transition after armed conflict or brutal repression, the conviction of former state officials serves the political goal of delegitimizing the predecessor regime and legitimizing its successor as a democratic rule of law-abiding state.[176] In this way, they create "a permanent, unmistakable wall between new beginnings and the old tyranny."[177]

Collective narratives could play a critical role in creating "new beginnings" for a nation. The mere act of allowing a formerly marginalized group to recount its collective experience

174. Baluarte & De Vos, *supra* note 99, at 68.

175. Asociación por los Derechos Civiles, The Effectiveness of the Inter-American System for the Protection of Human Rights: Quantitative Approach on the System's Operation and the Compliance with its Decisions (2009), *available at* http://www.adc-sidh.org.ar/images/files/adctheeffectivenessoftheinteramericansystemfortheprotectionofhumanrights.pdf.

176. Teitel, *supra* note 69, at 29.

177. *Id.*

of mass atrocities in a public forum sanctioned by the state signals a change. In addition, its admission at trial could help to reshape the identity of a nation by renegotiating a national "narrative of struggle and achievement, victory and defeat."[178] On the other hand, since collective memory accounts for the "the events that most profoundly affect the lives of its members and most arouse their passions for long periods,"[179] its exclusion could foster long lasting mistrust and resentment of state institutions of victims' groups.

*Reintegrating Victims into Society.* Because "[t]he repeated experience of domination and defeat leads to psychic withdrawal from the public sphere," another related goal of transitional justice is the reintegration of victims into society through reconciliation.[180] This goal is similar to a theory of punishment called restorative justice. Like retributive justice, restorative justice is driven by the notion that crime works a serious disruption in the social relationships between the offender and the victim.[181] But unlike retributive justice, the goal of restorative justice is not to inflict pain on the offender but rather to make amends for the harm caused to the victim.[182] Martha Minow evokes restorative justice principles when she describes her hope that accountability will help to create "a community of humanity . . . within which victims and survivors can be reclaimed as worthy members."[183]

The exclusion of collective memory from the judicial process inhibits victims from fully reintegrating into society. As Steven Lukes described in *Power: A Radical View*, one way in which powerful people and institutions subjugate people is by creating processes that constrain how groups present their experience and give it meaning.[184] Requiring victims who understand their harm collectively to communicate their stories in individualized frames contributes to their subordination and alienation from society.

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178. Snead, *supra* note 135, at 1236.

179. Osiel, *supra* note 1, at 19.

180. Lucie E. White, *To Learn and Teach: Lessons from Driefontein on Lawyering and Power*, 1988 WIS. L. REV. 699, 752.

181. Snead, *supra* note 135, at 1262.

182. *Id.*

183. MINOW, *supra* note 7, at 430–31.

184. White, *supra* note 180, at 751 (citing STEVEN LUKES, POWER: A RADICAL VIEW 23 (1974)).

If collective memory was instead incorporated into judicial proceedings, the accounting of wrongdoings in court could play the cathartic role for victims and society at large initially envisioned by Osiel and Durkheim. Since collective memory is "a source of solidarity, connection, and purpose," it is deeply related to how we form identities as individuals.[185] It helps us to define ourselves in relation to the larger society in which we live. Through our interconnectedness and social interactions with others in our community, we find meaning in what seem to be random occurrences. Collective memory provides us with a context through which to make sense of our own personal experiences and confers legitimacy to our individual interpretation of events.[186]

Because memory work creates strong bonds between individuals and helps them to work through significant events in their lives, the formation of collective memory can be particularly cathartic for those who have experienced trauma. Traumatized individuals are able to depersonalize and gain distance from traumatic events in their lives.[187] After being victimized, these individuals feel severed from society, outside of the realm of human concern. The process of remembering their memories collectively reconnects them with society and restores their sense of human dignity.[188] Communal discussion, empathy from others who have had similar experiences, and apologies from offenders help them to understand and contextualize traumatic events.[189] By understanding that their experience is not unique to them and that society recognizes that they were wronged, they are able to obtain closure about past events and feel less victimized. They also feel less vulnerable as part of a collective that protects its members.

*Creating a Historical Record and Forestalling Collective Amnesia.* Armed conflict, mass atrocity, and repressive rule create historical discontinuity and rupture how a nation conceives of its foundations.[190] Thus, "historical justice" may be a goal of accountability in courts in times of transition, to the extent

185. Snead, *supra* note 135, at 1236.
186. Apfelbaum, *supra* note 13, at 85.
187. Madeira, *supra* note 1, at 418–19.
188. Snead, *supra* note 135, at 1241.
189. Madeira, *supra* note 1, at 422.
190. Teitel, *supra* note 69, at 69.

that judicial decisions can help to settle historical controversies after mass violence.[191] After such disquieting events, historical accountability serves as a basis for the transition to a new democratic order. Creating a historical record is important because it prevents society from forgetting injustices. Alternatively, collective amnesia could have a corrosive effect on social solidarity within a nation and allow old repressors to regain power.[192]

Indeed, in Guatemala, societal forgetting opened the door for human rights abusers to re-emerge in positions of power. Ex-dictator Rios Montt served as President of Congress despite his reign over one of the bloodiest periods of Guatemala's thirty-six-year armed conflict.[193] Otto Pérez Molina was elected President of the Republic in 2011, even though he was implicated in atrocities that occurred during the armed conflict.[194]

As the example of Guatemala further demonstrates, once human rights abusers consolidate power, they have an interest in erasing any wrongdoing from the historical record. The week before the start of the trial of Rios Montt, President Pérez Molina asserted to assembled business elites that, "in Guatemala, there was no genocide," and that he "personally never received a document to go to massacre or kill a population."[195] Later, after the conviction of Rios Montt, which was ultimately overturned on a procedural technicality, Congress and a group of powerful business elite released statements denying that genocide occurred.[196] In this context, the collective accounting of what occurred during the atrocities in a state sanc-

191. *Id.* at 72 ("After a regime's change, successor trials are commonly held out as the primary means to establish a measure of historical justice. . .Through the trial, the pursuit of historical truth is embedded in a framework of accountability and in the pursuit of justice.").

192. Snead, *supra* note 135, at 1237.

193. Sonia Perez Diaz, *Rios Montt: From army to dictatorship to courtroom*, Associated Press, May 10, 2013, *available at* http://bigstory.ap.org/article/rios-montt-army-dictatorship-courtroom.

194. Victoria Sanford, Op-Ed., *Victory in Guatemala? Not Yet*, N.Y. Times, May 13, 2013, http://www.nytimes.com/2013/05/14/opinion/its-too-soon-to-declare-victory-in-guatemalan-genocide.html?pagewanted=all&_r=0.

195. Open Society Justice Initiative, *supra* note 95, at 16 n.58.

196. *Id.* at 16–17; *Genocidio es negado por legisladores*, Prensa Libre, May 14, 2014, *available at* http://issuu.com/prensalibregt/docs/plmt14052014.

tioned forum would educate the general population and undermine the political power of human rights abusers.[197]

Collective memory is essential to creating historical records, because it can play the all-important role of preserving memory that might otherwise be lost. Some social psychologists have encountered reluctance or even an inability of victims of mass violence or genocide to articulate what happened to them without placing their experience within the context a collective narrative.[198] Halbwachs describes instances in which memories that were particularly traumatic, so-called "affective memories," were only recovered through a series of reflections that drew from shared points of reference.[199] Because collective memories are triggered by social stimuli, they are recalled more frequently, which some psychologists believe aids in their commitment to long-term memory.[200] For this reason, collective memories may have more vitality. Given that trials of human rights abuses often occur after lengthy delays, this is a particular important attribute of collective memory.

*Recalibrating Societal Norms.* Justice also has important normative significance after mass atrocities. Kim and Sikkink explain that "[h]uman rights trials are not only instances of punishment or enforcement, but also high-profile symbolic events that communicate and dramatize norms. It is thus difficult to separate these normative and performative aspects of prosecution from its material punishment and enforcement effects."[201] This goal aligns with the moral educative theory, in which the punishment is meant to communicate "the proper distinctions between good conduct and bad—distinctions

197. Jo M. Pasqualucci, *The Whole Truth and Nothing but the Truth: Truth Commissions, Impunity and the Inter-American Human Rights System*, 12 B.U. INT'L L.J. 321, 331 (1994).

198. Apfelbaum, *supra* note 13, at 86 ("When I later extended my work and explored the realities of dislocation of people caught in various forms of political disruption, who has faced massive violence or genocide such as the Holocaust, the Armenian massacres at the hands of the Turks in 1917, or the more recent Rwandan killings, I encountered the same reluctance—or, more properly, the inability—to recount these dreadful experiences unless there was some kind of state discourse that allowed people to couch their personal experiences within a collective narrative.").

199. HALBWACHS, *supra* note 12, at 126.

200. Hom, *supra* note 15, at 1761.

201. Kim, *supra* note 123, at 940.

which, when known, most of society will observe."[202] Law related activities also instill legal values in a society by establishing an expectation that disputes will be resolved in courts, not in the streets.[203] Mark Osiel also hopes that a renewed faith in the rule of law will foster what he calls "thinking citizens," people who will act as conscientious objectors in the face of future atrocities.[204] Collective memory contributes to this goal because it imparts "moral imperatives – the obligation to one's kin, notions of justice, indeed, the lessons of right and wrong – that form the basic parts of the normative order."[205] Simply put, it provides us with a moral compass through which to judge the wrongdoings of others and inform our behavior in relation to others.

*Structural Deterrence.* Legal scholar Michael Reisman identified the protection and reestablishment of public order as a fundamental goal of international law.[206] Since a breakdown of the rule of law and the legal systems that provide checks and balances on executive power typically accompany mass atrocities, law reforms in addition to training and educational programs for state officials are necessary measures for preventing future mass atrocities. These remedies act as what I call "structural deterrence" and seek to dismantle the state mechanisms that facilitated mass violence, thereby preventing future state violence. Since no individual acting alone could commit administrative murder without the support of the state apparatus, the undoing of these mechanisms provides more effective long-term deterrence than individual criminal accountability.

Since collective memory consolidates and contextualizes the experiences of many witnesses, a statement documenting collective memory provides a more complete understanding of the system of violence than individual testimony. Collective memory thus illuminates how the state apparatus functioned as a killing machine. International bodies could use this infor-

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202. Snead, *supra* note 135, at 1261–62.

203. JUDITH SHKLAR, LEGALISM: LAW MORALS AND POLITICAL TRIALS 145 (1964) ("Trials may actually serve liberal ends, where they promote legalistic values in such a way to contribute to constitutional politics and to a decent legal system.").

204. Drumbl, *supra* note 104, at 589.

205. IRWIN-ZARECKA, *supra* note 17, at 9.

206. Michael Reisman, *Institutions and Practices for Restoring and Maintaining Public Order*, 6 DUKE J. COMP. & INT'L L. 175, 176–77 (1995).

mation to determine the root causes of the violence and instruct States to make systematic changes that unravel the state mechanisms that supported violence. In this way, the admission of collective memory also serves judicial economy because it would be impracticable if not possible to present the testimony of all victims of mass atrocity.

### D. *Exploring the Effectiveness and Accuracy of Collective Memory v. Individual Memory*

The reticence to incorporating collective memory into judicial proceedings is based on the commonly held view that individual memory is more reliable and accurate than collective memory. Recalling from individual memory is imagined to be akin to playing a video recording of "real life," but individual memory is constructed and modified in much the same way as collective memory.[207] This is because the way we remember an event is influenced by how we felt at the time of the event. While the details of the event may evaporate, the strength of the emotion we felt remains.[208] In addition, how we feel when we recall an event influences how we will remember it in the future. Brian Havel describes memory as "cannibaliz[ing] itself," in that each time a memory is recalled it builds upon a construct of the last time it was recalled.[209] As David Shenk explained in his acclaimed study of Alzheimer's disease, all memory retains a "built-in fuzziness."[210]

Research suggests that the more frequently we remember an event the sharper it becomes in our mind. In the first empirical study of memory in 1885, Hermann Ebbinghaus tested his own memory by memorizing lists of information and then trying to recall them within varying intervals of time. Unsurprisingly, he found that the longer the delay, the less he could recall, and that his memory was strengthened by repeated recall.[211] Similarly, German researchers Georg Müller and Alfons Pilzecker found that lasting memory becomes "consoli-

207. Brian F. Havel, *In Search of a Theory of Public Memory, the State, the Individual, and Marcel Proust,* 80 IND. L.J. 605, 697–98 (2005).

208. *Id.* at 699.

209. *Id.* at 697.

210. *Id.* at 698.

211. Snead, *supra* note 135, at 1200.

dated" over time.[212] Since the repeated retrieval of information from memory has been shown to produce better long-term retention than a single retrieval, the formation of collective memory may actually improve memory by facilitating more frequent recalls spaced over a longer period of time.[213]

A number of clinical studies have tested whether collective memory is inherently "better" than individual memory. Numerous psychologists have found that when people work together to remember an event they actually remember with greater accuracy and more consistency over time than any one individual within the group.[214] For instance, in a study conducted by psychologists Dell H. Warnick and Glenn S. Sanders, participants were asked to recall a video of a crime either alone or in a group. The group accounts of the video were significantly more accurate accounts than those produced by the average individual working alone.[215] In another study in which participants were asked to recall a story, psychologists Stephenson, Brandstatter, and Wagner found that collaboration increased the confidence, completeness, and accuracy of recall.[216] Studies of jurors also found that they remembered evidence and testimony much better in groups than individually.[217] Indeed, in U.S. courts, judges frequently tell jurors to

212. *Id.* at 1201.

213. Roediger, *supra* note 15, at 138.

214. Clark, *supra* note 9, at 80 (summarizing the results of tests of individual versus group recall that demonstrated that "collaboration led to a consistent and significant increase in the number of accurate responses made by all subjects, with four-person groups producing the highest levels of accuracy . . ., individuals the lowest . . . and dyads falling between the two"); J. Hartwick et al., *Improving group decision making in organizations, in* GROUP REMEMBERING: RESEARCH AND IMPLICATIONS 41 (R. A. Guzzo ed., 1982); David A Vollrath et al., *Memory Performance by Decision-Making Groups and Individuals, in* ORGANIZATIONAL BEHAVIOR AND HUMAN DECISION PROCESSES 43, 289 (1989).

215. Dell H. Warnick & Glenn S. Sanders, *The Effects of Group Discussion on Eyewitness Accuracy*, 10 J. APPLIED SOC. PSYCHOL. 249, 254 (1980).

216. Geoffrey Stephenson et al., *An Experimental Study of Social Performance and Delay on the Testimonial Validity of Story Recall*, 13 EURO. J. SOC. PSYCHOL. 175 (1983).

217. Harry Kalven, Jr., *The Dignity of the Civil Jury*, 50 VA. L. REV. 1055, 1067 (1964) ("Different jurors remember, and make available to all, different items of the trial so that the jury as a group remembers far more than most of its members could as individuals."); Daniel Goleman, *Jurors Hear Evidence and Turn It into Stories*, N.Y. TIMES, May 12, 1992, at C1, C11 ("[A] study of

"rely on their collective memories" in lieu of reading a transcript. In addition, a recent study found that individuals collaborating in a group made fewer errors than the same number of individuals working alone.[218] Even the study that did not find that collaboration produced more accurate memories nonetheless found that it produced more consistent and concise accounts than when individuals recalled alone.[219]

Psychologists speculate that group recall is more accurate than individual recall in part due to cross-cuing, which occurs when individuals in a group provide cues for one another in the process of remembering events that allow them to recall events that they would not remember on their own.[220] Psychologist Hinsz suggested three additional reasons for the superiority of group memory: (1) groups have a greater pool of information to draw from than individuals; (2) groups tend to correct the errors of their members; and (3) decisionmaking processes by groups tend to be more effective than those of individuals alone.[221]

At the same time, collective memory also presents some significant drawbacks. Specifically, psychologists have documented a phenomenon called collaborative inhibition. Studies show that, although groups as a whole remember more than any one individual remembering alone, each individual member of the group is actually less productive in remembering than they would be remembering alone.[222] These studies track the productivity of collaborative groups versus "nominal groups," which is calculated by comparing the number of nonredundant answers produced by individuals working alone with the same number of individuals working collabora-

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more than 700 jurors . . . found that the average rate at which individual jurors remembered evidence from a trial was 60 percent; for judge's instructions the average was 44 percent. But for the jury as a whole, the memory rates were far better: 93 percent for facts and 82 percent for instructions.").

218. Michael Ross et al., *Collaboration Reduces the Frequency of False Memories in Older and Younger Adults*, 23 PSYCHOL. & AGING 85, 88–90 (2008).

219. A. Daniel Yarmey, *The Effects of Dyadic Discussion on Eyewitness Recall*, 13 BASIC & APPLIED SOC. PSYCHOL. 251, 251 (1992).

220. Mary S. Weldon & Krystal D. Bellinger, *Collective Memory: Collaborative and Individual Processes in Remembering*, 23 J. EXPERIMENTAL PSYCHOL.: LEARNING, MEMORY & COGNITION 1160, 1161 (1997).

221. Verlin B. Hinsz, *Cognitive and Consensus Processes in Group Recognition Memory Performance*, 59 J. PERSONALITY & SOC. PSYCHOL. 705, 705 (1990).

222. Rajaram, *supra* note 42, at 650.

tively.[223] Psychologists believe that this occurs because when people recall in groups the input of other members of the group disrupts each individual's idiosyncratic organization of information.[224] This disruption lowers the output of each contributing member and, in turn, lowers the output of the group as a whole. Another explanation for collaborative inhibition is social loafing, which occurs when individuals working in a group make less effort than they otherwise would individually because there is less accountability for individual success in a group setting.[225]

Additionally, although collective memory is generally more accurate than individual memory, psychological studies have found that misinformation from a "social source" such as a co-witness is more likely to be retained and repeated than misinformation from a non-social source such as a newspaper article.[226] Psychologists who study this so-called "social contagion" have found that individuals acquire false memories as a result of the introduction of false information in group settings.[227] This finding is particularly problematic since studies also show that collaborative groups were more confident in all of their responses than individuals, regardless of whether the information is correct or incorrect.[228]

## V. The Preservation of Collective Memory in Judicial Proceedings

### A. *The Inclusion of Collective Memory in Judicial Proceedings*

The abundant research finding that collective memory is more accurate, consistent, and concise than individual memory as well as its therapeutic significance for victims of mass atrocities make incorporating it into judicial proceedings a laudable goal. At the same time, the risk of social contagion requires that we must use the utmost care in determining the correct form and forum for this type of memory.

223. *Id.*
224. *Id.*
225. Harris, *supra* note 24, at 218.
226. *Id.*
227. Henry L. Roediger et al., *Social contagion of memory*, 8 Psychonomic Bull. & Rev. 365 (2001).
228. Harris, *supra* note 24, at 214.

In the regional mechanisms that attribute civil liability to the state, collective memory could aid them in determining the appropriate reparations for damages that result from mass atrocities. These bodies provide relief aimed at making victims of human rights whole. Since mass atrocities damage the social fabric of a community, relief sometimes takes the form of measures aimed at reestablishing community networks and pride, such as memorials or community centers. In these forums, collective memory could take the form of a victim impact statement in which members of the community express how they experienced the harm from the violation collectively. Allowing community members to collectively explain the significance of these events could aid legal institutions to more effectively assess damage to community cohesion and cultural infrastructure. Such testament would allow these bodies to identify the relief best suited to make the community whole. For instance, community members could present a collective statement explaining how the systematic targeting of a particular ethnic group inhibited the exercise of the group's traditions. In order to repair this damage, an international body could recommend the construction of a cultural center.

In the criminal context, the admission of collective memory presents a greater challenge. We must exercise great caution to ensure that we do not run afoul of the accused's due process rights and right to a fair trial. Despite evidence of collective memory's accuracy, psychological studies have also determined that misinformation can spread more quickly when it is delivered by social sources. Since collective memory is more difficult to vet, the admission of collective memory should not be used as proof of guilt during criminal trials. In a judicial setting where an individual's liberty is at stake, upholding the rights of the accused to a fair trial and due process is paramount. Especially when the crime involves mass atrocities, the need for procedures and mechanisms to protect these rights is heightened, because the horrifying events described at trial might give rise to an increased impulse to punish even in the absence of conclusive evidence of guilt.

Significant procedural protections are also important after armed conflict in order to avoid the appearance of (or actual) victor's justice. When one group triumphs over another after armed conflict, questions of fairness loom high. Because of the deep political and ethnic divisions that frequently ac-

company armed conflict, convictions of mass murder and violence are likely to be very politically charged. Having a show trial, which lacks credibility and legitimacy, would be very harmful to nations trying to instill renewed faith in the rule of law and reconcile opposing groups. Indeed, according to many scholars, trials facilitate reconciliation, because they provide a forum in which each side of a conflict can stand on equal footing. As Matthew Burnett explains, "[c]ourts provide a useful setting for the reenactment of the past because they afford both a public forum and procedural safeguards that offer both sides to a dispute the opportunity to present their version of the facts."[229] Likewise, Martha Minow emphasizes the importance of fairness in judicial proceedings so as not to create a new cycle of hatred and violence:

> The task is to help the society—and the watching world—not merely recall but also re-member, that is, to reconstitute a community of humanity against which there can be crimes (hence, "crimes against humanity"), and within which victims and survivors can be reclaimed as worthy members. Indeed, the task is to help avoid the castigation and exclusion of whole groups of people—labeled as co-nationalists or otherwise associated with perpetrators—from the sphere of common concern . . . . For it is that fundamental humanity that entitles [those charged and eventually convicted of war crimes] to both procedural rights and to inclusion within the legally-framed sphere of human responsibility. Otherwise, they could simply be targets for retaliation and revenge.[230]

For these reasons, the strong impulse to punish must be met with equally strong protections for the accused. In such trials, collective memory should not be introduced as evidence of guilt of crime because of the difficulty of vetting it. For example, it would be impossible to cross-examine a group's collective memory.

Still, collective memory could play a similar role in many criminal proceedings as the one sketched out above in the re-

229. Matthew J. Burnett, *Remembering Justice in Rwanda: Locating Gender in the Judicial Construction of Memory*, 3 SEATTLE J. SOC. JUST. 757, 760 (2005).

230. Martha Minow, *The Work of Re-Membering: After Genocide and Mass Atrocity*, 23 FORDHAM INT'L L.J. 429, 430–31 (1999).

gional mechanisms for human rights protection. Specifically, communities could present what they lost as a collective so that the court can compensate for the losses that impact the community. In contrast to the American criminal law regime, many foreign and international criminal courts already have mechanisms in place that permit victims to have a direct role in prosecutions. Indeed, the vast majority of countries in the world have civil law systems, in which victims or organizations acting on their behalf in an *action civile* or *action popularis* can obtain damages as part of the criminal proceedings.[231] This practice has influenced international criminal courts, which, in contrast to the American criminal law regime, allow for victims to participate in the proceedings. For example, in the Extraordinary Chambers in the Courts of Cambodia, victims can intervene not only as witnesses but also as parties requesting reparations.[232] Article 68(3) of the Rome Statute allows victims to participate in the proceedings before the ICC at any stage provided that their personal interests are affected.[233] Pursuant

231. Christopher Hall, *The Duty of States Parties to the Convention against Torture to Provide Procedures Permitting Victims to Recover Reparations for Torture Committed Abroad*, 18(5) EUR. J. INT'L L. 921, 934, n. 55 (2007) (citations omitted) ("It is common for civil law countries, which are the vast majority of countries in the world, to require their courts to include civil claims in criminal proceedings initiated by victims or organizations acting on their behalf in an *action civile* or *action popularis*. For example, a study limited to EU Member States notes that such procedures existed in Austria, Belgium, Denmark, Finland, France, Germany, Greece, Italy, Luxemburg, the Netherlands, Portugal, Spain, and Sweden. . . Moreover, other states permitting civil claims to be raised in criminal cases based on universal jurisdiction include Argentina, Bolivia, China, Colombia, Costa Rica, Myanmar, Panama, Poland, Romania, Senegal, and Venezuela.").

232. Rule 33 of the Internal Rules of the Extraordinary Chambers in the Courts of Cambodia similarly provides that "[a]t any stage of the proceedings, the Co-Investigating Judges or the Chambers may, if they consider it desirable for the proper adjudication of the case, invite or grant leave to an organization or a person to submit an *amicus curiae* brief in writing concerning any issue. The Co-Investigating Judges, and the Chambers concerned shall determine what time limits, if any, shall apply to the filing of such briefs." Rule 33, Extraordinary Chambers in the Courts of Cambodia (Jan. 16, 2015), *available at* http://www.eccc.gov.kh/sites/default/files/legal-documents/Internal_Rules_Rev_9_Eng.pdf.

233. Rome Statute art. 68(3), July 7, 1998, 2187 U.N.T.S. 90 ("Where the personal interests of the victims are affected, the Court shall permit their views and concerns to be presented and considered at stages of the proceedings determined to be appropriate by the Court and in a manner which is

to this provision, victims may present their own views separate and apart from the prosecution. For example, in its first decision setting the principles and procedures applicable to reparations, the ICC in *Lubanga* considered the written observations submitted by the International Center for Transitional Justice and the Women's Initiative for Gender Justice on behalf of victims.[234]

### B. *Human Rights Lawyers as Preservers and Promoters of Collective Memory*

Human rights lawyers and advocates can also play important roles as promoters and preservers of collective memory by facilitating conversations among communities that have been subject to mass violence. This process will support the development of collective memory.

Some international courts, including the ICC and the IACtHR, already carve out a special role for a lawyer who acts as a common representative for groups of victims. Article 25(2) in the Rules of Procedure of the IACtHR ("Participation of the Alleged Victims or their Representatives") provides that "[w]hen there are several alleged victims or representatives, these shall designate a *common intervener*, who shall be the only person authorized to present pleadings, motions, and evidence during the proceedings, including the public hearings."[235] In the case of the *Dismissed Congressional Employees v. Peru*, the IACtHR explained that "in their briefs and oral arguments and in the evidence they provided, the common inter-

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not prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial. Such views and concerns may be presented by the legal representatives of the victims where the Court considers it appropriate, in accordance with the Rules of Procedure and Evidence."); *see also* ICC R. Proc., *supra* note 112, at R. 103 (allowing for amicus curiae and other forms of submission "at any stage of the proceedings," and "a Chamber may, if it considers it desirable for the proper determination of the case, invite or grant leave to a State, organization or person to submit, in writing or orally, any observation on any issue that the Chamber deems appropriate.").

234. *See* Prosecutor v. Thomas Lubanga Dyilo Case No. ICC-01/04-01/06-2904, Decision Establishing the Principles and Procedures to be Applied to Reparations, Trial Chamber I, ¶ 4 (Aug. 7, 2012); Prosecutor v. Thomas Lubanga Dyilo Case No. ICC-01/04-01/06-2870, Decision Granting Leave to Make Representations in the Reparations Proceedings, (Apr. 20, 2012).

235. Rules of Procedure of the Inter-American Court of Human Rights art. 25(2), Aug. 1, 2013.

venors [sic] should channel the different claims and arguments of the various representatives of the alleged victims or their next of kin, even though these should be submitted to the Court in a single brief."[236] Similarly, Rule 90(2) of the ICC's Rules of Procedure and Evidence ("Legal representatives of victims") provides that "[w]here there are a number of victims, the Chamber may, for the purposes of ensuring the effectiveness of the proceedings, request the victims or particular groups of victims, if necessary with the assistance of the Registry, to choose a common legal representative or representatives."

Common interveners should view facilitating conversation among victims as a central component of their representation. Lucie White describes how lawyers have a distinct role as outsiders with professional skills in engendering dialog that results in collective understanding amongst groups.[237] She described how a lawyer and an organizer effectively mobilized villagers in South Africa to resist the apartheid government's attempts to resettle them to remote towns.[238] Essential to this process was the ability of the lawyer to resist taking over as the "expert" and instead employ strategies that create cohesion and empower the community to speak for themselves.[239] White also suggests that groups should search for shared understandings about their reality and the problems they face through informal conversation.[240] Lawyers could generate such discussions by hosting town hall meetings in affected communities. During these meetings, the lawyer would ask the group questions about the atrocities that befell them and open up the floor to community members to discuss how they were harmed.

Human rights lawyers seeking to adopt a collective approach to representation can take lessons from community lawyers.[241] In contrast to lawyers who restrict their representa-

236. Aguado-Alfaro v. Peru, Preliminary Objections, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 158 (Nov. 24, 2006).

237. White, *supra* note 180, at 762 (1988).

238. *Id.* at 699.

239. *Id.* at 740–42.

240. *Id.* at 760–61.

241. *See generally* Caroline Bettinger-Lopez et. al., *Redefining Human Rights Lawyering Through the Lens of Critical Theory: Lessons for Pedagogy and Practice*, 18 GEO. J. ON POVERTY L. & POL'Y 337, 352 (2011) (arguing "that many as-

tion to individuals, community lawyers believe that the mobilization of communities is critical to achieving structural change in society.[242] Community lawyers prioritize the community as the primary messenger and leader in legal representation.[243] They take an inherently interdisciplinary approach to lawyering and are often part of a larger problem-solving team of organizers, social workers, medical professionals, and community leaders.[244] Scholarship on community lawyering has already addressed many of the challenges that human rights lawyers who want to act as promoters and protectors of collective memory might encounter, such as how to define "a community" and how to respond to dissenting voices within the community.[245] Common interveners like community lawyers could also play a role in developing democratic decision-making structures within their community client.[246]

## VI. Conclusion

In sum, after mass atrocity, survivors feel a strong impulse to unite and remember their experiences together. The collaborative remembering of these events results in a reframing of memories that is cathartic and leads to re-association with others in society. Despite assertions that legal proceedings aid

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pects of the community lawyering movement are a response to the critical analysis of poverty law practice.").

242. Muneer Ahmad defines community lawyering as "a mode of lawyering that envisions communities and not merely individuals as vital in problem-solving for poor people, and that is committed to partnerships between lawyers, clients, and communities as a means of transcending individualized claims and achieving structural change." Muneer Ahmad, *Interpreting Communities: Lawyering Across Language Difference*, 54 UCLA L. Rev. 999, 1079 (2007); *see also* Sameer M. Ashar, *Law Clinics and Collective Mobilization*, 14 Clinical L. Rev. 355 (2008) (offering clinical approaches to reconfigure public interest law and arguing for the moral imperative to engage in social reconstruction).

243. Charles Elsesser, *Community Lawyering - the Role of Lawyers in the Social Justice Movement*, 14 Loy. J. Pub. Int. L 375, 400–01 (2013).

244. Karen Tokarz et al., *Conversations on "Community Lawyering": The Newest (Oldest) Wave in Clinical Legal Education*, 28 Wash. U. J.L. & Pol'y 359, 379–80 (2008).

245. *Id.* at 117–20; Michael Diamond, *Community Lawyering: Revisiting the Old Neighborhood*, 32 Colum. Hum. Rts. L. Rev. 67, 117–20 (2000).

246. Rachel Lopez & Susan Brooks, *Designing a Clinic Model for a Restorative Community Justice Partnership*, 46 Wash. U. J.L. & Pol'y __ (forthcoming 2015).

in the development of collective memory, they may actually harm it. Because justice often comes long after collective memory has been established, victims seeking justice may be forced to re-conceptualize their experiences so that they fit into legal paradigms that favor individual memory and representation. As a result victims may feel traumatized and disempowered.

There are significant reasons to reconsider the preference for individual memory over collective memory in the transitional justice context. Psychological studies indicate that collective memory is more accurate, complete, and concise than individual memory. Additionally, the goals of transitional justice are much broader and more far-reaching than traditional justice and justify a modified approach. Specifically, transitional justice aims to provide redress to victims, create a historical record, dismantle the state mechanisms that supported violence, and facilitate reconciliation.

The admission of collective memory in judicial proceedings furthers these goals and may be instructive to courts when they determine remedies. For instance, since mass atrocities disrupt social cohesion and destroy cultural connections, there is a strong need to assess damages at the community level and award reparations that are narrowly tailored to repair this special type of collective harm. Admission of collective memory could help courts and quasi-judicial human rights bodies to determine what reparations are needed to make communities whole again. It might also aid courts in determining what legal reforms and trainings are needed to ensure that state-sponsored violence does not recur. In light of these considerations, judicial institutions addressing mass atrocity should endeavor to incorporate collective memory into their proceedings. Lawyers should also recognize their role in preserving collective memory and engage in practices that facilitate its generation within communities seeking to heal after mass atrocity.