Uses of History and Collective Memories by International Courts and Tribunals
Moshe Hirsch

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A. Introduction

1 International tribunals occasionally interact with collective memories prevailing in various communities, prominently with regard to historical narratives of major past events. Both historians and sociologists study past events and their ramifications. Historical writing (principally explored in historiographical literature) and collective memories (primarily studied by sociologists) present some essential distinctive features but also share certain significant commonalities. While some traditional historians aim at revealing and interpreting as accurately as possible ‘how things actually were’ in the past, sociologists focus on how a particular community perceives and interprets the past, assuming that collective memories are significantly influenced by the specific features of the contemporary society. International adjudicators are deeply rooted in social groups and affected by collective memories existing in their communities. International tribunals are occasionally involved (alongside other actors) in the development of historical narratives, either deliberately or incidentally. In both cases, tribunals have discretion whether to adopt an expansive or a restrictive approach regarding the presentation of the dispute’s historical background. This contribution briefly discusses the interactions between international law and collective memories, addressing the broad contours of the practice of international tribunals in this sphere and examining, primarily from a sociological perspective, the normative question of whether it is desirable for international tribunals to assume an active role in the construction of historical narratives. Generally, different sociological perspectives can not only shed light on previous legal developments but also generate different normative recommendations regarding future legal behaviour.

B. History and Collective Memory

1. History

2 History is a disciplined enquiry into the past and is occasionally undertaken by classical historians who describe as accurately as possible, interpret, and criticize past events. Some traditional historians embrace a combination of the ideal objective of unbiased analysis with a recognition of certain subjective elements in historical writing (interpretation is particularly underlined by cultural historians). Some traditional professional historians insist on a lengthy immersion in primary resources, deliberately shedding their present-day assumptions and aiming at valuing the past for its own. Thus, a conventional historian’s main task is to find out how and why people acted as they did, by ‘stepping into their shoes’, seeing the world through their eyes and, as far as possible, judging their conduct by those actors’ standards (Tosh, 2015, 2–12, 215–16; Cheng, 2012, 92–110, 124). Professional historians do not only seek to uncover the past, but also to explain it and its meaning, thus placing historical events in their context (Tosh, 2015, 9–10; Claus and Marriott, 2017, 24). They also seek to trace historical processes (in terms of relationships between various events over time) and explain causes and consequences, exploring both manifest and latent causes (Tosh, 2015, 10, 125–26; Claus and Marriot, 2017, 20–24). Since the past is never completely captured in documents or other primary resources, any attempt to reconstruct the past presupposes some exercise of imagination. The engagement of some conventional historians’ scholarship with interpretation and narration of past events creates a certain tension with historians’ classical aspirations to recreate the past as accurately as possible (Tosh, 2015, 142, 124: Claus and Marriot, 2017, 13–20). Historical analysis also requires critical evaluation and this feature constitutes one of the most significant features of the historian’s work (Cheng, 2012, 9–10; Tosh, 2015, 271).

2. Collective Memory
Like history, the notion of collective memory in sociological literature refers to knowledge about the past but unlike some traditional historical writing, sociological scholarship emphasizes the social aspects of exploring and remembering certain past events. People normally acquire their memories not only through individual means, but through social processes as well (Halbwachs, 1992, 38). Social groups often provide materials for memory, and prod individuals into remembering particular events. Groups produce memories of events that individuals have not directly experienced. The sociological study of memory does not imply that people’s recollections are unaffected by personal or biological factors; it rather highlights the social factors that influence memory (of both individuals and communities), emphasizing that what we remember includes more than what we have personally experienced. Remembering and forgetting are closely interlinked, and while some past occurrences enjoy numerous commemorations, others are subject to ‘collective amnesia’ (Olick and Robbins, 1998, 106; Zerubavel, 1996, 286; Zerubavel, 2003, 2–5).

Though collective memory relates to the past, it is constructed in the present and influenced by contemporary society and its particular features. Furthermore, the construction of collective memory is a selective process: not all historical events are stored in the collective memory, and even where a certain occurrence is remembered, the group’s memory does not normally include a precise and comprehensive account of all aspects of the event (Zerubavel, 1995, 6–9; Vinitzky-Seroussi, 2002, 34–35). Thus, collective memory interprets historical events according to the contemporary social context of the particular society (Assmann and Czaplicka, 1995, 130; Schwartz, 2000, 18). Collective memory confers meaning on historical events, and acts of commemoration often produce a historical narrative about a particular past (Zerubavel, 1995, 6; Vinitzky-Seroussi, 2002, 34–35). Such selective narratives occasionally offer a moral message to the group and provide some normative guidelines regarding appropriate behaviour (Assmann and Czaplicka, 1995, 131; Poole, 2008, 162; Zerubavel, 1996, 6), such as emphasizing the need for fighting the risk of inflation or vigilantly defending national sovereignty in the international legal sphere (Hirsch, 2015, 58–88).

Collective memory is substantiated and transmitted through a wide array of practices, including various public rituals, monument building, national holidays, museums, school textbooks, mass media, street naming, popular culture, or court proceedings. Agents of memory include various actors, including governmental and quasi-governmental bodies, historians, the mass media, → non-governmental organizations (NGOs) (including religious institutions), and occasionally tribunals. Sociological studies of memory have expanded on the significant role of collective memory in the formation of collective identity of social groups (including nations or regional groups) (Zerubavel, 1996, 290; Zerubavel, 2003, 3, 5).

Collective memories have an integrative influence and may also form the basis for various demands, such as taxation or sacrifice (Olick and others, 2011, 42). Political leaders do not ignore this factor and occasionally try to use collective memory as an instrument to further their aims. Occasionally, ‘counter memories’ constitute a source of opposition to be mobilized by subgroups, eg minorities (Foucault, 1997, 160–64, 150; Foucault, 2003, 68). Political leaders, however, often cannot control collective memories in the recruitment of people to their political aims. Furthermore, the exploration of the political dimension of social memories should not result in the reduction of the complex and multi-actor process of the formation of collective memory into political analysis alone (Schwartz, 2000, 14–17).
Social groups do not have a single memory and commemorative practices are not necessarily uniform across all segments of society. Multivocal commemorations take place in a shared space, a shared time, or a shared text which carries diverse meanings. The phenomenon of fragmented commemoration is defined as ‘multiple commemorations in various spaces and times where diverse discourses of the past are voiced and aimed at disparate audiences’ (Vinitzky-Seroussi, 2002, 32). In the latter cases, collective memory reflects consensus but is limited to the particular group participating in the specific commemorative practices (Vinitzky-Seroussi, 2002, 31–32).

3. Common Characteristics

The notions of history and collective memory are conceptually different but they also share some common characteristics. Notwithstanding many streams in historiography and collective memory scholarships, the two fields differ with regard to the critical timeframe and particular community in which the past is reconstructed. Some work by classical historians aims to be detached from the present in which the historical study is undertaken, and ‘to show how things actually were’ (Tosh, 2015, 268). Sociological analysis of collective memory does not aspire to discover the objective truth regarding a certain historical event, but rather to study how a particular social group perceives and interprets that historical event. Thus, while some classical historians aim at ‘liberating the past from the present’ (Tosh, 2015, 6), sociologists widely assume that collective memories of past events are constructed in the present and are influenced by contemporary society and its specific socio-cultural features (Assmann and Czaplicka, 1995, 130; Schwartz, 2000, 18).

On the other hand, scholars in both fields are aware that interpretation of historical events is central to the understanding of the past (either by present-day historians or members of a certain social group), and that the development of historical knowledge is influenced to a certain degree by social characteristics prevailing among either historians (Tosh, 2015, 20; Cheng, 2012, 110) or people belonging to some community. Experts in both fields emphasize the significant role of narratives in historical writing (Stone, 1979, 3; Tosh, 2015, 124–25; Cheng, 2012, 129–31), and collective memory (E Zerubavel, 2003, 13). The characteristics shared by these two groups of experts clearly arise from the statement of the historiographers Claus and Marriot: ‘yet historians are social and cultural animals, prompting the suggestion that history is less a science and more an art: it is constructed through the imagination of a particular moment rather than discovered through experiment or objective methodology’ (Claus and Marriot, 2017, 8). The role of individual subjectivity in historical writing is particularly emphasized by cultural historians (Cheng, 2012, 124; Tosh, 2015, 205–16).

Historical writing and the study of collective memory feed one another. From the social historian’s perspective, collective memory is an important topic of historical enquiry and ‘no comprehensive social history can afford to ignore it’ (Tosh, 2015, 20). From the sociological perspective, historians often constitute agents of memory and sociologists analysing collective memory explore, for example, why a particularly widespread perception of an historical event has changed over time among historians. The following discussion (largely from a sociological perspective), considers historians as significant agents of memory.

C. International Law and Collective Memory

Collective memory and law (see generally Savelsberg and King, 2007), including international law, interact in both directions: law affects and is affected by collective memory. International legal rules and institutions occasionally affect the memories of various social groups, including nations, regional groups, and global institutions. For example, some treaties, such as the 1842 Nanjing Treaty (Schwartz and Kim, 2010, 5), or international institutions’ resolutions are incorporated into national or regional memories,
prominently those related to the establishment of these nations or transnational groups (e.g. Hansen-Magnusson and Wustenberg, 2011) or to some major international conflict.

12 Some international instruments are explicitly involved in collective memories. Thus, the 1972 World Heritage Convention seeks to protect not only natural sites but also ‘sites of memory’ (United Nations Educational, Scientific, and Cultural Organization (‘UNESCO’), World Heritage at the Heart of UNESCO’s Peace Mandate), which are related, inter alia, to the ‘history of peoples’ (Arts 1 and 13 World Heritage Convention, 1972). Similarly, the European Convention on the Protection of the Archaeological Heritage expressly aims to protect archaeological heritage ‘as a source of the European collective memory’ (Art 1 European Convention on the Protection of the Archaeological Heritage (Revised), 1992).

Some international institutions have designated annual memorial days to commemorate certain historical events, such as the International Holocaust Remembrance Day (United Nations General Assembly (‘UNGA’) Res 60/7 (2005)), the International Day of Remembrance for the Victims of Slavery and the Transatlantic Slave Trade (UNGA Res 62/122 (2007)), or the European Union (‘EU’) Europe Day commemorating the 1950 Schuman Declaration (EU, ‘Europe Day’).

13 International law also affects the formation of collective memory in indirect manners. For example, treaties restricting the collection and use of data (e.g. Convention for the Protection of Individuals with regards to Automatic Processing of Personal Data, 1981) or conventions protecting certain human rights, such as the right to privacy or freedom of expression. Such international legal rules affect the capacity of various agents of memory to collect and disseminate information regarding historic events. Collective memories occasionally affect the content of international legal rules, their interpretation, and compliance with these rules. Some collective memories are institutionalized in various international legal mechanisms, while others are semi-institutionalized in diverse international soft laws. For example, the 1994 Inter-American Convention on Forced Disappearance of Persons and the 1973 Apartheid Convention were considerably affected by collective memories of past events. Germany’s collective memory of the hyperinflation during the Weimar Republic influenced the content of the EU Economic and Monetary Union law and its implementation during the Eurozone debt crisis (2009–2012) (Hirsch, 2015, 58–72). Nations’ collective memories occasionally affect states’ positions and conduct regarding the implementation of international legal rules. Thus, for example, Japan’s collective memory affects its position concerning the 1968 Non-Proliferation Treaty (Chanlett-Avery and Nikitin, 2009, 1), and various states’ territorial claims are often based on the collective memories of past events.

D. International Adjudication and Collective Memory

14 The discussion below starts with a general examination of interactions between various international tribunals (both criminal and non-criminal) and collective memories, and Section E addresses some controversies regarding the role of criminal tribunals and non-criminal tribunals in this field.

1. Interactions between Tribunals and Collective Narratives

15 International tribunals (→ International courts and tribunals) may be involved in diverse manners in the development of collective memories. Thus, for instance, tribunals’ archives (→ Archive: International courts and tribunals) often constitute a repository of knowledge that includes historical documents, witness’ testimonies (→ Testimony), and expert reports (→ Experts) presented during the legal proceedings. Various official reports, such as Opinions of the Advocate General of the Court of Justice of the EU or Merits Reports of Cases issued by the Inter-American Commission of Human Rights are often also significant, and are included in such archives. One of the factors occasionally affecting the selection of
cases brought before international criminal tribunals (→ International criminal courts and tribunals) (and not referred to national judiciaries) is the goal of ensuring that the historical narrative emerging from the tribunal’s case law will represent the event’s various aspects. The ‘referral’ practice of the → International Criminal Tribunal for the Former Yugoslavia (ICTY) shows that one of the criteria applied by the Prosecutor was ‘representation’ and the need to set the historical record of the events (Noam, 2013, 156–68; Prosecutor v Milosević, 2005, 11; Côté, 2005, 176). Navanethem Pillay, the former president of the → International Criminal Tribunal for Rwanda (‘ICTR’), stated that ‘the ICTR, through its jurisprudence and trial proceedings, is establishing a historical record of what happened in Rwanda between April and July 1994—a record which will help keep alive the world’s collective memory’ (Pillay, 2003).

16 A more active approach has been presented in the jurisprudence of the → Inter-American Court of Human Rights (IACtHR), and its practice grants special remedies in this sphere (Antkowiak, 2008, 381–82). The IACtHR explicitly aimed to influence collective memories, and in a series of cases has ordered respondent states to commemorate the victims of human rights violations. For example, it ordered Mexico to erect a monument to commemorate the women victims of gender-based murder (Cotton Field Case, Gonzales v Mexico, 2009, para 471); and Guatemala to establish a museum (Rio Negro Massacres v Guatemala, 2012, paras 279–80). In the ‘Street Children’ case, the Inter-American Court ordered the respondent state to designate an educational centre in the name of the young victims and place there a plaque with the victims’ names. The Court explained that ‘[t]his will contribute to raising awareness in order to avoid the repetition ... and will keep the memory of the victims alive’ (‘Street Children’ v Guatemala, 2001, para 103).

17 As discussed below, adjudicators taking part in international litigation regarding well-known historical events (such as the Yugoslav wars during the 1990s) are often influenced by the collective memories of these events prevailing in their respective communities. The latter collective memories may influence international judges, for example, while they interpret evidence presented during the legal proceedings.

2. Historical Narratives

18 Although international tribunals’ involvement in the construction of collective memories may take diverse forms (eg archives of historical documents or ordering to commemorate certain events), the remaining parts of this contribution focus on tribunals’ role in presenting historical narratives in their judgements. Stone defines ‘narrative’ in historical writing as ‘the organization of material in a chronologically sequential order and the focusing of the content into a single coherent story, albeit with sub-plots’. The two essential ways in which narrative history differs from structural history is that its arrangement is descriptive rather than analytical and that its central focus is on man not circumstances (Stone, 1979, 3). Historical narratives play an important role in modern history-writing (Stone, 1979, 3; Tosh, 2015, 124–25; Cheng, 2012, 129–31) as well as in collective memory. As to historians’ work, Tosh concludes: ‘history without narrative is a non-starter: It is narrative that gives shape and direction to what would otherwise be a formless, incoherent mess’ (Tosh, 2015 132). On the central role of historical narratives in collective memories, E Zerubavel explains: ‘[o]ne of the most remarkable features of human memory is our ability to mentally transform essentially unstructured series of events into seemingly coherent historical narratives. We normally view past events as episodes in a story ..., and it is basically such “stories” that make these events historically meaningful’ [emphasis in original] (E Zerubavel, 2003, 13).
3. Practice of International Tribunals

19 Where international tribunals describe a historical event in their decision, the legal decision may constitute a ‘site of memory’ and influence collective memories prevailing in certain international, national, or sub-national communities. Such judicial-historical pronouncements are often of profound significance for the litigating parties, social groups, and individuals. International adjudicators may be involved in the construction of historical narratives in either a deliberate or an incidental manner. In certain cases, tribunals are required to establish some historical facts in order to resolve a particular legal dispute and the presentation of an historical narrative is incidental to their role in resolving the specific legal dispute (eg regarding the genocide in Srebrenica, Prosecutor v Krstic, 2001, paras 6–71). Some international tribunals adopted a minimalist approach and did not present the historical narrative in cases where it was not strictly required to do so in order to determine the particular legal issues. For example, the 1996 Advisory Opinion on the Legality of Nuclear Weapons (Nuclear Weapons Advisory Opinions) of the International Court of Justice (ICJ) does not mention the renowned use of such weapons in Hiroshima and Nagasaki (Legality of the Threat or Use of Nuclear Weapons, 1996).

20 International tribunals have not adopted a consistent approach in this sphere and some tribunals went further than necessary to settle the particular legal questions. For example, though the Grand Chamber of the European Court of Human Rights (ECtHR) ruled in Janowiec v Russia that it had no competence to examine the complaint, the judgment devoted ten paragraphs to a description of the ‘Molotov Ribbentrop Pact’, the invasion of Poland in September 1939, the ‘Katyn Forest massacre’ executed by Soviet Union forces in Poland in April–May 1940 (including citation of a previously confidential document), and the attempts to conceal the identity of the perpetrators (Janowiec v Russia, 2013, paras 14–23).

21 The impact of international tribunals’ historical narratives on the collective memories of communities has not been examined in a comprehensive manner. There are some indications, however, that where such judicial-historical pronouncements clash with significant local collective memories, the local narratives are likely to prevail within the local community (eg regarding the impact of the ICTY’s judgements concerning the genocide in Srebrenica, Milanovic, 2016, 247–48). This significant evidence, however, does not imply that historical narratives presented by international tribunals do not influence any of the litigating parties or non-disputing communities.

22 A discussion on the role of international tribunals in the construction of historical narratives brings to the fore the broader question regarding the functions of tribunals in the international community (Sociological approaches to international adjudication). In addition to the traditional functions (eg dispute settlement) (eg Alvarez, 2014, 161–76), from a sociological perspective it is clear that tribunals also fulfil non-strictly-judicial functions, such as promoting social integration (Madsen, 2014, 244–45), social control (Hirsch, 2015, 163–68), and socialization (Cho, 2015, 128–31, 152; De Silva, 2018, 288). In addition, international tribunals express societal values and identities of the international community (Werner, 2001, 79). Tribunals’ proceedings often fulfil both traditional judicial and broader social functions, and, in reality, these functions are frequently intertwined.

E. Controversies

23 This section addresses controversies over the role of criminal and non-criminal tribunals regarding the presentation of historical narratives. The historical-record-setting role of international criminal tribunals constitutes a source of controversy in the literature, with some scholars criticizing it. The criticism prominently relates to the primary function of criminal tribunals to try individuals for their behaviour and the limitations of these tribunals in historical writing (relating, for example, to specific legal classifications and...
rules of evidence) (eg Koskenniemi, 2002, 1; Schabas, 2012, 159; Wilson, 2005, 912-16; Prosperi and Borda, forthcoming) (→ Evidence: International criminal courts and tribunals). Of no less importance is the risk that international adjudicators would be preoccupied with the historical-record-setting role, and neglect their critical role in determining individual responsibility (which may have grave consequences) (eg Koskenniemi, 2002, 7, 34; Osiel, 1997, 467, 505-11; Wilson, 2011, 5). The latter consideration indicates that international criminal tribunals should apply a far more cautious approach in this sphere.

24 The following discussion focuses on the question of whether it is desirable for non-criminal tribunals to assume an active role in the development of historical narratives, exploring this question primarily from a sociological perspective. The discussion here on non-criminal tribunals takes into account some literature on the general aspects of international tribunals (such as the functions of both criminal and non-criminal tribunals). The role of criminal tribunals (and their distinctive features in this field) is discussed separately in paragraph 23 above. Sociology is marked by theoretical diversity (Hirsch, 2008, 290-95); different sociological perspectives present different conceptions of collective memory, emphasizing different roles for international tribunals, and providing different answers to the above question. The reply to the question regarding the role of tribunals in this sphere is often not dichotomist; in certain cases, international tribunals are bound to establish some historical facts in order to resolve a specific legal question. Even in the latter case, however, international tribunals have discretion and may adopt either an expansive approach (elaborating on the particular historical narrative) or a restrictive approach (presenting only the most essential facts required to resolve the particular legal question).

25 Collective memories are significantly involved in the formation of the collective identity of social groups (including nations) (Olick and others, 2011, 41-42; Nora, 1989, 15). The integrative effect of collective memories is particularly significant for sociologists associated with the structural-functional approach which underlines the value of social integration and stability for social groups. Increasing social cohesion may be considered of particular importance for the international society, which is extremely heterogeneous and thus apparently more susceptible to social tensions and destructive conflicts. This consideration suggests that tribunals should apply an expansive approach towards the construction of unifying historical narratives promoting international social integration. The latter consideration, however, does not imply that tribunals should always assume an active role in the development of collective memories. When encountering divisive narratives that may constitute a source of friction, tribunals should adopt a restrictive approach and avoid promoting such historical narratives that enhance the prospects of international tensions (Hirsch, forthcoming, sec 4.1). The tendency not to promote divisive historical narratives resonates somewhat within the ECtHR jurisprudence (eg Perinçek v Switzerland, 2013, paras 115-17).

26 Other streams in sociological literature (prominently the symbolic-interactionist approach) do not support the promotion of international social integration through authoritative institutions (Hirsch, 2008, 291-93). According to the latter approach, meaningful historical narratives are more likely to emerge from interaction in smaller groups, and interpretations of past events developed in local communities are more likely to reflect the particular socio-cultural features of these communities. From this perspective, the extreme socio-cultural diversity characterizing the international society raises significant doubts as to whether global tribunals are capable of forming truly global narratives (Hirsch, forthcoming, sec 4.2).
Symbols play an important role in sociological scholarship (and particularly in approaches associated with the symbolic-interactionist approach). Society significantly depends upon symbols and the latter are often linked with particular experiences and perceptions. Social communication is carried out through symbols, allowing people to articulate cultural meanings. Diverse symbolic communications (prominently through words) are crucial for the social perception and categorization of our reality (Charon, 2011, 48–53; Denzin, 1992, 27; Carter and Fuller, 2016, 1). Sociological analysis of international law is attentive to the expressive role of international tribunals and the symbolic meaning of their decisions. Historical narratives presented in judgements of international tribunals are occasionally of vital importance to both litigants and social groups. Such judicial historical-narratives sometimes constitute a meaningful relief for nations, groups, or individuals whose rights have been violated. Judicial recognition of past wrongs is often more important for the communities involved than material remedies. From this perspective, judicial-historical narratives are meaningful even where a particular tribunal’s narrative is not accepted by wider society or does not promote social integration (Hirsch, forthcoming, sec 4.2). These considerations suggest that tribunals should not underestimate their expressive-symbolic function, particularly where the evidence indicates that the vital rights of certain groups or individuals have been breached.

One of the prominent divides in sociological literature relates to the focus placed on either wide-scale societies or smaller groups and individuals. Micro-sociological approaches emphasize the role played by small communities and individuals in constructing a wider society. Such approaches favour the emergence of historical narratives ‘from below’, from interactions in smaller groups, rather than narratives imposed on such communities by wider society. This perspective suggests that local bodies should develop historical narratives and that there is a preference for regional institutions (such as African or European tribunals; → Courts of regional integration organizations) over global ones (such as the ICJ). Generally, national or regional tribunals better reflect the specific socio-cultural features of particular communities and are in a better position to express their collective memories.

In light of the exceptional diversity of the international society, a relatively small number of historical narratives is likely to be shared by all regions and the few truly global narratives should emerge from ‘bottom-up’ interactions in (or between) national or regional communities (rather than shaped by global tribunals for all national and regional societies). These considerations suggest that national or regional historical narratives should generally be promoted by national or regional tribunals (Hirsch, forthcoming, sec 4.2), possibly also by such tribunals aspiring to enhance a sense of national or regional identity. The aspiration to reflect and develop ‘regional memories’ is echoed in some judgements of the IACtHR regarding the regional trauma of forced disappearances and related crimes perpetrated in Latin American countries during the Cold War, particularly in the 1970s and 1980s (eg Goiburú v Paraguay, 2006, para 61 (5) et seq).

International struggles are not only fought for economic and political resources but also over symbolic ones, including collective memories (eg Cherviatsova, 2018; DeGloma, 2015, 156). Some scholars argue that historical narratives constitute a significant instrument in inter-group battles, and privileged groups employ this tool to maintain their dominance in the international society. According to Foucault, ‘[h]istory is the discourse of power, the discourse of the obligations power uses to subjugate; it is also the dazzling discourse that power uses to fascinate, terrorize, and immobilize’ (Foucault, 2003, 68). Addressing a race struggle, Foucault coined the term ‘counter-history’ presenting a disruptive narrative in favour of subjugated groups (Foucault, 2003, 70–72, 80; see also Medina, 2011, 13–15). The superior resources available to powerful actors enhance their capacity to shape historical narratives. Thus, for example, actors possessing resources enabling them to influence other
agents of memory (like mass media outlets, relevant governmental bodies, or international institutions) are more capable of promoting historical narratives that serve their interests.

31 As for the role of international tribunals in ‘memory battles’, there are concerns that tribunals are not neutral, since they suffer from political and ideological biases (→ Institutional bias; → Independence: International adjudication; → Impartiality: International adjudication), and their historical narratives may be influenced by the unequal resources available to the litigating parties regarding the ability to prove historical events. Such concerns regarding the non-neutrality of international legal proceedings suggest that international tribunals should adopt a restrictive approach in this sphere. The above-mentioned asymmetric resources available to rival litigating parties also suggests that tribunals in such cases should aspire to mitigate inequalities and promote the development of ‘counter memory’ favouring the historical narratives of under-privileged groups in the international society (Hirsch, forthcoming, sec 4.3). Certain features of the latter approach reverberate in some judgements of the IACtHR regarding flagrant violations of indigenous peoples (eg Rio Negro Massacres v Guatemala, 2012, paras 27–44, 68–81).

32 The above discussion allows us to draw certain conclusions regarding the desirable role of non-criminal tribunals in this sphere (for a detailed and theoretical analysis, see Hirsch, forthcoming, sec 5). Tribunals have both judicial (in the narrow sense) and social functions, including the expression of social values and identities. Non-traditional functions include presenting historical narratives of significance for society at large, some smaller communities, and individuals. The presentation of historical narratives by international tribunals is often of more importance for litigating parties and social groups than material remedies. This consideration indicates that where reasonable evidence is available, tribunals should not underestimate their symbolic role in this sphere. The debate on the desirable role of tribunals in this field tends to overlook the interactionist character of the arena in which historical narratives emerge and are maintained. The point of departure is that when tribunals are involved in the construction of historical narratives, they constitute an agent of memory, ordinarily interacting with other social agents. Thus, even when tribunals assume an expansive role in this field, their narratives are mediated through other agents of memory (such as mass media outlets, national bodies, historians)—and the impact of judicial historical pronouncements depends on the interaction between the particular tribunals and narratives promoted by other agents of memory. Other agents may weaken, reinforce, or modify tribunals’ historical narratives. If tribunals refrain from presenting a certain historical narrative, other agents of memory are very likely to disseminate their own version of historical events without the involvement of tribunals. Furthermore, once a tribunal avoids the presentation of a narrative of a well-known historical event, historical narratives prevailing in their respective social group may well influence the adjudicators of that tribunal. In the latter case, adjudicators may decide not to get involved in the construction of a certain historical narrative, although they are influenced by historical narratives developed by other agents of memory (and, for example, influencing their interpretation of evidence presented during the legal proceedings). Consequently, the discussion should not only focus on tribunals but rather view them as one actor operating together with other agents in the interactionist arena where historical narratives are constructed.

33 Assuming that each agent of memory possesses some comparative advantages and disadvantages in this sphere, the challenging task is comparing the strengths and weaknesses of central agents of memory active in this sphere (including tribunals). Since such a comprehensive analysis of the issue exceeds the limits of this contribution, only certain prominent factors are briefly mentioned here. Noncriminal tribunals are more constrained than other agents of memory by legal classifications and rules of evidence (→ International Courts and Tribunals, Evidence). The description of past events by
Many international legal proceedings are discontinued (e.g., due to "out of court" settlements) and such proceedings are largely adversarial (see International procedural law), granting the rival parties a more significant role than adjudicators in this sphere. On the other hand, since international tribunals are regularly composed of adjudicators drawn from several state societies, their narratives are thus less likely to suffer from a national bias (often associated with governmental bodies, certain historians, or journalists). In comparison to other agents of memory, international legal proceedings are frequently more transparent and provide more opportunities for additional parties to present historical evidence. Historians often devote more time than tribunals to a comprehensive study of a particular historical event but evidentiary restrictions imposed on tribunals tend to enhance the reliability of the historical narrative arising from such a demanding procedure.

34 The above initial discussion on some pros and cons of some actors does not lead to the conclusion that non-criminal tribunals are preferable to other agents of memory. Since each agent of memory enjoys some advantages and suffers from certain disadvantages, I am of the view that it is generally desirable that different actors in this field constrain, bolster, or modify historical narratives presented by other agents of memory, including tribunals. Thus, where sufficient evidence permits, it is inadvisable to a priori exclude non-criminal tribunals from the interactionist field where historical narratives are developed. It is preferable that tribunals grant due weight to historical findings presented by historians, journalists, governmental bodies, NGOs, and other agents of memory. Thus, where reasonably available evidence allows, non-criminal international tribunals may legitimately take part in the construction of historical narratives. The involvement of international tribunals is particularly where national bodies (or other agents of memory) conceal or fail to present a narrative of an historical event that inflicted substantial harm on disadvantaged groups or individuals. Generally, local institutions are better-positioned to collect the relevant historical evidence, interpret it according to the particular context, and present the specific historic narrative. Such locally produced narratives are also more likely to gain legitimacy within the particular local community. Consequently, where national bodies function effectively and reliably, it is not desirable that non-criminal tribunals intervene in the development of national historical narratives. However, where national agents are incapable, conceal or distort a certain historical event, it is preferable that a regional tribunal interfere in that sphere (and if a regional tribunal suffers from such flaws, a global tribunal should intervene). Finally, where non-criminal tribunals face clashing narratives in starkly asymmetric settings, it is worthwhile that tribunals apply special rules of evidence to mitigate the parties’ unequal capacities, and grant the benefit of the doubt to weaker parties (e.g., by lowering the standard of proof).

F. Conclusions

35 Collective memories of historical events constitute a significant element of collective identity. A group's memory preserves the knowledge from which the group derives awareness of its unity and distinctiveness. Some traditional historians and sociologists explore historical events from different angles but their studies also share some common characteristics. While some classical historians generally aim at revealing "how things actually were" in the past, sociologists focus on how a particular community perceives and interprets the past, assuming that collective memories are significantly influenced by the specific features of contemporary society. Collective memories of historical events are commonly constructed in an interactionist field where diverse agents of memory are active, including governmental bodies, mass media outlets, historians, NGOs and tribunals. International tribunals are occasionally involved in the development of historical narratives, either deliberately or incidentally. In both cases, tribunals have discretion as to whether to
adopt an expansive approach (and elaborate on the historical narrative) or a restrictive approach (and present only the most essential facts required to resolve the specific legal question).

36 The above discussion leads to the conclusion that international criminal tribunals should generally apply a cautious approach regarding the development of historical narratives. As to non-criminal tribunals, the conclusion is that where sufficient available evidence permits, such tribunals may legitimately play a role in the development of historical narratives, alongside other agents of memory (which may constrain, reinforce, or modify tribunals’ narratives). Generally, national or regional tribunals should be preferred in this sphere, and the involvement of international tribunals is recommended where national or other agents of memory conceal or ignore past events that have generated substantial harm to disadvantaged groups or individuals.

37 Future studies could explore, for example, interactions between international tribunals (or semi-adjudicatory bodies) and other agents of memory in the development of the historical narrative of a particular past event, or how the distinctive features of certain tribunals influence the historical narratives presented in their decisions.

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