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Collective Memory and International Law

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I. Introduction

This Reflection briefly introduces the concept of collective memory and sketches out some lines pertaining to mutual interactions between international law and collective memories.¹ The point of departure of this and other socio-legal studies of international law is that international legal rules and institutions are embedded in diverse social factors and processes (such as norms, socialization or identity). A sociological analysis of international law enriches our understanding of the social factors involved in the formation, evolution and implementation of international law. Such an analysis may not only shed light on past and present trends in international law but may also bear certain implications for the interpretation of existing legal provisions, as well as suggesting better legal mechanisms for coping with contemporary challenges faced by international law. While sociological literature provides valuable tools for analyzing various international legal topics, it does not aim to substitute economic, political or other analyses but rather to complement them. Collective memory is one of the relatively new concepts in sociology's conceptual toolbox and since the 1980s has attracted increasing attention of sociologists (and scholars from other disciplines).

II. Collective Memory²

The concept of collective memory starts from the premise that people normally acquire their memories not only through individual means but through social processes as well. Group membership often provides materials for memory and prods individuals into

¹ For a broader discussion of this topic, see Chapter Five: 'Collective Memory and International Law' in Moshe Hirsch, *The Sociology of International Law* (forthcoming, OUP).

² On the concept of collective memory in sociological literature, see, e.g., Jeffrey K. Olick and Joyce Robbins, 'Social Memory Studies: From "Collective Memory" to the Historical Sociology of Mnemonic Practices' (1998) 24 *Annual Review of Sociology* 105; Eviatar Zerubavel, 'Social Memories: Steps to a Sociology of the Past' (1996) 19 *Qualitative Sociology* 283; Jeffrey K. Olick, Vered Vinitzky-Seroussi and Daniel Levy, 'Introduction' in Jeffrey K. Olick, Vered Vinitzky-Seroussi and Daniel Levy (eds.), *The Collective Memory Reader* (OUP 2011) 3.

recalling particular events. Groups can produce memories of events that individuals have not directly experienced. Collective memory often affects individuals' emotions and recalling a particular event may generate a sense of pride or embarrassment within the community's members.

Collective memory is substantiated and transmitted through a wide array of practices of commemoration involving, for example, various ceremonies, monuments, national holidays, museums, school textbooks, naming streets or the mass media. Agents of memory include diverse state and non-state actors, including individuals in key positions. Collective memory is different from past historical events; though it relates to historical experience, it is socially constructed in the present and is influenced by the particular features of the contemporary society. The construction of collective memory is a selective process; not all historical events are stored in the social memory and where a certain occurrence is remembered, the group's memory normally does not include a precise and comprehensive account of all aspects of the event. Collective memory interprets historical events according to the contemporary social context of the particular society. These selective narratives occasionally suggest a moral message to the group and provide some guidelines regarding the appropriate behaviour (such as emphasizing the need for fighting the risk of inflation or vigilantly defending national sovereignty), including in the legal sphere.

III. International Law and Collective Memory

Collective memory and law, including international law, interact in both directions; law affects and is affected by collective memory.³

International law occasionally affects the memories of various social groups, including national, regional and global communities. In some cases, international legal doctrines and decisions of international institutions (such as tribunals or the Security Council) function as carriers of collective memory, particularly among professional groups. Decisions of international tribunals regularly include a description of the relevant historical events. Students, practitioners and scholars who study significant judgments of international tribunals often learn the specific historical events as selected and interpreted by those tribunals. Similarly, a study of customary doctrines often necessitates learning certain historical events (such as the 'Caroline incident') as presented in authoritative treatises on international law. Memories transmitted in such textbooks, judgments and resolutions of international institutions are inherently selective.

International law actors aim in certain cases to affect collective memory. The founders of some international tribunals (such as the Nuremberg tribunal) aimed to influence future collective memory by producing a historical narrative of the relevant events.⁴ The selection of cases brought before international criminal tribunals also seems to be

³For a comprehensive discussion of the general interrelationships between law and collective memory, see Joachim J. Savelsberg and Ryan D. King, 'Law and Collective Memory' (2007) 3 *Annual Review Law and Social Science* 189.

⁴See, e.g., Antonio Cassese, *International Criminal Law* (3rd ed., Oxford University Press 2013) 256.

affected by the goal of ensuring that the historical narrative emerging from the tribunal's case law would present the various aspects of the occurrence.⁵ The employment of international criminal tribunals as an instrument to shape collective memory invites an in-depth discussion on the suitability of using such legal mechanisms to affect collective memories. Some international instruments, such as the UNESCO World Heritage Convention, explicitly aim to influence collective memories.⁶

International tribunals' capacity to affect collective memory is influenced by several distinctive factors. International tribunals are often powerful institutions in this sphere since they involve influential rituals.⁷ In addition, where historical facts or their interpretation are disputed, international bodies that are vested with legitimacy (such as many international tribunals) have a significant capacity to affect the collective memory. International legal institutions often deal with issues that attract public attention and they are more likely to affect collective memories. Though international bodies enjoy certain 'comparative advantages' in transmitting collective memories, some of their distinctive features constrain that capacity. Like domestic courts (but unlike other agents of memory like historians and journalists), international tribunals are restrained by evidentiary rules and the specific legal classifications (such as the particular elements of a specific obligation).⁸ More significantly, international courts' competence to render binding decisions is commonly subject to the parties' consent. Thus, significant historical events are often not addressed by international tribunals.

Collective memories occasionally affect the content of international legal rules, their interpretation and compliance with these rules. The collective memories of some historical events are institutionalized in various international legal treaties (such as the Inter-American Convention on Forced Disappearance of Persons) while other events are not stored in the social memory and do not affect international legal instruments. Thus, for example, Germany's collective memory regarding the hyperinflation during the Weimar Republic period considerably influenced the content of the EU Economic and Monetary Union (EMU) law (prominently the provisions concerning price stability, excessive deficits and 'no-bailout'). Though numerous agents of memory are involved in the formation and maintenance of this German collective memory and its normative lessons, the prominent agents are the main German political actors, the central bank, the mass media, and the German Historical Museum.⁹

⁵See, e.g., Luc Côté, 'Reflections on the Exercise of Prosecutorial Discretion in International Criminal Law' (2005) 3 *Journal of International Criminal Justice* 162, 176, 173-174.

⁶On the World Heritage List and 'Sites of Memory', see, e.g., UNESCO, *World Heritage at the Heart of UNESCO's Peace Mandate*, <http://www.unesco.org/new/en/culture/resources/in-focus-articles/heritage-and-peace/>.

⁷On the impact of rituals with regard to domestic courts, see, e.g., Savelsberg and King (n 3) 190; Mark J. Osiel, *Mass Atrocity, Collective Memory and the Law* (Transaction 1997) 15-17.

⁸On these features regarding domestic courts, see Savelsberg and King (n 3) 194; Osiel (n 7) 272.

⁹For a detailed discussion of the influence of this collective memory on EMU law and the relevant agents of memory, see Moshe Hirsch, "Collective Memory and International Law", Workshop on Sociological Inquiries into International Law (London School of Economics, 15-16 May 2014).

Collective memory occasionally influences the interpretation of international treaties. Treaty interpretation often necessitates an examination of the historical background of a particular treaty as (selectively) presented in the various historical and legal sources existing at the time of interpretation.

Finally, nations' collective memories at times affect states' positions and conduct regarding the implementation of international legal rules. Collective memories influence the resort to legal remedies redressing past events or advancing territorial claims that are often based on the memory of past events. In some cases, national or regional legal doctrines pertaining to the implementation of international law are affected by collective memories. Thus, for instance, the collective memory of past foreign intervention in Latin American states is embedded in the 'Calvo doctrine' which has influenced the implementation of obligations relating to international investment law.¹⁰

IV. Concluding Remarks

Collective memory and international law interact in both directions; international law affects and is affected by the collective memories of diverse social groups. Collective memories are occasionally embedded in decisions of international tribunals or customary doctrines (such as the 'Calvo doctrine' and the 'Caroline incident'). In such cases, international legal concepts and institutions function as carriers of collective memories. In some cases, international law directly aims to shape the collective memory of future generations while in other cases it is indirectly involved in constructing such memories.

While collective memories occasionally influence international law, they are obviously not the sole or determinative factor. The impact of those memories changes over time and other factors (such as other socio-cultural, economic or political ones) also affect legal attitudes and behaviour in the international system.

Further socio-legal studies may explore particular spheres of international law that are influenced by collective memories and identify common variables affecting the impact of such memories on international law. And vice versa, future studies can examine the influence of diverse international legal mechanisms on collective memories. Such studies may systematically analyze what kinds of international legal agents of memory – and under what circumstances – are more likely to influence national, regional or global memories.

¹⁰See Hirsch (n 1).