



## УКРАЇНА І СВІТ

10 листопада 2015 року кафедрою міжнародного права та міжнародних відносин започатковано традицію проведення обговорень актуальних проблем міжнародного права й міжнародних відносин, що досліджуються членами кафедри, у вигляді відкритих кафедральних семінарів.

Першою темою обговорення на подібних семінарах стала проблема формування міжнародними кримінальними судами колективної пам'яті в суспільствах, доповідачем за якою став кандидат юридичних наук, доцент кафедри міжнародного права та міжнародних відносин Д. Коваль. Насамперед було визначено поняття «колективна пам'ять» та розкрито особливості взаємодії цього поняття («колектив» і «пам'ять»). Було звернено увагу на фактори, що роблять міжнародні кримінальні суди установами, здатними впливати на формування колективної пам'яті. Обговорювалася важливість дослідження колективної пам'яті з позиції ефективності заходів транзитної юстиції, серед яких варто назвати також створення міжнародних кримінальних судів. Резюмовано, що питання формування колективної пам'яті має вивчатись для розуміння того, яким чином можливо зробити більш впливовими міжнародні кримінальні суди з позиції того, як вони діють на постконфліктні суспільства. Більш детально інформацію щодо обговорюваної теми представлено у відповідній статті в журналі.

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National University "Odessa Law Academy"**COLLECTIVE MEMORY  
AND INTERNATIONAL CRIMINAL COURTS' ACTIVITY**

This article is a modest attempt to rise the important issue of international criminal courts' activity namely the issue of collective memory formation. I am not going to present here some ready-made prescriptions of how international criminal courts influence on the collective memory or what may and should be done to improve the effectiveness of the mentioned above courts in terms of societies' collective memory changing. It is rather the discussion invitation and an

endeavor to look at legal problems from the sociological perspective.

Two words from the notion "collective memory" are intuitively intelligible. We have formed a strong set of images that are connected in our minds with them. Moving away from lay interpretations of these terms, which, of course, is essential to any analysis, makes the problem of these words interpretation harder.

Traditionally, when we hear the word "memory", we automatically think about





that is not influenced by the social context and structure. All other spheres of experienced are determined more or less by the social groups (collectives of different sizes: starting from the family and finishing with the world community).

After all this introductory thesis concerning the meaning of “collective” and “memory” in the notion “collective memory” I would like to proceed with the working definition of the later.

Collective memory is defined in a broad and narrow senses. In the first one it is depicted as a subfield of sociology of knowledge. In the broad sense it is perceived as a connective structure of society [3, p. 105]. M. Halbwachs underlined that: “It is in society that people normally acquire their memories. It is also in society that they recall, recognize, and localize their memory” [4, p. 38]. For M. Halbwachs memory is a matter of how minds work together in society [3, p. 106]. This does not mean that some mystical collective mind exists. It is individuals as group members who remember [5, p. 22].

In the second chapter of the mentioned above “Inoperative Community” J.-L. Nancy proposes very bright scenario of myth creation. M. Iampolski argues that it is also a scenario of community formation via the formation of collective identity [5, p. 2]. J.-L. Nancy presents the very commonly known (with different variations) story about the telling of myth around the campfire: “They were not assembled like this before the story; the recitation has gathered them together. Before, they were dispersed, shoulder to shoulder, working with and confronting one another without recognizing one another. He recounts to them their history, or his own, a story that they all know, but that he alone has the gift, the right, or the duty to tell. It is the story of their origin, of where they come from, and of how they come from the Origin itself-them, or their mates, or their names,

or the authority figure among them. And so at the same time it is also the story of the beginning of the world, of the beginning of the assembling together, or of the beginning of the narrative itself” [4, p. 44]. End of quotation.

Are international criminal tribunals able to tell the same story to the post-conflict societies? What are the measures that can improve the perception of the storytelling? What will serve as a campfire for the modern societies?

The first question of the line is connected with the potential of legal acts to create or change collective memory. Lawyers traditionally mention the Eichman case, Nuremberg and Tokyo trials, Australia’s cases on the protection of indigenous peoples’ rights etc. We can remind also the Dreyfus case in France or more seldom mentioned in this regard the George Edalji case. The later is famous because Mr. Edalji involved Conan Doyle as his public supporter. The father of Sherlock Holmes took part in the real investigation of Mr. Edalji case and helped him to avoid false theft accusations because of his race.

But what makes us think that all these cases really influenced the creation of the collective memory? Alternatively, what are the collectives that have been influenced by these cases? Maybe they are panel judges or the judges from the particular court, or lawyers as a whole? In any case, it is very hard to produce something other than emotional arguments on behalf of the mentioned above case’s influence on the societies’ collective memory. The measurability of such influence is more or less inversely proportional to the size of collective that is supposed to bear the collective memory.

M. Hirsh singled out several distinctive factors of international tribunals’ capacity to affect collective memory.

International tribunals are often powerful institutions in this sphere since they involve influential rituals (some type of

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<sup>1</sup> An *in situ* hearing is possible by virtue of article 3(3) of the Rome Statute, which allows the court to sit elsewhere whenever it considers it desirable. Rule 100(1) of the ICC Rules of Procedure and Evidence stipulates that this decision should be taken in the interests of justice.



siting around the campfire. However, the question emerges about the location of the campfire? In other words is it a good idea to have a campfire in The Hague and tell the story to Congo people?<sup>1)</sup>

In addition, where historical facts or their interpretation are disputed, international bodies that are vested with legitimacy (such as many (or maybe some) 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. Here is crucially important to take into consideration the dominate type of social connections in a particular society (collectivistic and individualistic societies). Developed collectivism in the society do not mean automatically better reaction on the ICT activity in terms of collective memory formation. The issue of prime importance is controllability of the society. Let me remind you the Orwell's "1984" and the episode when the demonstrators in Oceania support the war with Eurasia. Suddenly, the, lets call him, manager of the demonstration receives the information that the pact with Eurasia was signed and the Oceania declared the war on Eastasia. Demonstrates changed all the banners in a minute and started to support the war with Eastasia. The slowest demonstrators even got imprisonment for the propaganda of war with the allied Eurasia.

This "fictional" situation from 1984 has a lot of real manifestations. For instance, the democracy index of Russia is lower than Ukrainian one. However, according to the latest social study, the courts in Russia are much more independent. The explanation of this paradox is that Russian government control the society stronger than Ukrainian one. This makes direct control over judges not so relevant for the state.

Another example also coming from Russia. Social pools showed that Russian society's worldview is strongly depended on a governmental position. Change of the later may easily change the society's attitude towards different events happening in the world. We can partly observe this on the example of Russian society's desire to accede the territory eastern Ukrainian regions.

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). Legal way of thinking is logical and laconic that make the tribunal's finding concerning the past events more reliable comparing to the findings of journalists and historians.

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 [6].

On this point I would like to stop. As I promised in the beginning I have not proposed answers. It is rather welcome to thinking about ICT in terms of collective memory formation.

**Key words:** collective memory, international criminal courts, community, human rights and human security.

*The article is devoted to the study of collective memory and its formation by the international criminal courts. Attention is paid to the factors that make international criminal courts institutions able to influence collective memory. The concept of "collective memory" is analyzed in terms of what is memory and what influences its development. Moreover, it is studied who may form groups that may be involved in the creation of collective memory.*

*Статтю присвячено дослідженню питання колективної пам'яті та її формування міжнародними кримінальними судами. Звернено увагу на фактори, які роблять міжнародні*



кримінальні суди установами, здатними впливати на формування колективної пам'яті. Проаналізовано поняття «колективна пам'ять» із позиції того, що є пам'яттю та що впливає на її формування й утворення колективів, які можуть брати участь у її формуванні.

Стаття посвячена дослідженню питання колективної пам'яті та її формування міжнародними судовими органами. Звертається увага на фактори, що визначають міжнародні судові органи як установи, здатні впливати на формування колективної пам'яті. Аналізується поняття «колективна пам'ять» з точки зору того, що є пам'яттю та що впливає на її формування та формування колективів, які можуть брати участь у її формуванні такої пам'яті.

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