Symposium: Doing Justice to Truth in International Criminal Courts and Tribunals (Editorial)

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This post is part of a symposium, Doing Justice to Truth in International Criminal Courts and Tribunals. All currently available contributions to the symposium can be found <u>here</u>.

A PDF of this post can be downloaded <u>here</u>.

As the field of international criminal justice has institutionalized over the course of the past 70 years, communities—both local and international—have increasingly turned to international criminal courts and tribunals (ICTs) to serve as arbiters of truth in the aftermath of mass atrocities. In turn, ICTs have acted as epistemic engines, not only creating a large body of jurisprudence on genocide, crimes against humanity, and war crimes, but also constructing historical narratives and compiling vast quantities of historical materials concerning the particular episodes of mass violence that fall within their remit.

That ICTs somewhat inevitably perform a truth-telling function is now well-established. Indeed, already as far back as the Nuremberg Trial, Prosecutor Robert Jackson famously <u>proclaimed</u> that "the record on which we judge these defendants today is the record on which history will judge us tomorrow." Yet, if this is so, less apparent is how the truths that emerge from ICTs should be judged, how they relate to other kinds of truth, and which perspectives and criteria should be relied upon to evaluate judicialised truths in practice.

It is with these questions in mind that we convened the present symposium – a follow-up to <u>a conference</u> we convened at iCourts, Centre of Excellence for International Courts in Copenhagen last year—bringing together leading scholars from a diversity of disciplinary backgrounds to reflect on the truth-telling function of ICTs. In summarizing their rich and diverse papers, this introductory post identifies three themes in relation to the truths produced by ICTs that emerge from the symposium: first, the extent to which ICT truths are socially constructed; second, the plurality of ICT truths; and finally, the perception of ICT truths and how they relate to the observational viewpoint of the audience.

Socially Constructed Truths

Turning first to the social nature of truths, a pervasive theme of this symposium is that ICT truths are *socially constructed* by the actors who participate in the establishment and operation of international criminal courts.

To acknowledge the social character of truth is to recognise that truth is contingent on the choices of different actors in the international criminal process. This notion of *choice* underpins <u>Barbora Holá's contribution</u> to the symposium, which examines the narratives constructed by judges at the sentencing stage of international criminal proceedings. Holá

argues that international criminal judges possess a wide margin of discretion in determining the extent to which the crimes and culpability of defendants should be *contextualised* in sentencing proceedings. Yet, despite this opportunity to nuance the reductionist imagery that sometimes emerges from examining atrocities through a legal prism, Holá's review of sentencing judgments at the International Criminal Tribunal for the former Yugoslavia (ICTY) reveals a judicial discomfort with acknowledging the impact of situational forces on the agency of individuals in mass atrocity contexts. Instead, various aspects of the contexts in which defendants previously operated – including cultures of violence, terror and virulent propaganda – have tended to be crowded-out in light of the "extreme cruelty" and "sheer brutality" of the crimes under examination. By revealing how this judicial tendency to "turn a blind eye" to situational pressures constitutes a choice, Holá illuminates how sentencing proceedings represent somewhat of a missed narrative opportunity within the practices of international criminal courts.

The social nature of truth also forms a prominent part of Henry Redwood's contribution to the symposium, which examines the archive of the International Criminal Tribunal for Rwanda (ICTR). Redwood begins by identifying a range of actors who have sought to shape the ICTR's archive, including the Rwandan government, the UN Security Council (UNSC), the prosecution, as well as victims and local communities. By examining how the interests and strategies of these actors have shifted over time, Redwood reveals how particular actors were able to influence the scope and orientation of the ICTR's archive, with more wide-ranging 'thicker' accounts of violence in the ICTR's earlier trials compared to the accounts constructed within the more streamlined trials that were conducted towards the end of the tribunal's mandate. Reflecting on this shift, Redwood concludes that it is important "to question the whole concept of a singular archive, and rather consider it as multiple archives, or *multiple archival moments* and for this to be born in mind by anyone using the archive in the future."

Tangentially related to the issue of social construction is the recurrent claim that truths produced by ICTs are *sui generis* and therefore categorically different from and incommensurable with truths produced by other actors, such as historians or journalists. Jakob v. H. Holtermann's contribution critically examines this claim, which he identifies both in scholarship and among practitioners, proponents and critics of ICTs. Holtermann challenges the *sui generis* perception arguing in particular that *legal* truth cannot be defined exclusively as a procedural phenomenon in terms of, for example, fairness or equality of arms. On the contrary, the truths of ICTs are in general commensurable with other truths. ICTs are in the truth finding business in competition (and collaboration) with other institutions, and it is therefore warranted in legitimacy debates to look closer at how they fare in these regards.

"Truths" Not "Truth"

Beyond their social character, the truths constructed by ICTs are also plural – that is, there seems to be *a diversity of truths* constructed at various stages of international criminal proceedings by a range of different actors.

In terms of the different *sites* of truth construction, this symposium is testament to the range of settings at which truths are constructed within international criminal courts, ranging from the trial and judgment stages, to the sentencing and archival stages, and even extending to the reception and ongoing contestation of ICT truths beyond the courtroom.

International criminal courts are also host to a range of different *actors*, each constructing particular truths according to their specific interests at particular stages of the process. For instance, in the first part of his contribution to the symposium, Adam Branch reveals how the prosecution and defence teams in the case of *Dominic Ongwen* at the International Criminal Court (ICC) have constructed divergent and shifting portrayals of the Lord's Resistance Army (LRA) according to their particular interests. When the ICC first intervened in Uganda, the Prosecutor denounced the LRA as a "criminal organization" lacking any political agenda—a strategic move aimed at garnering support for the Prosecutor's investigation amongst both the Ugandan government and the international community more generally. By the time of the confirmation of charges hearing, however, the Prosecutor had shifted its narrative of the LRA in line with its interest in convicting Ongwen under the doctrine of command responsibility, portraying a hierarchically structured organisation with a clear political vision and a strategic rationality to its violence. In resisting the Prosecutor's portrayal at the confirmation of charges hearing, it was the defence who now presented the LRA as little more than a criminal gang, lacking any political agenda, organization or chain of command. As these contrasting portrayals indicate, multiple truths emerge within ICTs according to the evolving interests of the actors who participate at various stages of such proceedings.

Pluralism is also a central theme of Nancy Combs' contribution to the symposium, which identifies a number of variables that significantly influence fact-finding processes at ICTs: first, the location of the atrocity under examination, which can influence the extent to which witness testimony is relied upon within international criminal trials; second, the contextual and collective character of the international crimes adjudicated, which can affect access to evidence—depending upon, for example, the degree of governmental interference and level of security in the region—as well as the type of evidence collected —depending upon, for example, whether higher-level perpetrators are targeted according to complex liability theories; and finally, the nature of the body prosecuting the crimes, which can affect the need for language interpretation, as well as the degree of familiarity of trial participants with the conflict and atrocities examined. Reflecting on these factors, Combs notes that "mass atrocities and their prosecutions, therefore, are characterized by a pluralism that has only just begun to be systematically examined."

Finally, the theme of pluralism is at least implicitly present in Caroline Fournet's contribution, which focuses on the distinct contribution of forensic evidence to the overall truths asserted by the ICTY regarding past atrocities in the former Yugoslavia. Focusing on the Srebrenica genocide Fournet illustrates how the medico-legal analyses resulting from mass graves' exhumations have played a central role in establishing as a legal truth beyond reasonable doubt the scope and character of the atrocities that took place. Recognizing the need to manage expectations, Fournet emphasizes a number of

limitations in the application of forensic science: first, the limitations in scope and the fragmented nature of the insights provided by forensic science; second, the fallibility of forensic science; third, the risks of undermining the scientific independence of the forensic experts from the special interests of, for example, the prosecutor; and fourth, the risks of knowledge being "lost in translation" when transposed from the context of the laboratory to the courtroom.

The Observational Viewpoint of the Audience

Finally, how the truths constructed by ICTs are ultimately viewed and judged depends to a significant degree on *the observational viewpoint of the audience*.

The importance of the audience is a focal point of Nigel Eltringham's contribution to the symposium, which examines divergent perspectives of how the ICTR's archive should be utilised in the future. Eltringham begins by recounting the views of a number of prosecution lawyers, who believe that the historical record contained within the ICTR's archive should only be relied upon in ways that correspond with the tribunal's judgments. By contrast, according to those whom Eltringham describes as "'politically-motivated' defence lawyers," the archive should instead be viewed as a vital storage mechanism for a range of dissenting materials that seek to counter the official narratives set out in the tribunal's judgments. According to Eltringham, these contrasting perspectives bring home the fact that "archives never speak for themselves, rather, it is users who will determine what information they will get out of an archive."

The reception of ICT truths within particular audiences also features in Jessica Greenberg's piece, which compares the use of historical narratives at the ICTY with practices of bearing witness and public protest amongst Serbian feminist activists. As Greenberg explains, at the ICTY the prosecution used historical narratives to structure a particular relationship between past, present and future, one in which a distance was created between the present and the past so as to create conditions for "moving on" from the past. By contrast, Serbian feminist activists sought to anchor truth not only in narratives but in material practices, reconfiguring public space around their own bodies in an effort to hold on to the past in the present. Reflecting on these contrasting practices, Greenberg concludes that "for there to be a lasting legacy for the ICTY, activists and others will need to reconcile [its] relationship between time and responsibility with practices that refuse "moving on" and instead seek to hold past, present and future simultaneously in space."

Finally, in the second part of his contribution to the symposium, Adam Branch also discusses reception, specifically examining the impact of ICC trials on political discourses and practices beyond the courtroom. Branch argues that the ICC has managed to elevate the importance and legitimacy of the types of truths it establishes which centre on individual responsibility for mass atrocities. In doing so, however, the ICC has become somewhat a victim of its own success, with a range of stakeholders beyond the courtroom critiquing its practices for failing to investigate particular situations and neglecting to prosecute particular persons and crimes. In other words, the ICC's

success has led to demands for more complete and comprehensive stories of responsibility for violence around the world. However, according to Branch, "no matter where international criminal tribunals draw the line, demarcate the circle of responsibility, there will *always* be actors and agents outside that circle whom some insist need to be brought in and held accountable." With this in mind, Branch concludes by examining several different efforts that seek to recalibrate the relationship between the ICC and truth in order to rescue the court's legitimacy, ranging from espousing a new modesty on the part of the ICC and its supporters, to calling for the *proper* politicisation of the ICC, to allowing the ICC to become a site where stories are told that narrate "the endless relations of mutually constituted agency that form the fabric of reality and ourselves."

Conclusion

ICTs are epistemic engines that produce truths about past episodes of mass atrocity. This aspect of their activities raises questions regarding the extent to which these truths are socially constructed, their diversity, and their ongoing contestation amongst different audiences beyond the courtroom. By bringing together some of the leading thinkers in the field of international criminal justice, we hope that this symposium will contribute to a more informed debate amongst both scholars and practitioners concerning both the types of truths that ICTs construct, as well as the different perspectives from which they may be examined.