

# Humanity

## Truth Beyond the ICC

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July 10, 2017

As the Ongwen trial has made clear, the significance that international criminal trials have for the production of truth resides not only in the narratives forged within the courtroom but also in the impact trials have on the political discourses and practices around the trial. In the Uganda case, the most dramatic impact of the ICC intervention has been to elevate the importance of narratives about the war in which justice is framed as establishing the truth about individual responsibility for atrocity. The dramatic expansion of the anti-impunity industry throughout the continent paved the way for this phenomenon, enabling the ICC's intervention into the Ugandan conflict to spark a high-stakes debate around the truth of individual responsibility for specific acts of extreme violence.

And so, once the ICC intervened, calls immediately began to be heard in Uganda for an expansion of criminal responsibility, for Ugandan government officials to be put on trial, for more or fewer LRA commanders to be prosecuted, for the prosecution of those behind the vast global structures of power that had been driving on the war for two decades. So powerful was the idea of individual legal responsibility for atrocity promoted by the ICC that even the primary discourse opposing the ICC in Uganda—so-called traditional justice—remained on its terrain. Traditional justice proponents maintained the basic idea of individual responsibility but simply proposed other forms of justice be applied—so-called restorative or reparative—instead of retributive. Few, if any, of the vast array of formal efforts at justice and memorialization have strayed from the basic idea that justice demands the truth about individual responsibility for atrocity; few, if any, have sought to establish other kinds of truth based on different understandings of responsibility or of the individual's relation to the community.

The Ongwen trial makes clear the intense dilemmas faced by the ICC in the production of narratives of historical truth: due to a combination of jurisdictional limitations, institutional self-interest, and the court's radical and inescapable politicization, its necessary alignment with the interests and usually the violence of powerful states, the ICC can try only a handful of easily apprehended Africans, whom it represents as the most responsible for the worst atrocity crimes globally. Thus the ICC cannot help but produce highly reductive and patently politically determined narratives of violence that will always be open to rupture by counter-narratives that can claim for themselves the mantle of truth and justice, counter-narratives that denounce the ICC for telling politically-biased lies.

The ICC has been thrown into crisis as a result of these accusations of politicization. For ten years, it has faced intense criticism for political selectivity in its prosecutions, of demands for more truthful narratives about responsibility for atrocity. Critics demand that the ICC tell more truthful narratives about responsibility in the specific situations into which the ICC has

intervened—that it try the right people, that it go after LRA as well as Ugandan government, it try Gbagbo along with Ouattara. Of course, the ICC cannot do this without risking its survival.

Critics also demand that the ICC tell the truth about responsibility for injustice *globally*. By focusing exclusively on Africa and failing to deal with other episodes of atrocious violence, such as by the United States in Iraq, the ICC is accused of telling a false narrative of responsibility for global injustice, restricted to Africans committing atrocities against other Africans. And so demands are made for the broader application of criminal justice, for the ICC to tell more complete, comprehensive, true stories of responsibility for violence around the world. To prosecute the strong and the weak, to go after corporations and arms dealers that are funding violence; those responsible for, say, ecological despoliation or economic devastation and not just spectacular war-time atrocity, to expand the circles of responsibility ever wider. The ICC is a victim of its own success, in that it has established the absolute value of its mode of truth about responsibility for violence. It has thus created high incentives for others to produce narratives in that same mode, using the categories of international criminal law. The more it naturalizes that mode of truth, the more it will be accused of failing to live up to its own principles.

In Africa today, other experiments in international criminal justice are being developed that claim to construct more truthful narratives about episodes of political violence. The most notable is the effort by the African Union to establish an international criminal section of the Africa Court of Justice and Human Rights—the so-called African Criminal Court (ACC). While remaining within the criminal law framework and thus testifying to the naturalization of international criminal law as a necessary response to political violence in Africa, the proposed ACC, according to its proponents, would be able to tell more truthful narratives about responsibility than the ICC can. This is because, first, the ACC claims jurisdiction over an expanded set of international crimes, including those that are said to be of particular importance to Africa, such as the illicit exploitation of natural resources, mercenarism, and corruption. Second, the ACC claims jurisdiction not only over natural persons but also over corporations. These persons and corporations can be anywhere in the world, as long as the victims of their alleged crimes are African. With the ACC, it is asserted, the global networks of individuals, states, and corporations that are complicit in African conflicts can be held accountable, instead of dumping all responsibility onto a handful of easy African targets and focusing only on the most spectacular atrocities. Being closer to African realities, it is assumed that the ACC will be more representative of those realities, establishing the possibility for more inclusive and truthful narratives of violence to be produced, beyond the misrepresentations and limitations of the ICC.

But the effort to expand the circle of responsibility and use trials to produce more accurate narratives of historical-moral truth, whether through an African Criminal Court or otherwise, will always run up against limits. The problem, of course, is not the selective and political application of law but rather the legal form itself. Law is finite, but justice is infinite. 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. This problem reflects the familiar difficulty of using an individualizing mode of responsibility for episodes that are inherently collective—as any genocide, crime against humanity, war crime, or aggression, must be. Accusations of politicization against the ICC target only the overt mechanism through which this limitation is operationalized. As the ICC tries to

deal with accusations of politicization, it is doing so against the backdrop of this deeper impossibility.

At present, several different efforts can be identified that seek to deal with the ICC's current crisis by recalibrating the relationship between the ICC and the truth in an effort to rescue the court's legitimacy. One such attempt can be seen in the vociferous espousal of a new modesty on the part of the ICC and its supporters. We hear increasing calls for managing expectations, for people to no longer expect transformative intervention, to expect, at the most, a few prosecutions and a bit of justice down the road—but, after all, some justice is better than no justice, it is declared. Managing expectations represents the process by which the ICC tells people that *their* narratives of justice, their truths, are unrealistic, and that the narrative of truth that the ICC tells, although admittedly partial, is the best they will get.

A second effort can be seen in the growing trend among critical supporters of the ICC to recognize that the court will always be politicized and, on this basis, to call for the court's *proper* politicization. They argue that the ICC needs to admit that it will necessarily be part of a political agenda and thus to align itself with the right agenda. By making the ICC part of a broader moral-political history, whether one of liberal progress, democratization, international security, or emancipation, the ICC and its trials are not overburdened with the need to produce the entire historical truth themselves. Rather, any trial is just an instance of, a synecdoche for a much broader political history, a broader narrative of historical truth, that stands independently of and has legitimacy outside the legal process, and thus can anchor the legal process and give it meaning.

The third and most radical endeavor to resolve the dilemma can be identified in Fatou Bensouda's new espousal of a victim-oriented prosecution strategy. As opposed to Luis Moreno-Ocampo's perceived tendency to favor a narrow, strategic approach to charges, Bensouda has declared her intention to take a "comprehensive" approach to cases, trying to capture the total experience of victims' suffering. The most notable symptom of this "victim-centered" approach is a vast expansion of crimes—Ongwen's charge sheet went from seven to sixty-seven—but it represents a more fundamental shift: no longer do the categories of the law and the acts of the perpetrator establish the truth that must be told by the trial for it to be legitimate. Rather, now it is the victim's experience of suffering that is the truth that the trial must tell. This is supported by initiatives within international criminal law towards valuing the ICC as a mechanism of restorative justice rather than retributive; of the expressive function of trials rather than their legal function. The purpose of trials becomes to tell stories, stories that can be always expanded further, stories from the point of view of the victims, in which all who are responsible for the victim's suffering can be narrated into the story, can become part of the truth. This relaxes the burden of individual responsibility and the need to guard the law's stark dichotomies. In the case of Ongwen, no longer must he be a victim *or* a perpetrator, and LRA and government violence can blur into each other. Like Ongwen, everyone is always both victim and perpetrator, and there are long tendrils of responsibility reaching outwards from northern Uganda to encompass the globe. This solution comes at a high price, however: conviction is secondary, and the best international law can do to respond to reality is to evacuate the idea of responsibility of individual content and to let the court be the site where stories are told that narrate the endless relations of mutually constituted agency, that form the fabric of reality and

ourselves. With today's shift from atrocity to devastation, from "new war" to climate change, perhaps we can think of this as a proposal for an international criminal justice appropriate to the anthropocene.

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