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False promise and new hope: dead perpetrators, imagined documents and emergent archival evidence

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False promise and new hope: dead perpetrators, imagined documents and emergent archival evidence

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When those accused of being high-level perpetrators of human rights abuse die before publicly yielding their secrets in legal and archival arenas, victims may simultaneously express relief about the perpetrator's demise and grief that, along with it, possible crucial information about the past is lost forever. Although the accused do not usually directly admit their actions and the teasing out of what actually happened is dependent upon the complex processes of cross-examination of their testimony and of records and other forms of evidence, victims project such moments of revelation onto the public act of holding accused perpetrators to account. In their deaths, the accused become forever-from-now-on unavailable and thus unassailable evidence – in essence; they are transformed into imagined documents that can never be cross-examined. In this construction, the would-be testimony of perpetrators is given epistemological validity over that of victims, offering up the false and unfulfillable promise of establishing a singular truth. Complicating this scenario, however, is the increasingly open-ended hope offered to victims, judicial processes and historians alike by the application of new forensic methods, for example, in the examination of gravesites and human remains, and by satellite footage, that are generating additional categories of evidence. Using the juridical and archival legacies of the Khmer Rouge in Cambodia and the Yugoslav Wars as case studies, this article argues that when perpetrators die before giving legal testimony, survivors and victims' families construct them as unavailable documents with imaginary agency to settle competing versions of history. Such imagined documents enter into a complex landscape of human rights archives that has heretofore been exclusively focused on tangible evidence. *First*, this article frames the case of Khmer Rouge leader Ieng Sary, charged with crimes against humanity and war crimes, who died before giving his testimony in a hybrid tribunal. In the face of diverse archival documentary evidence capable of presenting a more complete and complex picture of atrocities, it contemplates why survivors and victims' family members placed high hopes on his potential testimony, essentially constructing him as a now-dead living document. *Second*, it explores a parallel case, that of the death of Slobodan Milošević while being tried by the International Criminal Tribunal for the Former Yugoslavia (ICTY), and argues that the notion of a dead perpetrator as imagined document has less sway when the public has the opportunity to hear the perpetrator defend himself, regardless of the perpetrator's own admission (or denial) of culpability. *Third*, it proposes the notion of imaginary documents. It argues that such imaginary documents challenge dominant conceptions of the evidentiary qualities of tangible records and the archival legacies of trauma by insisting on a more dynamic and holistic view of records that takes the affect of survivors and victims' family members into account.

Keywords: archives; records; imaginary; Cambodia; Yugoslav Wars

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Introduction

The legal and political instrumentalism of the latter twentieth-century phenomena of international criminal tribunals (ICTs), special courts and truth or truth and reconciliation commissions (TRCs) – as well as the extent to which they are ever able to establish an unassailable singular ‘truth’ about the horrendous acts that defendants are charged with perpetrating – has been extensively discussed in the media and in relevant scholarly literature.¹ The precedent for using international law to prosecute those who violated ‘the laws of humanity’ and the establishment of such legal bodies was established earlier in the twentieth century, first with the Commission to Consider the Responsibility of the Authors of the War that was set up as a component of the Versailles Peace Conference following World War I, and then with the International Military Tribunal (IMT) and subsequent tribunals held in Nuremberg after the end of World War II to prosecute crimes against peace, war crimes, and crimes against humanity.² Notably, in both cases, the bodies were established by the victorious sides. More specifically, in the case of the IMT, such trials, marked by new legal precedents, had to simultaneously prevent those on trial from being able to claim that they were being tried *ex post facto* (i.e., under a law that did not exist when the alleged crimes were committed), or to argue *tu quoque* (i.e., that ‘you also did it’). TRCs, on the other hand, may have various mandates, and may not always result in the punishment of perpetrators.

The notion that a singular ‘truth’ can be elicited by such official means is considered essential to the prevailing of justice and the processes of forgiveness, reconciliation and healing. Such an idea – in theory – subsequently allows affected individuals to move on with their lives and communities and nations to move forward with their recovery.³ Even so, a singular truth is at best transitory, and misleading. As important, this is likely an impossible objective, given each party’s selective memories, the often-integral relationship of those memories with identity, and the high degree of affect that those memories invoke. Within the scope of the legal proceedings, the dimensions, dynamics and performance of those memories have also been extensively examined; different narratives have accordingly been juxtaposed or correlated with various forms of documentary evidence. The volume of evidence introduced in some of the proceedings has proven to be unprecedented, even overwhelming. It can include not only personal testimony, photographs and news recordings, and physical and digital records of political and military decisions and actions, but also recordings of telephone conversations and footage collected through satellite and drone surveillance and local security cameras. In some cases, this documentation continues to be supplemented on an almost daily basis by emergent evidence, particularly the results of DNA matching performed on recovered human remains; increasingly, further insights have been ‘mined’ from existing documentation using new technologies for searching and analysing data. To this we might add the release by individuals of photographs and videos recorded using personal cellphones and digital cameras by soldiers and private citizens who were first-hand witnesses. New forms of post hoc documentation are also being created, including oral and video history projects and ethnographic research being conducted in post-conflict regions and with diasporic community members around the world. Both because and in spite of this dynamic unfolding of documentation, the understandings and perceptions of ‘truths’ and the associated emotions can shift considerably in and across time and arguably may never truly be resolved.⁴ Understandings and perceptions are also highly subject to influence from contemporary political ideology, social change, the effects of time, and generational transitions on what is remembered, how and why.

Despite the wealth of documentary evidence in many post-conflict and transitional justice contexts and the near-universal unwillingness of high-level perpetrators to discuss the details of their crimes, admit culpability or express remorse, survivors of atrocities, the families of victims and their advocates may still place much faith on perpetrators testifying before a tribunal or commission to the point where they may invest high-level defendants with unparalleled power to establish the truth about past horrors. Consequently, when those accused of being high-level perpetrators die before publicly yielding their secrets in legal and archival arenas (and given the length of time it may take before perpetrators are put on trial this has proven to be quite a likely outcome), such individuals may simultaneously express relief about the perpetrator's demise and grief that, along with it, possible crucial information about the past is lost forever. In their deaths, the accused may become forever-from-now-on unavailable and thus (in essence) unassailable evidence; they are transformed into imagined documents that can never be cross-examined. Despite the fact that most high-level defendants have remained defiant in the face of tribunals and have refused to admit any culpability, in this construction, the would-be testimony of perpetrators is given epistemological validity over that of victims and over documentary evidence, offering up the false and unfulfillable promise of establishing a singular truth.

Such phenomena precipitate more nuanced and expansive discussions about the evolving nature of both tangible and intangible documents as archival records and as evidence. This in turn opens the door for a more sophisticated contemplation of the roles archives might play with regard to understanding 'perpetration' and 'perpetrators', as well as recovery from human rights atrocities. Using the juridical and archival legacies of the Khmer Rouge in Cambodia and the Yugoslav Wars as case studies, this article argues that when perpetrators die before giving legal testimony, survivors and victims' families construct them as unavailable documents with imaginary agency to settle competing versions of history. These imagined documents enter into a complex landscape of human rights archives that has heretofore been exclusively focused on tangible evidence in a quest to identify statements made by perpetrators of their intent to commit genocide or other war crimes. *First*, this article frames the case of Khmer Rouge leader Ieng Sary, charged with crimes against humanity and war crimes, who died before giving his testimony in a hybrid tribunal. In the face of diverse archival documentary evidence capable of presenting a more complete and complex picture of atrocities, it contemplates why survivors and victims' family members placed high hopes on his potential testimony, essentially constructing him as a now-dead living document. *Second*, it explores a parallel case – that of Slobodan Milošević, who passed away while being tried by the ICTY – and argues that the notion of a dead perpetrator as imagined document has less sway when the public has the opportunity to hear the perpetrator defend himself, regardless of the perpetrator's own admission (or denial) of culpability. *Third*, it proposes the notion of imaginary documents. It argues that such imaginary documents challenge dominant conceptions of the evidentiary qualities of tangible records and the archival legacies of trauma by insisting on a more dynamic and holistic view of records that takes the affect of survivors and victims' family members into account.

Dead perpetrators as living documents

The Case of Ieng Sary

In March 2013, Ieng Sary died of a heart attack at the age of 87. As former deputy prime minister and foreign minister for the Khmer Rouge, Sary personally oversaw the transfer of

many Foreign Ministry staff to the notorious Tuol Sleng (aka S-21 prison), where they were tortured and then sent to the Choeung Ek Killing Fields to be executed.⁵ As the Khmer Rouge's third in command, Sary was aware of and played an active role in enacting the regime's plans to evacuate Phnom Penh, which placed millions of Cambodians on communal farms as slave labourers. He was also intimately involved in military actions against neighbouring Vietnam. At the time of his death, Sary had been standing trial for the international crimes of genocide, crimes against humanity, and war crimes, as well as homicide, torture and religious persecution under Cambodian law at the Extraordinary Chambers at the Courts of Cambodia (ECCC). The ECCC, which has been in operation since 2006, is a joint effort between the Royal Government of Cambodia and the United Nations, and has, at the time of writing, issued only three verdicts at the cost of more than \$150 million of international funding. Once thought to be a significant milestone for justice in Cambodia, the tribunal has been plagued by financial setbacks, corruption allegations, charges of political interference and strikes by unpaid translators, and, as such, has come under fire by an ever-increasing number of survivors of the regime, international legal experts and human rights advocates. Sary's death underscored the failure of the tribunal to administer justice in a timely and effective manner and highlighted the possibility that the other two defendants in the case might also die before the court reaches final verdicts (Sary's wife, Ieng Thirith, once a fourth defendant in the case and former Khmer Rouge social affairs minister, was ruled unfit to stand trial in 2010 due to an Alzheimer's diagnosis.) Despite Sary's role in the death of approximately 1.7 million Cambodians from starvation, execution and untreated disease, hundreds of Khmer Rouge loyalists and family members attended his weeklong funeral, which was capped by fond reminiscences, Buddhist chants and evening fireworks.⁶

During his time at the tribunal, Sary invoked his right to remain silent and refused to give testimony. This noncooperation was due, in part, to claims that a 1996 royal pardon protected him from a conviction by the ECCC (the ECCC deemed the royal pardon invalid). Sary was often absent from the proceedings, watching via closed circuit television from his holding cell, allegedly due to health issues. In 2011, before the start of the trial, his lawyers issued a failed motion for his release on house arrest. Even prior to the tribunal, Sary never discussed the details of his involvement, nor did he admit guilt for his actions, deflecting all blame to Pol Pot and Nuon Chea (the Khmer Rouge's second in command). At the time of his royal pardon and return to Cambodia in 1996, he was estranged from the Khmer Rouge leadership and claimed that Pol Pot 'was the sole and supreme architect of the party's line, strategy and tactics' and that 'Nuon Chea implemented all Pol Pot's decisions to torture and execute those who expressed opposite opinions and those they hated'.⁷ We can reasonably assume that, even had Sary lived to see his own conviction, he would not have yielded any information about his involvement with the regime, nor accepted any responsibility for his actions.

In the face of Sary's deafening silence in life, survivors of the regime, victims' families, and their advocates still lamented what they saw as the irrevocable loss of key evidence in his death. In this regard, key stakeholders placed a disproportionate faith in the hypothetical, nonexistent (and forever-from-now-on impossible) oral testimony of a dead perpetrator in establishing legal and historical facts. Cambodian responses to Sary's death reveal this paradox. For example, Vannarith Chheang, Executive Director of the Cambodian Institute for Cooperation and Peace told a reporter from the *Los Angeles Times*, 'We've lost another living document ... Thirty-five years after committing such heinous crimes, they're still getting away with it'.⁸ In this conception, Sary was himself a form of evidence that was necessary to establish legal accountability. This sentiment was echoed repeatedly in

interviews with members of the Cambodian public taken by staff at the Documentation Center of Cambodia (DC-Cam). One elderly man, Chen Mut, said,

When I heard about the death of Ieng Sary, I felt only regret that the country had lost an individual who could provide answers to the questions many have about the Khmer Rouge period. With his death I have lost the opportunity to hear his explanation about the atrocities and violence committed by so many. I am still hopeful that the senior leaders who are still alive will provide some answers. I want the tribunals to come to a conclusion about who was responsible ...⁹

As this quote reveals, some Cambodians linked the existence of testimonial evidence from the perpetrator to the establishment of legal justice, despite both the noncooperation of the perpetrator while alive in establishing such evidence and the ongoing impossibility of creating such evidence anew after the perpetrator's death.

Furthermore, many of those interviewed by DC-Cam conflated legally admissible evidence and historical evidence (i.e., proof that might establish the facts about a past event), positing that without Sary's testimony, legal truth could not be established, and without legal truth, historical truth could not be established. For example, Sambo Manara, a professor in the Department of Media and Communication at the Royal University of Phnom Penh, told DC-Cam staff, 'With Ieng Sary's death, the case has been closed. An important document on the Khmer Rouge period has been lost forever. I pity the victims who thought that they would receive answers about the violence and suffering during the Khmer Rouge years ... As a historian and researcher, I cannot comment upon whether Ieng Sary committed crimes because the court has not concluded its working'.¹⁰ Legal evidence, conflated with evidence in the archival sense, is intermixed with the court's ruling with the truth about the past. Yet, the truth of Sary's guilt is independent of Sary's conviction; even if Sary had lived to see a verdict, and even if the court had ruled Sary not guilty, Sary stills bears culpability in the death of 1.7 million people, as ample textual, photographic and verbal evidence from victims and witnesses attests (as will soon be addressed). Here, we see false hopes pinned on the ability of the judicial process to induce testimony from a heretofore silent perpetrator and on the ability of a perpetrator to provide indisputable truth about the past. In this construction, Sary's hypothetical (and now impossible) testimony trumps all other forms of evidence presented to the court and widely available in other arenas. Manara, like many of the Cambodians interviewed by DC-Cam in response to Sary's death, gives the perpetrator a disproportionate, undeserving and paradoxical evidentiary power, re-inscribing Sary's potency even in death.

Several of the interviews conducted by DC-Cam in the wake of Sary's death reveal how, like Manara, many Cambodian stakeholders have impossibly high and unrealistic expectations, both for the court to establish historic truth and for the perpetrators to detail their actions and motivations. One interviewee, Abdugani Pin Musa, told DC-Cam staff, 'The death of Ieng Sary has left behind uncertainty about the perpetrators of the cruelties committed during the Khmer Rouge regime. The question remains of whether Ieng Sary was a killer during the Khmer Rouge, or if he was just a subordinate. Therefore the history of the Khmer Rouge period remains unclear'.¹¹ In this vein, some Cambodians have broadened their expectations for the tribunal, expecting it not only to convict a few top leaders of the regime but also to induce noncompliant perpetrators to speak, and in so doing, to reveal the truth about the past.

Although some of those Cambodians interviewed by DC-Cam did acknowledge that, while alive, Sary was silent about his role, most still pinned hopes on the future possibility of his testimony, hopes which had to be abandoned in his death. 'Due to his old age and

illness, Ieng Sary talked very little during his trial and from an academic standpoint with his death we have lost a source of potential information on the Khmer Rouge', said interviewee Cheng Hong.¹² Similarly, Am Sophal said, 'I feel only regret at his death as he has not provided any information or answers yet ... His death means that the young generation will not receive proper answers. With his death the court has lost a source and the judicial process has become even harder'.¹³ Yet, it is not Sary's death that caused this perceived gap in information, it was his silence in life. Had Sary survived until the end of the trial, it is highly unlikely he would have reversed his previous 25 years of silence; even if he had testified, such testimony would not have provided victims with any satisfactory answers. In death, Sary becomes a forever-from-now-on unavailable piece of evidence, an eternally 'potential source of information' that can never be decoded.

Notwithstanding this overwhelming faith placed on Sary's nonexistent testimony, more than enough documentary evidence exists to establish Sary's role in the regime. Prior to the tribunal, historians Stephen Heder and Brian D. Tittmore made the case for Sary's indictment in their book *Seven Candidates for Prosecution*. Accordingly, Heder and Tittmore describe the text of numerous speeches, radio addresses and statements made by Ieng Sary during the Khmer Rouge period that reveal his knowledge, support of, and participation in the regime's policies to 'smash' all alleged enemies.¹⁴ Heder and Tittmore also show how Sary was copied on several confession statements extracted under torture, and that he was the recipient of numerous telegrams and internal memos reporting the 'smashing' of 'enemies' in the field.¹⁵ Heder and Tittmore conclude that such documentary evidence 'suggests that Sary knowingly contributed directly and substantially as an aider and abettor to the commission of crimes throughout the country'.¹⁶ Heder later recounted and showed such evidence in detail as he testified in the tribunal.

Contributing to this list of incriminating evidence, the ECCC's office of the prosecution presented a multitude of additional records establishing Sary's involvement in Khmer Rouge crimes. These included: minutes from 19 Standing Committee meetings that clearly indicate Sary as third in command (after Pol Pot and Nuon Chea); more than 100 telegrams sent to Sary which reported how internal enemies were identified and 'swept clean'; communications Sary had with the United Nations wherein he warns foreign countries to stay out of Cambodian internal affairs; a diary spanning 1976–1979 that detailed the actions of the Foreign Ministry and Sary's role in enacting them; and a 1977 letter in which an S-21 detainee describes his torture and pleads with Sary to release him, suggesting that Sary had authority over who was detained and tortured at S-21.¹⁷ Video represented a key medium of evidence, including: footage from 1975–1979 in which Sary is seen shaking hands with Pol Pot, addressing crowds of cadres and welcoming a Vietnamese delegation; a 1975 interview Sary gave with a French journalist in which he justified the evacuation of Phnom Penh; and an interview with Khmer Rouge military commander Ta Mok naming Sary as third in command.¹⁸ Throughout the trial, dozens of civil parties testified to the horrific conditions they endured under the regime, including forced labour, torture and the execution of family members and friends. Thus before Sary's death, the trial both established Sary's role in the regime and the regime's role in the death of millions of Cambodians, despite the absence of a formal conviction.

Given the wealth of documentary evidence collected by DC-Cam, interpreted by historians and presented as legal evidence in the tribunal, why are Cambodians lamenting the loss of the imagined testimony of a now-dead perpetrator? Why give epistemological validity to the nonexistent statement of a mass murderer? Is documentary evidence alone not enough to establish the facts about the past? An essay by DC-Cam legal advisor John D. Ciorciari hints at an answer.¹⁹ He writes, 'In thousands of interviews with DC-Cam, victims often

show more interest in seeking an explanation than in seeking revenge. To cope with the past, those who bear the scars of Khmer Rouge rule and lost loved ones want to know why'.²⁰ Perhaps it is not the facts of the past that Cambodians need Sary to establish (as those facts are overwhelmingly established by documentary evidence), but a justification for why so many people died, an account of the reasoning behind such unreasonable acts, a way to make sense out of the nonsensical. With Sary's death, such answers will remain perpetually elusive.

Worsening the impact of such unanswerable questions in the minds of many survivors, Sary left behind the equivalent of \$20 million in a Hong Kong bank account. Sary accrued the fortune through the Chinese government's funding of the Khmer Rouge and the regime's lucrative gemstone and timber trade after its toppling in 1979. In embezzling these funds from the official Khmer Rouge coffers, Sary later invoked the ire of Khmer Rouge leadership, who pushed him out of the party. Victims' advocacy groups and civil parties to the tribunal called for Sary's wealth to be investigated in 2009, but the ECCC refused. After Sary's death, they called once again for the funds to be seized by the Cambodian government and redistributed to victims as reparations. Youk Chhang, DC-Cam's Director, urged that Sary's wealth be used to create a national mental health care system, which would provide therapy to survivors of the regime. Despite such demands, government seizure of Sary's accounts remains highly unlikely given the absence of a formal conviction. In his death, Sary's family reaps the benefits of his wealth, even while his motivations remain a tortuous mystery to the regime's victims.

The case of Ieng Sary begs some important questions about whether the presence and power of imagined as opposed to tangible documents is a phenomenon distinctive to the Cambodian context or is one that might be anticipated and accounted for in other cases with similar circumstances. Furthermore, if there are multiple cases in which a dead perpetrator is imbued with the power to establish 'truth', is the imagined forever-unassailable living document just one of several possible constructions of an imaginary document that might be at work in the aftermath of traumatic events? If so, what other kinds of constructions might be anticipated and how might such notions of intangible or imagined documents interplay or hold sway in the face of tangible documents?

The case of Slobodan Milošević

People can always say it didn't happen but now there are documents (Zdravko Grebo, Director, Center for Interdisciplinary Postgraduate Studies, University of Sarajevo).²¹

One place to begin to explore these questions is to consider a situation where there are some parallels. Slobodan Milošević was the first head of state ever to be brought before an international criminal tribunal. In 2006, he died in the Hague, before the ICTY rendered its judgment. Unlike Ieng Sary, he had ample opportunity to give testimony before his death. Milošević's trial was supposed to 'shape all future efforts at punishing the world's bloodiest war criminals', but as a result of his death he was never found guilty of the crimes with which he was charged.²² Despite the length of the work of the ICTY (established by the United Nations in 1993 and projected to conclude appeals by 2015), the ongoing trials of other recently captured key figures, Radovan Karadžić and Ratko Mladić, and the millions of documents introduced as evidence, the death of Milošević and the later overturning upon appeal of the convictions of both Serbian and Croatian generals for war crimes left victims from Bosnia, Croatia and Kosovo without seeing justice served. It also left Serbia, as *The Guardian* put it in June 2012, 'A nation still wavering between guilt and victimhood'.²³

Indicted in 1999 by the ICTY for war crimes and crimes against humanity in Kosovo, Croatia and Bosnia and Hercegovina,²⁴ Milošević was arrested on charges of corruption and abuse of power in Belgrade by Serbian authorities in April 2001 following his 2000 first round loss in the presidential elections and subsequent mass protests on the streets of Belgrade at his refusal to accept that loss. He was transferred to the ICTY on 29 June 2001 by Zoran Djindjic, the new (and subsequently assassinated) reformist and pro-Western Serbian prime minister just in time to meet a US deadline for handing over Milošević or face losing US and international economic aid. By the time his trial began in February 2002, several lesser figures had already been tried and convicted, and other individuals who had played key roles in the Yugoslavian Wars had passed away or been killed. The trial was drawn out on account of Milošević's health and because he insisted, as a trained lawyer, on serving as his own counsel. He suffered from high blood pressure and a heart condition and the stress of the trial likely exacerbated these conditions. To provide him with time to prepare as well as to accommodate his poor health, the tribunal only met three days a week. He requested permission to go to Russia for medical treatment but his request was turned down by the tribunal on the grounds that good medical care was available in the Netherlands. Milošević was found dead in his United Nations prison cell in Scheveningen on 11 March 2006 before the ICTY rendered its judgment (expected to be in May 2006). He was 62. The proceedings against him ended on 14 March 2006.

Diane Orentlicher, principal author of the Open Society Justice Initiative's 2010 report on the impact of the ICTY on Bosnia, cites an almost universal sentiment about the ICTY expressed in extensive qualitative interviews she conducted of a cross-section of individuals from different ethnic groups in Bosnia and Herzegovina between June 2006 and July 2009. The sentiment was that the creation of the ICTY had offered the only possibility for justice during and after the violent inter-ethnic conflict that took place in Bosnia between 1992 and 1995,²⁵ even though its creation in 1993 did not halt atrocities and the proceedings of the ICTY have been criticised as ineffective, overly lenient, costly and politically biased. She quotes, for example, Kada Hotić, whose husband and brother were among those murdered in Srebrenica, recalling that:

... when the Hague Tribunal was established it gave us a big hope, not only to convict criminals ... but we expected to have the truth in this country revealed and proved, because we have a big problem here regarding acknowledgement of the truth. But in the absence of such acknowledgment, many Bosniaks believe it matters enormously that the ICTY has at least produced 'the evidence and proof that will someday make [Bosnian Serbs] understand they lied to themselves'.²⁶

Human Rights Watch researcher and Serbian human rights lawyer Bogdan Ivanisevic presents another view of the impact of the ICTY, this time contemplating the impact of the tribunal on Serbians:

Even though they have resistance to hearing non-Serb witnesses, people do take into consideration what they hear. The trial has caused reduced myth-making in Serbia. You don't hear, as you did prior to the trial ... that Srebrenica didn't happen or that the Muslims killed themselves. I wouldn't minimize this reduced space for rewriting history. As for acknowledgment of our side's crimes, it's a psychological barrier too difficult [to cross – admitting] that the policy we supported was criminal. It will take time. It may take a new generation that was not implicated.²⁷

The ICTY itself makes the following claim: 'The Tribunal has contributed to an indisputable historical record, combating denial and helping communities come to terms with their recent history. Crimes across the region can no longer be denied.'²⁸ As for the death of

Milošević, it produced deep disappointment among his victims that he had not lived long enough to be sentenced for his crimes, and little public sorrow in Serbia or among Bosnian Serbs.

In this context, then, it would seem like the death of Milošević resulted less in dashed expectations about what he might have revealed because there were copious other living and documentary sources of ‘truth’ as well as indictments of many other figures that were deeply associated with the genocides that took place in Bosnia. Instead it further diminished expectations about what the tribunal might actually achieve. Rather than Milošević becoming an imaginary document to survivors, the trial process actually assisted in debunking myths that had been used by some Serbians to deny or at least protect themselves from the realities of the crimes committed. In Ieng Sary’s case, however, the context was very different; the conflict was more than 30 years in the past, there were fewer accused high-level perpetrators still alive who might still provide the longed-for ‘truth’, and none of the new ‘hope’ offered to survivors by wide-scale DNA matching. Most important, Ieng Sary had not taken the stand, which operates in contrast to Milošević. Milošević’s arrogant, bullying and unrepentant conduct as a defendant and, as his own counsel clearly demonstrated, no truth would be forthcoming. As the long drawn-out trial progressed, expectations about what it could accomplish changed and were also influenced by surrounding circumstances, including the escalating ongoing conflict in Bosnia and Kosovo. To surmise and summarise, the notion of an unassailable living or imaginary document in the minds of victims is something that might arise under certain, but not all, circumstances where an accused perpetrator dies before being convicted. The imaginary document construct most likely arises when the public does not have the opportunity to hear the perpetrator defend himself or watch how he comports himself in trial, and when an unrealistic amount of hope has been pinned on the testimony of a single individual in what is often a much wider web of complicity. In this way, the conception of dead perpetrator as imaginary document loses its sway when the perpetrator testifies before his death, regardless of the quality of the testimony given.

It should also be noted that the notion discussed here of an imaginary document is an archival and not a legal one, just as archival notions of evidence are not coterminous with those in legal theory. For example, in writing about how Milošević’s trial ended without judgment, legal scholar Timothy William Waters discusses a legal version of an imaginary document in the form of the Trial Chamber’s ruling on Decision on a Motion for Acquittal brought under the tribunal’s Rule 98bis halfway through the trial.²⁹ The chamber ruled that the trial could proceed because the prosecution had presented enough evidence that a court might find Milošević guilty. Waters argues that in the absence of a verdict, ‘the prosecution, defense, chambers, and outsiders deployed the Rule 98bis Decision to tell a story about Milošević’s guilt or innocence and craft a final judgment in the eyes of the world, if not in the law’.³⁰

Emergent archival evidence and the imaginary

What are we to make of these paradoxical constructions of the evidentiary value of the imagined testimony of dead perpetrators from an archival studies perspective? Scholarship within the field of archival studies, in part reacting to technological and media developments over recent decades, and in part to the so-called archival turn in the humanities and social sciences, has considerably expanded upon traditional constructions of documentation, records and evidence. While some archivists might be keenly aware of legal definitions of evidence and the intricate rules of what counts as admissible evidence in

various legal settings, archivists generally employ the term ‘evidence’ in a more general sense as ‘that which we consider or interpret in order to draw or infer a conclusion about some aspect of the world’.³¹ In this regard, evidence does not exist in and of itself: it is ‘relational’ and contingent.³² It exists in support of a particular argument; it is a building block in making a larger case. In this regard, the documentation does not ‘speak for itself’, nor does it necessarily ‘speak truth’, despite ample claims to the contrary; it must be activated by users in support of a particular claim. This evidentiary quality is what distinguishes records from other forms of documentation; records may serve as evidence of activity in addition to their capacity to relay information. In its invocation as evidence in support of a claim, veracity may be less important in ascertaining the weight of a document than its emotive or affective capacity to effect particular understandings and outcomes.

In this light, this article advocates for taking the affective dimensions of records – tangible or intangible, real or imagined – seriously in our considerations of the human rights impact of archives. While hypothetical documents will never help convict a perpetrator, they nevertheless are powerful forces in the imaginary of survivors of human rights abuse and victims’ families, and as such, are crucial to dealing with the aftermath of mass murder in the communities most impacted. As such, these imaginary documents help expand our conceptions of records and their evidentiary qualities beyond narrow legalistic frameworks to more fully engage the emotional and psychological dimensions of archives in the wake of trauma. Considering imaginary documents reminds us that, for many survivors of human rights abuse, ‘truth’ will always be forthcoming, justice will always be unattainable, and closure is not an option.

Furthermore, the timing with which such evidence emerges is key to understanding its invocation in support or against particular claims. Not all documentation of human rights abuse is created contemporaneously to the abuse itself, nor does documentation created at the time of abuse always or completely come to the fore as soon as the abuse is over. Rather, there is a complicated cycle during which particular types of documentation emerge or are excavated and are put to use as evidence in support of particular truth claims. Tangible documentation of human rights abuse could be loosely assigned into several categories – those generated through routine bureaucratic and media processes that are later introduced as evidence of abuse and complicity; those created by the perpetrators (and sometimes victims) at the time of the abuse as part of the abuse itself; those created by observers such as the world media, peacekeeping forces and other nations’ surveillance activities; those created after the abuse by witnesses and survivors with the express purpose of documenting the abuse; and those created by truth commissions and tribunals in the process of exposing the abuse. Within this multi-format, multi-source and multiply-motivated documentary landscape, the testimony of alleged perpetrators is but one piece of a complex moving puzzle of evidence invoked to establish facts about the past.

Some of this documentation will subsequently be placed in an archive for long-term access and preservation, where some of it will be discovered by future users over time. Throughout each of the categories of human rights documentation, evidence is created, incorporated into archives and brought to the attention of interested parties over the course of years; the accumulation of evidence happens over large swathes of time and is dependent on the distribution of resources, the political agendas of those with the power to pursue such evidentiary investigations, and cultural contexts that impact what gets remembered and what gets forgotten. What all of these forms of documentation that usually end up in archives have in common, however, is that they are tangible and able to withstand intellectual cross-examination as evidence of decisions made, actions carried out and human motivation and complicity. This is not the case for an imagined document.

In this archival milieu, the construction of dead perpetrator as imaginary document arises at a particular moment in time – after the juridical process has begun, after the death of the perpetrator, but before the perpetrator gives testimony and before a legal verdict has been issued. This new imagined form of human rights documentation has the power to effect action, be exhibited as ‘proof’, and shape collective memory, despite its inadmissibility as legal evidence. These dispositive and probative capabilities are also key characteristics of tangible ‘real’ records. If they are at work also in the form of intangible ‘imaginary’ documents, then an important augmentation to classic archival and records theory is required.

These records – imagined rather than tangible – nonetheless become important source materials for the ongoing process of shaping collective memory of past atrocities. Collective memory has come to denote the ways in which everyday people socially construct the past through shared forms of remembrance and forgetting, as distinguished from history as the official story that is told about the past by a guild of trained historians.³³ As this article has demonstrated, paying attention to records and archives as a genre enables us to see how communities of survivors imbue records with the power to conceptualise, re-envision and make meaning of the past. The power of records to shape collective memory remains constant, regardless of the tangible or imaginary nature of the records in question. Furthermore, as imaginary records get reimagined with time, so to does collective memory of the past, opening up the records for infinite reinterpretation and reuse by subsequent generations.

In light of these newly imagined documents, we argue that human rights and social justice concerns – and particularly the prosecution of and recovery from war crimes and crimes against humanity – have surfaced additional conceptions of evidence that are fundamentally different from those based around commonly understood traditional legal, bureaucratic and historical premises. The notion of the record as evidence of human activity has become far less physically bounded, allowing not only for constructions that are premised in virtuality, but also in affect and effect. Such constructions draw the realm of the record away from the tangible and into that of the imaginary. Conjured by the unattainable hopes for closure by survivors and victims’ families, such imaginary documents are bound by their impossibility; they are always out of grasp, falsely promising to make sense of the non-sensical, always emerging on an intangible horizon. They will never serve as legal evidence, nor provide answers about past atrocities. Yet, despite these limitations, imaginary documents help us to both broaden our definition of human rights documentation to include the affective needs of survivors and victims’ families and to reconceptualise archives as institutions that can make meaning out of past atrocity when legal systems are unable to or are perceived to fail to administer justice.

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Notes

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