Digital Solidarity in International Criminal Evidence

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International criminal practice reflects biases toward high-resource languages, affluent states, and prestigious institutions. Along with its many benefits, digitalization of international criminal evidence has begun to further entrench some of the distance between differentially situated individuals. This post seeks to address the role that digital solidarity should play in the collection and analysis of international criminal evidence. Incorporating aspects of digital solidarity into the field of international criminal law would help address asymmetries in public international law and the digital realm through anchoring digital spaces and connectivity to such spaces in universal human rights and combatting the so-called "digital divide." Through integrating aspects of digital solidarity into the field of international criminal law, legal practitioners can work to prevent the systematic relegation of already marginalized voices.

Background

In recent years, international criminal evidence has undergone a digital transformation. Sources of information have become increasingly electronic, with efforts being made, for example, to collect digital devices, such as cellular phones and unmanned aircraft systems, in the battlefield to aid subsequent investigation, prosecution, and adjudication of alleged international crimes. Collection of digital open source information is on the rise. Practitioners and scholars are calling for the preservation of online material for potential use as evidence, including through partnering with internet hosting providers. Artificial intelligence is being employed to analyse information and courts are increasingly relying upon digital evidence. The above examples evince the growing trend of collecting digital information, or information stored or transmitted in digital form, and analysing this information by means of digital tools, for use as evidence in international criminal cases.

Unfortunately, with digitalization comes the so-called "digital divide" and its three levels: 1) inequality in internet access; 2) inequality in technology use due to differences in digital literacy or social ability; and 3) inequality in the capitalization on access to, and use of, information and communications technology. Thus, the digital divide serves to compound pre-existing structural inequalities and biases, influencing the choice of which information to use as evidence in international criminal practice.

Challenges

In addition to the challenges posed by inequality and the digital divide, available data suggest that the International Criminal Court (ICC) may insufficiently engage with affected communities and locally informed sources when collecting information. First, based on available information, the Court has not done enough to stay continuously engaged with impacted communities across all situations. The last time the ICC provided a comprehensive report about its outreach and engagement activities was in 2010. While the Court provides periodic updates about its outreach activities, it seems such efforts are disparately applied across preliminary examinations and investigations. For example, significant outreach activities seem to have been conducted in Côte d'Ivoire, Mali, and Sudan; some activities seem to have been conducted in Bangladesh/Myanmar, Georgia, and Kenya; and few seem to have been conducted in Afghanistan, Ukraine, and Venezuela. While understanding the

Court's limited budget and resources, the overall quality and quantity of the activities seem scant compared to the scale and complexity of crimes allegedly committed and the numerous affected individuals. Engagement with affected communities during evidence collection has a host of advantages, not least of which is building trust—an element often considered essential for victims and witnesses to come forward.

Second, almost all of the ICC's engagement and outreach activities have focused on educating people about the ICC's jurisdiction, mandate, and judicial proceedings. They have rarely covered information and evidence collection methods and tools, nor do they seem to have covered how impacted communities—including potential victims and witnesses—might be able to directly share information and evidence with the Court in a safe and secure manner. The minimal engagement with impacted communities and the lack of focus on information and evidence collection not only harm the image of the ICC, adding to existing critiques of the ICC's status as an impartial and independent court of last resort, but also negatively affect the collection, preservation, and analysis of relevant information.

Further, the ICC's Office of the Prosecutor (OTP) has overly relied on the English language in information submission and selection as evidence, at least pertaining to some situations. The OTP's latest digital tool for information submission, OTPLink, is only available in English. For selection of information as evidence, according to the authors' research into the preliminary examination in Afghanistan (article to be published in an upcoming issue of the Journal of International Criminal Justice), the OTP did not cite a single source in the local languages of Dari and Pashto (see, for example, the OTP's "Request for authorisation of an investigation pursuant to article 15"). This approach runs the risk of failing to capture incidents and events that may represent a piece of the puzzle of an international crime, but never make it to international organizations or the international media, then having other presumed indicia of reliability. For example, when dealing with crimes against humanity, "ordinary" domestic crimes, like murder, are considered part of the international crime when, among other constituent elements, "committed as part of a widespread or systematic attack directed against any civilian population." Proving the widespread nature of the attack is a quantitative inquiry, as inferred, for example, through the number of victims or the "attack's" extension over a

broad geographic area. If incidents or events are systematically under-considered due to over-reliance on information produced and available in high-resource languages like English, it is possible that crucial information or evidence, that might influence investigative focus, will be left unconsidered.

Finally, based on available information, the ICC seems to have ineffectively collaborated with international organizations, such as the United Nations, in international criminal investigations overall. For example, while the OTP has heavily relied on the information and evidence collected by the United Nations Assistance Mission in Afghanistan (UNAMA) during the preliminary examination in Afghanistan, there has ostensibly not been an effective digital mechanism nor tools in place between the ICC and the UN for sharing information and evidence concerning international criminal investigations, as would seem to be allowed under their Negotiated Relationship Agreement. The same seems to be true for the ICC and the Independent International Commission of Inquiry on Ukraine. This lack of collaboration may increase the cost of information and evidence collection in places where relevant UN agencies may already have a lot of useful and relevant information and evidence upon which the ICC can expand and build up its investigation.

Digital Solidarity

The concept of international solidarity has pervaded legal discourse for some time, including with the UN's continuing dialogue on a Global Digital Compact. While definitions of the terms certainly vary, the mandate of the UN Independent Expert on Human Rights and International Solidarity states that one of the objectives of "international solidarity" is the creation of an enabling environment for "[p]reventing and removing the causes of asymmetries and inequities between and within States, and the structural obstacles that generate and perpetuate poverty and inequality worldwide." Applying this concept to the digital realm would involve both addressing issues specifically arising out of digitalization, such as the digital divide, as well as those stemming more generally from public international law, including the anchoring of digital spaces and connectivity to such spaces in universal human rights. In the high-stakes context of international criminal practice, where asymmetries already exist, digital solidarity would be a welcome remedy. To tackle issues such as minimal engagement with affected communities and locally informed

sources in information collection, overreliance on the English language in information submission and selection as evidence, and potentially ineffective collaboration between the ICC and the UN in international criminal investigations overall, principles of digital solidarity should thus be incorporated into the field of international criminal evidence.

Incorporation of Principles of Digital Solidarity

To address the issue of outreach, the ICC can take advantage of new technologies and accessible, multimedia solutions to provide effective community engagement for information solicitation and submission. As other scholars have suggested, the ICC's use of technology in outreach activities should be tailored to the existing technological infrastructure and levels of accessibility in each community. For instance, access to and use of the internet or cell phones vary greatly between countries and within communities. Depending on the level of digital infrastructure in each situation, the ICC should use multimedia tools that are easily accessible to target communities. These tools could include text-to-speech software and awareness raising campaigns on social media, TV, over the radio, and in magazines.

The ICC should also not only focus on raising awareness about its mission, mandate, and judicial proceedings, but also about topics relating to information and evidence collection. For example, the OTP may consider educating affected communities, potential victims, and witnesses on how they can use OTPLink to directly submit information to the Court, and developing accessible and easy-read guides on evidentiary standards and evidence collection techniques. Given that nearly all of the current situations under preliminary examination or investigation at the ICC are countries from the Global South, the ICC's effective use of technology in outreach activities may increase the participation of affected communities in the justice process, giving them a sense of ownership and the opportunity to share information and evidence with the Court.

Relatedly, the ICC should also take a language inclusive approach to information collection and analysis, both providing information collection tools in low-resource languages and utilizing more non-English-language sources in initial pre-investigative work. For example, the OTP might consider creating the OTPLink interface in languages other than English or linking the platform to an

online automatic translation tool. The OTP may also consider giving priority to local sources and investing in translation of local sources and materials. Project Harmony's automatic translation and automated transcription features will be crucial to this end, so long as they involve other proactive steps to prevent language blind-spots. Examples of such measures may include timely training of AI models, especially large language models, in low-resource languages, and hiring language and other experts from the Global South. Taking these steps will enhance the ICC's information collection efforts and improve the ICC's image among affected communities as a court that takes steps to address the needs of victims of atrocities.

Finally, novel technologies can help improve cooperation and information-sharing among supranational institutions such as the ICC and the UN. Some UN mechanisms, including the Human Rights Council and its Special Procedures, have always been involved in investigating and documenting serious human rights abuses across the globe. The information these UN mechanisms collect may substantially help the ICC in its investigation of atrocities. Developing a digital platform that enables the ICC and UN agencies to instantly share relevant information about any potential atrocities could decrease the cost of evidence collection at the ICC and provide invaluable clues and leads for ICC investigations.

Through applying principles of digital solidarity in the manner described above, the ICC can work to raise the voices of potential victims who have been affected by the alleged international crimes, ultimately accelerating the Court's truth-seeking function.

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