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From Documentation to Justice: Rethinking Evidence

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Tine: Welcome to this new episode of the Justice Visions podcast. My name is Tine Destrooper, and this is our next episode in a mini-series on documentation in, or documentation and transitional justice. We're focusing this mini-series on documentation because every transitional justice process depends on it. Whether we understand documentation as testimonies, as case files, as exhumation reports, satellite images, medical records, you name it, documentation really is central across a range of transitional justice initiatives. And as such, it's also important to highlight that initiatives that those transitional justice initiatives depend on the work of those producing the documentation, and those are very often grassroots or civil society actors. So in this mini-series, we've been talking about the different meanings of documentation across a range of contexts to get to the heart of what documentation is, but also to get a better sense of which injustices are accounted for or unaccounted for, whose voices count, what is erased, but also which justice aspirations the documentation contains. And I am excited to say that today, to explore those topics further, we're joined by Thomas Keenan. Welcome, Tom.

Thomas: Thanks for having me.

Tine: Tom, you're the director of the Human Rights Project at Bard College, and there's a number of reasons why we wanted to really have this conversation with you in this mini-series. I'll mention some of them throughout the conversation, but I think the most obvious one to start is the publication that you did together with Hito Steyerl "What is a Document?". So why don't we take that seemingly very straightforward but really quite complex question to dive right into the conversation. What is a document?

Thomas: Well, there's obviously a lot of answers there. In this context, I would say there's a couple of ways to approach it. In that exchange that I had with Hito, who's an activist, artist, very tech-savvy smart person about contemporary tech culture, we brought two very different perspectives or backgrounds to the question of what a document is. Mine was, we could say vaguely, Latourian and I got interested in the etymology of the word. So "document" comes from the

Latin root "docu," which is to teach. And it struck me that that was a kind of under-acknowledged or underrepresented dimension of thinking about documents and documentation, was that it had a pedagogical or an instructive function, not just a laying-out-the-facts function, but a doing-something-with-the-facts function. And it felt to me like we didn't maybe take that dimension, that sort of next step, after we've found the document or made the document, the step of presenting and working with the document seriously enough. So I used the etymology as a kind of way into pushing that question. My interest throughout a lot of my writing on evidence has been to challenge or ask people who think about evidence in human rights contexts to give up what I think is a kind of maybe enlightenment residue of thinking that if I've determined the facts, and they are seeable, hearable, readable, touchable, that's enough. You put the facts on the table, and that's proof, or that's the biggest move toward a decision. It feels to me that that's just the starting point, that someone has to mobilize, someone has to interpret, someone has to build a narrative around them, tell a story, make the documents do some work that are aimed at justice or truth or whatever the case may be. So that was my angle in this conversation: to try to insist that we can't continue thinking about documents as inert objects which just contain residues or markers of truth. We have to get them working.

Tine: I like how you go straight to that point of doing the work, because one of the sentences that struck me most in that conversation is your line, "We expect documentation to do the work for us", right? Which I think, is very relevant also to transitional justice practitioners. And I think it's quite interesting how a lot of your work starts from that fact that "documents do not speak for themselves," that they require mediation, that they can provoke claims, but that there's always this politics that is required for bringing those claims into being. And I was wondering if you could think of any recent examples of where we saw just that, that there is a document and that the politics that are triggered by that document, or the work that document invites, that that creates, or that that becomes a starting point for maybe mapping or carving out new justice avenues, a new politics that contributes to justice, however broadly we want to understand it.

Thomas: Yeah, I was thinking about that. So you'll have to excuse I have a US-centric example here, but for me, there's a very interesting story to tell about the difference that we've traveled between the videotaped attack of the LA police officers on Rodney King and the Minneapolis police officers' murder of George Floyd. They're kind of structurally similar, both police violence against a Black citizen of the US caught on some kind of tape and extremely widely exposed before any trial took place. So widely exposed that it seemed as if there was enormous public consensus about the meaning of the document. So just the micro-history: Rodney King caught on tape by a guy who had just received as a

Christmas present a camcorder, which was like the size of the table that we're talking at at the moment. Testing it out, points it out the window, happens to see attracted by the lights and the noise of a helicopter and so on, happens to see this. And within a day or two, it's on LA TV, and then it's on CNN. It was in the early days of CNN, and then it's all over the world. So much so that everybody seemed to agree about what had happened and what the outcome should be. There's a trial. The videotape is subjected to extremely careful scrutiny, not by the prosecutors who are charging the police with violence, but by the defense lawyers for the police officers, who introduce enough doubt about what's happening on the tape that they win the case. In spite of, we could say, public opinion, consensus, etc. Go all the way forward to the murder of George Floyd. Similarly, it's a social media moment, not a camcorder moment, but roughly the same thing happens. There's a camera right there which captures the agonizing last seconds of his life. I mean, last minutes and last seconds. There, the prosecutors remembered what happened in LA, and they there was also lots of public opinion about this. There is in this case, again, a big consensus, and there the prosecutors really worked hard to narrate, right down to the microsecond, what happened on that videotape. They didn't pretend that anything spoke for itself. They had a very strong interpretation. It was contested, again, by the police officers' lawyers, but in this case, the prosecutors won their case against the police. I don't know if it's a turning point, but it is a big difference. And it's a difference in how the justice system, or how at least part of the justice system understands what the work of documentation and evidence is, and they're no longer content to act like it speaks for itself. That's in the first case, literally, the prosecutor said to the jury "I don't need to tell you what's happening on this tape. You can see for yourself." They can't deny it. They can't say they weren't there. It's right there. There's no question about it. So that seems to me the dumbest possible thing a prosecutor could say, no matter how high-grade their evidence is. You have to tell them what you think it means. That's what I mean by the teaching dimension of it. You have to offer a persuasive interpretation when someone is contesting it.

Tine: It's interesting, the story you're telling here about the mediation and the narration and the role also of the forum and how the forum has changed. It also reminds me of of the book you did with Eyal Weizmann, Mengele's Skull which has as a subtitle "The Advent of Forensic Aesthetics." And what for me, was really eye-opening in that book is that you focus so heavily on that notion of the forum, right? At Justice Visions, I think we're often very skeptical about the notion of *forensic* evidence, which is easily associated with factual truth, scientific evidence, etc. Whereas if you look at the documentation that grassroots actors, for example, are collecting, it often speaks to this notion of a thicker truth. It's much more multifaceted, etc. And so for me, what's interesting is in that in this piece you're also underlining the etymology of the word "forensic," and you're

saying this comes from the word "forum," right? So approaching the notion of forensic evidence through that question that you pose of how evidence is made sense of in a specific forum, I wonder if you could speak a bit about how, for you, that changes the very concept or definition of the word "evidence", basically.

Thomas: Yeah, so I'll try. Just one disentangling move. Sometimes when Eyal and I talk about forensics, we mean the common, the everyday notion, scientists looking at DNA, or as in the case that we studied bones or physical evidence. So we have an interest in things, in objects, etc., which we can talk about. Usually that's as you suggested, opposed to testimony, witness testimony, and so on. And we do kind of tell this story of the kind of history of human rights evidence and its movement from the privilege of the witness, the survivor, victim, witness, to the forensics. And we were trying to kind of, if you'll pardon the metaphor, excavate the the kind of forgotten history of physical evidence in war crimes cases because the shadow cast by the importance of the witness is so big. Maybe we overdid it a little bit. I'll concede that, that it feels a little binary at times in the book, and we're kind of trumpeting the arrival of this turn, quote-unquote. So I'm prepared to part with that. But that was our idea, that no evidence speaks for itself. So we had this formula, the non-self-evidence of evidence. Everything needs speaking for or interpreting, including witness testimony, partly because witnesses lie, and sometimes they are said to lie even if they don't, and that's often the case with what we're mentioning who's believed and who's credited and so on. So oftentimes witnesses who you and I might think are telling the truth can seem to be lying by clever opponents from the state. But on the other hand, state witnesses lie all the time, and their testimony needs to be scrutinized and challenged in the same way that you would want to challenge physical evidence, whether it's a bullet hole in a wall or a bone found in a mass grave or whatever. And so it's a little easier to make the case that the bullet hole and the bone don't speak for themselves and that they need a trained person who knows how to read them, to make them speak, as it were, to ventriloquize to speak on their behalf, to animate the object and so on. But the same logic goes for witness testimony too. Witness testimony needs to be framed. It needs to be narrated. It needs to be explained, particularly when we're talking about court proceedings. If we're talking about maybe a truth commission or something different where it's more about showing solidarity and emphasizing what the witness or what the subject has gone through for whatever reasons, then you're not in an adversarial situation, and it might seem a little different. But I think the logic holds of the forum, the forensics as the art of debating about what the facts in a case are in a foum, so forensic aesthetics meant a couple of things. So you went for forensics. We could also go for aesthetics, which for some people was a scarier word than forensics. Our idea there was that in the same way that aesthesis is about sense impressions again. Etymologically, it's about sensation and sensing, and it's

obvious that people sense. It's not so obvious that objects sense, but that's actually what physical evidence is whether it's a stone or a wall or a skull or whatever. Violence or experience or history in the world has imprinted traces on objects, which do require trained interpreters to decipher, but when they do, you have evidence, and you can start making a case. So in that sense, there's an aesthetic dimension. It's the sense, it's the impression-holding, trace-bearing character of the physical objects. But it's also the fact that it needs to be presented. So in that sense, it's closer to the everyday meaning of aesthetics. So your evidence needs to come in a frame. It needs to have some, it needs to be wrapped up and told as a story or as a picture. We once did a seminar Eyal and I, with some real forensics people, in quotation marks. People from forensic anthropology teams and others, and they were talking about how they document mass graves that they have exhumed. And the one guy we were talking to talked about how important it was to lay out the skeleton. So if you're exhuming human remains and you find more or less intact entire bodies, they try to lay out the remains in a way that approximates, without all the dirt and the junk around it, in a way that approximates the shape of the body which was either thrown or laid or whatever in the grave. And he was talking about it because he said the most important thing is to get a good photograph of it, cause you can't take the judge or the jury to the grave or wherever. And we had a kind of, I don't know how to characterize her, contrarian, smart colleague in the room who said, "So you're talking about staging the truth, right?" And you could see he flinched a little bit at the word "staging, because another meaning of staging is making up, inventing. And he thought about it for a bit, and then he said, "Yes, I, I think that's a fair characterization of what we're doing." So that happens already in the field. But it also has to happen in the forum. You need to make the presentation do something that affects the audience. So so that's why we tried to tie forensic and aesthetics together, because they were both about this moment of the forum. We were also very interested in the different ways the same kind of evidence can work in different fora. So think about the places where human rights work that mobilizes evidence happens today. It's not just in truth commissions, in courts. It's in blogs. It's in Instagram. It's in all kinds of media. It's in exhibitions. It's in news media. It's in photographs plastered on the side of buildings. All of those are forums. And one thing that was important to us, again, in keeping with the idea that it doesn't speak for itself, is that the context in which it appears is really critical. And the more context you have in principle, the more and different kinds of work you can do.

Tine: Which is really important because I think all these different spaces, all these different forums have different interpretive protocols, and one piece of documentation can travel to very different spaces and be interpreted in very different ways depending on the interpretive protocol of that, of that forum, of that space.

So, I like how you brought in the notion of aesthetics, and it's true that I've been focusing more on the forensic. And I think one part of the reason for that is that, to me, that notion of forensic, also raises questions about the role of victim-survivors, victims-protagonists. I was interested in hearing you speak a bit about what you think that move towards forensics, what that has done for the role of victim-survivors in, let's say, institutional forums or institutional spaces for seeking justice.

Thomas: I think it's complicated, and there are probably different answers depending on where you are and who the people are. When I teach evidence, I try to break it into three moments. And the first moment is actually documents in the classic sense, pieces of paper, effectively. And if you think about the history of celebrated human rights trials, you can kind of go from Nuremberg, which was the trial of the documents, where something like 97% of the material presented by the prosecutors was documentary, and that was on purpose. They said documents don't lie. Documents are self-incriminating. You can hear what the Nazis did in their own words. It's a loose quotation, and so on. So they didn't want the survivors because they thought they were prejudiced, biased, unreliable, etc. Eichmann trial upends that radically and kind of eliminates the classic documentary element of a trial in favor of witnesses, many of whom were not even witnesses in the way that a modern court would think of them as people who would who are eyewitnesses to crimes committed by the person who's on trial. But nevertheless, as you know, Wieviorka and Felman, who are some of our inspirations in that book, make really clear it was a landmark because it took voices which basically didn't exist in this world and gave them institutional legitimation and authority. It put survivors of the Holocaust in the witness stand where they were the dominant voice in that trial. Then step three, or stage three, would be forensics, and there we were kind of haunted, by the phrase of Moreno Ocampo, the first Argentine prosecutor who became the first ICC prosecutor, who said, this is not a direct quote, but pretty close, "I dream of a trial without witnesses." And he didn't mean documents. He meant forensics. He meant DNA and video and photography and so on. So that's kind of a bad story, I think, in which each genre of evidence displaces totally the prior one. And that's what I'm apologizing for in the binary. That wasn't really our idea. But I understand, and I think that especially when the book first came out, there were a lot of legitimate objections that the historic tie between the human rights investigator and the person against whom the crime that they're investigating was committed was in danger of being broken. So that's not just a legal tie. It's also an ethical one and a political one. And that seems to me really essential. That's a key part of what people who are doing human rights work think they're doing and why it's important to them. They're not just kind of neutrally, mechanically investigating what the facts in a case were and trying to get some judgment. They are acting in solidarity with the people who were harmed or the

people who survived. And that's something which we should never let go of, I think. And to the extent that an excitement about the objectivity, so-called, of forensic evidence threatens that, I think that should be challenged. So we tried to make it clear that our version of forensics wasn't about objectivity, that it's not about authoritative proof. But I do think that it's possible now and not only possible, but important, to try to bring survivor witnesses together with forensic evidence of all sorts. And I think at a moment when everybody's got a camera in their pocket, or almost everybody, that distance has shrunk a great deal. The people who are enduring injustices, whether it's in a demonstration or in a remote space where they're being attacked or whatever, are often able to produce a document even as they are undergoing whatever the violence is. And I think we're gonna see, we probably already are seeing more and more witnesses who are able not just to tell the story in their voice, but to show the evidence that they've collected. So that's one way in which I think that historic ethical tie can be preserved. But the value of documentation in the sense that you were laying out is also there. Forensic Architecture has developed an interesting version of that, which is what they call Situated Testimony, where a survivor works with an expert to recreate the scene of whatever violence is being investigate. So there are architects. There are modelers. So they'll be making a 3D model on a screen, and they'll have the person who was in that room when the drone came through the roof describing where things were, where people were and, and they build the model both through the physical records they have of the space, but also through the descriptions that the survivor provides. And that's great because it's another set of data points, if I can say that. But it's also apparently really valuable for helping people remember the act of putting themselves back in the space and in such a way that they're putting themselves in the space so that they can describe it to other people. My way around your question, in a way, is to say that I think more and more there's situations in which what could be a bad competition between the objects and the subjects is is solved or settled a little bit.

Tine: Tom, I'm jotting down 24 questions as you're speaking, but I'm also mindful of how much time we have left. One thing that stands out for me as I hear you speak now about, for example, the situated testimony is also that connection between the individual and the collective. Because I think in the example that you're giving, there is one witness, one person who is involved in this process of creating models, etc. I think there's a lot of ways in which documentation happens that are also fundamentally collective, whether it's through crowdsourcing, etc. And a lot of the interpretation and mediation that's happening is pretty much an individual process. And so I'm wondering, across these three generations or layers of evidence that you're talking about from the documents to the witness to forensics, what is the role of the collective across

those three? Or is that a fourth category? Is there a specific dynamic to documentation that is created in a collective way?

Thomas: Interesting. I think there's a historic prejudice of the human rights vocabulary for the individual. And I think more and more there was a while, I would say, when that was a popular and correct critique of the human rights paradigm. It's individualism. I think we're seeing both a theoretical evolution in which it's easier to understand the dimension of human rights that we claim human rights to other people. We claim them on behalf not just of ourselves, but of larger groups or everybody and so on. So it's easier to understand human rights advocacy as a,rans-individual project. And at the practical level, there are more and more groups, and more and more decentralized groups, that are engaging collectively as advocates with witnesses and survivors and with the evidence that they've collected. And they are turning to people who were there to make sense of, with them, the evidence that they're collecting. I know you're interested in things that might be inspiring to us these days in the world of human rights. And that, for me, would be up there. It's the proliferation and the profusion of grassroots locally based organizations for who don't feel obliged to kind of sign on to the full UN version of human rights and the ways it's been advocacy has been practiced, who are indigenizing it, who are making it work in their own political struggles without abandoning the value of generalizing the struggles in some cases. So, there it feels to me like there are more and more collective endeavors and the evidence that is being produced or deployed in those situations bears the traces of this more collective production process, say.

Tine: That's interesting. And I like how you're already pointing to the last question that we ask of all of our interviewees where do you find inspiration? When, or what makes you hopeful? So I'm going to use the fact that you already answered that question to ask a different last question, which is maybe to bring it back also to transitional justice specifically. If you were to rethink maybe not the whole transitional justice architecture, but some parts of it, and start from documentation, what could institutional processes do better to better accommodate for, for example, that collective nature of documentation?

Thomas: For me, the transitional justice projects that have been the most meaningful or the most significant are the ones that stay tied to the place that they're adjudicating. So, I mean, obviously, the classic examples would be war crimes courts in the Netherlands compared to hearings all over South Africa of the TRC. Partly that is I guess about collectivity and the ability of large numbers of people to come together and make a collective project out of the collective harm that was done to them, which obviously doesn't always happen. But it seems to me that if we can make structures that are embedded in communities and that have the power and legitimacy to help those communities, and not just

one side of the community come to terms with what's happened, then that's vastly preferable. So about evidence, it's more complicated, maybe. I don't think ordinary people are gonna be digging up mass graves, but the gap between technical expertise and ordinary life is so much smaller these days that there are lots of ways in which participating or being caught up in a conflict or a violence also kind of automatically involves making evidence about it. I also think that the the fact that evidence and forensics are such a popular experience. You know, major media all over the world now have their own little versions of forensic architecture. So I was on a jury recently in in New York City. My constitutional right to judge my peers when they are charged with a crime. And it was a crime that took place on a subway. And there was surveillance footage of what the prosecutors said was the crime being committed on the subway. So when we, the jury, were deliberating, there were some differences of opinion about the severity of the crime, about whether the crime that the prosecutors were charging actually corresponded to what had happened. And I was far and away the oldest person on this jury. Everybody is in their 20s or young 30s. They got the surveillance footage. They put it on the laptop in the jury room, and they started acting like they were forensic scientists: slowed it down, put a pencil tip on the forehead of one of the people involved, and traced his path across the subway. It was meticulous. It was very grainy footage, terrible camera, crowded subway. But everybody wanted to be a forensic investigator of this footage. And they, they did. And it was a collective effort. And they determined, to the satisfaction of all twelve of us on the jury, that maybe one of the crimes the government was charging wasn't proven by this evidence, even if another one, a lesser charge was. That, for me, was a really beautiful example of this shrinking distance. They had been trained by television to be forensic investigators. I don't know what it has to do with transitional justice in the rich sense of the word. But just for ordinary justice, it felt to me like that was an interesting moment.

Tine: Thanks a lot. I think it's very interesting because I think oftentimes when we think of a kind of more community-led documentation, we are mostly thinking of documentation practices in terms of *producing* documentation. Tom, I think we have to wrap up here. Thank you so much. I think a lot of what you've mentioned also speaks to the previous two episodes that we had on Mexico and Uganda. And I'm sure the ideas will be picked up as we move further in this mini-series. For our listeners who would like to revisit or read more about some of Tom's academic work, we'll post links to the abstracts and to the publications in the show notes, which you can find on justicevisions.org. And for now, thank you very much.

Thomas: It's a pleasure being here.