Cross-examining the past

Transitional justice, mass atrocity trials and history in Africa

Bouwknegt, T.B.

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Cross-Examining the Past

Transitional Justice, Mass Atrocity Trials and History in Africa

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Promotor(es): prof. dr. N.D. Adler, Universiteit van Amsterdam
prof. dr. P. Romijn, Universiteit van Amsterdam

Overige leden: prof. dr. A.H.M. de Baets, Rijksuniversiteit Groningen
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prof. mr. dr. H.G. van der Wilt, Universiteit van Amsterdam
prof. dr. L. Zegveld, Universiteit van Amsterdam

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Contents

ABBREVIATIONS........................................................................................................................................... 1

PREFACE. THE PROSECUTOR AND THE HISTORIAN ......................................................................................... 3

1. INTRODUCTION........................................................................................................................................... 12
   1.1 INTRODUCTION & SOURCES .................................................................................................................. 12
   1.2 RESEARCH QUESTIONS .......................................................................................................................... 16
   1.3 TRANSITIONAL JUSTICE AND THE TRIBUNALISATION OF HISTORICAL INJUSTICE ......................... 18
   1.4 CRIMINAL TRIALS .................................................................................................................................. 20
   1.5 OVERPROMISED, UNDERDELIVERED? ................................................................................................. 25
   1.6 CASE SELECTION .................................................................................................................................... 28
   1.7 SOURCES & METHODOLOGY ............................................................................................................... 31
   1.8 RESEARCH FRAMEWORK AND THESIS OVERVIEW ......................................................................... 33

2. UNRAVELLING THE PAST: TRANSITIONAL JUSTICE ................................................................................. 36
   2.1 INTRODUCTION ...................................................................................................................................... 36
   2.2 GENOCIDE .............................................................................................................................................. 38
   2.3 CRIMES AGAINST HUMANITY ............................................................................................................... 41
   2.4 WAR CRIMES ......................................................................................................................................... 44
   2.5 RECENT AND REMOTE MASS ATROCITIES AND ATROCITY TRIALS .................................................. 47
   2.6 CONFIGURING TRANSITIONAL JUSTICE ............................................................................................. 48
   2.7 STUDYING TRANSITIONAL JUSTICE ...................................................................................................... 52
   2.8 THE RIGHT TO HISTORICAL TRUTH ....................................................................................................... 57
   2.9 JUDGING THE PAST: INTERNATIONAL CRIMINAL TRIALS ................................................................. 60
   2.10 HISTORY WRITING IN INTERNATIONAL CRIMINAL TRIALS ............................................................ 64
   2.11 HISTORICAL TRIAL TESTIMONY ......................................................................................................... 68
   2.12 TRIALS AND TRIAL RECORDS AS HISTORICAL SOURCES ................................................................ 79
   2.13 CONCLUSIONS ...................................................................................................................................... 85

3. TRIBUNALISING THE PAST. AFRICAN MASS ATROCITY TRIALS ............................................................. 88
   3.1 INTRODUCTION ...................................................................................................................................... 88
   3.2 REMOTE MASS ATROCITY AND THE ADVENT OF TRANSITIONAL JUSTICE IN AFRICA .................. 89
   3.3 RECENT MASS ATROCITY IN AFRICA: FROM TRUTH COMMISSIONS TO TRIALS ............................... 97
   3.4 TRIBUNALISATION OF MASS ATROCITY IN AFRICA ........................................................................... 103
   3.5 ‘AFRICAN CRIMINAL COURT’ ............................................................................................................... 111
   3.6 RWANDA, SIERRA LEONE AND THE DEMOCRATIC REPUBLIC OF THE CONGO (DRC) ...................... 115
   3.7 CASE STUDY 1: RWANDA ...................................................................................................................... 115
   3.8 CASE STUDY 2: SIERRA LEONE ............................................................................................................ 118
   3.9 CASE STUDY 3: THE DEMOCRATIC REPUBLIC OF THE CONGO ...................................................... 121
   3.10 CONCLUSIONS ..................................................................................................................................... 124

4. CROSS-EXAMINING THE PAST. RWANDA: AN UNTOLD TROPICAL NAZISM ........................................... 126
   4.1 INTRODUCTION ...................................................................................................................................... 126
   4.2 MATTERS OF HISTORY: UPRISING AND CONTAINMENT ................................................................. 131
   4.3 REVITALISING HUTU NARRATIVES ...................................................................................................... 143
   4.4 COOKING FOR WAR ............................................................................................................................... 153
   4.5 TRANSITIONAL JUSTICE AND THE RESET OF HISTORY: RWANDA INC ........................................... 159
   4.6 TRIBUNALISING GENOCIDE: THE UNICTR ....................................................................................... 165
   4.7 UNFOLDING THE NARRATIVE. AKAYESU: GENOCIDE IN RWANDA? .............................................. 174
   4.8 CULTIVATING THE NARRATIVE: KAMBANDA’S ‘CONFESSION’ ........................................................ 196
   4.9 CONTRASTING AND IRONING OUT THE NARRATIVE: KIBUYE ...................................................... 199
   4.10 A MACHIAVELLIAN PLAN? .................................................................................................................... 204
5. CROSS-EXAMINING THE PAST. SIERRA LEONE: ‘TAYLOR-MADE’ TERROR .....................248
5.1 INTRODUCTION .................................................................248
5.2 FROM PHILANTHROPIC TO FAILED STATE ....................................250
5.3 ‘WAR DON DON’ ................................................................260
5.4 THE TRUTH AND RECONCILIATION COMMISSION FOR SIERRA LEONE ........264
5.5 ‘HYBRID’ JUSTICE: THE SPECIAL COURT FOR SIERRA LEONE ...................280
5.6 UNFOLDING THE TRIAL NARRATIVE .........................................290
5.7 COMPETING NARRATIVE ......................................................306
5.8 CONCLUSIONS ................................................................327
6. CROSS-EXAMINING THE PAST. ICC: OPENING PANDORA’S BOX IN CONGO ..........332
6.1 INTRODUCTION ................................................................332
6.2 THE ICC IN AFRICA ............................................................334
6.3 THE DEMOCRATIC REPUBLIC OF THE CONGO (DRC) ......................353
6.4 DIEUMERCI ........................................................................362
6.5 BOGORO .............................................................................371
6.6 “TERMINATOR TANGO” ........................................................375
6.7 ‘SIMPLY AN ACCOUNT’ ........................................................380
6.8 CONCLUSIONS ................................................................382
7. CONCLUSION & DISCUSSION ................................................................385
7.1 COMPETING NARRATIVES IN AND OUT OF THE COURTROOM ...............385
7.2 OVERPROMISED, UNDERDELIVERED ...........................................389
8. BIBLIOGRAPHY ........................................................................399

SUMMARY ..................................................................................445
SAMENVATTING ........................................................................450
ACKNOWLEDGMENTS ...............................................................458
Abbreviations

AC: Appeals Chamber
ACHPR: African Court on Human and Peoples’ Rights
AI: Amnesty International
ASP: Assembly of States Parties
AU: African Union
CAE: Chambres Africaines Extraordinaires
CAR: Central African Republic
CICC: Coalition for the International Criminal Court
DRC: Democratic Republic of the Congo
ECCC: Extraordinary Chambers in the Courts of Cambodia
ECOWAS: Economic Community of West African States
EU: European Union
HRW: Human Rights Watch
ICC: International Criminal Court
ICG: International Crisis Group
ICTJ: International Center for Transitional Justice
IMT: International Military Tribunal (Nuremberg)
IMTFE: International Military Tribunal for the Far East (Tokyo)
NGO: Non-governmental organisation
OAU: Organisation of African Unity
OTP: Office of The Prosecutor
PTC: Pre-Trial Chamber
Rome Statute: Rome Statute of the International Criminal Court
SCSL: Special Court for Sierra Leone
STL: Special Tribunal for Lebanon
TC: Trial Chamber
TRC: Truth and Reconciliation Commission
UN: United Nations
UNGA: United Nations General Assembly
UNHCHR: United Nations High Commissioner for Human Rights
UNICTR: United Nations International Criminal Tribunal for Rwanda
UNICTY: United Nations International Criminal Tribunal for the former Yugoslavia
UNMICT: United Nations Mechanism for International Criminal Tribunals
UNSC: United Nations Security Council
Preface. The Prosecutor and the Historian

It’s difficult for us to make history […]. We have to carry out our own French Revolution with Amnesty International peering over our shoulder.

- Laurent Gbagbo

When the International Criminal Court’s (ICC) new building in The Hague was officially inaugurated by Dutch King Willem Alexander in April 2016, the celebratory ceremony ended with a performance of children singing Michael Jackson’s *Heal the World.* Once again, the cheerleaders of the latest international justice venture echoed the extraordinary beliefs on what international criminal courts can achieve, despite the system’s rather juvenile performance and the criticism it had been facing from some African leaders of countries that had initially spearheaded its creation in the 1990s. Three months earlier, there was a totally different atmosphere at the court that investigates, prosecutes and judges those most responsible for genocide, crimes against and humanity and war crimes. On my way to the ICC, on 28 January 2016, I overheard the swelling hymns of a crowd chanting “Libérez Gbagbo! (“Free Gbagbo!””)." Outside the guarded entrance, armed with megaphones, drums and banners, Ivoirians from the diaspora community in Europe had assembled to demand the release of the man they still consider to be their President: Laurent Gbagbo. Inside, while the court clerk read out the charges at the opening of the trial, some of the spectators on the Public Gallery sizzled, others burst out in sardonic laughter. They rejoiced in faith and uttered praises when Gbagbo and his companion in the dock, former youth leader Charles Blé Goudé, did “not recognize the charges” and pleaded not guilty to charges of crimes against humanity. Absent from the hearings were the alleged victims of the post-electoral crisis that shocked the West African nation between late 2010 and early 2011 and had reportedly left 3000 civilians killed, hundreds of people wounded and scores of women raped. Inside the courtroom, the atmosphere was tense. One could hear a pin drop. It was the ICC’s first trial against a former President. Conscious of the highly politicised public discourse, controversies and conspiracy theories concerning the trial he is presiding over, the Italian Judge, Cuno Tarfusser, used the momentum of this important first trial day to explain what he and his two colleagues are about: “This is a criminal trial […] this is not a game in which one side wants to win

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4 The Crime of Aggression will be added to the Court’s jurisdiction from 2017. Its establishing treaty endorses the ICC as “a permanent institution and shall have the power to exercise its jurisdiction over persons for the most serious crimes of international concern, as referred to in this Statute, and shall be complementary to national criminal jurisdictions.” *Rome Statute of the International Criminal Court* (A/CONF/183/9*; 17 July 1998), art. 1. See for an insightful discussion on the negotiations and establishment of the ICC: David Scheffer, *All the Missing Souls: A Personal History of the War Crimes Tribunals* (Princeton: Princeton University Press, 2012), pp. 163-250.
6 Gbagbo was president between 2000 and 2010. After highly contested presidential elections, a temporary dual presidency and a violent battle, he was defeated and subsequently arrested in April 2011.
9 Another case, against sitting President Uhuru Kenyatta almost made it to trial but the Prosecution withdrew its charges due to insufficient evidence. ICC, TC V(B), OTP, *Situation: Kenya in the Case of the Prosecutor v. Uhuru Muigai Kenyatta: Notice of Withdrawal of the charges against Uhuru Muigai Kenyatta* (ICC-01/09/02/11; 5 December 2014).
and the other side shall be defeated. Ivory Coast is not on trial either here. The people of Ivory Coast are not on trial.”

Instead, he articulated, “the task of this bench is to determine on the basis of the evidence adduced by the parties and participants for our assessment whether the charges are, indeed, well-established or not.”

Throughout his life, Laurent “Koudou” Gbagbo has been a man of many faces: history professor, political prisoner, exile in France, fighter for democracy, even president. And perhaps, after a protracted trial that is projected to hear over 138 prosecution witnesses, he will end his career as a convicted criminal against humanity. That is, and only if, the ICC’s Gambian Chief Prosecutor, Fatou Bensouda, and her multi-cultural team prove ‘beyond any reasonable doubt’ the court’s most complexly formulated indictment to date. At first sight, the charges against Gbagbo seem precise: four violent attacks against unarmed civilians in the country’s capital Abidjan between December 2010 and April 2011. Goudé is additionally charged with a fifth assault. In reality however, Bensouda’s underlying case theory cultivates such a Manichean narrative on Gbagbo’s decade-long presidency and his virtually despotistic determination to cling to power, by all means necessary, that this trial from the start has proved to be all about the multifaceted and heavily disputed political history of Côte d’Ivoire. It is an opportunity Gbagbo and his six-man-strong defence team grasped by full force. From the start, the politician-turned historian Gbagbo and the flamboyant orator Goudé have turned their trial into a public medium through which they tell to their compatriots and an international audience their (his) stories.

International criminal trials are discursive battle grounds, on various levels. Amongst other things, agency largely shapes the quality and course of the proceedings. For instance, personality, eloquence and even chauvinism matter. Trials are all about controlling the strings. In the Ivoirian case, Blé Goudé exhibited to the court his impeccable mastery of the art of persuasive charming and eloquent reasoning, while his former college professor Gbagbo was more of a diplomatic puppet master. Back home, when he was still President, Gbagbo was known by his political nickname, le Boulanger (“the baker”) – a man who flours, kneads and moulds his political opponents.

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10 ICC, Gbagbo - Blé Goudé Transcript (28 January 2016), p. 3.
11 Idem.
14 At the ICC, everyone shall be presumed innocent until proved guilty before the Court in accordance with the applicable law. The onus is on the Prosecutor to prove the guilt of the accused. In order to convict the accused, the Court must be convinced of the guilt of the accused beyond reasonable doubt: Rome Statute, art. 61.
15 Gbagbo is accused of having engaged his individual criminal responsibility for four counts of crimes against humanity, in Abidjan, Côte d’Ivoire, jointly with members of his inner circle and through members of the pro-Gbagbo forces or, in the alternative, for ordering soliciting and inducing the commission of these crimes or, in the alternative, for contributing in any other way to the commission of these crimes. The acts charged, allegedly committed by pro-Gbagbo forces, include: the murder of at least 160 persons; the rape at least 38 persons; otherinhumane acts or attempted murder constituting a crime against humanity against at least 118 persons; and persecution on political, national, ethnic and religious grounds against at least 316 persons. ICC, PTC I, Situation: Côte d’Ivoire. In the case of The Prosecutor v. Laurent Gbagbo: Decision on the confirmation of charges against Laurent Gbagbo (ICC-02/11-01/11; 12 June 2014).
17 Both Gbagbo and Blé Goudé’s use of the ICC as a narrative space finds its roots in what is known as La Sorbonne and other “agoras”, “parliaments”, and “senates” which were scattered in the Ivoirian urban space during the crisis between 2000 and 2010. At first, La Sorbonne and similar gatherings emerged as “democratic space” which later morphed into places of ultranationalist discourse, where the eloquence and rhetorical prowess displayed in the performative speeches created their own “regimes of truth.” Oumar Ba, ‘The Court Is the Political Arena: Performance and Political Narratives at the International Criminal Court’, African Journal of International Criminal Justice, Vol. 1, No. 2 (2015), pp. 174-189.
Hague, he presented himself as a victim of an international plot to dethrone him but kept speaking in the third person and sought dominance through claiming the position he believed was stolen from him by his political rival Alassane Ouattara. Throughout the initial proceedings, his lawyers talked about him as “President,” to the evident chagrin of the lawyer representing the victims, Paolina Massidda. Judge Tarfusser, who was working hard not to make this a ‘presidential case’, agreed with Gbagbo’s French lawyer Emmanuel Altit that indeed “a title remains attached to its holder forever” but stated that in his courtroom “accused are all equal before the law” and “therefore, the Chamber requests that you no longer use this title.”

In scaling back the status of the defendant to “Mr. Gbagbo,” Tarfusser reinforced everyone’s respective positions in the courtroom, over which he presided.

As almost all defendants before international criminal tribunals, Gbagbo – not surprisingly – has vigorously contested the prosecution’s interpretation of himself, his politics and the nature of the post-colonial West African state. In February 2013, he therefore told the pre-trial chamber, “whatever you decide, I will send a batch of books written by Gbagbo to the Office of the Prosecution, and I will send you also a batch of my books, because, well, that is the man that I am.”

His pledge came after several days of hearings on the question if the four charges of crimes against humanity against him were to be confirmed and whether he should be sent to trial. As in most international criminal proceedings, the arguments of the prosecution and defence had been confrontational and the narratives valorised - on what occurred in the five months after Côte d’Ivoire’s hotly contested 2010 elections - diametrically competing. Forever defiant, Gbagbo grasped the momentum to lecture Chief Prosecutor Fatou Bensouda and the judges about the political history of West Africa in general and Côte d’Ivoire in particular. From behind his lectern-turned court booth, Gbagbo not only reinforced his position as the all-knowing leader and central agent in the recent Ivoirian history but also his supreme expertise as a history professor. In his opinion, Bensouda, who had monitored Côte d’Ivoire before she became Chief Prosecutor, had distorted the facts and “constructed a mere caricature of the history of Côte d’Ivoire, which made it impossible for them to fully grasp the issues at stake or to understand the reality of the crisis in this country.”

Initially, the pre-trial chamber was sceptical too towards the evidentiary basis of the Prosecutor’s case, which was built mainly on third party evidence

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20 ICC, Gbagbo - Bil Goudé Transcript (12 February 2016), pp. 36-37.
22 The confirmation of charges hearing for Gbagbo began in February 2013, but in June 2013, however, a majority of the judges sitting on the case found that the prosecution had failed to put forward enough evidence to send the charges to trial at that point. But, finding that the case was not “so lacking in relevance and probative value that it leaves the Chamber with no choice but to decline to confirm the charges,” the majority deferred a final decision, invited the prosecution to provide additional evidence in support of its charges, and adjourned the hearing for several months. The prosecution did so, and, in June 2014, the judges—this time by a different majority—sent the case to trial. ICC, PTC I, Situation: Côte d’Ivoire. In the Case of The Prosecutor v. Laurent Gbagbo: Decision Adjourning the hearing on the confirmation of charges pursuant to article 61(7)(c) (i) of the Rome Statute (ICC-02/11-01/11; 3 June 2013), §§44; ICC, PTC I, Situation: Côte d’Ivoire. In the case of The Prosecutor v. Laurent Gbagbo: Decision on the confirmation of charges against Laurent Gbagbo (ICC-02/11-01/11; 12 June 2014).
23 Gbagbo holds a BA in Philosophy and a PhD in History. He was a Professor of History and Geography at the University of Abidjan, where he later worked as a researcher and became director at the Institute of History, Art and Archaeology of Africa (IHAAM). Cyril K. Daddich, Historical Dictionary of Côte d’Ivoire (The Ivory Coast), Third Edition (London: Rowman & Littlefield, 2016), p. 261.
One judge, dissenting from the majority, found that the evidence was too insufficient to send the case, “as formulated by the Prosecutor [...],” to trial.27 Her opposition to confirm the charges, however, was a minority position and the case proceeded forward.

One day before the Gbagbo trial started in January 2016, Bensouda told journalists “that the purpose of the trial […] is to uncover the truth through purely a legal process […], for the sake of doing justice for the victims; and to prevent mass atrocities recurring in the future.”28 At first sight her avowal is innocuous and blends in the repetitive cacophony of platitudes made by cosmopolitan protagonists of global justice at the various international criminal tribunals and “special” and “extraordinary” courts. After all, as a civil servant of humanity, she vows to represent the victims and as independent prosecutor she is tasked with the burden of proof, after investigating incriminating and exonerating circumstances.29 But a vigilant close reading of the prosecution’s case theory warrants caution since she progresses a meagre historical narrative, arguing that “Upon assuming the Presidency of Côte d’Ivoire in October 2000, Gbagbo harboured the objective of retaining power by, inter alia, repressing or violently attacking those who challenged his authority.”30 The storyline follows that “in the following years, knowing that a freely-contested presidential election was inevitable, Gbagbo and the Inner Circle jointly conceived and implemented a common plan to keep him in power by all means, including by committing the crimes charged (“Common Plan”).”31 A decade after he became President alleges the OTP “the implementation of the Common Plan had developed to include a State or organisational policy aimed at a widespread and systematic attack against perceived Ouattara supporters.”32

Particularly informed by a pile of Human Rights Watch reports – which summarise anonymised witness testimony, media reports and selected interviews33 - and “a rather unsophisticated general hypothesis on the workings of the African state,”34 which even commences two years before the start of the ICC’s temporal jurisdiction from 1 July 2002, the allegations culminate in the core charge that from November 2010 “Gbagbo and members of the Inner Circle jointly planned, organised, coordinated, ordered, induced, authorised and allowed various measures to implement the Common Plan and the crimes charged. In pursuance of the Common Plan, pro-Gbagbo forces

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26 “The Chamber notes with serious concern that in this case the Prosecutor relied heavily on NGO reports and press articles with regard to key elements of the case, including the contextual elements of crimes against humanity. Such pieces of evidence cannot in any way be presented as the fruits of a full and proper investigation by the Prosecutor in accordance with article 54(1)(a) of the Statute. Even though NGO reports and press articles may be a useful introduction to the historical context of a conflict situation, they do not usually constitute a valid substitute for the type of evidence that is required to meet the evidentiary threshold for the confirmation of charges.” ICC, PTC I, Situation: Côte d’Ivoire. In the Case of The Prosecutor v. Laurent Gbagbo: Decision Adjourning the hearing on the confirmation of charges pursuant to article 61(7)(c) (i) of the Rome Statute (ICC-02/11-01/11; 3 June 2013), §35.


28 “The Prosecutor shall: In order to establish the truth, extend the investigation to cover all facts and evidence relevant to an assessment of whether there is criminal responsibility under this Statute, and, in doing so, investigate incriminating and exonerating circumstances equally.” Rome Statute, art. 54 (a).


30 ICC, Gbagbo - Blé Goudé: Corrected version of Prosecution’s pre-trial brief, §§.

31 Ibidem, §5.

32 ICC, PTC I, Situation: Côte d’Ivoire. In the Case of the Prosecutor v. Laurent Gbagbo: Decision Adjourning the hearing on the confirmation of charges pursuant to article 61(7)(c) (i) of the Rome Statute (ICC-02-11-01/11; 3 June 2013).

33 Author’s Interview (Skype): Scott Straus, 26 February 2016.
attacked, killed, injured, raped and persecuted hundreds of civilians.”35 Inadvertently, the exact criminal incidents36 that are retro-actively prosecuted were not only committed in the past, but also not in historical isolation. 37 Also, they took place in the immediate aftermath of the first presidential elections in a decade rising nationalism (encompassed by the concept of ‘Ivoirité’, or ‘Ivorianness’),38 a preceding civil war, prior political and ethnic animosity and anti-western – particularly French - sentiments.39 Arrested by these real social, political and historical dimensions in which Gbagbo had acted, in Bensouda’s quest for the truth, this broader historical context actually appear to matter more than she would have liked. In linking Gbagbo to – widespread and systematic - crimes against humanity,40 she elected to show the Trial Chamber is that Gbagbo - and his wife Simone, also a trained historian41 – had always been driven by an insatiable appetite for power. Once they were served the main dish (the Presidency), the couple was not about breaking bread, up to the point they became criminal minded. Moreover, Gbagbo’s intent to commit crimes, writes Bensouda, is partly demonstrated by “his historical repression of his political opposition.”42 That is the red thread in the case against him: that from the day Gbagbo was elected President in October 2000, he “intended to stay in power at any cost.”43 First he used the defence forces to quell demonstrations. But after a failed coup attempt in 2002, he employed militias, foreign mercenaries and “pro-Gbagbo youth”.44 Indeed, the civil war that plagued and divided Ivory Coast in the early 2000s was extremely violent, included massacres and some observers said even bordered on genocide,45 but this episode is not part of the charges.

In rebuttal, Gbagbo’s defence squad zealously picked up on the historical tone set by the prosecution, accentuated its own pitch and strategically put history at centre stage. Using the court as a “stage of performative discourse,” Gbagbo and lawyers, from the start, have been creating, changing, making, unmaking and framing their political narratives.46 For instance, arguing that “behind all judicial proceedings is a story, a story of dates, places and events, the story of one man, President Gbagbo,” Counsel Dov Jacobs went as far as saying that “In international proceedings, it is

35 ICC, Gbagbo - Blé Goudé: Corrected version of Prosecution’s pre-trial brief, §7.
36 These crimes were allegedly committed between 16 and 19 December 2010 during and after a pro-Ouattara march on the RTI headquarters, on 3 March 2011 at a women's demonstration in Abobo, on 17 March 2011 by shelling a densely populated area in Abobo, and on or around 12 April 2011 in Yopougon.
37 In making its case for crimes against humanity (a systematic and widespread attack), the Prosecution relies on acts committed against civilians during the course of 38 incidents but charges only 4 thereof. See for details: ICC, TC I, Prosecutor v. Gbagbo and Goudé: Corrected version of Prosecution’s pre-trial brief (ICC-02/11-02/11; 28 July 2015), §288-358.
40 Crimes against humanity (CAH) are defined as acts committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack. Attack directed against a civilian population” in these context elements is understood to mean a course of conduct involving the multiple commission of acts against any civilian population, pursuant to or in furtherance of a State or organizational policy to commit such attack. The acts need not constitute a military attack. It is understood that “policy to commit such attack” requires that the State or organization actively promote or encourage such an attack against a civilian population. Rome Statute, art. 7.
41 Cyril K. Daddich, Historical Dictionary of Côte d’Ivoire (The Ivory Coast), Third Edition (London: Rowman & Littlefield, 2016), p. 264. Simone Gbagbo, as argued in the Prosecution’s case, was a key contributor to the “common plan” and as such also faces ICC charges. Côte d’Ivoire’s judiciary, however, chose to prosecute her at home and not hand her over. She went in trial for crimes against humanity in May 2016. ICC, PTC III, Prosecutor v. Simone Gbagbo: Warrant of Arrest for Simone Gbagbo (ICC-02/11-01/12; The Hague, 29 February 2012); Robey Corey-Boulet, ‘Gbagbo’s Trial Is the Latest Sign of Victim’s Justice in Côte d’Ivoire’, World Politics Review, 4 May 2016.
42 ICC, Gbagbo - Blé Goudé: Corrected version of Prosecution’s pre-trial brief, §439.
43 Ibidem, §19-23.
44 Ibidem, §36.
also history with a capital “H” that is being written." Moreover, the lawyer, who also happened to be a law professor, continued: “The situations in which the Court must intervene require it to take on board historical, sociological and political context without which the case cannot be fully understood. It is also a history of a country, a region and a people and its sufferings that is being written.”

Thus, for Gbagbo the history professor, his criminal trial, as a defendant, was not only an arena in which he had to defend himself from criminal charges, but even more so he turned it into public lecture hall in which he set out to set the historical record straight.

Out-voiced by Gbagbo and Goudé’s oratorical finesse and sensible of the resonance their defence sparked among the many ‘pro-Gbagbo’ Ivoirians on the Public Gallery, the Prosecution, through lead Prosecutor Eric MacDonald, sought to temperate the role of history. “I will now highlight some of the historical background and context that lead to the post-election violence,” he started, but warned that “This context is not to establish the history of Ivory Coast. It is not the purpose of this trial.” Rather, the prosecutor underlined, “this context is relevant to describe the creation of the common plan and, more importantly, it shows evidence of Mr Gbagbo and Mr Blé Goudé’s intent and knowledge of past violence and how their methods in the past evolve over the years. It will serve also as pattern evidence, the “passé du futur,” the awareness of their actions.”

A minute later, however, MacDonald spiralled back to 1993, the year Côte d’Ivoire's first president, Félix Houphouët-Boigny, passed away and nationalistic, ethnic and xenophobic political discourse (Ivoirité) engulfed the political and social arena. From the moment Gbagbo became President in 2000, alleged the MacDonald, unfolded a: “pattern of repression of opposition with repeated allegations of crimes committed by pro-Gbagbo forces; a pattern of denial of these crimes by members of Mr Gbagbo's inner circle; a pattern of failure to hold anyone accountable for these crimes; a pattern of divisive identity-based politics and the use of speech by Blé Goudé and others to mobilize the youth and incite them to violence. You will see how these patterns are repeated in 2010.” Thus, although the prior violence does not form part of the charges, but in order to show these patterns and Gbagbo’s “intentionality” to commit crimes against humanity in the future as well as his awareness that these would be “committed in the ordinary course of events,” MacDonald told the bench they will “hear evidence about the crimes themselves from Ivoirian civilians, overview evidence on the historical and political origins of the crisis, expert evidence, and the evidence of many

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48 Idem.
51 Idem.
54 ICC, Gbagbo - Blé Goudé: Corrected version of Prosecution’s pre-trial brief, §439-440.
55 Elsewhere it is argued that Goudé narrative before the ICC is an extension of the eloquence and rhetoric of ultranationalist discursive politics of the Young Patriots movement and that his performance on the ICC stage mirrors the open agora in Abidjan such as La Sorbonne, during the crisis. Ba, "The Court Is the Political Arena", pp. 174-189.
insider witnesses.” In what appeared an inevitable U-turn, the prosecution sought to establish, introduce and highlight – pre-indictment - historical patterns and even vowed to present evidence to substantiate history, however it has not called professional historians to the stand. Thus, the prosecution’s contradictory desire to both use history to back its case and its denial that the case was about competing historical narratives came into full view.

For Paolina Massidda, the victims’ representative in court – her clients according to her “are the very sad raison d'être of the proceedings” - the historical latitude of the trial was even wider: “We must all keep in mind after all that the history that we are going to retrace here in this court room reflects not only the past, but also the present and the future.” Echoed by the defence, that reasoning was twisted into a customised presentation of the past that positively shaped the way in which Gbagbo is perceived in the present and into the future. In their account, Gbagbo did nothing illegal; all he did was protecting democracy from armed rebel forces, the country’s former coloniser France and armed groups that supported political rival Alassane Ouattara, the current President. Furthermore, the defence said “that the Prosecution is so uncomfortable with their scenario, which has no foundation, that to keep this scenario alive, they remain silent about all the high-level events of Côte d’Ivoire history of those years.” By omitting charges against the ‘other side’ to the conflict “and re-writing history,” the prosecution showed that it “did […] not interest themselves in understanding the history of Côte d’Ivoire” and that because “the more the Prosecution attempts to provide explanations, the more they find themselves bogged down in contradictions of history.” By unravelling the prosecutor’s legally tunnelled vision on Côte d’Ivoire’s history, the defence has strategically sought to rhetorically shift away the trial chamber’s focus on the true matter: Gbagbo’s alleged individual criminal responsibility for four events in the months between November 2010 and April 2011. Like the prosecutor, the defence abuses history by opportunistic framing of past events, the operationalisation of historical rhetoric and selecting corroborative witnesses to tell their version of the truth. But as transpired from the totality of the pre-trial proceedings, the prosecution’s investigations had been scant and the anonymised Ivoirian witnesses it located – primarily through the intermediate NGO Human Rights Watch – ambiguous.

Before the three judges in this case – non-historians from Italy, the Dominican Republic and Trinidad and Tobago respectively lies a moot responsibility. It is expected from them to sift
through this plethora of statements about the past, from witnesses from a totally different cultural, political and social context, to make findings – exclusively based on evidence presented at trial and beyond any reasonable doubt – on a distant history and the role therein of the accused. But from the beginning, the trial faced hurdles and promised to take a long breath. Already when the chamber heard the first prosecution witness on 8 February 2016, Tarfusser could not hide his annoyance about lawyers asking the same questions “three, four, five, ten times” or the witness being unable to estimate a distance, only to jokingly observe that “at this pace we finish this trial in 2050.” And he may be right. While hearing only the sixth prosecution witness three months later, almost half an hour was spent on questioning whether he was washing a kettle or if he was washing himself with water at 9 am on a Friday morning in February 2011, more than five years previously.

If getting as close to truth as possible on even the most basic facts about peripheral events in 2011 already seems impossible, how then to deal with witness testimony that turns the trial into almost carnival-like opera when dealing with historical analysis. After hearing harrowing detailed testimony from four Ivorian victims of the actual charged crimes, the prosecution called to the stand their fifth witness, Mohammed Sam Jichi, better known in Côte d’Ivoire as ‘Sam the African’. As a former ‘insider’ he was to testify against Gbagbo and corroborate the prosecution’s case theory. On the stand, however, the witness turned ‘hostile’ and changed the incriminating story he had told ICC investigators a year before and started to apologetically exonerate Gbagbo: “He is a professor. He knows the history of Africa. […] He was a great head of state […]. That’s my personal analysis. And in the investigations and in many documents you will read that this is the truth what I say to you.” Nodding in agreement, for Gbagbo, the historian, it was a narrative he would subscribe to. But moments later, the witness drifted on saying that “When I see the history of President Gbagbo it reminds me a little of that of Jesus and Barnabas […] It’s history repeating itself […] This is my analysis. This is what's happening to Gbagbo, Jesus and Barnabas.” Playing along the game, Gbagbo’s lawyer then staunchly asked “and who is Jesus?” only to wait for the Presiding judge to interrupt:  “I think we're going a little bit too far with this questioning on the Holy Bible. We should come back a bit to the facts. Please.” In trying to do so, the prosecution called their prime witness, former Human Rights Watch researcher Matt Wells, an American who was to testify on the investigations he had carried out immediately after the crisis and published in a key report relied on by the Prosecution. Yet, the precise contents of his reports, which form the core of the prosecution’s case, were hardly discussed as the hearings, which were dominated by belligerent cross-examination

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63 As of April 2016, 5 prosecution witnesses, out of a promised 138, had testified in the trial. Four were victims, one was a former ally of Gbagbo.
64 Author’s notes, 8 February 2016.
66 ICC, Gbagbo - Blé Goudé Transcript (15 March 2016), pp. 73-74.
67 Ibidem, p.74.
68 Ibidem, pp. 74-75.
by the defence on the investigative methodology and alleged bias of his organisation. This line of questioning continued when the trial chamber heard from Nigel Walker, a British-American documentary maker who made a film, Shadow Work, about the rise of Goudé’s youth movement in 2006, events from four years before the crimes charged occurred.

Increasingly irritated by the trial’s endless dwelling on the past while hearing the twelfth witness, former Cabinet Minister for Human Rights Joël Kouadio N’Guessan, Judge Tarfusser could no longer hide his impatience. On 28 June, after 5 hours and 45 minutes of questioning, he urged the prosecution to finally move forward with its examination to the post-electoral violence. Conscious of the fact that if the proceedings continue to be hijacked by history it will turn into a rudderless ship, he exclaimed “we are not here to rewrite history. I understand the importance of context, but I think we have enough context. Please proceed.” Thus, five months into the ICC’s most important trial, the proceedings had been riddled with historical questions outside of the scope of the indictment but had not touched upon the heart of the matter: the individual criminal responsibility of Gbagbo and Goudé for the specific incidents charged. For the bench, all this window-dressing questions on the larger questions of history may be interesting but they remain irrelevant in answering whether Gbagbo committed the crimes as charged or not. Yet, the proceedings have raised expectations of larger magnitude, including the writing of history, a feature of many international atrocity trials which will be explored, untied and presented in this dissertation.

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70 ICC, Gbagbo - Blé Goudé Transcript (17 May 2016); ICC, Gbagbo - Blé Goudé Transcript (18 May 2016); ICC, Gbagbo - Blé Goudé Transcript (19 May 2016).
71 Nigel Walker, Shadow Work (Walkerfilm, 2008) [YouTube: https://www.youtube.com/watch?v=l6XQiF-avHs].
72 ICC, Gbagbo - Blé Goudé Transcript (24 May 2016); ICC, Gbagbo - Blé Goudé Transcript (25 May 2016).
73 At the time he was testifying he was “a management consultant,” the assistant secretary general of a political party called le Rassemblement des Républicains (RDR) and “responsible for communications and public relations.” ICC, Gbagbo - Blé Goudé Transcript (27 June 2016), p. 2.
1. Introduction

If the law is to influence collective memory, it must tell stories that are engaging and compelling, stories that linger in the mind because they are responsive to the public’s central concerns. This proves to be difficult.

- Mark Osiel

1.1 Introduction & Sources

Laurent Gbagbo and Charles Blé Goudé – whose trial is portrayed in the prologue - are the latest couple out of the dozens of mass atrocity suspects I have seen appear in an international courtroom since 2003. From the general public’s perspective, the prosecution of Gbagbo for four violent attacks seemed a modest task. Many, including human rights organisations, would find him guilty by default. But nothing is easy. Prosecuting (former) Presidents or Heads of State for international crimes in an apparent fair trial setting that guarantees a presumption of innocence is delicate. It is a slippery slope and its occurrence in history is only relatively recent. Prior to this trial, which is the first of its kind at the International Criminal Court (ICC), I had already observed at other international tribunals the myriad of complexities, hurdles and vastly politicised nature of high-level atrocity trials while attending the cases of Serbia’s Slobodan Milosevic, Liberia’s Charles Taylor, Cambodia’s Khieu Samphan, Congo’s Jean Pierre Bemba Gombo, Bosnian-Serb Radovan Karadžić and Kenyan Uhuru Kenyatta. In fact, writing in July 2016, after 22 weeks of proceedings and hearing testimony from 13 witnesses in The Hague, in many ways, Gbagbo’s trial already resembled those other hard-to-prove leadership cases at previous international tribunals, but particularly those working on Africa. As you will discover in this dissertation, there are many similarities with cases at the United Nations International Criminal Tribunal for Rwanda (UNICTR) and Special Court for Sierra Leone (SCSL), principally when it comes to historical truth finding and fact ascertainment in the trial setting. From the very start of Gbagbo’s trial, the prosecution has not been able to deliver smoking-gun-type

76 Since December 2011, the author has attended the pre-trial, the confirmation of charges proceedings and the trial as well as followed proceedings through the court’s webcast. The author produced a documentary on the case: Jesper Buursink & Thijs Bouwknegt, La Président et le mécanicien (audio-documentary; 31 May 2013). Also see the author’s report on the trial’s progress between January and July 2016: Thijs B. Bouwknegt, ‘Gbagbo: Lost in History’, International Justice Tribune, 15 July 2016. Observing the trial became more difficult from 16 June 2016 onwards as the trial chamber announced that it had been informed of “several cases of the attempts to publicly identify [...] witnesses [which] have disrupted [...] proceedings significantly” and in order to “protect witnesses and [...] to prevent regular disruption of the proceedings”, it held that for all future witnesses in relation to whom it orders protective measures to keep their identities confidential, the following specific measures shall apply: “One, the public broadcast of the proceedings and the publication of the transcripts shall be delayed until completion of the testimony of the witness and until the entire testimony has been reviewed and redacted as necessary. Then the redacted video recordings and transcripts will be made available to the public [...] Two, the Registry is ordered to collect for each visitor in the public gallery the full name and nationality. Any person refusing to provide this information shall not be admitted to the public gallery. In this way any breach in confidentiality shall be contained and followed up.” See: ICC, TC I, Prosecutor v. Laurent Gbagbo and Charles Blé Goudé: Transcript (French version) (ICC-02/11/01/15; 16 June 2016), pp. 98-100.
77 HRW, “They Killed Them Like It Was Nothing”.
78 International Law provides that “All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law [...] 2. Everyone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law.” ‘International Covenant on Civil and Political Rights’, United Nations Treaty Series, No. 14668, Vol. 999 (1976), art. 14.
80 Respectively at the UNICTR, SCSL, Extraordinary Chambers in the Courts of Cambodia (ECCC) and the ICC.
81 Including six eyewitness affected by violence, three politicians, a human rights investigator, a documentary film maker, a member of the youth movement and an unidentified insider.
82 Although, up to a degree, the Khmer Rouge trials before the ECCC, in Asia, are similarly complicated. See: Thijs Bouwknegt, ‘Khmer Rouge Trials: justice delayed for old genocide crimes’, Newsletter Criminology and International Crimes, Vol. 9, No. 2 (December 2014), pp. 8-10.
of evidence - of the kind international judges prefer - in support of their historically framed charges: documents, audio-visuals or forensics. As in most international cases concerning atrocities in Sub-Saharan Africa, virtually all the evidence is testimonial.

No atrocity trial is the same, they deal with different countries, atrocities, personalities and all have their case specific dynamics. Yet, they all are fascinating, not only from the academic point of view, but on all levels. They are inherently holistic as they deal with law, politics, history, sociology, psychology, anthropology, forensic science and many other disciplines. In addition, numerous worlds, personalities and cultures come together in the courtroom and the corridors of the tribunals. In many respects, these “cosmopolitan courts,” form worlds apart. However, for outside audiences, criminal trials can also be dreary, complex and exhaustingly repetitive. Besides, they deal with convoluted geographically and temporally distant crime scenes that are rather unfamiliar or simply not on everybody’s radar. No wonder that public, but also academic, interest in the substantial trial hearings themselves generally wanes. Like in Gbagbo’s case. In order to comprehend, understand and apprehend the very dynamic process of fact litigation, it is essential to attend these live hearings. In fact, the hearings are the empirical data on which to assess the cases, trials and the dealing with the past. Atrocity trials are noteworthy for another reason. From attending the trial of Milosevic at the UN’s International Criminal Tribunal for Yugoslavia (UNICTY) and sifting through the court’s jurisprudence, live criminal trials appeared to me to be workshops of detailed fact, truths and narratives, puzzling together pieces of the jigsaw puzzle of mass violence. Also, considering its human, financial and diplomatic resources, trials are seemingly equipped to conduct large scale investigations and research under circumstances not available to the individual historian. Accordingly, the international criminal trial would appear to be an invaluable and unique historical and sociological source in the field of genocide studies. A question raised in Hannah Arendt’s reports on the former German Nazi Adolf Eichmann’s trial in Israel in the early 1960s is still valid today: should international criminal trials attempt to write history? Can – and should - history and justice be written with the same pen? Can trials inform us why people perpetrated atrocities? These questions are not new, but have not been significantly, or empirically, addressed with respect to the modern atrocity

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84 There are exceptions however, but they are rare. At the ICC, only in the case of Malian war crimes suspect Ahmad Al Faqi Al Mahdi, the prosecution has clear audio-visual evidence as well as satellite images that show the suspect actually carrying out himself the destruction of historical monuments. See: ICC, Decision on the confirmation of charges against Ahmad Al Faqi Al Mahdi: ICC-01/12-01/15; 24 March 2016; ICC, TC VIII, Situation: Mali: The Prosecutor v. Ahmad Al Faqi Al Mahdi: Judgment and Sentence (ICC-01/12-01/15; 27 September 2016).
86 Generally, the public, journalists and academics are interested in the newsworthy parts of criminal cases: the issuance of indictment, the arrest, the first appearance, opening of the trial, remarkable witnesses and the delivery of judgement.
87 With the exception of an exceptional journalist, family member, party supporter and groups of students, it is rather quiet in the Public Gallery. Victims, their relatives or alleged witnesses of Gbagbo’s alleged actions shine in absence. As is the case at most international criminal trials that I have attended, of course with exceptions particularly in Cambodia and to an extent the Yugoslavia Tribunal.
88 International criminal tribunals and courts hold public hearings, although judges may decide to hold sessions in private or closed sessions. The ICC stipulates that “The trial shall be held in public. The Trial Chamber may, however, determine that special circumstances require that certain proceedings be in closed session for the purposes set forth in article 68, or to protect confidential or sensitive information to be given in evidence.” Rome Statute, art. 7.
trials. So far, debates on the alleged history writing function of international criminal tribunals remain typically informed by a conception of mass violence through the lens of the Holocaust in Europe in the 1940s and based on the past experiences of the trials at the International Military Tribunal in Nuremberg (1946), Eichmann in Jerusalem (1961) and to a lesser extent Milosevic (2001) in The Hague. These trials, however, not only took place many years ago and dealt with crimes committed in Europe; they were also rather atypical since they were principally based on swathes of documentary evidence. Those studies on the relationship between history and atrocity trials, for years already, are the prime reference points in research. Nuremberg might be the ideal model, but Tokyo was rather emblematic for the reality of international criminal justice. From a more global perspective, the European cases, that have informed academic and public thinking, are far from being representative since they do not address ‘other’ atrocities, particularly carried out elsewhere – under different circumstances, in different cultures and in different time frames - in Africa, Asia and Latin America. In contrast, after attending, monitoring and covering atrocity trials between 2003 and 2016, which mostly dealt with non-documentary societies or scarcely documented crimes scenes in more than a dozen non-European settings, I raise the questions to what extent criminal trials can at all unravel – let alone explain - historically significant crimes while simultaneously adjudicating

93 An exception may be the UNICTY. Wilson, Writing History in International Criminal Trials, Navenka Tromp, Prosecuting Slobodan Milosevic. The Unfinished Trial (New York: Routledge, 2016).

94 The crimes perpetrated by the Nazi regime in Germany during the Second World War (1940-1945) remain a strong reference point to other episodes of mass violence, committed elsewhere and in different times. For many, genocide refers the Holocaust specifically; yet most contemporary genocides, or related atrocity crimes, do not at all resemble the Holocaust, which, like any other case of genocide, had a number of unique dimensions. Reference to the Holocaust, however, often features in appeals from victim groups to have their plight recognised as genocide. See: See: Strauss, Fundamentals of Genocide and Mass Atrocity Prevention (Washington: United States Holocaust Memorial Museum, 2016), p. 35; Eve Ensler, ‘Yazidi Activist Nadia Murad Speaks Out on the ‘Holocaust’ of Her People in Iraq, Time Magazine, 3 August 2016.


96 During the 216 days of trial, the prosecution called 33 witnesses, while 61 witnesses and 19 defendants testified for the defence and 143 additional witnesses gave testimony by interrogatories for the defence, which produced 17,000 pages of transcript. However, in preparation of the trial, over 100,000 captured German documents were screened or examined and about 10,000 were selected as having evidentiary value. Of these, about 4000 were translated into four languages and used, in whole or in part, in the trial as exhibits. In addition, millions of feet of captured moving picture film were examined and over 100,000 feet brought to Nuremberg. Relevant sections were prepared and introduced as exhibits. Also, over 25,000 captured still photographs were brought to Nuremberg, together with Hitler's personal photographer who took most of them. More than 1,800 were selected and prepared for use as exhibits. The Nuremberg Judgement, furthermore, reads that: “Much of the evidence presented to the Tribunal on behalf of the Prosecution was documentary evidence, captured by the Allied Armies in German army headquarters, Government buildings, and elsewhere. Some of the documents were found in salt mines, buried in the ground, hidden behind false walls and in other places thought to be secure from discovery. The case, therefore, against the defendants rests in a large measure on documents of their own making, the authenticity of which has not been challenged except in one or two cases.” See: United States v. Japan, Trial of the Major War Criminals Before The International Military Tribunal. Nuremberg 14 November 1945 -1 October 1946. Volume 1: Official Documents (Nuremberg, 1947), pp. 171:341-173.


98 When it comes to atrocity trials before international courts in the past 65 years, almost 40 percent of the suspects were charged in respect the Holocaust (7%) and crimes in the former Yugoslavia (33%). The rest came from Japan, East-Timor, Sierra Leone, Rwanda, Cambodia, Lebanon, Democratic Republic of the Congo (DRC), Uganda, Central African Republic, Kenya, Côte d’Ivoire and Mali. See: Alette Sneeuwers, Barbora Hola and Tom van den Berg, ‘Sixty-Five Years of International Criminal Justice: The Facts and Figures’, International Criminal Law Review, 13 (2013), pp. 7-41. Amongst several others, atrocity trials were held in relation to: Armenia, Ethiopia, Argentina, Guatemala, Bangladesh, Sri Lanka, Chad, Republic of Congo, Liberia and Haiti.

99 Rwanda, the Democratic Republic of the Congo (DRC), Sudan, Kenya, Uganda, Sierra Leone, Liberia, Central African Republic, Cote d’Ivoire, Mali, Ethiopia, Somalia, Lebanon, Sri Lanka, Cambodia and Afghanistan.
personal criminal responsibility and how – subsequently – historians could approach the sources they create?

Along the way, I have attended, monitored and reported on proceedings at all the international criminal courts and observed over 100 suspects and convicts of mass atrocity perpetrated in more than fourteen countries\textsuperscript{97} and listened to the testimony of possibly over a thousand witnesses in a courtroom over the past thirteen years. Altogether, their experiences composed a cacophony of often unimaginable terror, human suffering and grief. Alongside the testimony of insider witnesses or even perpetrators, many horror scenarios filled the ever so serene courtrooms. Harrowing and painful stories like these stick with you. All those horrible testimonies have one core function: they lay the foundation under the finding of either guilt or innocence of the accused on trial.\textsuperscript{98} But there is something strikingly odd about them. Along the way, the more prosecutorial theories, defence alibi’s, victim statements, witness testimonies and court reasoning you hear, the more sceptical you become about their rationale, accuracy, credibility, reliability and thus overall truthfulness.\textsuperscript{99} More and more, I came out of atrocity trials in disbelief. Who and what to believe? This question became even more pressing with the publication of ground-breaking work on the reliability of witness testimony at three largely non-documentary tribunals.\textsuperscript{100} If tribunals are indeed ‘fact-finding without facts’ institutions, what does that mean in terms of their historical legacy? Considering the fact that up to 5,000 witnesses testified at the internationalised courts that deal with mass atrocity in Sub-Saharan Africa,\textsuperscript{101} it becomes relevant to ask how to value legally enticed witness testimony as historical source, but also how to approach the application of transitional justice and international criminal justice in Africa, when its system is reliant on memory.

\textsuperscript{97} Suspects included: 3 at the ECCC; 4 (in absentia) at Special Tribunal for Lebanon (STL); 20 at the ICC; 3 at the Kigali High Court, International Crimes Chamber (Rwanda); 2 at Oberlandesgericht, Stuttgart (Germany); 9 at Mobile Court, Baraka Democratic Republic of the Congo; 10 + at Mombasa High Court (Kenya); 1 at Porvoo District Court (Finland); 1 at Court of Assize, Brussels (Belgium); 7 at District Court, The Hague (The Netherlands); 1 at Munich District Court (Germany); 3 at Gacaca Court, Randa (Rwanda); 3 at Appeals Court, The Hague (The Netherlands); 9 at SCSL; 15+ at United Nations International Criminal for the former Yugoslavia (UNICTY).


\textsuperscript{99} Journalist Thierry Cruvellier observation that “the more trials you follow, the more you start to disbelieve everyone: witnesses, the police, judges, prosecutors, defence lawyers, and victims” is one I have come to share. Thierry Cruvellier, The Master of Confessions: The Making of a Khmer Rouge Torturer (New York: HarperCollins, 2014), p. 77.

\textsuperscript{100} Nancy Amoury Combs, Fact-Finding Without facts. The Uncertain Evidentiary Foundations of international Criminal Convictions (Cambridge: Cambridge University Press, 2010).

\textsuperscript{101} Far away from the crime scenes and without any outreach efforts, justice was not seen to be done. But it was done, yet mostly on the basis of anonymised witnesses who often testified in closed sessions, shielding trials, testimony and evidence from the Rwandan public and scrutiny. In its 21 years of existence the ICTR Trial Chambers heard testimony from 3,062 witnesses, with 2,407 testifying as protected witnesses and 655 testifying as non-protected witnesses. See: UNSC, Report on the completion of the mandate of the International Criminal Tribunal for Rwanda as at 15 November 2015 (S/2015/884; 15 November 2015), §10.
1.2 Research questions

This research derives from the epistemological debate on ‘ways of knowing after atrocity’. It delves into the questions of what can be known, what is known, how it is known when studying mass-violence in modern Sub-Saharan Africa by studying international criminal trials. Atrocity trials and proceedings – like truth commissions - consciously offer accounts about the violent past. In fact, they are creative processes that produce narrative representations and bring about normative experiences. In the process of dealing with the past, they look at (criminal) acts performed in the past, they uncover sources from the past, they hear testimony about the past and they generate opinions on the past. Irrevocably, the mechanisms, the sources and judgements generated and configured by the international criminal courts and tribunals settle in the histories of mass violence and mend into historiographies of atrocious pasts of individual conflicts. If any, what historical knowledge, sources and explanations did these transitional justice mechanisms produce and to what extent do their concluding narratives square with historiography? An important sub-question is how these narratives were enticed, constructed established.

Historians do not only study the past, they also study the dealing with the past, increasingly including transitional justice practices such as criminal trials. As some of the first modern-day international (–ised) ad hoc tribunals and hybrid courts have fulfilled their mandates, time has come to have a first glance at what they have actually accomplished, appraise their inheritance and plunge into the vast archives they have inadvertently produced along the way. Informed by a rising interest in the legacy of international criminal tribunals, particularly by legal scholars and tribunal protagonists in a debate that is dubbed ‘Legacy Talk,’ taking wholesale stock is an empirically impossible project since from the outset. Besides its sheer volume, all these courts – or at least their political architects, legal agents and principled campaigners - have ascribed to the cosmopolitan international justice project myriad ambitious and untestable functions. Besides the primary purpose of investigating, charging, prosecuting, judging and sentencing individuals for their acts or omissions constituting genocide, crimes against humanity and war crimes committed in the recent or remote past, they also claimed to possess extra-legal powers such as making the world a better place, eradicating impunity for gross human rights violations, deterring potential génocidaires, ending protracted wars, serving victims with closure, reconciling fractured societies, ascertaining truth and writing historical records. Chipping in on what is mostly a theoretical discussion among tribunal staffers and non-

historians, this dissertation confines its scope to the alleged truth-finding and history writing function of the international criminal tribunals as well as the archival record they have left behind. Concretely, it focuses on three interrelated questions:

(1) How to understand the invocation of historical narratives in international criminal trials?

(2) How to position court judgements in the larger historiography on mass violence?

(3) How to approach the courts' trials and the trial records as historical sources?

By examining the investigation, prosecution and litigation of a selection of mass atrocity trials at the United Nations International Criminal Tribunal for Rwanda (UNICTR), the Special Court for Sierra Leone (SCSL) and the International Criminal Court (ICC), this dissertation offers an insight into the judicial understanding, framing and explanations of recent and remote historical injustices as well as consequences of the operationalisation of historical discourses in the trial setting for the historical record. Based on an effort of critical understanding and assessment of broader transitional justice goals, this study particularly (1) analyses uses and abuses of historical narratives, (2) scrutinises the process of historical fact ascertainment during international criminal trials and (3) questions the historiographical legacy of international criminal trials. In so doing, it problematises the seemingly uncertain ascertainment of facts in non-documentary contexts and when reliant on witness testimony. On that basis, this dissertation critiques (1) the enactment of historical narratives by prosecutors in case theories, (2) the substantiation of these narratives through witness testimony and (3) the limitations of the trial record as historical source. This dissertation then argues that legally enticed witness testimonies are problematic historical sources. Second, it argues that international criminal trials invoke particular readings of history and rather adjudicate competing narratives about the past than write history. Third, it argues that relying on trial judgement as seemingly objective and authoritative accounts on history warrants caution. Finally, based on thirteen years of the author’s first-hand trial observations, countless interviews and trial records from UNICTR, SCSL and ICC, this study concludes that trials on the Rwanda genocide, the Sierra Leonean civil war and ethnic cleansing in the Democratic Republic of the Congo generate a very specific genre of truth: oral histories on (1) the grand-historical developments, (2) individual agency and (3) micro-dynamics of mass atrocity violence through the prism of transitional justice.

1.3 Transitional justice and the Tribunalisation of Historical Injustice

Mass violence and large scale atrocities typically concern everyone and it affects societies at large.\textsuperscript{108} For mass violence strikes deep physical, psychological and social wounds: economies and infrastructures destroyed, families and communities fractured, interpersonal mistrust, grieving, trauma, post-traumatic stress, unwanted memories and many other forms of social suffering.\textsuperscript{109} It disrupts societies to the bone; its complications are long and deeply felt. But the past, as well as memories about the past, never seems to pass away completely. Its violent episodes live on in the minds of successive generations; they may linger like phantom pains.\textsuperscript{110} But what if it stops, when the perpetrators are making no more victims? How to heal the wounds? Across the globe, societies transitioning out of a period of violence often raise the same question: if at all, how to deal with this poisoned past? In tandem with the rather dogmatic globalisation and standardisation of a post-Cold War human rights canon\textsuperscript{111} and based on a liberal philosophy of history,\textsuperscript{112} the last three decades saw the industrialisation of past, present and future of human calamity. On the bazaar of compassionate humanism and cosmopolitanism, activists, lawyers, policy makers, humanitarians and academia jostled under the umbrella of what became known as Transitional Justice (TJ).\textsuperscript{113} Overall, the five guiding tropes in TJ are truth, justice, reconciliation, democratisation and redress, which are subsequently directed at (re-) establishing openness, accountability, social cohesion, rule of law and rehabilitation.\textsuperscript{114} Transitional Justice policies are designed to break with the dark past and establish a pathway towards a brighter future.\textsuperscript{115} But it is not as candid as it looks. The antidotes to the poisoned past fluctuate on the scale of continents, countries, localities as well as individuals.\textsuperscript{116} Depending on temporal, political and cultural contexts, inclinations for historical reckoning may ebb and flow.\textsuperscript{117} Some societies place moratoria on the past, negate it or choose to look forward instead of backward, while others document, open up archives or reflect. Perpetrators can be punished, rehabilitated or amnestied. Victims can be heard, compensated or silenced. Some countries seek external

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\textsuperscript{110} Analogous to: Luc Huyse, \textit{All Things Pass Except the Past} (Van Haelwyck: Kessel-Lo 2009), p. 15.


\textsuperscript{114} Other TJ mechanisms include, inter alia: amnesties, purges, reparations, cleansing rituals, symbolic apologies, academic study and literature, lieux de memoires, naming and shaming, trauma counselling, education or a mixture thereof. See: Lavinia Stan and Nadya Nedelsky (eds.), \textit{Encyclopaedia of Transitional Justice} [III Volumes] (Cambridge: Cambridge University Press, 2013).

\textsuperscript{115} Nanci Adler, ‘Remembering History in Post-Soviet Russia: A Case Study in Challenges to Transitional Justice’, \textit{Inaugural lecture}, University of Amsterdam (UvA), 14 April 2016.

\textsuperscript{116} Compare to recent argument put forward by Makau Mutua, who writes, ‘Dogmatic universality is a drawback to an imaginative understanding of transitional justice. In matters of social transformation, close attention must be paid to context and location. That is why it is intellectually indefensible to create a transitional justice blueprint ready for export.’ Makau Mutua, ‘What is the Future of Transitional Justice?’, \textit{International Journal of Transitional Justice} (2015), pp. 1-6: 5.

humanitarian, judicial or truth interventions, whilst local communities may retreat into customary practices or seek innovative customised rituals to overcome past horrors.

Out of potpourri of TJ strategies, innumerable practices and divergent objectives, historian Antoon De Baets extracts five recurring truth strategies applied by post-conflict entities. Forgetting, denying and explaining are connected to the violence itself, while purging and judging aims at punishing perpetrators. Typically, transitional justice mechanisms are directed towards unveiling brutality, unravelling its embroidery and identifying the designers. All schemes relate or are a response to the recent or remote past itself, as it happened. But even more they concern history. Not only do they accumulate, yield and deal with the sources from the past, they also confront the facts and opinions about the past. It is no surprise that the discourse that frames and generates post-violence responses and policies embraces historical adages. ‘Never again’ [Nunca Mas], ‘historical clarification’ or ‘closing the books’ are entrenched tropes in the popular vocabulary of those occupied in the transitional justice industry. Similarly, in this age of transitional justice, the phrase “that those who cannot remember the past are condemned to repeat it,” is hardly contested. And undeniably, in these activist politics of memory violent pasts increasingly find their ways back into the present. Doctrines like Imprimiscriptibility of infringements of international humanitarian law principles pull past violence back into the contemporary realm. Besides, in lieu of the globalisation of legal norms like jus cogens and universal jurisdiction – bygone atrocities cross borders and do no longer have nationalities.

Transitional justice mechanisms, like trials and truth commissions, are not only historical cleansing rituals, but they are historical events, in which the past is on the agenda and where historical sources are used, created and verified. With their retrospective mandates, transitional justice mechanisms are inherently linked to history. The one leads to another. Imperatively, historical wrongs spark these redress initiatives. But the relationship is also reciprocal as these mechanisms on their turn invoke history. Furthermore, the acts they scrutinise are of historic significance as they changed the histories of countries or societies. And third, the discourse that frames transitional justice echoes historical allusions. In fact: the past frames the goals of transitional justice agenda’s and frames its tasks while its acknowledgment is elementary to its questions. Accordingly, history, or at least the past, is the spine of transitional justice in general and international criminal justice in

References:


121 In an attempt to desacralize memory as an ethical and political imperative, David Rieff carefully countered to view that remembrance serves to interests of peace and prevents atrocities, by highlighting cases where memory does not mitigate but rather serves as a catalyst to violence. David Rieff, In Praise of Forgetting: Historical Memory and its Ironies (New Haven & London: Yale University Press, 2016).


126 See for these arguments: Nesiah, ‘Delimiting Accountability’.
particular. Often, however, transitional justice mechanisms carefully select specific episodes, target particular historical agents and treat brutalities as sealed events. Their idea is that these particular events belong to the past and the aspiration is to symbolically send the haunted past back to where it belongs, as a ritual of exorcism. Equally, the fact that transitional justice projects are always ad hoc demonstrates this desire to overcome the past; these processes are ultimately directed towards closure, generating acknowledgement, judgements and final conclusions. Their presentation of history, thus, largely represents views on the past at that particular moment. It is an official narrative or transitional truth that can equally be dismantled by later political elites more favourable to post-transitional justice denial and revisionism.

1.4 Criminal trials

When it suits them, judges, prosecutors, and activists happily embrace their role as peace- and history-makers, in the name of the victims. But as soon as such expectations look far-fetched, or are necessarily betrayed, the same people quickly state that this is not what courts are for. Can you have it both ways?

- Thierry Cruvellier

Historians, like Laurent Gbagbo, are rare defendants at the international criminal tribunals, arena’s that naturally adjudicate agency within the wider spectrum of historical events. In essence, international criminal trials are occupied with the past from the perspective of the present and directed at the future and as such inherently anachronistic institutions. A cursory overview across the globe shows a world record of criminal and civil cases that address historical injustices. By the mid 2010’s, trials concerned crimes going back as far as the Holocaust in the 1940s and cover crimes committed in all parts of the world. Building on a larger, perhaps more obscure history and as part of the larger transitional justice field, from the mid-1990s, the world has seen a tribunalisation of

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130 There have been many highly educated defendants but only two were historians: Ferdinand Nahimana, who was tried by the ICTR for public incitement to commit genocide and Ieng Sary, who was accused of genocide by the ECCC but died before going on trial. UNICTR, TCI, The Prosecutor v. Ferdinand Nahimana, Jean Bosco Barayagwiza & Hasssan Ngyeza: Judgement and Sentence (ICTR-99-52-T; 3 December 2003). ECCC, Office of the Co-Investigating Judges, Closing Order (002/19.09.2007-ECCC-O3); Phnom Penh, 15 September 2010), §996.
131 In Rwanda, the civil war and genocide between 1990 and 1994; in Sierra Leone, the civil war between 1991 and 2002. In all the ICC cases, events after 1 July 2002, the date the court became operative.
132 Antoon De Baets differentiates between recent historical injustice (past genocides, crimes against humanity, war crimes and historical crimes) and remote historical injustices (crimes of the past similar to genocides, crimes against humanity and war crimes). Recent historical injustices include “injustice of which at least some perpetrators or (direct and indirect) victims are still alive” whereas remote historical injustices include “injustice of which all perpetrators and (direct and indirect) victims are dead.” The latter may also be defined as historical crimes, which fall under the scope of ethics and history while the former may fall within the scope criminal and civil law and human rights and humanitarian law. See: De Baets, ‘Historical Impermeability’, p. 132.
133 For example: Dutch war crimes in Indonesia (late 1940s), colonial abuses in Kenya (1950s), mass killings in Bangladesh (1970s), the ‘killings fields of Cambodia (1970s), death flights and enforced disappearances in Argentina (1970s/80s), the genocide of the indigenous Ixil Maya’s in Guatemala (1980s), the genocide in Rwanda (1994), civil war in Sierra Leone (1991-2002), East Timor (1999). More recent cases investigated include mass violence in the Democratic Republic of the Congo (DRC), Uganda, Central African Republic, Kenya, Côte d’Ivoire, Libya, Sudan (Darfur), Mali, Georgia, Burundi, Lebanon and Kosovo. At the time of writing, initiatives were undertaken in relation Colombia, South Sudan, Central African Republic, Sri Lanka, Syria and many others.
134 An impressive, global yet atypical, history of atrocity trials, through the examination of 20 cases can be found in: Heller & Simpson, The Hidden Histories of War Crimes Trials.
historical injustice. Ever since the first international atrocity trials in the twentieth century, all these cases deal with history or at least events of greater historical significance. Judges at the International Military Tribunal for the Far East (IMTFE), for instance, recognised that the charges “directly involved an inquiry into the history of Japan during seventeen years, the years between 1928 and 1945” as well as “a less detailed study of the earlier history of Japan, for without that the subsequent actions of Japan and her leaders could not be understood and assessed.”\footnote{International Military Tribunal for the Far East (IMTFE), The United States of America, The Republic of China, The United Kingdom of Great Britain and Northern Ireland, The Union of Soviet Socialist Republics, The Commonwealth of Australia, Canada, The Republic of France, The Kingdom of The Netherlands, New Zealand, India, and The Commonwealth of the Philippines: Against ARAKI, Sadao, DOHBIHARA, Kenji, HASHIMOTO, Kingoro, HATA, Shunroku, HEMANUMA, Kiichiro, HIROTA, Koki, HOSHINO, Kaoki, ITAGAKI, Seishiro, KAYA, Oikinori, KODO, Koichi, KIKURA, Heitaro, KOISO, Kuniaki, KIKURA, Heitaro, KOISO, Kuniaki, MATSUI, Iwane, MATSUOKA, Yosuke, MINAMI, Jiro, MUTO, Akira, MAGANO, Osami, OSAWA, Shumei, OSHIMA, Hiroshi, SATO, Kenryo, SHIGEMITSU Mamoru, SHIMADA, Shigetaro, SHIRATORI, Toshio, SUZUKI, Teiichi, \[trial transcript\] (Tokyo, 4 November 1948), pp. 48428.}

It is no surprise that history books are often among the first references for court staff at international tribunals in understanding the culture and costumes, social and political landscapes and historical background to the conflicts and situations they are dealing with.\footnote{International Military Tribunal for the Far East (IMTFE), The United States of America, The Republic of China, The United Kingdom of Great Britain and Northern Ireland, The Union of Soviet Socialist Republics, The Commonwealth of Australia, Canada, The Republic of France, The Kingdom of The Netherlands, New Zealand, India, and The Commonwealth of the Philippines: Against ARAKI, Sadao, DOHBIHARA, Kenji, HASHIMOTO, Kingoro, HATA, Shunroku, HEMANUMA, Kiichiro, HIROTA, Koki, HOSHINO, Kaoki, ITAGAKI, Seishiro, KAYA, Oikinori, KODO, Koichi, KIKURA, Heitaro, KOISO, Kuniaki, MATSUI, Iwane, MATSUOKA, Yosuke, MINAMI, Jiro, MUTO, Akira, MAGANO, Osami, OSAWA, Shumei, OSHIMA, Hiroshi, SATO, Kenryo, SHIGEMITSU Mamoru, SHIMADA, Shigetaro, SHIRATORI, Toshio, SUZUKI, Teiichi, \[trial transcript\] (Tokyo, 4 November 1948), pp. 48428.} Likewise, the internal libraries at the tribunals all have collected history books, historical dictionaries or other historically relevant sources – like human rights reports - on the conflict situation on their docks.\footnote{International Military Tribunal for the Far East (IMTFE), The United States of America, The Republic of China, The United Kingdom of Great Britain and Northern Ireland, The Union of Soviet Socialist Republics, The Commonwealth of Australia, Canada, The Republic of France, The Kingdom of The Netherlands, New Zealand, India, and The Commonwealth of the Philippines: Against ARAKI, Sadao, DOHBIHARA, Kenji, HASHIMOTO, Kingoro, HATA, Shunroku, HEMANUMA, Kiichiro, HIROTA, Koki, HOSHINO, Kaoki, ITAGAKI, Seishiro, KAYA, Oikinori, KODO, Koichi, KIKURA, Heitaro, KOISO, Kuniaki, MATSUI, Iwane, MATSUOKA, Yosuke, MINAMI, Jiro, MUTO, Akira, MAGANO, Osami, OSAWA, Shumei, OSHIMA, Hiroshi, SATO, Kenryo, SHIGEMITSU Mamoru, SHIMADA, Shigetaro, SHIRATORI, Toshio, SUZUKI, Teiichi, \[trial transcript\] (Tokyo, 4 November 1948), pp. 48428.} On the other side of the spectrum, defence teams also regularly consult historians during pre-trial investigations and preparations – to counter the claims made by the prosecution’s historians. Thirdly, historians are often called by parties during trial, mostly as experts on the context of the alleged crimes. They have featured at all the tribunals and some became well-known.\footnote{International Military Tribunal for the Far East (IMTFE), The United States of America, The Republic of China, The United Kingdom of Great Britain and Northern Ireland, The Union of Soviet Socialist Republics, The Commonwealth of Australia, Canada, The Republic of France, The Kingdom of The Netherlands, New Zealand, India, and The Commonwealth of the Philippines: Against ARAKI, Sadao, DOHBIHARA, Kenji, HASHIMOTO, Kingoro, HATA, Shunroku, HEMANUMA, Kiichiro, HIROTA, Koki, HOSHINO, Kaoki, ITAGAKI, Seishiro, KAYA, Oikinori, KODO, Koichi, KIKURA, Heitaro, KOISO, Kuniaki, MATSUI, Iwane, MATSUOKA, Yosuke, MINAMI, Jiro, MUTO, Akira, MAGANO, Osami, OSAWA, Shumei, OSHIMA, Hiroshi, SATO, Kenryo, SHIGEMITSU Mamoru, SHIMADA, Shigetaro, SHIRATORI, Toshio, SUZUKI, Teiichi, \[trial transcript\] (Tokyo, 4 November 1948), pp. 48428.} Historical expert witnessing, however, has not been a new
phenomenon introduced by the tribunals,”

but it has remained a continuing practice at the international courts” and often times spark heated debates, particularly between experts and defence teams. The fourth, last and perhaps the most typical time for the historian to step in is after the trial, when they enter the archives to analyse the trial legacies, or write histories on the adjudicated conflicts, using the trial record. In this capacity, they have the advantage of being able to take a more birds-eye viewpoint.

In contrast to truth commissions or historians, criminal tribunals are occupied with rendering justice over individuals suspected of international crimes: genocide, crimes against humanity and war crimes, nothing else. They do so by enticing, collecting, presenting, questioning and reviewing testimony about the past as well as documents from the past. There are only two possible outcomes of the trial; a narrative of individual guilt or a narrative of individual innocence. There is one problem, however. Courts – or at least its creators or protagonists – “have always shown a remarkable lack of modesty as to what little they can actually accomplish.” In tradition of the International Military Tribunal in Nuremberg - as noted above - they have ascribed to themselves a plethora or other noble extra-legal goals and powers. But courts are not made for that and if they attempt so they risk becoming a “rudderless ship tossed about by the waves […]” and “end in complete failure.” Courts unstitch history, but they do not necessarily write history. By nature, the tribunals themselves are historical phenomena with retrospective mandates, which though the lens of law submit a narrative representation of individual transgression within a particular historical context and “[…] judges are acutely aware that their judgement will inevitably be viewed as making history and their judgement

145 In the Hissène Habré case before the Extraordinary African Chambers (EAC), Chadian historian Arnaud Dingammadji has extensively testified in 2015. Chambres Africaines Extraordinaires, La Chambre d’Instruction, Ordonnance de designation d’expert (Case No 01/13; Dakar, 2 August 2013); Chambres Africaines Extraordinaires, Rapport d’expertise sur la contexte historique du Tchad sous le regime de Hissène Habré de Arnaud Dingammadji (Case Document D1235); Trust Africa, “Summary of the fifth hearing held on 9 September 2015”, The Public Prosecution versus Hissène Habré (www-text: http://www.trustafrika.org/images/ICIJ reports/EAC%20Trial%20Hearing%20report%20-%20September%202015%20-%20English.pdf, last visit on 9 May 2016). Although, some historians decline to testify, arguing that it would be too strenuous: ECC, Trial Chamber, Subject: Outstanding issues relating to Expert Michael Vickery (2-TCE-94) (Phnom Penh, 4 August 2016), §3.
146 During the trial of Nuon Chea and Khieu Samphan, French historian Henri Locard went as far as accusing defence lawyers of subjecting him to “cold torture” during his time on the stand as an expert witness. After the hearings, through the media, he further accused the lawyers of behaving in a “criminal” and “perverse” manner and doing “everything to obfuscate the truth rather than for the truth to come out.” See: ECCC, Session 1 - 2 August 2016 - Case 002/02 - EN/FR: (Official trial video: https://www.youtube.com/watch?v=0lVeU_8Y_8s), at 7:20 minutes; ECCC, Press Statement by Defence Support Section, 5 August 2016; George Wright, “ECCC Defence Support Section Rejects Claim that Lawyers Are ‘Criminal’”, The Cambodia Daily, 6 August 2016.
147 This legal positivist stance was famously popularised by Hannah Arendt, who, after observing the Eichmann trial in Jerusalem in 1961 wrote: “The purpose of a trial is to render justice and nothing else; even the noblest of ulterior purposes should not detract from the law’s main business: to weigh the charges brought against the accused, to render judgment, and to mete out due punishment.” Arendt, ‘A report at large’ - V, p. 101.
148 Although, sometimes judges are becoming creative in this respect. ICC Judge Bruno Cotte, for instance, remarked during the reading of the acquittal judgement in the case of Mathieu Ngudjolo Chui from Congo that: “Dès lors, déclarer qu’un accusé n’ est pas coupable ne veut pas nécessairement dire que la Chambre constate son innocence.” (the fact of deciding that an accused is not guilty does not necessarily mean that the Chamber finds him innocent). See: ICC, Résumé du jugement rendu en application de l’article 74 du Statut dans l’affaire Le Procureur c. Mathieu Ngudjolo le 18 décembre 2012 par la Chambre de première instance II (18 December 2012), p. 6.
150 It in its preface of its published trial record the IMT explicitly outlined this role: “Recognizing the importance of establishing for history an authentic text of the Trial of major German war criminals, the International Military Tribunal directed the publication of the Record of the Trial.” International Military Tribunal, Trial of The Major War Criminals Before the International Military Tribunal. Nuremberg 14 November 1945 - 1 October 1946. Volume I: Official Documents (Nuremberg, 1947), p. vii.
will itself be subject to historiographical scrutiny.”

But doing justice according to law and writing history should not be confused.

“In the last 2500 years, since the beginnings in ancient Greece of the literary genre we call “history”, the relationship between history and law has been very close,” writes Carlo Ginzburg.

More than the act of judging and the study of history, the judge and the historian appear to share many commonalities. It is not just an etymological coincidence, but most importantly the pursuit for truth runs central in the worlds of both professional inquirers. Their dealing with the past, however, diverges. Judges must judge and historians can judge, leaving an important difference between legal truth and historical truth. As a result, the written judgements – which already present a legal way of storytelling - inherently carry a legally defaced account of history. Court verdicts are very different from historical writing. It is solely through the legal spectre that judges submit a narrative representation of individual transgression in a particular historical time frame. There is therefore a very specific and constrained kind of normative agency history, whereas historical writing focuses on agency as well as structure. Moreover, trials disfigure the complex interplay between grand histories of world historical events on the one hand and the structures and dynamics of systematic transgression on the other hand by ascribing to it individual agency. Simply, courts anthropomorphise historical realities.

There is thus an inherent relationship between international criminal justice and history, it is a forced marriage but is an uneasy one. At its core, proving past international crimes demands understanding the conflicts as such, the political and social contexts in which they took place and how they fit the demanding legal criteria of, for instance, the Genocide Convention. Yet, the complex endeavours of judging international crimes and writing history of an armed conflict cannot be characterised by “either harmonious accord or inherent contradiction.”

Different than professional historians, international judges are restrained in various ways. First, trial judges cannot freely and widely pick their topics and commence their own investigations. Tribunals prosecute only a limited

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154 He continues: “true, the Greek word historia is derived from medial language, but the argumentative ability it implied was related to the judicial sphere. “Carlo Ginzburg, ‘Checking the Evidence: The Judge and the Historian’, Critical Inquiry, Vol. 18, no 1 (Autumn, 1991), pp. 79-92; 79.
155 The word history derives from the ancient Greek ἱστορία (historia, “learning through research, narration of what is learned”), from ἱστορέω (historéō, “to learn through research, to inquire”), from ἱστορ (histor, “the one who knows, the expert, the judge”).
159 Wilson, Writing History, p. 13.
160 In civil law jurisdictions, investigative judges do play an important role, yet their investigations are sparked by criminal complaints. See for instance: Thijs Bouwknegt, ‘Chad – Dakar: Habré trial is litmus test for Pan-African justice’, African Arguments, 1 June 2015; Interview, Martin Witteveen, Investigative Judge, Amsterdam, 12 July 2013. At the ECCC, which builds on the French model of the investigating judge, pre-trial investigations are carried out not by the Prosecution and the Defence but by the two Co-Investigating Judges. They determine whether the facts alleged by the Co-Prosecutors in the Introductory and Supplementary Submissions constitute crimes within the jurisdiction of the ECCC (so called subject matter jurisdiction); whether the person investigated was either a senior leader or one of the persons most responsible for crimes committed during the Khmer Rouge Regime (so called personal jurisdiction); and whether the person under investigation is to be indicted and sent to trial, or whether the case against them should be dismissed. They, thus, do not initiate investigations. See: ‘Agreement between the United Nations and the Royal Government of Cambodia concerning the prosecution under Cambodian law of crimes committed during the period of Democratic Kampuchea. Phnom Penh, 6 June 2003’, United Nations Treaty Series, Vol. 2329, No. 41723 (2005), art. 5.
number of very specific crimes (genocide, crimes against humanity and war crimes) committed by a very limited number of defendants and by exclusion of other crimes narrow down the prism through which they may look at events from the past. Secondly, tribunals are also constrained in time. The best example is the ICC, which may not deal with events prior to July 2002. At the UNICTR, the temporal jurisdiction only stretched the calendar year 1994, thus including half a year after the genocide but excluding the period of civil war that started in October 1990. A third limitation is geography. In Freetown, at the SCSL, prosecutors and judges were only to adjudicate crimes within Sierra Leone, but not in Liberia, the country where its prime suspect, Charles Taylor, hailed from.

Fourth, there are also bars concerning the types of protagonists of violence. In theory, tribunals are supposed to deal with most senior leaders - intellectual actors - suspected of being “most responsible,” potential barring agency at mid- and low levels. Mostly, prosecutors make a selection out of this already exclusive group of agents and the bulk of alleged perpetrators, particularly at the mid- and low levels walk away, uninvestigated, unprosecuted and unsentenced. Often times, investigators simply follow leads and direct their focus and resources towards single suspects while not pursuing others.

Fifth, although some exceptional trial chambers of the international criminal tribunals undertake judicial site visits, mostly tribunals’ judges are largely dependent on the investigative work of others, mainly third-party investigators, prosecutors and defence lawyers. International judges are triers of fact, but in most cases they are not independent seekers of evidence. Lastly, judges have no room for nuance as they can only reach two possible conclusions: guilty or not guilty. All these legal straitjackets, in which the law confines the legal narrative of past events, mutilate the historical narrative and judges increasingly acknowledge that. At the UNICTY, for instance, Judge Alphons Orie told a defence witness who is an historian the following: “I want you to understand it, that we're not writing history of war but that we are preparing a judgement, whatever that judgement will be, on an indictment against one accused.” Other judges, at other tribunals, may be forced to interest themselves in in history, particularly when the alleged crimes were committed further back in time, but explicitly disclaim that their historical overviews, merely serve as context “to understand the facts” of the case before them. Although addressing interpretations of history and limiting the cope

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163 Agreement between the United Nations and the government of Sierra Leone on the establishment of a Special Court for Sierra Leone & Statute of the Special Court for Sierra Leone (Freetown 16 January 2002), annexed to: UNSC, Report of the Planning Mission on the establishment of the Special Court for Sierra Leone (S/2002/246; 8 March 2002).
164 The practice can be different though, depending, for instance, on the ‘availability’ of suspects rather than active pursuit. At the ICTY, ICTR and ICC, at least several lower level suspects were tried.
166 ICC, OTP, Paper on some policy issues before the Office of the Prosecutor (September 2003).
167 Author’s Interview, Jeroen Toor, Team Leader International Crimes Unit of Dutch Police, Woerden, 2 October 2013.
168 With exception of the ECCC and EAC, there are no investigative judges at the tribunals.
169 At the ICC, some trial chambers choose to apply a more inquisitorial approach, calling their own witnesses and visiting crimes scenes, In the Katanga trial the chamber said: “Aside from the opportunity thus afforded to the Chamber to gain a better understanding of the context of the events before it for determination, the main purpose of the site visit was to enable the Chamber to conduct the requisite verifications in situ of specific points and to evaluate the environment and geography of locations mentioned by witnesses and the Accused persons.” See: ICC, TCII, Situation in the Democratic Republic of the Congo in the Case of The Prosecutor v. Germain Katanga: Judgment pursuant to article 74 of the Statute (ICC-01/04-01/07; 7 March 2014), §106-108.
171 Chambre Africaine Extraordinaire D’Assises (CAE), Ministère Public c. Hissein Habré: Jugement (Dakar, 30 May 2016), §288.
of impermissible lies about the past, “trials cannot settle conflicting interpretations of history” and should therefore “not be expected to write history.”

1.5 Overpromised, underdelivered?

But it is hard to kill expectations and the way trials are announced and conducted point in the opposite direction. A main issue in international trials, as evidenced by the Gbagbo proceedings, remains the way in which prosecutors, defence counsel, victims representatives, witnesses and judges use non-legal evidence and historical narratives, and for what reasons: rhetorical window dressing or integral case theories? Along the way, the more trials you follow and the more prosecutorial theories, defence alibi’s, victim statements, witness testimonies and court reasoning you hear, the more sceptical you become about their meaning and truthfulness. Indeed, in the live setting of the international criminal trial, enticed, constructed and contested narratives often outweigh the forensic truth in the ‘Rankean’ sense – “wie es eigentlich gewesen” (how things actually were). As the Gbagbo proceedings show, trials are not necessarily inspired and driven by a “Rankean rage” in terms that they are about establishing the full truth about what happened and the development of an independent historiography. Much more, they are about testing delicately constructed case theories. The danger of such practices for the historical record is that it turns to deceit and that the public at large leaves that experience in confusion, disbelief and disappointment.

As initiators of proceedings, prosecutors often raise high expectations on what trials can uncover. In the Eichmann trial in 1961, Israeli Prosecutor Gideon Hausner believed that the court could “superimpose on a phantom a dimension of reality,” a “living record of a gigantic human and national disaster.” In Nuremberg and at the modern tribunals it was no different. At the Khmer Rouge trials in Cambodia, Cambodian co-prosecutor Chea Lang exclaimed that “we must never forget that it is the purpose of courts such as this one, to establish the truth, unflinchingly, without fear, restrictions or prejudice, so that humankind may learn and history not be repeated.” But, idyllically, for international prosecutors, academic discussions on history are not the prime focus, mostly for it is not their forte. Instead, the intention is to substantiate the individual criminal responsibility of the accused who they presume to be ‘most responsible’ for the crimes carried by others. In that process, however, they cannot escape invoking history and employing legal language to frame the complex

172 Juan E. Méndez, ‘backflip’, Wilson, Writing History.
173 Wilson, Writing History, p. 15.
179 For Robert G. Storey, US trial counsel at the International Military Tribunal (IMT) “the purpose of the Nuremberg trial was not merely, or even principally, to convict the leaders of Nazi Germany [.]. Of far greater importance, it seemed to me from the outset, was the making of a record of the Hitler regime which would withstand the test of history.” W. R. Harris, ‘Foreword’, Tyranny on Trial—The Evidence at Nuremberg (New York: Transaction Publishers, 1997), p. vii.
realities of mass violence – and vice versa. Progressing and escalating over time, the crimes they prosecute are the outcomes of a pre-conceived plan, a policy or a sequence of choices and decisions. At the international criminal tribunal, dwelling on the recent or more remote past to infer a criminal mind set or a pattern thus becomes a necessary evil. But unlike historians who have a professional duty to address the past with rigorous, academic and dispassionate caution, prosecutors cherry-pick, infer and frame - or arguably even mutilate - the historical narrative in such a way that best fits the charges and tells a coherent story, as will be demonstrated by this thesis.181 Trials are neither truth commissions nor pseudo-historians. But the nature of international criminal trials is that they are arrested by history and because prosecutors are not trained, independent and professional historians, one would expect them to be diligent, realistic and modest in what they can truly accomplish. Yet, in historic atrocity trials, international prosecutors often seem to be personally driven to write history themselves and re-enact Nuremberg-style historical trials.182 In their process of making legal history, however, prosecutors cherry-pick, infer and frame - or arguably even mutilate - the historical narrative in such a way that best fits the charges.183 Conflating history with a prosecutorial case theory and then on-promise ing that courts will establish the truth about past events has increasingly proved to be a recipe for public disappointment and disillusion.184 As a consequence, they litigate and progress a particular truth more than they uncover truth, with a capital “T”. As a consequence of charging in hindsight, case scenarios are not only anachronistic, they are also written with legal ink and are aimed at putting historically significant agents - defendants – behind bars. Considering the fact that their authoritative worth is overpromised by their protagonists, overrated by their readers and distorted by its critics, the consequences of this practice can be devastating, particularly when the evidence turns out to be unavailable, fluid, unconvincing, unreliable, manipulated or pointing in a different direction. Judgements – which carry much weight because they serve socially valuable ends185 - as a result, may very well be unsatisfactory and perceived as subversive towards the more generally held perceptions of history, as translated into case theory, narrated and litigated by prosecutors.

181 In the ICC’s Gbagbo trial for example, the most crucial omission, perhaps, in the Prosecutor’s narrative of the Ivoirian conflict are the alleged atrocities committed by Gbagbo’s opponents, providing the wider context in which Gbagbo’s actions can be understood. HRW, although a key Prosecution informant, has lamented the inaction of the Prosecutor in terms of investigating and charging individuals from both sides to the conflict. See: HRW, Making Justice Count. Lessons from the ICC’s Work in Côte d’Ivoire (New York: HRW, 2015).

182 A prime example was the UNICTR’s case against the alleged mastermind behind the 1994 Rwanda genocide, Théoneste Bagosora, in which Bensouda for a while served as a prosecution official in 2004. Author’s monitoring of proceedings of the Bagosora case at the UNICTR throughout 2004; See: Thijs Bouwknecht, ‘Bensouda: An African Heritage’, International Justice Tribune, No. 142 (21 December 2011), p. 4.

183 In the ICC’s Gbagbo trial for example, the most crucial omission, perhaps, in the Prosecutor’s narrative of the Ivoirian conflict are the alleged atrocities committed by Gbagbo’s opponents, providing the wider context in which Gbagbo’s actions can be understood. HRW, although a key Prosecution informant, has lamented the inaction of the Prosecutor in terms of investigating and charging individuals from both sides to the conflict. See: HRW, Making Justice Count. Lessons from the ICC’s Work in Côte d’Ivoire (New York: HRW, 2015).

184 A key example is the acquittal by the UNICTY of Vojislav Šešelj. The Serbian nationalist leader was acquitted of 9 counts of Crimes Against Humanity (persecution, deportation and inhumane act of forcible transfer) and War Crimes (muder, torture and cruel treatment, wanton destruction, destruction or wilful damage done to institutions dedicated to religion or education, plunder of public or private property). He was accused of having directly committed, incited, aided and abetted those crimes committed by Serbian forces during the period from August 1991 until September 1995, or to have been part of their commission through his participation in a joint criminal enterprise (JCE). Yet, the judges in this case departed from the narrative established in other trials and ruled that the “the Prosecution does no more than make general statements that fail to account for the specific evidence.” UNICTY, TGI, Le Procureur c/ Vojislav Šešelj: Judgment (IT-03-67-T, 31 March 2016); Dov Jacobs, ‘Is the ICTY ashamed by its own Šešelj judgment?’, Spreading the Jam, 31 March 2016 (www-text: https://dovjacob.com/2016/03/31/is-the-icty-ashamed-by-its-own-seselj-judgment/, last visit on 21 April 2016; Smiljana Vukojicic, Šešelj acquitted: Balkans outraged, Belgrade conflicted’, Euractive.com, 4 April 2016 (www-text: http://www.euractiv.com/section/enlargement/news/seselj-acquitted-outrage-in-the-balkans-mild-reaction-in-belgrade; visited: 22 April 2016).

Trials and their end judgements may lead to historically empty narratives or “mediocre historical accounts of the origins and causes of mass crimes.” Yet importantly, as they unravel past events, at minimum they contribute to the exposure of previously undetermined facts through cross-examined testimonial stories, guilty pleas and evidence that may transpire in the larger realm of a tribunal. Besides limited but significant historical conclusions, courts collect a wealth of historically relevant sources. But they also produce historical sources: particularly witness testimony. Amongst the most interesting achievements of the international courts is that they have established a massive repository of oral testimony on mass violence from the remote and recent past, although, again, through the limited lens of criminal procedure. Trials are creative processes and bring about normative experiences, but there remains crucial deficiency in the tribunals’ prime fact finding capacity: the volatility of the available evidence.

Who and what to believe is a question one is left with after the courtroom experience, which is “a social encounter, where different modes of being and different worldviews might conceivably collide.” As the Gbagbo case showed, trials often turns out to be more about narrative and proving a case theory, than it is about the ascertainment of truth: who presents the best, most credible and convincing version of events? Prosecutors employ their truth as a vehicle to secure convictions, defence lawyers do so to best serve their clients and judges apply the law and regulations to the evidence put in front of them and form a ‘reasoned’ opinion. But the truths presented, heard and deliberated on at trials are extremely delicate. With the relative exceptions of Nuremberg, the UNICTY and the Extraordinary African Chambers (EAC), there is a crying shortage of documentary, forensic or other tangible types of evidence at most other tribunals, including the ICC, which up to 2016 strictly dealt with cases in oral societies in Sub-Saharan Africa. Suffice to observe, the lack of organised documentation or forensic evidence in these countries is overwhelming. Assumed perpetrators simply did not keep logs or diaries; orders travelled from mouth to mouth. Most of their victims remained unknown and uncounted, decomposing in mass graves in inaccessible jungles, swamps or diamond fields. Then in court, denial, minimisation or falsification becomes the perpetrators’ technique of self-re-identification. Typically, we only get to know perpetrators as suspects in the courtroom or as opportunistic confessants before a truth committee, not in their cruelllest state, on the battlefield; in the way their victims would remember them. On the other side, victims, bystanders or observers rarely make recordings of massacres, they draw primarily from the

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186 Wilson, Writing History, p. 1.
187 UNICTY, ‘Address by Chief Prosecutor Carla del Ponte at the conference on “establishing the truth about war crimes and conflicts,” held in Zagreb, Croatia on 8 and 9 February 2007’, Press Release, 15 February 2007. For instance, the ICTR established beyond legal dispute that, during 1994, there was a genocidal “campaign of mass killing intended to destroy, in whole or at least in very large part, Rwanda’s Tutsi population.” UNSC, Report on the completion of the mandate of the International Criminal Tribunal for Rwanda, ¶55; UNICTR, Appeals Chamber, The Prosecutor versus Edouard Karemera, Mathieu Ngirunziza, Joseph Nzarorera: Decision on Prosecutor’s Interlocutory Appeal Decision on Judicial Notice (ICTR-98-44-AR73AC); 16 June 2006).
188 Amongst many other things, they also exhumed forensic evidence through forensic investigations, DNA tests or ballistics analysis that have been carried out by professional experts on demand of tribunals. Erin Jesse, ‘Forensic Investigations’, in: Lavinia Stan and Nadya Nedelsky (eds.), Encyclopaedia of Transitional Justice, Vol. I (Cambridge: Cambridge University Press, 2013) 27-32; Caroline Buisman, Ascertainment of the Truth in International Criminal Justice (PhD dissertation; January 2012), p. 199-200.
189 For instance, approximately 11.100 witnesses, including multiple and video-linked testimonies and support persons, have testified and assisted the ICTY (7.700) and ICTR (3.400). (www-text: http://www.unicrt.org/en/about/witnesses, last visit on 9 May 2016).
memories of what they have experienced or witnessed themselves or through hearsay.\textsuperscript{191} Tangible resources on the violence itself, from the past, are scarce. Practically, that means that trial judges have to rely almost exclusively on witness accounts which are given five, ten, sometimes 20 years or even longer after the facts have occurred.\textsuperscript{192} It poses a complex fact-finding challenge: the data of atrocity crimes is drawn from ephemeral stories out of fallible memory by witnesses who were, in one way or another, close to the violence.\textsuperscript{193} Dubbed a procedure of “fact-finding without facts” in a ground-breaking study by Nancy Combs,\textsuperscript{194} the knowledge produced about the past at most trials is almost exclusively testimonial and individualised. Moreover, this memorised data is legally enticed – by western fact finders - and informed by – normative, emotional and anachronistic - stories about the past, not objective observations from the past. One would suspect that international tribunals would be capable to at least unearth basic facts like what happened, where, when and to whom. When push comes to shove, however, international courts have struggled tremendously to do so. Yet if these micro fact finding parts of the puzzle are already arguably questionable, the larger political, social and historical contexts of violent conflicts narrated in judgements, based on these deficient pieces, are possibly defective as well. This Pandora’s Box,\textsuperscript{195} of what really is an existential ‘truth-finding crisis’, has particular opened itself in the ICC’s Congo and Kenya cases.\textsuperscript{196} The consequences can be devastating. In the latter case regarding the 2008 post-electoral crimes against humanity in Kenya, witnesses ceased their cooperation, disappeared or recanted their prior statements en masse and to such an effect that all trials against six accused were vacated.\textsuperscript{197} When it comes to an international criminal judgement, its foundation may be “uncertain” and may “often be little more than an act of faith.”\textsuperscript{198} This ultimately affects historical narratives, which are based on the trial record.

1.6 Case selection

It is unmanageable to study all outbreaks of mass atrocity violence worldwide or even Sub-Saharan Africa, let alone the succeeding transitional processes – if any. Hence, this dissertation concentrates on three specific cases of mass violence: Rwanda (1990-1994), Sierra Leone (1991-2002) and the Democratic Republic of the Congo (1996-2003). To a lesser extent, and particularly in order to highlight the continuing problem in the contemporary arena of international criminal justice, this book

\begin{thebibliography}{199}
\bibitem{De Swaan} De Swaan, \textit{The Killing Compartments}, pp. 227-228.
\bibitem{Also see} Also see: Bouwknecht, “How did the DRC becomes the ICC’s Pandora’s Box?”.
\bibitem{Cruvellier} Cruvellier, \textit{The Master of Confessions}, p. 80. It is a statement that reminds of a reflection on the ICTR trials by Norwegian Judge Erik Mose, who presided over the Bagosora trial, that “it is the responsibility of the judge to listen to the testimonies of the witnesses. Each presents his or her version of the truth. Our task is to get as close to it as possible.” Beate Arnstad (dir.), \textit{Telling Truths in Arusha} [Documentary film] (SF Norge A/S, 2010).
\end{thebibliography}
also deals with Côte d’Ivoire (2000-2011). Overall, the mass murders and maiming at the hands of machete-wielding children and raping men and women are ingrained refrains in the popular discourses about Rwanda, Sierra Leone and Congo. These world historical events have not only developed into key ‘African’ benchmarks in conflict studies, but even more so in the broader fields of human rights practice and research.

Thus, the empirical data stems from four Sub-Saharan African situations, each with its own unique historical, social and political circumstances, dynamics and characteristics. But they share some key similarities. Take the violence itself. Every time it was primarily directed against harmless and unorganised non-combatants (civilians) who were slew, maltreated or forcibly relocated en masse. Victims were numerous too, extending into the thousands, even millions. Furthermore, no one was spared. Men, women, children, the elderly and foetuses, they were all assaulted. Defenceless, they stood little or no chance against their hangmen. In Rwanda, Sierra Leone and in Congo, the violator units were correspondingly versatile. They consisted of professional soldiers, rebels, death squads, mercenaries, civilians, children and sometimes even ‘peacekeepers.’ Some were unwilling, others indifferent and few were avid agents of violence. On the individual level, intentions varied vastly, from the upper echelons, across the mid-cadres down to the assassins in the field. Few people acted out of deep-felt personal hatred against their targets. On the scale of rationales, the gauge is rather diffuse: ideology, social upheaval, widespread deprivation, modernity, political ambitions, ethnic antipathy, fear, confusion, frustration, excitement, peer-pressure, propaganda, buzz, greed or other factors. Ample theories, but diminutive evidence exists to single out a specific drive for their misdeeds.\(^{199}\) What is clear though is that their acts are labelled as crimes under both national laws and globalised treaties during or after they were performed. That is the starting point of this book.

Next to highlighting variances, comparing includes identifying similarities. In the cases of Rwanda, Sierra Leone and Congo it is particularly the aftermath - what happened after the violent explosions there – which has many analogies. Of course, again, diversity exists between them, but the violence there fit the categories of ‘international crimes’. Within that framework, on the structured outline, two similar transitional justice events unfolded in the wake of the violence. First, all three countries were put under the novel magnifying glass of the perpetrator-focussed international justice experiment. In Arusha, the UNICTR judged the supposed Hutu ringleaders – and one Belgian - of the genocide. For its part, the SCSL convicted the remaining avant garde of three warring factions and the external actor Charles Taylor. Subsequently, a handful of ex-fighters from eastern Congo battlefields made its way to the ICC in The Hague. Secondly, alongside these foreign (or hybrid) juridical establishments, some kind of truth-seeking mechanisms were inaugurated. Sierra Leone and Congo both had a Truth and Reconciliation Commission (TRC) while Rwanda’s Inkiko Gacaca can

\(^{199}\) For this line of argument also see: Scott Straus, *The Order of Genocide. Race, Power, and War in Rwanda* (Ithaca and London: Cornell University Press, 2006), p. 3. Straus argues, convincingly, that there is a lack of evidence – empirical data – to test these hypotheses.
effectively be understood as a sort of micro-level truth-tribunals. All three inquisitorial forums
functioned to document facts and histories of the conflict and to particularly provide victims with a
platform.

Another factor that brings these cases together is the available source material. Methodology
is key and quality fact-finding and truth ascertainment are vital in probing mass violence. The ways of
knowing about atrocity has two distinct phases: actual (during the violence) and retrospective (after
the violence). Knowledge itself varies from phase to phase. We may not know that genocide is being
committed when it takes place, while later on we may find that it was committed. As the abuses are
being perpetrated, the assessment by officials, journalists or NGOs that occupy themselves with
conflict monitoring is often rudimentary, hastily and based on scattered and often tainted
information.200 These multifocal sources, the cacophony of early analyses combined with newly
discovered information are harmonised in the evaluation after the events.201 Reconstruction of crime
scenes is the filtrate of a challenging process of verification, puzzling and fine-tuning of available
information from various carriers. But there is a striking problem concerning our three countries,
which are largely non-documentary societies. Not only were the UN and NGO reports - that lead to
the tribunals’ creation and formed the ground material for their investigations - solely based on
interviews with victims and witnesses, the Rwanda tribunal’s investigators never looked for archives
or exhume mass graves and identify victims to the extent its European and privileged sister, the
UNICTY, did. Nor did the SCSL find written orders to amputate civilians’ arms and legs. The ICC,
on another level, is likewise hindered in its investigations in the dense and volatile jungles in Congo202
or ‘no-go’ area of Darfur.203 Because of the shortage of forensics and documentary sources, these
courts heavily rely on fragile often uncorroborated secondary testimonial evidence carried in UN
reports, NGO reporting and journalism.204 As a result, courts base their finding on the coerced, enticed
and contextualised memories of victims, survivors, bystanders, perpetrators, refugees and foreign
‘experts’ in establishing basic facts on which eventually individual guilt or innocence will be decided.
Not only has this apparent modus operandi of “fact-finding without facts” led to “uncertain

200 Victims, bystanders or observers rarely make recordings of massacres, they draw primarily from the memories of what they have experienced or witnessed
themselves or through hearsay. Notable exceptions, such as ISIS in Iraq and Syria, exist.
201 See for a crucial discussion on the fallacies of NGO reporting: Alex De Waal, ‘Writing Human Rights and Getting It Wrong’, Boston Review, 6 June 2016;
588.
202 See the testimony of former team leader at the Office of The Prosecutor (OTP), Bernard Lavigne, about the investigations in the Democratic Republic of the
Congo (DRC): ICC, Prosecutor vs. Thomas Lubanga Dyilo: Transcript (ICC-01/04-01/06; 16 November 2010) & ICC, Lubanga Dyilo Transcript (17 November 2010).
203 ICC, Situation in Darfur, Sudan in the Case of the Prosecutor vs. Abdallah Banda Abukar Nourain and Saleh Mohammed Jerbo Jamus: Defence Request
for a Temporary Stay of Proceedings (ICC-02/05-03/09; 6 January 2012).
204 This practice in human rights fact finding and reporting remains intact. For example, the Independent International Commission of Inquiry on the Syrian
Arab Republic based its findings, that the Islamic State of Iraq and Al-Sham (ISIS) was committing genocide against Yazidis, on 45 interviews with survivors,
religious leaders, smugglers, activists, lawyers, medical personnel, and journalists, which was supported “hundreds of statements, photographs, satellite images,
and reports, as well as the factual findings of the OHCHR Fact-Finding Mission on the human rights situation in Iraq,” United Nations, Human Rights Council,
“They came to destroy”: ISIS Crimes Against the Yazidis (A/HRC/32/CRP.2; 15 June 2016), §4.
foundations” for international criminal convictions, it must also have trickled down into historiography that is based on the findings of these tribunals.

### 1.7 Sources & Methodology

Getting to know as much as possible about the trial and its context requires an interdisciplinary and creative approach, outside of the academic armchair comfort zones. The contemporary historian is chameleon-like and more often turns into an anthropologist or investigative journalist, conducting field work, observing trials and even participates (as many from the legal, but also from the social sciences have done) – of course solely where possible and only when academically appropriate. Having worked as a researcher at the UNICTR and ICC and having closely attended, monitored and observed over 50 trial proceedings in which up to 100 atrocity suspects featured for over a decade, I have experienced the trial itself and its immediate social, political and historical context in which it takes place. Personal observations and participation in “the justice arena” taught me a lot about the trial and the way case theories, evidence and the past are discussed, often much more than just the trial record. Partly, that is because of simple practical reason. Next to the immediate presence of critical agents such as prosecutors, lawyers, judges, investigators, witnesses, the affected public, NGO lobbyists, it is virtually unmanageable to digest everything after the trial. After twenty years, the trial records of the tribunals have grown to such enormity that it is an indigestible labyrinth for newcomers. Aside from the millions of pages of evidence, testimony, motions, decisions and judgements, the trials against Charles Taylor and Radovan Karadžić, for example, also produced thousands of pages of transcripts, worth months of reading. Even the experienced judge, assisted by a dozen staff members, and let alone a researcher with unlimited access, needs time to read every single page.

This dissertation is the product of four years of research. It is informed, however, particularly by thirteen years of the author’s first-hand atrocity trial observations at all the international criminal tribunals and a range of national jurisdictions in Europe and Africa, which adjudicated international atrocity crimes. I have done so in various capacities, but always applied a similar approach and methodology. Starting in 2003, I attended trials at the UNICTY, most notably Milošević, while I was a student in non-western contemporary history. In 2004, I spent about half a year in the public

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206 Only see the Judicial Records and Archives Database (JRAD), which provides access to all UNMICT public judicial records, as well as to the public judicial archive records of the ICTR and ICTY. The JRAD includes filings from parties and non-parties to trials; exhibits tendered in court; transcripts and audio-visual recordings of court hearings. Available at: [http://jrad.unmict.org](http://jrad.unmict.org).

207 In the ten-year trial against the Serbian nationalist politician Vojislav Seselj, judge Mandiaye Niang, who replaced a colleague after the trial was closed, took 1.5 years to “familiarise” himself with the case record, on the basis of which he had to pronounce a judgement. Robert Donia, a historian who testified for the ICTY’s prosecution and wrote a biography on Karadžić, for instance explained that over the years, he was only able to sift through a segment of the evidence. UNICTY, TCH, ’Annexe 2 - Rappel De La Procédure’, Seselj: Jugement, pp. 5-6.; Donia, ’Radovan Karadžić; ‘Interview Robert Donia’, New Books in Genocide Studies, 6 February 2015 (podcast at: [http://newbooksnetwork.com/robert-j-donia-radovan-karadzic-architect-of-the-bosnian-genocide-cambridge-up-2014-3](http://newbooksnetwork.com/robert-j-donia-radovan-karadzic-architect-of-the-bosnian-genocide-cambridge-up-2014-3), consulted on 22 April 2016).

208 Almost all contemporary trials referenced in this dissertation I have observed from a public gallery or in absence of such a gallery in the courtroom itself and alternatively through a video-link. I have never been a party to or have been involved in any trial. At trials, I would always refrain from any form of interaction with involved parties, as well as individuals in the audience.
galleries of the UNICTR in Arusha, Tanzania, observing trial proceedings and writing case minutes and trial reports for the UNICTR Newsletter. While at the UNICTR, I attended over a dozen trials and proceedings, including the court’s flagship trial of alleged genocide ‘mastermind’ Théoneste Bagosora, which is discussed in the chapter on Rwanda. In Arusha, I had the opportunity to attend the testimony of the Tribunal’s prime expert witnesses Filip Reyntjens from Belgium and Alison Des Forges from the USA. For me, a nearly graduated historian, these experiences at the UNICTR were formative in my thinking about the mechanics of international criminal justice as well as the history of the Rwandan genocide. After returning from Tanzania, I became a West-Africa researcher with Amnesty International (AI) for which I monitored the establishment of Truth and Reconciliation Commission for Liberia (TRC/L) as well several trial hearings at the Special Court for Sierra Leone (SCSL).

From March 2006, I also started to observe the first case, against the former Congolese warlord-turned-politician Thomas Lubanga Dyilo, at the International Criminal Court (ICC). Only a month later, Charles Taylor was transferred to The Hague for trial, which I have closely observed until its end in 2014. While attending the scarce pre-trial sessions in the Lubanga and Taylor cases before the trials started in earnest, I took a four-month research position at the ICC, working, amongst other things, on contextual research in the cases of Uganda’s Lord’s Resistance Army (LRA) and the violence in Sudan’s Darfur region. From 2007, when I became a full-time war crimes trials correspondent, I covered dozens war crimes proceedings at all the international tribunals, the ICC

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214 On various occasions, I was contacted by prosecution authorities or defence lawyers for consultancy, including the court’s flagship trial of alleged genocide ‘mastermind’ Théoneste Bagosora, which is discussed in the chapter on Rwanda. In Arusha, I had the opportunity to attend the testimony of the Tribunal’s prime expert witnesses Filip Reyntjens from Belgium and Alison Des Forges from the USA. For me, a nearly graduated historian, these experiences at the UNICTR were formative in my thinking about the mechanics of international criminal justice as well as the history of the Rwandan genocide.
and a range of domestic jurisdictions in Europe, Africa and Asia. For five years, as a journalist, I had the unique privilege to bear witness to the renaissance of international criminal justice and work with, meet, interview and observe many of the key agents at and around the tribunals. All my observations and work with the rich archive of court records and trial transcripts that I have collected along the way, informed this dissertation. As one could expect, the international criminal tribunals have been creating unique but also vast archives. As they continue to do so, the challenge for the historian is not only to delve into the archives, but also keep track of newly disclosed materials as trials forge on. Ever since starting on this project in 2011, I continued observing and following atrocity trials at the tribunals for the former Yugoslavia, Cambodia, Lebanon, Chad and the ICC.

Next to primary trial observation and court records, this dissertation draws from a multiplicity of other primary sources and a selection of secondary sources. The primary sources can be divided as follows. First of all, I held interviews and had many conversations with former and present tribunal staff, several defendants and convicts, victims, survivors, witnesses, UN and government officials, NGO personnel and academics. The bulk of this material has already been presented in over 850 journalistic articles, radio features, short documentaries and blog posts that I have produced. Where necessary, the original interviews or publications in which they feature are referenced throughout the text. Secondly, I have consulted official documents from governments, the United Nations, commissions of inquiry, parliamentary commissions and truth commissions. The third set of primary sources includes NGO reports, media reports and audio-visual material. The selection of secondary sources consists of monographs and articles by practitioners (former and present), jurists and academics from a range of disciplines. Using these sources, I have tried to maintain the hierarchical order applied above, meaning that preference is principally given to primary sources.

1.8 Research framework and thesis overview

As follows from the introduction, this dissertation roughly covers four main subjects in one geographical area: mass violence and international crimes; transitional justice and international

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218 It included, inter alia: the first ICC trials; the prosecution of Charles Taylor; investigations in Kenya; the composition of the Special Tribunal for Lebanon; the initial appearances and subsequent trials of Radovan Karadžić, Raïko Mladic, Laurent Gbagbo, Uhuru Kenyatta, Ngon Chea, Khieu Samphan and many other prominent figures; local trials in the Democratic Republic of the Congo: Gacaca sessions in Rwanda; a range of judgements in Arusha, Freetown and Phnom Penh; the Demjanjuk trial in Germany as well as many universal jurisdiction cases in a handful of European and African countries.

219 As was emphasised once again by Saskia Baas and Richard Wilson. Saskia Baas & Richard A. Wilson, ‘Behoud het archief van het Joegoslaviëtribunaal’, NRC Handelsblad, 4 April 2016. Similar appeals were raised with respect to the archives of the ECCC: Craig Etcheson, ‘Let the Khmer Rouge Record Show. Cambodia Shouldn’t Censor the Khmer Rouge Court’s Files’, The New York Times, 26 August 2014.

220 I attended hearings – or monitored them through the court’s video-stream, in all the ICC trials, including those against the Laurent Gbagbo and Charles Blé Goudé (Côte d’Ivoire), Bosco Ntaganda (Rwanda/Democratic Republic of the Congo, DRC), Mathieu Ngudjolo Chui (DRC), Germain Katanga (DRC), Dominic Ongwen (Uganda), Ahmad Al Faqi Al Mahdi (Mali), Uhuru Kenyatta (Kenya), William Ruto (Kenya), Joshua Sang (Kenya) and Jean Pierre Bemba Gombo (Central African Republic).

221 The international tribunals, by nature, conduct hearings in various languages, depending on the country or origin of the court staff, defendant and witnesses. Most tribunals provide translations in their official working languages – mostly English and French. At all trials, I have tried to follow proceedings, if possible, in their original language. Occasionally, for instance at Rwandan or Congolese courts, I had to rely on interpreters. At the tribunals, which normally provide court-interpretation, I have listened to the proceedings in English. Throughout this dissertation, when referencing court documents and transcripts, I have tried to use the English version, when available. By doing so, this text may contain quotes that were translated and may occasionally, depending on the quality of interpretation, differ from the original. In cross-checking transcripts, I found many discrepancies due to translations and interpretation errors.
criminal trials; fact seeking and fact ascertainment; and judicial and historical narratives on violence in Sub-Saharan Africa. Writing about these requires clear operationalisation and demarcation of these terms, as well as the cases and the subsequent methodology applied. All these topics will be subsequently and progressively dealt with in the coming chapters applying a three-pronged analytical framework: (1) unravelling the past, (2) tribunalising the past and (3) cross-examining the past.

In chapter II, the subject of this study will be further refined, including a brief survey on the current state of research on the topic, in order to elucidate where this book fits in. Then, mass violence and international crimes, transitional justice, the right to truth and truth commissions and international criminal trials are introduced, defined and demarcated. Thereafter follows a discussion on history writing in international criminal trials, trial records as historical sources, fact ascertainment deficiencies and witness testimony. In conclusion, I briefly introduce the three main case studies: Rwanda, Sierra Leone and the Democratic Republic of the Congo. Chapter II serves as a more general historical overview of mass violence and transitional justice in sub-Saharan Africa. As the reader will observe, transitional justice questions after mass violence are not at all just a contemporary issue. In a cursory but comprehensive narrative, this chapter delves into several examples of mass violence in Africa, which today could be categorised as recent historical injustices or remote historical crimes and the way in which these were either dealt with or obscured. Among the remote historical cases is the transatlantic slave trade, Shaka Zulu’s destructive wars in Southern Africa, King Leopold II’s Rubber Terror in Congo and the twentieth century’s first genocide in the German colony of Namibia. Then the focus shifts towards the Italian massacres in Ethiopia and the plurality of postcolonial eruptions of mass categorical violence throughout the continent and their respective post-violence responses, if any. We then turn to what I call the tribunalisation of violence, which is legal reckoning with mass violence in Africa, including Ethiopia’s Red Terror prosecutions, international justice and the turn towards a more continental approach. In conclusion, this chapter discusses the reliance of witness testimony in most of these cases. Subsequently, chapters IV, V and VI tackle the three main case studies: Rwanda, Sierra Leone and the Democratic Republic of the Congo (DRC).

In chapter IV, the case of Rwanda, the dissertation digs deeper into the history, historiography and the strong contentions therein. On that basis, an analysis is provided on the way the UNICTR has investigated, litigated and judged, first of all, the genocide and the war in Rwanda, and secondly, how the UNICTR unravelled generally accepted narratives on how it was orchestrated and carried out. What the reader will discover is that the tribunal along the way, as its agents – particularly experienced judges - became more knowledgeable about Rwanda’s history, politics and society, became less certain on the readings of history presented by the prosecution and its initial expert advisors. Questions on how, why and by whom the plan was hatched to unleash the genocide prior to 6 April 1994 were not answered. Its legacy in terms of truth finding and history writing, after 20 long

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and painful years of adjudicating the genocide and prosecuting its alleged orchestrators is therefore particularly shallow. It did not become the ‘African Nuremberg’ some of its agents had wanted it to become.

In the Sierra Leonean case, history is much less contested than in Rwanda. That is what we will see in chapter V, which deals with the Sierra Leonean rebel war. But similar problems arose in the transitional justice process after the war. Like Rwanda, Sierra Leone is an oral society and truth seeking, truth finding and fact ascertainment were equally difficult, particularly in the Special Court for Sierra Leone’s flagship trial against the former Liberian President Charles Taylor. In fact, prosecutors – who in some cases were the same agents who had before worked at the UNICTR - sought to bring to the judicial test a long reading of history that starts almost a decade before its temporal and geographical mandate but largely failed to prove their case theories with sufficient and convincing evidence. Yet, unlike in Rwanda, the broader process of transitional justice in a broader sense contributed much more to the historical record and the understanding of what happened during the civil war, why and how. The truth commission was particularly instrumental in doing so since it was the only institution that seriously investigated the history of the war and produced a voluminous report detailing its many explanations on why and how it occurred. In addition, although the SCSL did not manage to uncover smoking-gun-type evidence on the alleged criminal conspiracy behind and rationales for the Sierra Leonean civil war, its trial against Charles Taylor shed much light on what had occurred in West Africa, yet particularly through Charles Taylor’s own seven-month testimony on his role in the politics of West Africa in the 1990s.

Chapter VI, which puts an eye on the work of the International Criminal Court’s (ICC) work on Congo and the court’s first trials concerning mass atrocity in Ituri, analyses the contemporary modus operandi in the adjudication of mass violence in Sub-Saharan Africa. When putting the investigations and trials under the microscope, the reader will observe that the ICC’s Congo files, once again, opened up the Box of Pandora on the complexity of judicial truth seeking, truth finding and fact ascertainment on crimes from the past in the context of an oral society. Not only will we discern many similarities with the UNICTR and SCSL in this respect, but the chapter also highlights the acknowledgement of the impracticalities and delusions of over-reliance on witness testimony and third-party NGO reports and the subsequent quest for improvement in terms of investigations and evidence.
Unravelling the Past: Transitional Justice

The banality of evil transmutes into the banality of sentimentality. The world is nothing but a problem to be solved by enthusiasm

- Teju Cole

2.1 Introduction

What is mass violence and how does it fit the classifications of the legal lexicon of transnational atrocity criminalities? Writing on these issues necessitates sharp operationalisation, description and demarcation of terminology. Noticeably, it does not comprise everyday ‘ordinary’ aggressive violence, like pub fights, bank robberies or manslaughter. Nor are serial killings or terrorist attacks, but even those acts are not automatically included in the framework, notwithstanding the fact that they may cause lot of victims and that it can certainly be part of mass violence. Also, violations of the bulk of internationally recognised human rights are not necessarily ingredients of the mass violence corpus. All these crimes aside, the crux of the notion of international crimes lies in the unusual, systematic and macro-unsettling nature of the violence, as well as the socio-political situations in which it takes place. Often this type of violence is deemed so “serious” or so “unimaginable” that it “deeply shock[s] the conscience of humanity.”

Seldom does this ‘ultraviolence’ transpire in peace time. Neither does it often appear within the borders of democracy-styled or so-called rule of law nations, although these states or their nationals can be involved in them elsewhere. More common backgrounds and triggers of mass violence involve, amongst other things, war, civil conflict, insurgency, state repression, revolution, rapid political change or ecological...
change.\textsuperscript{231} Crucially, mass violence stretches beyond individual isolated incidents and is rather a state of affairs over a period of time, which typically involves larger groups of perpetrators and victims and affects comprehensive parts of communities or societies as a whole.\textsuperscript{232} War can be so. But conventional warfare itself is not \textit{per se} illegal. Generally, it is rather symmetric\textsuperscript{233} and battled out between professionally organised and recognisable armed units, such as military, gendarmerie, paramilitary, militias or mercenaries.\textsuperscript{234} Mass violence differs for it typically involves the asymmetric, and often systematic, targeting of numerous unprofessional, unorganised and unarmed civilians, regularly by a large group of organised and armed people.\textsuperscript{235} When talking about mass violence, we mean those situations in which human integrity (\textit{humanity}) is violated beyond the individual and where numerous killings – or other types of physical and psychological violence - of civilian non-combatants occur.

What is in a name? Mass murder, mass killing, massacre, pogrom, extermination, annihilation, ethnic cleansing, persecution, political violence, state crime and genocide may all sound the same and these types of mass violence could all be thought of as gross human rights violations, crimes against humanity or war crimes. And indeed they are interchangeably – and often confusingly and instrumentally - used in public, policy and academic vernaculars.\textsuperscript{236} Technically however, particularly when applying the operative legal definitions of these crimes, the terms imply diverse performances of violence, committed with dissimilar motives, in specific contexts and are sometimes targeted at differentiated victim groups. For example, genocide can involve extermination by mass killing, but exterminatory mass slaughter is not automatically genocide. Yet it surely is a crime against humanity. At least this would be the case for jurists, who would refer to the legal definitions and handle large-scale, methodical and group-selective violence from the strict juridical perspective. Social and political scientists, on their turn, tend to be more creative and flexible and tend to apply their own theoretical framework and self-styled definitions to “mass categorical violence” and may apply the genocide terminology\textsuperscript{237} in alternative academic definitions.\textsuperscript{238} Although often confusing for general audiences, the apparent dichotomy between the disciplines is that lawyers pursue to judge

\textsuperscript{231} Sudden deployment of security forces or commencement of armed hostilities; Spill over of armed conflicts or serious tensions in neighbouring countries; Measures taken by the international community perceived as threatening to a States' sovereignty; Abrupt or irregular regime changes, transfers of power, or changes in political power of groups; Attacks against the life, physical integrity, liberty or security of leaders, prominent individuals or members of opposing groups. Other serious acts of violence, such as terrorist attacks; Religious events or real or perceived acts of religious intolerance or disrespect, including outside national borders; Acts of incitement or hate propaganda targeting particular groups or individuals; Census, elections, pivotal activities related to those processes, or measures that destabilize them; Sudden changes that affect the economy or the workforce, including as a result of financial crises, natural disasters or epidemics; Discovery of natural resources or launching of exploitation projects that have a serious impact on the livelihoods and sustainability of groups or civilian populations; Commemoration events of past crimes or of traumatic or historical episodes that can exacerbate tensions between groups, including the glorification of perpetrators of atrocities; Acts related to accountability processes, particularly when perceived as unfair. United Nations Office on Genocide Prevention and the Responsibility to Protect, \textit{Framework of Analysis for Atrocity Crimes. A tool for prevention} (UN, 2014), p. 17.

\textsuperscript{232} Straus would define it as “large-scale, systematic violence against civilian populations”. Straus, \textit{Fundamentals of Genocide}, p. 31.

\textsuperscript{233} The ‘Rules of War’, as enshrined in for example the 1949 Geneva Conventions, comprises a large body of customs, practices, usages, conventions, protocols, treaties, laws and other norms that govern the conduct of hostilities, limits the methods and means of warfare used by fighting parties and seeks to protect civilians from suffering.


\textsuperscript{235} De Swaan, \textit{The Killing Compartiments}, pp. 9-11.


\textsuperscript{237} See for example: Straus, \textit{Making and Unmaking Nations}, p. 17.

\textsuperscript{238} Over 30 such diverging scholarly definitions – that propose alterations in the meaning of intentionally, the range of the protected groups or the specific genocidal acts - can be distilled from the literature since 1959. See for a sample of 22 definitions: Adam Jones, \textit{Genocide. A Comprehensive Introduction. Second Edition} (Abingdon: Routledge, 2011), pp. 16-20. New definitions continue to transpire and often they strikingly resemble other crimes, such as crimes against humanity. See for example: “Genocide can be defined as a complex process of systematic persecution and annihilation of a group of people by a government.” Uğur Ümit Üngör, ‘Introduction. Genocide, an Enduring Problem of our Age’, in: Uğur Ümit Üngör (ed.), \textit{Genocide. New Perspectives on its Causes, Courses, and Consequences} (Amsterdam: Amsterdam University Press, 2016), p. 15.
perpetrators, sociologists and criminologists try to understand the underlying processes and historians opt to reconstruct and explain the events within a larger historical context. To outlaw such puzzlement in this thesis, though, I will discuss below the operational definitions applied in this study.

2.2 Genocide

The people who asked others to die for ideas were the last ones to do so themselves.

- Alain Mabanckou

Perhaps the most ambiguous, frequently contested and sturdily politicised tag of mass violence is genocide, an ideologically based and discriminatory crime per se. Etymologically and substance-wise, the term has a resilient antecedent in Zulu (izwekufa), German (Völkermord) and possibly other languages. But it was not Shaka Zulu’s campaign of expansion and extermination in present-day South Africa and Zimbabwe in the early nineteenth century, nor Germany’s mass killing of Herero’s in present-day Namibia that gave birth to the concept as we know it since the second half of the twentieth century. Informed by other historical precedents, including the Turkish massacres of Armenians between 1915 and 1918, the current word surfaced during the Second World War and in context of the persecutory and exterminatory policies by the Axis powers in Europe. Stringing together the ancient Greek word for race or tribe (genos) with the Latin suffix for killing (cide), the term was first authored by the Polish public prosecutor and commercial lawyer Raphael Lemkin. Conceived “to denote an old practice in its modern development”, he described genocide as “the destruction of a nation or of an ethnic group.” In the popularly assumed hierarchy of crimes,
genocide, a crime against groups rather than individuals,\textsuperscript{249} is often considered to be the vilest, the most devilish and destructive human sin; it is denoted as the ‘crime of crimes.’\textsuperscript{250} Historically, genocide as a term and historical framework is connoted with the racist, discriminatory and industrial obliterating of millions of European Jews and other socially categorised groups by Nazi Germany.\textsuperscript{251} In fact, the term itself was crafted and enshrined in law with that very exterminatory violence - within its immediate European political, social and continental context - in mind.\textsuperscript{252} Ever since, the usage of the word has been a sensitive matter; ranges of besieged groups have claimed to be targets of genocide and have sought to have their plight acknowledged as such, while suspected culprits vehemently deny their violence was genocidal.\textsuperscript{253} Genocide is an emotionally, morally, legally and politically delicate and polemic subject.\textsuperscript{254} Victims, perpetrators, politicians, civil society agents, journalists, academics and even judges can therefore not agree on which events in history constitute genocides – and under which definition, legal or non-legal - and which not.\textsuperscript{255} Actually, the very conception of the Genocide Convention in 1948 was already the result of four years of political diplomacy and compromise.\textsuperscript{256} As it is beyond the scope of this thesis to look at alternative academic definitions, this study operationalises the description treasured in the Convention on the Prevention and Punishment of the Crime of Genocide, which since its adoption in 1948 and entry into force in 1951 remains the most widely accepted, adopted and applied legal definition.\textsuperscript{257} Unaltered ever since and featuring in the statutes of the tribunals and courts dealt with in this dissertation,\textsuperscript{258} genocide means killing,\textsuperscript{259} causing serious bodily or mental harm,\textsuperscript{260} deliberately inflicting conditions of life to bring about physical destruction,\textsuperscript{261} imposing measures intended to prevent births\textsuperscript{262} and, or, forcibly

\textsuperscript{249} In its first reference to genocide, the United Nations Generally Assembly defined it as: “a denial of the right of existence of entire human groups, as homicide is the denial of the right to live of individual human beings; such denial of the right of existence shocks the conscience of mankind, results in great losses to humanity in the form of cultural and other contributions represented by these human groups, and is contrary to moral law and to the spirit and aims of the United Nations. Many instances of such crimes of genocide have occurred when racial, religious, political, and other groups have been destroyed, entirely or in part.” Furthermore, the Assembly affirmed “that genocide is a crime under international law which the civilized world condemns, and for the commission of which principals and accomplices, - whether private individuals, public officials or statesmen, and whether the crime is committed on religious, racial, political or any other grounds – are punishable.” UNGA, Resolution 96 (I): The Crime of Genocide (11 December 1946).


\textsuperscript{251} For a landmark study that shaped the field of Holocaust Studies and subsequently Genocide Studies: Raul Hilberg, The destruction of the European Jews (London: W. H. Allen, 1961).

\textsuperscript{252} Although, in the most important trial of the Nazi leaders, at Nuremberg, the crime of genocide was not charged: International Military Tribunal, ‘Judgement’, in: International Military Tribunal, Trial of The Major War Criminals Before the International Military Tribunal. Nuremberg, 14 November – 1 October 1946 (Nuremberg, 1947), pp. 171-341.


\textsuperscript{256} As it is beyond the scope of this thesis to look at alternative academic definitions, this study operationalises the description treasured in the Convention on the Prevention and Punishment of the Crime of Genocide, which since its adoption in 1948 and entry into force in 1951 remains the most widely accepted, adopted and applied legal definition.\textsuperscript{257} Unaltered ever since and featuring in the statutes of the tribunals and courts dealt with in this dissertation,\textsuperscript{258} genocide means killing,\textsuperscript{259} causing serious bodily or mental harm,\textsuperscript{260} deliberately inflicting conditions of life to bring about physical destruction,\textsuperscript{261} imposing measures intended to prevent births\textsuperscript{262} and, or, forcibly
transferring children with intent to destroy, in whole or in part, a national, ethnic, racial or religious group, as such. A perpetrator of the crime of genocide, in the legal meaning but operationalised throughout this dissertation, is any person who was found by a court of law to have committed, conspired, directly or indirectly incited, attempted or was complicit in one or more of these acts, while having the intent that these acts would bring about the partial or complete destruction of any of the four specific groups.

Genocide, as enshrined in the Convention is a crime against many, but it first and foremost serves a legal concept and instrument for prosecution and individual punishment despite the fact that the Convention also talks about prevention. In the legal setting, proving the crime of genocide commands two basic requirements to prove its perpetration: the physical element actus reus (the committed or omitted acts) and the mental or moral element mens rea (intent and ‘specific intent’ dolus specialis). All components, starting with the alleged underlying facts must be proved beyond any reasonable doubt. For instance, the specific genocidal acts — killing, causing seriously bodily or mental harm, deliberately inflicting conditions of life calculated to bring about physical destruction, imposing measures intended to prevent births and forcibly transferring children — necessitate, without exception, that the victim belonged to either a national, ethnical, racial or religious group whilst the offender envisioned to destroy that particular group as such in whole or in part. Crucial, at the ICC, is that the perpetrator acted "in the context of a manifest pattern of similar conduct directed against that group or was conduct that could itself effect such destruction." There

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260 The perpetrator imposed certain measures upon one or more persons. The measures imposed were intended to prevent births within the particular group. ICC, Elements of Crimes, art. 6 (d) (1) & (4).
261 The perpetrator forcibly transferred one or more persons under the age of 18. The transfer was from the one particular group to another group. The perpetrator knew, or should have known, that the transferred person or persons were under the age of 18 years. The term “forcibly” is not restricted to physical force, but may include threat of force or coercion, such as that caused by fear of violence, duress, detention, psychological oppression or abuse of power, against such person or persons or another person, or by taking advantage of a coercive environment. Ibidem, art. 6 (e) (1), (4), (5) & (6).
263 Social science uses the concept of perpetrator or perpetration of genocide much more broadly and generally. In order not to confuse, this dissertation uses perpetrator only in case of legal conviction. When talking in broader terms, I will use either alleged perpetrator or the more generic term génocidaire.
264 UNGA, Genocide Convention, art. 3.
265 Although matters of interpretation persist in light of the preparatory works and intentions of the drafters of the Convention. Most notably the question if the required intent exclusively pertains to physical or biological destruction of the group or if it also includes the intent to stop it from functioning as a whole (“cultural genocide”). The latter was defined as "any deliberate act committed with the intent to destroy the language, religion or culture of a national, racial, or religion or culture of a national, racial or religious group on grounds of national or racial origin or religious belief as such: (1) prohibiting the use of the language of the group in daily intercourse or in schools, or the printing and circulation of publications in the language of the group; (2) destroying, or preventing the use of, libraries, museums, schools, historical monuments, places of worship or other cultural institutions and objects of the group." This definition was envisaged in the travaux preparatoires of the Convention but eventually dropped. See: United Nations Economic and Social Council (UNESC), Ad Hoc Committee on Genocide (5 April – 10 May 1948), Report of the Committee and Draft Convention Drawn up by the Committee (E/794), art. III.
267 The Rome Statute defines the mental element as follows: "a person shall be criminally responsible and liable for punishment for a crime […] only if the material elements are committed with intent and knowledge. […] A person has intent where: (a) In relation to conduct, that person means to engage in the conduct; (b) In relation to a consequence, that person means to cause that consequence or is aware that it will occur in the ordinary course of events. […] ‘Knowledge’ means awareness that a circumstance exists or a consequence will occur in the ordinary course of events. ‘Know’ and ‘knowledge’ shall be construed accordingly. Rome Statute, art. 30.
269 This is the general standard of proof applied at (international) criminal courts. The ICJ is different in its wording, stating that it requires “evidence that is fully conclusive” and adds that it requires that it be fully convinced that allegations made in the proceedings, that the crime of genocide or the other acts enumerated in Article III have been committed, have been clearly established.” International Court of Justice (ICJ), Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia): Judgment (The Hague; 3 February 2015), §177-179.
270 At the other earlier courts, this was not a necessary requirement. In practice, however, indeed genocidal intent was inferred from such patterns but legally this is not a requirement of genocide.
271 “The term ‘in the context of’ would include the initial acts in an emerging pattern”. ICC, Elements of Crimes, art. 6.
is no doubt that this crime is difficult to prove. So far, on the level of international criminal tribunals, only the UNICTY and UNICTR have rendered verdicts on genocide – on the basis of the Convention - crimes perpetrated by individual actors. Just one other international judicial forum, the International Court of Justice (ICJ), found that genocide occurred: the July 1995 massacres in Srebrenica. In Phnom Penh, the first genocide trial started in October 2014, concerning Khmer Rouge killings of ethnic Cham Muslims and Vietnamese nationals between 1975 and 1979. At the ICC, there is one outstanding arrest warrant for three counts of genocide on the Fur, Masalit and Zaghawa peoples in Darfur, allegedly committed by Sudan’s President Omar al Bashir. In the context of these and other criminal cases and for the purpose of this study, genocide is thus understood to be a criminal offence as defined above, committed in the past. Whereas non-legal disciplines, such as political science, sociology and anthropology, may be helpful in providing insightful theory to help understand the phenomenon and its assumed general processes more in-depth and comparatively, this study restricts itself to the post-facto juridical framing of mass violence, its epistemology and historiography: how it is dealt with, framed and debated in the trial setting and how is it proved.

2.3 Crimes against humanity

Genocide has been doused with demonic superlatives, often accrediting it with the title “crime of crimes.” However, it is closely related to the concept of crimes against humanity. Not only were genocide and crimes against humanity immediate conceptual responses to the Nazi crimes in the 1940s, its two designers, Raphael Lemkin and Hersh Lauterpacht, came from the same multi-ethnic Polish city (Lwów, now Lvov in Ukraine), studied at the same law school (Jan Kazimierz University, Lwów) and competitively advocated their theories to be included at the International Military Tribunal (IMT) in Nuremberg. Although strongly disagreeing on how to legally encapsulate the Nazi atrocities, both their concepts are now firmly understood to be a criminal offence as defined above, committed as moral, historically and comparatively, as crimes against humanity. Whereas non-legal disciplines, such as political science, sociology and anthropology, may be helpful in providing insightful theory to help understand the phenomenon and its assumed general processes more in-depth and comparatively, this study restricts itself to the post-facto juridical framing of mass violence, its epistemology and historiography: how it is dealt with, framed and debated in the trial setting and how is it proved.

274 UNICTY, TC, Prosecutor v. Radislav Krstic: Judgement (IT-99-33-T; 2 August 2001). In early 2015, the ICTY for the first time in its history rubberstamped a judgement on “conspiracy to commit genocide” when the Appeals Chamber entered this conviction for Vujadin Popovic and Ljubisa Beara. UNICTY, Appeals Chamber, Prosecutor v. Vujadin Popovic, Ljubisa Beara, Drago Nikolic, Radivoje Miletic & Vinko Pandurevic: Judgement (IT-05-88-A; 30 January 2015), §2117.

275 Serbia failed to prevent that genocide, but the ICJ judges found that the state did not commit or conspire it, neither that it was complicit in the crime. International Court of Justice (ICJ), Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro): Judgement (26 February 2007), §471 (5) & (7).


278 Although conceived with similar historical precedents in mind, the Genocide Convention does not allow for retroactive prosecution of events before 9 December 1948, including the Holocaust, it provides a useful analytical framework for historians to evaluate the past and compare similar events in different timescapes. I fully subscribe to the historian Benjamin Madley’s assertion that genocide “describes an ancient phenomenon and can therefore be used to analyse the past, in much the way that historians routinely use other new terms to understand historical events. Benjamin Madley, An American Genocide: The United States and the California Indian Catastrophe (Yale University Press, 2016), pp. e-book: “introduction.”

279 For example, some genocide scholars have featured as expert witnesses in criminal trials: Tom Zwaan (UNICTY; Prosecutor vs. Slobodan Milosevic, 2003); Jacques Séminel (Cour d’Assises de Paris; Prosecutor vs. Pascal Simbikangwa, 2012); Alexander Laban Hinton (ECCC; Case 002/2, 2016).


legal and academic concepts.\textsuperscript{282} Whereas Lemkin came up with a new word, Lauterpacht picked up already existing terminology,\textsuperscript{283} which was, unlike genocide, then enshrined - alongside crimes against peace and war crimes\textsuperscript{284} – in the IMT and IMTFE statutes.\textsuperscript{285} Accordingly, German and Japanese officials, or “war criminals” as they were called, were charged with acts of “muder, extermination, enslavement, deportation, and ‘other inhumane acts’ committed against any civilian population, before or during war” as well as “persecution on political, racial, and religious grounds”.\textsuperscript{286} Like genocide, which was codified into a Convention, a day before the adoption of the Universal Declaration of Human Rights, and entered into law in 1951,\textsuperscript{287} crimes against humanity faded to the background in international legal practice, only to manifestly resurface in the wake of the Cold War and the rise of ethnically tainted violence in the early 1990’s.

Brutal wars, mass murders and ethnic cleansing\textsuperscript{288} – with strong inter-ethnic, group-selective and large-scale exterminatory dimensions - in the former Yugoslavia and Rwanda led the UN’s Security Council to establish its two \textit{ad hoc} tribunals.\textsuperscript{289} But for UNICTY and UNICTR prosecutors, genocide proved a difficult crime to establish, particularly for its special \textit{mens rea} requirement that “intent to destroy, in whole or in part, a national, ethical, racial or religious group, as such.” As historian, legal professor and practitioner William Schabas outlines, the prosecution must establish that the offender must have had a “specific intent” (\textit{dolus specialis}), as discussed above. If not established, the act remains punishable, not as genocide, but may be classified as a crime against

\textsuperscript{282} Apart from genocide, however, there exists no convention on crimes against humanity. For a general background with respect to the emergence of the concept of crimes against humanity as an aspect of international law, its application by international courts and tribunals and its incorporation in the national laws of some states, see: UNGA, \textit{First Report on Crimes Against Humanity}. By Sean D. Murphy, \textit{Special Rapporteur} (A/CN.4/409; 17 February 2015).


\textsuperscript{284} The Tribunal listed “deliberate and systematic genocide” as a war crime (count 3), defining it as “the extermination of racial and national groups, against the civilian populations of occupied territories in order to destroy particular races and classes of people and national, racial, or religious groups, particularly, Jews, Poles, and Gypsies and others.” It was not discussed in the judgement.

\textsuperscript{285} (c) Crimes against Humanity: Namely, murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war, or persecutions on political or racial grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated. Leaders, organizers, instigators and accomplices participating in the formulation or execution of a common plan or conspiracy to commit any of the foregoing crimes are responsible for all acts performed by any person in execution of such plan.” General Headquarters Supreme Commander for the Allied Powers’, Charter of the International Military Tribunal for the Far East, General Orders. No. 1 (APO 500; 19 January 1946), art. 5.

\textsuperscript{286} International Military Tribunal (IMT), \textit{The United States of America, The French Republic, The United Kingdom of Great Britain and Northern Ireland, and The Union of Soviet Socialist Republics – against – Hermann Wilhelm Göring, Rudolf Hess, Joachim Von Ribbentrop, Robert Ley, Wilhelm Keitel, Ernst Kaltenbrunner, Alfred Rosenberg, Hans Frank, Wilhelm Frick, Julius Streicher, Walter Funk, Hjalmar Schacht, Gustav Krupp Von Bohlen Und Halbach, Karl Donitz, Erich Raeder, Baldur Von Schirach, Fritz Sauckel, Alfred Jodl, Martin Bormann, Franz Von Papen, Arthur Seyss-Inquart, Albert Speer, Constantin Von Neurath, And Hans Fritzsche, Individually And As Members Of Any Of The Following Groups Or Organizations To Which They Respectively Belonged. Namely: Die Reichs- Regierung (Reich Cabinet); Das Korps Der Po- Littischen Leiter Der Nationalsozialistischen Deutschen Arbeiterpartei (Leadership Corps Of The Nazi Party); Die Schutzstaffeln Der Natio- Nalsozialistischen Deutschen Arbeiterpartei (Commonly Known As The "Ss") And Including Der Sicher- Heidstidien (Commonly Known As The "Sd"); Die Geheime Staatspolizei (Secret State Police, Commonly Known As The "Gestapo"); Die Sturm Abteilungen Der Nedap (Commonly Known As The "Sa"); And The General Staff And High Command Of The German Armed Forces, All As Defined In Appendix B, Defendants: Indictment (Berlin, 6 October 1945) Count 4 (A) & (B).

\textsuperscript{287} The Convention entered into force on 12 January 1951. Ethiopia was the first to ratify the Convention, on 1 July 1949. Eleven more states ratified (Australia, Norway, Iceland, Ecuador, Panama, Guatemala, Israel, Liberia, the Philippines, Yugoslavia and El Salvador) and seven acceded to it (Monaco, Jordan, Saud Arabia, Bulgaria, Turkey, Vietnam and Sri Lanka). On 14 October 1950, two states ratified (France and Haiti) and three acceded (Cambodia, Costa Rica and the Republic of Korea), bringing the total to twenty-four contracting States. The text was published in the five official UN languages Chinese, English, French, Russian and Spanish: ‘No 1021. Convention on the Prevention and Punishment of the Crime of Genocide. Adopted by the General Assembly of the United Nations on 9 December 1948’, \textit{United Nations Treaty Series}, Vol. 78 (1951), pp. 277-323.

\textsuperscript{288} The forced removal of an ethnic group from a territory. The acts, which can be very similar to genocide and crimes against humanity, but the concept as such has not been criminalised as such. Mostly, it serves as a criminological, political or popular euphemism for certain atrocities crimes. See: John Hagen & Todd J. Haugh, ‘Ethnic Cleansing as Euphemism, Metaphor, Criminology, and Law’, in: Leila Nadya Sadat (ed.), \textit{Forging a Convention for Crimes Against Humanity} (Cambridge: Cambridge University Press, 2011), pp. 177-201.

\textsuperscript{289} See for a contextualised history of the establishment of these, and other, international courts: Scheffer, \textit{All the Missing Souls}. 42
the lexicon of crimes against humanity became a practical alternative as prosecutors needed only to prove that widespread or systematic violent acts were "directed against any civilian population", rather than against a designated and objective social group. 291 For prosecutors at the UNICTR the alternative of charging crimes against humanity was harder since the mandate puts crimes against humanity nearly on the same level as genocide as they required evidence of discriminatory elements. 292 Next to "any civilian population" it adds in its definition "on national, political, ethnic, racial or religious grounds", nearly equalling it with genocide crimes and thus placing a heavy burden on the prosecution at the tribunal to establish that crimes were directed at specific groups. 293

Crimes against humanity have now become a preferred and prominent legal framework – but not an alternative to genocide - at international tribunals and particularly at the ICC and countries that have incorporated the Rome Statute into national law. 294 By now, it is the most comprehensive and universally accepted definition, since no convention of crimes against humanity exists. 295 Likewise, the Rome Statute's definition is the conceptualisation this study uses, except when explicitly noted differently. Thus, for the purposes of this dissertation, crimes against humanity encompass the broad set of 'inhumane acts' of murder, extermination, enslavement, deportation, imprisonment, torture, sexual violence, persecution, enforced disappearances and

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291 At the UNICTY, crimes against humanity consist of acts of (a) murder; (b) extermination; (c) enslavement; (d) deportation; (e) imprisonment; (f) torture; (g) rape; (h) persecutions on political, racial and religious grounds; and (i) other inhumane acts. UNSC, Statute of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991 (S/25704; 3 May 1993), art. 5. The first conviction on crimes against humanity was rendered on Đuško Tadić: UNICTY, Prosecutor v. Đuško Tadić a/k/a "Dule": Opinion and Judgment (IT-94-1-T; 7 May 1997).
293 UNSC, ICTR Statute, art. 3. Only the ECCC, that deals with the Khmer Rouge crimes between 1975 and 1979, have a similar discriminatory requirement for crimes against humanity: Law on the Establishment of the Extraordinary Chambers, with inclusion of amendments as promulgated on 27 October 2004 (NS/RKM/1004/006), art. 5. The Special Court for Sierra Leone lists the same offences but does not add the discriminatory requirements: Agreement between the United Nations and the government of Sierra Leone on the establishment of a Special Court for Sierra Leone & Statute of the Special Court for Sierra Leone, art. 2.
294 The case against Laurent Gbagbo and Charles Blé Goude at the ICC, as discussed in the preface, is an example thereof. The case theory reads like a case of genocide, but its legal framing is crimes against humanity.
295 Although work continues towards such a convention, spearheaded by the UN’s International Law Commission. See: Sean Murphy, "Toward a Convention on Crimes Against Humanity?", La Revue des droits de l’homme, 7 (2015), p. 1-8.
296 "Other inhumane acts": The perpetrator inflicted great suffering, or serious injury to body or to mental or physical health, by means of an inhumane act, similar to the explicitly defined acts. The perpetrator was aware of the factual circumstances that established the character of the act. ICC, Elements of Crimes, art. 7 (1) (k).
297 Killing or causing death of one or more persons. Ibidem, art. 7 (1) (a).
298 Directly or indirectly killing, or causing death to, one or more persons, including by inflicting conditions of life calculated to bring about the destruction of part of a population, constituting, or taking part of, a mass killing of members of a civilian population. ICC, Elements of Crimes, art. 7 (1) (b).
299 The perpetrator exercised any or all of the powers attaching to the right of ownership over one or more persons, such as by purchasing, selling, lending or bartering such a person or persons, or by imposing on them a similar deprivation of liberty. Ibidem, art. 7 (1) (c).
300 The perpetrator deported or forcibly transferred without grounds permitted under international law, one or more persons to another State or location, by expulsion or other coercive acts. Such person or persons were lawfully present in the area from which they were so deported or transferred. Ibidem, art. 7 (1) (d).
301 The perpetrator imprisoned one or more persons or otherwise severely deprived one or more persons of physical liberty. ICC, Elements of Crimes, art. 7 (1) (e).
302 The perpetrator inflicted severe physical or mental pain or suffering upon one or more persons. Such person or persons were in the custody or under the control of the perpetrator. Such pain or suffering did not arise only from, and was not inherent in or incidental to, lawful sanctions. Ibidem, art. 7 (1) (f).
303 The perpetrator committed an act of a sexual nature – including rape, sexual slavery, enforced prostitution, forced pregnancy and enforced sterilisation - against one or more persons or caused such person or persons to engage in an act of a sexual nature by force, or by threat of force or coercion, such as that caused by fear of violence, duress, detention, psychological oppression or abuse of power, against such person or persons or another person, or by taking advantage of a coercive environment or such person’s incapacity to give genuine consent. ICC, Elements of Crimes, art. 7 (1) (g)–16.
304 The perpetrator severely deprived, contrary to international law, one or more persons of fundamental rights. The perpetrator targeted such person or persons by reason of the identity of a group or collectivity or targeted the group or collectivity as such. Such targeting was based on political, racial, national, ethnic, cultural, religious, gender as defined in article 7, paragraph 3, of the Statute, or other grounds that are universally recognized as impermissible under international law. Ibidem, art. 7 (1) (b).
305 The perpetrator: (a) Arrested, detained or abducted one or more persons; or (b) Refused to acknowledge the arrest, detention or abduction, or to give information on the fate or whereabouts of such person or persons. Such arrest, detention or abduction was followed or accompanied by a refusal to acknowledge that deprivation of freedom or to give information on the fate or whereabouts of such person or persons; or (b) Such refusal was preceded or accompanied by that deprivation of freedom. The perpetrator was aware that: (a) Such arrest, detention or abduction would be followed in the ordinary course of events by a
apartheid, \(^{306}\) “when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack.” \(^{307}\) Breaking up the constitutive elements of crimes against humanity, four crucial contextual factors come to the fore. First, crimes against humanity concern the repeated commission of violent acts, not an isolated incident. \(^{308}\) Either quantitatively, the violence can be widespread in that it concerns, for example, large numbers of victims or extends over a broad geographic area. Or qualitatively, the violence can be systematic for its organisational nature. Secondly, although some level of predetermined planning often animates attacks, the existence of a plan is not a necessary requirement but according to the ICC legal framework, such violent acts ought to be carried out “pursuant to or in furtherance of a State or organizational policy to commit such attack.” \(^{309}\) Thirdly, CAH do require a \textit{mens rea}, but it differs from the genocidal intentionality – to destroy a group in whole or in part - in that it suffices for the perpetrator to have knowledge of the attacks and “intended to further such an attack” and purposefully perpetrate the underlying crimes, such as murder or torture. \(^{310}\) Like genocide, fourthly, which focuses on group-discriminatory destruction, crimes against humanity are defined by its victims. In this case, rather than solely protecting members – which may include non-civilians - of a national, ethnic, racial or religious social group, CAH include targeting of ‘any civilian population’, and not necessarily in a group-discriminatory manner. For instance, persecution as the only explicitly discrimination-based CAH is carried out on “political, racial, national, ethnic, cultural, religious, gender or other grounds that are universally recognized as impermissible under international law” \(^{311}\) while extermination includes the mass killing of member of any civilian population, irrespective of its discriminatory or not motives. Although, genocide and crimes against humanity can have overlapping contextual grounds and do not necessarily exclude their parallel perpetration, in times of war or peace, the latter provides a much broader framework in that captures more acts, events or policies and is not limited to intended group-oriented destruction. \(^{312}\) Thus, ambiguous terminology such as genocidal acts, genocidal violence and even ethnic cleansing may post-facto not legally be labelled as genocide as a crime, but rather as crimes against humanity.

2.4 War crimes

Next to genocide and crimes against humanity, war crimes take an important place in the lexicon of refusal to acknowledge that deprivation of freedom or to give information on the fate or whereabouts of such person or persons; or (b) Such refusal was preceded or accompanied by that deprivation of freedom. Such arrest, detention or abduction was carried out by, or with the authorization, support or acquiescence of, a State or a political organization. Such refusal to acknowledge that deprivation of freedom or to give information on the fate or whereabouts of such person or persons was carried out by, or with the authorization or support of, such State or political organization. The perpetrator intended to remove such person or persons from the protection of the law for a prolonged period of time. ICC, \textit{Elements of Crimes}, art. 7 (1) (i).

\(^{306}\) The perpetrator committed an inhumane act against one or more persons. The perpetrator was aware of the factual circumstances that established the character of the act. The conduct was committed in the context of an institutionalized regime of systematic oppression and domination by one racial group over any other racial group or groups. The perpetrator intended to maintain such regime by that conduct. ICC, \textit{Elements of Crimes}, art. 7 (1) (j).

\(^{307}\) Rome Statute, art. 7; ICC, \textit{Elements of Crimes}, art. 7.

\(^{308}\) Although at trial, a defendant can be actually charged with a single incident crime, which is committed as part of a widespread attack.

\(^{309}\) ICC, \textit{Elements of Crimes}, art. 7.

\(^{310}\) Idem.

\(^{311}\) The Rome Statute includes broadest array of persecutory grounds. The UNICTY, UNICTR, SCSL, SPD, ECCC all refer to “political, racial, or religious persecution”. The EAC does not include persecution as a crime against humanity, yet it includes “political, racial, national, ethnic, cultural, religious or sexual” grounds for the crimes of torture and other inhumane acts.

\(^{312}\) Straus, \textit{Fundamentals of Genocide}, p. 36.
this study, as it features not only in the statues of the courts under study but also because it is often used as overlapping terminology when talking about mass atrocity, perpetration or the colloquial use of ‘war crimes trials’. Often, mass atrocities, even if they describe genocide or crimes against humanity, are simply referred to as war crimes and their agents as war criminals. In the legal realm, however, war crimes are very specific. Historically evolved as part of customary law and international humanitarian law (IHL), the rules governing the conduct of violent warfare automatically led to the incorporation of violations or ‘grave breaches’ of these rubrics. The concept of war crimes matured in the wake of World War I. It was introduced in the Peace Treaty of Versailles in 1919 and after World War II the wording was used in the London Agreement setting up the International Military Tribunal (IMT). One year after the subsequent adoption of the Genocide Convention and the Universal Declaration of Human Rights in 1948 saw the drafting of the Geneva Conventions, which referenced to “grave breaches” which were updated in 1977. From 1993, both UN tribunals included war crimes – more commonly known as serious violations of international humanitarian law - in their respective statutes, yet the most current, comprehensive and detailed definition is provided in the Rome Statute. It lists no less than 50 specific offences divided over four chapters: (a) grave breaches of the Geneva Conventions of 12 August 1949, namely, acts against persons or property; (b) other serious violations of the laws and customs applicable in international armed conflict, within the established framework of international law; (c) Article 3 common to the four Geneva Conventions of 12 August 1949, namely, acts committed against persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed hors de combat by sickness, wounds, detention or any other cause; and (d) other serious violations of the laws and customs applicable in armed conflicts not of an international character, within the established framework of international law. Seen altogether, the extensive list of specific war crimes includes acts very similar to genocide or crimes against humanity but the context in which they are committed differs. War crimes are specifically carried out during international or non-international

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315 The Treaty of Peace between the Allied and Associated Powers and Germany, and other treaty engagements, signed at Versailles (28 June 1919), art. 228. It reads, in part: “The German Government recognizes the right of the allied and associated powers to bring before military tribunals persons accused of having committed acts in violations of the laws and customs of war.”

316 Agreement by the Government of the United States of America, the Provisional Government of the French Republic, the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Union of Soviet Socialist Republics for the Prosecutions of the Major War Criminals of the European Axis. Charter of the International Military Tribunal, 8 August 1945, art. 6 (b). It reads: “Such violations shall include, but not be limited to, murder, ill-treatment or deportation to slave labour or for any other purpose of civilian population of or in occupied territory, murder or ill-treatment of prisoners of war or persons on the seas, killing of hostages, plunder of public or private property, wanton destruction of cities, towns, or villages, or devastation not justified by military necessity.”


319 ICTY, Statute, art. 2 & 3: “Grave breaches of the Geneva Conventions of 1949 & Violations of the laws or customs of war”; ICTR, Statute, art. 4: “Violations of Article 3 Common to the Geneva Conventions and of Additional Protocol II.”

320 Such as: killing, torture, directing attacks against civilian populations, attacking civilian objects, destroying historical, social or religious buildings.
armed conflicts. Also, war crimes are not as group-selective as genocide or crimes against humanity. However, the law on war crimes protects civilians and non-combatants and shield them from deliberate violence in times of war, a context often animating genocide or crimes against humanity.\textsuperscript{323}

\textsuperscript{323} Straus, Fundamentals of Genocide, p. 39.
2.5 Recent and Remote Mass Atrocities and Atrocity Trials

Altogether, genocide, crimes against humanity and war crimes constitute the main corpus of what is generally known as gross human rights violations, international crimes or atrocity crimes. Again, the overarching lexicon has historically evolved. From the mid-2000s, the dominant framework gradually became encapsulated under the concept of atrocity crimes, in order to separate the political use of genocide from its legal definition as a crime of individual responsibility. In extension of this wording, but including the non-legal concept of ethnic cleansing, which also seems to bridge a definitional and colloquial gap between the reality on the ground, the law and social science – all of which deal with mass violence - I will use throughout the thesis the term mass atrocity. This serves two purposes. First, as a legal concept, it is clear which broad range of crimes are covered, without continuously having to refer to specific details if not particularly necessary. Secondly, applying the term to different historical events, contexts or processes, it remains clear under what comparative legal framework these can be understood. In operationalising the generic term of mass atrocity, rather than mass violence, I take note of the fact that when discussing history, the problem arises that some of the underlying legal concepts, like genocide, were not in place yet when events occurred that retroactively may actually be determined to be genocide. Ergo, anachronisms may arise. Yet, in this respect, I employ the concept of 'historical imprescriptibility', as coined by Antoon De Baets, and which is informed by the notion of 'legal imprescriptibility' – the principle that atrocity crimes have to be investigated, prosecuted, and punished regardless of the passage of time, that is regardless of time bars or statutes of limitations. Legal imprescriptibility, however, can only pertain to ‘recent’ mass atrocities of which at least some perpetrators or (direct and indirect) victims are still alive. When there are no more such agents that could pull past events into the scope of atrocity law, atrocities enter the realm of history. Yet, invoking the principle of historical imprescriptibility, these past events can be analysed as historical crimes: crimes of the past similar to genocide, crimes against humanity and war crimes. Applying this perspective, this dissertation employs the terms mass atrocities, both for recent historical events as well as remote historical events. In consistency with all the above, when discussing trials, I will employ the term atrocity trials, rather than the somehow standardised, yet often misapplied, terminology of ‘war crimes trials’. In conjunction with the imprescriptibility

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330 For example, the historical case of the deliberate mass killing of Herero and Nama peoples by German colonial military could retroactively be termed genocide.
principles, I employ the term atrocity trial for all criminal and civil trials that in one way or the other deal with atrocity crimes, irrespective of when they took place or whether they addressed recent or remote atrocities. Furthermore, I will also employ the terminology of mass atrocities, in broader discussions on transitional justice and similar responses to either recent or remote historical episodes of mass violence.

2.6 Configuring transitional justice

Recent or remote cases of mass atrocity, as conceptualised and operationalised above, led to conscious legal and non-legal encounters with their occurrences. Although this study focuses on legal atrocity trials and international criminal justice, these and a broad variety of non-legal dealings with the past reside under what is known as transitional justice (TJ). Writing about it, demands clear operationalisation of the term as well as demarcating the specific elements that are subject of this book: dealing with the past, criminal trials and to some extent truth commissions. Also, it needs to be clear what, for the purposes of this dissertation, is understood when talking about transitional justice. From the outset, as I have already observed in the introduction, transitional justice, as a social, political and legal concept is an impractical and normatively problematic neologism. For starters, the nearly utopic, positivist idealism and the prophetic Universalist realm in which it is framed, rests on a set of amorphous, almost mythical, notions like closure, reconciliation, truth and justice. Second, the moral, political and activist field comprises an excess of mechanisms, goals and applications, which often even compete with one and another and occasionally have counterproductive results. Yet these are all currently accumulated in a blueprinted international prescriptive first-aid-kit policy framework full of cleansing rituals ready for export to potential, real-time or post-conflict situations. But do these transitional scripts offer realistic plots? Indeed, increasingly criticised as having become a paternalistic, orientalist and imperialistic “cottage industry” of ‘the West’, serious concerns have been voiced about its successfulness in repairing human relationships in post-conflict situations.

331 Broadly defined by the United Nations as the: “full range of processes and mechanisms associated with a society’s attempt to come to terms with a legacy of large-scale past abuses, in order to ensure accountability, serve justice and achieve reconciliation. Transitional justice consists of both judicial and non-judicial processes and mechanisms, including prosecution initiatives, facilitating initiatives in respect of the right to truth, delivering reparations, institutional reform and national consultations.” United Nations, Guidance Note of the Secretary General. United Nations Approach to Transitional Justice (March 2010), p.2.


333 For example, empirical research into the impact of Fambul Tok (see chapter Sierra Leone) across 200 villages, drawing on data from 2383 individuals found that reconciliation led to greater forgiveness of perpetrators and strengthened social capital, but at the same time worsened psychological health, increasing depression, anxiety, and posttraumatic stress disorder in these same villages. Our findings suggest that policy-makers need to restructure reconciliation processes in ways that reduce their negative psychological costs while retaining their positive societal benefits. Jacobus Cilliers, Oesindila Dube & Bilal Siddiqi, ‘Reconciling after civil conflict increases social capital but decreases individual well-being’, Science, Vol. 351, No. 6287 (13 May 2016), pp. 787-794.

334 For example, the European Union Foreign Affairs Council “recognises that transitional justice is an integral and important part of state and peace building and therefore must be integrated in the wider crisis response, conflict prevention, post-conflict recovery, security and development efforts of the EU.” The UN appointed a ‘Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence’, while underlying “the fact that, when designing and implementing strategies, policies and measures to address gross human rights violations and serious violations of international humanitarian law, the specific context of each situation must be taken into account with a view to preventing the recurrence of crises and future violations of human rights, to ensure social cohesion, nation-building, ownership and inclusiveness at the national and local levels and to promote reconciliation. The UN Secretary-General before outlined that “Transitional justice processes and mechanisms are a critical component of the United Nations framework for strengthening the rule of law [...] Whatever combination is chosen must be in conformity with international legal standards and obligations.” European Union Foreign Affairs Council, EU’s support to transitional justice - Council conclusions (16 November 2015) (13576/15; Brussels, 16 November 2015), §3; UNGA, Resolution adopted by the Human Rights Council 18/7: Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence (A/HRC/RES/18/7; 13 October 2011), p. 2.
and especially post-colonial settings. Vocal observers and stakeholders from the ‘non-western’ world – or ‘global south’ - are therefore urging thinkers and actors in transitional justice to consider context and location, reconstruct notions of transitional justice that are informed by a wider moral and social universe and to craft an agenda that assumes a more holistic approach. On the other side of the spectrum, however, we observe activist historians to become more and more engaged in the field, as participants, even arguing that historical research and writing in a preventive manner would facilitate goodwill and shared empathy among peoples. Academically, the debate on transitional justice is at least of a bipolar nature in that there is a striking contrast between activists and critics. An overview of the current state of affairs, debates and criticism would fill a separate book and is not at the heart of this study. I would therefore stop at the point where, non-historians have dubbed the post-Cold War period the age of global transitional justice. It may carry some etymological truth, but the meanings, goals and uses of transitional justice policies are strikingly different from when the field erupted after the Second World War.

As a novel human rights framework, TJ and its plurality of mechanisms have evolved through the dealing with the Second World War (1940s), political transcendence (1980s), mass violence (1990s), historical injustices (2000s) and international politicking (2010s). Interestingly, the field matured alongside the evolution of human rights law and atrocity law specifically. As a starting point, transitional justice was rather synonymous to post-WWII prosecutions at the International Military Tribunals and Allied war crimes trials. Modern transitional justice surfaced and evolved from the late 1980s, early 1990s, parallel to the tumbling of one-party regimes and impervious dictatorships in Eastern Europe, Latin America, Africa and Asia. How to realise ‘justice in transition’? The principal ethical, legal and practical question among human rights activists, lawyers and legal scholars, policy makers, journalists, donors and political scientists was how successor regimes could deal with the abusive legacies of their precursors. The practices were not new at the conclusion of

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136 Matua, “What is the Future of Transitional Justice?”, p. 5. UN, Guidance Note of the Secretary General.
the Cold War, the presumed triumph of free market ideologies and political liberation around the globe,343 but the overarching term only gained standing in 1995, when Neil Kritz edited a voluminous study titled Transitional Justice: How Emerging Democracies Reckon With Former Regimes.344 Yet at the time, only the subtitle revealed what defined transitional justice. For some, this English phraseology could not capture its substance. Reason for British historian Timothy Ash to suggest two German words: geschichtsauarbeitung and vergangenheitsbewältigung.345 Still, he summarised, that the various potential translations show the complexity of the matter: ““treating” the past, “working over” the past, “confronting” it, “coping, dealing or coming to terms with” it; even “overcoming” the past.”346 Ever since however, the term ‘transitional justice’ – with its French and Spanish conversions justice transitionelle and justicia transicional – has normalised,347 but many definitions do still co-exist.348

The idiom is now commonly accepted and used by various scholarly disciplines, professionals, politicians, (non- or semi-governmental) lobby groups and civil society actors.349 But even while transitional justice is omnipresent around the globe in various contexts, the multi-usage and the evolution of its terminology have made its essence multidimensional and ambiguous.350 Is it an academic framework,351 a universal dogmatic human rights doctrine,352 a formula for democratic rule or a UN directive? Or is it truly an answer to human aspirations or has it become a branch of the humanitarian industry? Besides its use, the terminology itself likewise raises questions. What is a transition, from what into what, how, when, by whom and why? What is justice, who renders it, who receives it and who decides so?353 Are its foundations and applications truly universal?354 Also, if

347 Teitel, Globalizing Transitional Justice, p. 63.
348 Ruti Teitel, a leading scholar on Transitional Justice defines transitional justice as “the conception of justice in periods of political transition.” Later, she updated it: “Transitional justice can be defined as the conception of justice associated with periods of political change, characterized by legal responses to confront the wrongdoings of repressive predecessor regimes.” Ruti Teitel, Transitional Justice (Oxford: Oxford University Press, 2000) 3; Ruti Teitel, ‘Transitional Justice Genealogy’, Harvard Human Rights Journal, Vol. 16 (2005) 69-94: 69. According to the United Nations (UN), “Transitional justice initiatives promote accountability, reinforce respect for human rights and are critical to fostering the strong levels of civic trust required to bolster rule of law reform, economic development and democratic governance. Transitional justice initiatives may encompass both judicial and non-judicial mechanisms, including individual prosecutions, reparations, truth seeking, institutional reform, vetting and dismissals. See: UNSC, The rule of law and transitional justice in conflict and post-conflict societies. Report of the Secretary-General (S/2011/634, 12 October 2011), §17. According to the ICTJ “Transitional justice refers to the set of judicial and non-judicial measures that have been implemented by different countries in order to redress the legacies of massive human rights abuses. These measures include criminal prosecutions, truth commissions, reparations programs, and various kinds of institutional reforms. Transitional justice is not a ‘special’ kind of justice, but an approach to achieving justice in times of transition from conflict and/or state repression. By trying to achieve accountability and redressing victims, transitional justice provides recognition of the rights of victims, promotes civic trust and strengthens the democratic rule of law. See: ICTJ, What is Transitional Justice? (www-text: http://www.ictj.org/about/transitional-justice, visited: 8 August 2014). The specialised Oxford Encyclopedia says “Transitional Justice comprises a variety of judicial and non-judicial means through which states and societal groups seek to come to terms with past human rights violations by providing truth, justice, redress, and reconciliation. In some cases, this occurs in the context of a state’s transition to democracy from repressive rule or to peace from violent conflict. In others, established democracies confront past serious injustices, sometimes generations after they were committed.” Lavina Stan & Nadya Nedelsky (eds.), Encyclopedia of Transitional Justice. Volume I (Cambridge: Cambridge University Press, 2013), pp. xli.
349 Since 2011, the UN’s Human Rights Council has called into life a Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence: UNGA, Human Rights Council, Resolution 18/7 (A/HRC/RES/18/7, 13 October 2011). The position is filled by Pablo de Greiff (Colombia) since 1 May 2012.350
351 Transitional justice has become a popular field of study within a variety of academic disciplines. There are at least two specialised journals on the topic: International Journal of Transitional Justice (Oxford University Press: 2009 - present) and Transitional Justice Review (Open access: 2012 – present).
there is alleged justified transitional justice what then is unjustified transitional justice and who is the judge on that matter? Is there such a thing as transitional injustice? Conservative transitional justice is a normative and a mostly positivist activist-inspired constellation, to a large extent also within academia. Its processes are framed in a dominant Universalist human rights discourse that they offer a good [just] roadmap for successful transitions [to democratic or rule-of-law-states or to peace]. ‘Negative’ transitions, departing from democratic rule or from peace, fall outside its scope, despite the fact that transitional justice mechanisms such as prosecutions and amnesties can be ‘unjustly’ applied. Hence, transitional justice – in its totality - is an extremely dynamic and multi-faceted concept, without a forthright definition. There is an important pitfall, however. That is that just like another delicate and emotionally loaded field like genocide studies – as briefly discussed above - transitional justice is a viable academic concept only “if protected from moral, legal, political and emotional constraints. It should [my emphasis] be approached in a dispassionate, amoral, non-juridical and apolitical way” to the largest extent possible.

In all, and perhaps at best, transitional justice could be understood as the acquired diversity of human rights related practices, mechanisms, policies and trepidations guiding societal and political transitions, aimed at confronting real or perceived injustice. As much as these processes are perceived to succour rather lofty ends such as truth, accountability, reconciliation and redress, they are not evidenced models with guaranteed outcomes. In real life, they can also be ignored, deficiently executed or managed, neglected, misplaced, utilised to reach the contrary or they can turn out not to have these intended effects at all. The success of transitional justice is simply in the eye of the beholder, often depending on its heirs.

For the sake of clarity and useful empirical operationalisation, this study departs from the use of transitional justice as framework and rather opts to treat transitional justice endeavours as historic phenomena, or historical rites de passage: case, local and culturally specific cleansing rituals guiding deep-rooted social and/or political change from widespread atrocity violence to the absence thereof. Breaking down the elements of this operative description, this thesis applies the following criteria. First, transitional justice is a liminal moment; it takes place at certain times and certain places for a certain time. It is transitory as it strives for closing and resolution. Second, transitional justice rituals

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557 Frequently these include, alone or in tandem and inexhaustively: nothing [let bygones be bygones, impunity], amnesties [political prisoners, perpetrators], purges [vetting, lustration], prosecutions [national, regional and international], truth seeking [inquiry, exhumation, documentation], mediation, reparations [monetary, moral, symbolic], memorialisation [lieux de mémoires, commemorations, arts], social engineering [reconciliation, cohabitation, dialogue, rehabilitation], remedy [counselling, trauma healing, healthcare] and institutional, educational and socio-economic reforms.
559 Cilliers et al., ‘Reconciling after civil conflict’, pp. 787.794.
560 The French Ethnologist Arnold van Gennep described rites de passage, as rituals marking significant transitions in human lives, such as birth, puberty, marriage and death. He introduced the concept of liminality to describe the time in which people are on the threshold of entering a new phase in their life, having left the previous one behind. The ceremonies marking this transition enable people to experience this liminal phase, losing and then recreating their identity. See: Arnold van Gennep, Les rites de passage (Paris: Emile Nourry, 1909).
can be both actions as well as inactions: for instance, to face the past or to not face it. Third, the change – or transition – applies to or has far-reaching implications for societies at large, or at minimum, significant parts thereof. Habitually, but not always necessarily, transitions are political, are escorted by political reconfigurations or have some kind of political consequences. Fourth, this study is particularly concerned with changes from a situation of widespread atrocious violence to a situation of non-widespread atrocious violence: the *rites de passage* of reckoning with mass atrocities as defined earlier in this introduction, irrespective of the political nature of the new regime. Fifth, the prime focus is on transitional fact finding agents, particularly criminal trials and (semi-) truth commissions. Sixth, despite its historical and global occurrence, this study focuses on these mechanisms in modern sub-Saharan Africa.

Thus, notwithstanding the possible critiques and pitfalls described above, transitional periods as such leave behind legacies, historical records of fighting past injustices.\(^{361}\) How to deal with this active dealing or breaking with the past? While living in this ‘age of transitional justice’, it is not only vital to critically address these processes itself, but also how parts of it functioned and what they leave behind. This study aims at offering glimpses of the process of shaping that legacy, of establishing narratives of the atrocious past and the potential and real-time uses and abuses of those ‘final’ truths or ‘transitional truths’. What kind of narrative truth do these mechanisms produce? What are the sources (testimony, forensics, documents)? Who are its creators (judges, truth commissioners, investigators, prosecutors, perpetrators)? Who are its consumers (victims, survivors, society, and politicians) and who were left out? In what way was transitional justice utilised by its protagonists, critics or affected societies and individuals? Last but not least, who takes ownership of the historical discourse in transitional justice? These are interesting questions when discussing transitional justice and they will be implicitly dealt with below.

### 2.7 Studying transitional justice

How to study transitional justice after mass violence? “In war, truth is the first casualty,” said the Greek tragedian Aeschylus.\(^{362}\) History is a fragile substance in the dramaturgy of conflict as it can be used and abused through deceptions, erasures and denials that blur the margins between verity and fiction.\(^{363}\) It is contested throughout its three-act structure; incompatible narratives of the past pave the way to or legitimise violence (*pre*), nourish war (*per*), and fester on in peacetime (*post*). Guns can be put to rest and perpetrators locked away, but it is conflicting memories and narratives that cannot be settled easily. *Wordfares* and competing narratives about the violent past may endure or substitute

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\(^{362}\) Aeschylus (525-524 BC - 456/455 BC).

\(^{363}\) See for an important discussion on this issue: Antoon De Baets, ‘A Theory of the Abuse of History’, In: Antoon De Baets, *Responsible History* (Oxford 2009), pp. 9-48. De Baets outlines that the natural habitat of abuses of history is a non-democratic environment but that its traces are also present in many democracies.
physical conflict, deeply simmering for generations to come and lingering like phantom pains. The essence of history is that it epitomises the route taken to the present. But it is the here and now that defines and shapes the representation of that passageway. Milan Kundera, the Czech novelist, elegantly described the process. According to him “we pass through the present with our eyes blindfolded. We are permitted merely to sense and guess at what we are actually experiencing. Only later when the cloth is untied can we glance at the past and find out what we have experienced and what meaning it has.” But history is also given meaning, through the way one wants to perceive it.

Historians, thus, do not just deal with the past, but also critically monitor and scrutinise the dealing with the past: how it is approached, unravelled and how narratives about the past come about. And for what reasons? Shortly, how is history used and possibly abused? Manifestly, criminal trials, as well as truth commission, warrant the historian’s notice because these are historical events, in which the past is on the agenda and where historical sources are used, created and verified. Also, their protagonists promise that these non-academic ventures will write ‘official’ and authoritative history. Simultaneously, transitional justice rites de passages – or cleansing rituals - are often presented as the closing ceremonies of violent eras as well as windows onto non-violent futures. But objective history is hardly the ultimate goal, because transitional justice formalities always take place in the contentious arena of truth politics: who decides what is to be known, can and may be known, by whom, how, where and when? Goals may heavily differ per agency group. Where victors, victims and survivors may want to seek, establish and reveal details about the repression, losers, perpetrators or bystanders rather distort, veil or obliterate those facts. Moreover, vanquishers without a clean slate can themselves employ transitional justice instruments to veil impunity, to whitewash prior crimes or to legitimise social engineering or foreign intervention. In the light of either these enactments or non-enactments of history, in particular the recent past remains emotionally, morally, politically and legally litigious and contested narratives and different truths about the past will always persist.

Narratives about the past frame history and the way it is experienced in many ways. The South African experience is a good example. For Archbishop Desmond Tutu, stories about the past bestowed a roadmap to “another country”, which landscape is versatile: “The way its stories are told and the way they are heard change as the years go by. The spotlight gyrates, exposing old lies and illuminating new truths.” In Tutu’s mind, the foreign past represented a jigsaw puzzle. Piece by piece, a fuller portrait emerges. But “it is not and cannot be the whole story,” Tutu writes in his preface to the ample report that concluded South Africa’s Truth and Reconciliation Commission

364 Analogous to: Huyse, All Things Pass Except the Past, p. 15.
366 Writer Teju Cole, noted in this respect, that the USA hoards information about its deployment of violence. For example, the only person in prison for the Central Intelligence Agency’s (CIA) torture regime is John Kiriakou, the whistle blower. Teju Cole, ‘Unmournable bodies’, The New Yorker, 9 January 2015.
(TRC) process in the mid-1990s. Nonetheless, he continues, its account provides a “perspective” as well as a “road map to those who wish to travel into our past.” And the voluminous TRC report definitely offers a guide alongside the country’s meandering pathways from Apartheid to egalitarianism, the ‘rainbow country’ spirited in Ubuntu. However, as a piece of history writing, the report was fundamentally constrained, in particular by the immediate transitional political context in which it was conceived, its objective of promoting national unity and reconciliation and the legal, geographical and temporal extent of its mandate. Furthermore, throughout its mandate, South Africa’s inquisitorial commission amassed some thousands of individual memories through testimony, viva voce or by affidavit. ‘Truth telling’, as the process was dubbed, enabled victims as well as perpetrators to memorise and narrate publicly, without much reservation. Lifting the veil of secrecy that had covered South Africa, formerly repressed memories, sentiments and opinions were allowed to enter the public sphere. But they were not always of the same nature. It was therefore that throughout its process of public hearings as well as report writing, the TRC held four different notions of truth and operationalised them at various levels, balancing between the objective and subjective dimensions of its mandate. factual or forensic truth, narrative truth, dialogical truth and healing or restorative truth. In addition to these notions, a fifth conception, punitive truth, could be added, which is similar to a process of naming and shaming. Particularly in South Africa, the TRC operationalised truth as a form of public and official acknowledgement of previously denied, obscured or rationalised crimes against humanity. As a result, a register of various truths told by thousands of victims, perpetrators and bystanders moulded one official account of the past: a transitional truth, the product of a negotiated politics of memory. Although the TRC’s historical narrative is now part of South Africa’s rich historiography, conflicting narratives about the history of Apartheid persist well into the future. Thus, the past has not been settled.
That these macro remembrances, or history, transform continuously and can strongly differ from objective truth, as they happened, in the Rankean sense, is hardly a surprise. Already on the level of the individual, human memory is dominated by discard, selectivity and forgetting, as was brilliantly illustrated by Luis Borges. Through *Funes the Memorious*, the Argentinian fictionist illuminates why the human brain does not and cannot catalogue all particulars witnessed by our five senses so we can use them to fully reconstruct the past; it would paralyse and confuse us. Also, these accounts of the past are never finished. Instead, they evolve in response to the needs of the present, in dialogue with others and with our own imagination. Further objective particulars of the past then often get lost in translation in the process of storing memories in the form of language. Recollections become narratives and the revival of them relies mainly on verbal associations. And indeed, from the micro to macro scales of events, “facts, in the field of history, come wrapped in words” and are thus interpreted, arranged and presented in narratives. This trickles down into the setting of criminal trials, in which memory and truth politics might obscure the truthfulness of facts about the past and cause confusion and disorientation.

In the court setting, enticed, constructed and contested narratives often outweigh the forensic, or Rankean, truth. Law in itself is not an exact science; in the words of Charles Dickens “it is an ass – a idiot.” Rather, as a medley of moral agreements, rituals and interpretations, its stringent self-referential application is predominantly about words and their enactment. What appears, for instance, from the Gbagbo proceedings is that international trials, which argue the law, are layered word games. What the Gbagbo trial further demonstrates is that history is used in case theories and abused as rhetorical window-dressing for both legal and extra-legal purposes. Trials represent a legal politics of memory; the transformative and political ways in which violent political events are recalled, recounted and framed and the larger role legal institutions play in modelling and controlling historical memory about those events. Tribunals are also affected by macro levels of memory

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382 Physically, forgetting takes charge from the moment humans receive information. The five sensory registers are equipped only for an extremely short stay and anything not taken onwards from there vanishes. The absence of forgetting would not create an improved memory but instead a growing confusion. Deouwe Draaisma, *Forgetting: Myths, Perils and Compensations* (New Haven & London: Yale University Press, 2015), pp. 2-3.

383 After once falling of a horseback and becoming paralysed, Funes perceives everything in full detail and remembers every bit of it. Nineteen years old, the fictional Uruguayan boy recites, in perfect Latin, the first paragraph of the twenty-fourth chapter of the seventh book of *Historia Naturalis*. But his memory stretches way beyond recitations. Funes knows by heart the forms of the southern clouds at dawn on 30 April 1882. He can reconstruct his dreams, even his half-dreams. Without hesitation, he remembers a whole day; but it takes him precisely 24 hours. In this fictional story, Borges suspects that the youngster is incapable of thinking, as it requires forgetting, generalising and making abstractions. And living in his infallible perception and memory. Once their tête-à-tête comes to an end, Borges even worries that all his words and his movements would endlessly inhabit Funes’ implacable memories. By his trying to safeguard Funes from more ‘useless’ remembrance, Borges presents the ability to memorise everything in crystal-clear detail as a curse. Not as a blessing. Luis Borges, ‘Funes the memorious’, In: Donald A. Yates & James E. Irby (eds.) *Labyrinths. Selected Stories and other Writings*. Jorge Luis Borges (New York: New Directions Publishing Corporation, 2007), pp. 59-66.


385 Draaisma, *Forgetting*, pp. 22.


389 In the larger filed of transitional justice the politics of memory was understood to consist “of policies of truth and justice in transition (official or public memory); more widely conceived, it is about how a society interprets and appropriates its past, in an ongoing attempt to mould its future (social memory). […] Historical memories and collective remembrances can be instruments to legitimate discourse, create loyalties, and justify political options. Thus, control over the narrative of the past means control over the construction of narratives for an imagined future. Memory is a struggle over power and who gets to decide the future. What and how societies choose to remember and forget largely determines their future options.” Alexandra Barahona de Brito, Paloma Aguilar, Carmen González-Enriquez, ‘Introduction’, in: Alexandra Barahona de Brito, Paloma Aguilar, Carmen González-Enriquez (eds.), *The politics of memory. Transitional Justice in Democratizing societies* (Oxford: Oxford University Press, 2001), pp. 37-38.
policies. In fact, their creators decide on their itinerary. Politics, law and pragmatism each in one or another way, escort, outline and contract transitional programmes. Thus, these backward-looking ventures are consistently confined and straitjacketed by mandates, policies and funds. Different from professional historians, judiciaries or truth commissions are set up to target and criminalise demarcated acts, during precise episodes and carried out by particular agents, often ignoring interconnected events, wider contexts and pivotal actors. The parallel, or even sequential, quest for truth and justice, as a consequence, is hardly ever a harmonious process. 390

Even more so, courts work towards final judgements, in which they present factual findings, which are largely based on witness testimony. However, at all times, the narratives people compose and rely on are deficient and sketchy by nature. In fact, they may well be different at other times. This is the result of the merger of oblivion, discard and selectivity. Also, accounts of the past are never finished as they evolve into the present. What we take for fact now can be exposed as a semi-truth or lie in the future - or vice versa. For the professional historian, chronicles about the past are never static. Discovery of new fact, debate and reinterpretation continually adjust insight and understanding of what has been or has taken place in earlier times. Revision is the rule, rather than the exception. Weaving together panoramas of evidence, employing historical critique and balancing probabilities, historians endeavour to get as close as possible to truth, or at best present a most plausible version thereof. Thus, critically probing the past itself as well as its representations is not simply a technique. It is an academic imperative. In the field of transitional justice, with its emotional, moral, political and legal connections to the past, this is rather an exemption, as it may not serve its interests. History is momentous and having its course on one’s side is alluring. But time and again, history falls victim to opportunism, politics or ideology as it is often censored, manipulated or fabricated. Evidently, history is an important, dangerous and fragile subject. 391 In this respect, also the seemingly harmless pursuit for historical truth, appeasement with the past or (temporary) oblivion in the field of transitional justice needs to be approached critically and dispassionately.

390 In South Africa, for instance, during the TRC process, amnesties were traded for ‘truthful’ confessions. Many amnesties were refused in the expectations of criminal trials, but hardly any criminal trial was held. Alan Cowell, ‘Truth, Reconciliation, and Now, a Prosecution in South Africa, The New York Times, 19 February 2016. Between 1997 and 2009, only 11 trials were held while 5392 petitioners were denied amnesty: Ole Bubenzer, Post-TRC Prosecutions in South Africa. Accountability for Political Crimes after the Truth and Reconciliation Commission’s Amnesty Process (Leiden & Boston: Martinus Nijhoff Publishers, 2009), pp. 23-92.

2.8 The right to historical truth

Gentlemen, please. We are trying to cut out this type of argument. We are running a trial now. We are not a truth commission. That’s the point. There is nothing to contradict this witness anymore because when shown the document he admitted that he had made an error [...] So there is no reason for entering it at this point [...] And I think that it is time for us to draw a distinction between the truth commission and a trial where we are trying to focus on the issues that are really important [...].

- Dennis Byron, Judge

Out of the great variety of transitional justice mechanisms, this study’s emphasis is unambiguously on African atrocity trials. Yet, closely related are truth commissions, particularly when it comes to unravelling mass atrocities and picturing a violent past.\(^{393}\) Whereas truth commissions are very different – they explain rather than judge\(^{394}\) – they often play a role prior, during or after national or international atrocity trials.\(^{395}\) In some exceptional African cases, like in Ethiopia\(^{396}\) and Rwanda,\(^{397}\) individual prosecutions and historical fact finding were pursued simultaneously by the same mechanism. In other cases, as we will see in Sierra Leone, trials and truth commissions operated at the same time.\(^{398}\) In Argentina, the truth commission’s report and victim’s testimonies became a crucial source for prosecutors\(^{399}\) in the trials of former junta leaders.\(^{400}\) Only in Colombia, at the time of

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162 UNICTR, *The Prosecutor of the Tribunal v. Edouard Karamera, Mathieu Ngirumapaye & Joseph Nzirorera: Transcript (ICTR-98-44-T; 2 November 2006)*, pp. 28-29. Also cited in: Nigel Eltringham, “‘We are not a truth commission’: Fragmented Narratives and the Historical Record at the International Criminal Tribunal for Rwanda’, *Journal of Genocide Research*, 11 (1) (March 2009), pp. 55-79. 56. Eltringham, omits to identify the trial as well as the date of this courtroom quote, but was so kind to inform me where it came from.


164 As explained by the truth commission in Guatemala: “La Comisión no fue instituida para juzgar, pues para esto deben funcionar los tribunales de justicia, sino para esclarecer la historia de lo acontecido durante más de tres décadas de guerra fratricida.” "The Commission was not established to judge - that is the function of the courts of law - but rather to clarify the history of the events of more than three decades of fratricidal war”. Comisión para el Esclarecimiento Histórico, Guatemala, *Memoria del Silencio* (June 1999), p. 15.

165 Notably, in Guatemala, the Commission for Historical Clarification’s report was instrumental in many subsequent prosecutions and convictions, including the country’s former President Efrain Rios Montt. The Commission’s finding are heavily cited and relied upon throughout the judgement. It features, amongst many other things, its historical findings and corroborative testimony: Tribunal Primero de Sentencia Penal, *Narcoactividad y Delitos Contra el Ambiente*, *Sentencia (C-01076-2011-00015 de 2; Guatemala Ciudad; 19 May 2012)*, pp. 662-665. Similarly, before the Extraordinary African Chambers, Chad’s truth commission’s report was used to highlight historical background, archival material, testimony and other evidence. The president of the truth commission was among the first to give testimony from the trial. See discussion in *Chambre Africaine Extraordinaire D’Assises, Ministère Public c. Hissein Habré*: *Judgement* (Dakar, 30 May 2010), §238-251.


167 The first objective of Rwanda’s Ininko Gacaca was “identifying the truth about what happened during the genocide.” See: Republic of Rwanda, *Summary of the report presented at the closing of Gacaca courts activities* (Kigali, June 2012), p. 29.


169 Author’s Interview with Luis Moreno-Ocampo, Prosecutor, Nairobi, 15 May 2010.
writing, in what may become the boldest transitional justice experiment ever, if eventually approved and implemented, will operate a complex system in which trials and a truth-endevour conjoin to an extent not experienced before.\footnote{On 9 December 1985, a civilian court, the Cámara Federal de Apelaciones en lo Criminal (the Cámara), convicted and sentenced Lieutenant General Jorge Rafael Videla of the Army and Admiral Emilio Massera of the Navy to prison for life; Brigadier General Orlando Ramón Agosti of the Air Force, Lieutenant General Eduardo Viola (Army) and Admiral Armando Lambruschini (Navy) were sentenced to prison for four and a half, seventeen, and eight years, respectively; Brigadier General Omar Graf Figna (Air Force), Lieutenant General Leopoldo Galtieri, Admiral Jorge Anaya, and General Basilio Lami Dozo went free. Cámara Nacional de Apelaciones en lo Criminal y Correccional Federal de la Capital Federal. Causa N° 13/84; “Causa originariamente instruida por el Consejo Supremo de las Fuerzas Armadas en cumplimiento del decreto 158/83 del Poder Ejecutivo Nacional”, sentencia del 9 de diciembre de 1985 (Beamos Aires, 9 December 2015). For and analysis of the trial see: Paula K. Speck, ‘The Trial of the Argentine Junta: Responsibilities and Realities’, University of Miami Inter-American Law Review, Vol. 18, No. 3 (1986-1987), pp. 491-534.} In fact, truth commissions deal with similar atrocities as courts – and can de facto operate as a kind of inquiry chamber or pre-trial investigative body - but they do so differently.\footnote{Colombia’s transitional justice scheme includes, inter alia: the Commission for Elucidation of the Truth, Coexistence and Non-Repetition; the Historical Commission of the Conflict and its Victims; the Special Unit for the Search of People deemed as Missing with the context and reason for the perpetration of crimes under international law and gross human rights violations; the circumstance and reasons for the perpetration of crimes under international law and gross human rights violations; the circumstances in which violations took place; in the event of death, missing or enforced disappearance, the fate and whereabouts of the victims; and the identity of perpetrators’ UNESCO, Study on the Right to Truth, §38.} A main difference is that trials are centred on individual agency on the context of atrocities, whereas recording the atrocities themselves and their societal impact run central at truth commissions. But, in both settings, the testimonies of both agents are often central features. However, it is safe to say that, more than trials, truth commissions are about history and the historical narratives. At times, they have been described as archaeologists of the atrocious past and as venues for a collective rendezvous with past atrocity.\footnote{William Schabas, ‘Introduction’, in: William Schabas and Shane Darcy (eds.), Truth Commissions and Courts. The Tension Between Criminal Justice and the Search for Truth (Dordrecht: Kluwer Academic Publishers, 2004), p. 2.} With their wider mandates and looser truth regimes, they are perhaps better equipped to reveal the underneath, or truth, of the mass atrocity than trials.\footnote{Antoon De Baets, ‘Archeologen van de repressie. De eerste stappen van waarheidscommissies op het pad van de geschiedboeboening’, Nieuwste Tijd, Vol. 1, No. 3 (2001), pp. 48-61.} As such, truth commissions, or other specialised commissions of inquiry, have been credited as significant accountability tools for meeting the desire, need or legal right to truth and right to know.\footnote{According to Yasmin Naqvi, the following points about truth can be adduced within transitional justice: (1) truth is a social matter. It may be generated by social procedures and structures; (2) it is something that can be verified or at least corroborated by evidence; (3) it may consist of an official statement or judgment about events that occurred; (4) truth implies an obligation to say that what happened did indeed happen (this implies an action of good faith and takes the form of an obligation of means, rather than result, much in the same way as the obligation to properly investigate crimes; (5) such a “statement” may take various forms of expression: visual, aural, artistic, etc.; (6) “truth” is relative to present needs and to its consequences; (7) there may be different accounts of “truth” or differing “truths” provided these are verifiable. See: Jasmin Naqvi, ‘The right to the truth in international law: fact or fiction’, International Review of the Red Cross, 862 (June 2006), pp. 253-254.} As such they can fill a gap left by trials,\footnote{The right to truth about mass atrocities, on both the individual and societal level, poses a direct obligation on those in power to protect these rights to know and to conduct effective and transparent investigations into human rights violations and state sponsored violence in order to ‘fight

impunity’. 410 Truth commissions, or commissions of inquiry, 411 are increasingly established to fulfil this obligation. 412 Although, still, they may also be used as an opportunistic cover up or surrogate for prosecutions, like the first such commission in Uganda in 1974. 413 In this light, the first ever modern truth commission has thus been totally discarded from the transitional justice literature – the 1986 Uganda’s second truth commission did not even mention its predecessor. 414 It was only later that countries in transition to forms of democratic rule used them to settle with past injustices, often as a - temporary - substitute to criminal trials, particularly in Latin America. 415 Many similar truth commissions – or commissions of inquiry – have been established around the globe ever since. 416 In Africa alone, there have already been more than fifteen with its most famous example being the Truth and Reconciliation Commission for South Africa (1995-1998), which dealt with human rights abuses during the Apartheid-era. 417 Irrespective of all the varying objectives between past, present and future truth commissions, 418 their common perspective is to establish a narrative about the past. But, like trials, truth commission are likely to only reduce the number of lies about the past, 419 uncover partial truths 420 or just tips of an iceberg of truth. 421 And like judges, truth commissioners occasionally

410. UNESCO, Study on the Right to Truth, §55-60. When considering this duty of states enable remembrance, one has to bear in mind that on the individual level, as historian Antoon De Baets has pointed out that, “there exists an individual right not to hold memories and a right not to be informed; if there is a right to memory, there is a right to oblivion too.” Antoon De Baets, ’A declaration on the responsibilities of present generations towards past generations’, History and Theory, No. 43 (December 2004), pp. 130-164: 156.


412. At the end of 2014, for example, on the same day, the Brazilian truth commissions presented its final report, while in Burundi commissioners were sworn in. See: Comisión Nacional Da Verdade, Relatório (Comisión Nacional da Verdade, 2014); Impunity Watch, Policy Brief, ‘Serious of Burundi’s Commitment to TJ under Scrutiny as TRC Commissioners Sworn In; Four-Year TRC Mandate Officially Begins (Bujumbura, December 2014).


415. A second, better-known, commission of inquiry was set up in Argentina in 1983 after seven years of successive military juntas. During this ‘anti-Communist’ epoch, a reported 10,000 to 30,000 ‘subversives’ disappeared at the hands of the military. The Comisión Nacional Sobre la Desaparición De Personas (CONADEP) [National Commission on the Disappeared] was set up by President Raúl Alfonsín to probe the widespread human rights abuses of the prior junta’s. In nine months, the commission had collected over 7,000 statements, documenting 8,961 so-called desaparecidos – the disappeared. It also revealed the existence of 365 torture centres throughout the entire country. Although there were no public hearings, the commission received overwhelming public interest as the report, in a shortened version ultimately became one of the bestselling books in Argentina. “Decreto 187/83”, 15 December 1983 [Reprinted in: Anales de Legislación Argentina. 1984, Tomo XLIV-A, LA LEY (Buenos Aires: Sociedad Anónima, 1984), pp. 137-138; Comisión Nacional sobre la Desaparición de Personas (CONADEP), Nunca Más: Informe de la Comisión Nacional sobre la Desaparición de Personas (Buenos Aires: Eudeba, 1984). [English translation available at www-text: http://www.desaparecidos.org/nuncamas/web/english/library/nevagain/nevagain_001.htm, visited: 9 January 2015.

416. Priscilla Hayner studied over 40 truth commissions established since the 1970’s to record the ‘unspeakable truths’ about human rights abuses. They have been spread out almost evenly between the Americas, Africa and even in Asia. There have also been some commissions in Europe - such as in the former Yugoslavia. In North America, there have also been such commissions, like in North Carolina and more recently in Canada, which is looking into treatment of indigenous populations going back several generations. Bouskouw, ’Unspeakable truths’, p. 4.

417. Uganda (2x), Zimbabwe, South Africa (3x), Kenya, Democratic Republic of the Congo, Ethiopia, Côte d’Ivoire, Ghana, Guinea, Togo, Morocco, Liberia, Sierra Leone, Rwanda, Nigeria, Tunisia, Guinea (Conakry), Burundi, Solomon Islands.


recognise their shortcomings in establishing the truth.422 TRC narratives stereotypically serve as official records of the past that typically defy the distorted versions of history, propagated by an outgoing regime, or alternatively, as in Colombia, strive for a combined narrative. Truth commissions, in theory, can bring the scale and impact of a violent past to the public consciousness, especially in cases where the violence was covert. Moreover, an inquisitorial commission can identify what has happened to people who ‘disappeared’ or are buried in unknown mass-graves.423 However, like trials – truth commissions opt for ‘usable truths’.424 Conventionally, they seek to use the truth and the process of truth finding as a means to promote reconciliation, prevention and national unity,425 socio-psychological healing426 and restorative justice or transformative justice.427 For these purposes, truth commissions generally choose the open arena to expose truth by hearing victims, perpetrators and institutions. Arguably, this modus operandi catalyses public debate on complex social, political and legal issues, which in turn may lead to a much wider informed and nuanced representation of past mass atrocities than those coming out of atrocity trials. On the other hand, however, historians studying truth commissions should always be cautious in using TRC records as objective accounts of history, as much as they should if they study atrocity trials in the field of international criminal justice.

2.9 Judging the past: international criminal trials

Whereas truth commissions, as a mixture between pseudo-accountability mechanism and pseudo-historian, operate within the legal framework of the right to know about legally framed atrocities, prosecutions serve the formal punitive demands of transitional justice. By doing so, they condense mass atrocity to individual agency (framed in terms of responsibility) at the perpetrator side. Although truth commissions continue to operate around the globe, often now in conjunction with prosecutions, the dominant, but also most classic, transitional justice response since the 1990s has been international criminal justice (ICJ). This evolving enterprise is principally designed to pursue the main architects and puppet masters of mass atrocities, although they rhetorically operate within the larger agenda of transitional justice.428 As such, since 2002, the first permanent transitional justice mechanism to deal with the aftermath of mass atrocities, while also introducing victims, the

422 The South African TRC, for example, clarified that its report “tries to provide a window on this incredible resource, offering a road map to those who wish to travel into our past. It is not and cannot be the whole story; but it provides a perspective on the truth about a past that is more extensive and more complex than any one commission could, in two and a half years, have hoped to capture.” TRCSA, Report, Volume 1, p. 2.
424 The South African Truth and Reconciliation Commission held four different notions of truth and utilised them at various levels. First, there is factual or forensic truth on a personal (who, what, where and when) and social (context, causes and patterns) level. Second, the commission recognised vast importance to so-called personal or narrative truth, meaning the truth as it unfolds when individuals recount on their pasts. In this process, observations, stories, myths, and experiences are recorded in order to recollect the national memory as it was suppressed in the past. A third notion was the social or dialogical truth – truth in the process of truth finding and interaction - through debate and dialogue between different factions in society. These truths are finally utilised in order to serve ‘healing’ and ‘restoration’. Public acknowledgement and disclosure of the truth about past injustices could – according to the commission – lead to social ‘healing’, historical ‘justice’ and restoration of human dignity. In addition to these notions, a fifth conception, punitive truth, could be added. In the South African context where perpetrators were given to chance to come clean publicly – they were offered amnesty in exchange for the truth – it was viewed that public shame during these ‘confessions’ could serve as an alternative form of justice. TRCSA, Report, Volume 1, pp. 110-114.
425 Dozens of truth commissions have been operating as truth and reconciliation commissions. Although heavily debated among academia and practitioners, it is assumed by many that truth commissions can promote tolerance and understanding within society by allowing conflicting parties – victims, offenders and/or other individual or community members – to hear and tell each other’s grievances and suffering in a safe and impartial forum.
International Criminal Court (ICC) has taken permanent seat in The Hague, The Netherlands.\(^\text{429}\) Thomas Lubanga Dyilo,\(^\text{430}\) who was once a flamboyant politician and militia leader in the Ituri province in the Democratic Republic of the Congo (DRC), was the first to be convicted by the ICC and joined the illustrious but select group of convicted mass-atrocity perpetrators.\(^\text{431}\) In the arena of the public international (-ised) courtroom these figures have become the emblems of evil and the heralded trophies of the ever growing field of transitional justice. By reducing mass crime back to ‘those most responsible’, criminal justice has anthropomorphised and to a certain degree personalised mass atrocities. Thus, whereas truth commissions are interested in macro questions of history, trials deal with micro individual agency focused history.

Only fourteen years old, the ICC took over sixty years to be established. It follows in the footsteps of the International Military Tribunal (IMT)\(^\text{432}\) and the International Military Tribunal for the Far East (IMTFE)\(^\text{433}\) for the trials of “major war criminals” in Germany and Japan. After these first two international tribunals, the UN set in motion the idea for a permanent tribunal, most notably to prosecute the crime of genocide.\(^\text{434}\) But it was not until 1993 that the UN International Criminal Tribunal for the Former Yugoslavia (UNICTY) – set up “for the sole purpose of prosecuting persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia”\(^\text{435}\) - became the third international criminal tribunal.\(^\text{436}\) Almost seventeen months later, the UN decided on a second ad hoc tribunal, this time “for the sole purpose of prosecuting persons responsible for genocide and other serious violations of international humanitarian law committed in the territory of Rwanda and Rwandan citizens responsible for genocide and other such violations committed in the territory of neighbouring States.”\(^\text{437}\) Almost fifty years after the adoption of the Genocide Convention, the UNICTR was the first international court to convict an individual on the basis of the Convention, in 1998.\(^\text{438}\)

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\(^{429}\) Teitel, Globalizing Transitional Justice, p. 63.
\(^{430}\) Thomas Lubanga Dyilo was convicted on three charges of war crimes committed in the Democratic Republic of the Congo, including enlisting, conscripting and using child soldiers. He was sentenced to 14 years’ imprisonment. ICC, TCI, Situation in the Democratic Republic of the Congo: The Prosecutor vs. Thomas Lubanga Dyilo: Judgment pursuant to Article 74 of the Statute (ICC-01/04-01/06; 16 March 2012) & ICC, Situation in the Democratic Republic of the Congo: The Prosecutor vs. Thomas Lubanga Dyilo: Decision on Sentence pursuant to Article 74 of the Statute (ICC-01/04-01/06; 10 July 2012); ICC, AC, Situation in the Democratic Republic of the Congo: The Prosecutor vs. Thomas Lubanga Dyilo: Judgment on the appeal of Mr Thomas Lubanga Dyilo against his conviction (ICC-01/04-01/06 A 5; 1 December 2014).
\(^{431}\) By 2013, in 65 years of international criminal justice, nine past and present international criminal courts and tribunals concluded 172 cases in which over 250 judges and 23 Chief Prosecutors were involved. All in all, 745 suspects were indicted, 356 were actually tried and, of these, some 281 defendants were convicted. The ‘average’ convicted perpetrator is male, aged 40 and a member of a military or paramilitary organisation from Europe, Asia or Africa who is acting on behalf of his government—See: Alet Teitel, ‘The Facts and Figures’, International Criminal Law Review, 13 (2013), pp. 7-41.
\(^{432}\) Agreement by the Government of the United States Of America, the Provisional Government of the French Republic, the Government of the United Kingdom Of Great Britain and Northern Ireland and the Government of the Union of Soviet Socialist Republics for the Prosecution and Punishment of the major war criminals of the European Axis (‘London Agreement’), 8 August 1945). The Charter of the International Military Tribunal is annexed to the agreement.
\(^{434}\) UNGA, Genocide Convention, art. I & IV; UNGA, B. Study by the International Law Commission on the Question of an International Criminal Jurisdiction ((A)RES/260 (III); 9 December 1948).
\(^{436}\) UNSC, Statute of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991 (S/25704; 3 May 1993), art. 4.
\(^{438}\) UNICTR, TCI, Prosecutor versus Jean Paul Akayesu: Judgement (ICTR-96-4-T; 2 September 1998) and UNICTR, TCI, Prosecutor versus Akayesu: Sentence (ICTR-96-4-T; Arusha, 4 October 1998).
The two temporary UN tribunals - which have jointly morphed into a new tribunal, the United Nations Mechanism for International Criminal Tribunals - were geographically and temporally specific, in contrast to the permanent ICC. The latter has enduring jurisdiction to potentially examine, investigate, prosecute, try and judge atrocity crimes across the globe. By the time of writing, it has examined and investigated alleged crimes in over a dozen countries or nationalities, covering Africa, the America’s, Asia and Europe. As a result of this wide-ranging fusion of atrocity situations, the ICC as a whole can be seen as a broad collection of mini ad hoc tribunals. Still, however, because of the ICC’s remaining temporal and jurisdictional limits, other specialised tribunals, with international features, have been erected, including the Special Court for Sierra Leone (SCSL), the Special Panels for Serious Crimes (SPSC; East Timor), the Iraqi Higher Criminal Court (IHCC), the Extraordinary Chambers in the Courts of Cambodia (ECCC), the Special Tribunal for Lebanon (STL), the Extraordinary African Chambers (EAC) and the Kosovo Relocated Specialist Judicial Institution (KRSJI). At the time of writing, highly politicized discussions on internationalized – hybrid – tribunals were ongoing in relation to atrocities in the Central African Republic, South Sudan, Sri Lanka and Syria.

Lubanga’s case was the debut trial of what is the pinnacle of the twentieth century’s evolution in international criminal justice. All these ad hoc, ‘special’ or ‘extraordinary’ international or internationalised trial systems have been scrutinised ever since their creation. However, critical, distant and empirical historiography, written by historians, on the modern panels has only gradually emerged. In the infancy days of the UN and hybrid tribunals as well as the ICC, studies were commonly conducted by a generation of its founders: a community of activists, judges, prosecutors,
lawyers and legal scholars (most of who have been involved themselves in “the justice project” in one way or another). Describing the trials and errors of a maturing criminal justice system, they mostly celebrated the precedents they shaped. Gradually, political scientists, practitioners and non-governmental lobby groups entered the sheltered and self-referential realm of international criminal justice. Only more recently anthropologists and historians started to observe courtroom rituals and debate legacies of modern international trials.454

Except for some rare efforts by journalists or bloggers, non-legal conventional literature on contemporary African atrocity trials hardly focused on the processes itself.455 In most studies, investigations, testimony and courtroom dynamics often only serve as a colourful or anecdotal illustration at the side-lines of the argument. This has been a hapless omission in (post) transitional justice research. There was and there is more to a trial than its surrounding politics, opening statements and verdicts. As argued earlier, the trial itself is a theatre of thought, debate and scrutiny. It is the pitch where barristers and judges exercise the rituals of testing the law and cross-examining witnesses. Likewise, the courtroom experience is furthermore “a social encounter, where different modes of being and different worldviews might conceivably collide.”456 Trial hearings, arguably, are the beating heart of international justice fact exposure. International criminal tribunals are the factories of historical evidence and the trial is the workshop of detailed fact about mass violence. It is also the arena where histories and scripts about the past are contested. Yet it is too often just an ill referenced footnote in academic literature. Ignoring all this blurs our knowledge and understanding about the legal dealing with mass atrocities at its heart. This book hopes to fill this gap.

454 See for instance: Kelsall, Culture under Cross-Examination; Wilson, Writing History; Kamari Maxine Clarke, Fictions of Justice: The International Criminal Court and the Challenge of Legal Pluralism in Sub-Saharan Africa (Cambridge 2009); Donia, Radovan Karadžić.
455 See in Rwanda: Ubatabera, Hirondelle News Agency, International Justice Tribune covered the day to day proceedings at the ICTR and SCSL.
456 Kelsall, Culture under Cross-Examination, p. 17.
2.10 History writing in international criminal trials

Charges are not merely a loose collection of names, places, events, etc., which can be ordered and reordered at will. Instead, charges must represent a coherent description of how certain individuals are linked to certain events, defining what role they played in them and how they related to and were influenced by a particular context. Charges therefore constitute a narrative in which each material fact has a particular place. Indeed, the reason why facts are material is precisely because of how they are relevant to the narrative. Taking an isolated material fact and fundamentally changing its relevance by using it as part of a different narrative would therefore amount to a “change in the statement of facts […]”.

- Christine van den Wyngaert, ICC Judge

How do law and history relate to each other? Are they incompatible, as many from both professions maintain, or, are there intimately connected, as many from both professions also argue? Much has been said and written about it, in general terms and in specific cases. Yet, it was German trial reporter on the Eichmann case in Jerusalem, Hannah Arendt, who put the debate on the map. Famously, she observed:

The purpose of a trial is to render justice and nothing else; even the noblest of ulterior purposes – such as “the making of a record of the Hitler regime which would withstand the test of history,” which is how Robert G. Storey, executive trial counsel at Nuremberg, formulated the supposed higher aim of the Nuremberg Trials – can only detract from the law’s main business: to weigh the charges brought against the accused, to render judgment, and to mete out due punishment.”[461] […] “Justice demands that the accused be prosecuted, defended, and judged, and that all the other questions, though they may seem to be of greater import - of "How could it happen?" and "Why did It happen?," of "Why the Jews" and " Why the Germans?," of "What was the role of other nations" and "What was the extent to which the Allies shared the responsibility?," of "How could the Jews, through their own leaders, cooperate in their own destruction?" and "Why did they go to their death like lambs to the slaughter?" be left in abeyance. Justice insists on the importance of Adolf Eichmann, the man in the glass booth built for his protection: medium-sized, slender, middle-aged, with receding hair, ill-fitting teeth, and near-sighted eyes, who throughout the trial keeps craning his scraggy neck toward the bench (not once does he turn to face the audience), and who desperately tries to maintain his self-control- and mostly succeeds, despite a nervous tic, to which his mouth must have become subject long before this trial started. On trial are his

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In Arendt’s view, courts deal with individual criminal responsibility and should not be blinded by the historical political and social circumstances in which the defendant operated. More than fifty years later, including more than 20 years of passionate international judicial reckoning with atrocities around the globe, no real consensus has been reached on the matter, particularly among the non-historians. However, social anthropologist Richard Wilson, in his landmark book on the topic, summarises it effectively: “courts of law produce mediocre historical accounts of the origins and causes of mass crimes.” Wilson, who is not a trained historian himself, divides the debate into different schools. In Arendt’s tradition, first there is the ‘justice-and-nothing-more-doctrine, which asserts liberal legalist view that justice agents should not attempt to write history at all, that it would even be inappropriate. In this view, extra-judicial historical probes should not overshadow due process, fair trial and the principles of law. Law-and-society adherents, who take it a step further, maintain that even if they try, courts will fail in their endeavour.

Wilson offers four reasons for law’s incapability to deal with history. First, historians and judges apply different methodologies and truth regimes: academic discussion versus cross-examination and balance of probabilities versus beyond any reasonable doubt. They also reach different conclusions: provisional and interpretative versus definite, verifiable and revisable (ne bis idem). Second, if history does not fit law’s templates and principles, then the historical narrative is bent in such a way that it will, not vice versa. Law ultimately distorts history. Third, not the full historical story may come up in the trial setting, but just parts of it, simply because law does not cover certain events or law agents choose not to deal with them. Fourth, the historical dimensions or narratives are overshadowed by the procedural technicalities, complexities and details of international trials. ‘Slow-trials’ spark boredom and lose historical momentum and their presumed educational functionality as ‘show trials’. Two differences must be added. The first concerns the topic; judges concentrate on individual responsibility for specific actions and thus on the behaviour and motives of deeds, not the sufferings of the Jews, not the German people or mankind, not even anti-Semitism and racism."

643 Perhaps she lent her insights from the court’s own perspective, which from the start clarifies that: “In this maze of insistent questions, the path of the Court was and remains clear. It cannot allow itself to be enticed into provinces which are outside its sphere. The judicial process has ways of its own, laid down by law, and which do not change, whatever the subject of the trial may be. Otherwise, the processes of law and of court procedure are bound to be impaired, whereas they must be adhered to punctiliously, since they are in themselves of considerable social and educational significance, and the trial would otherwise resemble a rudderless ship tossed about by the waves. It is the purpose of every criminal trial to clarify whether the charges against the accused who is on trial are true, and if the accused is convicted, to mete out due punishment to him. Everything which requires clarification in order that these purposes may be achieved, must be determined at the trial, and everything which is foreign to these purposes must be entirely eliminated from the court procedure. Not only is any pretension to overstep these limits forbidden to the court - it would certainly end in complete failure. The court does not have at its disposal the tools required for the investigation of general questions of the kind referred to above. For example, in connection with the description of the historical background of the Holocaust, a great amount of material was brought before us in the form of documents and evidence, collected most painstakingly, and certainly in a genuine attempt to delineate as complete a picture as possible. Even so, all this material is but a tiny fraction of all that is extant on this subject. According to our legal system, the court is by its very nature “passive,” for it does not itself initiate the bringing of proof before it, as is the custom with an enquiry commission. Accordingly, its ability to describe general events is inevitably limited. As for questions of principle which are outside the realm of law, no one has made us judges of them, and therefore no greater weight is to be attached to our opinion on them than to that of any person devoting study and thought to these questions.” “District Court of Jerusalem, Attorney General v. Adolf Eichmann: Judgement (40/61; Jerusalem, 11 December 1961), §2.
644 Wilson, Writing History, p. 1.
645 Like legal sociologist Mark Osiel, who said that the attempt to combine the two endeavours is very likely to produce poor justice or poor history, probably both.” Mark Osiel, Mass atrocity, Collective Memory, and The Law (New Brunswick & London: Transaction Publishers, 1997), p. 80.
646 Wilson, Writing History, pp. 2-6.
647 He describes them as (1) “incompatibility theory”; (2) “Legal Exceptionalism, or “The Law Is a Ass”; (3) “The Partiality Thesis” (4) “boredom on a Huge, Historic Scale.” Ibidem, pp. 6-12.
648 Wilson, Writing History, pp. 6-13.
unique and a-typical individuals. Historians call this approach to the past agency or event history, while they themselves emphasise agency and structure. They focus on the acting of persons and the structure and context in which they do.\(^{469}\) Secondly, and what we will see in this dissertation, is that lawyers have a different relationship with the past than historians. Disparate from professional historians, lawyers like to make – and become part of – history themselves, tweak historical narratives according to their argument and like history – like law – to be static. Thus, for the historian history is object and objective while for the lawyer history is subject and subjective.

In his book, Wilson tests these critiques in light of the UNICTY, UNICTR and the ICC.\(^{470}\) Central in his probe, is the question whether these international courts delivered innovative and significant understandings of the origins and causes of armed conflict and whether or not their historical inquiries undermined due process and violated the rights of the accused. Unprecedented, much court proceedings dealt with extensive historical deliberations on the Balkans, Rwanda and Congo, with a range of historians, social scientists and other ‘experts’ testifying about these conflicts’ causes, contexts and courses. Key is that, often, legal issues warranted these historical explorations. Proving past crimes against humanity and war crimes simply demands understanding the conflicts as such, the political and social contexts in which they took place and how they for instance fit the demanding legal criteria of the Genocide Convention, or not. In all, Wilson maintains that the complex endeavours of judging international crimes and writing history of an armed conflict cannot be characterised by “either harmonious accord or inherent contradiction.”\(^{471}\) No matter which one is true, the relationship between law and history is ever present. The main issue, however, is the way in which prosecutors and defence counsel use non-legal evidence and historical narratives, and for what reasons: rhetorical window dressing or integral case theories?\(^{472}\)

Wilson is not advocating for more history or historians in international criminal trials, simply and strictly for it is not in their mandates. Exhibiting historical and social contexts proves to be delicate and hazardous. In the legal realm, it may be of poor quality, considered irrelevant to the charges, misunderstood, ill represented, oversimplified, misused, or in the extreme, undermine the integrity of the court proceedings. Despite these pitfalls, with international courts risking producing unsatisfying historical narratives, I agree with Wilson’s observation that they may provide invaluable source material for historians, at least in documentary and literate contexts such as the Balkans which is the prime focus of his research.\(^{473}\) But first of all, pursuing justice and writing history is something else than pursing justice and reviewing history. The first pair is arguably irreconcilable, but the second is not. Disputes about the contexts and broader courses of alleged misconduct are at the heart of international criminal trials as the accused’s actions during highly contested historical events, acts and

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\(^{470}\) Based on interviews with legal actors, research staff at the courts and external experts as well as court records and an online staff survey at the UNICTY.

\(^{471}\) Wilson, Writing History, p. 13.

\(^{472}\) Ibidem, p. 15.

\(^{473}\) Ibidem, p. 69.
decisions are being litigated. Without historical inquiry or contextual explanations, ‘intentional group-
Discriminatory’ genocides, ‘widespread and systematic’ crimes against humanity and illegal acts of
‘war’ are effectively unmanageable to establish in isolation. Somehow, they constitute the legal
requirements for these specific categories of crimes. Therefore, prosecutors and defence counsel
utilise – use and abuse - historical interpretations in their case theory and evidence. During trial,
historical discussions, or about interpretations on bygone events, are therefore inevitable, but they are
not essentially about establishing historical truth. The language that frames the law confines the legal
narrative during trial and it is what prevails in the end.

Trials excavate data and create cradles of information useful to historians, but they may
significantly vary in quantity and quality, depending on the specific conflict and locality. And indeed,
the UNICTY – from which most of Wilson’s empirical data derives – was a rather ‘forensic’ tribunal:
witnesses were introduced to introduce material evidence. But the practice at the UNICTR, SCSL
were and the ICC is different. Rather, they can be considered as being almost exclusively
‘testimonial’ courts: the evidence came from witnesses. So their evidentiary source legacy is crucially
divergent and the historically substantial facts uncovered there are reasonably scarce. Other than at the
UNICTY, if history was written at these courts, it ought to be valued much more like a narrative oral
history from the perspective of victims, survivors, bystanders and perpetrators than as a collection of
physical data introduced by witnesses. It is thus a dissimilar history, based on complex memory
sources enticed in an arena where not only perceptions of justice may differ, but also where entire
reference frame works – in particular cultural and linguistic – may clash and cause crucial
misconceptions and decisive lost-in-translation-situations. And whereas the valorisation of victim
testimony – as experienced facts - indeed increased from the mid-1980s and found its way into the
international court rooms in the 1990s, judges have increasingly struggled to use eye witnesses as
reliable and verifiable evidence in complicated cases, particularly in non-western settings where there
is no – or hardly any - tangible forensic corroborative material available. It lays bare an old problem
of western-style fact-finding in non-western oral societies, considerable time after the events: fact-
finding without facts. In that context, witness testimony about the atrocious past, arguably, tells an
ambiguous story about the past and leads to shallow historical findings.


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2.11 Historical trial testimony

The marvel of oral tradition, some will say it is a curse, is this: messages from the past exist, are real, and yet are not continuously accessible to the senses. Oral traditions make an appearance only when they are told.

- Jan Vansina

Every witness shall, before giving evidence, make the following solemn declaration: "I solemnly declare that I will speak the truth, the whole truth and nothing but the truth."477

In his activism for recording Africa’s historical, religious, philosophical and scientific knowledge, Amadou Hampâté Bâ famously said that “every time an old man dies in Africa, it is as if a library has burnt down.”478 Importantly, he added that “writing is the photographing of knowledge, but it is not knowledge itself.”479 Speaking at a UNESCO conference in 1962, the Malian historian’s speech captures the problematical nature of oral history as evidence and testimonial evidence as oral history, an issue constantly recurring at the international tribunals and courts. Non-western witness testimony has been featuring chiefly in western-styled international criminal atrocity trials, typically in Sub-Saharan African circumstances. Operating in an international, mostly non-African environment, this custom, however, brings to light a striking epistemological misbalance between what evidence law demands, judges prefer and fact-seekers seek ideally on the one hand and what prosecutors present during evidentiary hearings.

Although a Liberian proverb says that “law is chameleon-like” and that “only those who know it well can tame it,”480 international criminal justice, as a system, is far from flexible. Like scholarship on international criminal justice – which typically builds on the a-typical Nuremberg legacy481 - the system itself remains ethnocentric and conservative in applying its liberal deep Judeo-Christian based legalism, norms and dogmatic human rights vocabulary.482 On the global level, this immediately sparks questions on the suitability of a cosmopolitan form of justice in diverse cultural contexts, where basic concepts of justice may already differ.483 International criminal justice

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482 See for an insightful analysis of this type of “white men’s justice”: Kelsall, Culture under Cross-Examination, pp. 1-16.
483 In Japan, for instance, there was hardly any cultural basis for international trials; “situational ethics” were, at the time, inherently unlegalistic. Judith N. Shklar, Legalism. Law, Morals, and Political Trials Cambridge: Harvard University Press, 1964), pp. 179-181.
is western in its very origin and it is run by a politics of fact positivism. At the two tribunals that dealt with atrocities in Europe, the IMT and UNICTY, lawyers could operate relatively successfully as documentary and forensic evidence was abundant. The situation at the other tribunals, however, was strikingly different as the forensic basis for prosecutions was particularly absent, necessitating a strong reliance on testimonial evidence.

Hearing oral testimony however is not an exclusive characteristic of the contemporary atrocity tribunals. But it is mainly its purposes, meaning and weight that differ.\textsuperscript{484} Witnesses performed already in Nuremberg, although extremely modestly. Justice Robert Jackson, the IMT’s first Chief Prosecutor wanted “to put on no witnesses we could reasonably avoid”\textsuperscript{485} particularly because of questions regarding their reliability.\textsuperscript{486} As the prosecution was running a ‘paper trial’, offering thousands of documents - found in German army headquarters, government buildings, salt mines, buried in the ground, hidden behind false walls and other secret places – they only featured thirty-three witnesses, but mainly to authenticate or explain documents.\textsuperscript{487} Sixty-one witnesses were put before the bench by the defence in rebuttal, alongside the live testimony of nineteen of the defendants. The Tribunal itself heard twenty-two witnesses.\textsuperscript{488} Whereas Nazi archives were the substantial underpinnings of the case,\textsuperscript{489} the more laborious Tokyo trial of 28 Japanese war crimes suspects\textsuperscript{490} – stretching over 818 public sessions – heard live testimony from 419 witnesses, permitted 779 witness depositions and affidavits and introduced expert evidence (including from historians).\textsuperscript{491} But unlike its Nuremberg-twin, which worked on the basis of masses of documents, the ‘Far East’-court was generally “disappointed by a large part of this evidence” as it regarded itself “handicapped” in its “search for facts” by the absence of official records. Most archives were either burned during the bomb raids on Japan or the deliberate destruction after the surrender, which the tribunal found a “disservice to the cause of international justice.”\textsuperscript{492} Halfway through the trial, after the prosecution

\textsuperscript{484} Holocaust survivors, for instance, stressed a certain duty to testify: “For the survivor who chooses to testify, it is clear: his duty is to bear witness for the dead and for the living. He has no right to deprive future generations of a past that belongs to our collective memory. To forget would be not only dangerous but offensive; to forget the dead would be akin to killing them a second time.” Ellie Wiesel, \textit{Night} (New York: Hill and Wang, 2006), p. xv.


\textsuperscript{490} The charges were grouped into (1) crimes against peace, (2) murder and (3) other conventional war crimes and crimes against humanity committed between 1 January 1928 and 2 September 1945. See: International Military Tribunal for the Far East (IMTFE), No. 1. \textit{The United States of America, the Republic of China, the United Kingdom of Great Britain and Northern Ireland, the Union of Soviet Socialist Republics, the Commonwealth of Australia, Canada, the Republic of France, the Kingdom of The Netherlands, New Zealand, India, and the Commonwealth of the Philippines Against ARAKI, Sadao. DOHSHIKA, Kenji, HASHIMOTO, Kingoro, HA T A, Shunrouku, HIMEUMURA, Kichiro, HIROTA, Koki, HOSHINO, Koski, ITAGAKI, Seishiro, KAYA, Okinori, KIDO, Koichi, KIKURU, Hisaeto, KOSO, Kunikatu, Matusu, Iwane, MATSUYUKA, Toseke, MINAMI, Jiro, MUTO, Akira, MAGANO, Osami, OKA, Takeumi, OKAWA, Shumei, OSHIMA, Hiroshi, SATO, Kenryo, SHIGEMITSU, Mamoru, SHIMADA, Shigenori, SHIBATORI, Toshio, SUZUKI, Teischi, Togó, Shigenori, TOJO, Hideki, OMEZU, Yoshijiro, \textit{The Anatomy of the Nuremberg Trials}, reprinted in: \textit{United States of America, Department of State, Trial of Japanese War Criminals} (Washington: United States Government Printing Office, 1946), pp. 45-76.


\textsuperscript{492} International Military Tribunal for the Far East (IMTFE), \textit{Judgement}, pp. 48427-48434.
rested its case, the tribunal relaxed its burden of proof by introducing a ‘rule of best evidence’. Much hearsay evidence was introduced, and besides lamenting the slowing down the proceedings because of live testimony, the chamber in its judgement found many witnesses unreliable as they had met the bench “with prolix equivocations and evasions, which only arouse distrust.” A major trial of victor’s justice in Asia, complicated by matters of translation, lengthy cross-examinations and six months of drafting a 1218-page opinion, the IMTFE produced a long trial record, almost reaching 50,000 pages of transcript. Arguably it is an invaluable source for historians. Occupied with penning down an official history, the majority devoted 1,050 pages to findings of fact, on the basis of which – through command responsibility – the Japanese leaders were found guilty of conspiracy to commit aggression and the aggression itself. But unlike Nuremberg, which rendered a unanimous verdict, five IMTFE judges, including the most outspoken, Judge Radhabinod Pal from India, contested this version of history. In his drawn-out dissenting opinion which meticulously exposes the lack of linkage testimonies and other direct evidence against the accused, Pal reasoned he would render a finding of not-guilty on all the accused: “The devilish and fiendish character of the alleged atrocities cannot be denied. I have indicated against each item the nature of the evidence adduced in support of the occurrence. However unsatisfactory this evidence may be, it cannot be denied that many of these fiendish things were perpetrated. But those who might have committed these terrible brutalities are not before us now.”

In fierce wordings, the Tokyo tribunal has been castigated for its cultural narrowness, ethical dogmatism and historical emptiness and its impact on the popular memory of Japanese was practically nihil. Nevertheless, it is reported that the “Tokyo Trial View of History” in the end became widely accepted among the populace, as it attributed the blame for the register of misconduct on its military leaders – not on the people themselves. Years later, in Jerusalem, acceptance was not enough. When Adolf Eichmann was brought before the Israeli court in 1960, shock therapy, identity-formation and social education were on the Prosecutor’s agenda. Even though it would have been sufficient to secure Eichmann’s conviction by letting the archives speak, it was particularly through the personal experiences of victims, so believed state prosecutor Gideon Hausner, that the trial could “superimpose on a phantom a dimension of reality,” a “living record of a gigantic human and national disaster.” And indeed, the court – despite the reservations of presiding judge Mosche Landau towards a

494 International Military Tribunal for the Far East (IMTFE), Judgement, p. 48423.
496 Minear, Victor’s Justice. The Tokyo War Crimes Trial, pp. 125-159.
498 Kelsall, Culture under Cross-Examination, p. 11.
499 Osiel, Mass atrocity, pp. 181-183.
500 Ibidem, pp. 15-17.
theatrical, educational and political trial – opened up its doors to the testimony of 121 Holocaust survivors. Gruesome personal stories were narrated by a carefully selected cross-section of victims: professors, housewives, artisans, writers, farmers, merchants, doctors, officials and labourers. An interlaced story about the entire Holocaust echoed through the courtroom, but none of it was directly related to Eichmann who was in fact for a lengthy part of the trial virtually forgotten. Thus, despite the strict legal positivism driving the court in its judgement, the court approved its public and widely televised trial hearings to become an extraordinary forum for history telling, victim narratives and collective memory consolidation. Still, regardless of their evidentiary lenience – including witness testimony - the three-panelled bench, in its judgement, was not shy to underline that “without a doubt, the testimony given at this trial by survivors of the Holocaust, who poured out their hearts as they stood in the witness box, will provide valuable material for research workers and historians, but as far as this Court is concerned, they are to be regarded as by-products of the trial.” What remained was a decision that very precisely described Eichmann’s particular crimes as well as the limits of his responsibility, mainly based on his own admissions and documentary proof.

The Eichmann trial is not only pivotal in the maturation of the internationalised justice venture, tackling international crimes crossing borders and time, it also set a particular precedent in terms of legal procedure, evidence, testimony and theatrical setting. Narrative content based on victims’ memories became an important feature of criminal procedure, next to adjudicating personal criminal responsibility. Extravagant trials about extravagant crimes demanded extravagant proceedings. The liberal show trial for administrative massacre was born. Displaying the horrific consequences of the illiberal vices and elucidating the human drama of mass violence, atrocity trials morphed into social and cultural performances involving historical reflection, social education and to some degree reconciliation of society by means of legal or other ritual procedures. Witness-driven mass atrocity prosecutions became the standard after the Eichmann trial. The model entered into full swing across the globe, including other Holocaust related hearings in Israel (Demjanjuk) and Canada (Finta). But also the junta trials in Argentina and the red terror cases in Ethiopia and profoundly influenced the proceedings at international tribunals. In their fashioning of grand-narratives on the wars in the former Yugoslavia, prosecutors weaved together testimony of large numbers of witnesses.

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505 The chamber was quite clear on its stand: “In this maze of insistent questions, the path of the Court was and remains clear. It cannot allow itself to be enticed into provinces which are outside its sphere. The judicial process has ways of its own, laid down by law, and which do not change, whatever the subject of the trial may be. Otherwise, the processes of law and of court procedure are bound to be impaired, whereas they must be adhered to punctiliously, since they are in themselves of considerable social and educational significance, and the trial would otherwise resemble a rudderless ship tossed about by the waves. It is the purpose of every criminal trial to clarify whether the charges in the prosecution's indictment against the accused who is on trial are true, and if the accused is convicted, to mete out due punishment to him. Everything which requires clarification in order that these purposes may be achieved must be determined at the trial, and everything which is foreign to these purposes must be entirely eliminated from the court procedure. Not only is any pretension to overstep these limits forbidden to the court - it would certainly end in complete failure.” District Court of Jerusalem, Attorney General v. Adolf Eichmann: Judgement (40/61; Jerusalem, 11 December 1961), §2.
507 District Court of Jerusalem, Eichmann Judgement, §2.
508 Osiel, Mass atrocity, pp. 15-17; 67.
During the first six-month trial, against low-level Bosnian Serb camp guard Duško Tadić, they called no less than 76 witnesses, many of whom were victims. In all subsequent trials saw a parade of over 4500 witnesses traveling to The Hague. In Arusha, at the Rwanda-tribunal, a total of 3378 witnesses have testified at trial. Their role, however, changed significantly over time.

When the UNICTY was established in 1993, it faced a different landscape than its predecessor in Nuremberg and to a lesser extent Tokyo. A most important variance was that the Bosnian war was not over; some of the fiercest atrocities had not yet occurred, including the massacres in Srebrenica in July 1995. Politics were at play as well. Five years of war, disintegration and subsequent peace negotiations had left no clear winners or losers. In this context, state cooperation became the biggest obstacle for the tribunal. In particular, fact-finding through criminal investigations was thus a huge challenge. Serbia, Croatia, and Republika Srpska in Bosnia-Herzegovina had become practically inaccessible to the UNICTY investigators, who could not obtain critical documents (if they even existed) held by authorities unsympathetic to the Tribunal’s existence or goals. Political transitions in these countries gradually led to increased assistance. But documents, defendants and witnesses were only slowly secured. Yet, when the UNICTY’s workload increased from 1997 onwards, prosecutors faced the reality that they could not depend as heavily on paper trails as they had hoped. Offenders in the Balkans had simply not been meticulously documenting their actions and particularly their individual involvement in possible crimes, as did the Nazi’s. And even if they did, the documents did not always end up on the tribunal’s desks.

Therefore, in The Hague, most early cases required substantial numbers of eyewitnesses to prove the very occurrence of crimes. Only in the first years already, 971 victim-witnesses came to The Hague to testify. The first genocide trial, involving Radislav Krstić, involved 103 prosecution witnesses, twelve defence witnesses and two Chamber witnesses.

Central to criminal proceedings is to establish the facts underlying the charges: to show that crimes have indeed occurred. Like the UNICTY, all the tribunals have faced problems in this respect.

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510 UNICTY, Tadić Opinion and Judgement, p. 11.
511 In total, approximately 7,700 witnesses, including multiple and video-linked testimonies and support persons, have testified and assisted the ICTY (www-text: http://www.unmict.org/en/about/witnesses, visited: 27 March 2015). Almost two-thirds of all witnesses have testified on behalf of the Prosecution. About a third has testified for the Defence. Two percent have been called by the Chambers. UNICTY, Witness Statistics [as of 2 February 2013] (www-text: http://www.icty.org/sid/10175, visited: 27 March 2015. Also see the documentary: UNICTY, Through their eyes. Witnesses to Justice (The Hague: UNICTY, 2014).
512 For the prosecution: 1782. For the defence: 1420. Expert witnesses: 176. Eighty-three per cent of the witnesses, including detainees, have benefited from protection measures. The remaining seventeen per cent of the witnesses, who were not provided protection, consisted of experts, non-protected detainees, and witnesses who otherwise waived protection. Email correspondence with Sera Ameso Attika, ICTR Witness Support and Protection Unit, dated 8 July 2013.
515 Waldt, ‘Note from the Field’, pp. 218-219.
517 Waldt, ‘Note from the Field’, p. 219.
518 Ibidem, p. 220.
At the ICC, in its first case for stance, the heart of the case was the question if Thomas Lubanga Dyilo had conscripted, enlisted and used children under the age of fifteen in his militia. But throughout the case the essential baseline element – that the children alleged to be children were indeed younger than fifteen – was hotly contested. As we will see in the chapter on Congo, the Congolese defendant was ultimately convicted, by majority, for three war crimes, but the evidentiary basis, nine alleged former child soldiers, was at least flimsy. The dissenting appeals judge, who deemed the evidence to be insufficient, expressed the hope “that future prosecutions of these crimes at the Court will adduce direct and more convincing evidence and preserve the fairness of proceedings, which lies at the heart of criminal prosecutions and should not be sacrificed in favour of putting historical events on the record.” Essentially, the Lubanga judgement, in a detailed manner, narrated the court’s baseline truth-finding crisis. Lubanga’s case rested almost exclusively on viva voce witness testimony, collected by three Congolese intermediaries as well as other third-party interviews with witnesses, most notably the UN and Human Rights Watch. Hardly any first-hand onsite investigations had been conducted and, as a result, the prosecutor had introduced no relevant forensic evidence during trial, not even concerning the ages of the alleged child soldiers. With two exceptions, all the tribunals, more or less, faced this fact-finding obstacle and therefore have no direct access to un tarnished forensics and first hand witness testimony. Consequently, the bulk of collected evidence consists of eyewitness testimony gathered by prosecutors and featured in reports by non-governmental organisations (NGOs). But judges have increasingly discredited witness testimony as being possibly manipulated, unreliable, inconsistent or vague and deemed several NGO reports to lack corroborative value.

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520 The Chamber heard a total of 67 witnesses over 208 days of hearings: 36 Prosecution witnesses, including three experts and nine former child soldiers, 24 Defence witnesses, three victims called as witnesses following requests from their legal representatives and four expert Chamber witnesses. A total of 1,373 items of evidence (368 by the prosecution and 992 by the defence) were admitted into evidence. ICC, Lubanga Dyilo Judgment, §12; For a discussion on the evidence: Caroline Busman, ‘Delegating Investigations: Lessons to be Learned from the Lubanga Judgment’, Northwestern Journal of International Human Rights, Vol. 11, No. 3 (Summer 2013), pp. 30-82.


522 ICC, Lubanga Dyilo Appeals Judgement, p. 17.

523 ICC, AC, Situation on the Democratic Republic of the Congo in the Case of The Prosecutor vs. Thomas Lubanga Dyilo: Transcript (ICC-01/04-01/06 A 5; 1 December 2014), pp. 17.


527 Time is an important factor. As a rule, much time elapses before on-ground investigations and prosecutions of these extraordinary, complicated and typically disordered international crimes are commenced, regularly some years. At the ICTY, the ICTR, the SCSL and the ICC, it took at least two to three years before the first investigators got to the field to unearth facts and investigate crimes. In Bangladesh, Cambodia and Chad, there even is a lapse of several decades. See for a practitioner’s experience: Witteveen, ‘Dealing with Old Evidence’, pp. 68-69.

528 But throughout the case several decades, see for a practitioner’s experience: Witteveen, ‘Dealing with Old Evidence’, pp. 68-69.

529 As a result of belated investigations, investigators and prosecutors have turned heavily to second-hand primary sources, particularly UN missions, humanitarian organisations, human rights advocacy groups, journalists and academia from various disciplines. Their reports, information and assistance are often very useful as the starting point, providing basic information, leads, possible witnesses and sometimes documentary evidence. A recurring problem, however, is that these sources often cite witness testimony themselves, which can hardly be corroborated later. Former ICC investigation team leader Bernard Lavigne compared the procedure of investigation of humanitarian groups to general journalism. ICC, Lubanga Dyilo Transcript (17 November 2010), p. 47.

530 ICC, Situation in the Democratic Republic of the Congo in the Case of The Prosecutor vs. Thomas Lubanga Dyilo: Transcript (ICC-01/04-01/10; 16 December 2011); ICC, Lubanga Judgment; ICC, Situation en République Démocratique du Congo. Affaire le Procureur c. Mathieu Ngudjolo: Jugement rendu en application de l’article 74 du Statut (ICC-01/04-02/12; 18 December 2012).
It lays bare the problem that in remote, unfamiliar and mostly non-documentary contexts, answering seemingly simple, yet basic, questions like what happened to whom, where and when already proves to be problematic. While journalists, human rights researchers, academics and the public easily pinpoint culprits, criminal investigators face problems corroborating these allegations beyond reasonable doubt. Courts, thus, appear to be less competent *chroniqueurs* about mass atrocity as is generally believed. In fact, when confronted with non-documentary societies such as Rwanda, inaccessible areas or when documents has have been destroyed as in Japan, their groundwork is often uncertain. Practically, that means trial judges have to determine individual responsibility for the most serious crimes almost exclusively on the basis of witness accounts which are given five, ten, sometimes 20 years or even longer after the facts have occurred. It poses a complex fact-finding challenge: the data of atrocity crimes is embedded in the fallible memories of people close to the violence, which in turn ultimately results in simplistic and distorted images of mass violence.

Recent studies, alongside legal practice and trial proceedings, demonstrate how this state of affairs impairs fact-finding processes and truth-ascertaining capacities. According to Nancy Combs, eyewitness testimony - which requires coerced, enticed and contextualised remembering - at international tribunals is of highly questionable reliability. She describes their modus operandi as ‘fact-finding without facts’. Combs has shown that witnesses at the Rwanda, Sierra Leone and East Timor tribunals have a hard time providing the kind of testimony that fact finders need to receive to determine with any kind of certainty basic facts like who did what to whom. Oral testimony at these tribunals is frequently vague, lacks detail and is often inconsistent with previous written statements. These deficiencies stem from multiple causes: witnesses’ lack of education, investigator errors, language interpretation, cultural divergences between the witnesses and courtroom, evasion or perjury. Crucial is that it is almost impossible for judges to separate one from the other and Combs therefore argues that international tribunals purport a fact-finding competence they do not possess. She concludes that international criminal trials appear on the surface to be western-style trials, but that they constitute a much less reliable fact finding mechanism. An additional complicating factor to

532 The most extreme example can be found in Rwanda, where hardly any relevant document exists on the execution of the genocide and the roles of individuals therein. Even video footage of the killings themselves or related events are extremely rare. Witteveen, ‘Dealing with Old Evidence’, pp. 71-72.
534 It poses a complex fact-finding challenge: the data of atrocity crimes is embedded in the fallible memories of people close to the violence, which in turn ultimately results in simplistic and distorted images of mass violence.
these fractures in the fact-finding process is that the brain endures physical and psychological erosion. Witness’ memories tend to simply be selective and poisoned with trauma and they often fade, distort or get influenced over time. This corrosion combined with the protracted proceedings leaves trial judges with the extremely difficult task of assessing witness credibility and reliability of the information rendered by witnesses and to ensure that the content of what has been said has been accurately conveyed in the trial setting.

The arena for international justice is the closed courtroom and its formal decorum. African witnesses travel miles away from home and end up in serene courtrooms where they are to perform an unfamiliar legal ritual, largely in the absence of supporters or spectators from home. Besides the often-frightening face-to-face meeting with the accused, the witnesses are confronted with robed judges and foreign lawyers who cross-examine them via invisible interpreters. The questions are complicated, direct and it is expected that the answers follow the same style. Sometimes it takes hours before it is established that witness “TFI1” or “XRA” walked from point A to B and that it took him about 5 minutes. Translations go from Kinyarwanda, Lingala, Swahili or Arabic into French and then into English. Very often, the very essence of testimony literally gets lost in translation. The translated words spoken however, find it to a final transcript. But once the witness takes the stand, her or his chronicle may only be channelled through the designated subject: the role of the accused in criminal activities. There is hardly any room for dwelling of topic. Contrary to the customary storytelling and narrative traditions of witnesses, international procedures limit the natural flow of narrative. They exclude everything deemed ‘inadmissible’ or ‘irrelevant’ to the crimes charged in the indictment and to the role of the accused therein. Although ‘Victims and Witness Support Units’ carefully take the witnesses through process of testifying, the very stage of the courtroom has often been hostile to international witnesses. Witnesses giving evidence at the UNICTR, SCSL and ICC have complained on being in the intimidating plain view of the perpetrators they are testifying against. Similarly, they have shied away from testifying about sexual violence before a gender-mixed panel and public they do not know. The very scenery often clashes with African customary law, which is more informal. Besides, particularly in the Francophone countries, it is often inquisitorial instead of adversarial.

Likewise, witnesses are often not accustomed to western fact-finding and legal discourse. Many witnesses from Rwanda, Sierra Leone or Congo are illiterate farmers, ‘bush’ soldiers or youngsters who often have a dissimilar reference framework and perception of time and space than the lawyers, prosecutors and judges questioning them. Some witnesses find it hard to testify as to

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542 At the ICTR and ICC, transcripts are only produced in the working languages, English and French, not in the local ‘African’ languages. At the SCSL, all the transcripts are in English, not in Krio.
544 Author’s observations.
545 Idem.
dates, time, distances or colours and others struggle to identify exhibits as maps, photographs and video’s. They often do not speak tribunal’s *lingua franca* French or English. Then there is the temporal distance between the crimes and the testimony: memories fade and details corrode while outside information interferes. A fundamental problem, however, is often the ‘witnessing’ itself. In several instances, witnesses have recounted facts or events they did not observe themselves but instead learned from others or via media.\(^{546}\) In all, most often, testimony lacks the desired detail and is often fuzzy.

Interpreting this oral testimony is problematic and there are many cultural factors that might disturb understanding this type of evidence. An often-cited problem is the mastered art of secrecy and evasion that Rwandans and Sierra Leoneans reportedly display. In their cultural life, directness or honesty is perceived as a weakness or sign of impoliteness. This inevitably challenges international fact-finders and judges. Who says what and what is true? In the end, foreign judges have to rule on the reliability and credibility of witnesses who appear before them. How do they do that when there is no documentary material to test their accounts? How to interpret this testimony? A judge is neither an anthropologist nor a psychiatrist. Some have acknowledged to problem. During the first cases at the UNICTR, judges therefore called in the assistance from anthropologists, sociologists, linguists and historians to guide them through Rwandan cultural practices. At the hybrid SCSL, the Sierra Leonean judges informed their international colleagues and often clarified issues with witnesses during testimony. The SCSL and UNICTR did identify the cultural differences and the problematic nature of witness testimony but were hardly able to put it to test. The ICC judges, in their first verdict do not explicitly deal with cultural factors while testing testimony but observed that they are to be extremely careful when there is doubt.

At the UNICTR, the trial chambers in the very first case, against Jean-Paul Akayesu, were clearest about their findings on cultural factors that could affect testimony at the tribunal: “[...] the interpretation of oral testimony of witnesses from Kinyarwanda into one of the official languages of the tribunal has been a particularly great challenge due to the fact that the syntax and everyday modes of expression in the Kinyarwanda language are complex and difficult to translate into English or French. These difficulties affected the pre-trial interviews as well as the in court translation of testimony.”\(^{547}\) When discussing hearsay or second hand witnessing, the tribunal observed it was at “times clarified that evidence which had been reported as an eyewitness account was in fact a second-hand account of what was witnessed.”\(^{548}\) In addition, the UNICTR heard expert testimony that “it is a particular feature of the Rwandan culture that people are not always direct in answering questions, especially if the question is delicate. In such cases, the answers given will very often have to be

\(^{546}\) Trial judges at the UNICTR recognised this problem, as they found: “Most Rwandans live in an oral tradition in which facts are reported as they are perceived by the witness, often irrespective of whether the facts were personally witnessed or recounted by someone else.” UNICTR, *Akayesu Judgement*, §155.

\(^{547}\) UNICTR, *Akayesu Judgement*, §145.

\(^{548}\) Ibidem, §155.
‘decoded’ in order to be understood correctly. This interpretation will rely on the context, the particular speech community, the identity of and the relation between the orator and the listener, and the subject matter of the question.\textsuperscript{549} In many of their judgements, however, judges omitted to highlight the instances where they considered these factors. Many mistakes have probably been taken for granted.

The rather isolated arena in which this testimony is provided often shields it from those affected by the crimes and public scrutiny. Trials are extremely inaccessible for most affected communities, not only because they take place far away from the crime scenes, but also many years after the events. While the performance space already irreversibly detaches the trial from society, there is another alienating factor. In theory international criminal justice is transparent, in practice however, the public only sees a glimpse of what takes place in the courtrooms. In Arusha, security personnel closed a blue curtain and sent the public home, in The Hague the electric blinds go down and the delayed web streaming would say “No Transmission: Closed Session”. These behind the curtain hearings of protected anonymous witnesses became the norm rather than the exception at the UNICTR.\textsuperscript{550} They are an erratic problematic feature of the fact-ascertainment process as it shields off those who testify from public scrutiny over the very truthfulness of their testimony.\textsuperscript{551} At the UNICTR, ICC and SCSL we only receive bits and pieces of the testimony and narrative through the trial process, despite the fact that tribunals are collectors, producers and archivists of oral testimonies and micro histories. In addition to that, witnesses were only allowed to relate on what their questioners deemed necessary. The alleged cathartic function of publicly testifying in international trials seems to fade. The arena of international justice is at times a hermetically sealed universe of tightly controlled and isolated testimony. This strikingly contrasts with the open-air Gacaca courts or the public hearings of the Sierra Leonean and Liberian TRC’s. The public staging of these processes are perhaps better-suited platforms for oral histories and personal experiences about mass violence.

Notwithstanding the restrictive environment in which trials take place, live trial testimony remains – as argued before- to be the foundation of international criminal justice. The trial is the site where controlled storytelling manifests itself and where different theories and narratives collide. The primary goal is to convince the judges beyond any reasonable doubt that a person is guilty or innocent. Prosecutors and defence teams select witnesses to substantiate their scripts. Each side tells a story and tries to convince the judge their version is the ‘true’ one. Testimony is presented and witnesses are cross-examined by opposing parties. To put it simply: there are generally three narratives during the trial. The prosecutor presents a detailed crime scene with the accused at its

\textsuperscript{549} Ibidem, §156.
\textsuperscript{550} Quantification of these instances proves to be challenging because a sheer amount of information is unavailable. A bulk of ICTR transcripts are not posted to the online Judicial Database (www: http://trim.unictr.org) but much testimony within the transcripts that are posted was held in closed sessions and show many redactions.
\textsuperscript{551} But for judges at the ICTR publicity did not seem to be a primary concern. As a former ICTR vice president, Judge Erik Møse once remarked in the media:

\textquotedblleft Public access is less important than the speed of the trial.\textquotedblright Quoted in: Thierry Cruvellier, Court of Remorse. Inside the International Criminal Tribunal for Rwanda (Wisconsin 2010), p. 53.
centre. The defence often downplays the crimes and presents the accused as a bystander or peace broker. Both parties present their narratives through witness testimony. The judge is to make findings on the witness’ credibility and the truthfulness of his testimony. As we have observed, this is already a delicate practice, which is further complicated by inter-cultural misunderstanding in most Sub-Saharan African atrocity trials.

Against this background, we have to observe the rise of a new kind of witnesses. Ever since the increasing number of Rwandans on trial in western countries under the norms of universal jurisdiction, some ‘regular’ witnesses have skilled themselves in testifying. After being heard in dozens of investigations they know what investigators want to hear and how they want to hear it. They are already familiar with the practice of western fact-finding. Then there is the eruption of the so-called NGO narrative. Humanitarian organisations working in conflict zones train people in the art of witnessing: people start to remember dates and time of atrocities. Post-war narratives are becoming formulas and standardised. Besides, there are witnesses who lie or tell half-truths. They do so for a variety of reasons. Some are triggered by feelings of revenge and would testify against anybody to get justice. More often, however, ‘witnesses’ see a way out of their miserable circumstances at home. Tribunals offer attractive daily allowances, protection and sometimes relocation – often with family members - to another country. Recognition as a victim and a witness at an international court thus offers advantages. But testifying on behalf of defendants can be beneficial as well. For example, three Congolese witnesses that came to testify at the ICC immediately sought asylum in The Netherlands and one simply ‘disappeared’.\(^{552}\) Another problem currently occurring at the ICC are witnesses who claim to have been paid or coerced to testify, or in the extreme case, to retract their testimony, either by the defence or the prosecution. At other times witnesses are deemed to ‘hostile’, uncooperative or unwilling to answer. These truth-traps make it difficult for judges to differentiate between genuine testimonies, made up stories, truths and half-truths and have given them reason to demand ‘better proof’ from prosecutors.

Meanwhile, some judges have sought creative solutions. ICC judges brought an entire trial chamber - including prosecutors, defence lawyers and victim’s representatives - along to the eastern Congolese village Bogoro for a judicial site visit.\(^{553}\) Some witnesses had testified in The Hague that they had seen the warlords Germain Katanga and Mathieu Ngudjolo Chui orchestrate an ethnic massacre in 2003. The witnesses had fled the attack and saw the killings from a nearby hill. The judges themselves climbed up the hill to verify if the witnesses could have physically identified


people from there. To see is to believe is their credo. Other trial chambers are considering holding *in situ* hearings, hoping for public exposure and scrutiny.

This overall situation poses epistemological questions. If convictions before tribunals indeed have uncertain foundations – what position do we take towards the products of the international trial? How to value these testimonies, judgements and facts? If the recollection of modern mass crime in non-western contexts is embedded in the memory of witnesses and if these recollections can be seriously fractured, misinterpreted or orchestrated what kind of narrative then do they establish? What is its use in the criminal trial? How to deal with them? What is their implication for the historical record of mass crime? And last but not least, how to discern this from the trial record?

### 2.12 Trials and Trial Records as Historical Sources

After having outlined the conceptual framework of this dissertation, the following paragraphs discuss the trial record and archives of international criminal tribunals and its promises and pitfalls of its use as historical source. In light of the tribunalisation of mass atrocities and at the closure of some tribunals, this question becomes pertinent. In December 2015, the UNICTR’s Appeals Chamber delivered its final judgement and shape shifted into the Arusha branch of the UN’s Mechanism for International Criminal Tribunals (UNMICT). Other tribunals, like the SCSL and the Special Panels in East Timor have already finalised their mandates, while the UNICTY and the short-lived Extraordinary African Chambers (EAC) are winding down. At the same time, a plethora of courts, like the ICC, the Extraordinary Chambers in the Courts of Cambodia (ECCC) and the Special Tribunal for Lebanon (STL) are in full operation. At this transitional juncture, lawyers and judges make room for archivists and historians. Archivists become the custodians of the court record and historians stand in line to consult them as source material for research on the trials themselves as well as the conflicts they have adjudicated. Whereas some of the international courts have already started to include archivists already during the process, historians similarly do not only step in after the events. Importantly, it ought not just the post-trial trial record that should interest historians, but also the trials themselves as well as the pre-trial proceedings. In these specific areas, historians assess the retroactive processes, methodologies and subsequent possible biases of fact-finding and truth ascertainment on the past. Moreover, understanding the trials, such as in the case of Laurent Gbagbo,

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554 The importance of adequate on-ground investigations cannot be underestimated. Nancy Combs points out that in three of the five ICTR trials in which defendants were acquitted, the Trial Chambers made on-site visits to the Rwandan crime scenes. By contrast, such on-site visits were made in only four of the eighteen ICTR trials that resulted in convictions. Combs, *Fact-Finding Without facts*, pp. 148.


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in which history and historical narratives are enticed, invoked and debated, is crucial to the appreciation of the trial record, to understand as well, the very birth of the trial record and its credentials.

Tribunals entice, collect, present, question and review testimony about the past as well documents from the past, for legal purposes and through a legal lens. As argued, atrocity trials and their end judgements may lead to historically empty narratives, yet importantly, as they unravel history, at minimum previously undetermined facts are exposed in testimonial stories, guilty pleas and evidence that may transpire in the larger realm of a tribunal.558 For instance, the UNICTY established beyond legal dispute that, during 1994, there was a genocidal “campaign of mass killing intended to destroy, in whole or at least in very large part, Rwanda’s Tutsi population.”559 Besides these kinds of significant historical conclusions, courts collect a wealth of historically relevant sources. Amongst many other things, they also exhumed forensic evidence through forensic investigations, DNA tests or ballistics analysis that have been carried out by professional experts on demand of tribunals.560 But they also produce historical sources: particularly witness testimony. Amongst the most interesting achievements of the international courts, is that they have established a massive repository of oral history on mass violence, although, again, through the very limited lens of criminal procedure.561

As argued, trials are creative processes and bring about normative experiences. They end with the trial record, a legacy of documents. Being convinced and accepting that the trial record is an invaluable source for historians; it should preferably not be our only reference. Understanding how it came about is perhaps equally important: how was the trial record established, who established it and under what conditions? We also should know what made it to that record and what did not? And why were these decisions made? The publicly available trial record is only a part of the trial record.562 Confidentiality agreements and sometimes censorship through redactions, witness protection or agreements with third parties are problematic bars for historians. Another bar for

559 UNSC, Report on the completion of the mandate of the International Criminal Tribunal for Rwanda, §55; UNICTR, Karemera, Ngirumpatse, Nzirorera: Judicial Notice.
561 For instance, approximately 11.100 witnesses, including multiple and video-linked testimonies and support persons, have testified and assisted the ICTY (7,700) and ICTR (3,400). (www-text: http://www.unictr.org/en/about/witnesses; last visit on 9 May 2016).
562 For instance, the UN’s Mechanism for International Criminal Tribunals (UNMICT), tightly controls all inactive records and archives of the UNICTR, UNICTY and the UNMICT itself. Exempt from disclosure are: (a) Records and information received or transmitted on a confidential basis or with the expectation of confidentiality, including any confidential information from or sent to third parties; (b) Records and information whose disclosure is likely to endanger the safety or security of any individual, violate his or her rights or invade his or her privacy. This shall include records and information related to the protection of witnesses, victims and other vulnerable individuals referred to in the evidence presented before the ICTR, ICTY or Mechanism or otherwise related to the judicial process, including records which contain information which, if disclosed without appropriate authorization, would reveal the identity and location of protected witnesses, victims and other vulnerable individuals. This shall also include personal information related to persons, or families of such persons, who have been or are currently detained by the ICTR, ICTY or Mechanism; (c) Records and information whose disclosure is likely to endanger the security of Member States or prejudice the security or proper conduct of any operation or activity of the United Nations; (d) Records and information covered by legal privilege or related to internal investigations, including judicial records classified by the submitting party or by order or decision of Chambers as “confidential” or “strictly confidential” and all information related to the deliberations of Chambers, as well as the records and information of the OTP which, if disclosed without appropriate authorization, would jeopardize investigations or prosecutions; (e) Internal inter-office or intra-office documents, including draft documents, if disclosure would undermine the Mechanism’s free and independent decision-making process; (1) Commercial records and information, if disclosure would harm either the financial interests of the Mechanism or those of other parties involved; (g) Other kinds of records and information, which because of their content or the circumstances of their creation or communication must be deemed confidential. United Nations, Mechanism for International Criminal Tribunals (UNMICT), Access Policy for the Records held by the Mechanism for International Criminal Tribunals (UNMICT/17; 12 August 2016).
historians, after twenty years of international atrocity trials is that the trial records of the tribunals have grown to such enormity that it is an indigestible labyrinth for newcomers. Aside from the millions of pages of evidence, testimony, motions, decisions and judgements, the trial against Charles Taylor and Radovan Karadzic, for example, also produced thousands of pages of transcripts, worth months of reading. Even the experienced judge, assisted by a dozen staff members, needs time. In the ten-year trial against the Serbian nationalist politician Vojislav Sešelj, judge Mandiaye Niang, who replaced a colleague after the trial was closed, took 1.5 year to “familiarise” himself with the case record, on the basis of which he had the pronounce a judgement. Robert Donia, a historian who testified for the UNICTY’s prosecution and wrote a biography on Karadzic for instance explained that over the years, he was only able to sift through a segment of the evidence. Thus, in tandem with the immediacy of trial proceedings and the continuous creation of new records, trial observers may be crucial to our understanding of trials, in lieu of the trial record. A pioneer in this respect is Hannah Arendt. In her journalistic observations, representations and opinions in the New Yorker about the Eichmann trial in Jerusalem, she not only showed that trials are dynamic processes and historical events on their own, but also their banality. From my own experience, covering proceedings since 2003, I came to understand that, in all respects, trials are real-time performances, which require real-time observation and study – their meaning gets lost when read from the armchair at university offices or legal libraries. Unfortunately for the post-trial researcher, most of the courtroom drama and theatrics cannot be captured in legal filings, written testimonies and documents, or out of their context. From the transcribed trial record, we cannot see the tears, hear the voices of witnesses or feel the tension in the courtroom and public galleries. For example, from the transcript we cannot read: the applause by Gbagbo supporters in the ICC’s public gallery when ‘their defendant” made a court entrance; that the Rwandan singer Simon Bikindi sang his closing statements at the UNICTR; and how Thomas Lubanga through his intense staring confused a former child soldier witness who accordingly recanted his testimony at the ICC. These trial events are often not even captured on the redacted video- or audio recordings, which are recorded, edited and distributed by the courts. Legally speaking, these things may be irrelevant, but for the social sciences and historians who need to contextualise their sources these are crucial. In this respect, one would bring back to memory the popular saying that ‘journalism is the first draft of history.’ At the UNICTY, trials were relatively continuously covered by journalists from the region as well as by the international press corps. At the ICC, which deals with an increased case-load from many situation countries, the reporting by

563 Only see the Judicial Records and Archives Database (JRAD), which provides access to all UNMICT public judicial records, as well as to the public judicial archive records of the ICTR. The JRAD includes filings from parties and non-parties to trials; exhibits tendered in court; transcripts and audio-visual recordings of court hearings. Available at: http://jrad.unmict.org.
565 Donia, Radovan Karadžić; ‘Interview Robert Donia’.
566 ICC, Gbagbo - Blé Goudé Transcript (28 January 2016).
567 As observed by the author on 30 September 2009.
568 ICC, Lubanga Dyilo Transcript (28 January 2009).
locals’ is mixed, while international journalists are increasingly organised and specialised.\textsuperscript{570} For the more obscure or distant trial settings that was not the case. Conceivably, we owe it to the endeavours of contemporary independent investigative journalists like Thierry Cruvellier that we know at least some critical details about the many trials and errors at the UNICTR in Arusha between the crucial years of 1997 and 2002.\textsuperscript{571}

Arendt, Cruvellier and many other investigative reporters were capable of providing critical understanding into these daily realities of the trial, vital data that can hardly be distilled from the trial record or from the pre-selected official “outreach” of the tribunals.\textsuperscript{572} Observers also highlight the critical moments in trials, which in daily reality are tirelessly boring, banal and disillusioning. But there is something else. The post-trial researcher can of course use the official court transcripts, videos and audio from the trial record to corroborate basic facts, like quotes, dates and names etcetera. But regrettably, the trial record is not always complete.\textsuperscript{573} Often because evidence was not used at trial, documents are confidential, or huge parts of the trial took place behind closed curtains or because documents were later redacted, or in the most extreme cases because it was censored. For instance, only those present at the delivery of judgement in Charles Taylor’s trial, including the author, were witness to the strong disagreement from the alternate judge. Malick Sow, from Senegal, who had sat through the entire trial, said he found the prosecution case was “not proven beyond any reasonable doubt” and that “there had been no deliberations” and that he feared the international justice system “was heading to disaster.”\textsuperscript{574}

But, during his statement, the tribunal was quick to cut off the microphone and lower the blinds in the public gallery. Afterwards, his statements were deleted from the court’s video record and from the court transcript. His name was initially not even published on the written Judgement.\textsuperscript{575}

These deliberate erasures from the trial record are disturbing. But there are other, more ordinary, elements that we will not find in the transcripts or videos. These include judges and other court staff, who fell asleep during the proceedings or battle out personal arguments amongst themselves behind the screens. But there is more. We cannot scrutinise Judges’ deliberations and look into their notes. These are private and secret. Similarly, we cannot see the various draft judgements with different scenarios that are usually produced by a batch legal officers and interns. These are probably electronically deleted or physically destroyed. Also, we do not see the non-verbal power

\textsuperscript{570} Through the Association of Journalists at the ICC (AJICC). Amongst several other media, there is a specialised website, which monitors at the proceedings at the ICC, in the Guatemalan genocide trial against Efrain Rios Montt as well as the Khmer Rouge trials at the ECCC: Open Society Justice Initiative, International Justice Monitor (www-page: http://www.ijmonitor.org).

\textsuperscript{571} Through his writings and those of a handful of other journalists in the subsequent magazines Diplomatique Judiciaire and the International Justice Tribune (IJT), whose archives are available at: https://www.justicetribune.com. Cruvellier’s reporting in Arusha formed the basis for his book on the ICTR: Cruvellier, Court of Remorse.


\textsuperscript{574} El Hadj Malick Sow, ‘Oral Statement’ (Leidschendam, 26 April 2012) on file with author. Also see an interview with Sow: ‘Justice Sow: Charles Taylor should have walked free’, New African (December 2012), pp. 46-53.

plays in the courtroom – for example between the accused persons and witnesses. We cannot read those from the written transcript. Next to that, post-trial researchers, cannot deduce from the trial record those lawyers and prosecutors who were on Facebook, Twitter or Instagram while their colleagues were cross-examining their witnesses. The latter may sound entertaining, but these are serious things that happen during war crimes trials. And we may only know about these things because independent observers or journalists witnessed them from the public galleries overlooking the courtrooms. Perhaps it is a cliché, but it is a very important one, particularly when studying international criminal justice, which in itself is a self-referential system. When using trials and the trial record as historical sources, we should always observe, read and analyse the trial record in tandem with independent and impartial first-hand reports and observations, preferably outside of the legal realm, because it provides critical context and is likely to fill gaps of information we do not always get through the official channels of the officially distributed court records.

Now, shifting away from the trial itself, there is another lacuna in the trial record. It concerns the records that were collected, selected and produced in the lead up to the trials: the investigations and the gathering of evidence. All tribunals start with sending investigators to the field. They conduct the first interviews, locate documents in dusty archives, follow leads, stumble upon various crime scenes, conduct exhumations, talk to low-level perpetrators, tap phones, collect materials from intelligence agencies, government agencies and UN peacekeeping missions, conduct forensic analysis and what more. Arguably, from a historian’s point of view, this is one of the most interesting elements of the work of a tribunal, because, it deals with the fundamental collection of facts, evidence and testimony. But it is also the least transparent part of the tribunal’s work and it seldom finds its way to the public trial record. This is the case both for the prosecution and for the defence and it creates a black hole in the trial record. Often we do not know anything about the investigators, their professional background, their methodologies and even their own reliability and objectivity.576 We know little about investigation decisions: how to investigate, when to investigate, where to investigate, who to investigate? This automatically also counts for when not to investigate, where not to investigate and who not to investigate. In the court records and tribunal’s archives, we do not find minutes of meetings of investigative teams, decision by chief investigators and investigator’s notebooks. In conjunction, the trial record does not disclose the early testimonies collected during the initial investigations, mostly because they were not introduced as evidence in the trials. More importantly, the prosecution, defence and the chambers’ archives are not an integral part of the publicly available court archives and we therefore miss a lot of valuable information. It is only quite recently that we are becoming more aware of the methodologies applied in these vital areas of

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576 At the ICC, for instance, this is confidential, including the Operations Manual. Author’s email exchange with Michel de Smedt, the ICC’s Head of Investigations, 15 May 2015.
The ICC, in its three Judgements, has opened up an interesting insight into the prosecutor’s investigations in the Democratic Republic of the Congo. Particularly, the Lubanga judgement is interesting in this respect. But we also continue to learn more in the Kenyan cases as lawyers have been calling for an independent investigation of the OTP’s modus operandi of alleged witness tampering. Thus, as the trials continue, the trial record expands and our understanding of it increases.


Bouwknegt, ‘How did the DRC becomes the ICC’s Pandora’s Box?’.  
ICC, TC V (A), *Situation in the Republic of Kenya in the case of The prosecutor v. William Samoei Ruto and Joshua Arap Sang: Public redacted version of “Ruto defence request to appoint an amicus prosecutor (ICC-01/09-01/11; 2 May 2016).*
2.13 Conclusions

This chapter has operationalised described, defined and demarcated terminology, concepts and frameworks. It then has outlined the debate that provides the contextual framework of the key elements of this thesis.

First, to sidestep pointless dwelling on definitions on genocide, crimes against humanity and war crimes which are interchangeably – and often confusingly and instrumentally - used in public, policy and academic vernaculars, I understand these events as criminal offences as defined in the Genocide Convention, the Geneva Convention and the Rome Statute. Conceptualising mass violence as atrocity crimes specifically or mass atrocities more generally serves two purposes. First, as a legal concept, it is clear which broad range of crimes are covered, without continuously having to refer to specific details if not particularly necessary. Secondly, applying the term to different historical events, contexts or processes, it remains clear under what comparative legal framework these can be understood. Furthermore, I employ the term mass atrocities, both for recent historical events as well as remote historical events. The first belongs to the legal realm, the latter to the historical. In consistency with all the above, when discussing trials, I will employ the term atrocity trials, rather than the somehow standardised, yet often misapplied, terminology of ‘war crimes trials’. Also, when discussing truth commissions, the scope is limited to the arena of mass atrocities. Similarly, I also set out to employ the terminology of mass atrocities in broader discussions on transitional justice and similar responses to either recent or remote historical episodes of mass violence.

Secondly, I have also sought to demarcate the ambiguous concepts of transitional justice. In all, I understand transitional justice as the acquired diversity of human rights related practices, mechanisms, policies and trepidations guiding societal and political transitions, aimed at confronting real or perceived injustice. Furthermore, in order to come to a more complex, detached, understanding of transitional justice, I have argued that the systems’ mechanisms can also be ignored, deficiently executed or managed, neglected, misplaced or utilised by political agents for much less lofty goals than prescribed in the cosmopolitan dogmatic human rights discourse to reach the contrary or they can turn out not to have these intended effects at all. In sum, transitional justice is inherently political and its mechanisms are therefore open to uses, abuses and manipulations in order to achieve other goals than the human rights it claims to serve. For the sake of clarity and useful empirical operationalisation, I have departed from the use of transitional justice as academic framework and rather opted to treat transitional justice endeavours as historic phenomena, or historical rites de passage: case, local and culturally specific cleansing rituals guiding deep-rooted social and/or political change from widespread atrocity violence to the absence thereof. In this dissertation, the particular rites de passage researched are criminal trials. Additionally, I have argued transitional
justice is a viable academic concept and can solely be convincingly investigated only if approached in a dispassionate, amoral, non-juridical and apolitical way to the largest extent possible.

Third, within the above understanding of transitional justice, I have discussed the two prime transitional justice mechanisms that are occupied with questions on historical truth finding: truth commissions and atrocity trials. I have argued that truth commissions, as a mixture between pseudo-accountability mechanism and pseudo-historian, operate within the legal framework of the right to know about legally framed atrocities and that prosecutions serve the punitive demands of transitional justice. I then turned to the broader discussion on the problematic relationship – as a forced marriage - between history writing and adjudicating historical events. I have argued that lawyers simply have a different relationship with the past than historians. Disparate from professional historians, lawyers like to make – and become part of - history themselves, tweak historical narratives according to their argument and like history – like law – to be static. Thus, for the historian history is object and objective while for the lawyer history is subject and subjective. Furthermore, I have shown that a key limitation to truth finding in the trial setting is the dependency on witness testimony. I have problematised the foundational problem that in geographically and temporally remote, unfamiliar and mostly non-documentary contexts, answering seemingly simple, yet basic, questions like what happened to whom, where and when already proves to be problematic and that courts appear to be less competent chroniquers about mass atrocity as is generally believed. In this apparent modus operandi of ‘fact-finding without facts’, I then question what position do we take towards the products of the atrocity trials: the trial record.

Fourth, this dissertation has thus far shown the promises and pitfalls of its use of court records as historical source. Despite the shortcomings discussed above, the tribunals have contributed to establishing facts beyond any legal dispute. But besides these kinds of significant historical conclusions, courts also collected, produced and brought together a wealth of historical sources: particularly witness testimony. For historians, the trial records and court’s archives are a unique source in studying mass atrocity, although there may be problems as to confidentially, accessibility and the sheer volume of court material. I have argued, for a variety of reasons, that despite the enormity, court records ought to be read in context and using non-court sources, particularly in those instances where proceedings took place behind closed doors or where the court record is censored otherwise. Historians studying mass atrocities and the subsequent dealings with those mass atrocities by courts and other transitional justice mechanism ought to act careful in using these sources. During and after these trials, we ought to be diligent that the expanding trial records ultimately settle in the histories of mass violence and mend into historiographies of atrocious past of individual conflicts. Thus, while the trial record is an invaluable source for historical research on the situations of mass violence they have adjudicated as well as their discussions on the past, interesting, vital and sometimes deliberate lacuna’s remain and thus ought to be cautiously read with informed knowledge
about why, how and under which circumstances they came and in conjunction with independent third-party primary sources.
3. Tribunalising the past. African mass atrocity trials

[...] until the basic human rights are equally guaranteed to all without regard to race - until that day, the dream of lasting peace and world citizenship and the rule of international morality will remain but a fleeting illusion.

- Haile Selassie I

3.1 Introduction

Writing about mass atrocity, atrocity trials and transitional justice in Sub-Saharan Africa\(^{582}\) necessitates at minimum some synopsis and deliberation on the history of atrocity on the continent and its reverberations, if any.\(^ {583}\) Abundant countries on the African continent have experienced a form or sometimes a mixture of a repressive state, war or mass violence, occasionally enduring into the present.\(^ {584}\) Bearing in mind the circumscribed scope of this study, however, the underneath passages do not aim to historically survey the entirety of violent conflicts and mass murders in Africa, let alone their transitional justice responses. Others have done so already, in bright and comprehensive studies.\(^ {585}\) In its place, I will only present a cursory sample of cases of remote and recent mass atrocities and roughly structure them into three timeframes: pre-colonial (pre-1884), colonial (1884-1960) and post-independence (1960-2015). Alongside, questions of transitional justice in relation to these events will be addressed.

Africa, contrary to colloquial belief, is neither a country nor an ahistorical continent.\(^ {586}\) Scattered around the colossal geography, Africa’s 54 states’ social and political make-up and local situations differ significantly. Still, some baseline analogies can be extracted. First, except for the Liberian and Ethiopian republics, all African states were moulded by European expansionism, colonialism and exploitation.\(^ {587}\) Its traces are detectable in the continents’ physical borders,\(^ {588}\) economic designs, political systems, social identity categories and persistent donor reliance. Next to

\(^{581}\) UNGA, Eighteenth Session, Address by His Imperial Majesty Haile Selassie I, Emperor of Ethiopia, 1229\(^{\circ}\) Plenary Meeting (A/PV.1229; 4 October 1963), pp. 3.

\(^{582}\) Roughly, Africa can be divided into five sub-regions: North Africa, West Africa, East Africa Central Africa and Southern Africa. When using the, although ambiguous, term Sub-Saharan Africa, I particularly mean West-, East– and Central Africa.

\(^{583}\) The legal and social science literature on transitional justice in various African countries is abundant, yet no comprehensive historical overview exists so far.


\(^{587}\) Famously, Georg Hegel remarked that Africa has no history: “At this point we leave Africa, not to mention it again. For it is no historical part of the World: it has no movement and development to exhibit”. Georg Wilhelm Friedrich Hegel, The Philosophy of History (New York: Cosimo Classics, 2007), p. 99.

Peripheral fertilisation, most post-colonial African states went through a gradual fruition from despotic, military or one-party systems towards democratic electoral competition from the 1990s onwards. The third locus is violence. Through all three timeframes, wars, rebellions, coups, insurgencies and atrocity violence contoured the public aura of Africa, as a bloodstained continent. Evidence suggests that two-thirds of post-independence states on the continent saw some kind of armed combat, which in some instances slipped into mass killing of civilians (38%). But since the late 2000s, large-scale violence has been declining and wars have been altering: they became small-scale, peripheral, border crossing and typically implicate factionalised insurgents, militia, para-militaries, mercenaries and criminal bands. New as well is regionalised Islamist terrorism, evidenced by the rise of groups like Al Qaeda in Sudan, Al Shabaab in Somalia, Boko Haram in Nigeria, Al Qaeda in the Islamic Maghreb (AQIM) in Mali and the Islamic State in Iraq and the Levant (ISIL; a.k.a. ISIS or IS) spreading from north Africa.

3.2 Remote mass atrocity and the advent of transitional justice in Africa

But the past never dies. Africa went through fundamental transitions in the past four centuries. In all, various past incidences of mass atrocities across the continent could – retroactively – well fit the different operative legal concepts of atrocity crimes: genocide, crimes against humanity and war crimes. Bearing in mind the imprescriptibility of this index of atrocity, countless past incidents could possibly be inscribed. Arguably, the so-called ‘white man’s burden’ in Africa can be read as a form of cultural genocide; a policy of attempted forced cultural assimilation of ‘savage’ African peoples by ‘civilised’ Europeans. Ancient political, social and spiritual orders were – partly or wholly - extinguished and substituted by norms, values and laws inspired by western Judeo-Christian values, the Enlightenment and social Darwinism. Commerce was also devastating. Now lucidly outlawed as crimes against humanity, the large-scale abduction, imprisonment, deportation, forcible transfer and enslavement of millions of African civilians and its encompassing murder, torture, sexual violence, inhuman acts and subsequent apartheid in the ‘new world’ is ingrained in the historiography and collective memory in African countries and throughout diaspora communities. Now often dubbed the ‘African Holocaust’ or Maafa, the Trans-Atlantic slave enterprise between the 16th and 19th century is perhaps one of the largest crimes of dehumanisation in the history of mankind. Yet, this

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590 Strauss, Making and Unmaking, pp. 89-91.
592 Nick Ridley, Terrorism in East and West Africa. The Under-focused Dimension (Cheltenham: Edward Elgar Publishing Limited, 2012); ‘Libya’s new agony; The spread of Islamic State’, The Economist (21 February 2015), pp. 44
595 Rome Statute, art. 7 (c).
596 ‘Enslavement’, Rome Statute, art. 7 (c). ‘Enslavement’ means the exercise of any or all of the powers attaching to the right of ownership over a person and includes the exercise of such power in the course of trafficking in persons, in particular women and children.
dark chapter remains an obscurity within the genocide framework, as one of the silences in mankind’s graveyard.\footnote{Adam Jones, \textit{Genocide. A Comprehensive Introduction}, Second Edition (London & New York: Routledge, 2011), pp. 39-42.} Transitional justice has remained largely absent, apart from moral apologies.\footnote{Some scholars have called for reparations and even a truth commission to tackle the legacy of Slavery: Rhoda E. Howard-Hassmann & Anthony P. Lombardo, \textit{Reparations to Africa} (Philadelphia: University of Pennsylvania Press, July 2008), pp. 1-18.} Memorialisation on the slave trade was debated during the World Conference against Racism, Racial Discrimination Xenophobia and Related Intolerance in 2001, in Durban, South Africa. In its concluding declaration, states acknowledged that slavery is a crime against humanity and called “upon States concerned to honour the memory of the victims of past tragedies and affirm that, wherever and whenever these occurred, they must be condemned and their recurrence prevented.”\footnote{UNGA, \textit{Report of the Special Rapporteur in the field of cultural rights, Farida Shaheed: Memorialization processes} (A/HRC/25/49; 23 January 2014), p. 34.} Noting that some had taken steps expressing regret, remorse or apologies, they called upon other states concerned to honour the memories of the victims of past tragedies.\footnote{UNGA, \textit{Memorialization processes}, p. 34.} But the deliberations were particularly stormy, as some Western countries feared that an obligation to express repentance would lead to increased claims for financial compensation.\footnote{UNGA, \textit{Report of the Special Rapporteur in the field of cultural rights, Farida Shaheed: Memorialization processes} (A/HRC/25/49; 23 January 2014), art. 98-101.} Internationally, the process of recognition and remembrance has been painstaking. Yet, in early 2015, a permanent memorial to the victims of slavery and the transatlantic slave trade was erected at the UN’s headquarters in New York. Named the ‘Ark of Return’, UN Secretary General Ban Ki Moon, expressed the hope that “this poignant and powerful memorial helps us to acknowledge the collective tragedy that befell millions of people. It encourages us to consider the historical legacy of slavery and, above all, it ensures that we never forget.”\footnote{‘UN unveils permanent memorial to victims of transatlantic slave trade’, \textit{Press Release}, 25 March 2015.} Africans were also part in the slave trade arrangements, raiding, kidnapping and retailing ‘human cargo.’ It was thus not just outsiders who inflicted mass atrocity and agony in Africa. In pre-modern Africa, many brutal wars were fought between indigenous peoples, tribes, clans, chieftdoms, kingdoms or other group-entities.\footnote{Timothy J. Stapleton, \textit{The Military History of Africa}, Vol. One: The Pre-Colonial Period: From Ancient Egypt to the Zulu Kingdom (Earliest Times to c.1870) (Westport: Praeger Security International, 2013).} Most have remained unaccounted for in a transitional justice setting, nationally as well as internationally, although even in the framework of the mass atrocity lexicon, etymologically, the term genocide has a resilient antecedent in Zulu: \textit{Izwekufa}.ootnote{“Death of a Nation.” The term stems from the Zulu “izwe” (nation, people, polity) and “ukufa” (death, dying, to die). Izwekufa is very identical – in meaning and etymology – to genocide. Michael R. Mahoney, ‘The Zulu kingdom as a genocidal and post-genocidal society, c. 1810 to the present’, \textit{Journal of Genocide Studies}, Vol. 5, No. 2 (June 2003), pp. 251-268: 255; Jeremy Sarkin, \textit{Colonial Genocide and Reparations Claims in the 21st Century. The Socio-Legal Context of Claims under International Law by the Herero against Germany for Genocide in Namibia, 1904-1908} (Westport: Praeger Security International, 2009), p. 99.} Shaka Zulu’s forces labelled their vicious operation of empire building and rampant annihilation of peoples between 1810 and 1828 in present-day South Africa and Zimbabwe as such. Zulu armies often aimed not only at defeating enemies but also at “their total destruction.”\footnote{According to contemporary reports, in 1928, Shaka literally destroyed the Ndwandwe tribe which numbered at least 40,000. Cited in: William D. Rubinstein, \textit{Genocide} (Abingdon: Routledge, 2014), e-book.} Those exterminated included not only whole armies, but also prisoners of war, women, children, and even dogs.\footnote{Mahoney, ‘The Zulu kingdom as a genocidal and post-genocidal society’, p. 254.} Southern Africa was further engulfed by violence and demographic and social transformation after Shaka became emperor...
of the Zulu Kingdom in 1817: the Mfecane.\textsuperscript{608} Reaching genocidal proportions, this period of exterminatory warfare between various peoples cost the lives of an estimated two million people in the 1820s and 1830s. Infamous were the widespread killings, forced migration and ethnic reorganisations by the forces of Matabele king Mzilikazi.\textsuperscript{609} In all, the mass killings in Southern Africa have been largely forgotten and appear only as footnotes in the genocide studies and transitional justice literature.

But explorer’s violence sustained in Southern Africa and more dazzlingly in Central Africa. At the turn of the twentieth century, the self-styled philanthropic Belgian monarch, Leopold II, carved out his own private colony at the promise of his Congo being a free trade zone between the Great Power’s colonial interests in Africa.\textsuperscript{610} Ivory was first on Leopold’s mind but soon John Boyd Dunlop’s invention of the inflatable rubber tire in 1888 generated an astronomical need for rubber. Congo was full of gum trees and profits were huge. But they came at the cost of Congolese lives. Abuse eclipsed in the ‘heart of darkness’, which saw the “vilest scramble for loot that ever disfigured the history of human conscience and geographical exploration.”\textsuperscript{611} Congolese were fatally beaten or whipped for failing to meet rigid production quotas for ivory and rubber reaps, imposed by Leopold's agents. In the deadly corvée system, many were worked to death, forced to slave-like labour as porters, rubber gatherers or miners for little or no pay.\textsuperscript{612} Murder was casual too and hands of those shot were amputated as proof ammunitions had been used to shoot a person and not for game hunt.\textsuperscript{613} The ‘Lokeli’\textsuperscript{614} led to “a death toll of Holocaust dimensions;”\textsuperscript{615} such that “Leopold’s African regime became an epitome for exploitation and genocide.”\textsuperscript{616} Adding the deaths caused by diseases introduced by the Belgians and sweeping famines,\textsuperscript{617} Leopold’s ‘rubber terror’ abridged the Congolese populace by half – between 8 to ten million Congolese died.\textsuperscript{618} Although no clear policy of intentional extermination of a particular group in Congo existed, “but it was definitely a hecatomb, a massacre at incredible scale […], a sacrifice on the altar of the pathological pursuit of profit.”\textsuperscript{619} Whether the atrocities in Congo are recognised as genocide or not,\textsuperscript{620} Raphael Lemkin, a pro-

\textsuperscript{608} In Zulu: “crushing”. In Sesotho (Difaqane): scattering, forced dispersal or forced migration.
\textsuperscript{609} For general accounts: Arthur Keith, The Belgian Congo and the Berlin Act (Clarendon Press, 1919); Martin Ewans, European Atrocity, African Catastrophe: Leopold II, the Congo Free State and its Aftermath (Routledge, 2002), pp. 95-103.
\textsuperscript{614} Hochschild, King Leopold’s Ghost, p. 4.
\textsuperscript{615} Martin Ewans, European Atrocity, African Catastrophe: Leopold II, the Congo Free State and its Aftermath (London: Routledge Curzon, 2002), p. 3.
\textsuperscript{616} Kakutani, ‘King Leopold's Ghost’.
\textsuperscript{617} Hochschild, King Leopold’s Ghost, pp. 225-233.
\textsuperscript{618} Reybrouck, Congo, pp. 90-91.
\textsuperscript{619} The genocide question has lingered for a long time. A full historical investigation has not transpired in Belgium so far, despite promises to do so. The Belgian government has never acknowledged it as such well, despite a British motion that called “upon the Belgian government to publish all the evidence that is available and to apologise to the people of Congo for the tragedy of King Leopold’s regime, which can only be classed as genocide.” “House of Commons, ‘Early day motion 2251: Colonial Genocide and The Congo’ (24 May 2006).
colonialist with racist views on African peoples, included the Congolese case in his historical reference to genocide, although tracing the atrocities back to African “native militia” whom he described as “an unorganized and disorderly rabble of savages [...].”

At the time, however, a type of transitional justice *avant la lettre* was playing out and ultimately led Leopold to sell off his property. Reports on the systematic and widespread human rights abuses from the far-off country and calls for accountability only surfaced gradually. Talking about crimes against humanity, George Washington Williams was the first, a north-American historian and lawyer, who called on Leopold to “answer at the bar of Public Sentiment for the misgovernment of a people, whose lives and fortunes were entrusted to you.” Edmund Dene Morel, a former British shipping-company employee and journalist, publicly pondered why ships filled with rubber and ivory arrived in Belgium only to set sail back to Congo with hardly any other cargo than guns, chains, ordnance and explosives. In 1904, Morel’s friend Roger Casement, an Irish member of the British consular service, sent home a stream of dispatches about the atrocities to the British parliament. Hoping to counter the swelling criticism, the King himself directed an international commission of inquiry to Congo to “investigate whether, in certain areas, acts of abuse were committed against natives, either by individuals or by state officials, possibly report useful improvements and to formulate, in case the investigation would have found abuse, proposals on the best ways to end it for the welfare of the inhabitants and good government of the territories.” But the Belgian, Swiss and Italian magistrates operated as a truth commission *avant la lettre*. The team organised public sessions, hearing hundreds of testimonies, bundling complaints and unravelling the commercial embroidery of Leopold’s outpost. It was the nail in the coffin. In 1908, Leopold effectively sold Congo to the Belgian government but destroyed his tracks before handing it over. He had the Free State archives burned before the takeover by its new owner. Reportedly, they “[...] burned for eight days turning most of the Congo state records to ash and smoke in the sky over Brussels” and Leopold said he “will give away my Congo [...] but they have no right to know what I did there.” Up to present, the ‘Congolese question’ of Leopold’s mass atrocities remain largely unaddressed in Belgium.

623 Although the literature does not use the terminology of transitional justice, it does describe a process that resembles some of its key features. See, for instance: Martin Ewans, *European Atrocity, African Catastrophe*, pp. 175-234.
625 Reybrouck, *Congo*, pp. 96-97. Morel was a fierce critic and member of the Congo Reform Association. He authored two books on Congo: ‘King Leopold’s Rule in Africa’ (1904) and ‘Red Rubber’ (1906).
626 Roger Casement, ‘On the Administration of the Congo Free State, 1903’ in *British Parliamentary Papers*, LXII, Cd. 1933 (1904); Kakutani, ‘King Leopold's Ghost’.
629 'Rapport De La Commission D'enquéte.'
Whilst the Congolese ‘blood rubber’ condition was ruffling feathers and heating up heads, a harsh extermination war was unleashed in German South-West Africa (GSWA), present-day Namibia.\(^{632}\) Hunting season on the Herero people was opened by an explicit order issued by General Adrien Dietrich Lothar von Trotha in October 1904:

> Ich, der große General der deutschen Soldaten, sende diesen Brief an das Volk der Herero. Die Hereros sind nicht mehr deutsche Untertanen […] Das Volk der Herero muß jedoch das Land verlassen. Wenn das Volk dies nicht tut, so werde ich es mit dem Groot Rohr dazu zwingen. Innerhalb der Deutschen Grenze wird jeder Herero mit und ohne Gewehr, mit oder ohne Vieh erschossen, ich nehme keine Weiber und Kinder mehr auf, treibe sie zu ihrem Volke zurück oder lasse auf sie schießen. Dies sind meine Worte an das Volk der Hereros.\(^{633}\)

What followed was the twentieth century’s first logged genocide,\(^{634}\) one that arguably sowed seeds for German Nazism and the machinery of the Holocaust.\(^{635}\) Its memory, though, has been long detached from European history and transitional justice studies.\(^{636}\) Initially run by Imperial Commissioner Heinrich Göring, who happened to be the late father of Hermann Göring, Bismarck’s imperialist yearning for Lebensraum, rooted in racist philosophy, reigned supreme in German South West Africa (GSWA). Around 4640 settlers strong by 1903, the Germans endeavoured to forcibly ‘negotiate’ their way into Damaraland, which was then held and occupied by the Herero. Cunning bigotry, enslavement, intimidation, cattle theft, land confiscation and rape by German settlers became a common strategy in their plight to unsettle, overtake and dominate these seminomadic cattle herding indigenous people. It led to popular revolts among the Herero.\(^{637}\) During one campaign in January 1904, over 100 Germans were killed and this unleashed fierce public German antipathy versus the Herero, sparking further militarism, nationalism and racism. The leader of the Second Reich, Kaiser Wilhelm, responded by sending a new army led by Von Trotha, a general who had built brutal repute in German East Africa and more notoriously during the Chinese Boxer Rebellion.\(^{638}\)

Von Trotha declared, “The exercise of violence with crass terrorism and even with gruesomeness was and is my policy. I destroy the African tribes with streams of blood and streams of

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\(^{633}\) “I the great General of the German soldiers send this letter to the Herero people. The Herero’s are no longer German subjects […] The Herero people, however, must leave the country. If the people do not do this, I will force it to do so with the cannon. With the German border, every Herero, with or without a gun, with or without cattle, will be shot, I do no longer accept women and children, I will drive them back to their people or will let them be shot at. These are my words to the Herero people.” ‘Auftruf an das Volk der Herero’, Abschrift zu O.K.: 179290 Gombo-Windembe, den 21.10.1904 Kommando der Schutztruppe (J.Nr. 3737). The original handwritten and signed order is reprinted in: Jan-Bart Gewald, ‘The Great General of the Kaiser’, Botswana Notes and Records, Vol. 26 (1994), pp. 67-76: 73.


\(^{635}\) David Olusoga & Ericzen, The Kaiser’s Holocaust.

\(^{636}\) Like the Nazi mass murder, the Namibian genocide on the Herero and Nama were premised upon ideas like Lebensraum [living space], annihilation war [Vernichtungskrieg] and German racial supremacy. Individual Nazis were also linked to colonial Namibia. Hermann Göring, who built the first Nazi concentration camps, was the son of the first governor of colonial Namibia. Eugen Fischer, who influenced Hitler and ran the institute that supported Joseph Mengele’s medical “research” at Auschwitz, conducted racial studies in the colony. And Ritter von Epp, godfather of the Nazi party and Nazi governor of Bavaria from 1933-1945, led German troops against the Herero during the genocide. See: Jones, Genocide, p. 123; Olusoga & Ericzen, The Kaiser’s Holocaust, pp. 1-13.


money. Only following this cleansing can something new emerge, which will remain.” On that unambiguous proposition of ethnic cleansing, on 11 August 1904, Trotha’s Schutztruppe embarked on an annihilation war against the Herero, ‘pursuing’ them into the Kalahari Desert and orchestrating extermination. In October, Von Trotha then issued his ‘Vernichtungsbefehl’ (‘destruction order’; cited above) and Herero’s were chased into the Omahake desert. Thousands died from starvation and dehydration. All those who survived were machine-gunned, strangled by fencing wire and then hung up, burnt to death, while young women and girls were often raped before being fatally bayonetted. When the killing order was rescinded in December 1904, Herero’s were relocated to lethal concentration camps throughout the country, as slave labourers, pseudo-scientific racial experiment objects and murder victims. The Namaqua (or Nama), who also unsuccessfully rebelled the Germans, were deported to an extermination camp known as “Shark Island,” where they faced a slow but certain death. When the concentration camps were shut down in 1908, the brutalities left approximately 60-80,000 Herero (about 66-75 %) and almost half of the Nama people dead. The surviving Herero and Nama people were sold off to white farmers as slaves. Interestingly, Raphael Lemkin, who coined the word genocide, never applied the term genocide to the Namibian case, although it would fit his definition very well. Instead, he saw the Herero as already helpless victims and believed that they had been committing national or race suicide: “having nothing left to exist for as a nation any longer, national suicide was started by birth control of a rigorous nature and artificial abortion.”

Overshadowed by this kind of tenacious racism and imperialism towards African peoples in Europe, the outbreak of two world wars and mass atrocities in Europe, the Namibian genocide was obliterated. It was not until Namibia’s independence from South Africa in 1990 that the ‘Herero and Nama question’ was aroused from its dormant status and publicised. But the new administration elected not to deal with the haunting past, apparently for the sake of reconciliation between the resident communities. Repeated calls for a truth commission were dodged, as were the 90 years old land claims. From the German side, an agenda of non-recognition of the massacres as genocide has ever prevailed, notwithstanding survivor’s descendant’s petitions for excuses and compensations. The lone mea culpa came from a German development-aid minister, Heidemarie Wieczorek-Zeul. In 2004 she stated, “[...] the atrocities committed at that time would today be termed genocide – and nowadays a General von Trotha would be prosecuted and convicted.” She added “Germans accept our
historical and moral responsibility and the guilt incurred by Germans at that time." Gripping as her statement was, its message was later officially dismissed as a “purely personal remark, not representing government policy.” When the Namibian parliament gave backing to Herero and Hama claims for compensation, the German political elite feared legal and moral consequences, in particular payment of reparations. As a result, the German Parliament threw out an opposition motion calling on the official recognition of genocide in 2012. Only in 2016 was the matter again tabled - quite oddly in the wake of the German recognition of the Armenian genocide – and, at the time of writing, it is expected that an official recognition is imminent.

Imperialist atrocities persisted in Sub-Saharan Africa. In terms of material substance and transitional justice questions, Abyssinia, present-day Ethiopia, stands out. For centuries, the empire had remained out of reach of European intrusion. That changed in 1935 when Italy’s army attacked and overwhelmed emperor Haile Selassie I’s legion, using modern tanks, planes and flame-throwers. The invasion and its subsequent occupation in 1936 came with a plethora of mass atrocities: the use of chemical weapons, the bombing of Red Cross-hospitals and ambulances and the execution of war prisoners. Mass graves filled up as traditional storytellers (oral historians), Coptic deacons and monks and intelligentsia were persecuted and massacred by the fascists. Emblematical was a three-day bloodbath in Addis Ababa from 19 February 1937, in which the ‘Black shirts’ armed with rifles, pistols, bombs and flame-throwers “cleaned up” up to 6000 Ethiopians. When Italy’s occupation ended in 1941 - and Ethiopia was put under British control - some 760.300 Ethiopians were killed.

In June 1936, at the League of Nations, employing a Lemkin-like language, Emperor Haile Selassie I mourned Italy’s “systematic extermination of a nation by barbarous means” involving “death-dealing rain to kill off systematically all living creatures” and the international community’s “refusal to stop an aggressor.” He demanded “[…] justice which is due to my people, and the assistance promised to it eight months ago, when fifty nations asserted that aggression had been

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649 Speech by Federal Minister Heidemarie Wieczorek-Zeul at the commemorations of the 100th anniversary of the suppression of the Herero uprising, Okahandja, on 14 August 2004.
650 Johanna Schmeller, ‘Germany refuses to acknowledge Herero massacres as genocide’, Deutsche Welle, 23 March 2012.
651 Vartan Estukyan, ‘Germany continues to confront its history with Herero Genocide’, Agos, 29 July 2016.
652 For instance, Britain in Matabeleland and Mashonaland (1896-1897), during the French pacification of Ivory Coast and French Congo, the Germans against the Hehe (1891-1898) and the Maji Maji (1905-1907) in German East Africa and in Kamerun (1903-1908). See for a detailed discussion on these cases: Kurt Jonassohn & Karin Solveig Björnson, Genocide and Gross Human Rights Violations in Comparative Perspective (New Brunswick and London: Transaction Publishers, 1998), pp. 233-252.
653 Although, in Lemkin’s seminal work, “the international outrages in Ethiopia” are solely mentioned in a footnote, Ethiopia, because of its experiences, was a leading protagonist for atrocity trials and the adoption of the Genocide Convention. Lemkin, Axis Rule in Occupied Europe, p. 115, note 34.
committed in violation of international treaties.” A year later, he bid the League of Nations’ Secretary General to assign a commission of inquiry to “investigate the horrors committed in Ethiopia by the Italian government.” But the matter was overshadowed and Ethiopia side-lined. In 1943, when the Axis’ atrocities in Europe were widely reported, the empire was barred from the UN War Crimes Commission (UNWCC), which also disqualified Italian delinquencies committed preceding the outbreak of the European war in 1939. As Ethiopia was one of the first sufferers at the hands of the Axis nations, Addis Ababa adhered to the London Agreement, which laid the groundwork for the Prosecution and Punishment of the Major War Criminals of the European Axis. Haile Selassie hoped for an international court to pursue Italian war crimes, resembling the military tribunals in Nuremberg and Tokyo, which were putting to trial Nazi and Japanese war crimes suspects.

Meanwhile, anticipating the international community’s averseness to try Italians, Ethiopia erected its own War Crimes Commission in 1946, mandated with “full authority for and charged with the functions of assembling evidence of war crimes in Ethiopia and of bringing and instituting charges and criminal proceedings against Italian individuals who have committed major war crimes against Ethiopia and the Ethiopian people.” Investigations were propelled into fifty suspects and Ethiopia informed the UNWCC that it ascertained ample evidence to bring to trial General Pietro Badoglio for the use of poison-gas, Rodolfo Graziani for crimes against humanity during the 1937 Addis Ababa massacre, and eight other Italian officials. Although the UNWCC had recognised the cases prima facie, the Brits and the French in 1949 unilaterally waived their backing for Ethiopia’s plans to set up an international Nuremberg-Tokyo-styled military panel and alternatively supported Italy’s national prosecution of Graziani for collaboration with the Germans while it deemed Badioglo too old to stand trial. Both men were never extradited and Ethiopia reposed its war crimes cases. Instead, as a final act, Ethiopia’s Justice Ministry published the two-volume Documents on Italian War Crimes submitted to the United Nations War Crimes Commission. Next to reproducing official telegrams, circulars and orders relating to “pacification”, it contained witness reports that gave vent to thousands of voices, some of them unfiltered by filters and screens of conscience. Here are some such narratives:

Ethiopian Imperial Order No. 1784.
Commander-in-Chief of Italian forces in East Africa, at the time of the invasion.
Commander of Italian forces in Somalia, and later Governor-General of Italian East Africa, and Viceroy of Ethiopia.
testimonies of Ethiopians who had seen atrocities, suffered torture or had been confined in concentration camps. The case was thereafter closed, never to be opened again.

3.3 Recent mass atrocity in Africa: from truth commissions to trials

After the Second World War, mass atrocities persisted across the continent. A few cases stand out. Ever troubled, the Great Lakes Region saw a handful of cases of genocidal violence and ethnic pogroms. In the wake of the 1959 Hutu revolution, the successive independence from Belgium and several attempted invasions by Tutsi refugees (Inyenzi), tens of thousands of Tutsi were butchered in reprisal killings between 1962 and 1964 in Rwanda. In neighbouring Burundi, in 1972, military-led massacres killed between 100,000 and 200,000 Hutu civilians. From October 1993, ethnic violence peaked again and acts of genocide against Tutsi and indiscriminate killings of Hutu cost the lives of an estimated 300,000 Burundians. A year later, over a half a million Tutsi were massacred in Rwanda and in 1996-1997 over 200,000 Hutu refugees were slaughtered in Zaire. Subsequent wars – and their side effects - in what became the Democratic Republic of the Congo cost the lives of over an estimated 4 million people. Up north, in Uganda, the subsequent despots Idi Amin Dada and Milton Obote had also been ruthless. Between 1971 and 1979, the mercurial Amin liquidated supposed political and civilian antagonists, persecuted Langi and Acholi speakers, tortured elites and expelled the Asian community, causing between 50,000 and 300,000 deaths and thousands of displacements. Obote’s track record reaches similar numbers. Persecuting and murdering Baganda, Banyarwanda and perceived insurgents, his army killed over 200,000 people between 1980 and 1985. In West Africa, the best-known humanitarian catastrophe unrolled in Nigeria’s secessionist enclave Biafra. During the fratricidal war (1967-1970), the federal state unpacked a deadly policy of starving, bombing and massacring Igbo civilians. Reaching genocidal proportions, the civilian death toll is estimated between one and 1.5 million. Down south on the continent, another mass atrocity is documented: the Gukurahandi in Zimbabwe. Shortly after independence, Robert Mugabe’s North Korean trained “Brigade 5” brutally supressed opposition by mass killings, targeted assassinations, disappearances, public beatings, detentions and torture of particularly Ndebele in the

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680 Shona: "the early rain, which washes away the chaff before the spring rains."
south-western parts of the country, leaving an estimated 6,000 to 20,000 dead between 1980 and 1988. Apart from these examples, mass atrocities were committed, or as in Sudan continue to be perpetrated, in a dozen African countries. Some of those will be discussed below, in a broader discussion on transitional justice to provide the historical context of the three case studies: Sierra Leone, Rwanda and the Democratic Republic of the Congo.

Ever since the commission of inquiry in the Congo Free State and the investigations by the Ethiopian War Crimes Commission, a myriad of quasi-legal official and unofficial transitional justice processes have been carried out in response to mass atrocities in Africa. Next to prosecutions, the localisation and apparent ‘retraditionalisation’ of mediation mechanisms, truth commissions or similar-styled panels of inquiry have mushroomed in Sub-Saharan Africa. The latest in a row deals with international crimes committed stretching a period of no less than 46 years in Burundi. Taking office in December 2014 after a troubled and protracted establishment period, 11 commissioners of the Truth and Reconciliation Commission embarked on their four year mandate to contribute, through investigations, public hearings and a documentary report, to the “rewriting of Burundian history to provide a widely shared and accepted version of events.”

Turning the stones of the country’s lengthy legacy of ethnic animosity and cycles of reciprocal genocides between Hutu and Tutsi, however, soon promised to be an arduous test, chiefly since transitional justice matters in the past have been marred by political and ethnic rivalries. And indeed, since Burundi was again on the brink of mass atrocities from 2015 onwards, the commission has been inactive.

Burundi’s case adds to the numerous truth commissions that have operated in Sub-Saharan Africa. Aside from the truth commission avant la lettre for Leopold’s Congo, the ‘truth-finding’ model was also set in Uganda. In June 1974, then President Idi Amin Dada established a commission of inquiry to investigate and report on mass disappearances at the hand of military forces in the first years of his own government. Himself an abusive autocrat, he purportedly set it up to whitewash his own abuses. But in its place, the four members heard 545 witnesses in public hearings, identified culprits and observers still see its concluding report – which documented 308 cases of disappearances

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682 Best known examples are Rwanda’s Inkiko Gacaca and Abunzi, Uganda’s Matu Oput, Sierra Leone’s Fambul Tok, Burundi’s Bashinginatse, Liberia’s Palava Huts, Mozambique’s Curaneiros and many others. See: Tom Bennett, Eva Breno, Giselle Corradi, Lia Nijzink and Martien Schotmans (eds.), African Perspectives on Tradition and Justice (Cambridge, Antwerp & London: Intercentia, 2012); Luc Huey & Mark Salter (eds.), Traditional Justice and Reconciliation after Violent Conflict. Learning from African Experiences (Stockholm: International IDEA, 2008).
683 Genocide, war crimes and crimes against humanity committed between 1 July 1962 and 4 December 2008. See: République du Burundi, Cabinet de Président, Loi no 1/18 du 15 Mai 2014 Portant Création, Mandat, Composition, Organisation et Fonctionnement de la Commission Vérité et Réconciliation (Bujumbura, 14 May 2014), arts. 1 (d) and 6 (1).
685 République du Burundi, Loi no 1/18 du 15 Mai 2014, arts. 4 (5) and 74 (g).
- as quite a critical marker as to what took place. At the time however, the report was not made public, the commissioners were harassed, none of its recommendations – to reform the police and the armed forces - were ever adopted and by large the report had no impact at all on the abusive practices of Amin's government.

The first ever modern truth commission in the post-colonial era, set up by the “butcher of Africa,” has thus been totally forgotten. Even Uganda’s second truth commission that was established by Yoweri Museveni twelve years later did not mention its predecessor. Hundreds of thousands of civilians had lost their lives under Amin and his successor Milton Obote between 1971 and 1985. In May 1986, Museveni’s Justice Ministry set up a Commission of Inquiry into Violations of Human Rights (CIHVR) to investigate mass murders, arbitrary arrests, torture, forced displacement, disappearances and discrimination under the previous governments from the time of independence in 1962. Despite the lack of further political support and financial backing, the commission held public hearings – some were broadcasted on national radio and television – in which it heard 608 witnesses. Foul horror was revealed to the commission. And with imminent prosecutions in mind the commission worked together with the Criminal Investigations Department and the Director of Public Prosecutions to corroborate the data and produced 18 bound tomes of transcribed narrated testimony. But when the final report was finally presented in 1994 without much public fanfare and no distribution, people “had already largely forgotten about the struggling Commission” and the testimonies were stored away in a “bug-infested closet in an unused building at Makerere University.”

Like in Amin’s case, Museveni used the commission to add legitimacy to his new government, rather than to genuinely examine past abuses, address violence by his own rebel force and commit to respect for human rights. It would become a tactic in his arsenal to dodge accountability, embarked on later when asking the ICC prosecutor to only investigate crimes committed by the Lord’s Resistance Army (LRA) and not the atrocities by the Ugandan Defence Forces.

In contrast to the boards of historical clarification in post-junta South American nations, the first specimens in Sub-Saharan Africa were instrumentalised to defame forerunners, to façade an ethos of enduring repression and legitimise new-fangled governments. Often, reports were shoved under the rug, testimonies stowed away in dusty accommodations and recommendations discounted. It was not different in Zimbabwe, in the early 1980s. The mass murders and ruthless clampdown in

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690 Amnesty International has a copy of the report on microfiche. See: Huskamp Peterson, Final Acts, p. 79.
693 Hayner, Unspeakable truths, 51-52.
Matabeleland (see Gukurahandi above) ignited a national and international row and led then Prime Minister Robert Mugabe to form a ‘Commission of Inquiry into the Matabeleland Disturbances’ (also known as the Chihambakwe Commission), to investigate the killing of 1,500 political dissidents and other civilians in the Matabeleland region in 1983 and to gather testimony. Yet, after some months of investigations and evidence collecting, the commission forwarded its report directly to Mugabe who up to today has not made it public, claiming it would spark ethnic conflict. Over a decade later, two Zimbabwean human rights organisations sought to break the silence and launched an unofficial inquiry, interviewing “a few hundred people.” In its widely distributed report, it details more than 20,000 civilians killed by security forces and locates mass graves as well as mine shafts where bodies had been deposited.

In Central Africa, in Chad, also after a violent succession, a commission of inquiry was established to look into past crimes, particularly illegal detentions, assassinations, disappearances, tortures, barbarity and a score of human rights abuses under the regime of Hissène Habré. Set up by Idriss Déby Itno, himself a former Minister of Defence under Habré, the 12 commissioners, who were housed in the former torture centres they were investigating, had a troubled start and faced difficulties in interviewing victims as well as members of the former secret police. Witnesses were being intimidated, but in the end the investigators managed to collect 1726 testimonies. Published in France, the report was meticulous, outlining and describing the involvement of the USA, ethnic persecutions, tortures and massacres; it even features graphic drawings of torture practices. In what the commission called a “veritable genocide”, at least 37,800 Chadians were killed. A first to do so, the commission named several perpetrators, some of whom were later accused by the Extraordinary African Chambers, went on trial in Chad or became important insider witnesses. As a register through Chad’s violent history, the commission’s report and its archives became an important

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696 It was led by the lawyer Simplicius Chihambakwe. Another Commission of Inquiry was established simultaneously, to look into clashes between two former rival liberation armies in Bulawayo in 1981. See: Richard Carver, Who Wants to Forget? Truth and Access to Information about past Human Rights Violations (London: Article 19, 2000), n.p.
697 Hayner, Unspeakable Truths, pp. 242-243.
702 662 former political detainees 786 close relatives to victims, 236 former prisoners of war, 30 former DDS agents and 12 high-ranking officials. The questionnaires were very specific and list over up to 50 questions. See: Questionnaire for the Taking of Testimony from a Former Political Detainee; Questionnaire for the Taking of Testimony from the Relative of a Victim; Questionnaire for the Taking of Testimony from an Ex-DDS Agent; reprinted in: Neil Kritz (ed.), Transitional Justice. How emerging democracies reckon with former regimes, Vol III: Laws, Rulings and Reports (Washington DC: United States Institute of Peace, 1995), pp. 94-100.
704 Hissein Habré Guinhni Korei, Abakar Torbo Rahama, Mahamat Djbrine. Chambres Africaines Extraordinaires (CAE), La Chambre d’Instruction, Ordonnance de non-lieu partiel, de mise en accusation et de renvoi devant la Chambre Africaine Extraordinaire d’Assis (01/13; Dakar, 13 February 2015).
706 Particularly Bandjim Bandoum: See: ‘PV d’audition de Bandjim Bandoum du 16/01/2014 en France (D2146/19)’ & PV d’audition de Bandjim Bandoum du 17/01/2014 (D 2146/18), cited 70 times in the Habré et al Indictment: CAE, de mise en accusation.
reference in these legal cases, with the commission’s president, Mahamat Hassan Abakar, testifying at both forums.707

Most renowned, publicised and idolised is the Truth and Reconciliation Commission for South Africa (1995-2002), set up to smoothen the transformation from forceful Apartheid into a democracy-like state.708 Led by the charismatic Desmond Tutu, the commission set a unique example on how to deal with political crimes and gross human rights violations and its blueprint was soon exported to other countries in Africa, in the belief it would work there as well. But while the success and legacy of South Africa’s commission remains an issue of social, political and academic contention within the country itself and abroad, its application elsewhere was deemed inappropriate, impossible or unsuitable. Or it simply failed. In Rwanda, after the genocide, the idea was found to be grossly inadequate to address the still raw feelings about the killings and the deep entrenched culture of impunity.709 Down south, in Burundi, facilitator Nelson Mandela managed to incorporate the noble truth model into a peace agreement that ended years of ethnic violence and genocide.710 But the political and ethnic landscape was on such a fault that Burundians did not desire to open up wounds immediately and the matter was stalled for 15 years.711 Only in Sierra Leone, after a decade of rebel warfare, resource plunder and a litany of violence, was the South Africa model mostly copied and inaugurated, except for the amnesty for truth provisions.712 Yet, as we will see in Chapter 6, despite that it collected 7706 statements713 and heard 500 persons in public hearings, public attendance was low714 and it had lesser social impact than in South Africa, amongst other things because it was somehow competing with the Special Court for Sierra Leone.715

There were more, but predominantly unnoticed in the transitional literature, truth commissions that dealt in one way or the other with serious human rights abuses. Most set up shop in West Africa: Nigeria (1999-2002),716 Ghana (2002-2004),717 Liberia (2006-2009)718 and Togo (2009-...
2012).719 Others rose in Morocco (2004-2006),720 DR Congo (2004-2006),721 Mauritius (2009-2011),722 Solomon Islands (2009 – 2012)723 and new ones were more recently inaugurated in Tunisia (2014),724 Mali (2014)725 and Burundi (2015).726 The results are mixed, throughout the line. The Congolese commission, for example, was heavily divided and never produced a report other than recommending a new commission. In Nigeria, the process of looking into 15 years of rights abuses under its former military regime had a shaky start but gained much public attention when it was holding hearing almost full-time for over a year throughout the country.727 More recent however, truth commissions have been used by new regimes to façade a culture of impunity and to circumvent legal accountability. Kenya is a good example. Years of corruption and ethnic political violence culminated in a transitional process from 2008, after yet another round of post-electoral violence. When international pressure swelled to install prosecutions and finally the International Criminal Court intervened, Nairobi decided to launch the Truth, Justice and Reconciliation Commission (TJRC). But it was highly politicised, compromised and criticised.728 A 6-volume report was published,729 after the government censored out parts of it that detailed abuses by sitting high-officials including the current President Uhuru Kenyatta, his father Jomo Kenyatta, as well as excluded the dissenting opinion of three of the international commissioners.730 In early 2015, the official TJRC website was taken down, thus making the report unavailable to the public.731 Against this background, Kenyatta officially apologised “for all past wrongs” and pledged to set up a fund “for restorative justice.”732 The same kind of controversy surrounds the Commission for Truth, Justice and Dialogue ((Commission Dialogue, Vérité et Réconciliation, or CDVR) in Côte d’Ivoire. Set up in 2011 in the wake of mass violence surrounding highly contested election, the new President Alassane Ouattara cherry-picked from the transitional justice toolbox. He first solicited the assistance of the ICC to prosecute the losing candidate Laurent Gbagbo (see preface) and also embarked on a truth commission.733 But the commission was ambivalent, unsupported and financially restrained. Tens of thousands statements were collected, but victims were hardly granted a platform and the first report in 2013 saw low...
distribution.\footnote{Côte d’Ivoire truth panel seen faltering’, IRIN News, 13 January 2014.} Hearings were finally held from September 2014, almost three years after the panel’s 11 members were sworn in. Its chairman, former Prime Minister Charles Konan Banny, a fierce Gbagbo-opponent, said “in the museum of horrors, we want to show Ivorians that we went too far.” Public hearings were held for three weeks in Abidjan, the Ivorian capital. Some eighty people, including victims and perpetrators, were heard but a lack of television broadcasts from the commission and low-key media coverage meant that powerful witness statements had little impact across the country.\footnote{Joris Fioriti, ‘Delayed Ivory Coast inquiry into past violence opens’, Agence France-Presse, 9 September 2014.} The commission has been criticised at large, for being incompetent to deal with a legacy of violence, political bias and serving victor’s justice.\footnote{HRW, Turning Rhetoric into Reality. Accountability for Serious International Crimes in Côte d’Ivoire (New York: HRW, 2013), pp. 32-34.} Its report was presented to president Ouattara in December 2014, but it was not made public. Neither was the Commission’s deliberations made known to the media.\footnote{Straus, Making and Unmaking Nations, pp. 116-117.}

Aside these quasi-judicial politics of memory, in most post-atrocity circumstances impunity triumphed. In terms of historic widespread delinquencies, committed prior to 1994 in Rwanda, only three cases have seen national judicial reckoning: Equatorial Guinea, Ethiopia and Chad. A brief impression paves the way to understanding the transitional justice experiences in Sierra Leone, Rwanda and the Democratic Republic of the Congo (DRC).

### 3.4 Tribunalisation of mass atrocity in Africa

The first case of post-atrocity judicial reckoning has remained an obscurity in the transitional justice literature and brings us back to Equatorial Guinea.\footnote{Robert H. Jackson & Carl G. Rosberg, Personal Rule in Black Africa. Prince, Autocrat, Prophet, Tyrant (Berkeley and Los Angeles: University of California Press, 1982), pp. 245-251.} It is a remarkable omission since it was the first time a former head of state was tried for international crimes – including genocide - in his own country. Between 1969 and 1979 the former Spanish micro colony of Equatorial Guinea on the coast of mid-west Africa was the scene of a virtually continuous political purge of anyone suspected of opposing President’s Fransisco Macias Ngwema’s brutal and unpredictable regime.\footnote{Straus, Making and Unmaking Nations, pp. 116-117.} Executions, torture, imprisonments, forced exiles and disappearances were common markers of repression, mostly targeting church clergy and “intellectuals” without making ethnic distinctions. Ranging estimates put the number of casualties between 5,000 and 20,000.\footnote{Alejandro Artucio, The Trial of Macias in Equatorial Guinea. The Story of a Dictatorship (Geneva: International Commission of Jurists, 1979).} After Macias was deposed in a coup in August 1979, the new regime brought him and ten of his collaborating officials to trial before five judges of a Special Military Tribunal that took seat in a cinema hall in the town of Malabo from 24 September 1979.\footnote{Straus, Making and Unmaking Nations, pp. 116-117.} Amongst others, charges in the “summary military trial” included “genocide”, “mass
murder,1948 and systematic violations of human rights. A drawn-up list of 474 Guineans assassinated under Macias’ regime served as an indicator of the extent of the brutality and during trial a dozen witnesses testified on their occurrence and patterns. Evidently, “numerous and horrifying murders of political prisoners and opponents were proved, but not genocide,” reported a trial monitor, who cited the absence of substantial considering of the protected groups and “the intent to destroy.” The first trial of a former head of state on genocide charges in sub-Saharan Africa was thus legally confusing and lacked opportunity for appeal. Nonetheless, Macias was tried, convicted and executed five hours later on 29 September 1979.

The second, and almost equally under researched, under reported and obscured domestic legal reckoning for genocide took place in Ethiopia. Haile Selassie I’s government was the first to ratify – but also to modify – the Genocide Convention, on 1 July 1949. With the Italian WWII war crimes issue deposited in history books, Ethiopia was plagued by many other domestic and regionalised armed conflicts, particularly between 1974 and 1991. At least four deadly wars were fought: against separatists from Tigray, Eritrea, Ogaden and Oromo. Severe famines throughout the country and popular uprisings in Addis Ababa meanwhile set in motion the downfall of the age-old Solomonic dynasty and the takeover by the extremist Maoist Provisional Military Administration Council of Ethiopia - or Derg (or Dergue; Amharic for committee). Effectively led by General Mengistu Haile Mariam, the junta had any political opposition crushed with suppressive atrocity, peaking during the Red Terror between 1976 and 1978. During this period, the Derg had urban dweller associations (‘kebeles’), militias and revolutionary guards kill, torture and maim any person suspected of being ‘subversive’, ‘anti-revolutionary’, ‘counter-revolutionary’ or ‘anti-people’. At least 9,546 lives were spilled during these political cleansing campaigns in Ethiopia’s main cities, while the civilian death toll during the Derg’s entire reign possibly reaches 1.5 million as a mixed outcome of its further campaigns of collectivisation, forced resettlement, state-orchestrated famine and aerial bombings in the 1980s.
In 1991, the Derg was defeated and ousted by the *Ethiopian People’s Revolutionary Democratic Front: EPDRF*. Mengistu had fled into exile to Zimbabwe, just before the Transitional Government of Ethiopia (TGE) had rounded up some 2,000 high Derg officials and civilians brought in a range of mid-level officials. The following year, the TGE decided to bring Mengistu and his immediate accomplices to trial for human rights abuses and created the *Special Prosecutor’s Office (SPO)*. The establishing proclamation mandated the SPO to investigate and prosecute “any person having committed or responsible for the commission of an offence by abusing his position in the party, the government or mass organisations under the Derg-regime”. But it also ascribed a historical mandate to the Prosecutor Girma Wakjira, to “establish for public knowledge and for the posterity a historical record of the abuses of the Mengistu regime.” Dubbed an ‘African Nuremberg’, the SPO somehow constituted the first-ever ‘truth-tribunal’ of its kind, although, in the underreported trial proceedings, stories were “mainly told through the official channels of court documents and witness testimonies in an adversarial setting.”

The ultra-communist Derg had been meticulous in documenting its meetings, decisions, directives, orders and actions. The Red Terror had been publicly proclaimed, execution orders were issued and reports on torture and killings were received. During two years of high-security investigations, the 34 Special Prosecutors amassed a wealth of documentary evidence, including over 309,778 pages of archived Derg documents and video- and audiotapes. The papers range from death warrants to calculations of the cost of executions to films of torture sessions and bombings. Aside, the investigators collected 5000 witness statements and an Argentinean forensic team exhumed numerous mass graves.

According to the SPO, it had “ten times more evidence than needed to successfully prosecute several of the detained and many of the exiles for serious criminal offences.”

The first charges against 73 high level officials, including Colonel Mengistu himself, policy and decision makers, senior government officials and senior military commanders, were filed in the Central High Court in Addis Ababa in October 1994. The Act of Indictment in this so-called Mengistu-case, based on five thousand pages of signed execution orders, videos of torture sessions

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and testimony, charged the accused with participating in 211 acts of genocide and in multiple violations of human rights. Since December 1994, a total of 5,119 Ethiopians were tried in various courts around the country for Derg-era crimes, with 3,583 convicted and sentenced to death or to lengthy prison sentences. After 12 years, the main trial against Mengistu ended on 12 December 2006. Judges Medhin Kiros, Nur Suaid and Solomon Emeru of the Federal High Court, found all, except one, guilty of genocide and 11 January 2007, the accused were sentenced to long prison sentences. Mengistu received a life term in absentia. On appeal, 18 of the convicts, including Mengistu, saw their sentences increased to the death penalty. Ethiopia’s mass prosecution of mass crimes has left a divided and even more unknown history. Like most criminal cases regarding atrocity crimes, much criticism has been levelled against it; for being one-sided, its slowness, trying accused in absentia, breaching defendants’ rights and for operating in isolation from the public. Nonetheless, the courts have heard testimony from over 2500 eyewitnesses and at least managed to collect and document the story of the victims of the Red Terror. Despite the fact that the prosecutor’s strategy of presenting witness testimony as evidence – and thus creating a type of truth commission forum for victims – the trial record remains largely inaccessible for the wider public as the vast trove of evidentiary materials remains to be digitised and disclosed. In absence of a centralised archive of the SPO in Ethiopia, the legacy of Africa’s first home-grown mass transitional justice endeavour remains thus a bit of an obscurity. International crimes cases relating to the Derg-period have only come back to the fore more recently, in The Netherlands, as part of a universal jurisdiction case. After years of investigations by the International Crimes Division at the Dutch Public Prosecutor’s Office, in 2015 an Ethiopian suspect, Eshetu Alemu, who was tried by the SPO in absentia, was arrested by

767 It is important to note that the Ethiopian Criminal Code holds a broader definition of genocide than the UN genocide convention., art. 281 of the 1957 Ethiopian Penal Code states that “Whosoever, with the intent to destroy, in whole or in part a national, ethnic, racial, religious or political group, orders or engages in, be it in times of war or in times of peace: (a) killings, bodily harm or serious injury to the physical or mental health of members of the group, in any way whatsoever; or (b) measures to prevent the propagation or continued survival of its members or their progeny; or (c) the compulsory movement or dispersion of peoples or children, or their placing under living conditions calculated to result in their death or disappearance, is punishable with rigorous punishment from five years to life, or, in cases of exceptional gravity, with death. The 2004 Criminal Code protects “ [...] a nation, nationality, ethnic, racial, national, colour, religious or political group.” See: ‘The Criminal Code of The Federal Democratic Republic of Ethiopia. Proclamation No. 414/2004’, Federal Negarit Gazetta (Addis Ababa: 9 May 2005), art. 269


769 Nyamuya Maqotso, ‘Reading the Shadows of History’, p. 304.


777 Author’s Interview, Tadesse Simie Mekeka, Jurist at Netherlands Public Prosecutor’s Office, Groningen, 4 February 2016.

Dutch authorities on four charges of war crimes allegedly committed in Gojjam Province under the Derg regime. At the time of writing, the case was scheduled to go to trial in November 2016.

In Equatorial Guinea and in Ethiopia, the criminal prosecution of former leaders for state-led human rights abuses and mass violence followed instantly after the tumbling of the ancient regime. But not in Chad, which experienced one of the longest civil wars in Central Africa. A blend of sharp ethnic, religious and north-south rivalry against a background of a failing state, underdevelopment and Cold War politics spiralled repression, outside intervention and combat through the former French colony since independence in 1960. Entangled in a web of political turmoil, civil war and chronic conflict with Muammar Gadhafi’s Libya, Chad entered a particular vicious era of state repression when Hissène (Hissein) Habré took control in 1982. Backed by the United States of America (USA) and dubbed by the CIA as its “quintessential desert warrior”, the ethnic Gorane from the north, persecuted, tortured and massacred non-Gorane rebel and civilian opposition in the South and Hadjaraïs and Zaghawa in Central and East Central Chad. A reported 37,800 Chadians were killed during what a national truth commission called Habré’s “veritable genocide.” Among the regime’s casualties were also thousands of people who bore the brunt of the political police services, the dreaded Direction de la Documentation et de la Sécurité (Documentation and Security Directorate; DDS). From its immediate creation in early 1983, Habré’s Gestapo-like institution became the principal emblem of repression, mass arrests, secret imprisonment, torture and assassination of anybody suspected to oppose the regime. Scores of Chadians ended up in secret prisons in N'Djamena or in the provinces where they were water boarded, asphyxiated, starved, electrocuted and fatally tied up (“Arbatachar”) by DDS ‘interrogators’. One of those prisons was built in the garden of the Habré presidential residence.
Just before he was deposed and fled to Senegal in December 1990, Habré reportedly had the Presidential Guard kill 300 political prisoners at the President’s headquarters and stole over four millions dollars from the national treasury.\(^789\) Only 29 days later, the new president Idriss Déby Itno – who is still in power - set up a commission of inquiry, “to investigate the illegal imprisonments, detentions, assassinations, disappearances, tortures and acts of barbarity, the mistreatment, the other attacks on the physical and mental integrity of persons, and all violations of human rights and illicit trafficking in narcotics.”\(^790\) Thirteen months later, after some hasty reconstruction work, prosecutor Mohamat Hassan Abakar set up office in the loathsome DDS headquarters. There, his investigators stumbled upon the detailed reports of executions, destruction of villages and a massacre in the DDS archives. And over the next 17 months, they exhumed gravesites and collected 1726 witness statements of former detainees, victims’ relatives, prisoners of war, DDS agents and senior officials. From these sources, the commission counted at least 54.000 detainees in Habré’s prisons and possibly 40.000 deaths.\(^791\) But Déby’s government – of which many officials and the president himself were involved in Habré’s crimes – did not pursue any justice\(^792\) and even locked away the truth commission’s files.\(^793\)

The solid truth commission account, alongside a report by a French medical team, which treated 581 torture victims, and 792 transcribed witness accounts embraced the documentary core of what became the first step in an “interminable political and legal soap opera – one that requires tabulated chronologies”\(^794\) to navigate the labyrinths of international law.”\(^795\) “Je ne reconnais pas les faits qui me sont reprochés. Je n’ai jamais commis de tels actes.”\(^796\) This scarce verse of renunciation was the single thing Hissène Habré wished to share with a judge on 3 February 2000 in a courtroom in Dakar’s Regional Court, where he was for the first time charged as an accomplice to torture and crimes against humanity and was placed under virtual house arrest. After the initial civil complaints in Senegal stranded at the highest court\(^797\), the Habré case went through a lexicon of courts\(^798\) all the way up to the International Court of Justice.\(^799\) Yet, pivotal was the four year investigation by the Belgian judge Daniel Fransen - who in 2005 charged Habré with grave violations of humanitarian law, torture,
genocide, crimes against humanity and war crimes\textsuperscript{800} and requested his extradition\textsuperscript{801} – that finally led to the creation of African Union (AU) backed special chambers in the Senegalese courts to try international crimes under the Habré regime: the Extraordinary African Chambers (EAC).\textsuperscript{802} Under the principle of universal jurisdiction, the court can adjudicate genocide, crimes against humanity, war crimes and torture committed in Chad. It also has a strong historical focus, covering the period between 7 June 1982 and 1 December 1990\textsuperscript{803} and will warrant historians’ attention. And indeed, like at the UN tribunals, the court appointed Arnaud Dingammadji, a Chadian historian as expert witness to lay out the contours of Habré’s rule,\textsuperscript{804} to which he later testified at trial.\textsuperscript{805} Fransen had taken copies of Habré’s DDS files, received the truth commission dossiers and compiled 27 binder files of evidence, which were sent to the EAC.\textsuperscript{806} With those in hand, four investigative judges amassed additional evidence in Chad and France, including over 2500 testimonies and expert witness reports. They formally charged Habré, together with five co-accused (in absentia), in early 2015 with crimes against humanity, war crimes and torture.\textsuperscript{807} After 52 trial days – the case was concluded with closing statements in early February 2016.\textsuperscript{808} Habré himself rejected the tribunal’s authority and managed to forestall the proceedings for a short period until the court appointed three Senegalese lawyers to defend him. When he was first brought in to the court by force, he was kicking and screaming but later throughout the proceedings Habré remained silent, even when the prosecutor tried to question him. Altogether, 96 witnesses testified, the majority from Chad.\textsuperscript{809} They comprised victims who described their experience in prisons and camps, but also a range of experts, including the 1992 Chadian truth commission president, former members of Habré’s political police, the DDS, Judge Daniel Fransen, a French doctor, researchers from Amnesty International and Human Rights Watch, and forensic, statistical and handwriting experts.\textsuperscript{810} Back in Chad, the trial was streamed live on the internet and broadcasted on national television.\textsuperscript{811} In this remarkable trial on historic crimes, which was also a litmus test for Pan-African Justice,\textsuperscript{812} judgement, in first instance, was rendered on 30 May 2016 and Habré was sentenced to life imprisonment for rape, enslavement, murder, summary

\textsuperscript{800} Arrondissement de Bruxelles, Tribunal de Première Instance, Cabinet de juge d'instruction D. Fransen, Pro Justitia * Mandat d'Arrêt International par défaut (2001/002; Bruxelles, 19 September 2005);
\textsuperscript{801} Ambassade de Belgique, Letter to Ministry of Foreign Affairs of the Republic of Senegal in Dakar (No 05/01788, Order No 432; Dakar, 22 September 2005).
\textsuperscript{802} Accord entre de Gouvernement de la République du Sénégal et l’Union Africaine sur la Création de Chambres Africaines Extraordinaires au sein des Juridictions Sénégalaises (Dakar, 22 August 2012).
\textsuperscript{803} Statut des Chambres africaines extraordinaires au sein des juridictions sénégalaises pour la poursuite des crimes internationaux commis au Tchad durant la période du 7 juin 1982 au 1er décembre 1990, annexed to: Accord entre de Gouvernement de la République du Sénégal et l’Union Africaine sur la Création de Chambres Africaines Extraordinaires au sein des Juridictions Sénégalaises (Dakar, 22 August 2012), art. 3-4.
\textsuperscript{804} Chambres Africaines Extraordinaires (CAE), La Chambre d’Instruction, Ordonnance de désignation d’expert (Case No 01/13; Dakar, 2 August 2013);
\textsuperscript{805} Chambres Africaines Extraordinaires, Rapport d’expertise sur le contexte historique du Tchad sous le régime de Hissein Habré de Arnaud Dingammadji (Case Document D1235).
\textsuperscript{807} Author’s interview (telephone), Franck Petit, Head of EAC Outreach Unit, 24 February 2015.
\textsuperscript{808} The co-accused are: Saleh Younouss, Guihini Korei, Abakar Torbo Rahama, Maharat Djibrine (El Djonto) and Zakaria Berdei.
\textsuperscript{809} Chambre Africaine Extraordinaire D’Assises, Ministère Public c. Hissein Habré: Jugement (Dakar, 30 May 2016), §125.
\textsuperscript{810} CAE, Habré Jugement, §116.
\textsuperscript{812} Mostly organised through the public outreach organisation Forum INTERACTIF sur les Chambres Africaines Extraordinaires (www-text: http://www.forumchambresafricaines.org/V1_ficae/).
\textsuperscript{800} See: Thijs B. Bouwknegt, ‘Chad – Dakar: Habré trial is litmus test for Pan-African justice’, African Arguments, 1 June 2015.
executions, torture, inhumane treatment, illegal detention, cruel treatment. Covering 680 pages, the judgement narrates events from the 1980. It is a tapestry of DDS documents, referenced with truth commission report findings, accentuated by testimony. Punctiliously, it breaks down the historical context before and during Habré’s rule, the political and legal, military architecture of his regime and a litany of mass atrocities. All, of these qualified as either crimes against humanity, war crimes or torture. When reading a summary of the Judgement, presiding judge Gberdao Gustave Kam said that Habré “had control over most of the security apparatus” as well the army during his eight-year rule over Chad, from June 1982 to December 1990, when Habré and his security organs “created a system where impunity and terror were the law”.

Unique for a number of reasons, the Habré trial was a particular rendezvous with Chad’s atrocious history, more so than other atrocity trials. Key to this case was that it was sparked by the victims themselves, with support of human rights organisations. It was for the first time in the history of international criminal justice that victims’ voices had been so dominant in a case and a trial. At the end of the hearings, they rejoiced loudly, while Habré remained silent, his face hidden behind sunglasses and a scarf. The whole trial was a stark contrast with the other, rather expensive and inefficient, international tribunals, which had solely centred on the perpetrators. Apart from that, contrary to the adversarial common law procedures in which prosecutors bring cases, the EAC operated in the civil law tradition of inquisitorial justice. Also in this case, the French-speaking prosecutors and judges stem from Africa and were arguably much more comfortable with the case, the witnesses and contextual elements than would, for example, an Argentinean prosecutor. On those terms, localised justice is probably better equipped in dealing with past atrocities than strictly international justice. Apart from these advantages, critical gaps remain. Although Habré was the most powerful men during his reign, others have remained out of reach of the court, including Chad’s current President Déby (Habré’s former army chief), his political backers from the United States of America and France and Libyans. As such, the trial verdict only covers a fraction of the history of Chad and presents a petite scope on questions of historical responsibility. Also, since Habré himself had refused to acknowledge and participate in the trial, key information on the rationales for the violence remains absent. On the other hand, although the African Union has endorsed and praised the Extraordinary African Chambers-precedent as a home-grown alternative to international justice, a genuine commitment to taking responsibility for crimes committed by its current leaders is virtually nihil. From that perspective, indeed, the EAC trial may well stand out as an exception in the history of

813 CAE, Habré Jugement, p. 536.
814 Ibidem, §288-345.
815 Ibidem, §346-480.
816 Including: mass arrests; torture; summary executions; sexual violence; repression of Arabs; repression of CODOS and southern peoples; the repression of the Hadjeraï; repression of the Zaghaus; massacres; attacks in villages; treatment of prisoners of war. Ibidem, §481-1351.
817 CAE, Prononce et Resume Du Jugement, §77.
818 Author’s Interview, Reed Brody, Counsel HRW, The Hague, 9 December 2015.
819 Forum interactif sur les CAE, Video Verdict Procès Hissene Habré (30 mai 2016), (www-video: https://www.youtube.com/watch?v=T74_bGLTWaQ, last visit on 19 August 2016.
820 All of the sessions are publicly available on YouTube: https://www.youtube.com/channel/UCglN8G8Qd65Kzo8NALpd2g
transitional justice in Africa rather than a precedent.\(^{821}\) As a tool of African universal jurisdiction, yet mostly financed through western governments,\(^{822}\) it was a historical case in the sense that it was a one-time occasion, as evidenced by a rising critique with in the African Union of the system as a whole.\(^{823}\)

### 3.5 ‘African Criminal Court’

Before discussing the case studies of this dissertation and introducing the United Nations International Criminal Tribunal for Rwanda (UNICTR) and Special Court for Sierra Leone (SCSL), it is crucial to discuss the pinnacle of the evolution of international criminal justice in Africa: the International Criminal Court (ICC). Although, the court as such and the African cases before it, particularly, in relation to the Democratic Republic of the Congo, will be discussed in the last chapter, I will stick here to highlighting key elements and the key discussions on the ICC in Africa.

The ICC has a long history of coming into being and its founding treaty, the Rome Statute, rubberstamps principles set out in the Universal Declaration of Human Rights and the Genocide Convention fifty years before it was finally established.\(^{824}\) The resolution adopting the latter explicated that individuals potentially charged with genocide ‘shall be tried by a competent tribunal of the State in the territory of which the act was committed or by such international penal tribunal as may have jurisdiction […]’ and invited the International Law Commission (ILC) ‘to study the desirability and possibility of establishing an international judicial organ for the trial of persons charged with genocide or other crimes over which jurisdiction will be conferred upon that organ by international conventions.’\(^{825}\) But little progress was made. After two subsequent contested draft statutes for an international criminal court in 1951\(^{826}\) and 1953\(^{827}\), further developments were forestalled and the subject was put to rest in 1954.\(^{828}\) It was a request by Trinidad and Tobago to the UN General Assembly in 1989 that led to the resumption of work on an international criminal court.\(^{829}\) A new draft statute was submitted by the ILC in 1994\(^{830}\) and a year later the General

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\(^{822}\) The Netherlands, for instance, was a key supporter politically and financially and remained a key decision-maker in the court’s Comité de Pilotage. It was the first donor to set up the EAC, an example followed later by Chad, the African Union, the European Union, the USA, Belgium, Germany, France and Luxembourg. Author’s Interview, Miriam Otto, Second Secretary at Dutch Embassy, Dakar, 2 September 2013.

\(^{823}\) Committee of Intelligence and security Services of Africa (Cissa), *Kigali Declaration on the Growing Threat of Abuse of Universal Jurisdiction Against Africa (CNF/13/OR/7)*, Kigali, 6 August 2016.

\(^{824}\) Already in the wake of the Second World War atrocities, the international community drafted international rubrics that were thought would help avert and outlaw comparable crimes. After the Nuremberg (1945–1946) and Tokyo (1946–1948) international crimes trials, the United Nations General Assembly (UNGA) adopted two prime documents: the Universal Declaration of Human Rights and the Genocide Convention. UNGA, *Genocide Convention*; UNGA, ‘A Universal Declaration of Human Rights’, GA Res. 217 A (III) (A/810); 10 December 1948. A year later, the Geneva Conventions were adopted.

\(^{825}\) *Genocide Convention*, art. 1 & IV & UNGA, R. Study by the International Law Commission on the Question of an International Criminal Jurisdiction ((A/RES/260 (III); 9 December 1948).

\(^{826}\) The International Law Commission, a UN Commission of legal experts, continued to work on a code of crimes against the peace and security of humankind intermittently for the next four decades, but not directly on a court that could try these crimes. See more on the history of the ICC: Cherif Bassioussi, *The Statute of the International. A documentary history* (Dordrecht 1999); William A. Schabas, *An Introduction to the International Criminal Court* (2nd edition; Cambridge 2004); Marlies Glasius, *The International Criminal Court. A global civil society achievement* (Abingdon 2006); Scheffer, All the Missing Souls; David Bosco, *Rough Justice. The International Criminal Court in a World of Power Politics* (Oxford: Oxford University Press, 2014), pp. 11-51.

\(^{827}\) The original request dealt with questions concerning international drug trafficking. United Nations (UN), Request for the Inclusion of a Supplementary Item in the Agenda of the Forty-fourth session, International Criminal Responsibility of Individuals and Entities Engaged in Illicit Trafficking in Narcotic Drugs and across National Frontiers and Other Transnational Criminal Activities: Establishment of an International Criminal Court with Jurisdiction over Such Crimes, Letter dated 21 August 1989 from the Permanent Representative of Trinidad and Tobago to the United Nations addressed to the Secretary-General, 21 August 1989 (Un.doc: Doc. A/44/195; 21 August 1989).
Assembly set up the Preparatory Committee for an International Criminal Court (PREPCOM). It convened an international meeting in Rome, Italy, from 15 June to 17 July 1998. During this United Nations Conference of Plenipotentiaries on the establishment of an International Criminal Court the Statute of the International Criminal Court (the Rome Statute) was adopted. South Africa, like other African countries, was a staunch supporter of the court. An African state, Senegal, was the first to ratify the Statute, on 2 February 1999. A phantom court for four years, the minimum number of sixty ratifications was reached in April 2002 and the Rome Statute subsequently entered into force on 1 July 2002 and the court was established.

Persons who committed any of the crimes described in the Rome Statue – genocide, crimes against humanity, war crimes and in the future, the crime of aggression- committed from 1 July 2002 are potential subjects for investigation and prosecution by the ICC. Victims of the crimes have a right to participate in proceedings through representation and may seek reparations, a novelty in the international criminal justice system. The ICC - as a complementary body to national criminal jurisdictions - functions as a court of last resort. It may only step in when alleged crimes are not investigated or prosecuted by a capable state because it is either unwilling or unable to genuinely start investigations. Even when that is the case, only a state party or the United Nations Security Council can refer a ‘situation’ to the Office of The Prosecutor (OTP), which itself can also start, upon approval by the pre-trial chamber, an investigation of a situation proprio motu. Then the prosecutor evaluates the available information during a preliminary examination and can decide to commence an

848 Rome Statute, art. 53.
853 ICC, Situation in the Republic of Kenya: Request for authorization of an investigation pursuant to Article 15 (ICC-00/09; 26 November 2009).
854 ICC, Situation in the Republic of Côte d’Ivoire: Request for authorization of an investigation pursuant to Article 15 (ICC-02/11; 23 June 2011).
858 The United States of America and the Russian Federation have signed (2000) and unsigned (resp. 2002-2016). The People’s Republic of China has not signed. Other non-members include: Israel (signed 2000, not ratified), Iran (signed 2000, not ratified), Syria (signed 2000, not ratified), Sudan (signed 2000, not ratified), Libya, Pakistan, Iraq and India.
859 For instance, Russia and the Russian Federation vetoed a resolution to refer the situation in Syria to the court. UNSC, Record of 7180th Meeting (UN doc: S/PV.7180; New York, 22 May 2014). Exemplary were the staunch reactions from Israel and the USA to the announcement that the court opened a preliminary examination into alleged crimes “in the occupied Palestinian territory, including East Jerusalem, since June 13, 2014, right after the accession to the Court by Palestine and in referral of this situation. See: ICC-OTP, ‘The Prosecutor of the International Criminal Court, Fatou Bensouda, opens a preliminary examination of the situation in Palestine’, Press Release (ICC-OTP-20151116-PR1083; 16 January 2015).
860 Although the permanent seat of the ICC is the court can decide to conduct trials elsewhere. Rome Statute, art. 62.
862 Situations “are generally defined in terms of temporal, territorial and in some cases personal parameters.” See: ICC, PTC, Situation en République Démocratique du Congo: Decision sur les demandes de participation à la procédure de VPRS 1, VPRS 2, VPRS 3, VPRS 4, VPRS 5 and VPRS 6 (ICC-01/04; 17 January 2006), §65.
863 Preliminary examinations refer to the analytical process by which the OTP assesses whether there is a reasonable basis to proceed with an investigation in a given situation. The OTP follows four steps in this procedure: (phase 1: initial review) proactively gathering and evaluating information from multiple sources, including “communications”, from individuals and parties concerned: (phase 2a jurisdiction) assessing jurisdictional, temporal, territorial and personal jurisdiction; (phase 2b jurisdiction) assessing subject matter jurisdiction; (phase 3 admissibility) assessing complementarity and gravity; and (phase 4 interest) assessing the interests of justice. See: ICC, Office of The Prosecutor (OTP) Paper Policy on Preliminary Investigations: Draft (4 October 2010).
Prosecutor issued public indictments against thirty-six persons\textsuperscript{865} of whom ten have been arrested,\textsuperscript{866} two surrendered\textsuperscript{867} while nine have come to The Hague voluntarily.\textsuperscript{868} Its judges have delivered four final verdicts,\textsuperscript{869} while the case of Gbagbo, Goudé, Bosco Ntaganda and Dominic Ongwen are ongoing at the time of writing. All the cases at trial deal with African situations. As shown in the final chapter of this dissertation, there is however much diversity in crime scenes and contexts.

The growing critique among a group of African leaders - such the late Muammar Gaddaffi (Libya), Omar al-Bashir (Sudan), Yoweri Museveni (Uganda), Uhuru Kenyatta (Kenya), Robert Mugabe (Zimbabwe), Paul Kagame (Rwanda), Jacob Zuma (South Africa) and Pierre Nkurunziza (Burundi) – that the international criminal justice system is exclusively singling out Africans for racist, neo-colonial and imperialistic reasons must be seen in the light of the more recent evolution of international atrocity justice regarding Africa.\textsuperscript{870} Unsurprisingly, the protagonists of these sentiments have without exception, in some way or another, been implicated in mass atrocities themselves. For them, the reach of the Extraordinary African Chambers – with its strictly limited jurisdiction over crimes committed by Chadians in Chad between 1982 and 1990 – posed no threat. There remains however no political will to follow up on this kind of accountability mechanisms. In their eyes, “the rate at which selective indictments and threats of arrest warrants against African leaders by the so-called “independent” western judges/courts threatens to reverse our strides towards stability; undermines sovereignty of targeted parties; creates tensions between communities and Nation States; inflicts suffering to citizens of targeted states due to unilateral imposition of sanctions.”\textsuperscript{871} Appealing to a sense of Pan-Africanism, nationalistic and anti-western sentiments, particularly international justice mechanisms have not only been a target but also a tool to show the world that Africa will make its own sovereign decisions. The reality of this practice, however, is strikingly confusing and reaches a high level of hypocrisy. Contemporary leaders of countries that experienced mass atrocities and have endeavoured towards truth and accountability, such as South Africa and Rwanda, are now

\textsuperscript{865} Situations included(ed): Afghanistan, Central African Republic (Il), Colombia, Comoros, Gabon, Georgia, Guinea, Honduras, Iraq/UK, Korea, Nigeria, Registered Vessels of Comoros, Greece and Cambodia, Ukraine, Venezuela.


\textsuperscript{867} Lubanga, Katanga, Ngudjolo, Bemba, Mbarushimana (released), Gbagbo, Ble Goude, Aime Kilolo Musamba, Jean-Jacques Mangenda Kabongo, Fidele Babala Wandu and Narcisse Arido.

\textsuperscript{868} Abu Garda, Banda, Jerbo, Kosgey, Sang, Muthaura, Kenyatta and Ali. 

\textsuperscript{869} (1) Thomas Lubanga Dyilo was convicted on three charges of war crimes committed in the Democratic Republic of the Congo, including enlisting, conscripting and using child soldiers. He was sentenced to 14 years’ imprisonment. ICC, Lubanga Dyilo Judgment & ICC, Lubanga Dyilo Sentence. (2) Mathieu Ngudjolo Chui was acquitted and the Prosecutor has appealed: ICC, Situation en République Démocratique Du Congo, Affaire Le Procureur v. Ahmad Al Faqi Al Mahdi: Jugement rendu en application de l’article 74 de Statut (ICC-01/04-01/07; 7 March 2014) & ICC, ‘Defence and Prosecution discontinue respective appeals against judgement in the Katanga case’, Press Release (25 June 2014). (3) Ahmad Al Faqi Al Mahdi was convicted of war crime of destructing cultural property after his confession and sentenced to 9 years. ICC, TC VIII, Situation: in the Republic of Mali in the case of The Prosecutor v. Ahmad Al Faqi Al Mahdi: Judgment and Sentence (ICC-01/12-01/15; 27 September 2016).


\textsuperscript{871} Committee of Intelligence and security Services of Africa (Cissa), Kigali Declaration on the Growing Threat of Abuse of Universal Jurisdiction Against Africa (CNF/13/OR/7; Kigali, 6 August 2016), §5.
welcoming indicted genocide suspects such as Omar al-Bashir on their soil.\footnote{The Supreme Court of Appeal of South Africa, \textit{Judgement} (867/15; 15 March 2016); Eugene Kwibuka, ‘Bashir is our guest and can’t be arrested here, Mushikiwabo says’, \textit{The New Times}, 15 July 2016.} Thus, irrespective of a long tradition of transitional justice, as evidenced by the trials in Equatorial Guinea, Ethiopia, Senegal, fears within the echelons of power, that this historical evolution progresses to the extent that would bring them in the docks, have led to endeavours to halt these developments, particularly against universal jurisdiction and the ICC.

3.6 Rwanda, Sierra Leone and the Democratic Republic of the Congo (DRC)

Within the realm of the historical context of mass atrocity and transitional justice in Africa analysed above, our three case studies really were the precedent and the pinnacle of the evolution of post-Cold War transitional justice. In light of the growing tendency of some African leaders, Rwanda’s position is particularly interesting. The genocide in 1994 sparked a level of home grown atrocity prosecutions to the extent never seen before. Since the first condemnation before a specialised chamber in the ordinary Rwandan criminal courts in 1997,\footnote{ Tribunal de Première Instance de Kigali, Chambre Spécialisée, Ministère Public C/ Karamira: \textit{Jugement} (No.7; Kigali, 14 February 1997).} thousands of Rwandan génocidaires have reportedly been brought before a variety of courts in Rwanda and throughout the world.\footnote{ Thijs B. Bouwknegt, ‘Ubutabera: courts of genocide’, \textit{LoveRadio}, April 2014 (www.text: http://www.loveradio-rwanda.org/episode/5/info/essay, visited: 17 March 2015).} It was rather from the Rwandan immediate experience than the Ethiopian trials that the tribunalisation of African mass atrocity took off. It was then extended to Sierra Leone.\footnote{ Agreement between the United Nations and the government of Sierra Leone on the establishment of a Special Court for Sierra Leone & Statute of the Special Court for Sierra Leone.} Then, while the UNICTR was delivering its first verdicts and the SCSL opening up its doors, the International Criminal Court (ICC) came into play, which in its first decade of work exclusively dealt with conflicts in Sub-Saharan and North Africa and has subsequently, been dubbed African Criminal Court.\footnote{ Besides similar fact-finding challenges faced by the ad hoc tribunals because of its almost extensive reliance on direct witness testimony. International Bar Association (IBA), Witnesses before the International Criminal Court. An International Bar Association International Criminal Court Programme report on the ICC’s efforts and challenges to protect, support and ensure the rights of witnesses (IBA, July 2013), pp. 14-15.} Below, in order to complete the picture on the evolution of the tribunalisation of mass atrocity in Africa, I will concisely outline this dissertations’ case studies transitional justice context. Each case study thereafter will be analysed in-depth in a separate chapter, particularly its judicial aftermath.

3.7 Case Study 1: Rwanda

Armled Forces (FAR), Interahamwe and Impuzamugambi militias, civilians, Burundian refugees and the Rwandan Patriotic Army/Front (RPA/F) all reportedly committed human rights violations and at least half a million Rwandan citizens were killed. After the dust settled on 19 July 1994, with the victory of the RPF and the installation of a transitional government, Rwanda used prosecutions, truth finding, reconciliation initiatives, re-education and reparations to transcend towards internal peace. Already during the war, after a two-week mission in January 1993, an international non-governmental commission of inquiry – comprising jurists, historians and journalists - documented government and rebel human rights violations and concluded that the Rwandan state, its army and aligned militia’s committed acts of genocide against Tutsis. Days into the 1994 massacres - on 13 April 1994 - the RPF envoy at the UN requested the Security Council to institute a “war crimes tribunal and apprehend persons responsible for the atrocities,” but no official request was endorsed as the Rwandan regime held a rotating seat. The transitional government filed a new request, while a UN Commission of Experts concluded that individuals from both sides to the armed conflict had committed crimes against humanity and that acts of genocide were committed against the Tutsi group and the International Criminal Tribunal for Rwanda (UNICTR) was set up shortly after. It was tasked with prosecuting “persons responsible for serious violations of international humanitarian law committed in the territory of Rwanda and Rwandan citizens responsible for such violations committed in the territory of neighbouring States, between 1 January 1994 and 31 December 1994.” In 22 years, the tribunal tried 82 Rwandans and one Belgian, while nine suspects remain at large. Its residual work, after its closure in 2016, has been taken over by the Mechanism for International Criminal Tribunals (UNMICT).
On the national stage, the RPF reportedly arrested between 120,000 and 135,000 people, intending to criminally prosecute everyone involved in the massacres. Simultaneously, the new Rwandan government, led by President Pasteur Bizimungu, convened an international conference to discuss its transitional justice strategy, resulting in the establishment of specialised chambers in the ordinary and military courts to try genocide and crimes against humanity committed since October 1994. Genocide offences were categorised and a confession procedure was put in place. The first trials began in December 1996 and from 1997 through June 2002, 7,211 persons were tried - of whom 1,386 were acquitted. Several hundred people were sentenced to death but no public executions have been carried out since 24 April 1998. Classic trials soon proved to be inadequate to criminally prosecute over a hundred thousand suspects in and outside the country and Rwanda established Inikko Gacaca – or lawn courts in Kinyarwanda – in 2001. Thousands of Inyangamugayo – lay judges - were nominated to oversee the process of (1) truth finding; (2) speeding up trials; (3) combating impunity; (4) sparking national unity and reconciliation; and (5) demonstrating that Rwandans can resolve their own problems. From 10 March 2005 until the closing of Gacaca in June 2012, 12,103 grassroots courts throughout the whole country had tried 1,003,227 people in 1,958,634 cases. Although the Gacaca procedures in Rwandan communities has met with praise and criticism from inside and outside Rwanda, its process has microscopically documented its genocide to an unprecedented extent. Besides Rwandan and supranational schemes, other models of inquiry and justice have dealt with the aftermath of the Rwandan genocide. Parliaments in Belgium, Switzerland and France installed special commissions of inquiry while the...
UN and the Organisation of African Unity (now African Union: AU) investigated the 1994 bloodbath on their behalf. In addition to these fact-finding exercises, a range of non-African countries opted for criminal prosecutions under the principle of universal jurisdiction. Some of these countries have sent criminal files to Arusha or vice versa, including transfers to a specialised international crimes chamber in Rwanda.

3.8 Case Study 2: Sierra Leone

While the genocide against Tutsi received unprecedented judicial attention, responses to the large-scale killings, amputations and annihilation in Sierra Leone took place in the shadow of Rwanda. Between March 1991 and January 2002, the Republic of Sierra Leone saw insurgency, civil war, a military junta and foreign intervention. The Revolutionary United Front (RUF), the Armed Forces Revolutionary Council (AFRC), the Civil Defence Forces (CDF), the Sierra Leonean Army (SLA), ECOMOG peacekeepers and (foreign) mercenary groups are all reported to have perpetrated mass atrocities. In 1999, violence paused after the signing of a peace agreement in Lomé (Lomé Agreement), which, inter alia, provided for disarmament, amnesty and a truth and reconciliation commission. Hostilities resumed in May 2000 and a month later, President Tejan Kabbah invited the UN to set up a tribunal “to try and bring to credible justice those members of the Revolutionary United Front (RUF) and their accomplices […]”. He declared that the war was over during a symbolic ‘Arms Burning Ceremony’ on 18 January 2002.
Amnesty, prosecutions, truth finding, reconciliation, reparations and re-integration were used in Sierra Leone to transcend to peace.\(^{911}\) The government and the UN jointly established the Special Court for Sierra Leone (SCSL).\(^{912}\) Based in Freetown, Leidschendam and The Hague, this hybrid and self-sufficient court investigated and prosecuted those who bear the ‘greatest responsibility’ for violations of international humanitarian law and Sierra Leonean law committed in Sierra Leone since 30 November 1996.\(^{913}\) Nine Sierra Leoneans (three RUF, two CDF and three AFRC) and the former Liberian president Charles Taylor have been tried and convicted. Other prime suspects died in detention were murdered or remain at large.\(^{914}\) In lieu of the blanket amnesty, national courts in Sierra Leone refrained from prosecuting pre-Lomé atrocities. However, in 2005 and 2006, the High Court in Freetown held two trials against 88 individuals for war related crimes perpetrated in 2000. It convicted ten members of the RUF/P and seven members of the West Side Boys (WSB).\(^{915}\) Next to international prosecutions, a truth and reconciliation commission\(^{916}\) carried out its work between 2002 until 2004.\(^{917}\) It was mandated to establish an impartial historical record of the conflict and human rights abuses, to address impunity, to respond to the needs of victims, to promote healing and reconciliation and to prevent recurrence of violence.\(^{918}\) But the SCSL and TRC formal processes were driven by concepts of justice,\(^{919}\) truth and reconciliation, which were alien to local communities.\(^{920}\) In this vacuum, non-governmental initiatives sought to build a bridge between high-level and low-level transitional justice. An exemplary mechanism is Fambul Tok (‘Family Talk’ in Krio), which facilitated unofficial community-based reconciliation gatherings.\(^{921}\) Through drawing on age-old customs of confession, apology and forgiveness, communities throughout the country have been organising ceremonies that included truth-telling bonfires and cleansing ceremonies.\(^{922}\)


\(^{912}\) Agreement between the United Nations and the government of Sierra Leone on the establishment of a Special Court for Sierra Leone & Statute of the Special Court for Sierra Leone.

\(^{913}\) Statute of the Special Court for Sierra Leone.


\(^{917}\) On the difficulties caused by this coexistence, see William A. Schabas, The Relationship between Truth Commissions and International Courts: The Case of Sierra Leone, Human Rights Quarterly, 2003, 1035-1066.

\(^{918}\) Throughout its process, the TRC collected some 8,000 statements from Sierra Leone and the Diaspora and held public, closed, thematic and event-specific hearings in Freetown and district capitals. The TRC’s findings and recommendations were published in a four-volume report (Witness to Truth), a child-friendly and secondary school version and a short film. TRCSL, Witness to Truth: Report of the Sierra Leone Truth and Reconciliation Commission (Accra 2004); TRCSL, Truth and Reconciliation Commission Report for the Children of Sierra Leone. Child Friendly version (Freetown 2004); TRCSL, TRC Report: A Senior Secondary School Version (Freetown 2005); TRCSL, Witness to Truth: A Video Report and Recommendations from the TRC of Sierra Leone (2004). All material, alongside testimonies, can be consulted at: http://www.sierraleonetrc.org.


\(^{920}\) Although customary justice systems existed among communities in Sierra Leone they are reported to be insufficient to reckon with the scale of the atrocities.


Liberia’s back-to-back conflicts [1989-2003] were closely intertwined with the Sierra Leonean war. Charles Taylor, the former Liberian president, played a central role in west-African politics and was a prime subject in transitional justice enterprises in the region. He stepped down after the Special Court warranted his arrest in 2003, leading to a Liberian peace agreement that called for a truth and reconciliation commission. Established in 2005, the TRC was to investigate Liberia’s ‘turbulent history’ between 1979 and 2003 and recommend steps towards peace, justice, and reconciliation. The first hearing began on 8 January 2008, one day after the first prosecution witness appeared in the trial against Taylor in The Hague. The commission released its final report in June 2009 and recommended reparations, memorialisation, purges, institutional reform and criminal accountability. Among the key advices is the erection of an Extraordinary Criminal Court, before which Charles Taylor was listed to be prosecuted, among others. Unique to Liberian TRC was that it also sought to include Liberians abroad. It established a Diaspora Committee that, with assistance from the NGO Advocates for Human Rights, gathered statements from Liberians living in the United States of America (USA), the United Kingdom (UK) and Ghana and held public hearings in St. Paul, Minnesota (USA), in June 2008. The Diaspora Project published its own report, documenting experiences by members of the Diaspora during their flight through Liberia and across international borders, while living in refugee camps in West Africa and in resettlement in the US and UK. In line with the historical connections and Diaspora representation, the USA judiciary tried Charles Taylor his son – Roy Belfast – or better known as “Chuckie” Taylor - for torture committed by Taylor’s Anti-Terrorist Unit (ATU). He was sentenced to 97 years in prison. Another case concerning serious crimes committed in Liberia is due for retrial at a Dutch appeals court, against


924 Ministry of Foreign Affairs [Liberia], An Act to Establish the Truth and Reconciliation Commission (TRC) of Liberia. Approved June 10, 2005 (Monrovia, 22 June 2005), art. IV.


Guus Kouwenhoven. The former Businessman allegedly breached the UN arms embargo for Liberia.932

3.9 Case Study 3: The Democratic Republic of the Congo

While the genocide against Rwandan Tutsi received unprecedented judicial attention and the atrocities in Sierra Leone have been addressed legally and were ‘truth commissioned’, the many cyclical episodes historical mass atrocity in the eastern parts of the Democratic Republic of Congo (DRC933) were addressed relatively marginally. Yet, they were closely related to events in bordering Rwanda.934

Unlike Rwanda and Sierra Leone, which are relatively small states with relatively comprehensible histories, Congo is amazingly vast in not just these two respects, it also relates to other countries, specifically bordering Rwanda.935 Since March 1993,936 particularly the eastern provinces937 of Congo saw ethnic violence, acts of genocide, refugee crises, insurgency, two full-scale international wars, internal rebellion, civil war and plunder of natural resources. Congolese government forces, paramilitary groups, militias, rebel groups, civil defence forces, an array of foreign armies and UN peacekeepers all reportedly committed atrocities in the past.938 Despite the presence of UN forces, violence is ever continuing.939 Omnipresent impunity, prosecutions, truth seeking, demobilisation and re-integration and amnesty,940 were used in Congo to respond to the back-to-back outbreaks of violence.

Congo’s 2002 ‘transition’ – towards peace under the new Presidency of Joseph Kabila - was blueprinted in South Africa’s Sun City, at the Inter-Congolese Dialogue, comprising 362 Congolese officials, political opponents, rebel groups and forces vives.942 They agreed, inter alia, on a truth and
reconciliation commission,943 which was later, enshrined in the 2003 Transitional Constitution944 and established the following year.945 The Commission Verité et Reconciliation (CVR) was tasked with investigating political crimes and human rights abuses between Congo’s independence on 30 June 1960 up to prospective “end of the transition” on 30 June 2006.946 Largely ineffective,947 the commission concluded that a new truth commission should be created, something that never happened.948 Whilst the CVR law was still in the making in March 2004, Congo invited the ICC to investigate and prosecute possible offenders of crimes of genocide, war crimes or crimes against humanity.949 The ICC investigations in the Ituri Provinces950 led the arrests of several Congolese militiamen, including Thomas Lubanga Dyilo,951 Germain Katanga, Mathieu Ngudjolo Chui,952 and Bosco Ntaganda.953 Further investigations in the Kivu Provinces into atrocities by the Forces Democratie\tiques de Liberation de Rwanda (FDLR) - a militia formed out of the ranks of former Rwandan génocidaire954 led to the arrest of Rwandan national Callixte Mbarangishma955 and a public arrest warrant for Rwandan national Sylvestre Mudacumura,956 both on atrocity charges.957

943 Dialogue intercongolais, Négociations Politiques sur les Processus de Paix et sur la Transition en RDC, Accord Global et Inclusif sur la Transition en République Démocratique de Congo (Pretoria, 16 December 2002), art. V & D (4)(a). The Truth and Reconciliation Commission was established alongside an independent electoral commission, a national observatory for human rights, a higher authority for media and an ethical commission to fight corruption.


945 Loi N°04/018 de 30 juillet 2004 portant organisation, attributions et fonctionnement de la commission vérité et réconciliation (Kinshasa, 30 July 2004).

946 It was fully mandated to (a) consolidate national unity and cohesion and social justice; (b) re-establish truth about political and socio-economic events; (c) reconcile political and military actors with civilians; (d) contribute to the Rule of Law; (e) revive a new national and patriotic consciousness; (f) bring together leaders; (g) restore climate of trust between communities and encourage inter-ethnic cohabitation; (h) recognize crimes committed against the Republic; (i) recognize individual and collective responsibilities and see redress; and (j) eradicate tribalism, regionalism, intolerance, exclusion and hatred in all forms. Loi N°04/018 de 30 juillet 2004 portant organisation, attributions et fonctionnement de la commission vérité et réconciliation (Kinshasa, 30 July 2004), art. 7.

947 Headed by Bishop Jean-Luc Kuate Ndondo wa Mulemera and seated in Kinshasa, the heavily divided 21 CVR members never embarked on a serious truth-seeking undertaking. Instead, they were caught up with resolving on-going political disputes and sensitising the public for the 2006 polls, the first multi-party elections in the country in 41 years. Hayner, Unspeakable Truths, pp. 253-255; and Scott Baldauf, ‘A bishop prepares volatile Congo for peace, Christian Science Monitor, 14 November 2006.

948 Priscilla Hayner writes that only an administrative report - Rapport final des activités de juillet 2003 à février 2007 - was submitted to the government in February 2007 but that no public version was published. It lists meetings but provides no substantive conclusions or commentary about human rights abuses. Hayner, Unspeakable Truths, p. 337, note 55.


957 Nine counts of war crimes, from 20 January 2009 to the end of September 2010, in the context of the conflict in the Kivus, including: attacking civilians, murder, mutilation, cruel treatment, rape, torture, destruction of property, pillaging and outrages against personal dignity. ICC, Situation in the Democratic Republic of the Congo in the Case of the Prosecutor v. Sylvestre Mudacumura: Decision on the Prosecutor’s Application under Article 58 (ICC-01-04-01/12; 13 July 2012), p. 29.
Next to the ICC’s interventions, numerous mobile tribunals throughout Congo investigated, prosecuted, judged and sentenced scores of rebel fighters, government soldiers and civil defence warriors for international crimes.

Apart from these ‘sedentary’ tribunals, a system of mobile courts was introduced in October 2009. Apart from these scattered courts, debate about the establishment of a specialised mixed jurisdiction for Congo with a longer historical mandate – alongside a new truth commission – has not been on the agenda as well, but at the time of writing it has not been established. Against this background, the cooperation between Congolese authorities and the ICC have matured.

Along the way, outside Congo, a handful of universal jurisdiction cases against Congolese failed, but increasingly led to success in The Netherlands and Germany.

Crimes in Congo were listed in the arrest warrant for 40 Rwandans by a Spanish judge in 2008. Arrested in January 2009 in Rwanda, the judicial faith of Laurent Nkunda Batware remains


959 The military court structure consists of the Tribunaux Militaires de Gendarmerie (Military Gendarmerie Tribunals, MTG), at first instance, the Cour Militaire (Military Courts MC) and the Haute Cour Militaire (Military High Court, MHC) as the final court of appeal. These tribunals replaced the Military Order Court, which had operated between 1997 and 2003: OHCHR, Report of the Mapping Exercise, p. 394.

960 By 2008, according to HRW researchers, trials involving grave violations of international humanitarian law had been conducted before the following courts: military tribunal of Bunia, military tribunal of Songo Bboyu, military tribunal of Mbandaka, military tribunal of Gbadolite, military tribunal of Iteni and the ICC. Mobile courts, which can be either military or civilian tribunals, are specifically provided for by Congolese law: République du Zaïre, Ministère de la Justice, Arrêté d’Organisation Judiciaire 299/79 portant règlement intérieur des cours, tribunaux et parquets (20 August 1979).


962 Also see letter from 146 Congolese civil society and international human rights organisations to the President of the Congo, Catherine Tshisekedi, ‘End impunity for the crimes committed against the Congolese people in the Eastern provinces of Democratic Republic of Congo’, 26 November 2008. 146 Congolese civil society organisations introduced a system of mobile courts to combat the crimes committed against the Congolese people, especially in the provinces of Sud-Kivu, Nord-Kivu and South Kivu.

963 Along the way, outside Congo, a handful of universal jurisdiction cases against Congolese failed, but increasingly led to success in The Netherlands and Germany. Crimes in Congo were listed in the arrest warrant for 40 Rwandans by a Spanish judge in 2008.
ambiguous, since Kigali has not ever acted on an extradition request from Kinshasa nor put him on trial.\textsuperscript{971} In 2014, a criminal complaint was lodged in The Netherlands and in Rwanda against Rwanda’s President Paul Kagame and other officials for alleged crimes, including genocide, in Congo.\textsuperscript{972}

3.10 Conclusions

This chapter has mapped and brought together some of the more obscure cases of recent and remote mass atrocities - or historical injustices - in Africa, from slavery, via Shaka Zulu’s ‘genocidal’ campaigns in the 1820s to the deadly terror campaigns of Boko Haram in Nigeria. Also, this chapter has traced the comprehensive genealogy – including both positive and negative cases - of transitional justice in Sub-Saharan Africa. Starting at the advent of the twentieth century, this dissertation has conjoined and detailed for the first time the history of truth commissions and atrocity trials in Africa. It has hence contributed largely to the few case studies that is referred to in transitional justice literature and countered the simplistic impression of a continent drenched in impunity and in need of non-African international intervention. We have seen, for example, that Ethiopia really set the stage for post-atrocity justice, not only during WWII but most prominently with the establishment in 1992 of the Derg-tribunal, which was also intended to serve as a mixed judicial truth commission. Furthermore, from the first truth commission \textit{avant la lettre} in the Congo Free State on King Leopold II’s Rubber Terror to the latest ICC Judgement on the destruction of historic and cultural heritage in Mali, a comprehensive overview has shown trends, parallels and differences in the dealing with mass atrocity in Sub-Saharan Africa. Interestingly enough, it is a cyclic narrative that stretches from simply doing nothing - via conscious reckoning through truth commissions, apologies, amnesties, traditional practices and criminal trials – to a much more complex stalemate between the international community, African governments and violent-affected communities. One more, this historical overview has shown that transitional justice for recent and remote historical injustices is always inherently political and that societies have come out with lingering competing narratives about the atrocious past. In other cases, like Sudan or Congo, continuing and back-to-back violence has largely overshadowed the older pains of the past and nothing may happen ever to address those events.

In terms of international justice and atrocity trials, this chapter has also shown the key role African countries have played in its evolution, but that this has not been fully recognised by the international community and transitional justice scholarship. A key example is that while Emperor Haile Selassie I was spearheading calls for human rights, accountability for mass atrocities and the establishment of a war crimes tribunal in 1936, the international community never acted upon the


\textsuperscript{972} Prakken d’Oliveira Human Rights Lawyers, \textit{Iyamuremye – Aangifte genocide, misdrijven tegen de menselijkheid, oorlogs misdrijven, gedwongen verdwijning en foltering Rwanda / Congo} (20140254.MP; Amsterdam, 4 April 2014) & Prakken d’Oliveira Human Rights Lawyers, Jean Claude Iyamuremye – Criminal Complaint against President Paul Kagame e.a. for genocide, crimes against humanity, responsibility, war crimes, enforced disappearances, torture and murder, \textit{committed in Rwanda & Congo} (20140254A.MP/nc; Amsterdam, 4 April 2014).
requests, excluded Ethiopia from the War Crimes Commission and only set up the tribunals in Nuremberg and Tokyo. In the post-WWII era, mass atrocities continued to be perpetrated across the continent, including genocide Nigeria, Burundi, Zimbabwe, Ethiopia, Chad, Rwanda, Sudan and elsewhere. In most cases impunity reigned supreme, in other cases quasi-judicial truth commissions were established while in Equatorial Guinea, Ethiopia, Rwanda and Chad national prosecutions were heralded. In contrast to popular belief, the advent and evolution of international criminal justice really took place in Africa, not so much in Nuremberg or at the UNICTY.

Although obscured from the transitional justice literature, Africa saw the world’s first national atrocity crimes tribunal that dealt with genocide and prosecuted former officials in Ethiopia. Four years later, the first international genocide court was established in Tanzania and delivered its first ever genocide conviction. Furthermore, the first hybrid tribunal was set up in Africa, at the request of Sierra Leone. In terms of universal jurisdiction, Senegal, in cooperation with the African Union, was the first country to try a former foreign President. Finally, African countries were to first to refer mass atrocities in their very own countries to the International Criminal Court, although they may be backtracking at the time of writing. Finally, within the context of the broader scheme of transitional justice in Africa, three cases have become emblematic: Rwanda, Sierra Leone and the Democratic Republic of the Congo (DRC). In looking ahead to the three upcoming chapters, here I have concisely sketched the broader transitional justice endeavours in these three respective countries, providing the broader context in which the UNICTR, SCSL and ICC have conducted atrocity trials.
4. Cross-examining the past. Rwanda: An Untold Tropical Nazism

Witness statements are the building blocks upon which the prosecution directly bases its case. The testimony of witnesses at trial is the principal form of evidence that the Prosecutor places at the disposal of the Trial Chambers. You have asked me if there is such a thing as objective truth. That is a huge, almost philosophical, question that I dare not attempt to answer. But in practice, in the judiciary, it is the responsibility of the judge to listen to the testimonies of the witnesses. Each presents his or her version of the truth. Our task is to get as close to it as possible.

- Erik Mose, Judge

4.1 Introduction

Days before the genocide ended in Rwanda, the popular simplistic version of the events as an outbreak of an “ancient tribal conflict” that had largely dominated western media reporting was subtly substituted with a much more complex narrative, one that was framed analogous to the Nazi extermination of Jews in Europe. Social anthropologist Alex de Waal, a doyen academic on Africa, wrote that “preparations for mass killing began in 1990, when the regime of the late President Juvenal Habyarimana first faced the simultaneous threats of rebellion by the Tutsi-dominated Rwandan Patriotic Front (RPF) and the transition to multi-party rule. Starting in 1991, members of the now-notorious Interahamwe militia were mobilised from every community in the country.” Although not entirely new, De Waal’s framing, analysis and narrative of Rwanda’s genocide, as a pre-planned conspired criminal enterprise by a “genocidal state,” gained much currency in the Anglophone world through the first voluminous reports by African Rights, an NGO he co-directed with Rakiya Omaar, a Somali lawyer and trained historian who had documented the atrocities real-time for a period of six to seven weeks. Their report, Death, Despair and Defiance, which was based on the raw testimonies of hundreds of survivors, for the first time provided a grand-narrative of the genocide as a state crime, told in an historical analogy to the “linear track of escalating dehumanization of

974 Amnesty, Telling Truths in Arusha, from 08:20 mins.
976 Alex De Waal, ‘Rwanda genocide took four years to plan’, The Times, 18 June 1994. Earlier on, De Waal had debunked the tribal conflict narrative in interviews, including: Martin Bright, Rwanda: Blurred Roots of Conflict; The current slaughter is political, not tribal, and those opposed to the regime include both Hutus and Tutsis’, The Guardian, 9 May 1994.
980 De Waal, ‘Ethnicity and Genocide in Rwanda’, p. 15; AR, Death, Despair and Defiance, p. xvii.
Jews” during the Holocaust. At the same time, the “yellow-book” as it soon became to be known for its yellow cover, for the first time meticulously identified and biographed the main alleged masterminds and executioners of the genocide – more than 200 in the first edition (September 1994) of the report and more than 600 in the second edition (August 1995) - many of whom ended up being prosecuted by the UN’s tribunal and jurisdictions in Europe. On different levels, the report’s narrative of a “pathology of genocide” and “preparation for the apocalypse”, the names of “killers and their accomplices” and detailed testimony from recent crime scenes has had a massive impact. In the first place, it was the first report that published testimonies from survivors and witnesses so immediately after the events. Second, it allegedly became a guide book to Rwanda for the overall non-French speaking UNICTR investigators, prosecutors and other staff. Besides serving as pseudo-prosecutor’s manual, the book was heavily consulted and referenced by the early Anglophone literary, academic and human rights community that shaped and trickled into early historiography on the Rwandan genocide.

In the field of mass atrocities, it is very common that NGOs, who as activist quasi investigative journalists bring to the attention of world leaders and the public at large immediate human rights situations, are the first to interview and document testimonies on the ground. Human rights reports often become the first drafts of history, even more so when written by historians. This was not only the case for African Rights’ Rakiya Omaar and Alex De Waal who crafted the first sketches of a narrative, but later also for Human Rights Watch’s Alison Des Forges, who published the second standard report on the genocide, Leave None to Tell the Story. Researched before and after the genocide, Des Forges’ report carried a similar linear explanation of the genocide, although also highlighting the role of the RPF. Both reports not only influenced popular thinking on Rwanda, historiography and a genocide scholarship, but also the manner in which prosecutors at the UNICTR and elsewhere framed the narrative of the crime of genocide that was committed in Rwanda.

982 AR, Death, Despair and Defiance, pp. 100-176. The chapter “the killers and their accomplices” is structured by: the president’s family; the interim government; politicians and intellectuals with an extremist agenda; military officers; professional Interahamwe; and principal killers in the prefectures.
983 In The Netherlands alone, I was able to track at least seven cases against Rwandans in which African Rights was the referencing source.
984 Days after the start of the genocide, Omaar had travelled to Rwanda with an escort from the rebel RPF and interviewed over 200 survivors. She took notes longhand and almost verbatim, sending to De Waal in London, who typed them up. De Waal, ‘Writing Human Rights’.
985 In the field of mass atrocities, it is very common that NGOs, who as activist quasi investigative journalists bring to the attention of world leaders and the public at large immediate human rights situations, are the first to interview and document testimonies on the ground. Human rights reports often become the first drafts of history, even more so when written by historians. This was not only the case for African Rights’ Rakiya Omaar and Alex De Waal who crafted the first sketches of a narrative, but later also for Human Rights Watch’s Alison Des Forges, who published the second standard report on the genocide, Leave None to Tell the Story. Researched before and after the genocide, Des Forges’ report carried a similar linear explanation of the genocide, although also highlighting the role of the RPF. Both reports not only influenced popular thinking on Rwanda, historiography and a genocide scholarship, but also the manner in which prosecutors at the UNICTR and elsewhere framed the narrative of the crime of genocide that was committed in Rwanda.

985
However, twenty years of criminal investigations, proceedings and judgements against 75 key suspects at the UNICTR did not substantiate such a narrative. Most likely, the genocide, which was a crime committed through the state machinery, was animated by some planning but it was arguably not conspired for four, three, two or a year in advance. In fact, no judge at the UNICTR was convinced that any of the persons tried had conspired to commit genocide before 7 April 1994. Their individual judgements, as we will see below, sometimes attempt to provide a nuanced reading on major historical claims, but the tribunal – since it is not its purpose – never brought everything together to endeavour to paint an all-encompassing picture of the genocide. Only since very recently, scholarship, in English, free from the Holocaust template and based on a mosaic of evidence gathered over the past twenty years, including much UNICTR material, provides us with rich and detailed understanding of the dynamic process that led genocide to become a policy but only from 12 April 1994.\(^{990}\) Overall and beyond any legal, historical and academic dispute, it is a fact that genocide was committed against the Tutsi population. However, the leading narrative of a tropical Nazism as coined by human rights organisations, operationalised by prosecutors and embedded in academia, in its immediate wake has not become a judicial truth, backed by irrefutable empirical evidence. Alex De Waal, in the summer of 2016, surprisingly, acknowledged this. His, and thereby Omaar’s, explanation of the genocide had become dominant in an academic and popular discourse, and he does not regret writing it “for Rwanda in 1994,” but other stories, particularly those of the fiercely fought war and violence by the RPF forces that chased out the genocidal interim regime, were corked. Moreover, the RPF government had turned this particular genocide story – which in the official version is traced back to Belgian colonial rule - into orthodoxy, even law, and used it for justify its lethal military operations against Rwandan Hutus in Zaire from 1996, its cling unto power and persecution of nonconformists. The compelling, but partial and incomplete, human rights narrative he had helped to craft, he says, had even become a license for despotism.\(^{991}\) Thus, twenty two years after the genocide and twenty six years after the start of the civil war, various narratives that are held to be true about the genocide and the context in which it was perpetrated persist among ‘ordinary’ Rwandans in- and outside Rwanda, the Rwandan government, Rwandese opposition, the international community, governments with close relations to Rwanda, NGOs, Rwandan and non-Rwandan academics, Rwandan and non-Rwandan ‘Rwanda-experts’, Rwandan and non-Rwandan jurists and Rwandan and non-Rwandan students of Rwanda. Suffice to say, when reading the passages below, this study does not attempt to write yet another Rwanda-story, nor deny that the crime of genocide was committed against Rwandan Tutsis, but it seeks to unravel how and why the dominant version that was informed by a Holocaust template of how genocide happens, coined by historians and adopted by the post-genocide authorities

\(^{990}\) André Guichaoua, *From War to Genocide: Criminal Politics in Rwanda, 1990-1994* (Madison: University of Wisconsin Press, 2015). This abridged English translation of the book, which includes a foreword by Scott Straus and new chapters, only became available after most of this chapter was already written. It is for that reason that in the text below, both the English and French versions are referenced. André Guichaoua, *Rwanda: De la Guerre au Genocide. Les Politiques Criminelles au Rwanda (1990-1994)* (La Découverte: Paris, 2010).

\(^{991}\) De Waal, ‘Writing Human Rights’.
in Rwanda, was litigated and not proven beyond any reasonable doubt by a court that was expected to be capable of unearthing the truth.

The Mille Collines

As has become clear in the short introduction above, Rwanda, on all altitudes, is a multifarious state. Before delving into the even more intricate matters of history, politics and mass violence, the first paragraphs below serve as introduction into some key facts on geography, population and administration.

Green slopes, rubicund earth and azure lakes typify the colour card of Rwanda’s landscape. Positioned in the Central African Great Rift Valley, a mountainous relief shapes the 26.338 square kilometres of land, known as the Mille Collines.992 Mount Karisimbi in the volcanic northwest forms the roof of the country at 4.507 meters, while the southwest lowlands mark the ground floor, still at 900 meters above sea level. At these altitudes, numerous rivers meander through grassy uplands, small rainforests, lowlands and savannahs, connecting twenty-three lakes. These diverse ecosystems host a rich natural flora and fauna, flourishing in a mild tropical climate, despite being only two degrees south of the equator. Good climatic circumstances explain the prevalence of agriculture and livestock in the country.993 Rwanda’s contemporary borders are among the scarce ones on the African continent that are not so much the reminders of Europe’s unilateral scramble for and partition of Africa in the late 19th century. Whereas elsewhere the stroke of a pencil sketched the angulated shapes of African countries on the atlas, back at the Congo-conference in Berlin in 1885,994 the frontiers of Rwanda are somewhat consistent with the ones European explorers located when they first set foot there. Essentially, Rwanda was not a European conception like many modern-day African states.995 But that is not the sole peculiarity.

An antique Kingdom ruled by complexly centralised dynasties,996 Rwanda997 only became part of ‘German East Africa’ (Deutsch-Ostafrika) in 1890, united with [B] Urundi and Tanganyika, until forces from the Belgian Congo seized it in 1916.998 Three years later, at Versailles, the Belgians were allocated control over Ruanda-Urundi, which became a mandate territory under the freshly
established League of Nations in 1924. Both central African countries regained their independence in July 1962, with Burundi preserving its monarchy and Rwanda becoming a republic. Kigali was made Rwanda’s capital and is at the heart of the landlocked country. Currently, the country has four neighbours: Uganda in the north; Tanzania in the east; Burundi in the south; and the Democratic Republic of the Congo (DRC) in the west. Lake Kivu borders most of the rugged western shores and beaches. Rwanda has always been one of the most densely populated countries in the world. Its population is classically and roughly divided into three social groups, which, since European dominion, were ambiguously labelled respectively as racial, ethnic and national. Reportedly, the majority of Banyarwanda (those who come from Rwanda”) is commonly believed to be [Ba] Hutu (85%), followed by [Ba] Tutsi (14%) and [Ba] Twa (1%), but no certified data exists since 1994. Most Rwandans are fluent in the lyrical language Kinyarwanda, followed by the two other lingas Franca English and French, while Kiswahili and Kirundi are much heard tongues as well. Half of the populace, which reaches almost 12.5 million (in 2015), is Roman Catholic, followed by Protestants and other Christians (45%) and a smaller group of Muslims (1.8%). Roughly 60% of the strongly urbanised (19%) population is younger than 25 years old, with a median age of 19, while life expectancy at birth is 59. From 1962 to December 2005, Rwanda was hierarchically administrated into prefectures (provinces), sub-prefectures, communes (municipalities), sectors, cells, and, at the lowest level, nyumbakumi (groupings of ten households). Since January 2006, as part of a decentralisation policy, the government altered place names all at administrative levels and put in place a reorganised administrative structure, consisting of five provinces: Kigali City (capital), the


1001 Also, there are twenty-odd clans known in Rwanda, which are found everywhere mixed one with the other, a situation that is the product of an historical evolution. See: Jan Vansina, Antecedents to Modern Rwanda. The Nyiginya Kingdom (Madison: University of Wisconsin Press, 2004), p. 33.

1002 In singular form Mahutsu, Matutsi and Matwa. Commonly these are simply referred to as Hutu, Tutsi and Twa, like in the rest of Africa. According to some estimates, the numbers were flexible, she adds: “said to represent 17,5 percent of the populations in 1912, Tutsi were counted as only 8,4 percent of the total in 1991. See: Des Forges, Leave None, p. 37 & 40. Other numbers exist. In 1960 the numbers were set at Tutsi (16,59 %), Huta (82,74%) and Twa (0,67 %), see: United Nations Trusteeship Council, Visiting Mission to Trust Territories in East Africa, 1960. Report on Ruanda-Urundi (§T/1538; 2 June 1960), §65. Rougher estimates circulate after the genocide, with Hutu making up between 84-90 % and Tutsi between 10-14 % of the population, see: Scott Straus, ‘The Historiography of the Rwandan Genocide’, in: Dan Stone (ed.), The Historiography of Genocide (Basingstoke & New York: Palgrave McMillan, 2008), p. 519.


Eastern-, Southern, Western- and Northern Provinces. The provinces are then divided into districts and municipalities. On the political level, the Republic of Rwanda (Republika y’u Rwanda) is a multiparty democracy,\textsuperscript{1009} headed by President Paul Kagame (since 22 April 2000).\textsuperscript{1010} His Rwandan Patriotic Front (RPF; or FPR in French) is the governing party since 1994.\textsuperscript{1011}

4.2 Matters of history: Uprising and containment

The African population of Ruanda is not of one single physical type: it includes Tutsi Hamites (or ethiopids) Hutu Bantus (or negroids) and Twa pygmies. The Twa, who no longer represent more than a small minority (0.67 per cent of the population), are related to the pygmies of the Belgian Congo and have probably been in the country from time immemorial. The Hutu came later, but nothing is known of their origin. They now form the great majority of the population (82.74 per cent of the population of Ruanda). Lastly, the Tutsi (16.59 per cent of the population of Ruanda) are related to the Hima, who are the ruling caste in all the kingdoms between the lakes. They probably came originally from Ethiopia. They undoubtedly migrated to Ruanda some time before the fifteenth century. The Tutsi were nomadic cattle-breeders, who gradually occupied the country and Subjugated the indigenous inhabitants, establishing various small kingdoms in the east of what is now Ruanda, and extending those kingdoms towards the west.\textsuperscript{1012}

Some people have asked whether this is a social or racial conflict. We think that that is idle speculation. In reality and in the minds of men it is both. It can, however, be narrowed down for it primarily a question of a political monopoly by one race, the Mututusi, and, in view of the social situation as a whole, it has become an economic and social monopoly, in view, also, of the de facto selection in education, this political, economic and social monopoly has also become a cultural monopoly, to the great despair of the Bahutu, who see themselves condemned forever to the role of subordinate manual workers, and this, worse still, after achieving an independence which they will have unwittingly helped to obtain. […] The difficulties which might arise from the Hamitic monopoly over the other more numerous races which have lived in the State for a longer time, must be eliminated. […] People are not unaware of the support the indirect administration gives to the Mututusi monopoly. Therefore, in order to keep a close check on this racial monopoly, we strongly oppose, for the time being at least, the discontinuance of the practice of entering Muhutu, Mututsi, or Mutwa on official or personal identity cards. Its discontinuance would make it even easier to practice selection, by concealing it and making it impossible to establish the true situation statistically. Moreover, it has never been agreed that the Muhutu is ashamed of his name; what he objects to is the privileged position of a favoured monopoly which threatens to reduce the majority of the population to a position of systematic inferiority and to an undeserved sub existence.

- Manifesto of the Bahutu\textsuperscript{1013}

\textsuperscript{1009} Although critics of the regime decry the democratic space and the “authoritarian” Rwandan Patriotic Front (RPF). Most notably: Filip Reyntjens, Political Governance in Post Genocide Rwanda (New York: Cambridge University Press, 2013); Strauss, Remaking Rwanda.

\textsuperscript{1010} Rwanda became a republic after independence. Since then, there have been five presidents: Grégoire Kayibanda (1962-1973); Juvénal Habyarimana (1973-1994); Pascal Sindikubwabo (1994-1995); Pasteur Bizimungu (1994-2000); and Paul Kagame (2000-). Presidential elections are slated for 2017 and as of 2015 there is a discussion on changing the constitution in order to facilitate a third term for Kagame. ‘Rwanda MPs step up efforts to grant Kagame third term, The East African, 25 July 2015.

\textsuperscript{1011} The Rwandan Patriotic Front (RPF) is also known as FPR (from French: Front Patriotique Rwandais) or RPF-Inkotanyi. It was established in 1987 as a successor of the Rwandese Alliance for National Unity (RANU), which was made up out of Rwandans (mostly Tutsi-exiles and their offspring) in the Diaspora, particularly in Uganda. Its military wing was known as the Rwandan Patriotic Army (RPA). Colin. M. Waugh, Paul Kagame and Rwanda: Power, Genocide and the Rwandan Patriotic Front (Jefferson & London: McFarland & Company, Inc., Publishers, 2004), pp. 36-43. Also see the RPF’s website: www-text: http://rpfinkotanyi.org/en/, visited: 2 September 2014.

History matters in Rwanda, as any other place that has experienced mass atrocities and identity-based violence.\textsuperscript{1014} In the young, seemingly divided nation, it is a lifeline. People keep a tight grip on it, twist it and throw it out again. Owning the past, or at controlling its narrative, is a survival strategy in the present. Those who pen down the narrative of history, carve a corridor into the future. Owning the discourse on the past is also a strategy of political survival. Without doubt, Rwanda’s past has been - and still is - significantly disputed; not only inside Rwanda, but also in the Diaspora and among foreign students of the republic. For the sake of space, the historical synopsis delivered below will be brief, accentuating only key ingredients that are central to the diverse narratives that deal with the 1994 genocide. Like elsewhere in Sub-Sahara Africa, little is known about the pre-colonial times.\textsuperscript{1015} Reconstruction may thus be puzzling. But it is not unmanageable.\textsuperscript{1016} Archaeology, oral histories and myths, at least, lift the lid to some extent and some consensus has been reached. In its most simplified account, bonafide scholars of history acknowledge that before colonisation Rwanda had advanced into one of the most sophisticated and powerful monarchies in the Great Lakes Region. Through their military forte and finely advanced feudal system, Tutsi kings (Mwami) had succeeded to enlarge their territory and establish a centralised monarchy. Towards the end of the 19\textsuperscript{th} century, the empire was firmly established in the south central part of the country and it had shown itself to be expansionist, centralised, hierarchical and militaristic.\textsuperscript{1017} The last sovereign monarch, Kigeri IV Rwabugiri (1860-1895), had in particular manifested centralised power, through large-scale institutional reforms.\textsuperscript{1018} From the lowest official, the chef de colline, all the way up to the royal court, through chefs and sous chefs, he built a strong hierarchy, particularly through a patron-client system between cattle herding Tutsi, farming Hutu and hunting Twa called Ubuhake.\textsuperscript{1019}

The red thread: class, race, ethnicity and political identity

A cornerstone as well as red thread in Rwanda’s history – particularly for understanding the 1994 genocide - is the relationship between Hutu and Tutsi.\textsuperscript{1020} Myriad diverging theories and explanations exist on these categories’ meanings, genesis and real and perceived differences.\textsuperscript{1021} Anachronistically – looking back knowing that genocide occurred in 1994 – the history of Hutu-Tutsi relations has often been described and comprehended as a continuous skirmish, often involving or descending into discriminatory violence. In his brilliant ‘lecture on Rwanda’, Ryszard Kapuscinski summarised the relations as a “dark passage of unceasing pogroms and massacres, of mutual extermination, forced


\textsuperscript{1015} Although, some standard works exist, including: Alexis Kagame, Les Milices du Rwanda précolonial (Brussels, 1962); Alexis Kagame, Un abrège de l’ethno-histoire du Rwanda I (Butare, 1972); Alexis Kagame, Un abrège de l’histoire du Rwanda II (Butare, 1975); J. Rumiya, Le Rwanda sous le régime du mandat Belge (Paris 1992); J.-N. Nkakurinfini, Le gros bétail et la société rwandaise, Evolution historique des XIIe-XIVe siècles a 1958 (Paris 1994).


\textsuperscript{1018} Des Forges, Defeat is the only bad news, pp. xxiii-xxviii.

\textsuperscript{1019} Newbury, Cohesion of Oppression, pp. 36-39.

\textsuperscript{1020} As a matter of fact, the Twa have always been and still are a group on the periphery.

migrations, furious hatred."1022 From the deterministic point of view, looking back with the wisdom of the present, his assessment makes sense. It is the story about Rwanda that is told by many. Yet, it is too unsophisticated. But also, it is not persuasive. Hutu, Tutsi and Twa labels existed already for centuries, although nobody can precisely isolate the date of genesis and its etymology. As ‘ethnic’ groups, they are invented, imagined and mythologised communities.1023 And their meaning has been morphing over time, drifting on political currents and exposed and magnified in times of political transition or imminent crisis. Like a chameleon, the immediate context dictates the colour of group identity and its place in the socio-political geography. Also, the three groups were not exclusive; clan, region and other social identities, including class, also mattered.1024 Hutu and Tutsi, furthermore, were most certainly not tribes, nor ‘races’ as many outside observers have wanted to believe.1025 The markers of belonging to either Hutu or Tutsi were – or arguably are again - rather economic (agriculturalists versus herders) or related to status (Tutsi as elite) and power (Tutsi royalists). A prevailing and popularly narrated myth is that in order to be labelled Tutsi one ought to own at least ten cows, the most valuable and sacred belonging in traditional culture. Similarly, the identity units were neither static, nor set in stone. Variations existed and moving up and down the ladder was possible, including through marriage. That was the situation before external intermingling. With the arrival of Europeans,1026 the existing social stratification was viewed, interpreted and operationalized from a new framework, the racist offspring of the European Enlightenment and its philosophers.1027

Obsessed with ethnography and inspired by ethnography and exotism, missionaries and colonial administrators perceived the social strata from a racial pyramid perspective.1028 For long, the guiding idea was that Africa, “was no historical part of the world” and that “in Negro life the characteristic point is the fact that consciousness has not yet attained to the realization of any substantial objective existence — as for example, God, or Law — in which the interest of man’s volition is involved and in which he realizes his own being.”1029 Like elsewhere in Africa and the Great Lakes Region, the ‘white man’s burden’ was to bring culture and shape identities and so they ‘ethnicised’ entire societies, often slashing through age-old existing groups and artificially defining dichotomies.1030 Armoured with the Hamitic hypothesis,1031 they believed the pastoralist Nilotic races, peoples who had descended from the north, via North Africa and the Middle East, to rule over the

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1023 Lemarchand, The Dynamics of Violence, pp. 49-57.
1025 It was particularly the case during the genocide, in which media and foreign political entities characterised the war and the genocide as a “tribal”.
1026 Only since 1894 had discoverers, mainly Germans, started to cross Rwanda. In that year, Mwami Yuyi Misingo put his land under German protectorate. The first catholic mission was established in 1900 and the German residence was only erected in 1907.
1027 See for instance: Emmanuel Kant, Über die verschiedenen Rassen der Menschen (1775).
Bantu populations of interior Africa. Based on this combination of the biblical narrative of the ‘curse of Ham’ and scientific racialism of the late 19th century, the Tutsi were believed to represent the Hamitic civiliser over Hutu Bantu Africans. Key to this observation was the question of how else would it have been possible that in Rwanda a complex, well-organised and centralised state existed, sharing many features of the modern European states? At the turn of the 19th century, so believed many, it must have been ‘some kind of white people’ who built it, as blacks were deemed incapable of civilisation. Simple at its core, the answer to this question was to claim that Hamites were “Caucasians under a black skin”; different than Negroes, those who civilized the Negroes and were in turn corrupted by the Negroes. These Hamites included ancient Egyptians, Nubians and Ethiopians, who had for centuries migrated down south.

In early colonial times, the bigoted Hamitic hypothesis served as a practical, political and ideological prism for colonial representatives through which to comprehend and map the freshly divided African continent. In Rwanda, European newcomers described the Tutsi as “brothers of the Nubians”, having a “Caucasian type” or as “Negroids […] which possesses the strongest Hamitic indices.” Despite its negligible administrative influences, the Germans had already favoured Tutsi, yet motivated by regional pacification and security as part of an indirect rule system. The newcomer, Belgium, was more influential. Leon Classe, a prominent White Father missionary and Catholic Vicar Apostolic in Rwanda between 1922 and 1945, was a sound devotee to Europe pseudo-scientific racial thinking and his ideas were constructive to the architecture of colonial policies and social engineering in Rwanda. In his mind, Tutsi were born rulers: that was the secret of their mastery of the country. According to him,

The greatest disservice which the Government could do to itself and to the state would be to eliminate the Tutsi caste. A revolution of that nature would lead the entire state directly into anarchy and to European-hating Communism. Far from furthering progress, it would nullify the Government’s action by depriving it of auxiliaries who are, by birth, capable of understanding and following it […] Generally speaking, we have no chiefs who are better, more intelligent, more active, more capable of appreciating progress and more fully accepted by the people than the Tutsi. It is therefore primarily and essentially with their aid that the Government will succeed in developing Ruanda from all points of view.

The façade of ‘indirect rule’ and Tutsi vassals

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On that European pseudo-scientific racialist proposition, the modern colonial Rwandan state was extendedly constructed, between 1926 and 1931. At the height of the transition into a de facto colony, Mwami Yuhi V Musinga, who wished not to convert to Christianity and was known to be clinging on to tradition, was purged and substituted by his son Mutara III Rudahigwa, a King by the grace of the Belgians. Most existing structures remained nonetheless, but the Belgians were on top of political control, through an arrangement of camouflaged direct rule system they labelled ‘indirect rule’. The undercurrent ideology was ‘racially’ prejudiced; all administrative posts were delegated to the ‘superior’ Tutsi. Accordingly, they were positioned at prominent spots within the Catholic Church as well as in schools. Moreover, many Tutsi were exempted from the dreaded corvée, a system of forced labour, which practically subjected the Hutu population into a second-class people. Thus, besides racist ideology and racialisation, social discrimination and segregation too widened the Hutu-Tutsi dichotomy. At the climax of the European interference, these new divisions were ethnicised, institutionalised, stabilised and essentialised through quasi-scientific racial measurements and the introduction, in the 1930s, of personal identity cards. Notoriously, these Livrets d’identité or Eenzelvigheidsboekjes marked ‘tribe’, ‘race’ and later ‘ethnicity’: Mututsi, Muhutu or Mutwa. This Apartheid-like constellation and exclusion of the majority was ready to crack. After a decade, change loomed, particularly in the quivering wake of the Second World War and the spirits of decolonisation and self-determination in the ‘non-western’ hemispheres. Cognisant of this, the Belgians shifted allegiances and by the mid-1950s those few educated Hutu saw their opportunity for social emancipation and had calculated their democratic overweight. A tragic event, jacquerie, or Hutu social revolution in November 1959 turned the table - reversing the racialist order – and paved the way to Hutu-majoritarianism, discrimination against Tutsi and post-colonial violence.

**A double decolonisation**

Decisive to the understanding of the political discourse and genocide dialectics in the 1990s are the period of decolonisation and the first decade of independence and nation building. In Rwanda, it was a double process. Not only were the foreign Belgians ousted, but the Hutu masses simultaneously ‘emancipated’ themselves from ‘foreign’ Tutsi control. Self-rule for the trust territories was on the horizon after the Second World War. In response to this changing climate and the rise of liberation movements in many colonies, Belgium allowed for an opening of public and political space, even

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1039 The Resident-General recalled that “In setting up the first administrative cadres they turned to the Tutsi aristocracy and with its aid began to carry out the urgent tasks, such as the establishment of the first colonial administration, the intensification and improvement of agriculture, the introduction of public health services and the opening of the first schools. In accordance with this policy, the influence and authority of Tutsi chiefs were extended over the north-western region of Ruanda during the earlier years of the administration.” See: UNTC, Report on Ruanda-Urundi, §79.


1043 Straus, *Making and Unmaking*, p. 227. Straus, like others, refers to ethnicity. That was only the case at a later stage, where cards depicted the label ‘ethnie’.

1044 UNTC, Report on Ruanda-Urundi, §59.

luring Hutu to articulate their grievances outside of Africa. By the end of the 1950s, colonial administrators accused Tutsi of “egotism, and lack of appreciation of an inevitable evolution towards democracy.” In the period leading up to independence, increasingly educated and aspiring Hutu counter-elite had risen. They were seeking to alter the racially codified distribution of power and privilege and were eventually backed by the Belgian authorities and clergy. On the other side of the spectrum remained the Tutsi, now downplaying the importance of race, hoping to remain in power after a swift transfer of power from Belgium to governing elite. But the ‘voices of the oppressed’ were loudly heard. Hutu political activists recognised, infused and operationalised the colonial identity labels and embraced a racial discourse, calling for democratic emancipatory liberation from “Hamitic colonialism.”

Drawn up by nine Hutu intellectuals, the Manifest of the Bahutu (or Bahutu Manifesto) became the clearest manifestation of that resentment and its signatories formed the "Mouvement Social Muhutu" in 1957, which later became the "Parti du mouvement pour l'emancipation des Hutus," or PARMEHUTU. Led by former journalist Grégoire Kayibanda, the party’s aim was to “end the Tutsi hegemony and the feudal regime.”

Racialized nationalism and anti-colonialism were the main ideological drivers on the eve of independence, particularly between 1957 and independence in 1962. Sharpened tongues within the Hutu political movement, articulated their plight in racial and ethnic terms. Not only did they wish sovereignty from Belgium, but also from deep-rooted Hamitic colonialism. It contoured what political scientist Scott Straus calls Rwanda’s founding narrative, which holds Hutu’s to be the “core political community, Hutu freedom and development to be the core political project, and Tutsi power to be a threat to the core community and the political project.” This vision guided the ‘revolution’ and became the anchor of the Rwanda’s political mind-state all the way up to 1994 and arguably continues as a negative – but legitimising - pointer for the current regime. Playing the genocide card and framed in the fashionable language of ‘reconciliation’, highlighting victimhood and keeping alive the fear of Hutu revenge or recurrence of violence soundly justifies a political dominance of Tutsi. November 1959 is a crucial month in understanding modern-day Rwanda, the context of the genocide, the history of the first two republics and the first outbreaks of mass violence. Richly detailed reports exist, but space considering, Straus’ brief summary of key events illustrates well enough what happened in that month: “in July 1959 the Tutsi king died unexpectedly after receiving an antibiotic shot from a Belgian doctor. His death crystallized the fears of many Tutsis, hardened their political positions, and
ultimately increased Tutsi elite alienation from the Belgians. In November of the same year, Tutsi party youth attacked a leading Hutu politician, in turn leading to a counterattack against Tutsi elites by Hutu crowds, further counterattacks by Tutsis against Hutu political figures, and yet more violence against Tutsi families. Ultimately, the Belgians intervened to stop the violence and, in its aftermath, radically restructured the administration. Whereas before the November 1959 events, every chief was Tutsi and all but ten sub chiefs were Tutsi, afterward the Belgians allotted half the chiefdoms and more than half of the sub-chiefdoms to Hutus. [...] In 1960, communal elections were held. The main Tutsi-led party boycotted, and the main Hutu-led party, PARMEHUTU, won an overwhelming majority of 74 percent. The leader of the party, Grégoire Kayibanda, a former journalist who was one of the authors of the Manifesto, became president in 1961, the same year that the Belgians and leading Hutu political figures announced the formation of a republic and the end of the monarchy. In July 1962, Rwanda achieved formal independence.  

**Ethnic paranoia: Kayibanda’s social revolution**

Transitioning from Ruanda to Rwanda, from colony to sovereign nation and from monarchy to republic had far-going social effects. “The events of 1959-1960 had left behind, in opposing ethnic and political groups, a residue of bitterness and fear,” reported the UN in 1961. There was bloodshed. Inter-ethnic violence flared up at several instances from November 1959. Next to thousands of huts that were set on fire, there were numerous killings, countless intimidations, myriad harassments, large lootings and many other ‘disturbances’. Consequently, or out of fear for new violence, a mass of Tutsi fled their homes and left for sanctuaries either in Rwanda itself or in neighbouring Burundi, Zaire and Uganda. From March 1961, some of these refugees, who had received training in China, began to attack Rwanda. Calling themselves *Inyenzi*, small bonds of Tutsi exiles sought to restore the monarchy through a counter-revolution using guerrilla tactics. Reportedly, they carried out repeated attacks, targeting Hutu elite and Europeans, some ten times up to 1966. In most cases, these raids triggered violent reactions towards Tutsi living in Rwanda. A perhaps real opportunity to realise their goals, occurred only once, at the end of 1963. From Burundi, on 21 December, the *Inyenzi* forces managed to move up to twenty kilometres from Kigali. But their march to the capital was stopped by Rwandese troops under Belgian command. Only two days later, mass retaliation by civil defence units against Tutsi civilians started in Kikongoro prefecture, leaving

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1058 Straus, Making and Unmaking, p. 282.


1062 'Terrorist Tribe Worries Rwanda', p. 18.


5,000 dead.\footnote{Elspeth Huxley, ‘The Rise and Fall Of the Watutsi’, The New York Times, 23 February 1964.} That death toll of Tutsi rose to an estimated 10,000 to 14,000 after the killings had spread to other locales.\footnote{Réne Lemarchand, Rwanda and Burundi, pp. 222-225.} After these massacres, the Inyenzi launched no other major attacks against the new Hutu regime and small-scale raids had ceased by 1967.\footnote{Weinstein, ‘Military Continuities in the Rwanda State’, p. 65.} At the regional level, in post-independence Zaire, anti-Tutsi – in line with a general resentment against Banyarwanda (‘Rwandans’) - sentiments were displayed. During the ‘Kanyarwanda war’ between 1963 and 1966, large-scale massacres by Congolese were reported against Tutsi as well as Hutu.\footnote{Lemarchand, The Dynamics of Violence, p. 13.}

 Already thousands of Tutsi had been killed and between 130,000 and 300,000 were reportedly forced to flee in the first years of Rwanda’s ‘first Republic’.\footnote{C.L. Sulzberger, ‘Foreign Affairs, The New York Times, 6 April 1964; André Guichaoua, ‘Vers Dexu Générations de Réfugiés Rwandais? La Première Génération: Les Réfugiés Tutsi, Trente Ans Après’, in: André Guichaoua (ed.), Les crises politiques au Burundi et au Rwanda (1993/1994) (Karthala: Paris, 1995), pp. 339-348.} Contrary to the insurgents’ objectives, the new regime only grew stronger as its ‘terrorist’ attacks made it survive its internal and regional dissensions and nurtured social cohesion among the Hutu populace.\footnote{Lemarchand, Rwanda and Burundi, p. 227.} In the end, the ‘foreign Hamitic Monarchy’ was toppled, the colonialists had left, the majority had materialised the Social Revolution, the resistance towards it had been quashed and a new nationalism had risen. These were the ingredients of the new regime’s ideology. The Hutu democratic masses had defeated their oppressive Tutsi elites. History’s course had been turned 180 degrees and the social balance was reset. Hutu-nationalism replaced Tutsi-feudalism, but the colonial ethnic identity cards were maintained and soon ethnic quotas were introduced, marginalising Tutsi from public life.\footnote{Lee Ann Fujii, Killing Neighbors. Webs of Violence in Rwanda (Ithaca & London: Cornell University Press, 2009), p. 71. Magnerella, Justice in Africa, 14-15.} A master of political rhetoric and memory manipulation, Kayibanda, while facing Inyenzi insurgencies, had crafted a narrative that would resurface in the late 1980s and was represented in the logic of the ‘Hutu Power’ movement in the 1990s: Tutsi had provoked violence against themselves, because some were not accepting the realities of the revolution. At a certain time, Kayibanda even called Tutsi “genociders” and if they did not desist they would face the “the precipitous end of the Tutsi race.”\footnote{Sinem, Who Must Die in Rwanda's Genocide?: The State of Exception Realized (Lenham: Lexington Books, 2015), p. 65-97.} In his political logic, that had earned him the presidency and legitimised his power in the first place, Tutsi remained a threat to the cause of the Hutu revolution and emancipation from feudal slavery, even despite the fact that by the end of the 1960s they posed no longer a realistic danger to the new-born Republic.\footnote{Kyrsten Sinem, Who Must Die in Rwanda's Genocide?: The State of Exception Realized (Lenham: Lexington Books, 2015), p. 75.} But Kayibanda’s post-independence paranoia stretched beyond the image of returning monarchists. He also feared democratic opposition and after just three years in power, he had turned Rwanda into a de facto one-party state, led by his MDR-Parmehutu. His eventual downfall however, was not organised by the exiled Tutsi he feared. Rather it came from the inside.\footnote{Sinem, Who Must Die in Rwanda's Genocide?: The State of Exception Realized (Lenham: Lexington Books, 2015), p. 75.} Like in other post-colonial African states, issues of land control, personal rivalries and regionalism were the real threats to the power. For Kayibanda, who hailed from south-central Gitarama prefecture, it was not different.
Regional events were the trigger. Rekindled racial tensions and violence against Tutsi intellectuals returned in Rwanda in early 1973, as a reaction to the genocide against Hutu in Burundi a year before. Amidst the crisis, which again produced a large amount of Tutsi refugees, Juvenal Habyarimana, a Hutu from the north (Gisenyi), staged a military coup in the dry season of 1973, heralding the birth of the ‘second republic’.

**Umaganda! Habyarimana’s ‘moral revolution’**

Scattered across the neighbouring yard of his former presidential palace in Kigali, parts of a shot-down airplane are the only reminders of the second and longest sitting president of Rwanda. On 5 July 1973, General Habyarimana, the most senior official of the army and former Defence Minister, had come to power in a seemingly bloodless coup – although some fifty political supporters of Kayibanda were executed or died in prison. On the promise to establish order in the wake of anti-Tutsi violence and national unity between Hutu from the north and Hutu from the south, he was quick to establish a single-party state under the National Revolutionary Movement for Development (MRND). Every Rwandan, by birth and irrespective of ethnicity, religion or region, automatically became a member. Also, he shifted the epicentre of his power from the central south to the northeast. Ideologically, the Second Republic claimed to complete the “national” revolution of 1959 through a “moral revolution.” To this effect, Habyarimana, in his “responsible democracy” showed himself to be two-headed Janus. On the one hand he preached unity, reconciliation, peace and even Tutsi integration, while at the other he endorsed the seeds and fruits of the social Revolution and clung on to the fundamental idea of Hutu majority rule. Identity markers, however, again, proved to be elastic. Where during the Revolution and under Kayibanda’s rule the Hutu political elites perceived Tutsi as a foreign race (Hamitic Ethiopids), Habyarimana arched them into an indigenous category: an ethnic group. This shift opened up opportunities for Tutsi to participate in the political and educational spheres, yet only befitting their minority status and strictly demarcated by state through quotas. It was not a strict quota. Tutsi were still restricted from the highest levels of the public sector and the army, whereas in other sectors – commerce, NGOs and development projects they were present beyond the proportion of 9% allotted to them. Discrimination against Tutsi

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1076 Tutsi were violently purged from schools and university. Several hundred Tutsi were killed. Carney, Rwanda Before the Genocide, pp. 184-193.
1079 The presidential palace, located in Kanombe, Kigali, has been turned into a museum. The physical remains of the plane that crashed and killed Habyarimana are preserved there and displayed.
1084 Mamdani, *When Victims Become Killers*, p. 138. From that time on identity cards would list people’s ethnie (Ubwoko), rather than ‘tribe’ or ‘race’.
1086 According to Strauss, ‘officially, Tutsi’s were welcomed in the MRND and were considered citizens but without a place in the political sphere. By the 1980s, the proportion of Tutsis in secondary schools, in government positions, in salaried employment and in key sectors such as banking and insurance remained superior to their official population share. Even in the Army, there was a Tutsi colonel, two Tutsi lieutenant colonels, and other Tutsi officers. Before the crisis of the 1990s, there were token Tutsi ministers and one Tutsi prefect, even if there were no Tutsi burgomasters, who were the key local officials at the local level. Strauss, *Making and Unmaking Nations*, p. 291; Prunier, *The Rwanda Crisis*, pp. 74-76.
prevailed, but most Hutu from the south were as much discriminated against in access to schools and universities.\textsuperscript{1087} On the general scheme of things, from the first years of the Second Republic, regionalism became more important than ethnicity.\textsuperscript{1088} By the end of the 1980s, ethnic tensions were reported to be at its lowest since colonial times.\textsuperscript{1089} At the factual levels of power, though, the top of the state machinery - or the Akazu (little house) – was exclusively Hutu and relatives and close allies of Habyarimana and all stemmed from the north.\textsuperscript{1090}

Rwanda has been one of the most aided countries in the world.\textsuperscript{1091} It is not a trend set in motion by the post-genocide regime. It originates from the Habyarimana times.\textsuperscript{1092} In contrast to Kayibanda, Habyarimana was not living in the tunnel vision of racial revolutionarism only. He also embraced an ideology of post-colonial development. As a self-styled ‘father of the nation’, his post-revolutionary policies soon focused on national state building, education, economic growth, infrastructure and international cooperation. Playing the development game smartly, Habyarimana lured in a vast army of foreign development NGOs, comforting them with liberal policies not seen in other African countries, while at the same time shielding them off from the political and human rights arena.\textsuperscript{1093} As part of what became some kind of a-political development assistance, large amounts of aid money were poured into Rwanda. Foreign currency became the magic oil of Rwanda’s economic engine, but it was attained by discourse of national ‘self-help’. In accomplishing development, Habyarimana’s post-colonial dictatorship relied on national mobilisation, participation and discipline. He perceived inactivity as a social evil.\textsuperscript{1094} In his vision, Rwandans ought to take personal responsibility and to take the ”revolution into one’s own hands - everyone is responsible.”\textsuperscript{1095} “First the population must get down to work […] Thus we shall devote each Saturday to tilling the soil with hoes in our hands,” he told a journalist from \textit{Le Monde} in 1974.\textsuperscript{1096} It quickly materialised. Embodied by the introduction and institutionalisation in 1974 of a state-led forced labour programme - \textit{Umuganda} (communal work) – public works projects were marshalled and materialised.\textsuperscript{1097} Every Saturday, one adult male per family had to participate in community labour on projects chosen by the state: campaigns to construct primary schools, offices for the communal administration and its personnel, roads, markets, or anti-erosion structures.\textsuperscript{1098} Through this policy of authoritarian development, which was kept in place through hierarchal social control, particularly agricultural

\begin{flushleft}
\textsuperscript{1087} Peter Uvin, \textit{Aiding Violence. The Development Enterprise in Rwanda} (West Hartford: Kumarian Press, 1998), p. 35. \\
\textsuperscript{1089} Guichaoua, \textit{Guerre au Genocide}, p. 44. \\
\textsuperscript{1093} Uvin, \textit{Aiding Violence}, p. 176. \\
\textsuperscript{1094} Mamdani, \textit{When Victims Become Killers}, p. 146. \\
\textsuperscript{1095} Straus, \textit{Making and Unmaking}, p. 288. \\
\textsuperscript{1096} Cited in: Mamdani, \textit{When Victims Become Killers}, p. 146. \\
\textsuperscript{1097} There still is a mandatory community service day from 8:00am to 11:00am, on the last Saturday of each month called “umunsi w’umuganda,” meaning “contribution made by the community which is designed to be a day of contribution and building the country by citizens themselves.” \\
\textsuperscript{1098} Uvin, \textit{Aiding Violence}, p. 131.
\end{flushleft}
production (coffee, tea and crops) had risen dramatically, even defying famines up to the point that by the mid-1980s the population had even grown to over 8 million.\textsuperscript{1099}

\textit{Transitioning into state of emergency}

After two decades of economic elevation, donor-darling Rwanda spiralled into a profound economic and financial crisis from the mid-1980s. First, food production stagnated and imports could not make up for it, triggering local famines in the late 1980s. Second, coffee and tea production fared well but the world market prices declined so much that export receipts dropped dramatically and took down the purchasing power of most rural households. Third, as the other few export industries folded, the government resorted to increased borrowing and rapidly increased its foreign debts. Aggregated by civil war since October 1990 - which further strained agricultural production, displaced farmers, rendered public finances and human resources and created a need for emergency food and housing - the economy buckled to its knees.\textsuperscript{1100} The donor community then forced Rwanda into a structural adjustment programme,\textsuperscript{1101} which again was a radical change. On top of the economic crisis grew separate social and political crises. Bundled together they would form a bomb, ready to explode. Tensions had been building up across the country: banditry and public insubordination rose, resentment between local and urban elites increased while corruption and favouritism became notoriously common.\textsuperscript{1102} This political discontent directed at least two other crises: the insurgency and war started by the Rwandan Patriotic Front (FPR) and international pressure for democratisation, free elections and reform. Together, these compressions exposed and destabilised the supremacy and privileges of the regime’s dignitary inner circles, the Akazu, around President Habyarimana and his wife Agathe Kanziga.\textsuperscript{1103} Faced with internal political party opposition and external political military opposition, their position was tumbling and radical elements among them embarked, as part of panicked crisis management, on a series of decisions, actions and strategies to retain power, including the murder of Tutsi civilians.\textsuperscript{1104}

\textit{Diaspora, insurgency and guerrilla}

A chief component of the accumulating calamities was the resurfacing eruption of an old problem that had been breading in Rwanda’s neighbouring countries for two decades: over half a million Tutsi refugees\textsuperscript{1105} who had fled during three earlier waves of violence (1959-61, 1963-4 and 1973).\textsuperscript{1106} Over the years, they had grown into a community of nationless Banyarwanda. Within the Great Lakes

\begin{thebibliography}{99}
\bibitem{1099}Cited in: Mamdani, When Victims Become Killers, p. 145.
\bibitem{1100}Uvin, \textit{Aiding Violence}, pp. 53-57.
\bibitem{1101}\textit{World Bank, Report and Recommendation of the President of the International Development Association to the Executive Directors on a Proposed Credit of SDR 76.5 Million to the Rwandese Republic for a first Structural Adjustment Program} (P5544; 29 May 1991).
\bibitem{1102}Straus, \textit{Unmaking}, 292; Melvern, \textit{A People betrayed}, pp. 39-49.
\bibitem{1103}Guichaoua, \textit{From War to Genocide}, pp. 49-52
\bibitem{1104}Ibidem, pp. 332-333.
\bibitem{1105}There is absolutely no consensus on the real number as official statistics are unavailable or tainted, with estimates going up into the million. See the discussion in: Mamdani, \textit{When Victims Become Killers}, 317-8, note 2. A somehow conservative, but median estimate comes from: Catherine Watson, \textit{Exile from Rwanda: Background to an Invasion} (US Committee for Refugees, 1991).
\bibitem{1106}These were the largest waves of refugees fleeing Rwanda.
\end{thebibliography}
Region they had meanwhile made up an “ethnic” group in itself, often uprooted, discriminated against and persecuted outside of Rwanda. They were Kinyarwanda-speaking Rwandans without a national home. In the course of years, intelligentsia among the exiles had developed a political diaspora - including some high-level Hutu dissidents – next to the much larger cultural diaspora of Banyarwanda, which also includes the non-refugees such as residents and migrants. From the earlier 1980s onwards, Habyarimana’s ultimate fiasco was his mishandling of the question of these Rwandans living outside Rwanda, their desire for repatriation and their true possible homecoming. The key failure was that he did nothing and when he did act, it was only half-heartedly or already too late. His categorical Malthusian policy was based on a meek pretext: ‘there was no more space in overpopulated Rwanda.’ Referring back to the 1960 Inyenzi raids, in public statements he uttered, “Tutsis could come back to Rwanda, but not by violence” and he rather encouraged many to assimilate into their host countries. Some had integrated into societies elsewhere, of course, but other exiles, principally those in Uganda, had organised in political associations such as the Rwandese Refugee Welfare Foundation. Set up in 1979, the Rwandese Alliance for National Unity (RANU) was their offspring, a clique that was openly discussing the question of return of exiles to Rwanda. Return became a necessary discourse from the late 1980s, mainly stirred-up by political winds from Kampala against the Rwandans. Although many of the refugees, including Fred Rwigyema and Paul Kagame, had joined Yoweri Museveni’s victorious National Resistance Army (NRA) and had worked their way up to minister of defence and acting chief of intelligence respectively, they saw themselves compelled to pick between forced naturalisation in Uganda or take up arms and go back to Rwanda. Meanwhile, presided over by a Hutu and joined by other Hutu opponents of Habyarimana but predominantly a Tutsi organisation, RANU had rechristened into the Rwandan Patriotic Front (RPF) in 1987 and Kagame was on his way for military training in the USA.

Rwanda’s violent state of emergency was heralded by an armed rebel invasion from Uganda. In the afternoon of 28 September 1990, Habyarimana was in New York, at the UN General Assembly. After elaborately lamenting Iraq’s “illegal occupation and aggression” in Kuwait

1107 Both Hutu and Tutsi – or related peoples like the Banyamulenge - have been targets in bordering countries. The problem remains up to the present day: Lemarchand, The Dynamics of Violence, pp. 12-29; Réné Lemarchand, 'The Politics of Memory in the Great Lakes Region, NIOD Lecture in Holocaust and Genocide Studies 2013 (Amsterdam: NIOD Institute for War, Holocaust- and Genocide Studies, 2013).
1108 Mandani, When Victims Become Killers, pp. 159-166.
1110 Straus, Making and Unmaking, p. 290.
1111 Mandani, When Victims Become Killers, p. 166.
1112 Waugh, Paul Kagame and Rwanda, pp. 39-41.
1113 They had assisted Museveni in the guerrillas he led against the regime of President Milton Obote (July 1985-December 1980) and Tito Okello (July 1985 - January 1986).
1114 Other prominent Hutu’s in the RPF were: Pasteur Bizimungu, the first post-genocide President of Rwanda and married to Kayibanda’s daughter, Colonel Alexis Kanyarengwe, who participated in the 1973 coup that allowed Habyarimana to power and. Thoneeste Lizinde, former head of security.
1115 Its mission statement was “the liberation of the Rwandan people from ignorance, poverty and dictatorship to achieve his own development” and it advocated a “multi-ethnic democracy” and opposed the “corrupt and tribalist regime” of Habyarimana. Its eight-point charter highlight the ideological background: the restoration of national unity; building a true democracy; the establishment of an economic system based on national resources; the fight against corruption, mismanagement of public affairs and misappropriation of public funds; safeguarding the security of persons and their property; the final settlement of the causes of the refugee problem; social welfare of the masses; the reorientation of foreign policy of Rwanda. See: Assemblée Nationale, Rapport D‘Information, pp. 121-127.
1116 Waugh, Paul Kagame and Rwanda, p. 42.
1117 Uganda’s President, Yoweri Museveni, would recount how he had always supported the RPF: ‘Museveni: How I supported RPF in Rwanda’s 1994 liberation war’, The Observer, 18 January 2015.
and the “inter-ethnic fratricidal war in Liberia,” he only hastily touched upon the problem that would change the course of his regime only a few days later:

No less important than the problems I have already mentioned is that of my compatriots living outside Rwanda. As I have repeatedly said, the question of Rwandese refugees is primarily the responsibility of the Government and the people of Rwanda. However, in the light of its well-known problems, including those due to the small size of its territory and its population, Rwanda cannot by itself resolve this thorny and painful problem. We renew our appeal to the international community to find a solution along three lines: voluntary repatriation, naturalisation in the host country, also voluntary, and freedom of residence.\footnote{UNGA, Forty-fifth Session: Provisional Verbatim record of the Thirteenth Meeting (A/45/PV.13; New York, 28 September 1990), p. 16.}

Habyarimana had stayed in New York for some days. On 1 October, he attended a UNICEF conference and banquet on children’s issues in the Third World, ironically together with Ugandan President Museveni. There he received the news that some hundred men, led by Museveni’s recently sacked Deputy Defence Minister Rwigyema, coming in from Uganda, attacked his country.\footnote{See for a detailed account of war-related events in October 1994: Reyntjens, L’Afrique des Grands Lacs, pp. 89-103.}

Benefitting from the act of surprise and a weak reaction by the Rwandan Armed Forces (FAR), the first RPA\footnote{The military branch of the RPF was named RPA (Rwandan Patriotic Army) but in fact the term was hardly used.} insurgents managed to push all the way through to Gabiro, 90 kilometres from Kigali.\footnote{Assemblee Nationale, Rapport D’Information, pp. 122-143.}

Soon joined by other Rwandans and dubbing themselves Inkotanyi (“those who complete” in Kinyarwanda), the RPF band had bet on a quick victory, erroneously relying on massive support of the population. But already in the second day, Rwigyema and two of his top lieutenants were killed.

Soon backed by a French intervention force (Opération Noroît), the FAR pursued the RPF back into Akagera National Park. In the north western Virunga forests, the RPF, now led by Paul Kagame who had quickly returned from his trainings in the USA on 14 October, regrouped and recruited new fighters from the region. From thereon, the RPF embarked on guerrilla warfare.\footnote{Gérard Prunier, The Rwanda crisis. History of a genocide (London 1995), pp. 93-108; André Guichaoua, Les antécédents politiques de la crise rwandaise de 1994, Rapport d’expertise rédigé à la demande du Tribunal pénal international des Nations Unies sur le Rwanda, Arusha (April 1997); Assemblee Nationale, Rapport D’Information, pp. 122-143.}

The scramble for Rwanda had started and plunged the country into a low-intensity war, low- and large-scale abuses and, at its height, mass annihilation. Despite the presence of Ugandan and Zairian elements in the RPF, by all means, it was a Rwandan war. Rwandans were fighting Rwandans. It would fundamentally change all those who took part in it: the RPF went to war as an army of liberation\footnote{In fact, the RPF continued to cultivate its image as an army of liberators. Republic of Rwanda, ‘History’ (www-text: http://www.gov.rw/home/history/, last visit 14 September 2016).} and came out of it as an army of occupation while the Habyarimana regime entered the war pledged to a policy of reconciliation and out of it pledged to uphold Hutu Power.\footnote{Mamdani, When Victims Become Killers, p. 185.}

4.3 Revitalising Hutu narratives

The first casualty of war is truth. Fighter’s statements, public rumours, half-truths, lies and political propaganda substitute it and start to take a life on their own. All parties to a conflict bend it in such a...
way that is most beneficial to their cause: winning. A reality is that winning – but also losing\textsuperscript{1125} often requires sacrifices: civilians. So was the case in the hills of Rwanda. Habyarimana and his entourage pulled an old trick from the box. Like Kayibanda, when faced with attacks from \textit{Inyenzi} in the 1960s, he found in the RPF attacks an opportunity to rally Rwandans against an ‘infiltrating enemy’ and consolidate them behind his MRND. It could possibly reconstitute the crumbling national (Hutu) cohesion and his power base. In so doing, he chose to sacrifice the Tutsi.\textsuperscript{1126} His deception was an RPF attack in Kigali, on 4 October 1990. In what appears to have been a staged event,\textsuperscript{1127} the attack gave him the pretext to massively jail ibyitso (accomplices), Tutsi\textsuperscript{1128} dissident Hutu as well as foreigners, all accused of somehow supporting the rebels.\textsuperscript{1129} Most detainees were brutalised in deplorable prison conditions.\textsuperscript{1130} On at least 17 occasions in various communes, between October 1990 and January 1993, an estimated 2.000 Tutsi were massacred.\textsuperscript{1131} On 8 October 1990, soldiers from the Rwandan Armed Forces (FAR) murdered at least 65 Hima in Mutara (Savannah in Northeast Byumba).\textsuperscript{1132} The second killing spree took place in Kibilira commune (Gisenyi) ten days after the staged attack. In 48 hours, at the instigation of local authorities, ‘civil defence’ groups killed 348 people and burnt more than 550 houses. Nineteen people were killed in the neighbouring commune.\textsuperscript{1133} Pogroms continued throughout 1991 and 1992 into 1993 in various communes in northwestern Rwanda. Between January and March 1991, an estimated 300 to 1.000 Bagogwe Tutsi were massacred in Gisenyi and Ruhengeri, following a major RPF offensive in the area at the end of January.\textsuperscript{1134} A year later, in March 1992, Bugesera (south-central Rwanda) was the scene of bloodbaths. Reportedly, following radio broadcasts that ‘warned’ of an imminent plot by Tutsi to kill Hutu leaders, civilian Hutu killed a reported 277 Tutsi.\textsuperscript{1135} On the side of the RPF – which had hindered a human rights probe in 1993 – abuses were reported as well, including killing of civilians, executions, abductions, pillage and forced displacement.\textsuperscript{1136}

\textit{‘Do not let yourselves be invaded’}

Like a drumbeat, stories of imminent danger travelled across the hills in Rwanda. Many of the outbursts of violence against civilians since the start of the war followed a same kind of pattern, even traceable farther back in history:\textsuperscript{1137} rumours emerge that Tutsi have killed or are planning to kill

\begin{footnotes}
\item[1125] See for this argument: De Swaan, \textit{The Killing Compartments}, p. 112. De Swaan argues, in the case of Rwanda, that the Hutu regime became powerless to expel the RPF. Instead of facing defeat, they embarked on annihilating, to the last soul, their enemies as a grand victory in the face of history. De Swaan calls this specific mode of mass annihilation: a \textit{loser's triumph}, a delirium of annihilation at the time of imminent military defeat.
\item[1126] A radical break was that the authorities also included Hutu (those opposing Habyarimana’s) among the ‘accomplices’. Des Forges, \textit{Leave None}, p. 50.
\item[1127] Guichaoua, \textit{From War to Genocide}, p. 34.
\item[1128] 90 \% of those arrested were reported to be Tutsi: André Guichaoua, Rwanda. \textit{De la Guerre au Genocide. Les Politiques Criminelles au Rwanda (1990-1994)} (Paris 2010), p. 77.
\item[1130] See for more details: Straus, \textit{The Order of Genocide}, 192-195; Guichaoua, \textit{De la Guerre au Genocide}, p. 79.
\item[1131] Out of 17 incidents of serious violence in the 1990-93 period, 14 took place in Gisenyi or Ruhengeri. Des Forges, \textit{Leave None}, pp. 87. Also see the map of principal massacres in: Reytjens, \textit{L'Afrique des Grands Lacs}, p. 186.
\item[1134] Ibidem, pp. 25-27.
\item[1135] Des Forges, \textit{Leave None}, p. 701.
\item[1136] Also see the table on ‘historical patterns of violence’, in: Straus, \textit{The Order of Genocide}, p. 198.
\item[1137] See for this argument: De Swaan, \textit{The Killing Compartments}, p. 112. De Swaan argues, in the case of Rwanda, that the Hutu regime became powerless to expel the RPF. Instead of facing defeat, they embarked on annihilating, to the last soul, their enemies as a grand victory in the face of history. De Swaan calls this specific mode of mass annihilation: a \textit{loser's triumph}, a delirium of annihilation at the time of imminent military defeat.
\end{footnotes}
Hutu; ideologues and the rural elite animate meetings at massacre sites; burgomasters mobilise their conseillers; death squads (residents, sometime accompanied by soldiers and increasingly Interahamwe) are dispatched to hunt, pillage and kill; authorities react slow, weak and unconcerned; culprits are arrested but the majority of cases is quickly dropped.\footnote{1138 Driven by mechanics of uncertainty and insecurity, the violence by ‘civil defence’ groups appeared as self-defence, retaliation, deterrent and ethnic rebalancing. In the process, civilian Tutsi became an integral part of the perceived rebel threat. All Tutsi soon “stood in for the actions of few.”\footnote{1139 This became vehemently apparent in the political language surrounding the violence. It was filled with historical analogies and references, pitting Hutu against Tutsi.\footnote{1140 The term Inyenzi immediately resurfaced (now meaning cockroach equated with the RPF) prior to a massacre, reinforcing the fear of raids by Tutsi exiles in the 1960s.\footnote{1141 It was a discourse that trickled down from the central government all the way into the communes and cells. Haybarimana had already linked the RPF to ‘the Monarchy’, saying that “rather than giving up a single inch of our territory in response to a fait accompli from these deserters of a foreign army, the Rwandan people – all of us – […] we will fight to the last man before allowing our country to be destroyed and the return of a feudal, elitist and royalist regime.”\footnote{1142 Reports circulate, that in the lead-up to massacres, certain ‘ideologues’ animated sentiments against Tutsi, embarking on the ‘anti-royalist’ and ‘threat-to-the-revolution’ discourse. Prior the massacre in Bugesera, for example, journalist and editor of Kangura newspaper Hassan Ngeze, was reported to have travelled through the prefecture to “distribute anti-Tutsi tracts.”\footnote{1143 Better known to students and scholars of Rwanda - as it is the only one that is preserved in its entirety-\footnote{1144 is a November 1992 speech by Léon Mugesera. The political scientist (PhD) and freshly elected vice-chairman of the MRND in Gisenyi prefecture told a crowd of MRND ‘militants’ in Kabaya commune:\footnote{1145 [...] that you should not let yourselves be invaded […] for our peace, there is no way to have it but to defend ourselves [...] I tell you that the Gospel has changed in our movement: if someone strikes you on one cheek, you hit them twice on one cheek and they collapse on the ground and will never be able to recover! […] Something else which may be called "not allowing ourselves to be invaded" in the country, you know people they call "Inyenzi" (cockroaches), no longer call them "Inkotanyi" (tough fighters), as they are actually "Inyenzi". These people called Inyenzi are now on their way to attack us. [...] Are we really waiting till they come to exterminate us? [...] we must do something ourselves to exterminate this rabble. I tell you in all truth, as it says in the Gospel, "When you allow a serpent biting you to remain attached to you with your agreement, you are the one who will suffer [...] they}

[...] that you should not let yourselves be invaded [...] for our peace, there is no way to have it but to defend ourselves [...] I tell you that the Gospel has changed in our movement: if someone strikes you on one cheek, you hit them twice on one cheek and they collapse on the ground and will never be able to recover! [...] Something else which may be called "not allowing ourselves to be invaded" in the country, you know people they call "Inyenzi" (cockroaches), no longer call them "Inkotanyi" (tough fighters), as they are actually "Inyenzi". These people called Inyenzi are now on their way to attack us. [...] Are we really waiting till they come to exterminate us? [...] we must do something ourselves to exterminate this rabble. I tell you in all truth, as it says in the Gospel, "When you allow a serpent biting you to remain attached to you with your agreement, you are the one who will suffer [...] they
only want to exterminate us: they have no other aim. [...] They attacked the homes and killed people. [...] we must defend ourselves. [...] we must wake up! [...] "Unite!" [...] As they intend to cut our necks, let them bring (money) so [[we can defend ourselves by cutting their necks]]! Remember that the basis of our Movement is the cell, that the basis of our Movement is the sector and the Commune. [...] If anyone penetrates a cell, watch him and crush him: if he is an accomplice do not let him get away! Yes, he must no longer get away! [...] the most essential is that we should not allow ourselves to be invaded, lest the very persons who are collapsing take away some of you. Do not be afraid, know that anyone whose neck you do not cut is the one who will cut your neck. [...] Another important point is that we must all rise, we must rise as one man [...] if anyone touches one of ours, and he must find nowhere to go. Recently, I told someone who came to brag to me that he belonged to the P.L. - I told him “The mistake we made in 1959, when I was still a child, is to let you leave”. I asked him if he had not heard of the story of the Falashas, who returned home to Israel from Ethiopia? He replied that he knew nothing about it! I told him "So don't you know how to listen or read? I am telling you that your home is in Ethiopia, that we will send you by the Nyabarongo so you can get there quickly [...].”

In the speech - so abridged some human rights enquêteurs, observers, academics and legal practitioners later - Mugesera spelled out the typical pro-Habyarimana and anti-RPF propaganda. Also it would be a prime ingredient of the dominant narrative on the 1994 genocide and interpreted as an indicator of national planning. His commanding refrain was: “do not let yourself be invaded.”

Others, including the UN tribunal that would adjudicate the matter, argued that in his speech he “called for the extermination of the Tutsi and the assassination of Hutu opposed to the President.” Acutely alarming in his speech was the apparent insinuation - through an analogy of the encounter he had with a political opponent from the Liberal Party whom he held to be Tutsi - to the idea that Tutsi came from Ethiopia and that after they had been killed, they should be thrown into the tributaries of the Nile, so that they should return to where they are supposed to have come from. In his improvised political animation, he pitches in other historical allusions, like the equation of the RPF with Inyenzi. Mixed with his petition to “not be afraid”, “unite”, “rise”, “defend ourselves” and above all “not the be invaded”, he urges reprisal, unity and self-defence. The fact that a month after his speech, parts of which were reportedly broadcasted on radio and printed in a newspaper, new massacres occurred, has led many to believe that there was a causal relation between the speech and the killings as assailants were reportedly citing phrases from the speech to legitimise their actions.

At the time, even the Rwandan judiciary, led by a Minister from the opposition Parti Libéral (PL), found that Mugesera made an inflammatory speech that could set citizens against each other and even trigger “disturbances in the Republic’s territory” and called for his arrest three days later because he had “damaged the security of the state.” From the speech, on the one hand, emerges, directly and

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1146 Calibrated from the full text: Décary, Létourneau & Pelletier, Judgement, §15-17.
1147 Mugesera was convicted by a Rwandan court for incitement to commit genocide for his 1992 speech. Ivan R. Mugisha, ‘Rwandan court sentences former don to life for genocide’ The East African, 16 April 2016.
1149 Straus, Making and Unmaking, p. 197.
1150 UNICTR, Akayesu Judgement, §100.
1152 Létourneau, & Pelletier, Judgement, §227-236.
indirectly, a call on his MRND audience to take the law into its own hands and defend Rwanda from ‘infiltrations’ and ‘attacks’ by forces controlled from the outside (RPF). A Rwandan court, in 2016, convicted him of incitement to commit genocide and persecution.\textsuperscript{1153} On the other hand, he also identifies and warns for the dangers from the inside. He starts his talk with lamenting the MDR party, but also balks at the PL and PSD.\textsuperscript{1154} These political opponents, which had become part of a coalition government and started talks with the RPF (see below) and whom he easily also equates with \textit{Inyenzi}, had been ‘invading’ the MRND, posed a threat to Hutu unity but most importantly to President Habyarimana.

\textit{Multiparty-ism, political calamity and radicalism}

Mugesera’s oration reveals a political mind state of calamity, confusion and imaginably also anxieties. Full authority was slithering out of the hands of Habyarimana’s MRND like a roller ball and its protagonists faced an existential political watershed, already stemming from a tidal change set in motion in mid-1990.\textsuperscript{1155} Several months ahead of the RPF attack in October 1990, Habyarimana had bowed to post-Cold War international and national calls for reform to (re) inaugurate multiparty-ism.\textsuperscript{1156} Even his model-state for African development – which was built on apolitical aid - had to face the newly furnished moral conditions by Western donor states, including from its staunchest supporter France. Democracy, liberalisation and human rights became the tropes of the post-communist political order and development industry.\textsuperscript{1157} This chorus was joined throughout Africa by internal calls for opening up political space, including in Rwanda. Habyarimana, who was sensitive to the idea that he could not halt a democratic transition, tried to administer the reform process by himself in order to show the people he was a reborn democrat.\textsuperscript{1158} Conscious that democracy would ultimately mean the demise of his 17-year old authoritarian legacy, he desired to go slow and appoint his henchmen in key commissions that would lead the democratic turn.\textsuperscript{1159} But the tide was turning more quickly. With the RPF pressuring the regime from the outside and the massive arrests just after the start of the war, in-house antagonists demanded more rapid transformation.\textsuperscript{1160} Habyarimana caved in and only eleven months later, the regime legalised, through the constitution, political parties other than the MRND.\textsuperscript{1161} A dozen parties emerged.\textsuperscript{1162} Amongst the most important opposition groups were the Democratic Republican Movement (Mouvement Démocratique Républicain, MDR), Social Democratic Party


\textsuperscript{1154} "The first point I would like to submit to you, therefore, is this important point I would like to draw to your attention. As MDR, PL, FPR and the famous party known as PSD and even the PDC are very busy nowadays, you should know what they are doing, and they are busy trying to injure the President of the Republic, namely, the President of our movement, but they will not succeed. They are working against us, the militants: you should know the reason why all this is happening: in fact, when someone is going to die, it is because he is already ill!"

\textsuperscript{1155} Guichaoua, \textit{From War to Genocide}, pp. 39-61.

\textsuperscript{1156} On 1 July 1990 he announced he would work towards a new constitution that included democratic reforms. Reyntjens, \textit{L'Afrique des Grands Lacs}, pp. 90-91.

\textsuperscript{1157} Fujii, \textit{Killing Neighbors}, pp. 46-47.

\textsuperscript{1158} Ibidem, p. 47.

\textsuperscript{1159} Guichaoua, \textit{From War to Genocide}, pp. 41-42.

\textsuperscript{1160} Des Forges, \textit{Leave None}, p. 51.

\textsuperscript{1161} “Political parties fulfilling the legal conditions shall concour to the expression of suffrage. They shall be formed and shall exercise their activities freely provided that they respect democratic principles and not infringe upon republican form of government, national territorial integrity, and the security of the State.” \textit{Constitution for the Republic of Rwanda} (30 March 1991), art. 7.

(Parti Social Démocrate, PSD), Liberal Party (Parti Libéral, PL) and the Democratic Christian Party (Parti Démocrate Chrétien, PDC).\textsuperscript{1167} Whereas the centre-right, urban-based PL attracted business people and well-to-do Tutsi, the strongest opposition came from a party that celebrated the accomplishments of the Hutu revolution: the MDR.\textsuperscript{1164} Basically a reincarnation of Kayibanda’s MDR-PARMEHUTU,\textsuperscript{1165} the new party – with a strong base in central and south Rwanda - publicly presented itself as a non-ethnic ‘Rwandan’ party fighting against the corrupt northern Gisenyi mafia,\textsuperscript{1166} while at the core remained faithful to the triumphs of the 1959 Revolution.\textsuperscript{1167}

With the outbreak of the tit-for-tat armed engagement with the RPF, Habyarimana’s logic had become to remobilise the Hutu people from the countryside and consolidate the opposition against the common enemy embodied by the RPF.\textsuperscript{1168} Framing the insurgency as a racial and ethnic war and using its well-organised ‘retaliatory’ massacres against Tutsi, the regime hoped to characterise any further moves toward democratisation as a “slide toward anarchy” and refocus on the real enemy.\textsuperscript{1169} On the other hand, the regime was using the war and its accompanied state of emergency as a pretext to silence the freshly arisen opposition - through mass arrests and political assassinations of Hutu moderates – those who did not subscribe to the hard-line. Massacres were performed to instil fear into civilians (paysants) and signal they should not allow themselves to become victims (i.e. ‘members’ “to be invaded” in Mugesera’s language) of a new political order ran by so-called ‘accomplices.’ The strategy had worked for a while, with the MDR nominally aligning itself to the MRND’s stance towards the insurgency. But soon, the moderates saw through the regime’s tactics in thwarting reforms. Now working together as a common front against the regime, the opposition organised mass street parades in January 1992 that forced Habyarimana to agree to a new cabinet under a MDR Prime Minister in April, a month after the start of the Bugesera massacres. As part of larger agenda on reforms of the coalition,\textsuperscript{1170} official peace talks with the RPF would deepen the political crisis.

Yet, as the negotiations for the coalition government had been going on, a group of 51 Hutu, allegedly close to the Akazu, established a new party, the Coalition for the Defence of the Republic (Impuzamugambi Ziharanira Repubulika; Coalition pour la Défense de la République, CDR). It was not included in the coalition government. Its manifesto, alongside a membership application form, was published in a special issue of Kangura; the extremist glossy newspaper ran by one of the CDR’s founding members Hassan Ngeze, which in 1990 had published the infamous Hutu Ten Commandments.\textsuperscript{1171} Under the motto of “unity and solidarity,” the party’s statute spoke of the “need

\textsuperscript{1167} Des Forges, Leave None, p. 51.
\textsuperscript{1164} Prunier, The Rwanda Crisis, pp. 124-125; Straus, Making and Unmaking, p. 297.
\textsuperscript{1165} In March 1991, its protagonists published ‘an appeal for the recreation of the Mouvement Démocratique Républicain n(MDR)’. See: Prunier, The Rwanda Crisis, p. 122.
\textsuperscript{1166} Fujii, Killing Neighbors, p. 48.
\textsuperscript{1168} Straus, Making and Unmaking, p. 298.
\textsuperscript{1169} Guichaoua, From War to Genocide, p. 40.
\textsuperscript{1170} Fujii, Killing Neighbors, pp. 49; 51; Prunier, The Rwanda Crisis, p. 144.
\textsuperscript{1171} Out of seven objectives, “negotiating peace”, “assuring national security” and “settling the refugee problem” related to the civil war. Reyntjens, L’Afrique des Grands Lacs, p. 111.
to preserve the gains of the 1959 Social Revolution” and the concern “to reinforce the unity of the popular masses.”

Positioned on the far right side of the MRND – and sometimes dubbed the “Akazu-MRND” the CDR became the regime’s radical proxy. Although they were officially separated and openly criticising each other, the CDR existed “to state positions favoured by the MRND but too radical for them to support openly.”

Thus, with its conservative ideology and racist lexicon, the protagonists of the emerging Hutu Power movement built its own political institutions: a political party, a radio station (RTLM), a newspaper (Kangura) and a youth militia (Impuzamugambi).

At the same time, it sought to expand through control over the existing state institutions of power: the media of the ruling party and its armed groups, including the Army, the Presidential Guard and the MRND’s youth movement (Interahamwe).

**Defining the enemy**

All these political struggles and changes did not occur in a vacuum. The country was still engaged in a contained low-scale war. Despite a Zairian brokered cease-fire in 1991, low-intensity military operations had continued but neither the RPF nor the FAR was gaining real advantages. So far, the main consequence of the sporadic raids and fighting was a massive displacement of populations, particularly Hutu farmers fleeing RPF-controlled areas. More distracting and disturbing than the conventional war between the two armies was the political violence and state-controlled massacres of civilians.

The demarcation lines between the authorities and its enemies became clearer and clearer. By the end of 1991 – over a year after the start of the war and a handful of pogroms – a ten-member military commission, appointed by Habyarimana and led by Colonel Théoneste Bagosora, defined its enemy and its partisans:

1. The primary enemy are the extremist Tutsi within the country and abroad who are nostalgic for power and who have NEVER acknowledged and STILL DO NOT acknowledge the realities of the Social Revolution of 1959, and who wish to regain power in RWANDA by all possible means, including the use of weapons.

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1172 See: ‘Coalition pour la Defense de la République’, p. 3-7; UNICTR, Nahimana, Barayagwiza & Ngeze Judgement, §83.
1173 Guichaoua, From War to Genocide, p. 352.
1174 Des Forges, Leave None, p. 53.
1175 Mandami, When Victims Become Killers, p. 209.
1179 Guichaoua, From War to Genocide, pp. 37-40.
1180 On 4 December 1991, President Habyarimana set up a military commission with the mandate “to further study and respond to the question: What must be done in order to defeat the enemy militarily, in the media, and politically”. Théoneste Bagosora chaired the commission, which sat until about 20 December 1991. The report was originally given limited distribution. However, on 21 September 1992, the Rwandan chief of staff, Déogratias Nsabimana, sent a letter to all OPS Sector Commanders units, enclosing excerpts of the report (it is only the second part of a six-part report, which has never been fully produced at the ICTR). The commanders were asked to “circulate this document widely, highlighting in particular the chapters concerning the definition, identification and recruiting grounds of the enemy”. UNICTR, Bagosora, Kabiliyi, Nabakuce & Nsengiyumva Judgement, ¶227; Thierry Cruvellier, ‘Brainless Genocide’, in: Gargot, Christophe, Sylvie Lineparg & Thierry Cruvellier (eds), Arusha to Arusha (DVD/Book: Paris 2011), pp. 58-74: 61.
2. Enemy supporters are all who lend support to the primary enemy. […]"

According to the Rwandan military experts at the time, the enemy and its supporters were essentially recruited among Tutsi refugees, the National Resistance Army (in Uganda), the Tutsi from inside, the disgruntled Hutu of the regime in place, the unemployed from inside and outside Rwanda, foreigners married to Tutsi women, the Nilo-Hamitic peoples from the region and criminals on the run. Not to be confused with the enemy or its supporters, added the commission, were “political opponents who desire power or peaceful and democratic change in the current political regime in Rwanda.” After the genocide in 1994, the commission was often compared, even by UN investigators and prosecutors, to the Nazi’s 1942 Wannsee Conference and its report taken into account as a document that shows not only genocidal intent but also prior planning. For some observers, talking about “Tropical Nazism”, it fitted perfectly in the analogy to the Holocaust and the persecution of European Jews from the 1930s onwards. Undoubtedly, and as will transpire in detail below, the document became a central issue in debates on the alleged planning and the conspiracy to carry out genocide. The text was drafted in 1991 by a commission of ten prominent military men on the request of Habyarimana and sought to answer the question “how to vanquish the enemy in the military, media and political domains.” In questioning if the so-called “enemy report” was drawn up with an intent that resonates the language of the genocide convention, one recent understanding of the report is that it represents, at minimum, that the military elites in the 1990s perceived the RPF attacks through the discursive and political lens of the 1959 Social Revolution. Its discourse uncovers a historical logic that Tutsi (RPF) in the present wants the same as the Tutsi (unwinnable Inyenzi) from the past. And to that effect, Straus claims, thirty years later the new war was still perceived and pitted as one “between those who would take away Hutu freedom and those who would protect it.”

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1183 It goes on saying: “The ENEMY, or their accomplices, be they Rwandan or foreign nationals within the country or abroad, can be identified in particular by any of the following acts: Taking up arms and attacking RWANDA; Purchasing arms for enemy soldiers; Contributing money to support the ENEMY; Providing any form of material support to the ENEMY; Spreading propaganda favourable to the ENEMY; Recruiting for the ENEMY; Contaminating public opinion by spreading false rumours and information; Spying for the ENEMY; Divulging military secrets to the ENEMY; Acting as a liaison officer or runner for the ENEMY; Organising or performing acts of terrorism and sabotage in support of ENEMY activities; Organising or inciting revolts, strikes or any form of disorder to support ENEMY activities; Refusing to fight the ENEMY; Refusing to comply with war requisitions.” UNICTR, Bagosora, Kabiligiti, Nabakaze & Nsengiyumva Judgement, §202.

1184 Cruvellier, Court of Remorse, p. 141.


1187 Des Forges, Leave None, pp. 59-64

1188 Des Forges, Leave None, pp. 59-64

1189 Des Forges, Leave None, pp. 59-64

1190 Des Forges, Leave None, pp. 59-64

1191 Des Forges, Leave None, pp. 59-64

1192 Des Forges, Leave None, pp. 59-64

1193 Des Forges, Leave None, pp. 59-64

1194 Straus, Making and Unmaking, p. 296.

1195 Straus, Making and Unmaking, p. 296.
For one of the members of the military commission, however, that interpretation (that the Tutsi as a whole group were the enemy) was held by the ruling party (MRND), but it was not the “spirit of the commission”, which, according to him, took a more practical stance and sought just to represent a “sociological reality.” Augustin Cyiza was one of the two moderates on the commission that attained high positions in the post-genocide government. It appears that the authors’ wording in the secret report is less crucial to understanding its meaning than is the timing and context in which the extract of the report was widely distributed by the army nine months later; at a time that the controversial Arusha peace agreements were being negotiated and the Hutu Pawa (Power) was mobilising against possibly sharing power with the RPF.

**Arusha: the political ‘settlement’**

As sketched above, the political context had drastically changed in early 1992. Amidst an excavating crisis three major political forces had emerged at the national level: (1) a coalition of mainstream Hutu moderates (liberal democrats), with some support in the army; (2) conservative, opportunistic and racist Hutu hardliners from the MRND, CDR, the Akazu and their allies in the military, media and militias; and (3) well-organised and uncompromising Tutsi rebels of the RPF. Now also faced with opposition parties in its own coalition government – although maintaining key portfolios such as defence, interior and civil service - Habyarimana and his MRND saw power evaporate as water in the open sun. A chief concern became the coalition’s wish to negotiate with the unified, disciplined but uncompromising RPF, which had swelled in ranks but maintained a hard line position that it could only stop its rebellion through a negotiated settlement that would give them out of proportion participation. Early talks hosted by Laurent Desire Mobutu Sese Seko and Yoweri Museveni in Zaire shipwrecked and succeeding cease-fire promises were nonchalantly broken. But the situation had changed. Throughout the war period, the FAR’s was incompetent in extricating the rebels from their northern strongholds and at times even needing French support to stop their swelling force - despite its own growth from 5,000 to 30,000 poorly trained and badly disciplined troops. This military weakness combined with international efforts to pressure for a political settlement led to the
commencement of talks between the three opposition parties (MDR, PSD and PL) and the RPF in Paris in May 1992.\textsuperscript{1197}

For years, the Arusha International Conference Centre in Tanzania was the centre stage for dealing with the ‘Rwanda question.’ After the 1994 genocide, as outlined later in this chapter, an intercontinental flock of jurists set up their courtrooms there to adjudicate the man-made humanitarian catastrophe that was the climax of a peace agreement and power-sharing accord signed in the very same building in August 1993.\textsuperscript{1198} Thirteen months of draining marathon negotiations – interrupted in 1993 by pogroms against Tutsi\textsuperscript{1199} and bombings and assassinations by the RPF\textsuperscript{1200} - between the Rwandan Government and rebels had preceded the so-called Arusha Accords. But it was a peace deal and power-sharing agreement, enforced on Habiyarimana by donor countries\textsuperscript{1201} and reached between the moderates and the RPF and fiercely rejected by the hardliners who had been excluded from the process as well as the outcome.\textsuperscript{1202} Branded as a sell-out by the CDR and conservative figures in the MRND at the time - and retrospectively a very likely kick-starter of further polarisation and radicalisation - the RPF celebrated the accords triumphing and left the President’s party defeated\textsuperscript{1203} Comparable to modern transitional justice settlements, the Accords were comprehensive and encompassed separate agreements on the rule of law, transitional institutions, repatriation and resettlement of refugees and displaced persons and the integration of the two opposing armies.\textsuperscript{1204} But the MRND returned from Arusha severely bruised, losing most of its power. Habiyarimana was to remain president until elections, but his party would only hold 26, 3 percent of the ministerial portfolios in the “broad-based transitional government”\textsuperscript{1205} and less than 20 percent of seats in the


\textsuperscript{1199} Africa Watch reported that “More than 300 Tutsi and members of political parties opposed to Rwandan President Juvénal Habyarimana were massacred in north-western Rwanda in late January 1993 by private militia at the direction of local and central government authorities. In February and March, smaller scale attacks claimed the lives of at least thirty others. Rwandan soldiers have also attacked Tutsi and opposition party members, and, since January, have killed, beaten, detained or made to disappear hundreds of civilians. Africa Watch, ‘Beyond the Rhetoric: Continuing Human Rights Abuses in Rwanda’, News from Africa Watch, No. 7, Vol. 5 (June 1993), pp. 4-5.

\textsuperscript{1200} Prunier, The Rwanda Crisis, 174-186; Guichaoua, From War to Genocide, pp. 67-70.

\textsuperscript{1201} An ultimatum was set on 9 August for Habiyarimana to sign or else donor countries and the World Bank would cease international funds. See: Des Forges, Leave None, p. 124.


\textsuperscript{1203} Strauss, Making and Unmaking, p. 229.

\textsuperscript{1204} Des Forges, Leave None, p. 124.

\textsuperscript{1205} The portfolios were distributed as follows: MRND: (1) Defence; (2) Higher Education, Scientific Research and Culture; (3) Public Service; (4) Planning; and (5) Family Affairs and Promotion of the Status of Women; RPF: (1) Interior and Communal Development; (2) Transport and Communications; (3) Health; (4) Youth and Associative Development; and (5) Rehabilitation and Social Integration; MDR: (1) Prime Minister; (2) Foreign Affairs and Cooperation; (3) Primary and Secondary Education; (4) Information; PSD: (1) Finance; (2) Public Work and Energy; (3) Agriculture and Livestock Development; PL: (1) Justice; (2) Commerce, Industry and Cottage Industry; (3) Labour and Sexual Affairs; PDC: (1) Environment and Tourism. See: Protocols of Agreement between the Government of the Republic of Rwanda and the Rwandese Patriotic Front on power-sharing within the Framework of a Broad-Based Transitional Government, signed at Arusha on 30 October 1992 and 9 January 1993, in: UNGA & UNSC, Letter dated 23 December 1993 from the Permanent Representative of the United Republic of Tanzania to the United Nations addressed to the Secretary-General (UN docs. A/48/824 & S/26915; 23 December 1993), art. 56.
"Transitional National Assembly." Predictably, as a matter of principle and out of resentment for their exclusion, the radicals of the CDR snubbed at each sole letter of the settlement. But there were other adversaries too, including senior officers, soldiers, burgomasters, prefects and civilians. Most were left disillusioned by the political settlement of the war they had not lost, feared losing their privileged positions and were worried about sharing scarce resources with returning refugees. Facing this new paper order, the MRND calculated that it could actually “avoid the negative terms of the peace deal” by benefitting from an electoral advantage and turning to the masses. Again, against the grains of the spirit of the Accords, they sought to create and play out two blocks: anti-RPF/pro-Hutu versus pro-RPF (Tutsi). By some means, Arusha hastened and reinforced the strategy of ethnic polarisation and spirited the notion and sense of Hutu Power (‘Hutu Pawa’ in local parlance). This new sentiment was “built on the corpse of Melchior Ndadaye.”

4.4 Cooking for war

Cynically, the deadly faith of one of the observers to the signing of the Accords catalysed Hutu Power, warranted self-defence and escalated the Rwandan crisis. Officers in the Tutsi-led army assassinated Burundi’s first democratically elected Hutu President Ndadaye, only two months after he attended the signing ceremonies in Arusha. The murder did not only spark reciprocal mass killings between Hutu and Tutsi in Burundi and set adrift thousands of refugees who flocked into southern Rwanda. It was used by hardliners and propagandists of the CDR-controlled Kangura glossy and RTLM radio to spread rumours and instil fear into Rwanda’s Hutu population, warning that the RPF was “to exterminate the popular majority in reprisal against those who engineered the Social Revolution of 1959.” Next to accusing the RPF for the assassination and mass killings of Hutu, they also speculated that Tutsi were not destined at all to accept the outcome of democratic processes, anywhere, including in Rwanda and by all means necessary. Simply, in the political tradition, the struggle for state-control was fought out on the basis of ethnicity and the RPF would never win numerically. Thus, panic was spread and the polarisation worked. It even trickled down to the moderates, who became increasingly pessimistic about a peaceful integration of the RPF into the government and armed forces. Rwandan Tutsi, on the other side, saw once again that the only way to protect themselves from defeat was to gain control of the state, if necessary by force. Dangerously infused by political elites (like the MDR’s Froduald Karamira), legitimised by intelligentsia (like historian Ferdinand Nahimana and political scientist Mugesera) and valorised at political rallies, songs

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1207 Des Forges, Leave None, pp. 125-126.
1209 Des Forges, Leave None, p. 137.
1211 Des Forges, Leave None, p. 135; Straus, Making and Unmaking.
(Simon Bikindi) and through inflammatory media who all brought back to the arena the discourse of the social revolution (founding narrative), the post-Arusha dialectics were dangerously escalating. Although Rwanda’s regime change through diplomacy was sponsored, applauded and endorsed by the international community and the United Nations, its Assistance Mission to the transition (UNAMIR), led by the famous Dutch-Canadian General Roméo Dallaire, could only ‘observe’ the country sliding into chaos.

In fact, from late 1993 onwards, the freshly negotiated transitional state that was to prepare for democracy was not functioning at all. Instead it was preparing for war. All political settlements had failed or were continuously frustrated. Demobilisation of the FAR and integration of the RPF forces never really started as well. Vis-à-vis this political and military deadlock, the Hutu-power coalition extended and professionalised its informal and extra-state institutions. Particularly youth agents of the radical’s ‘self-defence’ militia programme which had already commenced in 1990 – neighbourhood watch patrols, the AMASASU (military), Interahamwe and Impuzamugambi – were formalised, professionalised and militarily trained, at least from late 1993 onwards. By the early months of 1994, there appear to have been at least several thousand armed pro-Hutu militias in different parts of the country, while the RPF was simultaneously recruiting new fighters in Zaire, rearming and threatening to break the fragile cease-fire. In this period of intense political distrust, state collapse and the reported circulation of death lists, the MRND leaders and the RPF (which from January had a base in Kigali) were both preparing for war and accusing the other of doing the same.

From 8 January 1994, after a ceremony to install a failed and incomplete transitional government nobody wanted, the crisis accelerated. The Presidential Guard and political militias that supported Habyarimana rioted and set up roadblocks to prevent opposition deputies from attending the ceremony. Amidst cautions of an imminent civil war and low-scale massacres by the Interahamwe, skirmishes sparked by militias increased by the day in Kigali. Two assassinations on 23 February - of anti-Hutu Power PSD leader Félicien Gatabazi and pro-Hutu CDR-president Martin Bucyana – again created a politically explosive situation, manifested by killings, mob violence, protests and intimidations in the capital as well as attacks against Tutsi civilians across the country. In the meantime, the post-Arusha political impasse sustained at least up to the first week

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1212 UNSC, Resolution 872 (UN-doc S/RES/872(1993); 5 October 1993).
1215 Strauss, The Order of Genocide, p. 27.
1216 Prunier, The Rwanda Crisis, p. 205; Des Forges, Leave None, p. 129.
1217 Strauss, Making and Unmaking, p. 304.
1218 UNAMIR, Outgoing Code Cable: Weekly SITREP, No 13, 04 JAN 94 -10 JAN 94 (Kigali; 11 January 1994).
1219 UNAMIR, Outgoing Code Cable: Request for Protection of Informant (Fax no: 011-250-84273; Kigali, 11 January 1994). [this document is also known as the “genocide fax”].
of April 1994. The RPF declined to agree to allow the CDR into the transitional government because it was not renouncing “racial hatred” and “violence.” The disastrous climax of the unending political deadlock, the looming of an inevitable resumption of war and racist discourse was heralded by the successive assassinations of Habyarimana, Prime Minister Agathe Uwilingiyimana and ten UN peacekeepers from the evening of 6 into 7 April. What followed were six days of vicious political manoeuvring, the RPF quickly advancing towards Kigali, targeted assassinations and massacres. Then a short but explosive, full-blown destructive final war was launched by political and military extremists against the perceived support base of the RPF: Tutsi civilians and their democratic supporters (moderates). Operating in a vacuum of confusion, a self-proclaimed interim government of 19 radical Hutu ‘liberators’ (Abatabazi) chose elimination of all political opposition followed by exterminatory violence against unarmed and unorganised civilians as a strategy to defy the unbeatable RPF, which was rapidly closing in, once and for all and to bring back power to the Hutu masses in whose name they proclaimed to be fighting. This strategy of crushing their enemy at its roots (as a “final solution”) became an effective order of genocide for three months. However, in the face of imminent military defeat, the extermination of Tutsi turned into a last triumph of losers; in its downfall, finalising the destruction of the Tutsi became the extremists’ only winnable battle and would be its sole victory in the face of history and in fulfilment of the Hutu Revolution.

In the genocidal logic of Hutu Power, the RPF could win the war, but when it would finally do so all of its supporters (Tutsi and moderate Hutu electorate) would be dead and the Hutu masses still alive.

**Tuzabatsembatsemba, tuzabatsembatsemba**

Sprawled over the steps leading up to the pulpit was the body of a teenager. Around the base of the pulpit lay the bodies of several women slain with machetes and a male corpse was slumped over the seat in the confessional. Jesus had fallen from his Cross, and lay near the body of a small girl. This churchyard in eastern Rwanda was pervaded by an overwhelming stench of rotting flesh. The deadly silence in this beautiful, hilly landscape of pink and yellow flowers was disturbed only by the song of a lone bird and the insistent buzzing of thousands of flies. This was where the Interahamwe, the murderous bands of Hutu militia, took their toll. Having first surrounded the church and the nearby classrooms, they moved in and slaughtered two or three thousand Tutsi refugees who were sheltering there. In the reading room lay a baby; its severed head had fallen onto a book entitled ‘The secret of faith’. Bodies had been piled up in a corner of the courtyard, and maybe a hundred children’s bodies lay in a classroom. The next classroom contained fifty more dead. One lifeless man, his hand chopped...
Between 1990 and 1994, the down-spiralling economic, social and political crisis, a series of events and process of radical decision-making culminated in the widespread and systematic murder of thousands of Rwandans since April 1994. Starting on the evening of 6 April 1994, armed conflict broke out again and Rwandan political and military leaders decided on a series of actions that turned into a policy of genocidal mass violence. Hardliners from within the ruling party and military took over power in the political vacuum that was created with the – still unresolved - assassination of Habyarimana, his Burundian counterpart Cyprien Ntaryamira and their entourage. First on target were political rivals and elites, the Prime Minister, RPF supporters and UN peacekeepers. Simultaneous to their political assassinations, extremist Hutu declared war against the entire Tutsi civilian populace, which was already associated with the Tutsi-dominated guerrilla forces of the RPF. Through effective state bureaucracy, compulsion and selective incentives, Hutu Power networks overpowered internal antagonism to the violence, mobilised local officials, militia and civilians and set in motion a vast extermination operation across the country. For nearly three months, the theme of community ‘work’ (Umaganda) was “cutting the tall grass,” a much-reported euphemism for killing Tutsi. Armed with machetes, farming tools and other handmade weapons, mobs of Hutu men roamed their neighbourhoods, the hills and the swamps, singling out, abusing and murdering Tutsi. Allegedly, “[…] for those people, the intention was to completely wipe out Tutsi and lay outstretched across a large wooden table. A large stick had been thrust into the genitals of a middle-aged woman by the murderers. Only one woman in the church survived the massacre. She lost the power of speech.

1230 In May, the UN estimated that “more than 200,000 people, the majority of them civilians, including children and women, have been killed” and that the number “may be considerably higher and may exceed 500,000” but that the number […] will probably never be determined accurately.” Report of the United Nations High Commissioner for Human Rights on his mission to Rwanda of 11–12 May 1994 (E/CN.4/S.3/1994); 13 April 1994). UNSC, Report of the Secretary-General on the situation in Rwanda, reporting on the political mission he sent to Rwanda to move the warring parties towards a cease-fire and recommending that the expanded mandate for Unamir be authorized for an initial period of six months (S/1994/460; 31 May 1994), § 5.
1231 The literature (a fluid conglomerate of official, NGO, journalistic, literary and academic writing produced in the global north) on the genocide has swelled to large proportions and there is no space to critically review these. See for an overview: Straus, ‘The Historiography of the Rwandan Genocide’, pp. 517-542.
1233 The others killed in the attack were: Bernard Ciza (Burundian Minister of Public Works); Cyriaque Simbizi (Burundian Minister of Communication); Michel Perrine (flight engineer).
1235 The shooting down of the plane touched off the widespread massacre of Tutsi, the murder of Hutu opponents and the renewed war between government forces (FAR) and RPF-rebels. Historically significant, the attack has never been fully resolved and sparked three inquiries with different outcomes. Although it fell under its mandate, the ICTR never carried out a judicial investigation because nobody was charged with the attack. In 2006, a French anti-terrorist investigative judge probed the matter and concluded that the RPF bore the responsibility: Tribunal de Grande Instance de Paris, Cabinet de Jean-Louis Bruguiere, Délibération de Mandats d’Arret Internationaux (97.295.2303/0; Paris, 17 November 2006). Rwanda disagreed heavily and responded with its own investigation, concluding that the missiles came from Kanombe military base of the Rwandan government forces: Republic of Rwanda, Independent Committee of Experts Charged with the Investigation into the Crash on 06/04/1994 of Falcon 50 Aeroplane, registration number 9xr-nn, Report of the Investigation into the Causes and Circumstances of and Responsibility for the attack of 06/04/1994 against the Falcon 50 Rwandan Presidential Aeroplane, registration number 9xr-nn (Kigali, 20 April 2008). A second French investigation also concluded that the attack was not launched from Masaka Hill, which was the RPF base at the time: Cour d’Appel de Paris de Grande Instance de Paris, Rapport d’Expertise. Destruction en vol de Falcon 50 Kigali (Rwanda) (9729523030; Paris, 5 January 2012).
1236 The others killed in the attack were: Bernard Ciza (Burundian Minister of Public Works); Cyriaque Simbizi (Burundian Minister of Communication); General Degratias Naibumana (Chief of Staff Rwandan Defence Forces); Major Thaddée Bagaraza (Chief of “maison militaire” of Habyarimana); Colonel Elie Sagatwa (Chief of Habyarimana’s Military Cabinet); Juvenal Renaho (Habyarimana’s foreign affairs advisor); Emmanuel Aki (Habyarimana’s personal physician); Jacky Héraud (French pilot); Jean-Pierre Minberry (French copilot); and Jean-Michel Perrin (flight engineer).
1237 United Nations Assistance Mission in Rwanda (UNAMIR), Daily Sitrep Period 070600h Apr to 080000h Apr 94 (Kigali, 8 April 1994).
1239 Scott Straus, ‘20 Years after the Genocide in Rwanda, where do we stand?’, Lecture at NIOD Roads to Justice Series, Humanity House, (2 April 2014).
only by consulting a history book.”

That was perhaps why no one was spared: inter-married family, friends, neighbours, colleagues, men, women, elderly people, children and in several cases the un-born. Most probably, the killing campaign could not have been executed without the active support by powerful elements within the national, mid-level and local state apparatus, the military and militia, who simultaneously propagated and celebrated the slaughter at public gatherings (animations and political rallies) and on radio broadcasts. At the same time the UN force (UNAMIR) that was tasked with ‘peacekeeping’ retreated, effectively turning its back on defenceless Tutsi. In this context of complete impunity and security vacuum, the mass killings that unfolded spread like a controlled virus of cultivated genocidal fever, which in its first month was carried out at a speed that has no equivalent in the history of mass violence.

In the interim, the war on the military fronts had continued unabated since the shooting down of Habyarimana’s plane, with the RPF steadily advancing on the government forces (FAR) and Kigali. In three months, until the RPF overthrew the homicidal regime by mid-July, at least half a million Rwandans were slain. Tutsi civilians had been systematically and aggressively beleaguered because their assailants identified them as Tutsi. Victims were easily selected. Either, their assailants knew they were Tutsi, deemed they looked Tutsi, found their names on circulated death lists, were incited by superiors or peer-pressured to target certain persons, were informed and directed by radio announcements or – in most cases – corroborated their ethnic label in identity cards – which listed a person’s ethnicity - at the many roadblocks that had been erected throughout the country. A reported three-quarter of the Rwandan Tutsi civilian population did not outlive the killing spree. Countless others carry both the bodily and psychological scars of violent and sexual assaults, witnessing and surviving the wielding machetes or being orphaned. Scores of people fled to neighbouring countries. Beyond any legal dispute, it has been well established and recognised that Tutsi were dehumanised, persecuted, uprooted, violated and killed with the intent to destroy them, in

1239 UNICTR, Akayesu - Audio Recording of 24/05/97 - AM (ICTR-96-04-01033; 24 February 1997), from: 03:21:40. It became a referenced statement Prosecution witness Des Forges. In full it reads: “From the statements made by certain political leaders, from the popular songs and slogans of the Interahamwe, I believe that for those people the intention was to completely wipe out Tutsi from Rwanda so that - as they said occasionally, so that their children would know what a Tutsi was only by consulting a history book.” However, in its trial judgement of 2 September 1998, the trial chamber not only misquotes the statement, it also provides the wrong date: “In this connection, Alison Desforges, an expert witness, in her testimony before this Chamber on 25 February 1997, stated as follows: “on the basis of the statements made by certain political leaders, on the basis of songs and slogans popular among the Interahamwe, I believe that these people had the intention of completely wiping out the Tutsi from Rwanda so that-as they said on certain occasions - their children , later on , would not know what a Tutsi looked like, unless they referred to history books.”” UNICTR, Akayesu Judgement, §118. 1240 Interahamwe (“Those Who Stand Together” or “Those Who Attack Together”: MRND youth group) and “CDR youth group). 1241 Chrièn et al., Les médias du génocide: Scott Straus, ‘What Is the Relationship between Hate Radio and Violence? Rethinking Rwanda’s “Radio Machete”’, Politics & Society, Vol. 35 No. 4 (December 2007), pp. 609-637. 1242 On 7 April, after the plane crash and start of massacres, the RPF launched a military offensive against the government forces and “interim government.” At the end of May, they controlled half of the country (including important parts of Kigali, such as the airport). See: UNSC, Report of the Secretary-General on the situation in Rwanda, reporting on the political mission he sent to Rwanda to move the warring parties towards a cease-fire and recommending that the expanded mandate for Unamir be authorized for an initial period of six months (S/1998/640; 31 May 1994), §12-14. 1243 Atrocity numbers are always contested and lead to fierce debate. It is not different in Rwanda, where no exact number of casualties was ever established. The official Rwandan statistic is around 1 million, UN and other official sources typically cite 800,000 and human rights and scholarly commentators usually put the number of at least half a million or closer to 650,000 or 700,000. The exact number may never be known. Taking that into consideration, I use the most conservative estimate of at least 500,000. Only once, in 2001, was a census carried out, by the Ministry of Youth, Culture and Sports, that cites a number of 937,000 victims. The records of the census, which details names, ages, family members, causes of death and more information are part of the Gacaca Archive in Kigali. 1244 Identity cards, since 1933, listed Rwandan’s ‘Ethnie’ (‘Ethnic’ in French): Hutu, Tutsi, Twa or Naturalisé. Older cards use the French terms ‘Peuplade’ or ‘Race’ or the Flemish words ‘Volkstam’ or ‘Ras’. 157
whole in part, because of their perceived ethnic – or racial - identity.\textsuperscript{1245} In all clarity, the crime of genocide had been committed against the Tutsi. But the génocidaires, as Hutu killers became to be known, also murdered many Hutu, whom they considered to be politically ‘moderate’, ‘ibyitso’ or ‘accomplice’ to the RPF or opposed to Hutu Power and the mass assassinations. In addition, although unparalleled to the scale of the killings of Tutsi, Hutu civilians were also victimised in atrocities, summary executions and massacres committed by RPF fighters or Tutsi elements.\textsuperscript{1246} A score of reprisal killings and abuses at their hands has been reported as well, claiming at least 10,000 lives.\textsuperscript{1247} Both the Rwandan government forces and RPF also had casualties of the war that had continued.

When the RPF won the war and brought an end to the genocide in July 1994, the losing regime, the army, the militias and Hutu civilians fled en masse to Zaire. Created by an UN-sponsored French intervention,\textsuperscript{1248} they had walked through the safe corridor zone Turquoise.\textsuperscript{1249} A new humanitarian crisis unfolded in camps in Goma and Bakauv where they mixed with Tutsi who had earlier fled them.\textsuperscript{1250} Génocidaires regrouped, slaughtered in the camps and launched guerrilla-killing missions into Rwanda.\textsuperscript{1251} On its turn, the victorious RPF that had established itself as the new government in Rwanda – together with Uganda and through proxy forces - invaded Zaire in 1996, purportedly massacring numerous Hutu (ex-) militia and non-combatants and helped toppling the long-running despot Mobutu.\textsuperscript{1252} After the RPF’s vassal Laurent Kabila was installed and the country renamed the Democratic Republic of the Congo (DRC) in 1998, Rwanda was again involved in a regional war in its neighbouring state and preserved miscellaneous high-level and low-level forms of proxy-military presence in that country from the end of the Second Congo War in 2003 well into 2013.\textsuperscript{1253} Internally – except for the well-reported Kibeho massacre in April 1995\textsuperscript{1254} and several small insurgencies - the RPF managed to maintain relative stability, peace and security. It managed to do so

\textsuperscript{1245} U.N.C.I.T.R., Karemera, Ngirumpatse, Nzirorera: Judicial Notice; U.N.S.C., Resolution 2150 (S/RES/2150 (2014); 16 April 2014). This resolution was intended to stress the UN’s recommitment to fight against genocide during the 20th commemoration of the Rwanda genocide. It basically accepted and defined the events as “the 1994 genocide against the Tutsi in Rwanda, during which Hutu and others who opposed the genocide were also killed.”

\textsuperscript{1246} See detailed report: Des Forges, Leave None to Tell the Story, pp. 692-735.


\textsuperscript{1248} U.N.S.C., Resolution 929 (UN-doc: S/RES/929(1994); 22 June 1994).


\textsuperscript{1250} U.N., Report of the Secretary General, p. 6.


\textsuperscript{1254} Massacres were carried out in the context of an evacuation of the refugee camp in Kibeho. Many people did not survive the harrowing journey. See: HRW, May 1995.
4.5 Transitional justice and the reset of history: Rwanda Inc.

Reckoning with mass violence is the red thread in the transitional justice enterprise. As outlined above, between October 1990 and July 1994, Rwanda experienced insurgency, intra-state warfare, massacres, ethnic violence, political violence and genocide. In these four years, the Rwandan Armed Forces (FAR), Interahamwe and Impuzamugambi militias, civilians, Burundian refugees and the Rwandan Patriotic Front (RPF) all committed human rights violations or violated international humanitarian law. In the subsequent twenty years, Rwanda used prosecutions, truth finding, reconciliation initiatives, re-integration, re-education and reparations to transcend towards internal peace.\(^{1256}\)

Fact-finding through human rights reporting, commissioned inquiries and UN missions already commenced during the war. Since the RPF attacks in October 1990, several massacres were reported\(^{1257}\) and after a two-week mission in January 1993, an international non-governmental commission of inquiry documented government and rebel abuses and concluded that the Rwandan state, its army and aligned militia’s committed acts of genocide against Tutsis.\(^{1258}\) Despite a fragile peace agreement\(^{1259}\) and the presence of international troops,\(^{1260}\) violent incidents continued to occur through its effective, militarised and authoritarian-like rule, which is founded on ethnic amnesia, developmental ideology and the political mobilisation of its genocide experience.\(^{1255}\)

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\(^{1255}\) Scott Strauss labelled the system as “transformative authoritarianism.” See: Scott Strauss, “20 Years after the Genocide in Rwanda, where do we stand?”, Lecture at NIOD - Roads to Justice Series, Humanity House, (2 April 2014) on file with author. Filip Reyntjens is more critical, arguing that Rwanda’s “deeply flawed political governance is likely to destroy the achievements of decent bureaucratic governance and may lead to new large-scale violence.” See: Reyntjens, Political Governance, front matter. Earlier on, Reyntjens observed even that there was a striking continuity from the pre-genocide (Habyarimana) to the post-genocide ( Kagame) regime. Filip Reyntjens, ‘Rwanda, Ten Years on: From Genocide to Dictatorship’, African Affairs, 103 (2004), pp. 177-210.

\(^{1256}\) Besides the mechanisms further discussed in this paper, Rwanda established various post-genocide TJ initiatives: National Unity and Reconciliation Commission (NURC 1999); Ingando (solidarity camps); Abakangurambago (reconciliation volunteers); Ubusabana (community celebrations); Isero (civic education); National Commission for the Fight Against Genocide (CNLG, 2007); Compensation and Reparation policy. See: Charles Villa-Vicencio, Paul Nyanhuya Tyrone Savage, Building Nations. Transitional Justice in the African Great Lakes Region: Burundi, The DRC, Rwanda, Uganda (Cape Town 2005), pp. 86-95.


\(^{1260}\) The Security Council in June 1993 established the United Nations Observer Mission Uganda-Rwanda (UNOMUR) on the Ugandan side of the border, while a 50-member Neutral Military Observer Group (NMOG I) furnished by the Organisation of African Unity was already stationed in Rwanda. In October 1993, the Security Council, established the United Nations Assistance Mission for Rwanda (UNAMIR). The force was reduced from 2,548 to 270 in April 1994, only to increase it again to up to 5,500 troops at the end of 1994. From June 1994, French-led multinational forces carried out “Operation Turquoise”, which established a humanitarian protection zone in southwestern Rwanda. The operation ended in August 1994 and UNAMIR took over in the zone. Meanwhile, the Security Council gradually scaled down UNOMUR, which left Uganda in September 1994.

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in the lead up to the genocide.\textsuperscript{1261} Days into the massacres - on 13 April 1994 - the RPF envoy at the UN requested the Security Council to found a “war crimes tribunal and apprehend persons responsible for the atrocities,”\textsuperscript{1262} but no official request was endorsed as the Rwandan regime held a rotating seat.\textsuperscript{1263} After the genocide, the new transitional government filed a new request.\textsuperscript{1264} A UN Commission of Experts concluded that individuals from both sides to the armed conflict had committed crimes against humanity and that acts of genocide were committed against the Tutsi group and the International Criminal Tribunal for Rwanda (UNICTR) was set up shortly after.\textsuperscript{1265} It was tasked with prosecuting “persons responsible for serious violations of international humanitarian law committed in the territory of Rwanda and Rwandan citizens responsible for such violations committed in the territory of neighbouring States, between 1 January 1994 and 31 December 1994.”\textsuperscript{1266} In its lifetime, the tribunal charged 89 Rwandans and one Belgian of whom 74 were tried for substantive crimes (genocide, crimes against humanity or war crimes), while nine suspects remain at large in 2015.\textsuperscript{1267} Parts of its residual work were taken over by the Mechanism for International Criminal Tribunals (UNMICT) since July 2012 and the UNICTR will gradually fully merge into the UNMICT from 2016.\textsuperscript{1268}

On the national scale, the RPF as well as civilians arrested and brought in between 120,000 and 135,000 people, intending to criminally prosecute everyone involved in the genocide.\textsuperscript{1269} Simultaneously, the new leadership in Rwanda, led by President Pasteur Bizimungu, a Hutu, convened an international conference to discuss its transitional justice strategy,\textsuperscript{1270} resulting in the establishment of specialised chambers in the ordinary and military courts\textsuperscript{1271} to try genocide and crimes against humanity committed since October 1990.\textsuperscript{1272} Genocide offences were categorised\textsuperscript{1273}

\begin{itemize}
\item Category 1: a) planners, organisers, instigators, supervisors and leaders; 1b) official, military, religious or militia perpetrators; b) notorious murderers; c) sexual offenders; Category 2: perpetrators, conspirators or accomplices of murder; Category 3: persons who assaulted others; Category 4: persons who committed offences against property.
\end{itemize}


\textsuperscript{1261} UNSC, Independent Inquiry into the Actions of the United Nations During the 1994 Genocide in Rwanda, p. 68.

\textsuperscript{1262} Moghata, Rwanda’s Genocide, p. 20.


\textsuperscript{1265} UNSC, ICTR Statute: The only country voting against its establishment was Rwanda.

\textsuperscript{1266} The ICTR indicted 90 persons for genocide, crimes against and war crimes, half of them were politicians (20 interim government members and 25 local politicians) Twenty-three suspects were affiliated with the military, a militarised unit (militia) or the police. There were also 5 businessmen; 6 suspects were involved in media; and 7 were affiliated to the church. In addition to these there was also one prosecutor; one medical doctor, one singer and one youth organizer indicted. Barbara Hola and Alette Smeulers, ‘Rwanda and the ICTR: Facts and Figures’, in: Smeulers A., Brouwer A. (Eds): Elgar Companion to the International Criminal Tribunal for Rwanda (ICTR) (London: Edward Elgar Publishing Ltd., 2016).

\textsuperscript{1267} UNICTR, Mechanism for International Criminal Tribunals (MICT) begins work in Arusha (press release: ICTR/INFO-9-2-725.EN, 2 July 2012). The UNMICT carries out a number of essential functions of the UNICTY and UNICTR after the completion of their respective mandates. UNSC, ‘Annex 1: Statute of the International Residual Mechanism for Criminal Tribunals,’ Resolution 1966 (S/RES/1966, 22 December 2010). Amongst its main tasks are tracking down and prosecuting the remaining fugitives (the other 6 fugitives are set to be tried by Rwandan courts when captured). If necessary, the Mechanism can conduct appeals, retrials and review proceedings. Alongside, it will maintain the protection of victims and witnesses, supervise sentence enforcement, assist national jurisdictions and preserve the archives. The UNMICT has one president (Theodor Meron); one prosecutor (Hassan B. Jallow); a registrar (John Hocking) and 25 judges.


\textsuperscript{1269} The conference stressed the need of bringing perpetrators of genocide to justice, rejected any consideration of amnesty and discussed two alternative proposals of specialised tribunals: a specialised court for genocide cases or a specialised chamber in ordinary courts. Besides criminal prosecutions, the conference discussed the possibility of a truth commission, traditional courts (Gacaca) and alternative sanctions. Recommendations of the Conference held in Kigali from November 3rd to November 5th, 1993 (Kigali, December 1993), pp. 8-9 & 16-24.


\textsuperscript{1271} Organic Law No 08/96 of 30th August 1996 on The Organization of the Prosecutions for Offences Constituting the Crime of Genocide or Crimes Against Humanity Committed since 1 October 1990, Official Gazette of the Republic of Rwanda, Year 35, No. 17 (1 September 1996), art. 1.

\textsuperscript{1272} Category 1: a) planners, organisers, instigators, supervisors and leaders; b) official, military, religious or militia perpetrators and fosterers; c) notorious murderers; d) sexual offenders; Category 2: perpetrators, conspirators or accomplices of murder; Category 3: persons who assaulted others; Category 4: persons who committed offences against property. Organic Law No 08/96 of 30th August 1996, art. 2.
and a confession and guilty plea\(^{1274}\) procedure was put in place. The first trials began in December 1996 and from 1997 through June 2002, 7,211 persons were reportedly tried - of whom 1,386 were acquitted.\(^{1275}\) Reliable recorded figures on the total number of people tried do not (publicly) exist, leaving researchers with estimates. Reportedly, several hundred people were sentenced to death but no public executions have been carried out since 24 April 1998.\(^ {1276}\) Classic trials soon proved not to be sufficient in criminally prosecuting thousands of suspects in and outside the country and Rwanda established \textit{Inkiko Gacaca}\(^ {1277}\) – or \textit{lawn courts} in Kinyarwanda – in 2001.\(^ {1278}\) Thousands of \textit{Inyanganugayo} – lay judges - were nominated to oversee the process of (1) truth finding; (2) speeding up trials; (3) combating impunity; (4) sparking national unity and reconciliation; and (5) demonstrating that Rwandans can resolve their own problems.\(^ {1279}\) From 10 March 2005 until the closing of Gacaca in June 2012, 12,103\(^ {1280}\) grassroots courts throughout the whole country had reportedly tried 1,003,227 people in 1,958,634 cases.\(^ {1281}\) Although the Gacaca process has met with praise and criticism from inside and outside Rwanda,\(^ {1282}\) its community proceedings have likely microscopically documented its genocide to an unprecedented extent.\(^ {1283}\) Future archival research and study of the 60 million pages of court records may possibly shed light on the micro-dynamics of the genocide.

Besides Rwandan and supranational schemes, other models of inquiry and justice have dealt with the aftermath of the Rwandan genocide. Parliaments in Belgium, Switzerland and France installed special commissions of inquiry\(^ {1284}\) while the United Nations and the Organisation of African Unity (now African Union: AU) investigated the 1994 bloodbath on their behalf.\(^ {1285}\) In addition to these fact-establishing exercises, a range of countries opted for criminal prosecutions. Judiciaries in Belgium, the Netherlands, Canada, Switzerland, France, Finland, Germany, the United Kingdom

\(^ {1274}\) Confessions required: (a) a detailed description of all the offences, including the date, time and the scene of each act, as well as the names of victims and witnesses; (b) information with respect to accomplices, conspirators and all other information useful to the exercise of public prosecution; (c) an apology; (d) an offer to plead guilty.


\(^ {1278}\) Republic of Rwanda, National Service of Gacaca Courts (NSGC), \textit{Summary of the Report Presented at the Closing of Gacaca Courts Activities} (Kigali, June 2012), p. 34.

\(^ {1279}\) 9,013 cell level courts; 1,545 sector level court (plus 1,803 additional benches to complement these courts; 1545 appeals courts (plus 412 additional benches). See: NSGC, \textit{Summary Report}, 33.

\(^ {1280}\) No comprehensive report exists, except for a ‘summary report’: Republika YÚ Rwanda, National Service of Gacaca Courts, \textit{Summary Report Presented at the Closing of Gacaca Activities} (Kigali, June 2012), pp. 34-39. Similar to the ordinary trials, no other source data exists or has been disclosed. Academic studies on the Gacaca court, therefore, all cite conflicting numbers in terms of courts, people tried and the number of people convicted.


\(^ {1282}\) The Gacaca archive currently consists of some 20,000 boxes, which are kept in 1,800 square meters large building at the National Police Headquarters in Kigali.


\(^ {1284}\) UNSC, Independent Inquiry into the Actions of the United Nations During the 1994 Genocide in Rwanda; OAU, The preventable genocide.
(UK), the United States of America (USA), Denmark, Sweden, Norway and Spain have investigated, indicted or tried dozens of Rwandans suspected of crimes committed in 1994 under the principle of universal jurisdiction.1286 Like the UNICTR, some of these countries have sent criminal files to Arusha or vice versa, including transfers to a specialised chamber in Rwanda.1287 The case of Léon Mugesera (see above) is perhaps the most prominent example of this, although he is among the few persons accused of genocide for a speech he made in 1992. Legal complaints against the RPF political and military leadership have been filed around the globe, including in the USA, The Netherlands, Spain and the United Kingdom, but no trial has commenced at the time of writing in 2015.1288

Resetting time

The history of contemporary Rwanda really commenced in July 1994, on the ruins its divided and destructive forerunner had left behind. A seemingly iconoclastic leadership that reset time, essentially reinvented and ‘remade’ Rwanda,1289 yet old contours, structures and traditions can easily be discerned.1290 From scratch, the nouveau régime engineered a new nation in the Great Lakes Region, embracing a new flag, different anthem and extra language. After becoming President in 2000,1291 Paul Kagame introduced Vision 2020, a comprehensive roadmap for reforms and sustainable economic growth.1292 Ever since, Rwanda set in motion a vast, ambitious and disciplined transition,1293 with the financial backing of friendly governments and philanthropic NGOs.1294 Under RPF leadership, the country has economically moved forward significantly; it is characterised by some as the ‘Singapore of Africa.’1295 It made much progress on many different levels. Amongst its structural projects, the administration was reformed, public corruption virtually outlawed and public health was improved. With a GDP growth rate of 9% per year it desires to become a regional economic hub, a paradise for tourists and attractive to foreign investment.1296 Meanwhile, troops of

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the Rwandan Defence Forces (RDF) are among the best trained and well-disciplined on the continent and contribute significantly to several complex peacekeeping missions in Africa.\(^\text{1297}\)

On the social and cultural levels, transformation came at the speed of a whirlwind. Because of the four-year war, the genocide and the loss of human life, there was a major population shift. Many people perished while other Rwandans were spread all over the region, as Internally Displaced People (IDP’s) in Rwanda or as refugees in neighbouring countries. But there were many exiles in the Diaspora as well who returned to Rwanda, in the footsteps of the RPF. All these migrations after the genocide structurally transformed the social landscape of Rwanda. There were Hutu who had stayed, gradually returned from refugee camps or resettled elsewhere in the country. There were Tutsi who had survived, returned from refugee camps to their villages or resettled elsewhere when they found out Hutu had taken their houses. Many ‘old case returnees’ (exiles and emigrants) from Burundi, Tanzania, Uganda, Zaire and other places also settled in the country, mainly in Kigali. Although they were all Banyarwanda,\(^\text{1298}\) the immigrants brought along different cultural elements to Rwanda, including for instance the English language. Amidst these reshufflings, the first thing on the regime’s agenda was to eradicate the underbelly of societal animosity: the ethnic labelling of Rwandans.\(^\text{1299}\) Ethnic classification was scrapped from identity cards, public registrations and the official population census. After 1994, the Hutu-Tutsi question has basically been banned from public and official life and was substituted by an ideology of ‘Rwandanticity’, which emphasises that Rwandans “enjoy the privilege of having one country, a common language, a common culture and long shared history which ought to lead to a common vision of our destiny.”\(^\text{1300}\) Divisions on ethnic and political grounds - is the common idea – spark genocide. Thus, the notions of unity and reconciliation are contemplated and discursively framed as prime constituents for deterrence of renewed conflict and mass murder.\(^\text{1301}\)Ethnic and other divisions have been progressively removed from daily life through self-contained taboos, education programmes\(^\text{1302}\) and criminal laws on genocide ‘sectarism’, divisionism and genocide denial and ideology.\(^\text{1303}\) Non-African rights watchdogs and engaged scholars have

\(^{1297}\) Since 2004, Rwanda’s participation in such operations include the transitions from: the AU Mission in Sudan to the AU-UN Hybrid Mission in Darfur; from the African-led International Support Mission in Mali (AFISMA) to the UN Multidimensional Integrated Stabilization Mission in Mali (MINUSMA); and from the African-led International Support Mission to the Central African Republic (MISCA) to the UN Multidimensional Integrated Stabilization Mission in the Central African Republic (MINUSCA). It also has large presence in the UN Mission in South Sudan. See: Permanent Mission of Rwanda to the United Nations, Statement by Minister of State in Charges of Cooperation, Eugene-Richard Gasana at the UN Security Council Open Debate on United Nations Peacekeeping: Regional Partnerships and their Evolution (New York, 28 July 2014).\(^\text{1298}\) Kinyarwanda - plural: abanyarwanda, singular: umunyarwanda; literally “those who come from Rwanda.”\(^\text{1299}\) According to Paul Kagame, because “it is distortions and prejudices that for decades were associated with these terms for political ends”. Paul Kagame, ‘Preface’, in: Phil Clark & Zachary D. Kaufman (eds.), After Genocide: Transitional Justice, Post-Conflict Reconstruction and Reconciliation in Rwanda and Beyond (London: Hurst and Company, 2008), pp. xxii-xxvi.\(^\text{1300}\) Stef Vandeginste, ‘Governing ethnicity after genocide: ethnic amnesia versus ethnic power-sharing in Burundi’, Journal of East African Studies, Vol. 8, No. 2 (March 2014), pp. 296-297; Republic of Rwanda, Constitution of the Republic of Rwanda (adopted on 26 May 2003), ‘preamble’.\(^\text{1301}\) Republic of Rwanda, National Unity and Reconciliation Commission (NURC), Report on the Evaluation of National Unity and Reconciliation (Kigali: NURC, 23 November 2001).\(^\text{1302}\) Particularly through the National Unity and Reconciliation Commission (NURC) that was provided for in the 2003 Constitution (art. 178).\(^\text{1303}\) Genocide ideology is defined as “an aggregate of thoughts characterized by conduct, speeches, documents and other acts aiming at exterminating or inciting others to exterminate people basing on ethnic group, origin, nationality, region, colour, physical appearance, sex, language, religion or political opinion, committed in normal periods or during war. [...] characterized in any behavior manifested by facts aimed at dehumanising a person or a group of persons with the same characteristics in the following manner: (1) threatening, intimidating, degrading through defamatory speeches, documents or actions which aim at propounding wickedness or inciting hatred; (2) marginalising, laughing at one’s misfortune, degrading, mocking, boasting, despising, degrading creating confusion aiming at negating the genocide which occurred, stirring up ill feelings, taking revenge, altering testimony or evidence for the genocide which occurred; (3) killing, planning to kill or attempting to kill someone for purposes of furthering genocide ideology. See: Republic of Rwanda, ‘Law No 18/2008 of 23/07/2008 Relating to the Punishment of the Crie of Genocide Ideology’, Official Gazette of the Republic of Rwanda, No 20 (15 October 2008), art. 2 & 3. Other laws outlawing ‘divisionism’ include: Republic of Rwanda, ‘Law No 47/2001 of 18/12/2001 Instituting Punishment for Offences of Discrimination and Sectarism, Official Gazette of the Republic of Rwanda, No. 4 (15 February 2002).
particularly voiced concerns about the strategy of ‘ethnic amnesia’, asserting it is used as instrument of suppression of political opposition, civil society and media.\footnote{HRW, Law and Reality: Progress in Judicial Reform in Rwanda (New York: HRW, July 2008), pp. 34-41; Article 19, Comment on the Law Relating to the Punishment of the Crime of Genocide Ideology of Rwanda (London, September 2009); AI, Safer to stay silent. The chilling effect of Rwanda’s laws on “genocide ideology” and “sectarianism” (London: Amnesty International Publications, 2010); René Lemarchand, ‘The Politics of Memory in Post-Genocide Rwanda’, in: Clark &. Kaufman, After Genocide, pp. 65-76.} In real life, Rwandans remain well aware of their ethnic lineage (or at least of their Tutsi or Hutu lineage, irrespective of what these terms mean), as it is the spine of their private, shared and collective history, which is centred around the genocide event.

It would have been unmanageable to concoct a new Rwanda so steadfast without the repentance coinage from donors that ‘did not stop the genocide’ (some critics call this the “genocide credit”).\footnote{Reyntjens, ‘Rwanda, Ten Years on: From Genocide to Dictatorship’, p. 199. According to Reyntjens, this is also used to deflect attention from alleged RPF crimes.} Moreover, the robust manifestation of the government and its clever usage of transitional justice mechanisms were key economic and social drivers. On the continent, there is no other African country as safe, orderly and clean as Rwanda. With over one million inhabitants, Kigali remains relatively quiet and amiable, the streets are well brushed and its coffee bars and restaurants are trendy. Gentrification has pushed away the poorer parts of the population to the quiet villages.\footnote{HRW finds that this is largely a result of the practice by the Rwanda National Police of rounding up “undesirable” people - street children, street vendors, sex workers, homeless people and suspected petty criminals - and arbitrarily detaining them at unofficial detention centres. See: HRW, “Why Not Call This a Prison?” Unlawful Detention and Ill-Treatment in Rwanda’s Gikondo Transit Center (HRW: New York, September 2013).} Security, discipline and hygiene are the strategic drivers behind the RPF’s rule. Behind it, lingers the philosophy that only under those circumstances it can restyle the economy, society and culture.\footnote{See for an analysis of Rwanda’s economic policies and practice: Patricia Crisafulli & Andrea Redmond, Rwanda, Inc. How a Devastated Nation Became an Economic Model for the Developing World (New York: Palgrave Macmillan, 2012).} But in order to realise its vision, the government maintains steady grip on private and public space, from house stoves to parliamentary seats. Controlled muteness and conformity are its instruments; the RPF ideologues observe that pluralism may re-furnish the radical splits that paved the way to the genocide. Only if they rhyme with fundamental government-set historical, policy and social narratives are opposition parties, civil society, non-governmental organisations, media and foreign programmes tolerated. Counter-discourses are actively disdained, undermined and countered by officials, elites and non-elites around the board. Dissent, if any, is often practiced in silence, while articulate dissidents abroad are reportedly intimidated and even killed.\footnote{HRW, Repression Across Borders. Attacks and Threats Against Rwandan Opponents and Critics Abroad (New York: HRW, 28 January 2014); AI, Rwanda: Shrouded in Secrecy. Illegal Detention and Torture by Military Intelligence (Amnesty International: London, 2012 (AFR 47/004/2012)).} Arguably, societal control and social engineering has particularly been manifested through Rwanda’s bold transitional justice scheme. It has been claimed, for instance, that laws and criminal prosecutions have been operationalised as an important tool of social control.\footnote{Reyntjens, Political Governance, pp. 73-79.} Education has been equally important. Equipping – particularly young - Rwandans with the dogma of “national unity and reconciliation” has, for instance, been centrepiece in solidarity camps (Ingando) and civic education...
trainings (Itorero).1310 Public tutelage was allegedly further channelled through the nation-wide - mixed judicial and truth seeking - enterprise of neo-traditional community courts (Inkiko Gacaca).1311 In this intimate process of local-level inquest, charging, naming and shaming, testimony and judgement, the good versus evil boundary between the old and new regime and its separate value systems was well demarcated. There is no convincing conclusion, however, reached among the handful scholars - who altogether observed perhaps less than 1 per cent of all trial hearings - what the real effects of Gacaca has been during, as well as after, the process. Where sound and representative empirical data is lacking or conflicting – a commonality in Rwanda - sets of conflicting theories and political interpretations remain, which all suggest that it has had some kind of social effects at the time the trial took place. At least it be can argued, that it became clear who was sentenced for genocide crimes and who was not.1312

4.6 Tribunalising Genocide: The UNICTR

As the atrocities in Rwanda transpired and reached its peaks, pleas for justice were already progressively articulated.1313 At first, calls came from Rwanda, aired by the RPF. Claude Dusaidi, the rebel group’s representative at the UN, wrote a letter to the president of the Security Council, in which he claimed, “a crime of genocide has been committed against the Rwandese people” and requested the “International Community, through you Mr. President, to immediately set up a UN war crimes tribunal, apprehend those who have committed crimes against humanity in Rwanda and bring them to justice.”1314 Dusaidi furthermore underlined that the international community had “stood by and only watched” and that a tribunal would be a noble service to the Rwandan people.”1315 Only days into the slaughters, the RPF soon fostered a sense of guilt within the UN, for not managing to either prevent or stop the genocide. Ironically however, Rwanda held a rotating seat on the Council, which was occupied by Ambassador Jean-Damascene Bizimana, who represented the extremist government in Kigali at the time. So he did not endorse an official request, but international actors began to talk of the need for justice.1316 At the UN, the driving force was remorse, for its hesitant role in preventing or stopping the escalation of mass atrocity.1317 Besides, Alison Des Forges and Timothy Longman allege that not establishing a tribunal like the UNICTY for crimes in Rwanda that “were so much more

1312 Important to note is that in this respect, the vast majority of people sentenced committed property crimes during the genocide and are convicted as génocidaires. Ergo, persons sentenced by Gacaca for theft can too easily be seen as killers. by default.
1313 For quality histories about the establishment of the tribunal, see: Moghala, Rwanda’s Genocide; Cruvellier, Court of Remorse.
1314 Letter from the RPF to the President of the Security Council, New York, 13 April 1994.
1315 Letter from the RPF.
1316 See, inter alia, the highly informative narratives on the debates, politics and actions towards setting up the UNICTR: Scheffer, All The Missing Souls, pp. 69-80; Gerald Gahima, Transitional Justice in Rwanda: Accountability for Atrocities (New York: Routledge, 2013), pp. 83-88.
1317 Des Forges, ‘Legal Responses to Genocide in Rwanda’, p. 51; Moghala, Rwanda’s Genocide, p. 162; Cruvellier, Court of Remorse, p. 167.
blatant and grievous and large in scale than those committed in the former Yugoslavia” would have led to complaints of racism, particularly from the side of Rwanda and other African countries.1318

As the world powers, in particular the USA and the UK, struggled to label the persecutions and killings of Tutsi as genocide in the early days of the massacres,1319 the Security Council on 30 April 1994 recalled that the “killing of members of an ethnic group with the intention of destroying such a group in whole or in part constitutes a crime punishable under international law” and that “persons who instigate or participate in such acts are individually responsible.”1320 Jose Ayala Lasso, the UN’s High Commissioner for Human Rights at the time, added to this chorus that “the authors of the atrocities must be made aware that they cannot escape personal responsibility for criminal acts they have carried out, ordered or condoned.”1321 His Special Rapporteur, René Degni-Ségui from Côte d’Ivoire, went on to advocate “an ad hoc international tribunal to hear the evidence and judge the guilty parties or, alternatively, should extend the jurisdiction of the international tribunal on war crimes committed in the former Yugoslavia.”1322 It then took until late July for the Ghanaian Secretary General Kofi Annan to institute a commission of three experts1323 who were to collect evidence of grave violations of international humanitarian law, including “possible acts of genocide.”1324 In Geneva, they opened their probe and on 15 August went on a 20-day fact-collecting mission to Rwanda, Burundi, Tanzania and Zaire. Rapidly, they were barraged with materials. States, UN organs, intergovernmental bodies, NGOs and private individuals forwarded information to the commission.1325 Some rights organisations called for a court. But politics were at play as well. Both the genocidal Hutu government – by then in exile - and the RPF submitted thousands of pages of documents, letters, complaints and testimonies. From the RPF, the commission received lists of alleged principal Hutu suspects, while the exiled regime forwarded the names of people presumably murdered by the RPF, locations of 15 mass grave sites and testimony of Hutu who had escaped RPF occupied territories.1326 In sum, the commission determined that individuals from both sides committed war crimes and crimes against humanity. Yet, more importantly, it said “overwhelming evidence” existed “to prove that acts of genocide against the Tutsi group were perpetrated by Hutu elements in a concerted, planned, systematic and methodological way.”1327 In other words: the mass extermination of the Tutsi was deemed genocide within the meaning of the 1948 Convention. Whereas mass assassinations and summary executions at the hands of Tutsi elements were also
reported, the commission did not uncover evidence that these were systematic nor committed with the intent to destroy the Hutu ethnic group as such."\textsuperscript{128}

After the genocide the question was what to do with these crimes and their perpetrators, who were wandering around in Rwanda or elsewhere? Prisons started to swell as the authorities were arresting people on a massive scale. Officials in Kigali initially contemplated setting up local tribunals, as the set-up of an international tribunal would take too long. But soon, the administration realised that its judiciary was in total shambles and that suspects had fled to countries that were not willing to extradite or otherwise deliver them.\textsuperscript{129} Just a week before the Expert Commission released its preliminary report, the newly established transitional government in Kigali complained about the international reluctance to erect an international tribunal “to expose and punish the criminals who are still at large” and demanded the Security Council to set one up, “as soon as possible.”\textsuperscript{130} Contention grew over the question if the genocide in the Great Lakes region should be referred to the Yugoslavia tribunal in The Hague or if a separate jurisdiction should take on the Rwanda situation.\textsuperscript{131} Like the Special Rapporteur, the expert’s Commission had recommended an annex to the UNICTY’s mandate to include crimes in the African country from 6 April 1994.\textsuperscript{132} But after failing to act and stop the killings in Rwanda, the extended Yugoslav tribunal idea was soon dropped to take away the impression the Rwanda genocide was not “second-class” but was given “due consideration” by having a tribunal solely dedicated to it.\textsuperscript{133}

\textit{Schisms}

So a separate tribunal was on draft. Its configurations remained a boiling matter of disagreement. First, Kigali wanted the tribunal to deal with former regime crimes committed from 1 October 1990, when the RPF had invaded Rwanda until 17 July 1994, when the war ended. But New York opted for the calendar year of 1994, including the lead-up to the genocide in April. In light of the myriad of perpetrators, Rwanda also objected to the proposal of having only six judges and two trial chambers. Sharing an appeals chamber and above all a prosecutor who had to apportion his energy to the Balkans and the Great Lakes at the same time was considered unworkable. Thirdly, Rwanda favoured the tribunal having jurisdiction only over crimes of genocide, not also over ‘secondary-level’ crimes against humanity and war crimes as envisioned by the statute drafters - who had in mind possible RPF cases. Location was another issue. The government argued that Kigali was the only suitable place for Rwandans to see justice being done and learn from the past, while the UN thought a site outside Rwanda would brand the tribunal more independent. Capital punishment and imprisonment in

\begin{itemize}
  \item \textsuperscript{128} Ibidem, §79-83.
  \item \textsuperscript{131} Gahima, Transitional Justice in Rwanda, pp. 83-84.
  \item \textsuperscript{132} UNSC, Preliminary Report of the Independent Commission of Experts, §139, 142 & 152.
  \item \textsuperscript{133} Gahima, Transitional Justice in Rwanda, p. 84; Morris, The International Criminal Tribunal for Rwanda, p. 70.
\end{itemize}
Rwanda were also a non-option for decision makers in New York. Staffing the court became the last hot potato as the sponsors of the draft statute desired to rule out any Rwandan participation, to eradicate the appearance of a tribunal of the vanquished, in the novel UN branch.\footnote{1334}

The Rwandan government, still convinced that an international tribunal ought to take in account the concerns of Rwandans and Rwandese realities, was the only country voting against the court, while The People’s Republic of China abstained.\footnote{1335} Nine months after the start of the genocide, “the International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan citizens responsible for genocide and other such violations committed in the territory of neighbouring States, between 1 January 1994 and 31 December 1994” was a fact.\footnote{1336} The UNICTR – or TPIR according to its French acronym - was to “contribute to ensuring that such violations are halted and effectively redressed” and “to contribute to the process of national reconciliation and to the restoration and maintenance of peace.”\footnote{1337} Its birth certificate - the statute – granted the tribunal supreme competence to try the crime of genocide,\footnote{1338} crimes against humanity\footnote{1339} and war crimes.\footnote{1340} Six judges divided over two trial chambers were to oversee trial proceedings, while UNICTY judges in The Hague would join five appeals judges.\footnote{1341} Justice Richard Goldstone from South Africa, the then already Chief Prosecutor of the UNICTY, was automatically appointed as Prosecutor.\footnote{1342} Honeré Rakotomanana was appointed as Deputy Prosecutor in Kigali.

\textit{A corrupted start}

At the Tribunal, investigations were largely target-based. In this regard, investigators would ask questions regarding the activities of the particular high-level accused persons being investigated.\footnote{1343}

Launching the tribunal was one thing, getting it into action was another. It was to be set up from the

\begin{thebibliography}{99}
\item \footnote{1334} See: UNSC, Forty-ninth Year, 3453rd Meeting. Tuesday, 8 November 1994 (S/PV.3453; 8 November 1994), pp. 13-16.
\item \footnote{1335} UNSC, Forty-ninth Year, 3453rd Meeting, p. 2.
\item \footnote{1336} UNSC, Resolution 955 (1994) (S/RES/955 (1994); 8 November 1994).
\item \footnote{1337} UNSC, Resolution 955.
\item \footnote{1338} “any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such: (a) Killing members of the group; (b) Causing serious bodily or mental harm to members of the group; (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part; (d) Imposing measures intended to prevent births within the group; (e) Forcibly transferring children of the group to another group. Punishable are the following acts: (a) Genocide; (b) Conspiracy to commit genocide; (c) Direct and public incitement to commit genocide; (d) Attempt to commit genocide; (e) Complicity in genocide. UNSC, ICTR Statute, art. 2.\footnote{1339} The following crimes when committed as part of a widespread or systematic attack against any civilian population on national, political, ethnic, racial or religious grounds: (a) Murder; (b) Extermination; (c) Enslavement; (d) Deportation; (e) Imprisonment; (f) Torture; (g) Rape; (h) Persecutions on political, racial and religious grounds; and (i) Other inhumane acts. Ibidem, art. 3.
\item \footnote{1340} Violations of Article 3 common to the Geneva Conventions and of Additional Protocol II: (a) Violence to life, health and physical or mental well-being of persons, in particular murder as well as cruel treatment such as torture, mutilation or any form of corporal punishment; (b) Collective punishments; (c) Taking of hostages; (d) Acts of terrorism; (e) Outrages upon personal dignity, in particular humiliating and degrading treatment, rape, enforced prostitution and any form of indecent assault; (f) Pillage; (g) The passing of sentences and the carrying out of executions without previous judgement pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples; (h) Threats to commit any of the foregoing acts. Ibidem, art. 4.
\item \footnote{1341} In its lifespan up to the writing of this chapter in August 2015, however, a total number of 53 judges have served at the ICTR. By far, the most experienced trial judge is Erik Mase, sitting in 13 cases on trial. In the Appeals Chamber Fausto Pocar adjudicated 30 cases and Theodor Meron 29 cases. The longest serving ICTR judge is the Tanzanian William Sekule, from the beginning to present.
\item \footnote{1342} UNSC, Resolution 936 (S/RES/936; 8 July 1994); Goldstone worked as Chief Prosecutor from 1994 to 1996 and was subsequently followed Louise Arbour from Canada (1996 – 1999), Carla Del Ponte from Switzerland 1999 – 2003 and Hassan Jallow from The Gambia (2003-2015).
\end{thebibliography}
ground, with no permanent address. Goldstone had made his first visit to Kigali at the end of December of 1994 and Rakotomanana landed a month later, to form the investigative and prosecutorial unit. A team was temporarily founded at the UNICEF building but was later redeployed to UNAMIR’s old headquarters at the Amahoro Hotel, next to the national stadium. Nonetheless, the hearings were to be held elsewhere. Eyes were on Nairobi, which had the required infrastructure, support facilities and communication systems as well as a large UN presence. But Kenya did not want to host the tribunal, allegedly because of President Arap Moi’s warm ties with the Habyarimana establishment. Close by to Nairobi, the second best choice left was the International Arusha International Conference Centre in Tanzania, by then already a symbolic place for the derailed diplomacy towards the Rwanda question. Dusty and isolated, the pass-through town for well-off Safari-trekkers would become the UNICTR’s home base for management and trials, while investigators worked mainly from the Kigali office. Meanwhile, the Security Council called upon states to arrest and detain Rwandans suspected of crimes under the tribunal’s jurisdiction, even before investigators were hired, the eleven judges were appointed and a prison and courtrooms were built in Arusha. Without ready offices, the registry started its work from hotel rooms, while judges “were reading documents in the evenings occasionally […] by candlelight because of regular power cuts.” Making legal history at the beginning demanded a hands-on mentality; the first ever hearing on an indictment and arrest warrant was held in a hotel room. Using a typewriter from the hotel manager, with a typist who could not type and a quickly wooden-carved stamp, Navanethem Pillay signed and issued the first indictment against 8 suspects.

Justice comes slowly, particularly if generated from the stubborn UN bureaucracy. Finding suitable and capable staff willing to work on the short-term contracts in a country still recovering from war was a challenge. Recruitment procedures were lengthy with some posts taking up to year to be filled. A Registrar, Adronico Adede, was only appointed on 5 September 1995, almost a year after investigators were hired, while the turnover rate at the registrar’s office was close to 50%. Without an office for the registry, the registry started its work from hotel rooms, while judges “were reading documents in the evenings occasionally […] by candlelight because of regular power cuts.” Making legal history at the beginning demanded a hands-on mentality; the first ever hearing on an indictment and arrest warrant was held in a hotel room. Using a typewriter from the hotel manager, with a typist who could not type and a quickly wooden-carved stamp, Navanethem Pillay signed and issued the first indictment against 8 suspects.

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after the birth to the tribunal.\textsuperscript{1356} In fact, serious operational deficiencies and corruption in the daily management of the tribunal stalled the healthy conception of a vital tribunal. The entire Registry administration functioned ineffectively\textsuperscript{1357} and the OTP in Kigali had administrative, leadership and operational problems.\textsuperscript{1358} The insolvent investigations unit in Kigali took over ten weeks to become operational,\textsuperscript{1359} while in April 1995, Richard Goldstone had reported it was already processing about 400 cases.\textsuperscript{1360} But the team was seriously understaffed, with fewer than a dozen members on board by August 1995. Some western countries, in particular The Netherlands and Canada,\textsuperscript{1361} literally saved the tribunal from total disaster by providing resources, equipment and police detectives and analysts.\textsuperscript{1362} One year after its establishment, the OTP had 52 staff members from 15 different countries, 28 of them on secondment. It comprised 30 investigators, lawyers, intelligence analysts, advisers, a scientific director, experts in forensic medicine, statisticians, demographers, interpreters and translators and support staff.\textsuperscript{1363}

Experience and qualification within the unit soon proved to be insufficient to carry out the mandate: three senior prosecutors came from academia or human rights organisations and had neither criminal trial proficiency nor experience; the legal advisors assigned to the investigation teams had no experience in criminal investigations; investigators, drawn largely from national police forces, had no know-how at all on investigating massive international crimes. Apart from that, many had never set foot on the African continent, let alone in tiny but complex Rwanda.\textsuperscript{1364} Since there were no Rwandans hired except for translators, all staff in the investigations unit was totally unfamiliar with the society, culture and history of Rwanda and Kinyarwanda was incomprehensible for the either French or English speaking staff.\textsuperscript{1365} Practical working conditions were hard; some dedicated staff left “having left a piece of [their] heart” or was contemplating leaving “in complete frustration.”\textsuperscript{1366}

Tribunal staff regularly received threats and some staff members were even assaulted. The offices

\textsuperscript{1356} UNSC, First annual report of the International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and Other Such Violations Committed in the Territory of Neighbouring States between 1 January and 31 December 1994 covering the period from 8 November 1994 to 30 June 1996, adopted at the third plenary session of the Tribunal (A/51/399 and S/1996/778; 24 September 1996), §23.

\textsuperscript{1357} Finance had no accounting system and could not produce allotment reports, so that neither the Registry nor UN Headquarters had budget expenditure information; lines of authority were not clearly defined; internal controls were weak in all sections; personnel in key positions did not have the required qualifications; there was no property management system; procurement actions largely deviated from UN procedures; UN rules and regulations were widely disregarded; the Kigali office did not get the administrative support needed, and construction work for the second courtroom had not even started. UNGA, Report of the Office of Internal Oversight Services on the audit and investigation of the International Criminal Tribunal for Rwanda (A/51/789; 6 February 1997), §§11-18.

\textsuperscript{1358} Functions were hampered by lack of experienced staff as well as lack of vehicles, computers and other office equipment and supplies. Lawyer posts were vacant and, of the almost 80 investigator posts, only 30 had been filled. Prosecution strategy deficiencies were noted. The witness-related programmes had not been fully developed. UNGA, Report of the Office of Internal Oversight Services, §§19-25.

\textsuperscript{1359} UNSC, Further report of the Secretary-General pursuant to paragraph 5 of security council resolution 955, §4.

\textsuperscript{1360} UNSC, S/1995/297, §18.

\textsuperscript{1361} Tweede Kamer der Staten-Generaal, Brief van de Ministers van Buitenlandse Zaken en voor Ontwikkelingszaken, 23 727 Rwanda, No. 25 (8 October 1996).


\textsuperscript{1363} The number of investigators had risen to 52 in July 1997, but dropped to some 30. In 2002, the investigation division had on staff 108 persons in the investigations division – compared to 288 at the ICTY. UNGA, Report of the Office of Internal Oversight Services, on the review of the Office of the Prosecutor at the International Criminal Tribunals for Rwanda and for the former Yugoslavia (A/58/677; 7 January 2004), §6.

\textsuperscript{1364} Also see interviews with investigators, trial lawyers and prosecutors in the documentary about the ICTR’s trial of Jean-Paul Akayesu: Nick Louvel & Michele Mitchell, The Uncondemned (Film at Eleven, 2016).

\textsuperscript{1365} Des Forges, ‘Legal Responses to Genocide in Rwanda’, p. 53. According to his CV, one of the authors, Longman, provided trainings himself to “researchers for the International War Crimes Tribunal” while he was a research consultant to HRW between 1995 and 1996. See Curriculum Vitae: Timothy Paul Longman (www-text: http://www.bu.edu/polisci/files/2014/03/Longman.pdf), UNGA, Report of the Office of Internal Oversight Service.
lacked computers, phones, faxes and even stationary, leaving some with no other option than to bring their own laptops to the field. But they also lacked vehicles, essential to visit crime scenes and witnesses. Overall, at the inception, the OTP was in disarray and – above all – had no strategy at all but rather “a leadership void,” according to an official oversight investigation.\footnote{UNGA, Report of the Office of Internal Oversight Services, §56.}

As a result, self-organised investigative teams set their own plans and strategies\footnote{Idem.} and made no systematic effort to gather documentary and forensic evidence, linking alleged organisers to specific crime scenes. There were no archives or any other paper trails to follow throughout the hills, where the main source of information was oral tradition. Finding credible evidence that could be corroborated and would hold up in a court of law was a major challenge. But independent investigations were not the principle. On the contrary, investigators heavily relied on testimony of witnesses identified and delivered to them by the Rwandan government, state-controlled ‘NGOs’ (African Rights) and organisations of genocide survivors (KWIBUKA).\footnote{Des Forges, ‘Legal Responses to Genocide in Rwanda’, pp. 49-68.} Rwandan state officials, clergy, policemen or translators, were often present during the interviews. Also, the starting point would often not be a crime scene. Instead, the OTP worked from UN or human rights reports, with Goldstone’s reported list of 400 potential suspects, or would focus on Rwandans, who were captured already, then trying to find evidence on these people, rather than doing the reverse.\footnote{Jones, Courts of Genocide, pp. 112-115.} Thus, from the start, the investigations were suspect based, rather than evidence based. Otherwise, the only strategy was geographical, focusing on those areas where the massacres had been worst, in the prefectures of Butare, Kibuye, Cyangugu and Kigali.\footnote{Larissa Van den Herik, The Contribution of the Rwanda Tribunal to the Development of International Law (Leiden & Boston: Martinus Nijhoff Publishers, 2005), p. 65.} And indeed, it was in Kibuye and the hills of Bisesero, that the first three investigators gathered the first survivor testimonies, in May 1995.\footnote{Cruvellier, Court of Remorse, p. 81.} It was not difficult to gather evidence in Rwanda. “Basically, conducting investigations was not complicated. In Rwanda, everyone knows everything, and everybody knows everybody,” one of the investigators on the first team in charge of investigating Kibuye in 1995 candidly explained to the court.\footnote{Ibidem, p. 96.} Sometimes, in the case no witnesses could be found around the crime scenes, reports a former OTP member, professional witnesses would offer their fairly priced ‘testimonial services’ to investigators.\footnote{André Sirois, ‘Les mauvais débuts du Tribunal international pour le Rwanda’, Mondialisation.ca, 13 November 2014.} All the times, from early on, there were rumours and allegations of denunciation syndicates in Rwanda, groups of opportunistic people, who allegedly organised testimony against persons who were known to be rich or own real estate or cattle.\footnote{The Rwandan director of the Centre for the Struggle against Impunity and Injustice, Joseph Mutata, told the ICTR, as a defence witness for Akayesu, that those indicted by the Rwandan courts and by the ICTR are accused on the basis of orchestrated testimony from so called “denunciation syndicates” active in Rwanda. See: ‘The trial of Jean-Paul Akayesu, former mayor of Taba commune’, Hirondelle News Agency, 1 September 1998.} At no time, even during the first trial against Akayesu, were these alleged phenomena seriously addressed by the lawyers. The very judges, who had to base their findings solely upon witness testimony from people unknown to them, seemed not convinced of,
neither disturbed by, the charge, since the defence did not put it directly to the witnesses, and brushed the matter away.\footnote{1376} This highly problematic investigatory modus operandi by western fact-finders in an unfamiliar politically, economically and socially anxious context, although never critically researched, would sow the seeds, in part, for the troublesome process of truth-ascertainment at the tribunal. If as truly disturbing as reported, false denunciations may have very well trickled down into judiciaries beyond the UNICTR and subsequent research based on those sources.

\textbf{The trials}

Throughout its lifespan, the Arusha-tribunal publicly charged 90 individuals for genocide, crimes against humanity and war crimes and two people for contempt of court.\footnote{1377} Apart from one Belgian suspect (Georges Ruggiu), all were Rwandan Hutu and only one of them was female. Most of the suspects were believed to be interwoven in the web of Hutu extremism and their names had already circulated widely during and immediately after the genocide.\footnote{1378} None of the suspects belonged to the RPF, Tutsi or was charged with alleged international crimes attributed to the RPF.\footnote{1379} Nor was anybody publicly indicted and prosecuted, despite OTP investigations into the matter,\footnote{1380} for the shooting down of Habyarimana’s plane, an affair critical to the understanding of the unfolding of the genocide. In the end, half of those charged with a variety of crimes committed between 6 April and mid-July 1994, comprised Abatabazi government members (20) and local politicians (25). Twenty-three indictments were linked to members of the military, para-military units or the police. Among the core group of politicians were Prime Minister Jean Kambanda, prominent MRND members,\footnote{1381} CDR-

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\item Akayesu’s lawyer, Nicholas Tiangaye, had made the suggestion that some, if not all, of the Prosecution witnesses did so because they were colluding in a "syndicate of informers" which would denounce a particular individual for political reasons or in order to take over his property. "So, what do we do, Mr. President, ladies and gentlemen, when witnesses come to tell lies before the Chamber, what do we do?" In reply, the Chamber held it was merely a generalised and unsubstantiated suspicion and that during the trial the Defence did not put, nor even suggest, to a single prosecution witness that he or she was lying because he or she had been drawn into a syndicate of informers and instructed as to how to testify against the accused, or that the witness was lying because he or she wished to take the accused’s property. UNICTR, \\
\item Many more files were prepared, but did not make it to trial. They were forwarded to the General Prosecutor in Rwanda. By 8 June 2010, for instance, the ICTR prosecutor had transferred 55 files to Rwanda for investigation or prosecution. See: UNICTR, Office of The Prosecutor, Complementarity in Action. Lessons Learned from the ICTR Prosecutor’s Referral of International Criminal Cases to National Jurisdictions (ICTR: Arusha, February 2015), p. 7, note 17.
\item See for instance and in particular the work by African Rights. Their reports detail and highlight many suspects, most of whom were later indicted by the ICTR. See: African Rights, Who is Killing; Who is Dying; What is to be done? A discussion paper (African Rights: London, May 1994); and in particular their 750-paged “yellow-pages” into the genocide: AR, Death, Despair and Defiance. As a first elaborate study in English, the book, which listed ‘culprits’ and heavily cited witness testimony soon became the first guide book for the non-French speaking – mostly Dutch – ICTR investigators.
\item Investigations into allegations of RPF crimes were commenced but charges were never pressed, allegedly out of fear that Rwanda would stop its cooperation with the court. Prosecutor Del Ponte even claims that her wish to pursue these case or “Special Investigation” led the UN not to extend her mandate at the ICTR. Carla del Ponte, Madame Prosecutor – Confrontation with humanity’s worst criminals and the culture of impunity (New York: Other Press 2009). E-book “chapter 9”. When the ICTR got its own Prosecutor, the UN called “on all States, especially Rwanda, Kenya, the Democratic Republic of the Congo, and the Republic of the Congo, to intensify cooperation with and render all necessary assistance to the ICTR, including on investigations of the Rwandan Patriotic Army [author’s emphasis] and efforts to bring Felicien Kabuga and all other such indictees to the ICTR and calls on this and all other at-large indictees of the ICTR to surrender to the ICTR.” UNSC, Resolution 1503 (2003) (S/RES/1503(2003); 28 August 2003), §3. At least one dossier, the “Kabgayi case”, however, was cleared by the OTP and send to Rwanda’s General Prosecutor, who brought a case against four individuals. See: UNICTR, Letter from Hassan B. Jallow, Chief Prosecutor ICTR to Kenneth Roth, Executive Director Human Rights Watch, ref. OTP/2009/P/084 (Arusha, 22 June 2009). The non-charging of persons alleged to be responsible for crimes attributable to the RPF has become the major criticism of the tribunal among jurists, activists and scholars. Amongst the latter was Filip Reyntjens, who had worked as consultant to the OTP and an expert witness since 1995. See: Filip Reyntjens, ‘Prosecutorial Policies in the ICTR: Ensuring Impunity for the Victors’ text: http://www.mrnt.org/Conference2/Papers/Filip_Reyntjens_Prosecutorial_Policies_in_the_ICTR_Ensuring_Impunity_for_the_Victors.pdf, visited: 3 September 2015).
\item Investigator Michael Hourigan led the so-called ‘National Team’, tasked with, \textit{inter alia}, Bagosora and identifying those responsible for the fatal rocket attack. He prepared a memo, based on testimonies from three ex-RPF informant who pointed a Kagame as the one responsible, titled ‘Secret National Team dossier, the “Kabgayi case”, however, was cleared by the OTP and send to Rwanda’s General Prosecutor, who brought a case against four individuals. See: UNICTR, Letter from Hassan B. Jallow, Chief Prosecutor ICTR to Kenneth Roth, Executive Director Human Rights Watch, ref. OTP/2009/P/084 (Arusha, 22 June 2009). The non-charging of persons alleged to be responsible for crimes attributable to the RPF has become the major criticism of the tribunal among jurists, activists and scholars. Amongst the latter was Filip Reyntjens, who had worked as consultant to the OTP and an expert witness since 1995. See: Filip Reyntjens, ‘Prosecutorial Policies in the ICTR: Ensuring Impunity for the Victors’ text: http://www.mrnt.org/Conference2/Papers/Filip_Reyntjens_Prosecutorial_Policies_in_the_ICTR_Ensuring_Impunity_for_the_Victors.pdf, visited: 3 September 2015).
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\item Chairman Mathieu Ngirumapfani, vice-chairman Edouard Karemera and secretary general Joseph Nzirorera.
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founder Jean-Bosco Barayagwiza and interim government ministers and officials.\footnote{1382} Out of the twenty-five regional and local political leaders - such as prefects, burgomasters or councillors - 18 were convicted, three acquitted, one transferred and three remain at large. The second largest group indicted by the tribunal’s prosecutors were those affiliated with armed groups,\footnote{1383} most of them members of the Rwandan army (FAR) and some \textit{Interahamwe} leaders. Most notorious amongst the \textit{Military} were Théoneste Bagosora, Aloys Ntabakuze (battalion commander), Anatole Nsengiyumva (lieutenant colonel) Gratien Kabiligzi (brigadier-general), who were lumped together in the \textit{Military I} case. \textit{Military II} included Augustin Bizimungu, Augustin Ndigiyimana, François-Xavier Nzuwomene and Innocent Sagahutu. Eleven others in this group received sentences ranging between 12 and 35 years. The rest of the suspects came from other walks of life. There was an historian (Dr. Ferdinand Nahimana), a newspaper editor (Hassan Ngeze), a radio presenter (Georges Rugui), businessmen (Felicien Kabuga most prominently\footnote{1384}), clergymen,\footnote{1385} a medical doctor (Gerard Ntakirutimana), a deputy prosecutor (Simeon Nchamihigo), a ballet director and singer (Simon Bikindi)\footnote{1386} and a youth organiser and former UNICTR defence investigator (Nzabirinda).

During its 20-year life span, the UNICTR conducted 52 cases regarding mass crimes, trying 74 individuals, all Hutu and one Belgian.\footnote{1387} From those who were publicly indicted, six men surrendered themselves voluntarily while 73 others were arrested in 24 different countries, mostly in Africa.\footnote{1388} Not all indicated persons were thus brought before one of the three UN Trial Chambers in Arusha. Some indictments were withdrawn,\footnote{1389} while others were forwarded to national courts in Rwanda and France. At the time of writing nine suspects were still out of the reach of the UNICTR’s fugitive tracking department, of which three (Bizimana, Kabuga, Mpiranya) will be tried by the UNMICT if ever apprehended, while the others are destined for specialised international crimes chambers in the Rwandan courts.\footnote{1390} Arrested in Zambia, the first three suspects (Clément Kayishema, Jean-Paul Akayesu and Georges Rutaganda) arrived at the court in Arusha in May 1996.\footnote{1391} Since the reconstruction of premises was not concluded yet, they were introduced to a three-panel bench in a
Taba’s former burgomaster, Akayesu, was the first to go to trial on 9 January 1997. One and a half year later, on 2 September 1998, he became the first ever to be convicted and sentenced by an international tribunal for the crime of genocide as defined in the 1948 UN Convention. After having established that genocide was committed in Rwanda in the Akayesu case and a dozen subsequent trials, in 2003, the UN urged the UNICTR to start working towards closure of the tribunal in 2010. In its so-called “completion strategy”, the focus shifted towards trying the most senior leaders in Arusha and transferring intermediate - and lower ranking suspect to other jurisdictions. The deadline of 2010 was never met. Only in December 2012, was the last trial Judgement delivered in the Ngirabatware case and in December 2015 the ICTR definitely closed down with handing out its last appeals Judgement in in “the Butare case” against six defendants. Of the 74 persons brought before the UNICTR, 14 were acquitted. Most persons indicted, arrested or surrendered received a full trial, including presentation and discussion of evidence. In nine cases however, suspects pleaded guilty and no evidentiary proceedings took place. Altogether, the judicial process was slow, particularly in the pre-trial and the appeals phases. At the average rate of almost 7,5 years per trial (from indictment to final judgement delivery), the Rwanda tribunal was the slowest international court so far, mostly because of its delays in bringing suspects to trial and the elaborate hearing of witnesses. In terms of records, the Butare-case is notorious, absorbing 10 years of trial in first instance. Similarly, the longest entire proceedings lasted almost 13,5 years in the Government I case, involving Ngiirimpa, Karemera and Nzirorera.

After 20 years of work, the UNICTR convicted 52 individuals (88 per cent) for genocide, either by committing it, inciting it, being complicit to it and – to a lesser extent – conspiring to commit it. Often, the genocide convictions went along with a combination of crimes against humanity or war crimes. As a novelty to international criminal justice, the UNICTR tried 43 defendants for rape, as atrocity crime, or other acts of sexual violence.

4.7 Unfolding the narrative. Akayesu: Genocide in Rwanda?

The evidence produced by the parties to the case was mainly testimonial. Yet, human testimony often has the shortcoming of being eminently fragile and fallible. The Chamber considered the credibility of the testimonies, all the more so as three problems were posed: firstly, the fact that most of the witnesses directly experienced the terrible events they were
narrating, and that such trauma could have had an impact on their testimonies; secondly, the impact of cultural and social factors on communication with the witnesses; and thirdly, the difficulties in interpreting the statements made by the witnesses, most of whom spoke in Kinyarwanda. Despite the difficulties experienced, the Chamber wishes, in this regard, to thank each witness, once again, for his/her deposition at the hearing and commends the strength and courage of survivors, who have narrated the extremely traumatic experiences they had, sometimes rekindling extremely painful emotions. Their testimonies were invaluable to the Tribunal in its search for the truth on the events that happened in Taba commune in 1994.\footnote{1401

On Wednesday 2 September 1998, the name Jean-Paul Akayesu was inscribed as a milestone into the embryonic history of international criminal justice. The event was announced with much fanfare. He was branded the international community’s first ever convicted génocidaire, based on the wording of the UN’s Convention. It is dubious honour, in many respects. As a burgomaster, Akayesu had not killed anyone in his community, nor had he had any blood on his hands. Even more so, for almost two weeks he had opposed the genocide, only to turn 180 degrees on 19 April, allowing, even inciting at times, an estimated 2,000 Tutsi to be killed. Essential to his case – in order to determine his alleged individual responsibility – was the question if genocide had occurred in Rwanda. As there was no material evidence introduced to the trial other than post facto photographs from Taba and dead bodies in Southern Rwanda, the judges had to solely rely on testimonies from a varied group: victims, genocide suspects, villagers, Taba’s new mayor,\footnote{1402 a former police officer, a former mayor, investigators, 5 international experts,\footnote{1403 the former head of the UN’s peacekeeping mission Dallaire and Akayesu himself. From the memory of those 42 people,\footnote{1404 they managed to make that finding: As regards the massacres which took place in Rwanda between April and July 1994, as detailed above in the chapter on the historical background to the Rwandan tragedy, the question before this chamber is whether they constitute genocide. […] Even though the number of victims is yet to be known with accuracy, no one can reasonably refute the fact that widespread killings took place during this period throughout the country […]}.\footnote{1405 In the opinion of the Chamber, many facts show that the intention of the perpetrators of these killings was to cause the complete disappearance of the Tutsi people. In this connection, Alison Des Forges, a specialist historian on Rwanda, who appeared as an expert witness, stated as follows: ‘on the basis of the statements made by certain political leaders, on the

1400 UNICTR, Akayesu Judgement, p. 5.
1401 Ephrem Karangwa.
1402 Dr. Mathias Ruzindana (linguist), Dr. Alison Des Forges (historian/human rights activist), Lindsey Hilsum (journalist and UNICEF employee), Dr. Rony Zacharia (medical doctor MSF) and Simon Cox (camera man). With respect to the three latter, the Prosecution intended to prove “the required elements of the charges against Akayesu, such as the widespread and systematic nature of the conflict. The witnesses do not directly implicate Jean Paul Akayesu.” See: UNICTR, OTP, Letter from Sara Darehshori to Mr. Tiangye: The Prosecutor v Jean Paul Akayesu ICTR-96-4-T (7 January 1997).
1404 Omitted text: “Dr. Zachariah, who appeared as an expert witness before this Tribunal, described the piles of bodies he saw everywhere, on the roads, on the footpaths and in rivers and, particularly, the manner in which all these people had been killed. He saw many wounded people who, according to him, were mostly Tutsi and who, apparently, had sustained wounds inflicted with machetes to the face, the neck, the ankle and also to the Achilles’ tendon to prevent them from fleeing. Similarly, the testimony of Major-General Dallaire, former Commander of UNAMIR, before the Chamber indicated that, from 6 April 1994, the date of the crash that claimed the life of President Habyarimana, members of FAR and the Presidential Guard were going into houses in Kigali that had been previously identified in order to kill. Another witness, the British cameraman, Simon Cox, took photographs of bodies in various localities in Rwanda, and mentioned identification cards strewn on the ground, all of which were marked “Tutsi”. Consequently, in view of these widespread killings the victims of which were mainly Tutsi, the Trial Chamber is of the opinion that the first requirement for there to be genocide has been met, to wit, killing and causing serious bodily harm to members of a group. The second requirement is that these killings and serious bodily harm be committed with the intent to destroy, in whole or in part, a particular group targeted as such.”
basis of songs and slogans popular among the Interahamwe, I believe that these people had the intention of completely wiping out the Tutsi from Rwanda so that-as they said on certain occasions- their children, later on, should not know what a Tutsi looked like, unless they referred to history books"

In the opinion of the Chamber, this demonstrates the resolve of the perpetrators of these massacres not to spare any Tutsi. Their plan called for doing whatever was possible to prevent any Tutsi from escaping and, thus, to destroy the whole group.

Other testimonies heard, especially that of Major-General Dallaire, also show that there was an intention to wipe out the Tutsi group in its entirety, since even newborn babies were not spared. Based on the evidence submitted to the Chamber, it is clear that the massacres which occurred in Rwanda in 1994 had a specific objective, namely the extermination of the Tutsi, who were targeted especially because of their Tutsi origin and not because they were RPF fighters. The Chamber concludes that, alongside the conflict between the RAF and the RPF, genocide was committed in Rwanda in 1994 against the Tutsi as a group.

The Chamber is of the opinion that the genocide appears to have been meticulously organized. In fact, Dr. Alison Des Forges testifying before the Chamber on 24 May 1997, talked of "centrally organized and supervised massacres [...]. The fact that the genocide took place while the RAF was in conflict with the RPF, can in no way be considered as an extenuating circumstance for it. This being the case, the Chamber holds that the fact that genocide was indeed committed in Rwanda in 1994 and more particularly in Taba, cannot influence it in its decisions in the present case. Its sole task is to assess the individual criminal responsibility of the accused for the crimes with which he is charged, the burden of proof being on the Prosecutor." Jean-Paul Akayesu (1953), despite being a small fish, was the first to go on trial in Arusha, a case that was not just about him but even more so about answering the legal question if the overall context of his individual actions was genocide. But there was a complicated pre-history to the historic judgement of which portions are cited above. Born in Murehe sector, Taba commune, about half an hour drive southwest to Rwanda’s capital Kigali, Akayesu had built a career in his locality. When he was young, he married Suzanne Mukandinda, a nurse at the local hospital, with whom he has five children, later on, should not know what a Tutsi looked like, unless they referred to history books". [...]

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children. Akayesu was a well-known and popular figure in the Taba, considered a man of high morals, intelligence and integrity. First a teacher at the École Technique Féminine and at a primary school in Remera-Rukoma, he was later promoted to Primary School Inspector. He was in charge of inspecting the education in the commune and acting as a head of the teachers and, when necessary, he filled in as a substitute teacher. Following Rwanda’s transition to multiparty-ism in 1991, Akayesu became politically active and was one of the signatories to the statute and a founding member of the MDR, the MRND’s main opposition party. Eventually, Akayesu was elected local MDR president in Taba, where a sizeable proportion of the population became members of the party. Different groups in the commune, including other MDR leaders, communal representatives and religious leaders pressured him into candidacy for burgomaster, the position he was elected to in April 1993. Notwithstanding his initial disinclination to take up an official post, he treated it with great responsibility and honour. In charge of the communal police and any gendarmes assigned to the commune, he became an advisor on matters like security. But he was also concerned with economics and the social well-being of the villagers. Soon, he was considered a trusted father figure or parent of the commune, to whom locals would come also for informal advice. During the genocide, however, an estimated 2,000 Tutsi were murdered in the commune. As the war's tide turned, on 26 June 1994, Akayesu escaped to Zaire and arrived in Zambia on 31 December 1994. There he was arrested by Zambian authorities, on the request of Chief Prosecutor Richard Goldstone, in October 1995. After his trial, Akayesu was sent to Mali to serve his life sentence.

Akayesu’s ‘conversion’

[…] the fact that genocide was, indeed, committed in Rwanda in 1994, and more particularly in Taba, cannot influence it in its findings in the present matter. It is the Chamber's responsibility alone to assess the individual criminal responsibility of the Accused, Jean-Paul Akayesu, for the crimes alleged against him, including genocide, for which the Prosecution has to show proof. Despite the indisputable atrociousness of the crimes and the emotions


1414 UNICTR, Akayesu Judgement, §53.

1415 UNICTR, Interview of Mr. Jean Paul Akayesu in Zambia by ICTR, in Presence of his Lawyer (Rec. No. ICTR-96-04-01165; 12 March 1998).

1416 UNICTR, Akayesu – Audio Recording of 12/03/98 (Rec. No. ICTR-96-04-01165; 12 March 1998).

1417 UNICTR, Akayesu – Audio Recording of 12/03/98, from: 0:25:00.

1418 UNICTR, Akayesu Judgement, pp. 60-61.

1419 Ibbad, §73.

1420 “I left because I learned that the RPF had arrived in the administrative sector in that area and that I understood that there would be a battle that would take place in our areas, in our communes, so I decided to leave at that time.” UNICTR, Interview of Mr. Jean Paul Akayesu in Zambia by ICTR, in Presence of his Lawyer, Tape VI, Side B (Zambia, 11 April 1996), pp. 3-4.


1422 UNICTR, Interview of Mr. Jean Paul Akayesu, p. 6. Akayesu was arrested along with seventeen other genocide suspects in Lusaka, Zambia, in October 1995. Only he – alongside Clement Kayishema and Georges Rutaganda - ended up at the tribunal in Arusha since the Prosecutor did not request the transfer of the others. See: AR, Witness To Genocide: Jean Paul Akayesu, p. 4.
evoked in the international community, the judges have examined the facts adduced in a most dispassionate manner, bearing in mind that the accused is presumed innocent.\textsuperscript{1424}

A key date in Akayesu’s life is Monday 18 April 1994, twelve days into the genocide.\textsuperscript{1425} Before that day, hundreds of Tutsi refugees from Kigali were pouring into Taba and Akayesu had secured them at the bureau communal, vigilantly shielded off his community from the Interahamwe attacks and sought to maintain peace.\textsuperscript{1426} Even the prosecutor, Pierre-Richard Prosper,\textsuperscript{1427} from the USA, had to admit that Akayesu was not an ideologue and that witnesses indeed saw him assisting Tutsi. But, according to witnesses,\textsuperscript{1428} something changed in his attitude after he attended a morning meeting on 18 April in Murambi, where the interim regime, headed by Jean Kambanda, had urged all the Bourgmestres and préfets to unite and follow the genocidal course that was set into motion.\textsuperscript{1429} According to the prosecutor, Akayesu underwent a radical makeover; from 19 April onwards he exchanged his business suit for a military jacket, picked up a rifle, joined the killers’ cause, administered the genocide in Taba and cheerlead rapes and sexual abuses.\textsuperscript{1430} An estimated 2,000 murders “were openly committed and so widespread that, as bourgomestre” Akayesu “must have known about them” and never “attempted to prevent the killing of Tutsi.”\textsuperscript{1431} Moreover, “Akayesu made a choice,” claimed the prosecution, “he rather became a willing, indeed an enthusiastic, participant in the killings and the persecutions of the Tutsi’s.”\textsuperscript{1432} According to the charges he urged villagers to murder RPF accomplices, read out names of people to be executed, conducted house-to-house searches, violently interrogated and threatened people, destroyed homesteads, participated in the killing of “three brothers”, ordered the killing of teachers and encouraged the sexual abuse of...

\textsuperscript{1424} UNICTR, Akayesu Judgement, §192.
\textsuperscript{1425} See also: AR, Witness To Genocide: Jean Paul Akayesu, Cruvellier, Court of Remorse, pp. 20-31.
\textsuperscript{1426} AR, Witness To Genocide: Jean Paul Akayesu, p. 7.
\textsuperscript{1428} UNICTR, Interview of Mr. Jean Paul Akayesu in Zambia by ICTR, in Presence of his Lawyer, Tape III, Side B (Zambia, 11 April 1996), p. 5.
\textsuperscript{1429} UNICTR, Akayesu – Audio Recording of 13/03/98 (Rec. No. ICTR-96-04-01171; 13 March 1998).
\textsuperscript{1430} UNICTR, The Prosecutor of The Tribunal Against Jean Paul Akayesu: Indictment (ICTR-96-4-I; Kigali, 13 February 1996); UNICTR, The Prosecutor of The Tribunal Against Jean Paul Akayesu: Éléments Justificatifs ((ICTR-96-4-I; Kigali, 13 February 1996); UNICTR, The Prosecutor of The Tribunal Against Jean Paul Akayesu: Amended Indictment (ICTR-96-4-I; Kigali, 17 June 1997). The first three counts involve genocide and crimes against humanity (extermination), the fourth contains incitement to commit genocide. Counts 5 and 6 were charged against Akayesu for crimes against humanity (murder) and violations of Article 3 common to the Geneva Conventions (murder), and count 7 and 8 involve crimes against humanity (murder) and Violations of Article 3 common to the Geneva Conventions (murder). Counts 9 and 10 contain crimes against humanity and violations of Article 3 common to the Geneva Conventions (murder). Furthermore, counts 11 and 12 were charged for crimes against humanity (torture) and violations of Article 3 common to the Geneva Conventions (cruel treatment) and finally counts 13 through 15 for crimes against humanity (rape and other inhuman acts) and violations of Article 3 common to the Geneva Conventions and of Article 4(2)(e) of additional protocol 2 (outrages upon personal dignity, in particular rape, degrading and humiliating treatment and indecent assault).
\textsuperscript{1431} UNICTR, Akayesu Indictment, §12.
\textsuperscript{1432} UNICTR, Akayesu – Audio Recording of 09/01/97 (ICTR-96-04-00007; 9 January 1997), from: 1:17:00.
several women.\textsuperscript{1433} His lawyers Nicolas Tiangaye (Central African Republic) and Patrice Monthè (Cameroon) on the other hand, claimed Akayesu’s authority was overrun by the \textit{Interahamwe}, led by Silas Kubwimanana\textsuperscript{1434} and that he was effectively degraded to a bystander who lacked the means to stop the massacre. If General Dallaire, they reasoned, could not stop the genocide while he was in charge of 2,500 troops, “how, then, was Akayesu, with 10 communal policemen at his disposal, to fare any better?”\textsuperscript{1435} Despite that he “tried to save some Tutsis and appeal for law and order” he “was accused of supporting RPF and [his] life was threatened.”\textsuperscript{1436} He further denied his alleged transformation from being the guardian of law and order and a saviour of Tutsi in his commune to being a perpetrator of Tutsi killings after 19 April 1994: “Actually, I did not change my attitude; I continued to try to work to protect people and to save them and I did. In fact, that entire day, I was not at the commune. I think you should probably back and ask what happened when I was not present and why the situation has changed when I returned,” he told investigators in 1996.\textsuperscript{1437} At trial he continued to say “It is a sin to say I changed. Why did the \textit{Interahamwe} want to kill me, or why did they kill my policeman and stab the other, if I had changed?” he asked the Trial Chamber.\textsuperscript{1438}

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\item \textsuperscript{1433} The charges read: “As bourgmestre, Jean Paul AKAYESU was responsible for maintaining law and public order in his commune. At least 2000 Tutsis were killed in Taba between April 7 and the end of June, 1994, while he was still in power. The killings in Taba were openly committed and so widespread that, as bourgmestre, Jean Paul AKAYESU must have known about them. Although he had the authority and responsibility to do so, Jean Paul AKAYESU never attempted to prevent the killing of Tutsis in the commune in any way or called for assistance from regional or national authorities to quell the violence; 12A. Between April 7 and the end of June, 1994, hundreds of civilians (hereinafter “displaced civilians”) sought refuge at the bureau communal. The majority of these displaced civilians were Tutsi. While seeking refuge at the bureau communal, female displaced civilians were regularly taken by armed local militia and/or communal police and subjected to sexual violence, and/or beaten on or near the bureau communal premises. Displaced civilians were also murdered frequently on or near the bureau communal premises. Many women were forced to endure multiple acts of sexual violence which were at times committed by more than one assailant. These acts of sexual violence were generally accompanied by explicit threats of death or bodily harm. The female displaced civilians lived in constant fear and their physical and psychological health deteriorated as a result of the sexual violence and beatings and killings; 12B. Jean Paul AKAYESU knew that the acts of sexual violence, beatings and murders were being committed and was at times present during their commission. Jean Paul AKAYESU facilitated the commission of the sexual violence, beatings and murders by allowing the sexual violence and beatings and murders to occur on or near the bureau communal premises. By virtue of his presence during the commission of the sexual violence, beatings and murders and by failing to prevent the sexual violence, beatings and murders, Jean Paul AKAYESU encouraged these activities; 13. On or about 19 April 1994, before dawn, in Gishyeshye sector, Tabu commune, a group of men, one of whom was named Francois Ndimunbanza, killed a local teacher, Sylvère Karera, because he was accused of associating with the Rwandan Patriotic Front (“RPF”) and plotting to kill Hutus. Even though at least one of the perpetrators was turned over to Jean Paul AKAYESU, he failed to take measures to have him arrested; 14. The morning of April 19, 1994, following the murder of Sylvère Karera, Jean Paul AKAYESU led a meeting in Gishyeshye sector at which he sanctioned the death of Sylvère Karera and urged the population to eliminate accomplices of the RPF, which was understood by those present to mean Tutsi. Over 100 people were present at the meeting. The killing of Tutsis in Tabu began shortly after the meeting; 15. At the same meeting in Gishyeshye sector on April 19, 1994, Jean Paul AKAYESU named at least three prominent Tutsis -- Ephrem Karangwa, Juvenal Rukundakugwa and Emmanuel Sempabwa -- who had to be killed because of their alleged relationships with the RPF. Later that day, Juvenal Rukundakugwa was killed in Kanyinya. Within the next few days, Emmanuel Sempabwa was clubbed to death in front of the Tabu bureau communal; 16. Jean Paul AKAYESU, on or about April 19, 1994, conducted house-to-house searches in Tabu. During these searches, residents, including Victim V, were interrogated and beaten with rifles and sticks in the presence of Jean Paul AKAYESU. Jean Paul AKAYESU personally threatened to kill the husband and child of Victim U if she did not provide him with information about the activities of the Tutsis he was seeking; 17. On or about April 19, 1994, Jean Paul AKAYESU ordered the interrogation and beating of Victim X in an effort to learn the whereabouts of Ephrem Karangwa. During the beating, Victim X’s fingers were broken as he tried to shield himself from blows with a metal stick; 18. On or about April 19, 1994, the men who, on Jean Paul AKAYESU’s instructions, were searching for Ephrem Karangwa destroyed Ephrem Karangwa’s house and burned down his mother’s house. They then went to search the house of Ephrem Karangwa’s brother-in-law in Musambara commune and found Ephrem Karangwa’s three brothers there. The three brothers -- Simon Mutijima, Thaddée Uwanyiligira and Jean Chrysostome Gakuba -- tried to escape, but Jean Paul AKAYESU blew his whistle to alert local residents to the attempted escape and ordered the people to capture the brothers. After the brothers were captured, Jean Paul AKAYESU ordered and participated in the killings of the three brothers; 19. On or about April 19, 1994, Jean Paul AKAYESU took 8 detained men from the Tabu bureau communal and ordered militia members to kill them. The militia killed them with clubs, machetes, small axes and sticks. The victims had fled from Runda commune and had been held by Jean Paul AKAYESU; 20. On or about April 19, 1994, Jean Paul AKAYESU ordered the local police and militia to kill intellectual and influential people. Five teachers from the secondary school of Tabu were killed on his instructions. The victims were Theogene, Phoebe Uwineze and her fiancé (whose name is unknown), Tharcisse Twizeyumyrame and Samuel. The local people and militia killed them with machetes and agricultural tools in front of the Tabu bureau communal; 21. On or about April 20, 1994, Jean Paul AKAYESU and some communal policemen went to the house of Victim Y, a 68-year-old woman. Jean Paul AKAYESU interrogated her about the whereabouts of the wife of a university teacher. During the questioning, under Jean Paul AKAYESU’s supervision, the communal police hit Victim Y with a gun and sticks. They bound her arms and legs and repeatedly kicked her in the chest. Jean Paul AKAYESU threatened to kill her if she failed to provide the information he sought. 22. Later that night, on or about April 20, 1994, Jean Paul AKAYESU picked up Victim W in Tabu and interrogated her also about the whereabouts of the wife of the university teacher. When she stated she did not know, he forced her to lay on the road in front of his car and threatened to drive over her. 23. Thereafter, on or about April 20, 1994, Jean Paul AKAYESU picked up Victim Z in Tabu and interrogated him. During the interrogation, men under Jean Paul AKAYESU’s authority forced Victims Z and Y to beat each other and used a piece of Victim Y’s dress to strangle Victim Z. See: International Criminal Tribunal for Rwanda (ICTR), \textit{The Prosecutor of The Tribunal Against Jean Paul Akayesu: Amended Indictment} (ICTR-96-4-I; Kigali, 17 June 1997), pp. 5-23.
\item \textsuperscript{1434} Not much is known about this person and he was not charged himself by the ICTR and the author is not aware if he was tried ever in Rwandan courts or Gacaca. After the trial in which one of its author testified, HRW recalled he was “an honorary vice-president of the Interahamwe at the national level and a political rival of Akayesu,” who “had left the commune some months before when Akayesu was powerful. Now he returned with the backing of the national Interahamwe leadership and with guns, grenades, and military uniforms to distribute to his followers.” Des Forges, \textit{Leave None}, p. 274.
\item \textsuperscript{1435} ICTR, \textit{Akayesu Judgement}, §31.
\item \textsuperscript{1436} ICTR, ‘Jean-Paul Akayesu begins testimony in his Defence’, Press Release, 12 March 1998.
\item \textsuperscript{1437} ICTR, ‘Jean-Paul Akayesu begins testimony in his Defence’, p. 13.
\item \textsuperscript{1438} ICTR, ‘Jean-Paul Akayesu begins testimony in his Defence’.
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contrary, he claimed. At the Murambi meeting, he even asked Jean Kambanda for three gendarmes to protect his commune.\textsuperscript{1439}

\textbf{Genocide in Taba commune}

What had happened in Taba? It was the question on the minds of the three judges who had never been to Rwanda at all. Eager to learn, they had not only observed the cross-examination of witnesses by the parties but posed questions themselves all the time. In the end, after this quasi-inquisitorial process, from the judgement emerges a grim picture of what unfolded in Taba between April and June in 1994, the time that Bourgomestre Akayesu was responsible for maintaining law, public order and the communal police. In its reasoned judgement, the trial chamber was convinced “beyond a reasonable doubt” that the following facts had occurred, mainly on 19 and 20 April. Numerous Tutsi, who sought refuge at the Taba Bureau communal, were frequently beaten by members of the Interahamwe. Some of them were killed, while women were sexually abused and raped. Although no witness was able to estimate the number of people killed, the court found that “it is clear from the testimony of many witnesses that a substantial number of people were killed in Taba. The number 2000 has not been contested by the Defence, and it seems to the Chamber, based on the evidence of killings and mass graves, a modest estimate of the number of people killed in Taba during this period. The testimony also uniformly establishes that virtually all of these people were Tutsi.”\textsuperscript{1440} At trial, nobody had denied that these killings spread through the commune, particularly from 19 April onwards, including Akayesu himself.\textsuperscript{1441} Before 18 April, Akayesu had opposed to the killings to spread into Taba, attempted the prevent violence, called on resident to chase away attackers, intervened when refugees from Kigali were being shot at by the Interahamwe, confiscated their weapons and their vehicle and asked for three gendarmes at the meeting with the Prime Minister. Then his conduct changed on 19 April.\textsuperscript{1442} Yet, the judgement only talks about that Tuesday and Wednesday 20 April. Apart from helping a Hutu woman protecting her Tutsi children, Akayesu generally stopped attempting to prevent the killing of Tutsi. In fact, “there is evidence that he not only knew of and witnessed killings, but that he participated in and even ordered killings.”\textsuperscript{1443} In all, “he chose the course of collaboration with violence against Tutsi rather than shielding them from it.”\textsuperscript{1444}

The trial narrative then turns to the details. In the early hours of 19 April, Akayesu joined a crowd of over 100 folks, which had assembled around the lifeless body of a youthful Interahamwe member in Gishyeshye secteur. He took this occasion to call on his listeners to unite in order to eliminate the enemy, the RPF. From the Interahamwe, he had received lists with names of RPF

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\textsuperscript{1439} UNICTR, Akayesu – Audio Recording of 13/03/98 (Rec. No. ICTR-96-04-01171; 13 March 1998), from: 1:52:50.
\textsuperscript{1440} UNICTR, Akayesu Judgement, §181.
\textsuperscript{1441} UNICTR, Akayesu – Audio Recording of 12/03/98 (Rec ICTR-96-04-01165; 12 March 1998), from: 2:01:00 mins.
\textsuperscript{1442} UNICTR, Akayesu Judgement, §187.
\textsuperscript{1443} Ibidem, §193.
\textsuperscript{1444} Idem.
\end{footnotesize}
‘accomplices’. He specifically told his listeners that Ephrem Karangwa’s\(^{1445}\) - a Tutsi judicial police inspector - name was on one of the lists.\(^{1446}\) Following his public address, extensive killings of Tutsi spread through the commune. On the same day, Akayesu threatened to kill a Tutsi woman (witness U), while she was being interrogated, and a Hutu man (victim V). The latter was thereafter beaten so hard with a stick and the butt of a rifle by communal policeman Mugenzi and militia member Francois, that one of his ribs was broken. Earlier that day, Akayesu and a group of men under his control were looking for Ephrem Karangwa and destroyed his house and burned that of his mother. The men, according to Karangwa’s testimony at trial, then went to search the house of his brother-in-law, in Musambira commune, and killed his three brothers. Karangwa – who had overheard Akayesu order the killing of his brothers - fled to a cathedral in another community, where Akayesu also came looking for him, but he managed to stay out of his hands and ultimately survived the genocide.\(^{1447}\) At another time on 19 April, Akayesu took from Taba’s communal prison eight refugees (apparently Tutsi), handed them over to Interahamwe militiamen and ordered that they be killed. They were massacred them with machetes and small axes. Also, Akayesu ordered locals to kill ‘intellectuals’ and to look for a professor called Tharcisse. Together with his spouse, the gentleman was brought to the Bureau communal and furiously killed with a machete blow to the neck. Four other educators, from Remera School, were murdered later that day. Then, on the evening of 20 April 1994, Akayesu, two Interahamwe militiamen and a communal policeman interrogated, hit and beat a 69-year-old Hutu farmer suspected of knowing the hide-out of Alexia, the wife of Pierre Ntereye, a university teacher. Later on, outside a mine, Akayesu had her lie down in front of his vehicle and threatened to drive over her if she failed to give the information he sought. He casted the same threat on another woman (Vitim W) that same evening. When Akayesu and his entourage interrogated two others (Z and Y), the burgomaster put his foot on the face of one of his victims (Z), causing the said victim to bleed, while the police officer and the militiaman beat the victim with the butt of their rifles. In the torture, the militiaman forced victim Z to beat victim Y with a stick.\(^{1448}\) Sexual abuses were committed throughout the commune as well. Numerous Interahamwe gang-raped 25 girls and women in the cultural centre, others were raped near the bureau communal and one in a nearby forest. Some girls were forced to publicly strip naked and perform exercises, march and sit in the mud near the communal bureau.

It is a gruesome picture that emerges from those two days. Much less to virtually nothing, however, is known from the trial record about what happened in Taba afterwards other than that people from the commune have said that the raids and killings of Tutsis lasted for weeks. Survivors reported that at Akayesu’s urging, militia set up roadblocks and killed scores of people every day for


\(^{1446}\) Although Akayesu has explained that he did so to prove how ridiculous and implausible the list was, the ICTR found that it instead enticed the present hearers to not only kill Karangwa, but all Tutsis within the community. UNICTR, Akayesu Judgement, §§362, 378, 384.

\(^{1447}\) UNICTR, Akayesu Judgement, §§220-268.

\(^{1448}\) Ibidem, §§682-683.
weeks. Some people, the witnesses said, were reduced to paying the militia for bullets to avoid being killed by machete. Then, in early May, Akayesu received a letter from the prefect to orchestrate a meeting to keep people calm and to raise self-defence. On the fourth or the fifth, an assembly was organised in the presence of parliamentarian Cyrille Ruvugama and Interahamwe leader Silas Kubwimana. There, the burgomaster explained to his listeners, “we had to be in charge of civil self-defence and live with our neighbours in peace. Then it was Silas’s turn. He set everything in motion. He said that when we talk about the enemy, we were talking about Tutsis and that we had to get rid of the enemy. […] I was doing my job. I read the letter.”

Meanwhile, RPF troops had well-advanced and taken over larger parts of Kigali. Amidst all the violent turmoil, Akayesu fled Rwanda to Zaire, never to return home again. He only came on the UNICTR’s radar after he, as part of a larger group of Rwandans, was arrested in Lusaka, Zambia in October 1995. Investigations into his actions in 1994 commenced thereafter. A former OTP participant in the first investigative mission, recalls going to Taba with Dutch investigators to interview witnesses: “Not only did we return empty-handed since witnesses had nothing to say or did not offer reliable testimony, but one of the interviewees proved to be an excellent potential witness for the defence, providing Akayesu’s facts and actions during the period which were very favourable,” he commented. Sometime later though, the prosecution discovered a dozen new witnesses, this time à charge. Their testimony was the gist of the indictment, which was drawn up four months after his arrest. Akayesu himself was interviewed subsequently for two days by UNICTR investigators in April and brought to Arusha in May 1996. At his initial appearance in a cramped and hastily improvised courtroom, four days after his arrival in Tanzania, he pleaded "non coupable" to all counts against him.

At trial

Thank you very much Mr. President. May I introduce myself I am Jean-Paul Akayesu. I was born in the commune of Taba in the Prefecture of Giterama in Rwanda. I am married and I am a father of five children. As far as my occupation is concerned, I was for a long time a teacher in various schools. And from 1990 up to 1993 I was Inspector for the Schools in our commune. After that period, I was then elected as a Bourgomestre for that commune until June, 1994. […] It is one Commune. Taba, is the name of the commune.

- Jean-Paul Akayesu, Accused

Trials took off slowly in Arusha. Meanwhile in Rwanda, genocide suspects were cramping the prisons. But in its race against the UNICTR, Kigali had already managed to start genocide trials...
before specialised chambers in the ordinary and military courts and was preparing to put to trial a much bigger fish than Akayesu; the ideological father and coiner of the “Hutu Power”, Froduald Karamira.1454 Back in Arusha, where fair trial rights allowed Taba’s former bourgmestre to change his defence team several times, the trial was postponed several times.1455 The UNICTR’s first trial thus opened on 9 January 1997, before trial chamber I, composed of Laity Kama (Senegal), Lennart Aspegren (Sweden) and Navanethem Pillay (South Africa). With Louise Arbour, the Canadian Chief Prosecutor absenting “because of obligations at the ICTY”, senior trial attorney Yacob Haile-Mariam presented the formal opening statements:

[…] we realise the paramount responsibility of this Tribunal is to assuage the hurt of the victims, to render fair trial to the accused and to vindicate humanity, on whose behalf we are prosecuting Jean-Paul Akayesu. At the same time, your honours, we cannot help but to recognise the solemnity of this occasion, the historic dimension of the process and the far reaching consequences of your acts today and in the coming weeks.1456 Your honours, on April 19th and subsequently in the commune of Taba, 2000 Tutsi’s, men, women, and children were beaten, hacked, maimed, and killed as the result of the orders, incitement and action of mister Jean-Paul Akayesu. Your honours, mister Jean-Paul Akayesu, who is standing, who is sitting before you, has been charged with genocide, crimes against humanity and violations of article 3 of the Geneva Conventions. The evidence of the Prosecution will prove, beyond any reasonable doubt, that Jean Paul Akayesu ordered and killed, and incited people to kill and was in complicity in killing members of the Tutsi ethnic group, with the intent to destroy, in whole or in part, the Tutsi population of Rwanda. In addition, prosecution witnesses will show that the accused committed these acts as part of a widespread and systematic attack against the civilian population […]1457

With these words, the UNICTR’s debut trial commenced. But next to highlighting the significance of the case to the cause of justice in Africa and addressing the necessary issues of law, Haile-Mariam was quick to turn to history, as a blueprint for the case theory. In a nutshell, he provided the judges with an overview of the social and political nature of Rwandan society, the road to the civil war, the armed conflict, the Arusha accords, political killings and the genocide of 1994. According to the Ethiopian Prosecutor, the armed conflict between the FAR and the RPF was a precursor for genocide: “[…] the massacre of 1994 was not a spontaneous outburst of popular anger at the death of a beloved president, as some detractors would like us to believe, rather it appeared to be a carefully calculated, systemically planned and meticulously executed carnage.”1458 To prove the accusations, Haile-Mariam foreshadowed his use of expert witnesses, international news media and NGO staff who, as eyewitnesses, were to testify to the history, society and widespread and systemic nature of the attacks against civilians. In order to prove Akayesu’s partaking in the genocide, Haile-Mariam announced that victims and survivors – who “are simple family men and women” - from Taba would “narrate the
saga of killings, beatings, torture, murder, by the order of Jean-Paul Akayesu.” He then pertinently asked, “[…] these witnesses who have given their words, are they credible?” Raising the concerns that “[t]he witnesses are persons who lived through the ordeal. Some of them survived death by dint of chance and others by heroic determination to live” he underlines that “their words are irreproachable, because they have stared death in the eye and brushed against it […]” Then he concludes, “would their judgements be impaired by the horrors they were staring at? In our view, no […]. men and women who brushed with death do not lie! […] we have been impressed by the absolute lack of rancour and vengeance of the victims and witnesses against mister Akayesu. In the same vain, we have equally been impressed by their determination to ask for justice. They have taken the courage, the courageous decision to tell the truth at extremely great risk to themselves and to their families, if at all there are any family members left.”

Survivor testimony

Akayesu had appeared in court on Thursday when the trial started with opening statements, but proceedings were adjourned for the day when three witnesses failed to arrive on time from Rwanda. Amongst those first witnesses were victims and survivors from Taba, including the prosecutor’s first witness, the commune’s former cashier and accountant. Dubbed ‘Witness K’, literally pointed out her former boss in the courtroom and said she had seen him order and oversee the killings of Tutsis in 1994. On 19 April, the middle-aged Tutsi woman recounted how Akayesu escorted eight men from Runda who had taken refuge in his office to a group of young Interahamwe carrying traditional weapons. The killers told them to sit down in a straight line with their arms and legs well before them and then hacked them. “Akayesu said quickly! And they were quickly killed,” she said. "Everybody who was there used the weapon he had had with him or her.” Then they hit a professor called Samuel with a machete at the throat. The woman told the judges that she escaped death because she was married to a Hutu and because she paid off the killers with money and a radio set. By June 1994, she testified, the killings had decreased notably but there were not many people in the streets.

On Monday 13 January, Akayesu – who tried to fire his lawyers that day – was shortly allowed to defend himself and cross-examine Witness K, who on that morning had walked into the tribunal carrying a baby. “Madame, my best wishes for the year 1997 first all […] I’m very happy and very happy to see you again,” Akayesu told the ‘K’ in French before beginning his highly charged questioning. For over one and a half hour, Akayesu mainly questioned the woman about the role of...
mayor in Taba, looking for her to state that the main responsibility for law and order in the town rested with the judicial police and not the bourgomestre. At the end of the morning, Akayesu complained about the lack of time – and paper - to prepare and write up more questions and was granted an adjournment. He continued the next morning, talking about himself in the third person: “Was Akayesu violent with his staff?”, “You did not hear it said that Akayesu was hostile to Tutsi’s?” “These people began killings on Akayesu’s orders?” After two hours of softly answering, Witness K, added to her testimony “that there were many people killed in the commune and that very few people who survived, in relationship to the people who survived in other communes, and this is all due to the acts of Akayesu. Thank you.”

That same afternoon, the second witness took the stand. This time a Hutu-farmer with the pseudonym “C” was on the witness stand. He was not among the killers, he said in a rather confusing statement marred by translation issues. He told the court that he was hiding a Tutsi friend in his house but that Akayesu, together with militia, had come to look for the refugee. When he refused to disclose the whereabouts of his friend Alexia, the militiaman beat him, took him to a forest, made him lie on the ground and stomped on his face until he was bleeding. Akayesu beat him as well, he said, and in court he stripped of his shirt to show scars at the left side of his back. In the following weeks, fourteen other witnesses from Taba recounted their painful experiences.

Cross examining culture

From the testimony, which at times was illustrated by tendered exhibits showcasing pictures of weapons, crime scenes and maps, a picture emerged on what had occurred in Taba commune. Central to that narrative were Akayesu’s makeover and the events on 19 and 20 April. But how did the attacks on people in that locality fit in the larger context of Rwanda? It was a question that became crucial at the tribunal. For the Prosecution, the answer was obvious; “the isolated attacks, or isolated crimes, that we allege Akayesu has performed or committed, by themselves alone would not constitute crimes against humanity […] Akayesu’s acts become crimes against humanity only when they are part of the systematic and widespread attack […]” Thus, the prosecutor wanted to prove that Akayesu’s actions were part of a well-conspired, organised and executed master plan to exterminate Tutsi through a campaign of widespread and systematic killing “and Akayesu’s acts was part of that global crime that we want to prove.”

Yet, in the absence of Nazi-like archives, from which, through a documentary chain, could such a case theory be inferred, the prosecution was challenged in its presentation of a judicial account of ‘what happened’ and in what context. In doing so, they sought the assistance of handful expatriates – with specialisations in social sciences, journalism or humanitarian

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1468 UNICTR, Akayesu - Audio Recording of 14/01/97 - AM (Arusha, 14 January 1997), from: 1:38:00.
1469 Ibidem, from: 00:15:00.
1470 Ibidem, from: 00:45:00.
1471 Ibidem, from: 01:14:00.
1472 UNICTR, Akayesu - Audio Recording of 16/01/97 - PM (Arusha, 16 January 1997), from: 00:14:00.
1473 Ibidem, from: 00:14:00.
work – to outline to the judges that genocide had indeed occurred from April onwards. In particular, a group of experts’ accounts structured the framework within which the genocide was understood but more importantly provided the very basis for the legal determination that the crime of genocide – and crimes against humanity - was even applicable. Through these specialists, the tribunal’s litigants, in various trials before different chambers, outlined the various elements of the crimes described in the statute: widespread and systematic violence, the targeting of a defined group, the existence of those groups and the existing intent (genocide) to destroy these social groups, in whole or in part.

**Bringing in the ‘experts’**

In Akayesu’s trial, the first ‘experts’ were expatriates who happened to be at the crime scene in 1994. First up to share his observations was Ronie Zachariah, who was the Medical and Field Coordinator for Médecins Sans Frontiers (MSF), in Butare. The Indian doctor recounted that on 13 April, when he was driving, his Tutsi driver was treated aggressively at “checkpoints” and “barricades” manned by armed soldiers and civilians with yellow scarfs and armed with machetes. On later days, he found many Tutsi civilians in Gitarama Hospital, visited Kibeho Church just before two to four thousand people were massacred and saw civilians being massacred in villages throughout the countryside on his way to the Burundi-border. “For me it was more the less the same picture. All the way through we could see on the horizon, sorry, on the hillside […] where there were communities, people were being pulled out by people with machetes, and we could see piles of bodies. In fact the entire landscape was becoming spotted with corpses, with bodies, all the way from there until almost Burundi’s border.”

From his car, the doctor had taken two pictures of a pile of bodies, which he showed to the court.

After hearing that some 40 Rwandan MSF personnel had already been killed, Zacharia evacuated his team to Burundi. On his way down, he did not see bodies on the mountain sides any longer, but now he had crossed streams and rivers in which the mutilated corpses of men, women and children floated by at an estimated rate of five bodies every minute. On the next day at trial, Lindsey Hilsum, a journalist, who was working on a freelance contract for UNICEF in Rwanda in 1994, came to testify. She told the court about five bodies of naked women slashed to death she had seen piled up in a flower bed behind a house guarded by two men. When she visited Kigali central hospital she found wounded men, women and children of all ages packed into the wards. Glancing

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1474 In the early days, the OTP solicited the knowledge of three pro bono consultants in order to blueprint indictments and strategise their prosecutions: Alison Des Forges, a USA-based, human rights activist and historian of Rwanda who; André Guichaoua, Professor of Sociology at Université des Sciences et Technologie de Lille, France; and Filip Reyntjens, Professor of African Law and Politics at the University of Antwerp, Belgium. In the early days of the tribunal, the three would meet with the OTP in various locations, even at Reyntjens’ home in Antwerp, where the prosecutors would, as Reyntjens’ described it, ‘pick their brains’ about Rwanda and the genocide. Author’s Interview (telephone): Filip Reyntjens, 31 August 2012; Buss, ‘Expert Witnesses and International War Crimes Trials’, p. 30.
1476 The ICTR Statute, contrary to other tribunals, requires for crimes against humanity also that they be committed on ‘national, political, ethnic, racial or religious grounds’. UNICTR, Statute, art. 3.
1477 UNICTR, Akayesu - Audio Recording of 16/01/97 - PM (Arusha, 16 January 1997), from: 00:28:00.
1478 UNICTR, Akayesu - Audio Recording of 16/01/97, from: 01:14:00.
1479 UNICTR, Exhibit 2: Pile of dead bodies (937) & UNICTR, Exhibit 2A: Pile of dead bodies (938).
1480 UNICTR, Akayesu - Audio Recording of 16/01/97, from: 02:00:00.
1481 UNICTR, Akayesu - Audio Recording of 17/01/97 - AM (ICTR-96-04-00913; 17 January 1997), from: 00:51:00.
down on the hospital’s morgue, she saw "a big pile like a mountain of bodies outside and these were bodies with slash wounds, with heads smashed in, many of them naked, men and women." She estimated that the pile outside the morgue contained about five hundred bodies, with more bodies being brought in all the time by pickup trucks. 

Simon Cox, a cameraman and photographer, headed south from Uganda with an RPF escort. When he arrived in Rwanda in the third week of April, he testified, he saw massacre sites in church compounds where he found Tutsi identity cards and Tutsi civilians suffering from machete wounds in hospitals. During one of his trips close to the Tanzanian border, Cox filmed corpses of dead people floating by at a rate of “several a minute.”

On a subsequent journey to Rwanda, on the way to Kibuye, he saw freshly dug mass graves in churchyards and later, in the hills of Bisesero, he saw some 800 Tutsi civilians “in a desperate, desperate state,” many apparently starving and with machete, bullet or fragment wounds, and with dead bodies strewn all over the hills.

After listening to the leader of the OTP’s ‘Zambia team’, Halvard Tømta – who introduced a range of pictures on various crime scenes in Gitarama taken in June 1996 - two other experts were called. For the three judges, who knew nothing or little about Rwandan culture, society and history but showed themselves very eager to learn, these anthropological and historical expert testimonies became highly educational and influential to their judgements. First up was Dr. Matthias Ruzindana, a Rwandan lecturer from the University of Rwanda in Butare. Rwandan witnesses had almost exclusively been interviewed by investigators or testified in court in their own language Kinyarwanda. At trial, the chamber had asked many questions as to the meaning of several words, syntax and modes of expression. Therefore – and because the Prosecutor charged Akayesu with incitement – the prosecution called the expert on applied linguistics to “illuminate” the meaning of particular words used in the context of the genocide.

His testimony, delivered in impeccable English, touched upon the “extended” meanings of the words Inkotanyi, Icyitso/Ibyitso, Inyenzi, Interahamwe.
and the expressions used in Kinyarwanda for "rape" in various time and space settings, particularly in the context of the genocide. Throughout his testimony and answering to the extensive questioning by the judges, Dr. Ruzindana outlined in particular how these words were used in extremist language in various media, including Kangura and RTLM, and that their extended meaning became clear to many Rwandans through an oral tradition in which information travels from A to B to C: “these media had a lot of influence on people.” Strikingly, in lecturing the court on how Rwandans use language to communicate, Ruzindana touched upon a crucial area: “you have to bear in mind […] that most Rwandese do not write or read. They hear and report what they hear.” Rwanda, lectured Ruzindana, “is a society ran by oral tradition […] so therefore they do not rely on print, or on radio or television to know facts […] A saw or heard something, which he or she said to person B, who reported to person C and so on. This is how information was channelled. Ok? In this situation the tendency is not to question the source, because very often the source isn’t there. You get it from D, who got it from C, who got it from B, who got it from A. But C will not tell to D how the information had travelled. The tendency will be “I heard this, or I saw this.”

Facts in Rwanda, Ruzindana thus explained, are reported as they are perceived by the witness, often irrespective of whether the facts were personally witnessed or recounted by someone else (hearsay). When asked how Rwandan witnesses respond when asked questions, he jokingly answered that he “was not even answering the [prosecutor’s] questions directly.” He continued to state that the “Rwandese are rarely straightforward,” – being very general, avoiding explanations, beating around the bush or giving implied answers - especially when the issue is delicate. Mostly, answers – or Kinyarwanda words in general - have to be “decoded” in order to be understood correctly, depending on context, the particular speech community, the identity of and the relation between the orator and the listener, and the subject matter of the question. Later, in its judgement, the judges themselves recognized other cultural constraints in relying on witness testimony highlighting that Rwandan witnesses had difficulty “to be specific as to dates, times, distances and locations” and their “inexperience […] with maps, film and graphic representations of localities” but that had not drawn “any adverse conclusions regarding the credibility of witnesses based only on their reticence and their sometimes circuitous responses to questions.”

**Lessons in history: intent and ethnicity**

[…] allow me […] to elaborate on what we intend to prove with this testimony. […] the 1994 massacre in Rwanda was not a spontaneous outburst of anger by the people because of the

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1494 During investigations and hearings during trial, the terms gusambanya, kurungora, kuryamana and gufata ku ngufu were used interchangeably by witnesses and translated as "rape". UNICTR, Akayesu Judgement, §152.
1495 Since not many people are literate or own a radio, much of the information disseminated by the press in 1994 was transmitted to a larger number of secondary listeners by word of mouth. UNICTR, Akayesu - Audio Recording of 04/02/97 – AM (ICTR-96-04-00961; 4 February 1997), from:00:55:00.
1496 UNICTR, Akayesu - Audio Recording of 04/02/97 – AM (ICTR-96-04-00961; 4 February 1997), from: 01:47:00.
1497 UNICTR, Akayesu - Audio Recording of 30/01/97 – PM (ICTR-96-04-00958; 30 January 1997), from: 01:56:50.
1498 UNICTR, Akayesu - Audio Recording of 30/01/97, from: 01:44:00.
1499 UNICTR, Akayesu - Audio Recording of 30/01/97, from: 01:56:50.
1500 Ibidem, from: 01:47:00.
death of a popular president. It was something planned meticulously, and carried out ruthlessly and it was not hatched in one night either. It was planned over a long period of time and therefore it becomes necessary mister president to go into the history of Rwanda and illuminate the culture of impunity that has developed in that country.

- Yacob Haile Mariam, Prosecutor

We judges agreed that you can’t avoid this question of history of Rwanda, otherwise it’s just one ethnic group killing another ethnic group with no reason why. History is necessary for an understanding of why the conflict occurred. Our first judgment—Akayesu—did this.

- Navanethem Pillay, Judge

Everything was new at the UNICTR and its personnel came in unprepared and inexperienced, with some judges having no prior experience as a judge, including Pillay. Knowledge about Rwanda or any type of source material was virtually absent in the judges’ offices in Arusha, or in matter of fact throughout the tribunal. Not much had been written about it yet, particularly in English, except for a handful of immediate post genocide scholarly books like Prunier’s ‘Rwanda Crisis’, journalistic accounts like Gourevitch’s ‘We Wish to Inform You’, NGO reports like ‘Death Despair and Defiance’ and a selection of UN documents.

But in the early days of the tribunal, there was no library available to explore literature, let alone legal reference books or dictionaries. In fact, the trial judges were only learning about the substance along the way they were presiding over the cases in which evidence was presented. In that respect the venue of the Akayesu trial, which was the court’s first, was not only a judicial courtroom, it was also a classroom. After Ruzindana’s lecture in linguistics and oral culture, the Trial Chamber soaked up floods of information about Rwanda during eight days of testimony by Dr. Alison Des Forges. With the authority of the experienced lecturer that she was, the American historian and Human Rights Watch activist started her testimony with the basics: “Rwanda is a small country characterized by its position, more or less, in the heart of Africa, which meant that, unlike other regions of Africa that suffered the depredations of the slave trade and the early onset of colonialism, Rwanda was, more or less, protected from these occurrences, and, by the fact of its geography.”

She then took the court, in what can be described a series of mini-lectures, through in-depth history of the country from pre-colonial times well into the early days

1501 UNICTR, Akayesu – Audio Recording of 11/02/97 (ICTR-96-04-00977; 11 February 1997), from: 00:04:00. Several times during the hearing, Presiding Judge Kama complained about the translators. So did Akayesu, who stood up to correct the translator.

1502 Quoted in: Wilson, Writing History, p. 52.


1504 On 11, 12, 13, 18 and 21 February and 22, 23 and 24 May. Altogether, the English verbatim transcripts, which are on file with the author, of these hearings make up 1116 pages of text.

1505 On 11/02/97 (ICTR-96-04-00977; 11 February 1997), from: 00:24:40. Doris Buss, ‘Expert Witnesses and International War Crimes Trials’, p.32. Buss writes that the transcript of the testimony “reads like a series of erudite mini lectures delivered to the trial chamber.” From the original audio recordings of the proceedings, a similar conclusion can be drawn, yet with the addition that it “sounds” like mini-lectures too. However, listening to the testimony, the listener may observe the profound carefulness, as well as confidence, in deliverance of the testimony that was mostly given in English and at times in French.
of the genocide in 1994. Impressed and excited by her “interesting” expertise, the judges, from early on, were eager students shooting a stream of questions at her: “Doctor, when you say what we would now call ethnic groups, what are you referring to?”; “What does it mean?”; “is that true?” After her first three hours of audience, Judge Kama even apologised: “Madame, I hope you will understand that we are taking a lot of your time because your testimony is particularly of great importance. You know very well Rwanda, as well as its history. And also the judges will be benefiting from your knowledge […] I hope that we will not be accused of asking too many questions.”

On their minds were fundamental, yet still basic queries about Rwanda. In particular, they desired to know what kind of groups Hutu and Tutsi were and if these would fit the definition of protected groups under the genocide convention. In all, Des Forges’ evidence was considered by the magistrates so authoritative that in the judgement, in no less than 33 paragraphs (out of 744 in total) under the heading “Historical Context of the Events in Rwanda in 1994”, her testimony is “briefly” summarised “in order to understand the events alleged in the Indictment.” In fact, Des Forges’ testimony, which was a raw version of what had happened in Rwanda, virtually trickled down Arusha as the tribunal’s official version of history. It heavily influenced the minds of the judges in making sense of the causes and dynamics of mass violence in Rwanda, but it also provided them with an explicit narrative structure to discuss evidence and present their findings. Whereas the chamber had not allowed the defence to call the Rwandan historian Dr. Ferdinand Nahimana as an expert witness, Des Forges’ explanations on Rwanda remained virtually uncontested by the defence, which did not put a challenging cross-examination, during trial. As a result, the judgement’s historical overview confidently structures and summarizes the socio-political history as told by the American historian up to the genocide.

A heavy emphasis is put on the historical evolution of Hutu and Tutsi identities. It recounts a history of the “racist” introduction by colonialists and clergy of ethnic markers and divisions in Rwanda in the early twentieth century – via the Social Revolution, political strife during independence, the war, the Arusha negotiations, political extremism, propaganda and inciting language, pogroms, events in Burundi, political killings, the assassination of Habyarimana, the establishment of Bagosora’s Hutu-Power government, the killing of Peacekeepers - all the way up to the massacres from April 1994 onwards. “So, to sum up, you could say that from the plane crash through, perhaps, the 11th, 12th, there was some confusion about the target. From the 12th […] or

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1507 Often citing from René Lemarchand and Filip Reyntjens, her own investigations as part of her work for the International Commission of Inquiry and Africa Watch, a branch of HRW at the time.
1509 UNICTR, Akayesu Judgement, §78.
1510 UNICTR, Akayesu Judgement, §78.
1512 The Defence argued that hearing Nahimana “would enlighten the Tribunal on the history of Rwanda and enable the Defence to dispute the scientific validity of the theories advanced previously in the present case by Dr. Alison Des Forges, Historian, specialist on Rwanda, called by the Prosecutor to testify as an expert.” Since Nahimana himself was an accused before the tribunal, the chamber questioned impartiality as an expert witness. See: UNICTR, The prosecutor versus Jean-Paul Akayesu: Decision on a defence motion for the appearance of an accused as an expert witness (ICTR 96-4-F; 9 March 1998).
1513 In fact, her testimony presents a very first overview of the book, Leave None To Tell The Story, she was writing, which later from 1999 onwards became the new “bible” at the tribunal and required reading for all staff. Only in 2014 was the book translated into Kinyarwanda (Ntihazasigare N Uwo Kubara Inkuru).
1514 UNICTR, Akayesu Judgement, §84.
13th killings were beginning on a large scale. The major massacres were finished by -- most of the major massacres were finished by the 22nd. And then, the government moved into a new stage of more controlled and discrete killings of Tutsi and -- and people said to be associated with the RPF. Next to serving as an academic guide through the history of Rwanda, Des Forges’ testimony became crucial in the prosecutor’s framework and the court’s determination that genocide had taken place.

In a section immediately following, carrying the title “Genocide in Rwanda in 1994?” the court deliberates whether the massacres constituted genocide, obviously according to the Genocide Convention. For the panel, uncertainties persisted about the number of people massacred in Rwanda but that could not refute the fact that widespread killings were perpetrated throughout Rwanda.

The testimony of witnesses Zacharia, Dallaire, Cox proved that “killing and causing serious bodily harm to members of a group” were committed. Then the chambers moves forward to analyse the question if these crimes were “committed with the intent to destroy, in whole or in part, a particular group targeted as such.” ‘Intent’, in general terms, was the first requirement to be met. Although the chamber considered it “a mental factor which is difficult, even impossible, to determine” it sought to “deduce genocidal intent inherent in a particular act charged from the general context of the perpetration of other culpable acts systematically directed against that same group, whether these acts were committed by the same offender or by others.” The chamber then turns to Des Forges. Convinced that the massacres were aimed at exterminating the group that was targeted, the chamber paraphrases Des Forges “on the basis of the statements made by certain political leaders, on the basis of songs and slogans popular among the Interahamwe, I believe that these people had the intention of completely wiping out the Tutsi from Rwanda so that-as they said on certain occasions - their children, later on, would not know what a Tutsi looked like, unless they referred to history books.” Dr. Zacharia’s testimony that the Achilles’ tendons of many wounded persons were cut to prevent

1514 Des Forges described these as follows: “In other words, in commune after commune the initial effort of local people, with a small amount of military support, was ordinarily not successful. In most cases of massacres, the initial attack did not succeed the first day. But, on the second or third day the assailants had access to soldiers and to police, often with heavier weaponry, who came in to support them and which then permitted the -- the final carrying out of the massacre. A massacre usually began with attack by grenade and gunfire, and ended with the final destruction of the remaining people through machetes and other forms of -- of weapons, clubs, spears and so on, that did not involve use of expensive ammunition. In addition, the use of the barriers to limit the movement of population, the use of patrols to search for and to search and destroy Tutsi, the use of communal labor, of Umuganda to cut down all the bush, to clear the areas where Tutsi could potentially hide and to kill any who were found hiding in the process. The -- the use of whistles to give signals and to set the pace of killing. The use of banana leaves to identify assailants in those large massacres where you had coming together massive numbers of assailants who didn’t know each other and who might, potentially, have distinguishing who was Hutu from who was Tutsi because, as we pointed out, you couldn’t always tell from a person’s physical appearance. So, the assailants wore banana leaves or some other kind of leaves to identify themselves. All of these details you find throughout the country at many different sites and more or less at the same time.” See: UNICTR, In the Matter of Jean Paul Akayesu: Transcript (ICTR-96-4-F; 24 May 1997).

1515 Des Forges, Akayesu Transcript (18 February 1997).

1516 UNICTR, Akayesu Judgement, §114.

1517 Ibidem, §116.

1518 Ibidem, §117.

1519 “On the issue of determining the offender's specific intent, the Chamber considers that intent is a mental factor which is difficult, even impossible, to determine. This is the reason why, in the absence of a confession from the accused, his intent can be inferred from a certain number of presumptions of fact. The Chamber considers that it is possible to deduce the genocidal intent inherent in a particular act charged from the general context of the perpetration of other culpable acts systematically directed against that same group, whether these acts were committed by the same offender or by others. Other factors, such as the scale of atrocities committed, their general nature, in a region or a country, or furthermore, the fact of deliberately and systematically targeting victims on account of their membership of a particular group, while excluding the members of other groups, can enable the Chamber to infer the genocidal intent of a particular act.” Ibidem, §523.

1520 The Chamber observed that this testimony was confirmed by prosecution witnesses KK and OO, who testified that Tabu’s Interahamwe leader Silas Kubwimanana had said during a public meeting chaired Akayesu that all the Tutsi had to be killed so that someday Hutu children would not know what a Tutsi looked like. UNICTR, Akayesu Judgement, §118.
them from fleeing, argued the chambers, demonstrated the perpetrators’ resolve not to spare any Tutsi: “Their plan called for doing whatever was possible to prevent any Tutsi from escaping and, thus, to destroy the whole group.”

On many occasions, continued the chamber, many Tutsi bodies were often systematically thrown into the Nyabarongo river, a tributary of the Nile. The judges had seen pictures of dead bodies floating in the river and Des Forges had “explained that the underlying intention of this act was to "send the Tutsi back to their place of origin", to "make them return to Abyssinia", in keeping with the allegation that the Tutsi are foreigners in Rwanda, where they are supposed to have settled following their arrival from the Nilotic regions.”

Dallaire’s testimony that “even new-born babies” were not spared and evidence of forced abortions or killings of women carrying foetuses of a Tutsi father were further testimony of “an intention to wipe out the Tutsi group in its entirety.” Tutu, as members of an ethnic group, were the targets of the violence, said the chamber. On the basis of their identity cards, they were sorted out and separated from Hutu at roadblocks while various news media overtly called for the killing of Tutsi. The 1991 military’s report defining the enemy, which was disseminated in 1992, “could be added to this lot”, wrote the chamber, to conclude that “all this proves that it was indeed a particular group, the Tutsi ethnic group, which was targeted […] because they belonged to said group; and hence the victims were members of this group selected as such.” Then the chamber emphasised that “according to Alison Des Forges' testimony, the Tutsi were killed solely on account of having been born Tutsi.” From the forgoing testimony, the magistrates concluded that genocide was “committed in Rwanda in 1994 against the Tutsi as a group.”

But that was not all that the chamber found, it also carefully exposed its understanding of the causes and dynamics of the genocide. Most interestingly, the judges were of the opinion that “this genocide appears to have been meticulously organized.” They had been convinced by some of the testimonies. Des Forges had talked of "centrally organized and supervised massacres," Zacharia had talked about lists, General Dallaire mentioned arms caches, the chamber summarised, only to bring into memory “the training of militiamen by the Rwandan Armed Forces and of course, the psychological preparation of the population to attack the Tutsi, which preparation was masterminded by some news media, with the RTLM at the forefront.”

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1521 Witness OO testified that during the same meeting, a Parliamentarian had stated that he would rest only when no single Tutsi is left in Rwanda. Ibidem, §119.
1522 Ibidem, §120.
1523 Witnesses KK, PP and OO had recounted the use of a proverb according to which if a snake wraps itself round a calabash, there is nothing that can be done, except to break the calabash (”Iyo inzoka yiziritse ku gisabo, nta kundi bigenda barakimena). In 1994, this meant that if a Hutu woman married to a Tutsi man was impregnated by him, the foetus had to be destroyed so that the Tutsi child which it would become should not survive. In Rwandese culture, breaking the “gisabo”, which is a big calabash used as a churn was considered taboo. Yet, if a snake wraps itself round agisabo, obviously, one has no choice but to ignore this taboo in order to kill the snake. UNICTR, Akayesu judgement, §121.
1524 Ibidem, §121.
1525 UNICTR, TCI, Prosecutor Versus Jean-Paul Akayesu: Exhibit 25 A. (ICTR-96-4-T).
1526 UNICTR, Akayesu judgement, §124.
1527 Ibidem, §124.
1528 Ibidem, §126.
1530 UNICTR, Akayesu Transcript (24 May 1997).
1531 UNICTR, Akayesu judgement, §126.
organised by FAR members and Hutu Power political forces, the chamber tried to place it in its context and venture into an explanation of why it was committed. The genocide, it argued, was “fundamentally different from” but “probably facilitated” by the war, in the sense that the fighting against the RPF forces was used as a pretext for the propaganda inciting genocide against the Tutsi, by branding RPF fighters and Tutsi civilians together, through dissemination via the media of the idea that every Tutsi was allegedly an accomplice of the Inkotanyi. Very clearly, once the genocide got under way, the crime became one of the stakes in the conflict between the RPF and the RAF.\footnote{Ibidem, §128.}

\textit{Testimony beyond reasonable doubt}

So solely on the basis of witness testimony, the UNICTR was convinced ‘beyond reasonable doubt’ that genocide had taken place. One vital question to this determination was not resolved beyond ambiguity, but rather with a great deal of creativity. It concerned the meaning of Hutu and Tutsi identity concepts in respect to the wording of the Genocide Convention. Settling the issue whether they would empirically constitute protected groups (national, ethnic, racial or religious),\footnote{Ibidem, §127.} however, became essential to the heart of the case and very raison d’être of the tribunal: the charge of genocide against the Tutsi ethnic group.\footnote{These social categories were defined and operationalised by the chamber as follows: “Based on the Nottebohm decision rendered by the International Court of Justice (ICJ), the Chamber holds that a national group is defined as a collection of people who are perceived to share a legal bond based on common citizenship, coupled with reciprocity of rights and duties. [...] An ethnic group is generally defined as a group whose members share a common language or culture. [...] The conventional definition of racial group is based on the hereditary physical traits often identified with a geographical region, irrespective of linguistic, cultural, national or religious factors. [...] The religious group is one whose members share the same religion, denomination or mode of worship.” Ibidem, §512-515.} In extenso, it was important to have a clear marker in terms of crimes against humanity.\footnote{Wilson, Writing History, p. 170.} The judges had to venture into the question themselves, since the Prosecutor did not specifically state in the indictment against which group the genocide was committed\footnote{It appears that the Prosecutor missed the deadline for filing closing submissions and were, according to Judge Pillay, “not read.” See: Wilson, Writing History, p. 174.} nor did he file in time his closing brief to explain the matter in further detail.\footnote{The Prosecutor missed the deadline for filing closing submissions and were, according to Judge Pillay, “not read.” See: Wilson, Writing History, p. 174.} What was obviously clear was that the genocide was committed against the Tutsi group, but not on which basis. Again, Des Forges was instrumental in setting parameters. Throughout the trial and in the judgement, the question of race (which was the perpetrator’s view, grounded in the Republic’s founding narrative, of the Tutsi – stemming from Ethiopia) appeared not to have been on the docket at all,\footnote{Social anthropologist and tribunal observer Nigel Eltringham critiqued the ICTR’s ignorance of race as a determinant in the genocide. “The Tribunal failed to deal with how Tutsi were targeted: the perception of indelible, racial distinction. The Tribunal missed the opportunity to reveal the wholly ideational nature of the genocidal mentality.” See: Nigel Eltringham, Accounting for Horror: Post-Genocide Debates in Rwanda (London: Pluto, 2004), p. 30.} resulting in the exclusive focus on ethnicity.\footnote{According to Judge Pillay, “The definitions of race and ethnicity in Akayesu came from Rwandan witnesses, there was an accepted social structure for these things. In the Judgement, we cited the UN treaties and articles but we said that they didn’t fit the Rwandan situation. We had very little help so we relied on the evidence and views of the people of Rwanda.” Cited in: Ibidem, p. 175.} In leading the evidence, prosecutor Haile Mariam, through Des Forges, was in search for an empirical reality that would fit the Genocide Convention and to his mind it was ethnic: “Doctor, the groups that you have been talking about at that time, how could they be categorized, as economic groups, ethnic groups, social groups [...]?”\footnote{UNICTR, Akayesu Transcript (11 February).}
During her testimony, drawing on oral history she had collected, Des Forges narrated a history of a colonially distorted, racially inspired and politically operationalised ethno-genesis and animosity which crested, in the early 1990s through political manipulation into the large-scale violence. Her symposium on ethnicity is lengthy, typically in response to queries from the prosecutor and a decidedly focused bench, and carefully formulated. “Academic experts refer to ethnic groups meaning people who identify themselves as a unit and who signify that identification through their language and culture. In other words, people who speak the same language, worship the same God or gods, experience a common sense of a shared historical past could be qualified as an ethnic group. But, this is a term whose usage evolves and is evolving.” She continued that in Rwanda these groups “were in the process formation during the course of the 20th century.” The historian added that “social science is not exact.”

As I defined the idea of ethnic group yesterday, I spoke of two criteria: One being the administrative, which we have just discussed now; the other being the subjective definition, the sense of being Tutsi, the sense of being Hutu. While it's easy to assign a specific date to the beginning of an administrative practice, it is not easy to assign a date to a developing sense of group identity. No doubt it happened faster with some people than with others.

To a large extent, the UNICTR judges followed Des Forges. “One can hardly talk of ethnic groups as regards Hutu and Tutsi, given that they share the same language and culture.” Administratively, however, the colonizers, through state-issued identity cards, had divided Rwanda’s population “into three groups which they called ethnic groups.” Next to the obligation to carry identity cards, other objective group indicators existed in Rwanda. The Constitution and other laws in place in 1994, for instance, identified Rwandans by reference to ethnic groups. Moreover, customary rules existed in Rwanda governing the determination of ethnic group, which followed patrilineal lines of heredity. This administrative status quo led Rwandans themselves to have a sense that they belonged to one of the groups. The dichotomy had become embedded in Rwandan culture and the chamber remarked that witnesses who testified before the Chamber identified themselves by ethnic group, and generally knew the ethnic group to which their friends and neighbours belonged. Moreover, claimed the chamber without going into detail “the Tutsi were conceived of as an ethnic group by those who targeted them for killing.”

1542 Idem.
1543 Idem.
1544 Idem.
1545 Idem.
1546 Idem.
1547 UNICTR, *Akayesu Transcript* (12 February).
1549 Ibidem, §83.
1550 Ibidem, §170.
1551 Ibidem, §171.
difficult to make an ultimate determination and continued to quote Des Forges at length in their search for an answer:

As the expert witness, Alison Desforges, summarised: “The primary criterion for defining an ethnic group is the sense of belonging to that ethnic group. It is a sense, which can shift over time. In other words, the group, the definition of the group to which one feels allied may change over time. But, if you fix any given moment in time, and you say, how does this population divide itself, then you will see which ethnic groups are in existence in the minds of the participants at that time. The Rwandans currently, and for the last generation at least, have defined themselves in terms of these three ethnic groups. In addition, reality is interplay between the actual conditions and peoples’ subjective perception of those conditions. In Rwanda, the reality was shaped by the colonial experience, which imposed a categorisation, which was probably more fixed, and not completely appropriate to the scene. But, the Belgians did impose this classification in the early 1930's when they required the population to be registered according to ethnic group. The categorisation imposed at that time is what people of the current generation have grown up with. They have always thought in terms of these categories, even if they did not, in their daily lives have to take cognizance of that. This practice was continued after independence by the First Republic and the Second Republic in Rwanda to such an extent that this division into three ethnic groups became an absolute reality. 1553

Ambivalence prevailed, as well as contradictions. In determining crimes against humanity, the chamber considered that these were committed on “ethnic grounds”, implying that the Tutsi were an ethnic group. 1554 But in determining genocide, based on the evidence and available instruments discussed above, the magistrates were headed towards a conclusion that the Tutsi did not objectively meet any of the criteria of any of the four categories protected under the Genocide Convention. How to rhyme this conclusion with the mandate of the tribunal, to prosecute génocidaires? If one of the requirements was not met, the UNICTR’s legal finding would have been that genocide had not been committed in Rwanda. Cognizant of that dilemma and determined to forge ahead, the chamber threw out a lifeline and questioned “whether it would be impossible to punish the physical destruction of a group as such under the Genocide Convention, if the said group, although stable and membership is by birth, does not meet the definition of any one of the four groups expressly protected by the Genocide Convention.” 1555 In looking for the answer, the chamber revolved to some “isolated comments by a few delegations” to the preparatory works of the convention, 1556 in which it read “that the crime of genocide was allegedly perceived as targeting only "stable" groups, constituted in a permanent fashion and membership of which is determined by birth, with the exclusion of the more “mobile” groups which one joins through individual voluntary commitment, such as political and economic groups.” From there, they concluded that “a common criterion in the four types of groups protected by the Genocide Convention is that membership in such groups would seem to be normally not challengeable by its members, who belong to it automatically, by birth, in a continuous and often
In applying this reasoning to the parameters set and evidence elicited during the trial, the chamber could not conclusively prove that the Tutsi qualified as an ethnic group, yet permanent membership to the group was administratively conferred by the state and social customs. In any case,” found the chamber, “at the time of the alleged events, the Tutsi did indeed constitute a stable and permanent group and were identified as such by all.” In doing so, not only did the tribunal “vex” the Genocide Convention it also subscribed to the epistemological impasse to legally answer the sociological and anthropological questions as to the objective as well as subjective meanings of Hutu and Tutsi.

4.8 Cultivating the narrative: Kambanda’s ‘confession’

The Akayesu judgement was announced to be “historic” and “precedent-setting.” That may very well be the case in the realm of international criminal justice, in terms of writing history about (or understanding and interpreting) events Rwanda, however, the Akayesu judgement reads as more than a first, yet confident, draft by three judges than as a conclusive account. In their opinion, they reference solely to the evidence tendered by 41 witnesses, a handful UN reports and 155 impressionistic exhibits presented at trial, but somehow, it appears that they brought in knowledge or persuasion from other cases they were conducting. Only two weeks after the Judgement, Judge Keita wrote in his yearly report that “given the position occupied by Jean Kambanda at the time, his plea has implications beyond the issue of his own individual responsibility. In pleading guilty, the former Prime Minister not only acknowledged and confirmed that genocide did indeed occur in Rwanda in 1994 but also indicated that it was organized and planned at the highest levels, both civilian and military.” Bearing in mind that he – next to Judge Aspegren and Pillay – was presiding over both cases, an important question remains. How much did the chamber, in making contextual findings in Akayesu, had in mind the admissions Jean Kambanda had consented to make to the Prosecutor? At least, considering Kaita’s observations regarding Kambanda’s plea, they must have been already confident that genocide had taken place. But nowhere, do they explicitly mention this in Akayesu’s ruling, nor in other reasoned filings.

A week after the closing statements in the Akayesu trial, the interim government’s former Prime Minister had appeared before the same judges, to “consciously and voluntarily” plead guilty to all charges levelled against him, including conspiracy to commit genocide. Only a few
days before, Kambanda had penned his signature under a plea agreement with the Prosecutor in which he pledged to cooperate with the tribunal. Not only had he already provided investigators with between 60 and 90 hours of recorded and transcribed testimony and promised to testify, he consented to a very particular legally framed narrative of the genocide. It tells the story as follows. First, he acknowledged that there was a widespread and systematic attack against civilian Tutsi and moderate Hutu, on political, ethnic or racial grounds, which resulted in the death of hundreds of thousands of persons throughout Rwanda. The purpose of the mass killings of Tutsi was to exterminate them, evidenced by targeting women and children, young people and people alike and the fact that they were pursued in prefectures and commune offices, schools, churches and stadiums.

That apart, Kambanda acknowledged the existence of groups within military, militia, and political structures, which had planned the elimination of the Tutsi and Hutu political opponents. As Prime Minister at the time, he presided over meetings of the Cabinet Ministers (attended by Pauline Nyiramasuhuko, Eliezer Niyitegeka and Andre Ntagerura, among others) in which the massacres were “actively followed” or “promoted,” while reports by the préfets on the course of the massacres were discussed. He, his ministers and government forces were further involved in several local meetings where they called for civil vigilance and support for the FAR in the fight against the RPF and its "accomplices", understood to be the Tutsi and moderate Hutu. Later on, his government assumed the responsibility for the actions of the Interahamwe. This militia was trained before the genocide “with the intent to use them in the massacres,” while the government distributed arms and ammunition to them at roadblocks with the knowledge that these roadblocks were used to identify the Tutsi and moderate Hutu, to separate them and to eliminate them. As part of “the plan to mobilize and incite the population to commit massacres of the civilian Tutsi population,” media (RTL-M) were used, including by Kambanda himself. Besides using media, Kambanda and his Ministers, between April and July, occasionally visited several prefectures, to publicly incite and encourage the population to commit and amplify massacres against Tutsi and moderate Hutu. Also, he was not the only official who distributed weaponry and “was an eyewitness and […] had knowledge of the mass killings of the Tutsi.” He was informed about it by other Ministers, Préfets, Bourgmestres, Government civil servants and military personnel who themselves “ordered, instigated, aided and

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156 Journalist Linda Melvern, who also served as a consultant to the ICTR’s OTP in the Bagosora case, claims it is 60 hours without providing a clear reference, while legal scholar Nancy Combs cites 90 hours, referring to the OTP’s sentencing brief (which the author of this dissertation was unable to obtain for cross-checking). Nancy Amosur Combs, ‘Copping A Plea To Genocide: The Plea Bargaining of International Crimes’, University of Pennsylvania Law Review, Vol. 15, No. 1 (November 2002), pp. 1-158; 5; Linda Melvern, Conspiracy to Murder: The Rwandan Genocide (London & New York; Verso, 2004), p. 2.


1568 UNICTR, Kambanda Plea Agreement, §30.


1570 Ibidem, §25.


1573 Ibidem, §29.

1574 Ibidem, §30-31.

1575 Ibidem, §36.

1576 Ibidem, §30-31.
actively engaged in actions wilfully intended to massacre and exterminate the Tutsi and moderate Hutu.\footnote{1577}

On the basis of these admissions, during the hearing of 1 May 1998, after five minutes of deliberations, the bench declared Kambanda guilty of the six counts\footnote{1578} the prosecutor had drafted and pressed against him.\footnote{1579} Only four months later – a time they also spent writing Akayesu’s judgement – they ‘officially’ pronounced the verdict, containing, for the record, a brief summary of the ‘facts’ Kambanda had admitted to.\footnote{1580} Interestingly, in Kambanda’s case there were no hearings and no presentations of any documentary or testimonial evidence at all. That was the modus operandi at the UN tribunals: admitting guilt means that the right to be presumed innocent and the prosecutor’s burden to prove the charges are waived. Therefore, the time frame between his signing of the plea agreement and the chamber finding him guilty only bridged 2 days. As a consequence, the chamber did not make any findings of its own but simply copy-pasted parts of Kambanda’s confession into its judgement. But it did not explain any reasons for the genocide and the government’s responsibility. Kambanda never discussed his plea nor explained himself in court. “I have nothing further to add,” he told the judges when Keita solicited his views a day before sentencing.\footnote{1581} Seemingly, it had appeared to Kambanda he did not have to address the court since he had written them a letter. During the plea negotiations and a day prior to the pleading hearing in May, Bernard Muna, the deputy prosecutor in Arusha, had advised Kambanda to write a public account explaining himself. Kambanda had eagerly grasped this opportunity and produced a 35-paged political manifesto (“The Truth of the Rwandan Tragedy”).\footnote{1582} For the prosecution, however, the treatise was unacceptable since he claimed no criminal responsibility, only political responsibility. On appearance, the document would make the confessions not look unequivocal. Therefore, Muna reportedly promised to forward the document to the Chamber for consideration, but he never did.\footnote{1583}

As a consequence of this horse-trading, the court endorsed as official the narrative of the prosecutor. Whereas in Akayesu the judges were eager to unravel the genocide and learn about Rwanda, in Kambanda they emerged more zealous to secure a conviction than establish facts. One of the results was that two days after a reasoned overview of context and in-depth analysis of the question of ethnicity in Akayesu, they found Kambanda “responsible for the killing of and the causing of serious bodily or mental harm to members of the Tutsi population with intent to destroy, in whole

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\footnote{1577} UNICTR, Kambanda Plea Agreement, §32-40.
\footnote{1578} (1) Genocide; (2) Conspiracy to commit genocide (with others, including Ministers of his Government, such as Pauline Nyiramasuhuko, Andre Ntagerura, Eliezer Niyitwegeka and Edouard Karemera); (3) Direct and Public Incitement to Commit Genocide; (4) Complicity in Genocide; (5) Murder as a Crime Against Humanity; and (6) Extermination as a Crime Against Humanity.
\footnote{1579} UNICTR, Kambanda - Audio Recording of 01/05/98 - AM (ICTR-97-23-00460; 1 May 1998), from: 00:46:10.
\footnote{1580} UNICTR, The Prosecutor Versus Jean Kambanda: Judgement and Sentence (ICTR 97-23-S; 4 September 1998).
\footnote{1581} UNICTR, Kambanda - Audio Recording of 03/09/98 - AM (Rec. No. ICTR-97-23-00466; 3 September 1998). However, a day later, during sentencing, the judges lamented the fact Kambanda “offered no explanation for his voluntary participation in the genocide; nor has he expressed contrition, regret or sympathy for the victims of Rwanda, even when given the possibility to do so by the Chamber, during the hearing or 3 September 1998. See: UNICTR, Kambanda: Judgement, §51.
\footnote{1582} Jean Kambanda, Le Manifeste De La Vérité Sur “l’Apocalypse” Au Rwanda en 1994 (Dodoma, 30 April 1998).
\footnote{1583} Muna promised Kambanda that his written statement would be sent confidentially to the judges only. Two years later, the prosecution office discreetly admitted that the document was never forwarded. Cruvellier, Court of Remorse, pp. 44-45.
or in part, an ethnic or racial group, as such, and has thereby committed genocide […]”

There was no mention at all of the careful considerations they had in proving genocide in Akayesu. Despite this material emptiness as a result of the absence of factual examination in the ‘standard operation procedure’ in guilty pleas, Kambanda’s guilty plea was conceived as a trophy, featured in the OTP’s strategy in cases against other government officials and it is still presented as one of its milestone.

With his confession and pages of interviews in the pocket and his promise to assist the prosecution in the trials against his former henchmen (and woman) the tasks ahead seemed winnable for the OTP. However, from an official milestone he became practical millstone. Days after receiving a life sentence, Kambanda felt betrayed and disgruntledly rescinded all his acknowledgments and appealed to the higher chamber that his confessions were made under duress of two investigators and was asking to give him an actual trial. His appeals brief, allegedly, spelled out his true thoughts about Rwandan politics in 1994 and the crimes he had admitted to. He presented himself a scapegoat of a tragic situation over which [he had] absolutely no control, as such. “No control,” was the red thread in his appeals case and the narrative of his outright denial of the specific charges he had confessed to. When he lost his appeal, he cut of his contact with the OTP and was sent to prison in Mali. Only in 2002, Carla Del Ponte sought his help again, brought him to The Hague but a year of negotiations there never led to anything. He only came back to Arusha once, not on behalf of the OTP, but to testify for three days for the defence of Colonel Bagosora. Ever since, he maintains that the UNICTR tricked him to outline its narrative on the genocide.

4.9 Contrasting and ironing out the narrative: Kibuye

Unlike the leaders of Nazi Germany, who meticulously documented their acts during World War II, the organisers and perpetrators of the massacres that occurred in Rwanda in 1994 left little documentation behind. Thus, both Parties relied predominantly upon the testimony of witnesses brought before this Chamber in order to establish their respective cases. A majority of the Prosecution witnesses were Tutsis who had survived attacks in Kibuye Prefecture (survivor witnesses), in which both accused allegedly participated.

When Judges Kama, Pillay and Aspegren were breaking their heads on the cases of the wolf in sheep’s clothing Akayesu, the opportunistic PM Kambanda and from March 1997 the former

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1584 UNICTR, Kambanda Judgement.
1586 The document is not publicly available in the ICTR’s judicial archive.
1587 Cruvellier, Court of Remorse, pp. 46-47.
1590 Cruvellier, Court of Remorse, pp. 46-48.
1591 UNICTR, Bagosora, Kahiligiywa & Nsengiyumva Transcript (11 July 2006); UNICTR, Bagosora, Kahiligiywa, Ntabakazi & Nsengiyumva Transcript (12 July 2006); UNICTR, Bagosora, Kahiligiywa, Ntabakazi & Nsengiyumva Transcript (13 July 2006).
Interahamwe leader Georges Rutaganda,1594 Trial Chamber II1595 had also commenced its work. On its docket were the Kibuye massacres,1596 the most thoroughly investigated and adjudicated crime scenes at the tribunal.1597 In the dock, from 11 April 1997, were Kibuye’s préfet - and former judge and medical doctor - Clément Kayishema and the businessman Obed Ruzindana.1598 In this first joint-trial, fifty-one prosecution witnesses, most of whom were Tutsi survivors from the crime scenes, had presented a “horrific account” of the annihilation of Tutsi in the Western region and the role the accused had played in it from mid-April 1994.1599 Both men were found guilty of genocide, yet acquitted of crimes against humanity and war crimes, in the tribunal’s fourth judgement.1600 What transpires from this case is that different judges – congregated in different Trial Chambers faced with different court room dynamics – who are dealing with different accused, prosecutors and witnesses, employ different methodologies and perspectives, pursue different extra-legal ambitions and consequently write different judgements, including findings of historical significance. In itself, that is not surprising. International judges are human beings as well, apply their standards, knowledge and national legal traditions and learn along the way they deal with more similar cases. For the shaping of the historical record established by ‘the’ tribunal, though, it is crucial not only to recognise this fact, but also to underscore it as a factor that is detrimental to the ascertainment of judicial truth about mass violence in Rwanda throughout the life span of the UNICTR. In the end, particularly in the beginning, the independent trial chambers – and appeal chambers for that matter - themselves were in continuous dialogue about the interpretation of events in Rwanda as well as the narrative framework in which they presented their findings.

First of all, in Kayishema, the judges spelled out that they had no extra-legal ambition in terms of history writing on the genocide in larger terms as “it is impossible to simplify all the ingredients that serve as a basis for killings on such a scale.”1601 Although it found it “necessary to address the historical context within which the events unfolded in Rwanda in 1994, in order to understand fully the events alleged in the Indictment and the evidence before the Trial Chamber […] The Trial Chamber is of the opinion that an attempt to explain the causal links between the history of Rwanda and the suffering endured by this nation in 1994 is not appropriate in this forum and may be

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1595 Composed of Judge William Sekule (Tanzania), Yakov A. Ostrovsky (Russia) and Tafazzal Hossain Khan (UK).
1596 Notably: at the Catholic Church and Home St. Jean complex, in Kibuye town, Gitase commune, on a piece of land which is surrounded on three sides by Lake Kivu; at the Stadium, in Kibuye town; the Church of Mubuga, Gishyita Commune in the south of Kibuye Prefecture; and Bisesero area in the Gishyita and Gisovu communes. UNICTR, The Prosecutor of The Tribunal against Clément Kayishema & Obed Ruzindana: First Amended Indictment (ICTR-95-1-1 (sic); 11 April 1997).
1597 Kibuye was the first prefecture were a contingent of ICTR investigators landed in May 1995 to collect survivor testimonies. Between 1997 and 2005 ten Rwandans were tried for the genocide in Kibuye, including two government ministers, one préfet, three Bourgmestres, one pastor, one doctor, one factory manager, one businessman, two town councillors and one restaurant owner. Cruvellier, Court of Remorse, p. 81.
1598 See biographies, based on the testimony of Kayishema’s and Ruzindana’s wife: UNICTR, Kayishema & Ruzindana Judgement, §6-12.
1599 The Chamber uses this phraseology throughout its judgement. Ibidem, §75, 470, 355, 586.
1600 The third judgement, also rendered by Trial Chamber I, concerned former Interahamwe leader Omar Serushago, who had been a substantial OTP informant since 1997 and had pleaded guilty to four (out of five) counts of genocide and crimes against humanity on 14 December 1998. His information, even before he voluntarily came to Arusha, had led to the arrest of several high-level suspects in Kenya in 1997. During the pre-sentencing hearing, Serushago expressed his remorse at length and openly, asking for forgiveness from the victims of his crimes and the entire people of Rwanda. See: UNICTR, TCI, The Prosecutor of The Tribunal Against Omar Serushago: Transcripts (ICTR-98-39-I; Arusha, 14 December 1998); UNICTR, TCI, The Prosecutor vs. Omar Serushago: Sentence (ICTR 98-39-S; 5 February 1999); Cruvellier, Court of Remorse, pp. 55-56.
1601 UNICTR, Kayishema & Ruzindana Judgement, §31-32.
futile. This stance, in contrast to Akayesu, may have been the offspring of the a-historical indictment and charges they had to judge. The prosecutors, at trial, had not embarked on an historical narrative to the extent their colleagues had done in the Akayesu proceedings. Subsequently, they had called different witnesses to testify to contextual elements. For instance, historian Des Forges was not called as an expert. In her place came Professor André Guichauoa, “Rwandan Scholar” Francois Nsanzuwera. Michel Guibal, a French jurist, testified on behalf of the defence. With some professional, academic and personal experience in Rwanda and Burundi – he was in Kigali in the first few days after Habyarimana’s plane was attacked - the sociologist Guichauoa was the most influential contextual expert. Moreover, the French scholar had been working closely with the OTP since April 1996 and had prepared two substantial reports that were tendered into evidence by the prosecutor. In critical parts, his expertise was heavily relied on in making findings on, for instance, ethnicity, but also on the political make-up of Rwanda during the First and Second Republics. In conclusion of the concise section on historical context, the chamber found that “The ethnic tensions were used by those in power in 1994 to carry out their plans to avoid power sharing. The responsible parties ignored the Arusha Accords and used the militias to carry out their genocidal plan and to incite the rest of the Hutu population into believing that all Tutsis and other persons who may not have supported the war against the RPF were in fact RPF supporters. It is against this backdrop that of thousands of people were slaughtered and mutilated in just three short months.”

On that premise, the chamber, like its equivalent in Akayesu, delved into the question if these slaughters constituted genocide. Yet, in contrast to Akayesu, this panel of judges treated the inquiry differently: “Considering the plethora of official reports, including United Nations documents, which confirm that genocide occurred in Rwanda and the absence of any Defence argument to the contrary, one could consider this point, settled.” In contrast to their colleagues, this chamber did not so much rely on contextual evidence as spelled out by an historian but on the official documentation and the fact that the defence in this case did not deny the charge. Legally, the argument would have held, but the chamber quickly added that it still felt “obliged to make a finding of fact on this issue.” Without referencing to evidence or testimony from the other trials, notably Akayesu, the key witness

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1602 UNICTR, Kayishema & Ruzindana Judgement, §31-32.
1605 Email correspondence with André Guichauoa, 17 October 2012; UNICTR, Office of The Prosecutor, Letter from Richard Karegyesa (Chief of Prosecutions) to Pro. André Guichauoa: Re: Request OTP ICTR Work History (24 September 2012).
1607 Ibidem, §54.
1608 Ibidem, §273.
1609 Ibidem, §34-45.
in this case, on whose “convincing” testimony the chamber relied, was the Ivorian Dr. René Degni-Segui. As the former UN special rapporteur on Rwanda, he had investigated and produced seven reports for the Security Council. Summarising from those writings, Degni-Segui testified that “no one has found any official written document outlining the genocidal plan, there exist sufficient indicators that a plan was in place.” These pointers included deaths lists, extremist propaganda, civil defence programme and the “screening” of civilians at roadblocks. On that outlined basis, the chamber recounts, in a poor prose with crucial spelling mistakes that equals the language of a political scientist rather than a professional judge events before and during the genocide. In its narrative that includes many uncorroborated facts and misquotations, however, are hidden many explanations for the logic of genocide: “The state of fear that ensued, caused by the rumours about the intentions of the RPF to exterminate the Hutus and the terror and insecurity that prevailed in Rwanda, served as a pretext for the execution of the genocidal plan and consequently the retention of power by the extremist Hutus.” They also show themselves not to be passionate: “Unfortunately, the civil defence programme was used in 1994 to distribute weapons quickly and ultimately transformed into a mechanism to exterminate Tutsis.” In between the pen strokes, they already answered the question: “The perpetrators of the genocide often employed roadblocks to identify their victims.” Then after the diminutive exposé, the Trial Chamber finds:

[…] that the massacres of the Tutsi population indeed were “meticulously planned and systematically co-ordinated” by top level Hutu extremists in the former Rwandan government at the time in question. The widespread nature of the attacks and the sheer number of those who perished within just three months is compelling evidence of this fact. This plan could not have been implemented without the participation of the militias and the Hutu population who had been convinced by these extremists that the Tutsi population, in fact, was the enemy and responsible for the downing of President Habyarimana’s airplane. The cruelty with which the attackers killed, wounded and disfigured their victims indicates that the propaganda unleashed on Rwanda had the desired effect, namely the destruction of the Tutsi population. The involvement of the peasant population in the massacres was facilitated also by their misplaced belief and confidence in their leadership, and an understanding that the encouragement of the authorities to guaranteed them impunity to kill the Tutsis and loot their property. Final reports produced estimated the number of the victims of the genocide at approximately 800,000 to one million, nearly one-seventh of Rwanda’s total population. These facts combined prove the special intent requirement element of genocide. Moreover, there is ample evidence to find that the overwhelming majority of the victims of this tragedy were Tutsi civilians which leaves this Chamber satisfied that the targets of the massacres were “members of a group,” in this case an ethnic group. In light of this evidence, the Trial Chamber finds a plan of genocide existed and perpetrators executed this plan in Rwanda between April and June 1994.

1612 UNICTR, Kayishema & Ruzindana Judgement, §265.
1613 “The time was ripe in early 1994 for certain so-called Hutu extremists in power in Rwanda who opposed the Arusha Accords, to avoid having to share decision-making positions with opposition groups.” And for example: Bismungu instead of Bizumungu etcetera.
1614 For example, the chamber cites from a “UNICEF report which refers to an RTLM broadcast stating that “for babies who were still suckling . . . they [the assailants] had to cut the legs so that they would not be able to walk.” Elsewhere, it paraphrases a witness’ recollection of the content of Leon Mugesera’s speech, which does not correspond with the original speech.
1615 UNICTR, Kayishema & Ruzindana Judgement, §277.
1616 Ibidem, §284.
1617 Ibidem, §287.
1618 Ibidem, §289-291.
In all, Trial Chamber II, found that genocide had been committed, that it had been a national plan and that it targeted Tutsi as an ethnic group. In the rest of their judgement, they embarked on writing a detailed history of how the genocide had unfolded in Kibuye. In fact, the chamber embarked on writing down the micro historical facts, instead of answering larger questions on the unfolding and reasons for the genocide as a whole. Stretching over sixty pages (almost 25 percent of the judgement), they go on describing what happened in Kibuye – “the Chamber finds that events in Kibuye unfolded as follows.”

Throughout the prefecture, they found, that the “plan of genocide implemented by public officials.” In their narrative examination, the chamber cites heavily from testimonies from survivors and victims, which were the first to be recorded by UNICTR investigators. Like in Akayesu, testimonial proof was the prime basis for establishing individual responsibility, but in terms of more general fact-finding about the genocide the Kayishema and Ruzindana trial also received material evidence, including data from exhumations. Scores of maps, aerial images and photographic slides from the massacre sites were tendered in as exhibits by the prosecutor. But the judges also benefitted from the detailed reports by a specialised forensic anthropologist and a pathologist, which both outlined and categorised the findings of the exhumations and analysis their team of forensic investigators carried out for the tribunal. Both experts had examined the dead bodies of hundreds of people and described how most of them had been killed by force trauma. In several mass graves they had examined, they found identity cards on the victims indicating that they were all Tutsi. At trial, the anthropologist and UNICTR’s senior forensic advisor, Dr. William Haglund, testified to the killings methods and recounted that when he was investigating sites in Bisesero that “[…] if one looks through field glasses or a magnifying instrument across […] this hillside there were many white spots – it looks almost like strange mushrooms growing here and they represented skeletons, the heads of human bodies that were littered on this landscape […]” and “in a brief walk around I observed a minimum of 40 to 50 individual skeletons lying about on the hill. These were skeletons on the surface. They represented men, women, children and adults. In no other UNICTR trial was such tangible material gathered, presented and accepted and it represents the sole forensic evidence on
massacre sites in Rwanda presented at the Tribunal. On that basis, but also because of larger-scale early investigations in the region, Kibuye did not only become the most reliable and unlimited source of cases for the UN tribunal to investigate, prosecute and judge, it also remains the best recorded crimes scene. Taba, Akayesu’s commune, remained an isolated area and crime scene in the Tribunal’s records.

These first trials set out the evidentiary and narrative path the tribunal would walk, although they remained problematic and ambiguous. First of all, the question if the Tutsi were an ethnic group remained unresolved, and second, the premise that the genocide was planned, or conspired for that matter, had been assumed but not put to a serious evidentiary test in the trials. In terms of the latter, the persisting general account about the genocide at that time – as narrated by experts like Des Forges, ‘acknowledged’ by Kambanda and uncontested by the early defendants – had not yet been charged and litigated. These crucial elements remained contentious at least until the UNICTR’s flagship trials against the ‘Media-group’ and Bagosora, the alleged mastermind of the killings. Around the second millennium, the prevailing understanding of Rwanda, the definitive account on events between 1990 and 1994 and the logic behind the genocide at the UNICTR, apart from many lawyers at the defence side, was capsulated in the phonebook sized book Leave None to Tell the Story. Edited by the court’s most trusted and beloved expert witness Des Forges, the 1999 report, of which piles of copies in both English and French were available in the UNICTR’s library, was cherished as the ‘Bible’ and prescribed as obligatory readings for new-comers in Arusha.

4.10 A Machiavellian Plan?

At the outset, the Chamber emphasises that the question under consideration is not whether there was a plan or conspiracy to commit genocide in Rwanda. Rather, it is whether the Prosecution has proven beyond reasonable doubt based on the evidence in this case that the four Accused committed the crime of conspiracy.

In 2008, fifteen years after the erection of the tribunal, in just thirty-five minutes, Erik Møse, in his characteristically composed and vigilant tenor, often revealing his Norwegian inflection, read out the summary of the UNICTR’s most-awaited trial decision:

The judgement in this case, often called the Military I trial, is the result of several years of proceedings. Many of us in the courtroom today have been working with each other for most

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1626 An exhumation of 27 remains was conducted in a garage in Kigali between 30 May and 16 June 1996. See: UNICTR, Prosecutor versus Rutaganda. Exhibit 254 A: Forensic Investigations at the Amgar Garage and Nearby Vicinity, 30 May 1996 to 17 June 1996 (ICTR-96-3-T; 1 July 1997). The report, however, was not admitted into evidence since the Prosecutor failed to show a direct link between its findings and his specific allegations. See: UNICTR, TC I, The Prosecutor Versus Georges Anderson Niderbrunze Rutaganda: Judgement and Sentence (ICTR-96-3-T; 6 December 1999), §258. Besides Kibuye and the Kigali garage, no other exhumations were carried in Rwanda on the order of the ICTR.

1627 Based on research by an international team of historians, political scientists and lawyers including Des Forges, Timothy Longman, Michele Wagner, Kirsti Lattu, Eric Gillet, Catherine Choquet, Trich Huddleston and Jemera Rone from early 1995 under the organisational umbrella of HRW and FIDH. The book, the authors stress, was “not meant to establish "judicial truth" as to the guilt or innocence of any person, which is the responsibility of legally established national and international tribunals.” But, “indeed,” they published “the results of our research in part to encourage public support for the efforts of judicial authorities responsible for finding and judging those guilty of genocide.” Des Forges, Leave None, pp 28-31.

of its 409 trial days. […] The amount of evidence in this case is nearly eight times the size of an average single-accused case heard by the Tribunal.1629

For many, the several hundred pages of judgement were iconoclastic. Møse and his two colleagues did not reach the popularly anticipated conclusion and their ruling, seemingly, contravened the dominant plot of the genocide. Some profoundly disillusioned sighs resonated through the public gallery in Arusha.1630 A heavy-loaded trial - implicating four Rwanda’s prime defendants - which lasted 409 days and had examined the most complexly articulated charges, ended with a loss for the prosecution. Its flagship accusation, that the genocide was conspired1631 at the highest national levels, including the genocide alleged mastermind Bagosora, from late 1990 remained unsubstantiated ‘beyond any reasonable doubt.’1632 After considering all trial evidence - 242 viva voce witnesses1633 and nearly 1,600 exhibits - the chamber’s finding on conspiracy was candid: “[…] a firm foundation cannot be constructed from fractured bricks.”1634 Thus, the most anticipated judgement regarding the mass killings in Rwanda was in deep contrast with the official historiography of the genocide as conceived by the early NGO reports and further progressed by the victorious RPF government.

It did not sojourn there, however, and the decision itself remained free of revisionism.1635 Conscious of the political, social and historiographical impact their judgement might have, the judges expounded their position towards the extra-legal powers third parties ascribe to them, including authenticating broader matters of historical truth. First, and foremost for the public record, they stressed their precise purpose and underlined that their task is fundamentally “narrowed by exacting standards of proof and procedure, the specific evidence on the record before it and its primary focus on the actions of the four Accused in this trial.”1636 Then, secondly, they emphasized that even in a trial of this magnitude, “the process of a criminal trial cannot depict the entire picture of what

1630 Author’s observation, Arusha, 18 December 2008.
1631 Conspiracy to commit genocide was defined as “an agreement between two or more persons to commit the crime of genocide.” The Trial Chamber held that “the agreement can be proven by establishing the existence of planning meetings for the genocide, but it can also be inferred, based on circumstantial evidence. The concerted or coordinated action of a group of individuals can constitute evidence of an agreement. The qualifiers “concerted or coordinated” are important: it is not sufficient to simply show similarity of conduct. In certain cases, the existence of a conspiracy to commit genocide between individuals controlling institutions could be inferred from the interaction between these institutions. When based on circumstantial evidence, the finding of a conspiracy must be the only reasonable inference based on the totality of the evidence. UNICTR, Bagosora, Kabiligi, Ntabakaze & Nsengiyumva Judgement, pp. 2087-2088.
1632 At the time of the judgement, in December 2008, the Tribunal’s case law had addressed the issue of conspiracy in eight cases: Kagijijwe, Kambanda, Musenzi, Nahimana et al., Niyitegeka, Ntacenura et al., Nkuriyumana and Seromba. A conspiracy was found to have existed by the Trial Chambers in those cases only in three of them: Kambanda, Nahimana et al. and Niyitegeka. Prime Minister Jean Kambanda pleaded guilty to conspiring with other ministers and officials in his government to commit genocide after 8 April 1994. The conspiracy conviction in Niyitegeka’s trial concerned a specific attack in the Bisesero region in June 1994 and was based on his participation and statements in several meetings that took place around the same time. In Nahimana et al., the Trial Chamber convicted the three Accused “for consciously interacting with each other, using the institutions they controlled [Kangura, RTLM and the CDR party] to promote a joint agenda, which was the targeting of the Tutsi population for destruction.” The Appeals Chamber, however, reversed the finding in Nahimana et al. because, while the factual basis for the conviction was consistent with a joint agenda to commit genocide, it was not the only reasonable conclusion from the evidence. See UNICTR, Appeals Chamber, Juvénal Kagijijwe (Appellant) v. The Prosecutor (Respondent): Judgment (ICTR-98-44A-A; 23 May 2005); UNICTR, Appeals Chamber, Alifried Musenzi (Appellant) v. The Prosecutor (Respondent): Judgment (ICTR-96-13-A; 16 November 2001); UNICTR, Appeals Chamber, Elizer Niyitegeka (Appellant) v. The Prosecutor (Respondent): Judgment (ICTR-96-14-A; 5 July 2004); UNICTR, Appeals Chamber, THE PROSECUTOR (Appellant and Respondent) v. ANDRÉ NTAIGERUZA (Respondent), EMMANUEL BAGAMBIKI (Respondent) SAMUEL IMANISHIMWE (Appellant and Respondent): Judgment (ICTR-99-A-6-A; 7 July 2006); UNICTR, Appeals Chamber, The Prosecutor v. ELIZAPHAN NTAKIRUTIMA AND GERARD NTAKIRUTIMA: Judgment (Cases Nos. ICR-96-10-A and ICR-96-17-A; 13 December 2004); UNICTR, Appeals Chamber, The Prosecutor v. Athanase Seromba: Judgement (ICTR-2001-66-A; 12 March 2008). Also in 2011, in the Government II case, the ICTR convicted Justin Mugenzi and Prosper Mugiraneza of conspiracy to commit genocide for their participation in the decision to remove Butare’s Tutsi Prefect, Jean-Baptiste Habiyakami. After 2008, Callixte Nzarabimana, was convicted of conspiracy to commit genocide based on two agreements to commit genocide on 18 April 1994 in Murambi, in Gitarama prefecture.
1633 Eighty-two for the Prosecution and 160 for the Defence. The Defence teams have challenged the credibility of the Prosecution’s evidence. In particular, Bagosora and Kabiligi have contested that they had actual authority over members of the Rwandan military, and Nsengiyumva and Ntabakaze have disputed that soldiers under their command committed criminal acts. For some of the events the Accused have presented the defence of alibi, most notably Kabiligi. […]
1634 UNICTR, Bagosora, Kabiligi, Ntabakaze & Nsengiyumva Judgement, p. 2112.
1636 UNICTR, Bagosora, Kabiligi, Ntabakaze & Nsengiyumva Transcript (18 December 2008), p. 3.
happened in Rwanda.” Third, they acknowledged, their verdict may not present to final finding. Beyond this actual case that was before them, “other or newly discovered information, subsequent trials or history may demonstrate a conspiracy involving the Accused prior to 6 April to commit genocide.” In other words, the Trial Chamber, at that moment in time, knowing what it knew and reviewing the evidence presented to them, could not confidently and legally substantiate the most pressing issue at the tribunal, although they show some tendency towards it:

The Chamber certainly accepts that there are indications which may be construed as evidence of a plan to commit genocide, in particular when viewed in light of the subsequent targeted and speedy killings immediately after the shooting down of the President's plane. However, the evidence is also consistent with preparations for a political or military power struggle, and measures adopted in the context of an on-going war with the RPF, measures that were used for other purposes from 6 April 1994.

Between the lines, and at times explicitly, the chamber condemned the prosecution for its failure to prove beyond a reasonable doubt that the only inference from all its evidence was that the kingpins conspired amongst themselves or with others to commit genocide before it unfolded from 7 April 1994. And indeed, the prosecution, which brings specific charges and carries the subsequent burden of proof, in many incidents, did not prove its case. In that sense, the Judgement is not only a limited verdict in terms of factual findings, it also reads as an indictment to the prosecutor: “[...] the judgement amounts to several hundred pages. [...] Only the key findings can be highlighted here. [...] It contains many incidents where the Prosecution did not prove its case.”

Military I.

As the Tribunal had a distressed belated and even corrupted start, its work had already been fundamentally tarnished and it had virtually lost all its credibility to deliver prompt, quality and fair justice, let alone unearth the truth about what happened in Rwanda. Interest, like at most tribunals, had waned quickly after the initial media flurry on the first trials and judgements, both in Rwanda as well internationally, where criticism swelled. Fully aware that the tribunal could only function with its cooperation, Rwanda’s government was the most hostile, manipulative and powerful decrier, while international rights organisations lamented its one-sidedness. With a reputation of being a sluggish, exorbitant and a politically dependent institution, quick and popular success was needed, alongside structural improvements. With a more balanced interest towards Rwanda than her predecessor Arbour who preferred working in the Balkans, the robust Carla Del Ponte pushed forward. In an effort to pace up the large backlog of trial proceedings - some suspects had already spent several years in the UN prison without having their case heard by a judge – the Swiss Prosecutor clustered the senior suspects

1637 UNICTR, Bagosora, Kabiligi, Ntabakuze & Nsengiyumva Judgement, §2112.
1638 UNICTR, Bagosora, Kabiligi, Ntabakuze & Nsengiyumva Transcript (18 December 2008), p. 5.
1639 Ibidem, p. 2.
in thematic and regional groups, forming six bulky trials: Media, Government I, Government II, Military I, Military II and Butare. While the media trial, trying the ideologues running Kangura and RTLM, would be the tribunal’s most provocatively received but popular trial, Military I would be most important, like Milošević at the UNICTY, which had started only shortly before.

On trial were Colonel Théoneste Bagosora, the directeur de cabinet of the Ministry of Defence, General Gratien Kabiligi, the head of the operations bureau (G-3) of the army general staff, Major Aloys Ntabakuze, the commander of the elite Para Commando Battalion, and Colonel Anatole Nsengiyumva, the commander of the Gisenyi operational sector. All men were senior military officers in the Rwandan Armed Forces (FAR). Bagosora was the alleged kingpin in the genocide conspiracy before 6 April, or as some noted the UNICTR suspect by default, and the person who enabled the installation of the regime under which guise the genocide was carried out. Broadly speaking and based on a variety of circumstantial pieces of evidence highlighting links in chain that would prove long term planning, the prosecution had alleged that the foursome had conspired amongst themselves and with others from late 1990, or later, through 7 April 1994 to exterminate the Tutsi population. On the other side, at the defence desks, the counsels for the military men disputed that there was a conspiracy, or even genocide for that matter, arguing that the prosecution lacked credible evidence and drew inferences from unproven facts. A main argument they advanced, amongst several alternative explanations of the events in 1994, was that the RPF shot down Habyarimana’s plane, which in its turn triggered spontaneous killings. Some of these arguments, wrote the judges, “may provide a fuller picture of the events in Rwanda in 1994, [but] they do not raise any doubt about the Chamber’s overall characterisation of the events as genocide, or the key findings which form the basis of the judgement.” Thus, although the conspiracy charge was not met with sufficient evidence under the tribunal’s standards and temporal mandate, the bench was not satisfied with the defence’s arguments as to other serious charges. Bagosora, Ntabakuze and Nsengiyumva were sentenced to life imprisonment for genocide, crimes against humanity and war crimes. Only Kabiligi was acquitted of all charges. Irrevocably, the judges explained that:

The evidence of this trial has reiterated that genocide, crimes against humanity and war crimes were perpetrated in Rwanda after 6 April 1994. […] These crimes were directed principally against Tutsi civilians as well as Hutus who were seen as sympathetic to the Tutsi-led Rwandan Patriotic Front (RPF) or as opponents of the ruling regime. The perpetrators included soldiers, gendarmes, civilian and party officials, Interahamwe and other militia, as well as ordinary citizens. Nevertheless, as the evidence in this case and the history of the Tribunal show, not every member of these groups committed crimes.\[1642\]

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"Tropical Nazism?"

Clearly, the tribunal’s finding shows that the UNICTR had matured by 2008 and was very capable of making more nuanced and further advanced findings about the Rwandan genocide itself, for example by highlighting that “also other persons than Tutsis and moderate Hutus suffered in 1994” and not every Hutu in Rwanda in 1994 was a perpetrator. Concurrently, the Military I case also highlights that while experienced chambers became more knowledgeable about Rwanda and the genocide, it grew less confident, however, on its causes, planning and more broadly on the epistemology and interpretations of its contexts and facts. However, in this case, Bagosora was definitively listed among the senior Rwandans responsible for crimes, including genocide, in the immediate hours and days after Habyarimana’s death. Because he was the highest authority in the Rwandan Ministry of Defence with authority over the Rwandan military between 6 and 9 April, for a period of 72 hours, he was considered responsible for several killings during those days. Amongst the victims, on 7 April, were 10 Belgian UN soldiers, Prime Minister Agathe Uwilingiyimana, Constitutional Court President Joseph Kavaruganda, as well as opposition party officials and government ministers Frédéric Nzamurambaho, Landoald Ndasingwa and Faustin Rucogoza. Next to these identified prominent individuals, Bagosora was also found to bear responsibility for organised killings perpetrated by soldiers and militiamen at a number of sites throughout Kigali and Gisenyi.

It seemed that before Christmas 2008, the court, also in other Trial Chambers, had come to realise its inability to answer the vital question to the Rwandan genocide they had adjudicated for over a decade - if, how, when and by whom was a plan to commit genocide contrived before Habyarimana was killed? In a separate trial that reached a judgement at the same day, another infamous suspected ‘conspirer’, Protais Zigiranyirazo, was also acquitted of conspiracy. In his trial, the widely nicknamed “Monsieur Z” was convicted of committing genocide and crimes against humanity at Kesho Hill in the Gisenyi prefecture in April 1994. However, the chamber was not satisfied that Zigiranyirazo, who was Habyarimana’s brother-in-law and alleged Akazu member, was involved in planning the genocide with others, including his sister Agathe Kanziga and Nsengiyumva, prior to April 1994. Although his case, in terms of scope and responsibilities, was not as big as Bagosora, its symbolic and political implications reached identical iconoclastic heights. In the eyes of Rwandans, the UNICTR again failed to proof what was a recognised fact of public knowledge and

[1644] Buss makes a similar argument, although only talking about context, not the epistemology behind it. Buss, ‘Expert Witnesses and International War Crimes Trials’, p. 25.
[1645] Whereas the main arguments in this chapter concern Bagosora, the other three men are not part of the main text. For the sake of fact, it would be sufficient to summarise that Ntabakuze was found guilty for the participation of his soldiers in killings at Kabera, Nyanza Hill and the L’Institut Africain et Mauricien de Statistiques et d’Economie (IAMSEA) in Kigali. Nsengiyumva was considered responsible for massacres at Mudende University, Nyundo Parish as well as the targeted killing of civilians in Gisenyi prefecture, the area under his operational command. He was also found guilty of sending militiamen to the Bisesero area of Kibuye prefecture to kill Tutsi refugees in June 1994. The Prosecution alleged that Kabiligi participated in the distribution of weapons, meetings to plan the genocide as well as a number of specific crimes, many of which were related to roadblocks in the Kigali area. Kabiligi, however, had advanced a successful alibi for much of this time period. It was also not proven that he had operational authority or that he targeted civilians.
[1647] Specifically, the chamber faulted the prosecution for not arguing its case properly and presenting evidence that could establish a conspiracy. In particular, the tribunal said: “The Prosecution did not lead any evidence in relation to the allegations in paragraph 8 of the Indictment, which referred to an III February 1994 agreement amongst the Accused, Agathe Kanziga, and Colonel Anatole Nsengiyumva to kill the enemy and accomplices, as well as the establishment of a list of Tutsi and Hutu to be killed.” See: Ibidem, §70-80; §393.
integral part of the popular meta-narrative: the central role of the Akazu in planning the genocide, within the walls of Habyarimana’s palace.\textsuperscript{1648} Even more shocking to Rwandans was Monsieur Z’s full acquittal on appeal two years later, because for the ‘lesser crimes’ he was convicted he actually had an alibi.\textsuperscript{1649}

What was going on at the Tribunal? Were the judges rendering political judgements to frustrate Rwandans in whose name the UNICTR operated, as were the allegation from Kigali? Were the defendants completely innocent of any crime, as revisionists and anti-RPF protagonists were claiming? Was the problem that the Prosecution, who bears to charging responsibility and subsequent burden of proof, had sought to turn and present weak, or hard-to-prove, cases into strong ones, as the tribunal’s own experts reveal?\textsuperscript{1650} Or, was the tribunal just not equipped and capable to deal with this particular event in history, in this particular country and in its particular culture? Could, or should, the prosecutor not have modified the charges, in light of the evidence he converged, and present a more, legally, realistic cases? Perhaps it is the most devilish choice at the tribunals. Either to target suspected individuals of international crimes and charge them to the maximum and for everything in an attempt to ‘cover the entire story’, pursue a sense of ‘overarching justice’ and please the entire affected community? Or, present easy to prove cases in an Al-Capone-style, a minimalistic and effective strategy? When it comes to mass violence or genocide - intrinsically emotionally and politically loaded crimes - the latter is often a publicly unpopular strategy. In line with the prevailing human rights idealism, legal dogmatism and reckless, often idle, believe in transitional justice mechanisms, the UNICTR Prosecution, particularly under Louise Arbour, cherry-picked the overarching justice strategy. In its enthusiasm, the UNICTR’s agents in Arusha - like their colleagues at the UNICTY in The Hague and those urging for the establishment of the ICC in Rome - cultivated extraordinary expectations of what their international trials could achieve. While starting off, they were blind and ignorant to the far-reaching symbolic and political implications of not being able to ‘deliver the goods’. In either way, the problem as well as the challenge with adjudicating mass violence in such a way that it can lay the responsibilities for its occurrence with individuals, is converging irrefutable proof that would meet the standards applied in a fair trial setting while at the same time satisfying those calling for justice. The presumption that it was capable to do so became the UNICTR’s principal delusion and was demonstrated by the Bagosora judgement and its saga as well as the previous media trial.

\textsuperscript{1650} As stated by ICTR expert witness André Guichaoua in an interview on the case. See: Franck Petit, ‘Shock of the acquittal of Mr. Z’, p. 4.
Playing Nuremberg

The Office of the Prosecutor gives priority to investigations into the conspiracy to commit genocide. Based on serious and corroborating leads, it has systematically conducted detailed investigations into the preparation and execution of the conspiracy. It has also formed new investigation teams, on the basis of the political, administrative, military and other institutions, which were operating in Rwanda at the time the acts, were committed, since certain officials of those institutions were implicated in crimes.¹⁶⁵¹

The great crimes of the modern world happened in Rwanda, and I want to prosecute them. […] What happened there has no real parallel in history. Terrible crimes took place during the genocide, far worse than what happened in the former Yugoslavia. As far as I am concerned, this is our Nuremberg.

- Stephen Rapp, Prosecutor¹⁶⁵²

A general tendency discerned from atrocity trials is that the first casualty in international criminal prosecutions is the presumption of innocence. It is inherent to the very nature of the crimes; they are so gross and widespread that they reach beyond the stage of international public deniability. Evidently, in those cases the most responsible persons for the atrocities are identified in leadership positions, classically in the political arena, on the battlefield and among elites. It was a lesson learned at Nuremberg and Tokyo and was juxtaposed to the UNICTY and the UNICTR. Most prime suspects in Rwanda were génocidaires by default, already condemned in advance by survivors, the RPF, NGOs, diplomats, academics and also the tribunal’s investigators. That is why they started targeted investigations, going into the field with lists of names collecting evidence to prove that the suspects are guilty. Nobody cared about this inside-out strategy, which is common to all the international courts, with perhaps the exception being the Special Tribunal for Lebanon (STL) where there is much evidence but no available defendants. The justification appears to be simple; even if there are problems of proof, it is publicly certain that they are guilty. In a similar way was the narrative about the genocide in Rwanda deduced.

Despite the discussion on whether they ought to write history, they do write history and, if so, what kind of history, tribunals simply cannot dodge the past, as explained earlier in this thesis. Criminal intentions, behaviour or elements of mass crime are inferred from past political, social or economic events or conditions. Inference from contextual elements is the key methodology used by the courts.¹⁶⁵³ Akayesu is a textbook example thereof. Earlier on in this thesis, we saw that to this effect, professional historians - or experts with acquired historical knowledge - have been called to testify in criminal proceedings pertaining international crimes. Not only do they provide a framework of reference and knowledge but also perspective and interpretations that provide judges with

understanding. They illuminate context, details and provide explanations. At the UNICTR, the prosecutor’s office from the early days adopted and advanced a specific socio-historic narrative of the genocide, which was informed by the work and testimony of Des Forges. The American activist historians, flanked by expert colleagues Reyntjens and Guichauoa, had hoped that the UNICTR’s investigative means would be used to lay bare the full scope of the genocide and its causes, assembling irrefutable and tangible evidence. Yet, the experts the UNICTR was relying on were soon disenchanted by the lethargic legal realities. As engaged academics and routine experts in Rwanda cases and inquiries around the globe, they had gained new insights, nuanced their perspectives and pressed on other issues. Meanwhile, Des Forges lamented the fact OTP investigators had made no serious endeavour to gather documentary or forensic evidence, whereas Reyntjens, on the record, suspended his work for the OTP as it did not pursue indictments on RPF crimes.

But the Prosecution in Arusha, which had started its work built on the early case theories and expert advice, could not be as flexible as the experts themselves, nuancing as they were going, unbound by legal mandates and political pressures from the Security Council to start completing their work and from Rwanda not to pursue RPF crimes. No, the OTP had already settled with the limitations of its investigations, publicly arrested suspects, filed indictments, aired accusations and outlined their case theories. For them, there was virtually no way back. Modification would have heralded their early defeat, procedurally but also in the face of history. Once the major leadership trials were to commence, however, the evidentiary foundation at the tribunal as a whole was very meagre and inherently fluid – and at worst tainted. As we saw before, its precedent setting case, Akayesu, was solely based on witness testimony and the confessors (Kambanda, Serushago and Ruggiu) had merely signed their guilty pleas without any evidentiary basis. Moreover, despite the fact that in the early days the confessors had recognised and confirmed that there had been genocide and that it had been organised and planned at the highest political and military levels, later on, as insider witnesses in other trials, their testimonies were found to be riddled with detailed lies, inventions, contradictions and inconsistencies. Thus, throughout the UNICTR’s lifespan, the evidentiary base for prosecutions was almost exclusively testimonial and floating on a commonly accepted macro- narrative progressed by the experts in the 1990s.

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1655 Like Des Forges, Reyntjens is one of the leading experts in Rwandan law, politics and history and has testified in Rwanda trials and before commission of inquiry around the world. He has testified for the prosecution in the ICTR trials against Georges Rutaganda (1997) and Bagosora (2004) and later for the defence in the case against Joseph Kanyabashi (2007). In addition, he testified before parliamentary commissions in Switzerland, Belgium and France and Rwanda trials in Canada, the United States of America (USA), Switzerland, Belgium, Finland, Denmark and the United Kingdom (UK). Author’s interview, Filip Reyntjens, Telephone, 31 August 2012.
1657 Kambanda immediately stopped his cooperation after the OTP demanded a life sentence and Serushago’s and Ruggiu’s testimonies in the Media trial were riddled with lies, inconsistencies and contradictions UNICTR, Nahimana, Barayagwiza & Ngeze Judgement, §817-824 & 548-549.
As outlined above, colleagues and friends in the human rights field have described Des Forges as the OTP’s ‘personal guide to understanding the genocide and making sense of how to proceed against its authors’.\(^{1658}\) She had deduced a scenario of a “tropical Nazism”\(^{1659}\) in Rwanda, a common reference framework applied by comparative genocide scholars in the field of social sciences: ideally, it follows a “process” of classification, symbolisation, dehumanisation, organisation, polarisation, preparation, persecution, extermination and denial. Most of these elements were reviewed in every genocide trial up to 2006, when the tribunal finally accepted as a ‘judicial notice’ that (1) Hutu, Tutsi and Twa are protected groups under the Genocide Convention; (2) between 6 April and 17 July 1994 there were widespread and systematic attacks against civilians based on ethnic identification; and (3) between 6 April and 17 July 1994 there was a genocide against the Tutsi ethnic group.\(^{1660}\) In 2006, the UNICTR – after twelve years of litigation - had thus established that the Rwandan genocide was a fact beyond legal dispute. In itself, that was a remarkable accomplishment. Notwithstanding that, the foundation of the prosecution’s thesis on if and how it was planned, however, was seriously undermined in the tribunal’s flagship trials – Media and Military I - which both extensively dealt with Rwanda’s history. A central element unresolved was the conspiracy and plan to commit genocide before the murder of Habyarimana. Like Adolf Hitler’s plan to exterminate the European Jews, the OTP had set out to excavate and expose such a plan in Rwanda to kill Tutsi, led by Théoneste Bagosora in a conspiracy with the military, the government and the media.\(^{1661}\) At first glance it may be a logical comparison. Indeed, genocide had been committed in Europe in the 1940s and genocide had been committed in Rwanda in 1994. Nevertheless, the fact that the events carry the same label/classification does not mean that the very events and their circumstances are the same. Simply put, what the international community, experts and prosecutors ignored was that Africa is not Europe, Rwanda is not Germany, the 1940s are not the 1990s, the Third Republic is not the Third Reich, Bagosora was not Hitler, Hutu Power was not the Nazi party, the *Interahamwe* was not the SS, Hutu’s were not Germans, Tutsi’s were not Jews, the *Jenocide* was not the Holocaust and most certainly, Arusha was not Nuremberg. Overall, the differences overshadow commonalities, even including the application of the Genocide Convention to the events. The Nazi leadership was tried for crimes against peace and crimes against humanity; the Rwandans were tried for genocide. Applying the Holocaust perspective in prosecutions was likely the foundational problem in the process of truth seeking, truth finding, fact ascertainment and establishing a judicial account of events in Rwanda at the tribunal as a whole. The UNICTR’s media trial was a first example thereof.

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\(^{1659}\) Borrowed from: Chrétien, ‘Un “nazisme tropical”’, pp. 131-142.

\(^{1660}\) UNICTR, *Karemera, Nigirumwate, Nizorera Judicial Notice*.

\(^{1661}\) At the start of the case against Bagosora, in 1996, Prosecutor Richard Goldstone had already announced that he was “proceeding to interview witnesses and collect documents to determine the merits of the allegations that massacres were planned and led to the mass murder of a large number of victims protected under international law.” UNICTR, (OTP), *Application By The Prosecutor For A Formal Request For A Deferral By The Kingdom Of Belgium In Respect Of Colonel Théoneste Bagosora* (ICTR-96-7-D; Kigali, 15 May 1996), §2.2.
Radio Nkotsa

[RTLM] [o]ften talked about the history of Rwanda, how the history of Rwanda evolved, with emphasis on domination and colonization of Tutsis over Hutus. And they referred to 1959, saying that it was the victory of the Hutus over that colonization.

Thomas Kamilindi, Witness

A first attempt to really try to lay bare the ideological spine of the genocide was made in the trial that was furthermore supposed to put the tribunal back on the world map and under popular attention: the media case. On the docket were lethal words and the folks who had either articulated them or provided a platform for their public ventilation. Balancing between the freedom of expression and hate speech, this legal folder focused on direct and public incitement to commit genocide through political rallies, print media and radio broadcasts. But next to media and narrative analysis, the case also sought to un stitch a conspiracy - through the institution’s principal agents - between RTLM, Kangura and the CDR. Next to CDR-party president, RTLM shareholder and former lawyer Jean Bosco Barayagwiza stood the protuberant French-trained historian Dr. Ferdinand Nahimana and editor Hassan Ngeze; the latter two scripted, dictated and disseminated the historical prevalent Hutu discourse in the early 1990s. All three indictments, produced by the so-called ‘propaganda team’, which in this case were coalesced, accordingly spelled out lengthy “historical contexts” of Rwanda. Going back to the Hutu revolution and ploughing through the succeeding 35 years of political and violent ordeals of Rwanda, all way outside the temporal scope of the tribunal, seemed a peculiar strategy since one of the accused was a Rwandan history professor. Yet, rather than being a recitation of crimes, it served as the meta-narrative, although at times poorly written, framing key events and processes that led up to the mass killings, in which the long list of charges were to be understood. It was the same historical prefab, based on Des Forges’ writings, which starred in most of the late 1990s indictments. In this case, however, it all came down to the proviso that these men had used words, carefully crafted in a highly metaphorical historical discourse, to kill. The prosecution’s overall case scenario was clear: “The Prosecution theory of the media case is that the

[1662] Former RTLM presenter Valerie Bemerihi testified that the radio station was often called ‘Radio Nkotsa’ (Nkotsa is a bird that signifies doom and bad omens. UNICTR, TCI, The Prosecutor of The Tribunal against Ferdinand Nahimana, Hassan Ngeze & Jean Bosco Barayagwiza: Transcript (ICTR-99-52; 14 October 2002), p. 2.


[1665] UNICTR, The Prosecutor Against Ferdinand Nahimana: Amended Indictment (Kigali, 15 November 1999); UNICTR, The Prosecutor Against Jean-Bosco Barayagwiza: Amended Indictment (Kigali, 13 April 2000); UNICTR, The Prosecutor Against Hassan Ngeze: Amended Indictment (Kigali, 10 November 1999).


[1667] They were all charged on counts of genocide, conspiracy to commit genocide, direct and public incitement to commit genocide, complicity in genocide, and crimes against humanity (persecution and extermination). Additionally, Hassan Ngeze was charged with crimes against humanity (murder). The Accused are charged with individual criminal responsibility under Article 6(3) of the Statute for these crimes. Nahimana was additionally charged with superior responsibility under Article 6(3) in respect of direct and public incitement to commit genocide and the crime against humanity of persecution. Barayagwiza and Ngeze were additionally charged with superior responsibility under Article 6(3) in respect of all the counts except conspiracy to commit genocide. In the Indictments, Ferdinand Nahimana and Jean-Bosco Barayagwiza were also charged with the crime against humanity of murder, and Barayagwiza was charged on counts of serious violations of Article 3 common to the Geneva Conventions and of Additional Protocol II. On 25 September 2002, the Chamber granted the Defence motion for acquittal in respect of these counts. UNICTR, Le Procureur c. Ferdinand Nahimana, Jean Bosco Barayagwiza and Hassan Ngeze: Judgement ((ICTR 99-52-1; 3 December 2003); UNICTR, The Prosecutor Against Ferdinand Nahimana: Amended Indictment (Kigali, 15 November 1999); UNICTR, The Prosecutor Against Jean-Bosco Barayagwiza: Amended Indictment (Kigali, 13 April 2000); UNICTR, The Prosecutor Against Hassan Ngeze: Amended Indictment (Kigali, 10 November 1999).
incitement of ethnic hatred and eventually ethnic violence by the media was one of the vehicles by which the plan to exterminate the Tutsi population was executed. The media was therefore part of the wider conspiracy to commit genocide. The timing of its creation, its use before and during the genocide, and the philosophy of the extremist politicians who created the media support this theory.।1668 At the end, since criminal trials are about individual criminal responsibility, “the objective of the Prosecutor is to seek out people like these, those cool minded theorists who conceived, planned and executed the genocide of the Tutsi and the extermination of political opponents and other innocent citizens in Rwanda.”।1669 In clear language, the Prosecution had outlined what they had set out to do.

**Prosecuting the narrative**

For the judges, precedent setting was equally important: “this case raises important principles concerning the role of the media, which have not been addressed at the level of international criminal justice since Nuremberg. The power of the media to create and destroy fundamental human values comes with great responsibility. Those who control such media are accountable for its consequences,” said Judge Pillay at the end of the trial.।1670 Ferdinand Nahimana was listening attentively and sceptically when he was convicted and sentenced to life imprisonment.।1671 Like he did on the first day of the case its evidentiary hearings, an event both his co-accused had boycotted.।1672 Back then, in October 2000, in a furthermore fully packed courtroom and before a crowded public gallery, Deputy Prosecutor Bernard Muna, in his public opening statement, went as far as comparing the “quickest killing in human history” in Rwanda to the Holocaust, quoting historian Raul Hilberg,।1673 where “the whole process took nine years.”।1674 By comparison, he said, “the Hutu leaders went from stage one to stage four within a few weeks.”।1675 He was vainly conscious of the historical significance of the trial he was inaugurating. Since Julius Streicher, known as “Jew-baiter number one” and publisher of the anti-Semitic weekly Der Stürmer, no ideologue had stood trial before an international jurisdiction for inciting large scale atrocities.।1676 Muna called Nahimana।1677 the “intellectual high priest of Hutu

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1671 The Trial Chamber found Ferdinand Nahimana, Jean- Bosco Barayagwiza and Hassan Ngeze guilty of conspiracy to commit genocide; genocide pursuant to Article 6(1) of the Statute and, with respect to Jean- Bosco Barayagwiza, also pursuant to Article 6(3) of the Statute; of direct and public incitement to commit genocide pursuant to Article 6(1) and, with respect to Ferdinand Nahimana and Jean- Bosco Barayagwiza, also pursuant to Article 6(3) of the Statute; of persecution as a crime against humanity pursuant to Article 6(1) and, with respect to Ferdinand Nahimana and Jean- Bosco Barayagwiza, also pursuant to Article 6(3) of the Statute; of direct and public incitement to commit genocide pursuant to Article 6(1) and, with respect to Ferdinand Nahimana and Jean- Bosco Barayagwiza, also pursuant to Article 6(3) of the Statute; of persecution as a crime against humanity pursuant to Article 6(1) of the Statute and, with respect to Jean- Bosco Barayagwiza, also pursuant to Article 6(3) of the Statute. The Trial Chamber acquitted the three Accused on the Counts of complicity in genocide, and murder as a crime against humanity. It also acquitted Jean- Bosco Barayagwiza on the Count of serious violations of Article 3 common to the Geneva Conventions and of Additional Protocol II.
1672 Barayagwiza said he was boycotting the trial because it was not going to be fair. Ngeze was also absent to protest the fact that issues of Kangura being used as evidence have not yet been translated into English and French.
1673 Raul Hilberg, in his book the “Destruction of the Jews in Europe” describes four stages in the process which led to their destruction: “Classification as a Jew, expropriation of property, restrictions to ghettos, and camps and eventual extermination. Although the destiny of the Jews was clearly sealed with the proclamation of the Nuremberg plans, which described what it was to be Jewish, the whole process took nine years.”
1675 Ibidem, p. 52.
1676 Streicher was convicted for acts of incitement to murder and extermination constituting persecution on political and racial grounds in connection with War Crimes and constituting crimes Against Humanity. International Military Tribunal (IMT), Judgement, pp. 301-304.
Supremacy”, Barayagwiza “the master manipulator of the truth both at home and abroad” and Ngeze “the venomous vulgarian and purveyor of racial libel and slander.”

As the tone was set, Muna accused the trio to be principally responsible for what was broadcasted or printed as part of a strategized plan to spread the mass killings throughout the country. After a quick introduction of Lemkin and his labour for the genocide convention, he went on to state that “there cannot be genocide without a conspiracy.” The Cameroonian prosecutor compared such a plot to a moving train that “would stop at the prefecture and prefect and his assistants would be invited to join the conspiracy, after it had been explained to them or after they had been reproached for not recognising that the hour had come to eliminate the Tutsis.” Then he asked the chamber, “How could this have been done without consultation, organisation, without planning? I am sure, that at the end of this case, this question will be answered beyond reasonable doubt.” Confidently, he then implicitly allured to Nuremberg, promising, “We will not ask you to convict these men merely on the testimony of their perceived foes. Every count in the indictment will be proved by credible evidence and is supported by hundreds of hours of taped radio broadcasts and newspapers generated by the prisoners themselves.”

Powerful words were used to inaugurate the trial that was to judge the rhetoric of hate. Muna, the orator, was however taken off the case and in May 2001 Stephen Rapp, the same American lawyer who would later lead the trial against Charles Taylor, took the lead as senior prosecutor. Although highly ambitious and a firm student of the Nuremberg proceedings, he could not help to see the trial unrolling into nothing more than intense ‘wordfare’, fierce and spirited cross-examinations by Ngeze’s American lawyer and courtroom intrigues between witnesses, a problem also faced by the judges. A continuous intense atmosphere and clash of intellectual cultures hung over the proceedings, with the inflammatory and flamboyant Ngeze and erudite Nahimana and their respective counsels vigorously participating in their defence and examination of witnesses. From his prison cell, Barayagwiza, who boycotted the entirety of the proceedings, embarked on overwhelming the chamber with letters complaining about his abused fair trial rights. For the judges it was difficult to control the courtroom and even they experienced it as a personal challenge.

1677 During cross-examination, the prosecution, accused Nahimana of writing Nazi-style literature, in particular his Ph.D. thesis. Stephen Rapp also referred to a 15-page essay written by Nahimana in 1993 with the title “Rwanda: problems and solutions.” In the essay, Nahimana talks of a conspiracy by a “Tutsi league” to destabilise the country. “Isn’t this similar to the Nazi theory of an international Jewish conspiracy that was blamed for European problems”, Rapp asked Nahimana. “In doing that, weren’t you playing with fire given the situation in Rwanda at the time”, he added. See: Rwandan Professor had “Nazi-Style” Literature, Prosecutor Tells Rwanda Tribunal, Hirondelle News Agency, 26 September 2002.

1678 UNICTR, Nahimana, Barayagwiza & Ngeze Transcript (23 October 2000), pp. 41-42.

1679 Ibidem, p. 46.

1680 He goes on saying “The prefect and his lieutenants would then join the conspiracy and smaller trains would go into the Communes where Bourgemestres and Councillors would also be convinced to join the conspiracy. UNICTR, Nahimana, Barayagwiza & Ngeze Transcript (23 October 2000), p. 51.

1681 Idem.

1682 Idem.

1683 Reportedly, he played videos of the Allied trial during potluck dinners and was known amongst ICTR colleagues as a “Nuremberg geek.” See: Temple Raston, Justice on the Grass, pp. 103-104.

1684 As evidenced by the audio-recording available in the ICTR’s archives.

1685 See interview Pillay, As a result of courtroom dynamics in the media trial, in which lawyers and witnesses at certain times were exchanging insults and even calling each other “stupid,” even the Rwanda government complained about the conduct of the proceedings: Kigali unhappy with cross-examination of prosecution witnesses, Hirondelle News Agency, 27 February 2001.

1686 See interview Pillay.
witnesses ended up in heated debates with the defence, the prosecution and even the chamber.\textsuperscript{1687} On other occasions, after being lured into rhetorical and emotional traps laid out by highly skilled defence lawyers, witnesses contradicted themselves, including Georges Ruggiu.\textsuperscript{1688}

Initially listed to be in the dock next to Nahimana and his worst enemy Ngeze, Ruggiu, the Belgian RTLM presenter, had signed a guilty plea and sworn to work with the OTP in this particular trial. Yet, when his confession was put to the test, he embarked on refuting elements of its guilty plea and even inventing, on the spot, new versions of events. Under those circumstances, wrote the chamber, it could not determine from his testimony “where the truth lies – whether he is speaking the truth now when he was saying he was lying earlier or whether he was earlier speaking the truth and is lying now.”\textsuperscript{1689} Two other prosecution insiders also buried their evidence under their own riddles and broad accusations, apparently in order to settle old personal scores irrelevant to the case. Dieudonné Niyitegeka, shielded from the public as Witness X,\textsuperscript{1690} the former Interahamwe leader – who was never pursued by the UNICTR but used as a key informant to investigators - went on to damn witness Ruggiu even further, instead of directly implicating Nahimana. Whereas Ruggiu’s testimony was found not to be credible, Niyitegeka was only found to be “generally credible.”\textsuperscript{1691} Another confessant and OTP co-operator, Omar Serushago, was so keen to recall to have seen Ngeze so many times at execution sites that he was implicating himself in crimes beyond to what he had acknowledged in his guilty plea, including rapes. His declarations, implicating everybody, were so confused and incompressible that the judges would only admit it if other evidence validated them.\textsuperscript{1692}

\textit{Trial of the historians}

By all means, the Media trial was, per substance, perhaps the most remarkable trial. Probing the role of media in mass violence, unravelling Hutu Power Ideology and implicating the ideologues themselves, this trial was to shed light into the mental state behind the genocide. Paradoxically enough, the trial that was to arouse renewed public interest in the tribunal was largely obscured. Countless witnesses were heard in closed session and only a dozen transcripts from the trial proceedings are publicly available, mainly from the defence case. Much of its content also did not make into the trial Judgement.\textsuperscript{1693} One example thereof is the testimony of the fifteenth witness, Rwandan historian José Kagabo, a former colleague of Nahimana, who testified that he was known “an inciter of hatred.”\textsuperscript{1694} From media sources at the tribunal, it appears that an “unprepared”\textsuperscript{1687} Media trial adjourned amid further heated exchanges, \textit{Hirondelle News Agency}, 15 March 2001.\textsuperscript{1688} “I lied in my book to protect RTLM, says convicted radio presenter”, \textit{Hirondelle News Agency}, 28 February 2000.\textsuperscript{1689} UNICTR, \textit{Nahimana, Barayagwiza & Ngeze Judgement}, §549.\textsuperscript{1690} Witness X testified on condition he received immunity from prosecution, which he did shortly before his testimony. He maintained that this letter was important for his credibility. The Chamber, however, found it more likely that it was \textit{quid pro quo} for his testimony. Ibidem, §547.\textsuperscript{1691} See: Ibidem, §547.\textsuperscript{1692} Cravelliер, \textit{Court of Remorse}, pp. 74-77; UNICTR, \textit{Nahimana, Barayagwiza & Ngeze Judgement}, §821.\textsuperscript{1693} In particular, at the time of writing, the transcripts from the prosecution’s case (between 23 October 2000 and 12 July 2002) are not available in the tribunal’s judicial archive.\textsuperscript{1694} “Media trial adjourned to April 4th”, \textit{Hirondelle News Agency}, 29 March 2001.
prosecution was marred by problems with its linkage witnesses, a sheer volume of them insiders close to the accused, including former friends, colleagues and a range of journalists. They were brought to Arusha to testify as to the specific behaviour and actions of the accused; to pinpoint their actual influence in and control over the media outlets and talk about meetings where the accused had allegedly met together. Not only were proceedings tarnished by unrelenting rows between the OTP and the defence over witness credibility and allegations of interference and fabrication of testimonies. A score of dispatches from the Public Gallery described Rwandan witnesses, who refused to testify suddenly had mental problems; were lacking or had stormed out of the courtroom. Unquestionably, the trial had a murky jump, even before the substance of the charges was dealt with: the deadly gist of the media articles and broadcasts and its effects.

Muna’s promise to have a Nuremberg-type of documentary trial was broken on the same day he had made it. From early on, his office had only translated segments of articles in Kangura collected, transcribed and translated a selection of radio broadcasts. Most of the material was either not ready in time or just incomplete, handpicked by the prosecution. It took over a year, until March 2002, for the chamber to admit the first 130 audiotapes holding dozens of RTLM broadcasts as prosecution exhibits. Together with a score of translations from Kangura excerpts, including the infamous Hutu Ten Commandments, the testimonials and writings of the accused themselves was the main base for the second stage in the trial: the evaluation of propaganda between 1990 and 1994. Contrasting earlier trials, the substance led to a virulent contention between foreign experts and the original Rwandan authors. Disagreements immediately were in full swing from the first day of evidentiary hearings. Swiss journalist Philippe Dahinden, who had been working with Reporters Without Borders in Rwanda and had been a member of the 1993 Commission of Inquiry, had already testified about meetings he had with RTLM chief editor Gaspard Gahigi and Nahimana, who had described to him Nahimana as “the top man” and to Barayagwiza as “number two.” On Kangura’s publication of the Hutu Ten Commandments, he said it “sent a shockwave a shock

1696 Muna had said the OTP “did not think that it was necessary to translate the Kangura and the Beer adds [...]we [have] taken out the extracts of the Kangura which we believe is pertinent to this case [...] and which was incriminating the Accused person. [...] I think that would be luxury if we could just get the whole Kangura, translate it, [...] it is fun, bare luxury. I would like to read the whole damn article. I am curious to know what is in the whole article, but the point is that, I don’t think that the Tribunal has all these resources to translate the whole Kangura so that the Prosecutor can have the liberty of amusing himself in the evening when he has nothing else to do, to read what Mr. Ngeze was writing at the time.” UNICTR, The Prosecutor of The Tribunal Against Jean Bosco Barayagwiza, Ferdinand Nahimana and Hassan Ngeze: Transcript (ICTR-99-52-T; 23 October 2000), pp. 192-194.
1702 Prosecution witness Kaiser Rizvi, a former ICTR investigator, testified on the chain of custody of the cassettes. The court had initially refused to admit them or provisionally admitted them pending authentication. The defendants repeatedly objected to the admission of the cassettes saying that Rizvi had not produced sufficient proof as to who had made the original recordings and whether or not the recordings had been tampered with. Rizvi said most of the cassettes had been obtained from the USA State Department in Washington and the Rwandan Patriotic Front (RPF) secretariat archives in Kigali, Rwanda. Other cassettes were obtained from individuals who, according to Rizvi, directly recorded RTLM broadcasts. Rizvi could not testify as to who recorded the tapes from the USA State Department or those from the RPF secretariat. See: ‘Rwanda tribunal admits alleged recordings from “hate radio” as exhibits’, Hirondelle News Agency, 8 March 2002.
1703 A video recording (Exhibit P3) made by Dahinden of his discussions with Gahimana and Nahimana was introduced into evidence and shown in court: UNICTR, The Prosecutor Versus Ferdinand Nahimana, Jean Bosco Barayagwiza and Hassan Ngeze: Transcript (31 October 2000), p. 144.
wave among the people” while RTLM was “radio that killed.” Ngeze’s lawyer, John Floyd, put up a strong line of defence, trying to discredit the journalist’s expertise, accusing him of “rattling on”, “misleading the court” and at times calling him a spy rather than an independent journalist. Another expatriate journalist, Colette Braeckman, from Belgium, said that RTLM was putting oil on the fire testified that she had met with Prime Minister Agathe Uwilingiyimana in December 1993, “who of her own initiative, told me that the radio RTLM was mounting a campaign, an ethnic hate campaign”. In rebuttal, the defence teams sought to discredit her evidence as it, according to them, was based on hearsay. Aside from the two western journalists, whom the chamber considered to be credible and useful, the prosecution put heavy weight on the testimony of historians.

Effectively, the media trial became the debating ground for historians, including the prime accused Nahimana. First up as the prosecution witness was Rwandan José Kagabo, a former colleague of Nahimana, who talked about Nahimana racist views and policies: “he acted as an extremist, using both his power and status as a historian […].” But the Rwandan historian, who was not called as an expert witness, did not leave a big impression on the judges. His name was not even mentioned in the judgement. More weight was brought in by the OTP in 2002 when they called a handful of experts. Between March and July 2002, at the close of their case, they called four experts, including Ruzindana and Des Forges, both of whom who had already appeared in court in the Akayesu trial. Jean Pierre Chrétien and Marcel Kabanda, two other historians, who had edited a book on the Rwandan media, also came to Arusha to testify, largely about Rwanda’s media history and content of Kangura. Nahimana, who was not allowed as an expert in his trial, called in the expertise from German historian Helmut Strizek. In contrast to proceedings in Akayesu, the defence lawyers did not only heavily contest the OTP experts’ very methodologies, expertise and credibility; they furiously contested their analysis of the facts. For the judges, who nevertheless accepted their reports and found their testimonies credible, this was reason to form a more nuanced analysis of the history of Rwanda. Although, it copy pasted the entire section on historical context from the Akayesu judgement – again based on Des Forges’ testimony into the Media judgement, it acknowledged “that much of the evidence set forth above is not disputed as a matter of fact. What is disputed, vigorously, is the analysis of these facts.” Having said that, the chamber, based on the evidence in the media trial,

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1706 UNICTR, The Prosecutor Versus Ferdinand Nahimana, Jean Bosco Barayagwiza and Hassan Ngeze: Nahimana et al - Audio Recording of 30/10/00 – PM (ICTR-99-52-02016; 30 October 2000)
1710 “Closing Statements”
1712 See for a detailed analysis of their expertise and critique by the defence on that expertise: UNICTR, Nahimana Judgement Appeal, §196-215 & 277-295.
1715 Also former Rwandan Prosecutor François Xavier Nsanze testified again and his evidence was heavily relied on.
1716 “The Chamber notes that in the first judgement of this Tribunal, the history of Rwanda was examined in detail from the pre-colonial period. The Chamber accepts the importance of this history, particularly in this case, and for this reason sets forth largely, in extenso, the comprehensive review of the historical context as described in the Akayesu judgement. UNICTR, Nahimana, Barayagwiza & Ngeze Judgement, §106.
1717 Ibidem, §118.
affirmed the historical findings, but noted that “the accused have introduced much historical background that further elaborates on various aspects on it.”

In conclusion, the chamber sharpened their view on how the genocide had enrolled, by finding, for instance, “that within the context of hostilities between the RPF and the Rwandan Government, which began when the RPF attacked Rwanda on 1 October 1990, the Tutsi population within the country was systematically targeted, as suspected RPF accomplices. This target included a number of violent attacks that resulted in the killing of Tutsi civilians. The RPF also engaged in attacks on civilians during this period. Following the shooting of the plane and the death of President Habyarimana on 6 April 1994, widespread and systematic killing of Tutsi civilians, genocide, in Rwanda commenced.”

Most importantly, in accepting evidence that was beyond its temporal jurisdiction - including Kangura magazine from 1990, the tribunal inscribed another element in its historical narrative: the role of the media in the lead up to the genocide. Page after page, the judgement compiles analyses and meticulously discusses Kangura’s editorial policy and selected content as well as RTLM broadcasts.

After reading through its articles, editorials and cartoons, the chamber found that Kangura “conveyed contempt and hatred for the Tutsi ethnic group, and for Tutsi women in particular as enemy agents, and called on readers to take all necessary measures to stop the enemy, defined to be the Tutsi population […] Through fear-mongering and hate propaganda, Kangura paved the way for genocide in Rwanda, whipping the Hutu population into a killing frenzy.” Pillay told Ngeze he was its main protagonist, who was in a “position to inform the public and shape public opinion towards achieving democracy and peace for all Rwandans. Instead of using the media to promote human rights, you used it to attack and destroy human rights. […] You abused the trust of the public by using your newspaper to instigate genocide. […] You poisoned the minds of your readers, and by words and deeds caused the death of thousands of innocent civilians.”

On RTLM’s role before 6 April 1994 the chamber was clear: “The Chamber finds that RTLM broadcasts engaged in ethnic stereotyping in a manner that promoted contempt and hatred for the Tutsi population. RTLM broadcasts called on listeners to seek out and take up arms against the

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In particular, the Accused Ngeze introduced into evidence numerous historical works that clearly establish the history of ethnic identity and conflict in Rwanda, which has roots long preceding 1959, contrary to the statement made in paragraph 1.1 of the Indictments of the Accused.” See: Ibidem, §107.


Including the history of its creation (May 1990), ownership and its distribution (between 1,500 & 3,000 copies per issue depending on sales and period and no publication during the genocide).

Specifically: themes (ethnicity and call for action); the Hutu Ten commandments (Kangura No. 6); Kangura cover No. 26 of November 1991 (depicting a Machete and the text “what weapons shall we use to conquer the Inyenzi once and for all”); Editorials (“the triangle that is disturbing peace” [November 1990], “Hutu should help defend the Hutus [July 1991], “A cockroach Cannot Give Birth to a Cockroach”[February 1993], “Rubengeri And Byumba Attacks, The Tutsis Took Champagne” [February 1993]: “If One Asks Generals Why They’re Favoring Tutsis” [November 1991]); Publications of lists of names; Cartoons; articles from the five 1994 issues of Kangura (“The Last Lie” [January], “Who Will Survive the War of March?” [January], “How Will the UN Troops Perish?”[February], “One Would Say That Tutsis Do Not Bleed, Tat Their Blood Does Not Flow”[February], and a joint Kangura/RTLM competition.

Including the history of its creation (April 1993), its ownership (largely MRND party members and CDR leadership), management (Nahimana, Barayagwiza); the editorial board, the staff (editors and presenters) and its daily control. UNICTR, Nahimana, Barayagwiza & Ngeze Judgement, §489-619.

Including the role of radio in Rwanda, its programming, its reach and its impact. Several hundred tapes of broadcasts were introduced and the chamber only took into consideration those “most incriminating and the most exculpatory”, distinguishing between broadcasts before and after 6 April 1994 and specifically focusing on the issue of ethnicity and call for action. Notably, the chamber discussed broadcasts of interviews – including with Nahimana – in which “reductionist” historical discourse was used. Ibidem, §324-486; 347.

UNICTR, Nahimana, Barayagwiza & Ngeze Summary, §64

UNICTR, Nahimana, Barayagwiza & Ngeze Summary, p. v.
enemy. The enemy was identified as the RPF, the Inkotanyi, the Inyenzi, and their accomplices, all of whom were effectively equated with the Tutsi ethnic group by the broadcasts."¹⁷²⁷ After 6 April 1994, the chamber, the "virulence and the intensity of RTLM broadcasts propagating ethnic hatred and calling for violence increased. These broadcasts called explicitly for the extermination of the Tutsi ethnic group."¹⁷²⁸ Advancing the testimony of historians Des Forges and Chrétien, the chamber further found "that RTLM broadcasts exploited the history of Tutsi privilege and Hutu disadvantage, and the fear of armed insurrection, to mobilize the population, whipping them into a frenzy of hatred and violence that was directed largely against the Tutsi ethnic group."¹⁷²⁹

In sentencing him to life imprisonment, Judge Pillay, told Nahimana: "you were a renowned academic, Professor of History at the National University of Rwanda. You were Director of ORINFOR and founded RTLM radio station as an independent private radio. You were Political Adviser to the Interim Government sworn in after 6 April 1994 under President Sindikubwabo. You were fully aware of the power of words, and you used the radio – the medium of communication with the widest public reach – to disseminate hatred and violence. You may have been motivated by your sense of patriotism and the need you perceived for equity for the Hutu population in Rwanda. But instead of following legitimate avenues of recourse, you chose a path of genocide. In doing so, you betrayed the trust placed in you as an intellectual and a leader. Without a firearm, machete or any physical weapon, you caused the deaths of thousands of innocent civilians."¹⁷³⁰

4.11 Clashing perspectives, clashing narratives

At the end of the trial, the judges,¹⁷³¹ wrote a judgement that was sweeping in its broad and generous inferences and findings on the meta-narrative on the genocide and the role of propaganda therein, even mounting its temporal jurisdiction by accepting evidence from before 1994 and condemning the trio on that basis. Four years later, conversely, in 2007, the appeals chamber¹⁷³² annulled some of its most important findings.¹⁷³³ It took a very legalistic perspective, trying to apply its jurisdiction very strictly. As a consequence, it reversed the trial chamber’s findings made on events or statements made

¹⁷²⁷ UNICTR, Nahimana, Barayagwiza & Ngeze Judgement, §486.
¹⁷²⁸ Ibidem, §486. The chamber continues: "Both before and after 6 April 1994, RTLM broadcast the names of Tutsi individuals and their families, as well as Hutu political opponents. In some cases, these people were subsequently killed, and the Chamber finds that to varying degrees their deaths were causally linked to the broadcast of their names. RTLM also broadcast messages encouraging Tutsi civilians to come out of hiding and to return home or to go to the roadblocks, where they were subsequently killed in accordance with the direction of subsequent RTLM broadcasts tracking their movement. Radio was the medium of mass communication with the broadest reach in Rwanda. Many people owned radios and listened to RTLM – at home, in bars, on the streets, and at the roadblocks. The Chamber finds that RTLM broadcasts exploited the history of Tutsi privilege and Hutu disadvantage, and the fear of armed insurrection, to mobilize the population, whipping them into a frenzy of hatred and violence that was directed largely against the Tutsi ethnic group. The Interahamwe and other militia linked to RTLM and acted on the information that was broadcast by RTLM. RTLM actively encouraged them to kill, relentlessly sending the message that the Tutsi were the enemy and had to be eliminated once and for all.
¹⁷³⁰ Ibidem, §488. During the delivery of the judgement Pillay said “RTLM broadcasting was a drumbet, calling on listeners to take action against the enemy and enemy accomplices, equated with the Tutsi population. The phrase “heating up heads” captures the process of incitement systematically engaged in by RTLM, which after 6 April 1994 was also known as “Radio Machete”. The nature of radio transmission made RTLM particularly dangerous and harmful, as did the breadth of its reach. Unlike print media, radio is immediately present and active. The power of the human voice, heard by the Chamber when the broadcast tapes were played in Kinyarwanda, adds a quality and dimension beyond language to the message conveyed. Radio heightened the sense of fear, the sense of danger and the sense of urgency giving rise to the need for action by listeners. The denigration of Tutsi ethnicity was augmented by the visceral scorn coming out of the airwaves - the ridiculing laugh and the nasty sneer. These elements greatly amplified the impact of RTLM broadcasts." Ibidem, §99.
¹⁷³¹ UNICTR, Nahimana, Jean-Bosco Barayagwiza & Hassan Ngeze: Summary, p. V.
¹⁷³² The Trial Chamber was composed by Navanethem Pillay (presiding), Erik Mose & Asoka de Zoysa Gunawardana.
¹⁷³³ The Appeals Chamber was composed of Fausto Pocar (presiding), Mohamed Shahabuddeen, Mehmet Güney, Andréa Vaz & Theodor Meron.
before 1 January 1994, before the UNICTR’s mandate. In a sense, it demonstrated the court’s incapacity and power – and perhaps unwillingness - to make overarching findings on how, why and when the genocide was conceived in the years preceding the massacres. *In extenso*, it ruled out the conspiracy among the defendants. The appeals judges found that prosecutor had miscarried in demonstrating the existence *in 1994* of a conspiracy to commit genocide between Radio Television Libre de Mille Collines (RTLM), newspaper Kangura and the Coalition pour la Defence de la République (CDR) party. They furthermore ruled out an analogous genocidal plot between their three respective representatives.1734 Whereas the trial judges had in 2003 accepted hate-filled radio broadcasts and publications from before 1994 - but outside its jurisdiction - as evidence for *continuing crimes*, which ultimately culminated in the achievement of the crimes’ intended purpose: genocide. Since the massacre happened in 1994, the trial judges found they had jurisdiction to try these crimes. The appeals judges however, strictly applying the tribunal’s temporal jurisdiction, ruled that culpability could only be based on events in 1994.1735

With regards to the substance, the appeals judges applied a much stricter perspective than their colleagues in the trial chamber.1736 Whereas the judges in 2003 made broad findings on the role of the media before April 1994 in the acts of genocide, the appeals chamber re-examined the question if there was causal link between, on the one hand, RTLM’s broadcasts, the articles that were published in Kangura and the activities of the CDR and, on the other hand, the acts of genocide. And they disagreed substantially with the trial chamber. In sum, they considered that the Trial Chamber “could not find beyond all reasonable doubt that the broadcasts made prior to 6 April 1994 contributed significantly to the commission of murders, instigating as it were the commission of acts of genocide. The appeals chamber did not rule out the relevance of pre-1994 materials, but narrowed down their usefulness so far that “RTLM broadcasts or

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1734 “The Appeals Chamber finds that a reasonable trier of fact could not conclude beyond reasonable doubt, on the basis of the elements recalled above, that the only reasonable possible inference was that the Appellants had personally collaborated and organized institutional coordination between RTLM, the CDR and Kangura with the specific purpose of committing genocide.” UNICTR, Nahimana, Bararuyezza & Ngeze Appeals Judgement, §292.

1735 The Appeals Chamber argued “that the qualifications of inchoate crime and continuing crime are independent from one another. It is the Appeals Chamber’s view that the Trial Chamber erred in holding that incitement to commit genocide continues in time until the completion of the intended acts. On the contrary direct and public incitement is completed as soon as the words in question are uttered, broadcast or published. The Trial Chamber could not have jurisdiction over incitement committed before 1994 on grounds that such incitement continued in time until the occurrence of genocide. […] Lastly, the Trial Chamber should have mentioned more clearly the broadcasts which, in its opinion, amounted to direct and public incitement to commit genocide; by failing to do this the Trial Chamber erred.


1738 “The Appeals Chamber also considers that a reasonable trier of fact could not have found beyond all reasonable doubt that Kangura publications had contributed significantly to the commission of acts of genocide. The Appeals Chamber notes in particular that the Trial Chamber did not state the issues of Kangura published in 1994 that would have contributed significantly to the commission of acts of genocide. This ground of appeal is allowed.” Idem.
**Kangura** newspaper editions before 1994 could however be taken into account as contextual factors that would permit a better understanding of the broadcasts or newspapers published in 1994.\(^{1740}\)

Thus, the deductions reached by the trial chamber and the appeals chambers heavily clashed. As shown above, the latter struck down most of the ‘historical’ findings of the initial judgement. How was that possible? Had the trial judges done a bad job and did they get the facts wrong? Considering the reconsiderations in the plot, that may appear to be a logical assumption. However, whereas the historian – and others outside of the enclosed world of international justice and law – may perceive the differences as being a rewriting of history, in reality, they are more of a legal interpretative nature – albeit obviously with serious implications in substance and perceived understanding of the genocide. There is something else at play, however, pertaining to the UNICTR as a learning institution. The strong dichotomy in the two media judgements indicates a movement and crucial change, within the tribunals, towards a stricter interpretative construction of what they were set up to do, and on how to do it. In earlier days, the UNICTR – like its bigger sister the UNICTY - had applied a very broad and liberal interpretative approach to legal provisions prohibiting mass crimes and stipulating individual criminal liability and the contextual circumstances in which they were committed. In a bid to judge history, they had sought to extend their purpose and work terrains, trotting way outside strict and literal interpretations of their mandates. It appears that for more than ten years trial judges in Arusha had favoured a simplistic understanding of a genocidal process or had consoled themselves with the determinism of an *a posteriori* interpretation of history.\(^{1741}\) After the media trial, which was very liberal in its findings on the role of the media and its agents in the alleged genocide planning, apparently for the first time, however, the appeals chamber strictly broke with that tradition and dedicated itself to a “principle of strict construction of criminal law.”\(^{1742}\) As an unsurprising result of this modus operandi, many findings made under the old interpretative framework, starting with the media case, were struck down, largely because of jurisdictional arguments and rising reasonable doubts on the narratives. Progressively, some judges over the course of years and different trials had also become real ‘specialists’ on Rwanda themselves and along the way they grew more sceptical, or less naïve, towards how the facts, if at all found, reasonably fitted the official historiography presented in the indictments by the prosecution. A direct consequence thereof was that the UNICTR’s reading of history, or account on the genocide prior to April 1994, in its judgements from 2007 onwards changed significantly. More and more, they became constricted within a legal straitjacket and focused on the period after April 1994. This new stance would significantly impact the tribunals’ conspiracy trial against Bagosora. If conducted earlier, its outcome would, most likely, have been different. Judge Møse, in particular, was part of that change. In the media case he, and of course his two colleagues, was still open to broad interpretations of history and

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\(^{1740}\) UNICTR, Nahimana Summary Appeals Judgement, pp. 13-14.  
\(^{1741}\) Cruvellier, ‘Brainless Genocide’, p. 61.  
\(^{1742}\) William Schabas, ‘Appeals Judgement in the ‘Media Case’.”

222
the uses and abuses of the past, but when he presided over the Military case he became extremely cautious and particularly careful towards the facts presented at trial and the interpretations thereof.\textsuperscript{1743}

**Conspiracy?**

This is the first time in the history of this Tribunal that the evidence that we are discussing has been put before jurists for evaluation, not historians, not political scientists, not Alison Des Forges, jurists. And it is the only tribunal, the only case in this Tribunal, that's based upon the actual documentary evidence of the United Nations and of the state department of the United States, not who remembers something about a particular date.

- Peter Erlinder, Defence\textsuperscript{1744}

No. Perhaps here we see the difference between a lawyer and a historian. A historian must take account of the incredible complexity and nuance and cannot take one brief instant of time when the pen is picked up to sign a paper.

- Alison Des Forges, Expert Witness\textsuperscript{1745}

The appeals judgement in the Media Trial came six months after the closing arguments in the UNICTR’s most significant 5-year marathon trial. At the end of May 2007, Gambian Prosecutor Hassan Jallow summarised again what the trial was about:

Your Honours, the conspiracy began to show itself from around October 1990, following the RPA attack on Rwanda in that year. Following this attack, we know the FAR targeted, imprisoned and killed civilian Tutsi and their accomplices. All four of the Accused, senior military officers at the time, were responsible for these arrests and killings. […] By 1991, the conspiracy was well formulated and thought through. Bagosora, Ntabakuze and Nsengiyumva worked together on a commission to define the enemy. The product of their efforts was a document referred to in this courtroom as the “definition of the enemy” document. That document was widely circulated in the Rwandan army, and it defined again the enemy to be the Tutsi.”\textsuperscript{1746}

Without doubt, but of course unaware of the appeals judgement in Nahimana’s trial, the Prosecutor was still assured about the conspiracy charge and referred back to the Media Judgement, which had established a pre-April 1994, plot.\textsuperscript{1747} But according to Jallow, Bagosora and the other accused were not only part of the propaganda conspiracy. Their responsibility was all-encompassing: “[…] they prepared, they planned, they ordered, they directed, they incited, they encouraged and they approved

\textsuperscript{1742} From early 2003, after hearing the first two witnesses in the Bagosora trial, the panel of three judges were replaced by a new panel consisting of Judge Møse as the presiding judge, accompanied by Judges Jai Ram Reddy and Sergei Alekseevich Egorov.
\textsuperscript{1743} UNICTR, Bagosora, Kabiligi, Ntabakuzi & Nsengiyumva Transcript (1 June 2007), p. 63.
\textsuperscript{1744} UNICTR, Bagosora, Kabiligi, Ntabakuzi & Nsengiyumva Transcript (8 July 2002), p. 37.
\textsuperscript{1746} “The Accused had collaborators too. The RTLM assisted in this process and, of course, all four Accused, either as shareholders or otherwise, supported the RTLM and its propaganda. We know Bagosora, for example, was one of the RTLM’s largest shareholders. We know Kabiligi supported the work of the RTLM by even awarding special military privileges to the RTLM journalist, Ruggiu. Of course, the moment the broadcasts on RTLM stopped, the privileges were withdrawn. The support, therefore, was conditional. As long as the RTLM served as a tool to disseminate ethnic hatred and facilitate the genocide, the four Accused would continue their support. The diary we recall of Father Otto Mayer captures the role of RTLM in this memorable phrase where he said, "The RTLM stirred up the old demons with every peasant in the remotest regions of the country" was subjected. The Kangura newspaper was there as well. It was hostile towards the Tutsi; boldly printing the Hutu — the so-called "Hutu Ten Commandments" and thus elevating the ethnic tension to a level equal to God’s proclamations of the laws of man to Moses. And in this version of the law — in this version of the law, Kangura created the Tutsi woman to be the apple to the Hutu Adam.” UNICTR, Bagosora, Kabiligi, Ntabakuzi & Nsengiyumva Transcript (28 May 2007), pp. 13-14.
the killing of innocent civilian Tutsi men, women and children, as well as other civilians who were considered their accomplices.”

Four days later after the defence lawyers had presented their alternative versions of events in Rwanda between 1990 and 1994 – that the killings were a chaotic outburst attributable to the RPF’s shooting down of Habyarimana’s plane\textsuperscript{1749} - and the role of their clients in it, prosecution attorney Drew White reminded the judges about the societal and historical impact their judgement may leave. He warned them “to be careful not to revise the history from an Alice in Wonderland story, based on fanciful notions of what the evidence might have been. [...] You’re not making a record here of the entire Rwanda genocide for the entire history of the world. Your task is much more discrete.”\textsuperscript{1750} White then pushed further, asking the judges to consider the “future after the trial” and alluring to recent statements Kofi Annan had made on “never forget” and “working to prevent another genocide,” only to suggest that “once the facts are found [...] they ought to be denounced [...] as enemies of the human race. And we should do that to support the cry for the future by the secretary general. Because it’s the right thing to do.”\textsuperscript{1751} On the other side of the courtroom sat the 65-year-old defendant Bagosora. His direct response was short, but clear.\textsuperscript{1752} At the end of the hearings he told the judges “that I have been, and remain, a victim of an ignominious propaganda of the RPF and its allies, and I believe that you alone are capable of rehabilitating me in society” and then generally requested “all people of goodwill to free their minds from the intoxication, mind poisoning, caused by this propaganda, which has caused me immeasurable prejudice.”\textsuperscript{1753} Reciting the gist of his 17 days of testimony in 2005, that the “excessive massacres” had happened beyond his control, Bagosora declared “that I did not kill anyone, neither did I give any order for anyone to be killed.”\textsuperscript{1754} Meanwhile, in the hallways of the Arusha International Conference Centre, Bagosora’s lawyer Raphael Constant told reporters he had little hope for his client to be acquitted, since “this tribunal was established to some extent to convict Mr Bagosora. If that does not happen, it will shut down the next day.”\textsuperscript{1755}

**Bagosora and 28 others**

Perhaps there was some truth in Constant’s remark. After all, the prosecution had from the start brandished Bagosora as the kingpin in the genocide, the mastermind behind the whole enterprise. In Arusha, the Bagosora had become synonymous to the very crime committed in Rwanda, like Hitler

\textsuperscript{1748} Ibidem, p. 5.

\textsuperscript{1749} Bagosora’s defence team argued that the RPF shot down the plane and that this subsequently unleashed chaotic and spontaneous killings and argued that “If the RPF is responsible, then Colonel Bagosora is not responsible for this event.” See, for instance: UNICTR, Bagosora, Kabili, Nabakuze & Nsengiyumva Transcript (29 May 2007), p. 53.

\textsuperscript{1750} Ibidem, Bagosora, Kabili, Nabakuze & Nsengiyumva Transcript (1 June 2007), p. 46.

\textsuperscript{1751} Ibidem, p. 46.

\textsuperscript{1752} He had testified at large during the trial in 2005. Also, his version of events in Rwanda, he had already written up in an essay while in exile in Cameroon: Colonel BEMS BAGOSORA Théoneste, l’Assassinat du President Habyarimana ou l’ultime operation du TUTSI pour sa reconquete du pouvoir par la force au Rwanda (Yaoundé, 30 October 1995).

\textsuperscript{1753} Ibidem, Bagosora, Kabili, Nabakuze & Nsengiyumva Transcript (1 June 2007), pp. 64-65.

\textsuperscript{1754} Ibidem, pp. 64-65.

\textsuperscript{1755} Xan Rice, ‘Five years on, genocide accused awaits his faith’, The Guardian, 2 June 2007.
was to the Holocaust. And whereas the meta-narrative on the Rwandan genocide was presented as a kind of Tropical Nazism, Arusha was likened as an African Nuremberg and Bagosora depicted as Rwanda’s Hitler: the most responsible by default. As in Nuremberg – and in the vein of the Eichmann trial in Jerusalem and Milošević trial in The Hague - ambitions and expectations at the tribunal were high: history would be unravelled and judged. And indeed, the Military I trial against Bagosora and three others relied heavily on the theory of a longstanding conspiracy. Even though prosecutor Carla Del Ponte opened the trial with the proviso that “the tribunal can never write the whole history of the Rwandan tragedy of 1994, in particular the Rwandan genocide, its genesis and it realisation.” the charges were formulated in strong historical terms. It was a leftover from her precursors. While Goldstone had quickly written up an indictment after Bagosora’s arrest in 1996, Louise Arbour transformed it into a ‘global charge sheet.’ In an attempt to generate an historical record of the Rwandan genocide, she charged Bagosora in conjunction with 28 others. Literally a heavy document, it was an épistle that unmasked an obsessive prosecutor. As if written with the pen of an historian, the 357-paged indictment’s first twenty-nine pages deal exclusively with the history of Rwanda, starting with the ‘revolution of 1959.’ It then introduced the “concise statement of the facts: preparation”: 

From late 1990 until July 1994, Théoneste Bagosora, Augustin Ndindiliyimana, Augustin Bizimungu, Aloys Ntiriragabo, Gratien Kabiligini, Protai Mpiraya, Aloys Ntabakuzi, François-Xavier Nzuwonemeye, Anatole Nsengiyumva, Samuel Imanishimwe, Augustin Bizimana, Andre Ntagerura, Pauline Nyiramasuhuko, Andre Rwamakuba, Edouard Karemera, Mathieu Ngirumapate, Joseph Nzirorera, Felicien Kabuga, Tharcisse Renzaho, Emmanuel Bagambiki, Sylvain Nsabimana, Alphonse Nteziiryayo, Joseph Kanyabashi, Edouard Karemera, André Ntagerura, Sylvain Nsabimana, Alphonse Nteziiryayo, Joseph Kanyabashi, Edouard Karemera, Mathieu Ngirumapate, Joseph Nzirorera, Felicien Kabuga, Tharcisse Renzaho, Emmanuel Bagambiki, Alphonse Nteziiryayo, Sylvain Nsabimana, Joseph Kanyabashi, Elie Ndayambaje, Ladias Ntaganzwa, Bernard Munyagishari, Omar Serushago and Yussuf Munyakazi conspired among themselves and with others to work out a plan with the intent to exterminate the civilian Tutsi population and eliminate members of the opposition, so that they could remain in power. The components of this plan consisted of, among other things, recourse to hatred and ethnic violence, the training of and distribution of weapons to militiamen as well as the preparation of lists of people to be eliminated. In executing the plan, they organized, ordered and participated in the massacres perpetrated against the Tutsi and moderate Hutu population. In a letter dated 3 December 1993, certain FAR officers revealed to the UNAMIR Commander the existence of the plan which they called a "Machiavellian plan" conceived by military who were mainly from the North and who shared the extremist Hutu

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1756 The case also concerned General Gratien Kabili (head operations bureau of army general staff), Major Aloys Ntabakuzi (Para Commando Battalion commander) and Colonel Anatole Nsengiyumva. UNICTR, Bagosora et al.: Amended Indictment (ICTR-96-7-T; 31 July 1998).
1757 UNICTR, Prosecutor versus Théoneste Bagosora et al.: Opening Statement (ICTR-96-7-T; 2 April 2002).
1758 Bagosora was arrested in Cameroon following a Belgian arrest warrant, in which he was charged with direct responsibility for the massacres which followed the attack against the plane of President Juvenal Habyarimana on 6 April 1994, and for the murder on 7 April 1994, of 10 UNAMIR soldiers from the Belgian contingent stationed in Kigali, Rwanda. See: Tribunal de Première Instance de l’arrondissement de Bruxelles, Pro Justitia. Mandat d’arrêt par Défaut, dossier 57/95, notices no. 3089332/95 (Brussels, 29 May 1995). The first ICTR Prosecutor Richard Goldstone signed an indictment – very similar to the Belgian one - listing four counts of genocide, crimes against humanity and war crimes. UNICTR, The Prosecutor of the Tribunal Against Théoneste Bagosora: Indictment (ICTR-96-7-T; 5 August 1996). It was based though on the wording of provisional charges that stipulated Bagosora “committed, on Rwandan territory, between January and July 1994, by planning, conspiracy, direct and public incitement, order, command, omission, complicity, or by otherwise aiding or abetting in the planning, preparation or execution of genocidal acts against the Tutsi population of Rwanda, with intent to destroy, in whole or in part, a national ethnic or racial group, as such, thereby committing the crime of genocide embodied in Articles 2 and 6 of the Tribunal Statute.”
1759 Louise Arbour, OTP, The Prosecutor of the Tribunal Against Théoneste Bagosora: Request For Transfer And Provisional Detention Under Article 40 Bis Of The Rules Of Procedure And Evidence Of The International Criminal Tribunal For Rwanda (Kigali, 16 May 1996).
There was no doubt in the mind of the team that had worked on the indictment that the genocide in Rwanda was a conspiracy that was relentlessly planned and executed by Hutu Power, a movement that surrounded Bagosora. But the tribunal’s judges barred a Nuremberg-style mammoth trial, on procedural grounds. Arusha would not become Africa’s Nuremberg. It was a blow in the face of the prosecutor, who then decided to chop up the charges in smaller trials, grouped around certain individuals. In Bagosora’s case she soon filed an amended indictment, now alongside three others. The language of the shipwrecked mega trial was copy pasted to the new charge sheet, almost in its entirety. Only some names were expunged. Of the more than 60-page indictment, the first ten pages set out the ‘historical context,’ before it goes on to formulate the individual accusation: from late 1990 to July 1994, the former colonel conspired with other extremist Hutus to execute a “Machiavellian Plan” to exterminate all Tutsis and their Hutu ‘accomplices’. Some minor details were altered in the final operative indictment, but the main accusation was set in stone.

**At trial**

Trial Chamber III of the International Criminal Tribunal for Rwanda, composed of Judge Lloyd G. Williams presiding, Judge Pavel Dolenc and Judge Andrésia Vaz, is now sitting in open session, today, Tuesday, the 2nd of April 2002, for the commencement of trial in joint trial, No. ICTR-98-41-T, in the matters of the Prosecutor v. Théoneste Bagosora, the Prosecutor v. Gratien Kabiligi and Aloys Ntabakuze, and the Prosecutor v. Anatole Nsengiyumva.

- Court Officer

Much of the UNICTR’s work surrounded Bagosora, the alleged mastermind who had been in the Tribunal’s detention centre already since 1996. His trial, however, only started in 2002, two months after the start of the Milošević trial in The Hague, 6 years and one month after Bagosora’s arrest and 8 years after the genocide. Yet, the accused were still protesting delayed disclosure of evidence,
including the French translation of Alison Des Forges’ expert report – whose testimony was cancelled that day - and several statements of prosecution witnesses.\textsuperscript{1768} Citing a breach of fair trial rights, for them it was enough reason to skip the opening statements uttered by Chief Prosecutor Carla Del Ponte and senior trial attorney Chile Eboe-Osuji. First up, in this “highest profile media event”\textsuperscript{1769} was the Swiss Prosecutor, who told the judges that the “principal perpetrators of genocide in Rwanda in 1994 are the four men before you.”\textsuperscript{1770} In contrast to the many lofty opening statements by prosecutors at the international tribunals, she appeared to be robust and realistic: […] if the existence of genocide in Rwanda in 1994 is no longer at issue and is not arguable, the sure issue that is partially to be resolved is, who was responsible?\textsuperscript{1771} Wary of the widely expected extra-legal effects that the trial might have sparked, she was quick to warn:

This Tribunal, unfortunately, can never write the whole history of the Rwandan tragedy, particularly that Rwandan genocide, its genesis, its implementation. We do not have the means, and ultimately that is not our mandate.”\textsuperscript{1772}

Del Ponte’s stance that the trial was about individual criminal responsibility promised a trial in the sense Hannah Arendt would have had appreciated, leaving aside the ulterior questions. Yet, only a couple of minutes later, the senior trial lawyer in the case, Eboe-Osuji – who would later become a judge at the ICC - took a drastic turn and asked the very question Arendt had critiqued: “why did people commit that ugly crime in that country?”\textsuperscript{1773} He sort of had an immediate riposte, mulling together two elements. First, according to Osuji “some Hutus intended a final solution to the ethnic problems of Rwanda” while secondly “there was a venal subtext in this story […] The wind of political reform was blowing strongly and it was threatening to blow away some of the privileges of some powerful Rwandan elites, including the four defendants […] they would rather plunge their own country in a blood bath of genocide.”\textsuperscript{1774} The Canadian-Nigerian lawyer – who is now a judge at the ICC - must have struggled with the fact that he was litigating a historical charge sheet, which trotted at least three years outside of the tribunal’s jurisdiction. In order to somehow veil that the case may go out of bounds, he went on to recognise that motives in the province of criminal justice “were second-class citizens” which only at times “must be put into this juristic context” and that “we must beware, Your Honours, to avoid losing our way in that jungle of motives.”\textsuperscript{1775} But then, several minutes into his presentation he brought to the fore the crux of what he was going to prove: “[…] a conspiracy whose object was the whole or a partial destruction of the Tutsi ethnic group from Rwanda.”\textsuperscript{1776} And where he had first pursued to relax the judges that they were not to get lost in a jungle of motives, he

\textsuperscript{1768} Ibidem, p. 29.
\textsuperscript{1769} Carla Del Ponte (with Chuck Sudetic), Mevrouw de Aanklager (Amsterdam: De Bezige Bij, 2008), p. 325.
\textsuperscript{1770} UNICTR, Bagosora, Nuengiyumvwa, Kahiligira & Ntabakaze Transcript (2 April 2002), p. 143.
\textsuperscript{1771} Ibidem, p. 140.
\textsuperscript{1772} Ibidem, p. 142.
\textsuperscript{1773} Ibidem, p. 145.
\textsuperscript{1774} Ibidem, p. 146.
\textsuperscript{1775} UNICTR, Bagosora, Nuengiyumvwa, Kahiligira & Ntabakaze Transcript (2 April 2002), p. 147.
\textsuperscript{1776} Ibidem, p. 154.
bluntly explained to them that they would “hear evidence of this common plan and objective perhaps even involving a web that may appear so contrived in its complexity as to confound the casual observer.” The judges frowned their eyebrows, for this promised to become a trial especially about motives, which were only traceable in the past.

Although the prosecution claimed “the provenance of this conspiracy among the defendants may be traced to as far back as October 1990 when the RPF attacked Rwanda” they defined one particular event as the birth cradle of the genocide plans. “For now,” said Osuji, “we begin the story from the 4th of December 1991.”

On that day, Habyarimana had appointed the infamous commission to prepare a secret report on how to defeat the enemy, whom they referred to as the “ENI” and how to defeat them in the media, on the battlefield of war, and on the political arena. Bagosora, as we saw earlier in this chapter, was the chairman of it, while Lieutenant Colonel Anatole Nsengiyumva, Major Aloys Ntabakuze were members. Generally known as the Bagosora commission, Osuji christened it the “ENI Commission” or “Enemy Commission.” From that moment onwards, the genocide eclipsed like an organic chain of events. “Yes, the stories in this trial will betray a complex chain of events sometimes resembling the movement of stormy clouds ushering in a heavy storm as we saw happen in fact, and what a tangled web they wove,” the prosecutor claimed, to conclude that:

Yet, Your Honours, amidst all of that, one thing is clearly discernible: the calculating hands of the conspirators, among them the Defendants in this case. However hard, they tried hide their hands, it was all out in the end. They guided the events. They constantly stoked the fire of fear and hate of Tutsis. They were making genocidal plans and they were leading the way to their ultimate goal: [...] tubatsembetsembe. That is the Kinyarwandan expression for "let us exterminate them", "them" being Tutsis. Your Honour, we say that was the basic objective, the conspiracy.”

No trial at the UNICTR was the same and all had their own specific courtroom dynamics and lines of argument. They were all different. No defendant is the same and trial chamber changed in composition. Also they bring in different lawyers, from other legal traditions, national cultures and with different professional capacities and experience. Prosecution teams similarly change and their agents may adopt new strategies or alter the discourse in which they frame the cases. So was the case in Bagosora. Despite an indictment that reads like a Rwandan version of Nazism, the prosecutors in this case explicitly refrained from highlighting this analogy. In their version of events, Bagosora was undeniably the kingpin in the genocide, highlighting his central role in the planning and referring to statements he allegedly made when he returned from the Arusha talks in 1993 saying he was “going

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1778 Ibidem, p. 158.
1779 Ibidem.
1780 Ibidem, p. 178.
1781 See for the trial between 1997 and 2002: Cruvellier, Court of Remorse.

228
home to prepare the second apocalypse.” Nevertheless, they did not want to go as far as to compare him to Hitler, as it was “not necessary to do so, neither did he need to be a Hitler, to be -- in order to be the driving force of the Rwandan genocide, as he did” but stressed that “he was at the centre of the conspiracy, and you will hear evidence of what he did to execute it and to conceive it.” In their attempt to show Bagosora’s role in the genocide and decipher the organisation of the mass killings in 1994, the prosecutor had essentially assembled major general ‘facts’ and allegations, that were already ready known in 1995, to concoct the narrative of the way the Rwandan genocide against Tutsi had been thought out and planned. That, maybe, is the most problematic red thread throughout the UNICTR’s lifetime. Despite the differences per trial some bad habits had been ingrained at the root-level, including, amongst other things, the prosecutor’s selective, uncritical, widespread and systematic reliance on anonymous testimony from witnesses, who were often interviewed years after the events. Aside from these generally unverifiable sources, the prosecutor’s inventory of evidence had from the beginning been flimsy, to say the least. Irrespective of the question whether it even exists, the OTP’s investigators had never produced any direct or conclusive material that would even reasonably confirm the extraordinary charges it was bringing against those who stood accused in Arusha, including Bagosora. As in the earlier trials, the best evidence available still came from the experts who themselves had stood at the cradle of the prosecutor’s theories, already seven years before.

An historical indictment demanded a meticulous exhumation of the past and it was no surprise that Alison Des Forges featured as the prosecutions first witness and Filip Reyntjens towards the end of its case. From its 82 witnesses in this case, the two experts served not only to connect the whole narrative together, but also to tender in evidence (such as Bagosora’s diary) and testify to crucial facts, for which the tribunal had not produced ‘smoking-gun-type-of-evidence.’ Their role would be bigger than Chile Eboe-Osuji made the judges believe. After a lull of no less than months since his opening statements he called the American activist historian Des Forges as his first witness, on 2 September 2002. Only a month earlier she had concluded her testimony in the media case, as an expert, but from the start the defence quarrelled with the chamber and the prosecutor over the question if she would actually constitute an expert. On the first day, from the witness stand, Des Forges was mainly a spectator of heavy litigation on her professionality, methodology and knowledge. In challenging her on every point imaginable – including her research methodology, her professional history and earlier testimonies she had given at the tribunal and elsewhere - the defence sought to cast doubt on her credibility as an expert and reliability of her evidence. Highly aware of the importance the prosecutor attached to her testimony, they would accept, at maximum, her as an expert on pre-

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1783 Ibidem, pp. 190-191.
1785 The trial chamber heavily relied on them, as ‘as experts in Rwandan history,’ Des Forges’ name appears no less than 199 times in the judgement and Reyntjens’ name 145 times.
1787 UNICTR, Bagosora, Nsengiyumva, Kabilig & Ntabakuze Transcript (2 September 2002), n.p.
1990 Rwandan affairs, outside the scope of the allegations. Of the eighteen days she was profoundly cross-examined, Eboe-Osuji only had explained his strategy for calling her testify first: “Your Honour, we are calling Ms. Des Forges […] to give the story of the history of Rwanda and give her opinion on whether or not there were […] systemic violations that one might recall when one starts talking about genocide in Rwanda.” She was called as the first witness, continued the prosecutor, “so that when she is done […] we will call other factual witnesses and the evidence of such factual witnesses will be put now in the context of what you would have heard from Ms. Des Forges, both in terms of the history of the country and in terms of the context in which -- what happened -- on the events that happened, and the context in which each of these witnesses will be coming to testify. It would make better sense to the trier of fact to call her first.” In other words, the prosecutor, who was litigating a case informed and framed by Des Forges’ her very own theory of the genocide, needed her to provide the entire narrative and factual framework through which the rest of the evidence was to be perceived.

In contrast to Akayesu and to a lesser extent the media trial, the dynamics during Des Forges’ testimony were more combative, at times even hostile. Without much interference or questions from the bench, her responses to questions were tightly controlled by continuous jurisdictional and substantial challenges from the defence, particularly on the framing of the events between 1990 and 1994 and the use of the word genocide. However, the framework had been erected, one that the judges were familiar with from other cases. Throughout the rest of the trial, it would definitely become the overarching spectre from which the OTP sought to present its case and on which basis the defence tried to challenge the merits of case. As observers and adjudicators of those substantial but completely inharmonious narratives on the genesis and nature of the genocide, the judges themselves had no other option than to make reasoned findings not only on the available evidence but on the framework as a whole. And since the case scenario was strongly built on the structures of a particular but dominant and generally accepted historiography, any finding by the tribunal would have been interpreted as a judgement of history; either as a revision or as an acknowledgment.

**A Prosecution condemned**

To influence collective memory through legal proceedings, it is helpful for prosecutors to be familiar with accepted genres of storytelling. In other words, prosecutors must discover how to couch the trial's doctrinal narrative within "genre conventions" already in place within the particular society. These conventions are by no means universal and will often require some rather fine-grained "local knowledge."

- Mark Osiel

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1788 Idem.
1789 Idem.
1791 Idem.
1792 Osiel, ‘Ever Again’, p. 524.
In 2008, more than fourteen years after the events, the man whose name had become emblematic to the ugliest crime in Rwanda received his sentence by the UNICTR. Bagosora was found guilty of genocide, crimes against humanity and war crimes for ordering and authorising various killings and rapes between 6 and 9 April 1994. But the ‘mastermind’ mantra of a diabolical national conspiracy and planning of the genocide between him, his three co-accused and others before 6 April was struck down by the UN tribunal. The billion-dollar charge was ruled out however. Six years of trial proceedings and deliberations did not provide the legal answer - beyond reasonable doubt - to the historically framed inquiry into the alleged pre-6 April 1994 planning, process and organisation behind the extermination of Rwandan Tutsis and their ‘accomplices.’ Within the circumstances, the trial against four persons, it was not proved. What was reason? According to the judges, several elements commonly considered to be crucial in the planning of the 1994 massacres were “not supported by sufficiently reliable evidence” or did “not necessarily demonstrate criminal intent.” Confronted with circumstantial evidence,” the magistrates carefully wrote in their decision, “the tribunal may only convict where conspiracy is the only reasonable inference from the evidence.” Applying that test, the chamber concluded that the prosecution did not prove beyond a reasonable doubt that the only reasonable inference to be drawn from the evidence is that the four accused conspired amongst themselves - or with others - to commit genocide before it unfolded from 7 April 1994. In fact, supposed elements of the conspiracy to commit genocide, as alleged by the prosecution, were either dismissed or found unconvincing.

As a result of the OTP’s shoddy work, the judgement that was expected to shed light on the mechanics of the Rwandan genocide reads as a lamentation, at times even an indictment, against the party that had promised to substantiate historiography: the prosecution. Despite its observation that the “question under consideration is not whether there was a plan or conspiracy to commit genocide in Rwanda,” in its decision, the trial chambers breaks down all the elements that led to its acquittal on the conspiracy count. In its allegation that Bagosora and his co-accused conspired “to work out a plan”, the prosecution had put forward that the components of this plan included, amongst others, speeches and incitement, the training of militia groups and the writing up of death lists. To show Bagosora’s involvement in the extended planning and preparations for genocide before 1994, the OTP had pointed to certain key pieces of evidence or alleged events. In particular, they had highlighted the work of the “Enemy Commission”, Bagosora’s 1992 reference to planning the “apocalypse”, secretive clandestine organisations (AMASASU), Jean-Pierre’s warnings to Dallaire, the “Machiavellian Plan” letter, the preparation of lists, the creation, arming and training of civilians and RTLM. All elements,

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1793 Guichaoua, From War to Genocide, pp. 322-327.
1794 UNICTR, Bagosora, Kabiligi, Ntabakuze & Nsengiyumwa Judgement, §12.
1795 Ibidem, §9.
1796 Rather, wrote the chamber, the question is whether the Prosecution has proven beyond reasonable doubt based on the evidence in this case that the four Accused committed the crime of conspiracy. Ibidem, §2092.
evidence and events are deeply ingrained in the popular narrative on the genocide. From the judgement, however, a more nuanced interpretation transpires. Ultimately, observed the chamber, since this case was built only on circumstantial evidence, a conspiracy could only be proved if it is “the only reasonable inference based on the totality of the evidence.” In other words, like in the media case, the facts may all be consistent with a joint agenda to commit genocide, but they must be exclusively so: no other explanation may plausibly exist.

With such a tall evidentiary bar, the case ought to be crystal clear and the evidence robust. But in respect to Rwanda - where facts, truths and sources are generally hazy - those two elements are strikingly absent. For starters, the Prosecution only pleaded the formation of a conspiracy before 7 April 1994, not when it commenced or was unfolding. Also, the prosecution was not clear about when they thought the alleged planning had started. In the 1999 indictment they were convinced the conspiracy took place from “late 1990”, but at the end of the trial they only maintained “the planning aspect of conspiracy extended a significant time prior to the events in 1994.” In fact, the OTP was pleading “there was no plan in 1992 to conduct genocide in April 1994. There’s no evidence of that,” instead there was a tendency towards a conspiracy. Indeed, at trial, even the prosecutor’s experts could not agree on the question. Des Forges elucidated that the “organisational” phase of the planned genocide “dates to the period of 1993 and early 1994,” although “a very small group of people” had been conceptualising and planning the genocide for a “much longer time than for the great majority of later participants”. Two years later, the other OTP expert, Reyntjens, added to the confusion: “I do not believe […] and I could well be wrong, I mean, I don’t have all information, but that in my view there has been no particular moment in time when a number of conspirators sat together and decided, "We are going to organise a genocide. This is our machinery. This is our ideology. This is how we're going to do it, to spread it, to convince people to join it." […] What I believe is that the genocidal instrument and ideology have developed incrementally, probably starting on the 1st of October 1990, and there have been some killings then which I would -- which were, as I have already said, I think, in a context of the beginning of the war and may have been, to some extent, spontaneous or organised just by local authorities, not by central authorities.” In rebuttal, the defence’s historians, Bernard Lugan and Helmut Strizek testified they “not only in the state of my knowledge and in the current state of research, I have not found any proof of planning” or that “there was no command, no planning. It was a spontaneous act of unruly, uncontrollable people who went on a killing spree. And

1797 Ibidem, §2088.
1798 In this case, the chamber took a very lenient stance towards allegations and evidence preceding the Tribunal’s temporal jurisdiction. It would except such evidence if the chamber deemed such evidence relevant and of probative value and there is no compelling reason to exclude it. Such evidence can be relevant to: clarify a given context; establishing by inference the elements (in particular, criminal intent) of criminal conduct occurring in 1994; and demonstrating a deliberate pattern of conduct. Ibidem, §2091.
1799 Arguably, the chamber, could have made a finding that Bagosora was conspiring, for instance, since the evening of 6 April, the moment he was among the highest authorities in the country.
1800 1801 1802 1803
1804 UNICTR, Bagosora, Kabili, Ntabakuze & Nsengiyumva Transcript (1 June 2007), pp. 41-42.
1805 UNICTR, Bagosora, Kabili, Ntabakuze & Nsengiyumva Transcript (26 September 2002), p. 36.
1806 UNICTR, Bagosora, Kabili, Ntabakuze & Nsengiyumva Transcript (20 September 2004), pp. 9-10.
it is actually this argument which [General Dallaire] confirms here that there were uncontrollable and mass actions.”¹⁸⁰⁵

¹⁸⁰⁵ UNICTR, Bagosora, Kabiliyi, Nabukaze & Nsengiyumva Transcript (12 May 2005), p. 68.
Planning the ‘Apocalypse’?

On that premise, the chamber in its decision meticulously ticked off whether the prosecution’s evidence on alleged meetings showed that there was high level planning and conspiracy to commit genocide. First it discussed the so-called ENI document, in which a military commission headed by Bagosora defined the enemy in ethnic terms, and of which only parts were presented by the prosecution as a crucial step towards a criminal conspiracy with criminal purpose.\textsuperscript{1806} Despite the fact that “that the over-emphasis on the Tutsi ethnicity in the document is troubling,” the chamber did not conclude that the ambiguously worded “document or its circulation to soldiers in the Rwandan army in themselves” evidenced a conspiracy around late 1991 to exterminate the Tutsi ethnic group.\textsuperscript{1807} Instead, the UNICTR judges found that “defining the enemy is normal and necessary in times of war” to “adapt its strategies and order its resources.”\textsuperscript{1808} Moreover, observed the chamber, the Commission in itself was not composed of extremists and included a number of moderates. However, sentient to the weight their ruling was carrying and not blinded by historical revisionism, the judges were careful to observe that even though a conspiracy was not the only inference, the ENI document still “can be interpreted as equating Tutsi civilians with members of the RPF,” which was an “important precondition of the genocide” and “is therefore significant as an early illustration of the tendency to polarise Rwandan society along ethnic lines.”\textsuperscript{1809}

Having outlawed one of the central elements in the chain of events cited in the general historiography on the genocide, the chamber then turned to another key event that features in all the writings on the genocide: Bagosora’s “Apocalypse” statement.\textsuperscript{1810} According to the popular readings Bagosora told a RPF delegate, when leaving the Arusha peace talks in 1992 that he was returning to Rwanda to ‘prepare the apocalypse.’\textsuperscript{1811} When read in the context of what happened in 1994, the statement is bitterly disturbing. In a bid to corroborate the proclamation, the Prosecution traced down the men who first reported on it: protected witnesses XAM and KT, both members of the RPF delegation in Arusha. But their anonymous evidence showed deep discrepancies. Witness XAM, who was the only one to provide direct evidence in court, repeatedly told the chamber that Bagosora made the statement during lunch time in an elevator, sometime in October 1992, while witness KT claimed in a written statement that the incident occurred in a morning around Christmas 1992. Aside from Bagosora’s testimony that he was only in Arusha between 2 and 26 December, that was the only available evidence on the famous statement. For the judges, it was unreliable and did not prove the accusation.\textsuperscript{1812} The tone was set for the rest of the evaluation of the evidence.

\textsuperscript{1806} Only an excerpt distributed on 29 September 1992 was presented at trial as the entire report is no longer available.
\textsuperscript{1807} UNICTR, Bagosora, Kabiligi, Nabakaze & Nsengiyumva Judgement, §205.
\textsuperscript{1808} Ibidem, §200-201.
\textsuperscript{1809} Ibidem, §209.
\textsuperscript{1810} Ibidem, §209.
\textsuperscript{1811} See also: Cruvellier, ‘Brainless Genocide’, pp. 61-62.
\textsuperscript{1812} AR, Death, Despair and Defiance, p. 113.
\textsuperscript{1812} UNICTR, Bagosora, Kabiligi, Nabakaze & Nsengiyumva Judgement, §§211-222.
In the next 35 pages, the chamber struck down all the allegations of seven ‘conspiracy meetings between 1992 and 1994. In evaluating the evidence, which exclusively consisted of witness testimony, the chamber went into a mode of repetition in lamenting the inconsistencies, credibility and overall uncorroborated prosecution evidence. It stopped for a moment to observe that the “lack of consistency raises some concern about the credibility of the Prosecution’s evidence on this point. The Chamber therefore declines to accept the specific details of each of the witnesses’ accounts.” Even key evidence fell apart. Two days before the genocide, on 4 April, Bagosora attended a crowded and noisy dinner at the Méridien Hotel in Kigali organised by the Senegalese contingent of UNAMIR. The prosecution alleged that Bagosora, in the company of Colonel Luc Marchal and General Roméo Dallaire, had said that “the only solution to the political impasse was to eliminate all the Tutsis.” At trial, the prosecution’s evidence was blurry, even second-hand. Dallaire testified that Marchal had told him some 12 days later that Bagosora had stated that the war was at hand and that “a final solution was going to happen”, involving elimination of Tutsis. Reyntjens testified that, later in July 1994, Marchal had told him during an interview that Bagosora had said “the Arusha Accord was going to lead nowhere, except to disaster, and that the only course of action would be to exterminate all Tutsis.” But the source himself, Colonel Marchal, testified for the defence. Already in 1997 he told UNICTR investigators he had become uncertain whether Bagosora had used the term “Tutsi” or “RPF” and at trial could not recall if Bagosora had called for their elimination. For the chamber it became clear, because Marchal had explained his different accounts as confusion about what was said “the exact content of the statement raises some doubt concerning what was said.” Again, accuracy to the very facts charged was absent in the prosecution’s testimonial evidence. The case suffered from it and its effects were devastating for the record. But the prosecution case crumbled even further.

When it came to the preparation and use of lists, the chamber repeated the same riddle. Yes, there were lists, they said, based on the fact that nobody contested their existence. The links to the accused however, remained mostly unclear. There was no answer to the origin of the lists and moreover they included not just Tutsi, but also included the broad spectrum of Habyarimana’s opponents, including Hutu. It led to a very general conclusion: “Nsengiyumva given his role as head of the military intelligence bureau (G-2) on the army staff would have been involved in the
preparation of lists and that Bagosora in light of his position was likely aware of them. It also concluded that Ntabakuze made use of lists to arrest people in October 1990. It was not proven that Kabiligi was involved in this effort. Yet, on the substantial charge, that these lists were prepared or maintained with the intent to kill Tutsi civilians, the UNICTR was not satisfied. It reached a similar conclusion on the creation of civilian militias: “The Chamber has found that Bagosora, Nsengiyumva and Kabiligi participated in varying degrees in the arming and training of civilians. […] However, when viewed in the context of the immediate aftermath of the RPF’s violation of the cease fire agreement, it does not necessarily show an intention to use the forces to commit genocide.” With respect to the existence of Zero Network and the AMASASU and the question if the accused were members of them, the chamber could make no conclusion since the “available information concerning [it] was limited and to a large extent second-hand.” The same was the case with the death squads. Based on the testimony of six witnesses, including Reyntjens, a residential watchman in the Kiyovu quarter and Dallaire, the chamber was convinced about their existence and role in killings before April 1994. However, said the chamber, “the mere fact that such groups existed and were engaged in criminal acts does not mean that it was preparing a genocide.” Moreover, all the sources on Bagosora’s involvement or membership of these escadrons de la mort were all second-hand and limited.

Moving on to RTLM, the judges lamented the prosecutor’s amateurism for not listing “the relevant allegations in the indictments.” Yet, citing the testimony of Des Forges, Ruggiu and some other witnesses, they went as far as stating for the record that is was “clear that RTLM played a significant role in sowing ethnic discord before 6 April 1994 and in inciting genocide against members of the Tutsi population after the death of President Habyarimana on 6 April.” Bagosora, Nsengiyumva and Ntabakuze were all shareholders, but the judges found the linkage with the ENI report too far-fetched to conclude that “RTLM’s calls for the population to support the army” illustrated army control of the station, “even when they shared common some goals.” With 50 shares, Bagosora was amongst the largest shareholders, but, said the judges, “the evidence referred to by the Prosecution is inconclusive and, even if true, does not concretely show a specific connection between the Accused and RTLM.” Nevertheless, the judges appeared to at least make some factual findings and wished to mention that Bagosora’s “relatively significant ownership interest in the station is noteworthy. It amounted to three times his monthly income.”

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1822 UNICTR, Bagosora, Kabiligi, Ntabakuze & Nsengiyumva Judgement, §2322.
1823 Ibidem, §2102.
1824 Ibidem, §2114.
1825 Ibidem, §2106.
1826 Ibidem, §617.
1827 Ibidem, §762. Later, they write: “However, in the Chamber’s view, the security provided by Presidential Guard at the station after 6 April, the housing provided to some RTLM staff at the Hôtel des Diplomates, and the role played by the army in moving RTLM’s transmitter from Kigali to Gisenyi prefecture reflect a more substantial form of assistance by the army to the station. This evidence is indicative of the army’s efforts to ensure that RTLM continued its broadcasts, thus reflecting its general approval of the editorial content. By itself, however, it does not demonstrate any overall editorial control by the army of the station’s broadcasts. Ibidem, §764.
1828 Ibidem, §762.
1829 Ibidem, §649.
1830 Ibidem, §762.
evidence was convincing on some matters. But it was not so on one of the most vital pieces of evidence on the planning of the genocide: Dallaire’s genocide fax and a letter outlining a Machiavellian plan.

Like Bagosora’s Apocalypse statement, no other element has been highlighted in the literature as much as the General Dallaire’s warning to the UN that genocide was coming. On 10 January 1994, an informant by the name of “Jean-Pierre” informed UNAMIR of a secret plan to train militia to exterminate the Tutsis and their “accomplices”. At least, that is what is generally believed and what was claimed by the prosecutor in the Bagosora trial. It is a remarkable story. In early January 1994, Prime Minister designate for the Broad-Based Transitional Government, Faustin Twagiramungu, told Dallaire, that a member of the Interahamwe’s high command had information concerning its secret plan to exterminate Tutsis. On 10 January 1994, Lieutenant-Colonel Frank Claey and Colonel Luc Marchal, along with two other UNAMIR officers, met with Jean-Pierre. The man claimed to be a former Para Commando, previous member of the Presidential Guard and current top-level trainer of Interahamwe. His information was shocking. He told UNAMIR that approximately 1,700 to 1,900 Interahamwe had been trained in the use of military equipment at Camp Kanombe and other camps around Kigali. He also told the Peacekeepers that Kigali was divided into 20 cells and that each cell was responsible for exterminating Tutsis registered in their cell. In his estimation, 1,000 Tutsis could be killed in Kigali every 20 minutes. Lists had already been prepared to assist in this purpose. Jean-Pierre also informed UNAMIR of weapons caches in Kigali and that both the Minister of Defence and Colonel Bagosora were involved in a plan to distribute weapons to militia. Furthermore, Jean-Pierre spoke of a plan to get Belgians to overreact to the militia’s provocations in order to trap them and force UNAMIR to withdrawal. Dallaire was briefed on the informant’s information and sent a code cable to the UN headquarters in New York. In hindsight, the information Jean Pierre forwarded to UNAMIR was prophetic. For the prosecution, its content was the ultimate proof that the genocide was being planned and that Bagosora was named in relation to it, at least from the very starting point of the tribunal’s jurisdiction. But through their entire case, so much doubt was already cast over its evidence and witnesses that suspicions towards this mysterious informant reigned supreme.


1832 This calibrated section represents an edited version of the narration in the judgement and is based on the testimonies by General Roméo Dallaire, Major Brent Beardsley, and Lieutenant-Colonel Frank Claey. See: UNICTR, Bagosora, Kahiligi, Ntahakaze & Nsengiyumva Judgement, §509-511; UNICTR, Bagosora, Kahiligi, Ntahakaze & Nsengiyumva Transcript (20 January 2004); UNICTR, Bagosora, Kahiligi, Ntahakaze & Nsengiyumva Transcript (22 January 2004); UNICTR, Bagosora, Kahiligi, Ntahakaze & Nsengiyumva Transcript (26 January 2004); UNICTR, Bagosora, Kahiligi, Ntahakaze & Nsengiyumva Transcript (27 January 2004); UNICTR, Bagosora, Kahiligi, Ntahakaze & Nsengiyumva Transcript (3 February 2004); UNICTR, Bagosora, Kahiligi, Ntahakaze & Nsengiyumva Transcript (4 February 2004); UNICTR, Bagosora, Kahiligi, Ntahakaze & Nsengiyumva Transcript (5 February 2004).

1833 On 11 January, Special Representative Booh-Booh received a cable from Kofi Annan, the head of the United Nations Department of Peacekeeping Operations, addressed to both Booh-Booh and Dallaire, asking them to see President Habyarimana about dismantling the weapons caches cited by Jean-Pierre. Booh-Booh was also asked to meet with Ambassadors of Western countries and, if need be, put pressure on President Habyarimana. Annan’s telegram denied Dallaire permission to inspect the weapons caches cited by Jean-Pierre, stating that the UNAMIR mandate did not extend far enough for such an operation.
Claeys was Jean-Pierre’s sole UNAMIR contact and met with him five times. But little was known about him. Witnesses A and BY, both high-ranking Interahamwe leaders testified they knew Jean-Pierre and confirmed he was in charge of distributing weapons from the Ministry of Defence to the MRND. But they also suspected him of diverting weapons. Beardsley and Claeys testified about a videotape that had shown Jean-Pierre at an MRND rally, giving directions with a hand-held radio to uniformed Interahamwe. Yet, some of the testimony suggested that Jean-Pierre was not whom he claimed to be. Joseph Buckeye, Jean-Pierre’s former employer, for instance, identified Jean-Pierre as a man named “Turatsinze” and refuted he had military training. Marchal\textsuperscript{1834} speculated that Jean-Pierre could have been an RPF agent whose information was part of RPF machinations,\textsuperscript{1835} a theory that was supported by witness ALL-42.\textsuperscript{1836} This RPF member testified that Jean-Pierre was an RPF agent who had infiltrated the Interahamwe and that his actions were part of a plan to manipulate UNAMIR. Dallaire also conceded that there was a risk that the information provided by Jean-Pierre had been manipulated, but at the time felt that there were reasonable grounds to rely on his intelligence. At first glance, the chamber appeared to go along with Dallaire: “When looking at how the events unfolded in Kigali after the death of President Habyarimana, the Chamber notes the similarity of how they corresponded to Jean-Pierre’s information. His account could therefore be true.” But then they grew suspicious. It almost was too good to be true, especially in light of an unsigned letter of December 1993 supposedly from a Rwandan military officer to Dallaire outlining President Habyarimana’s “Machiavellian plan” to commit massacres throughout the country and commit targeted assassinations of certain political officials in order to incite the RPF to violate the cease-fire agreement. The letter, however, was anonymous, disputed and lacked details on which officers were part the purported plan. In that light, they observed, the evidence based on Jean-Pierre’s information is entirely second or third-hand. Moreover, his whereabouts and circumstances concerning his disappearance are unknown. Also, witnesses A and BY, both high placed Interahamwe leaders, did not corroborate Jean-Pierre’s information about the plan to kill Tutsis. To some extent, Jean Pierre’s information had been corroborated, including the creation of lists, weapon catches and training of Interahamwe. Regardless, the judges wrote him off: “the Prosecution’s reliance on this evidence is problematic since there are lingering questions concerning the reliability of this evidence and because it does not directly implicate the Accused. This evidence therefore has limited probative value in establishing the Accused’s role in a conspiracy.”\textsuperscript{1837}

4.12 A prosecutorial narrative derailed

It remains important to note that, based on the evidence, Bagosora was found guilty of superior


\textsuperscript{1835} Ibidem, pp. 1-4.

\textsuperscript{1836} Ibidem, pp. 1-4.

\textsuperscript{1837} UNICTR, Bagosora, Kabiligi, Ntabakaze & Nsengiyumva Transcript (30 November 2006), p. 32.
responsibility for actions of Rwandan army soldiers committed in the first few days of the genocide.\textsuperscript{1838} He was responsible for killings \textit{during} the genocide but not for planning or organising these killings \textit{before} the genocide. By far, the Bagosora judgement is the tribunal’s most complicated writing, for many reasons, but it is also the most nuanced, if read closely. Despite the fact that the chamber found that against the backdrop of targeted killings and massive slaughter perpetrated by civilian and military assailants immediately after the assassination of Habyarimana, as well as earlier cycles of violence, they surely show that the genocide was not spontaneous and carries elements of a prior groundworks or even a conspiracy.\textsuperscript{1839} But, in the view of the chamber, even if these preparations are completely consistent with a plan to commit genocide, they are also consistent with preparations for a political or military power struggle.\textsuperscript{1840} That is a nuanced conclusion, made in the narrow space in which the judges were operating.\textsuperscript{1841} In this specific case, however, and in light of the evidence presented at trial, “it is possible that some military or civilian authorities did intend these preparations as part of a plan to commit genocide”, but this has not yet been sufficiently proved with regards to Bagosora and the three other accused.\textsuperscript{1842}

In sum, the prosecution at Bagosora’s trial did not prove the most important elements of the planning. Its theory of a tropical Nazism was not upheld. Overall, from the judgement, the conclusion can be drawn that “the Rwandan army was no more a “genocidal” army than the Second Republic of Juvénal Habyarimana was a “Nazi regime” or Rwanda was a fascist country since 1959,” as has been officially progressed by the victorious RPF regime.\textsuperscript{1843} As shown above, the creation and work of a military commission to define “the enemy” chaired by Bagosora in 1991 were not considered as criminal. Bagosora and others had played a role in the creation, arming and training of civil militias and maintaining lists of “RPF accomplices”, but the judges could not conclude that “these efforts were directed at killing Tutsi civilians with the intention to commit genocide.” Bagosora’s reported warning in 1992 that he was going to “prepare the apocalypse” proved to come from two dubious witnesses who contradicted themselves. His alleged role in clandestine organisations, such as the AMASASU, the Zero Network or death squads was supported by considerable evidence, yet it was

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\textsuperscript{1838} “There were other organised killings involving the Rwandan military, at times working in conjunction with Interahamwe and other militias throughout Kigali, during the first 72 hours after the death of President Habyarimana. […] In its judgement, the Chamber has found that Bagosora was the highest authority in the Ministry of Defence and exercised effective control over the Rwandan army and gendarmerie from 6 until 9 April, when the Minister of Defence returned to Rwanda. For the legal reasons given in the judgment, he is therefore responsible for the murder of the Prime Minister, the four opposition politicians, the 10 Belgian peacekeepers, as well as the extensive military involvement in the killing of civilians in Kigali during this period. The same conclusion applies to Nabakazi with respect to crimes committed by members of the Para Commando Battalion in Kabeza.” Ibidem, §23-25.

\textsuperscript{1839} “The Chamber simply cannot accept that elite units of the Rwandan army would spontaneously engage in sustained gun and grenade fire with Rwandan gendarmes and United Nations peacekeepers, murder and assault the Prime Minister of their country, and kill five prominent personalities, unless it formed part of an organised military operation pursuant to orders from superior military authorities.” Ibidem, §20.

\textsuperscript{1840} “The Chamber certainly accepts that there are indications which may be construed as evidence of a plan to commit genocide, in particular when viewed in light of the subsequent targeted and speedy killings immediately after the shooting down of the President’s plane. However, the evidence is also consistent with preparations for a political or military power struggle and measures adopted in the context of an on-going war with the RPF that were used for other purposes from 6 April 1994. Consequently, the Chamber is not satisfied that the Prosecution has proven beyond a reasonable doubt that the only reasonable inference to be drawn from the evidence is that the four Accused conspired amongst themselves or with others to commit genocide before it unfolded from 7 April 1994. The Chamber has acquitted them of Count 1 of each of their Indictments.” Ibidem, §13.

\textsuperscript{1841} “In relation to the Prosecution submissions about conspiracy, the Chamber points out, first, that the question is whether it is proven beyond a reasonable doubt, based upon the evidence in this case, that the four Accused committed the crime of conspiracy to commit genocide. Second, when confronted with circumstantial evidence, the Chamber may, according to established case law, only convict where conspiracy is the only reasonable inference. Third, the evidence implicates the Accused in varying degrees.” Ibidem, §9.

\textsuperscript{1842} “The Chamber has found that some of the Accused played a role in the creation, arming and training of civilian militia as well as the maintenance of lists of suspected accomplices of the RPF or others opposed to the ruling regime. However, it was not proven beyond a reasonable doubt that these efforts were directed at killing Tutsi civilians with the intention to commit genocide.” Ibidem, §11.

\textsuperscript{1843} Guichara, \textit{From War to Genocide}, p. 327.
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indirect, second-hand and did not mean they were preparing genocide. Testimony about a meeting in Butare in February 1994, where Bagosora allegedly drew up a list of Tutsis to be killed, was not considered credible. The Chamber reached the same conclusion with respect to Kabiligi’s alleged speech about genocide in Ruhengeri in February 1994. Moreover, there were concerns over the reliability of the information provided by Jean-Pierre and an anonymous letter outlining a “Machiavellian Plan”. “In reaching its finding on conspiracy, the Chamber has considered the totality of the evidence, but a firm foundation cannot be constructed from fractured bricks,” concluded the judges.  

Read in isolation, the judgement may indeed be perceived as an iconoclastic and revisionist writing, although on the other hand, the judges “managed to set limits on the rewriting of history by the victors.” In court, the alleged masterminding role of Bagosora in the genocide was reduced to that of a “temporary project manager” for 65 hours (between 6 and 9 April 1994). Then, on appeal, Bagosora’s factual responsibility was even trimmed down even more and his life sentence was reduced to 35 years. The appeals chamber concluded that ‘there is no finding or sufficient evidence that Bagosora ordered or authorised any of the killings for which he was found to bear superior responsibility’ - but that he ‘failed to take the necessary and reasonable measures to prevent these crimes,’ while he was in a position to do so. Thus, while the historical lead-up to events in 1994 were crucial to the UNICTR’s understanding of the genocide, it appears that on the basis of testimony from 242 witnesses, nearly 1600 exhibits and around 4500 pages of submissions from the prosecution and defence, the UNICTR judges were not able to – beyond any reasonable doubt - corroborate historiography on the architecture of the Rwandan genocide. The contrast is stark. On trial Bagosora was found guilty of genocide; not of ‘masterminding’ it since 1990 as generally thought, but by omission just when it started on April 1994. On the surface, the trial appears to be the sobering illustration of justice’s powerlessness to substantiate historiography. That may be true, but it is too simplistic. It overlooks changing dynamics within the institution. What the Bagosora trial also shows is that while the tribunal’s chambers grew more knowledgeable of what happened, became more critical towards the evidence and increasingly detached from the NGO narratives, they simply became less certain about what happened, how, when and why. Besides, while progressively becoming a professional law institution, judges became much more rigorous in testing the evidence and found witnesses testimony less convincing, credible and reliable. That has had a huge impact on how judges
worked. Writing ten years after the Akayesu judgement, the judges – followed the appeals chamber’s new restricted stance as highlighted in the 2007 Media judgement – completely dropped the ambition to simply understand the genocide as a whole and to author an historical record. Instead, they became way more critical towards the evidence, careful in their writings and much narrower in focus. That being the case, the core theory of the case was destined to fall apart. Ever since they had been drafted in 1997 with an intention to unravel the entire Rwandan genocide, the prosecutor’s charges, evidence and motivation had remained unaltered and static. When they went to trial in 2002, they were simply not prepared and up to date as to the realities of a maturing international justice system, which after ten years was no longer a naïve copy of Nuremberg. The sad reality of that system is that perhaps the prosecution was too late. Had Bagosora been tried at the same time as Akayesu and Kambanda, the judges at that time would have probably convicted him of the conspiracy.

By 2007 that was most certainly no longer the case. In fact, by then the trial judges had already explicitly outlined that ‘the process of a criminal trial cannot depict the entire picture of what happened in Rwanda’, emphasising that their task is narrowed by exacting standards of proof and procedure as well as its focus on the accused and the specific evidence placed before it. It did, however, make the important finding that the evidence may indicate a plan to commit genocide - in particular when viewed in the light of the subsequent targeted and speedy killings immediately after the shooting down of Juvenal Habyarimana’s aircraft - but that this was also consistent with preparations for a political or military power struggle in the context of an on-going war with the RPF. Yet, applying their narrow judicial focus, it was not for them to judge on that. They concluded that other or newly discovered information, subsequent trials or history may very well demonstrate a conspiracy - involving the accused - prior to 6 April 1994 - to commit genocide.

On 31 December 2015, the UNICTR formally closed its doors, after 5,800 days of proceedings. A month earlier, the tribunal had already held a closing ceremony, which included the inauguration of a new Peace Park in Arusha, “in memory of the victims and survivors of the Rwandan genocide and to the work of the ICTR […]. According to Judge Vagn Joensen, the Tribunal’s President, praised the “more than 3,000 witnesses who bravely recounted some of the most traumatic events imaginable during UNICTR trials.” But he did not go into detail about the contents and relevance of those testimonies for the historical record, nor on any of the findings by the judges. For Joensen, the largest legacy of the Tribunal is its development of “international legal concepts and providing a model for domestic judiciaries by codifying numerous facets of international criminal law and international humanitarian law that, at the time of the Tribunal’s establishment, were either
undevolved or non-existent.”\textsuperscript{1856} Obviously, he referred once against to the seminal judgement in the Akayesu case, that was not only the first judgement by an international court on the crime of genocide but also an “acknowledgment by an international court that genocide against the Tutsi had occurred in Rwanda in 1994, which was subsequently treated by the Tribunal as a fact of common knowledge that could not be disputed.”\textsuperscript{1857} He then summed up how the 45 judgements had “significantly impacted the evolution of international law, including the first conviction for rape and sexual violence as a form of genocide as well as the first judgement against a Head of Government since the Nuremberg and Tokyo Tribunals. Further, by strengthening the jurisprudence on sexual violence crimes through the extended form of Joint Criminal Enterprise and by holding those in power accountable, the UNICTR has issued judgements that serve as powerful deterrents to those committing similar crimes in the future while also sending a clear message to the international community that all those who commit genocide or other atrocities, regardless of their position, will no longer go unpunished.”\textsuperscript{1858} Several weeks later, the very political body that set up the UNICTR, the UN Security Council, copy-pasted most of Joensen’s remarks, acknowledging in addition though the “substantial contribution of the ICTR to the process of national reconciliation and the restoration of peace and security, and to the fight against impunity […].”\textsuperscript{1859}

Amidst the self-praising statements, the legacy in terms of truth finding about the genocide is only to be found in a single paragraph in the UNICTR’s report, which was published already a month before the tribunal even delivered its very last appeals judgement. Surprisingly, it is even shallower and more ambiguously phrased than what would actually transpire from the 45 judgements that the UNICTR issued in its 21 years of operation. In a paragraph titled “establishment of a genocidal campaign, it reads in full:

\begin{quote}
In the course of its investigations and prosecutions, the Office of the Prosecutor established beyond dispute that, during 1994, there was a campaign of mass killing intended to destroy, in whole or at least in very large part, Rwanda’s Tutsi population. This genocidal campaign was orchestrated at the highest levels of government, including by members of the interim Government. It engulfed the entire country and was perpetrated by a variety of means, including large-scale massacres at places of refuge such as churches and government offices. Directives issued by the interim Government called for the use of roadblocks to identify, kill or rape Tutsis. Public media was used to incite the population to commit acts of violence against the Tutsi population and those perceived to be sympathetic to them. Widespread and systematic acts of sexual violence were perpetrated against Tutsi women and girls. In addition, politically motivated killings took place against those opposed to the genocidal campaign waged by the interim Government.”\textsuperscript{1860}
\end{quote}

\textsuperscript{1856} Idem.
\textsuperscript{1857} Idem.
\textsuperscript{1858} Idem.
\textsuperscript{1859} UNSC, ‘UN tribunal on Rwandan genocide formally closes – major role in fight against impunity’, Press Release, 31 December 2005.
\textsuperscript{1860} UNSC, Report on the completion of the mandate of the International Criminal Tribunal for Rwanda, §55.
This chapter has shown that history matters in Rwanda, as any other place that has experienced mass atrocities and identity-based violence. I have traced down that in the young, seemingly divided nation, it is a lifeline. People from various walks of life keep a tight grip on it, twist it and throw it out again. Owning the past, or at least controlling its narrative, is a survival strategy in the present. Those who pen down the narrative of history, carve a corridor into the future. Owning the discourse on the past is also a strategy of political survival. Without doubt, Rwanda’s past has been - and still is - significantly disputed; not only inside Rwanda, but also in the Diaspora and among foreign students of the republic. This chapter has tackled the thorny issue of history in Rwanda; how it was conceived by colonial powers, how it became a driver for decolonisation, how it was instrumentalised into the lead up of the genocide, how it was reset after the genocide and how the post-genocide government instrumentalised it in its repression and social engineering, through transitional justice mechanisms, of society. Particular readings of history have served those in power as much as those opposed to power in Rwanda as foundational narratives. In Rwanda, it is a historical political tradition, or at least a continuum. Under German and Belgian occupation, whites reigned supreme over blacks and Tutsi, who were conceived to the whitest blacks, were privileged over Hutu. Hutu on their turn, perceived themselves as the true natives of Rwanda and both the Belgians and the Tutsi as foreign colonisers and suppressors. Bending the racist discourse of the European occupiers, the Hutu, during the First Republic persecuted and discriminated against Tutsi as part of its founding narrative. Only under the Second Republic, was the racial question, translated to an ethnic question. Animosity between Hutu and Tutsi in Rwanda continued but it was overshadowed by internal political divisions, economic crisis and a younger generation demanding change. The real problem was posed however by a larger Tutsi Diaspora living outside Rwanda, as refugees.

As shown in this chapter, the historiography of Rwanda before, during and after the genocide is a highly contested one. There are only a few points of consensus, either they be factual (as to historical events) or imagined (as pre-colonial history). The most heavily debated historical event remains the genocide in 1994, in particular its context of war, political strife and extremism. Whether transitional mechanisms have helped establish the truth about what happened is equally controversial. Protagonists have claimed that Gacaca has uncovered the reality on the micro-level, that ordinary trials showed agency on the mid-level and the UNICTR on the macro-level. Moreover, they have praised the non-judicial endeavours to spark reconciliation, healing and reintegration. Antagonists have claimed exactly the opposite, arguing that Gacaca were used to enforce a state narrative on the general population, that ordinary courts are used to silence critics and that the tribunal in Arusha was a total sham as it never dealt with the RPF on the macro political and military level. Moreover, they have argued that the non-judicial transitional justice worked against reconciliation, healing and
reintegration. In this almost bipolar heated, politicised and normative debate about the politics of transitional justice and whether it is even empirically possible to make even a slight guess on the real-time effects of the judicial and non-judicial post-genocide reckonings in Rwanda, I have limited this study to three questions: how to understand the invocations of historical narratives at the UNICTR, how do its judgements square with historiography and how to approach the UNICTR trials as historical sources.

Regarding the first question, I have shown that the invocation of historical narratives at the UNICTR stems from several reasons. First of all, agency mattered. Those doyens who researched, exposed and publicised the human rights abuses and the genocide from the mid-1990s onwards were either professional historians, were trained in history or were interested in history. In the first NGO-led commission of inquiry in 1993, there were at least two historians, amongst whom was Alison Des Forges, who also happened to have been the key researcher for Human Rights Watch on Rwanda since 1992. Des Forges’ explanation of the genocide as a linear project became the leading narrative of the history of the genocide. Other rights organisations, such as African Rights, which was also led by a historian, Rakiya Omaar, from early on polished this narrative in an analogy to the Holocaust. Others, like academics, journalists and tribunal-staff, picked up this narrative of a ‘Tropical Nazism’ to be the true story about what had happened in Rwanda. At the UNICTR, the genocide narrative in early historiography – as progressed by Prosecution consultant and expert Des Forges - was then transformed into case theory by non-Rwandan prosecutors who had no knowledge at all about Rwanda. Despite of that, some prosecutors had the ambition for the tribunal to fully uncover the extent of the genocide and made it a historical ambition to prove their case theory, not as law, but as history. Secondly, law and legal history mattered. The UNICTR was the first international tribunal to deal with a genocide case (Akayesu). Informed by the Genocide Convention as judicial response to the Holocaust, the first response by prosecutors was a logical one: if the mass killing of European Jews was a linear, conspired and planned crime, the mass killing of Rwandan Tutsi must be treated similarly for it to fit the legal characterisation of the crime of genocide. Totally obscuring the uniqueness of the Rwandan case, the modus operandi, became to litigate a kind of tropical Nazism. In so doing, and by working anachronistically and in hindsight, all elements that would look like prior planning for genocide – such as defining the enemy, organising civil defence and inflammatory media – were too simplistically interpreted by prosecutors as genocide. Third, but closely related, was the fact that in order to prove the mens rea requirement for genocide, the prosecutors chose to frame particular political, social and military events, decisions and choices as process of genocidal strategizing from key leadership suspects. Next to that, prosecutors had to show that the Tutsi constituted a protected group under the Convention. In order to argue that they were either a de facto ethnic group or perceived racial group, they had to present to judges the evolution of these two group-identity markers in a country were both Hutu and Tutsi shared the same language, history, culture,
religion and traditions. However, particularly in terms of the *mens rea*, prosecutors were uncritical, arguably blind, towards alternative inferences of pre-genocide events, particularly in the more complex context of the civil war, rise of democracy and political infighting in Rwanda. From the start, the UNICTR prosecutors invoked history, valorised a historical narrative and sought to substantiate that particular version through oral historical evidence while risking that another reading of history, thus shedding reasonable doubt, was amongst the possibilities. I have shown the inherent dangers of having to prove case theories and presenting them as objective versions of history with a capital H or the truth, for that matter, with a capital T.

If prosecutors litigate a very particular reading of history, according to a young and yet uncomplicated historiography, what impact would that have on judgements rendered by judges who have to weigh the evidence put before them? Or, more concretely, how do the UNICTR judgements square with historiography? From what transpired from the key trials discussed above, there cannot be a simple answer, particularly if one considers that the tribunal itself over the years matured into a more professional institution. At the start, the non-Rwandan, the non-experienced and non-specialised judges, were eagerly learning about international criminal law and procedure, Rwandan history and the atrocities that had taken place. In their first case, Akayesu, judges easily subscribed to the NGO-narrative presented by Des Forges, the testimony of witnesses and the basics of political events in Rwanda. In what was a highly complex case involving an accused who from one day to the other turned into a *génocidaire*, the reading of the trial chamber of what happened in Rwanda was copied-pasted from the early historiography and available information at the time. Basically, in the early days, the UNICTR applied a very broad and liberal interpretative approach to legal provisions prohibiting mass crimes and stipulating individual criminal liability and the contextual circumstances in which they were committed. In a bid to judge history, they had sought to extend their purpose and work terrains, trotting way outside strict and literal interpretations of their mandates. It appears that for more than ten years, trial judges in Arusha had favoured a simplistic understanding of a genocidal process or had consoled themselves with the determinism of an *a posteriori* interpretation of history. But the UNICTR was also a learning institution. As time progressed and judges increasingly detached themselves from the normative and emotional aura surrounding the atrocities, became more informed about the sophisticated realities in Rwanda and grew critical towards the troublesome nature of the evidence produced by the prosecution, the judgements became more carefully written and nuanced. Increasingly and progressively, trial chambers and appeals chambers struck down generally held historical findings of their predecessors. From 2003, the trial chambers and appeals chambers moved towards a stricter interpretative construction of what they were set up to do, and on how to do it. After the media trial, which was very liberal in its findings on the role of the media and its agents in the alleged genocide planning, apparently for the first time, however, the appeals chamber strictly broke with that tradition and dedicated itself to a principle of strict construction of criminal law. As an
unsurprising result of this modus operandi, many findings made under the old interpretative framework, starting with the media case, were struck down, largely because of jurisdictional arguments and rising reasonable doubts on the narratives. Progressively, some judges over the course of years and different trials had also become real ‘specialists’ on Rwanda themselves and along the way they grew more sceptical, or less naïve, towards how the facts, if at all found, reasonably fitted the official historiography presented in the indictments by the prosecution. Moreover, as the tribunal’s chambers grew more knowledgeable of what happened, became more critical towards the evidence and increasingly detached from the NGO narratives, they simply became less certain about what happened, how, when and why. Besides, while progressively becoming a professional law institution, judges became much more rigorous in testing the evidence and witnesses’ testimony and found it less convincing and credible. A direct consequence thereof was that the UNICTR’s reading of history, or account on the genocide prior to April 1994, in its judgements from 2007 onwards changed significantly. More and more, they became constricted within a legal straitjacket and focused on the period after April 1994. This new stance significantly impacted the tribunals’ conspiracy trial against Bagosora, in which judges were simply not able to infer from the evidence the unchanged prosecution’s case theory. Its stricter approach does not mean that the genocide did not happen, it simply means that the tribunal ruled out the prosecution’s narrative on when, why and how it was committed.

In some way, the UNICTR judges have advanced alongside the development of historiography and increasingly found that the genocide was rather an event triggered by contingency than conspiracy. To an extent, this is in line with the consensus on the Rwandan genocide within the serious, detached non-politicised academia. Sober recent scholarship, based on UNICTR elicited evidence, also suggest the genocide evolved into a full-scale campaign from 12 April onwards and was rather the result of a political crisis-management in times of war than a pre-planned event. However, using the UNICTR archives, read conjointly and in lieu of other material particularly by professional historians, different explanations and narratives may arise in the future. Whereas judges ruled out the conspiracy based on the evidence presented to them at particular trials through particular procedures, historians are less constrained. Analysing the same evidence, they might well conclude, and have done so already, that there had been some high-level conspiracy to commit genocide in Rwanda before it unfolded. It is not justice’s powerlessness to judge history. It is rather the illustration of the “problem that arises when relying on a trial judgement as an objective account of history.”

There is a inherent mismatch between the restrictive standard of proof of ‘beyond reasonable doubt’ judges must apply to an already narrowly judicially straitjacketed historial event and the standard of proof of balance of probabilities or convergence of evidence that the historian can apply to a

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1861 For instance: Straus, *The Order of Genocide*; Guichaoua, *From War to Genocide*.
1862 See this argument by: Gaynor, “Uneasy Partners”, pp. 1271-1272.
temporally and geographically unrestricted scope of historical events, structures and agencies. New historiography depends on the critical reading of the sources, the court’s records which are available through the court’s online archives. This chapter has contributed specifically to a deeper understanding of the trial record, through an analysis of the UNICTR investigations, litigations at trial and close reading of its key judgements. A key limitation when it comes to relying on the court records is the fact that is built on the fallible foundation of witness testimony, of which almost 70 % was provided behind closed doors. A lot of information thus, is not publicly available for crucial historical research.

\[1863\] Idem.
5. Cross-examining the past. Sierra Leone: ‘Taylor-made’ terror

A rebel conflict for the sake of power
When two elephants dem a fight
The grass dem a suffer

Which is the position of the civilians?
Lord I cry
Dem a big fool us

Have no mercy for the vulnerable
Have no mercy for the women
Have no mercy for the youths
Have no mercy for the children
Oh, we a go suffer

Sierra Leone Refugee All Stars

5.1 Introduction

Whereas in Rwanda the contested narratives about the genocide prevail and are increasingly stringent, the history of the civil war in Sierra Leone has evidently scarred Sierra Leonean society but the politics of memory has not taken such a virulent turn. First of all, the atrocities, by all sides to the conflict, are widely known in Sierra Leone, its occurrence was bluntly overt. In Rwanda, basic facts continue to be disputed and many alleged atrocities by the RPF were carried out covert. Secondly, the pre-war history of Sierra Leone was not tainted by ethnic politics and cyclic struggles for power along ethnic lines, alike the Hutu-Tutsi dichotomy. The discourse that animated the violence in Sierra Leone was strikingly different; it was not deeply ideological and was not framed in a discourse of historical enemies. Thus, thirdly, the nature of the atrocities was not genocidal and there were no specific social categories targeted for extermination and played out against each other as was the case in Rwanda. Accordingly, after the war in Sierra Leone, there was no particular group that came out of the war victorious to the extent that the RPF did. Animosity on the basis of ethnicity, for example, does exist, but hardly up to the levels as in Rwanda. Fourth, the dealing with the past through transitional justice was not tarnished by absolute victor’s justice and the shifting of responsibility on one collective, as was the case in Rwanda with Hutu population. Rather, all parties partook in either the truth and reconciliation process, were pursued by the Special Court for Sierra Leone or were involved in the Fambul Tok community reconciliation sessions. Also, the perceived masterminds behind the carnage in Sierra Leone were abstract entities, such as ‘rebels’ rather than prominent politicians and military. Moreover, whereas the RPF complexly constructed the abstract idea that genocide was the historical endgame of Belgian colonial policy in the 1930s, in Sierra Leone the real

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culprits and instigators of mass atrocity were concrete living human beings who operated from the outside and remained outside during the war. Crucially, it is generally held and largely accepted that Charles Taylor, the former President of neighbouring Liberia, was a key protagonist of violence in Sierra Leone. As such, there is no disagreement among Sierra Leoneans who was the most responsible. Arguably, because he was a non-Sierra Leonean, Sierra Leoneans hardly have any reason to contest the external reasons and origins of the war. Fourth, there was no radical ideological regime change as in Rwanda and those in power had no urge, like the authoritarian RPF, to rewrite history and create a new founding narrative that was coerced on society as a whole. A particular version of history in Sierra Leone, although painful, did not become the foundational ideology of the state and a rather pluralistic public space to hold one’s own opinion and version about past atrocities has remained. Moreover, Sierra Leone rather aspired a future-making project which focused on a common destiny rather than an articulation of a common past. Finally, Sierra Leone hardly had time to come to terms with the violence as extreme poverty and new crises shifted the focus on the immediate present and future hardships, not so much on the past.

The next case study, thus, differs fundamentally from Rwanda in terms of the deeply ingrained contestation of narratives about the violent past. The specific dynamics of the insurgency and subsequent four-year two-faced categorical and ethnically tainted war in Rwanda and the rather multi-factional, eleven-year, rebel war in Sierra Leone essentially explicate those variations. Subsequently, the post-conflict response was also different. Sierra Leone, for instance, embarked on a truth commission to unravel the causes of the war and give a podium to victims and perpetrators at the same time. Also, because Sierra Leone had already agreed to amnesty low-level perpetrators and child soldiers, it hardly pursued criminal justice in its national courts. Instead, it embarked, conjointly with the United Nations, on a hybrid prosecution and judgement of some of those who were believed to bear to biggest responsibility for atrocity crimes from all sides of the conflict in front of a court that was based in the capital. Another key difference is that, unlike in Rwanda, the process of transitional justice has had a much bigger role on the historiography of the war. Absent the government’s active meddling in (re-) writing history and the magnitude of critical historical scholarship on the genocide in Rwanda, basic knowledge on and explanations of key events, issues and agency in Sierra Leone were, and remain to be, particularly established, enticed and narrated through the truth commission and the Special Court for Sierra Leone (SCSL). Other sources have so far remained relatively scarce. There are however, some crucial similarities, in the way transitional justice was done. First, like in Rwanda, the epistemological base for truth-finding was almost entirely witness testimony, enticed through a legalistic lens. Secondly, there was hardly any forensic

1866 In Sierra Leone the idea that war violence is common knowledge and therefore does not need to be publicly discussed has contributed to the pervasive and institutionalised culture of silence. See: Gellman, ‘Teaching Silence in the schoolroom’, p. 149. A similar argument is made in: Johanna Zetterstrom-Sharp, ‘Heritage as future-making: aspiration and common destiny in Sierra Leone’, International Journal of Heritage Studies, Vol. 21, no 6 (2015), pp. 609-627.


1868 After the Holocaust, Rwanda is arguably the most researched case of genocide in academia.
corroboration possible for those testimonies. Third, the rationale of transitional justice agents was ambitious. Not only, did the truth commission try to unravel and write the first comprehensive and authoritative long history of Sierra Leone, it also set out to, amongst many other things, spark reconciliation, contribute to national healing and forge a vision for the future. At the Special Court it was not different. Prosecutors promised Sierra Leoneans to enlighten them with the truth about what had happened in dark Sierra Leone, while former UNICTR investigators were scrambling for evidence in the Sierra Leonean forests the same way they had done in the Rwandan hills. Also coming from the UNICTR was Stephen Rapp, who had led the media case against Ferdinand Nahimana. His task was to prosecute the SCSL’s main case against Charles Taylor. However, as we will see below, the historical charges levelled against Taylor as a conspirator of mass atrocity and godfather of terror, would not hold up in court, beyond any reasonable doubt. In the coming chapter, we will analyse what the reasons were for the promises that could not be met. Before I do so, I will outline the contextual contours of the civil war in Sierra Leone.

5.2 From philanthropic to failed state

Sierra Leone will taste the bitterness of war.

- Charles Taylor

Modern-day Sierra Leone is generally known for two things: shiny diamonds and mind-boggling calamities. With its strappingly young, urbanised, but unemployed population, the west-African country endemically ranks amongst the poorest countries around the globe. On top of that, an epidemic of the Ebola virus disease (EVD) in 2014 did not only kill over 3400 persons but also pushed the country further into economic and social quarantine and underdevelopment. In the foregoing decade it had barely climbed out of a destructive civil war that killed between 10,000 and 70,000 people, a man made crisis. From the early 1990s onwards, Sierra Leone made headlines...
with unsettling images, in which intoxicated child soldiers, blood diamonds and people with hacked off arms and legs featured as the figurants of what observers dubbed the “coming anarchy.”¹⁸⁷⁶ Death, despair and lawlessness are branded on Sierra Leone’s retina and dominate the outside worlds’ perception of its contemporary past.¹⁸⁷⁷ Yet, details on the country’s early history remain typically unknown. What is clear from the scarce sources is that migration waves coloured the early contours of what grew into a multi-ethnic state representing a mosaic of over 17 ethnic groups.¹⁸⁷⁸ Linguistic analysis suggests that the Limba were the first known to enter the territory, followed by Mande-speaking groups, including the Mende.¹⁸⁷⁹ In the time to follow, Guinean and Senegalese Mandinka traders brought along Islamic tradition and induced the northern Temne area.¹⁸⁸⁰ Some early Portuguese settlers (lança dos) had settled on the mainland and wedded local women, establishing a group of so-called Luso-Africans blending African and Catholic traditions and speaking the precursor of the present day dominant language, Krio.¹⁸⁸¹ The pre-colonial political configuration was composed of centralised political entities headed by kings. Paramount chiefs, who are still highly influential, regulated the localities.¹⁸⁸² From early on, the West African coasts, including Sierra Leone, were gradually incorporated into the Atlantic triangle of the slave trade,¹⁸⁸³ yet it was the British abolitionist movement who spurred the original colonisation of the country.¹⁸⁸⁴

Abolitionists and philanthropists had idealised the land to develop a self-governing home for freed slaves, mostly from London and the colonies in the Caribbean.¹⁸⁸⁵ Ex-slaves from Nova Scotia and Jamaica were among the first to settle in ‘Freetown’ between 1792 and 1800.¹⁸⁸⁶ Blending Western and African influences, these ‘creoles’ and their offspring cultivated a ‘Krio’ culture and soon they valorised itself as an elite class and gradually morphed into a distinctive ethnic group.¹⁸⁸⁷ After 1808, the British declared Freetown, its peninsula and its direct environs a Crown Colony in which around 74.000 ‘Liberated Africans’ settled down.¹⁸⁸⁸ Sierra Leone, and particularly Freetown, then soon became a magnet for Africans from the region, looking for labour, trade opportunities or an escape from their own enslaving leaders or ‘owners’.¹⁸⁸⁹ For most of the nineteenth century, the vast majority of the present-day hinterlands remained in the hands of its indigenous peoples, essentially Mendes in the South and Temnes in the north.¹⁸⁹⁰ At the dawn of the twentieth century, in 1896, the

¹⁸⁷⁸ John L. Hirch, Sierra Leone: Diamonds and the Struggle for Democracy (London 2001), p. 22. The largest groups are the northern and centrally located Temne (35%) and the southern and eastern Mende (31%). Both groups have their distinct languages but Krio is most widely understood while the official English is limited to a literate minority. About 90% of the Sierra Leoneans practice Islam (60) and indigenous beliefs (30), Christians are in minority.
¹⁸⁸¹ Hirch, Sierra Leone, p. 23.
¹⁸⁸² Ibidem, p. 22.
¹⁸⁸⁴ Shaw, Memories of the slave trade, pp.27-29.
¹⁸⁸⁵ Gberie, A dirty war, p. 17-18.
¹⁸⁸⁶ Ibidem, p.18.
¹⁸⁸⁸ Gberie, A dirty war, pp. 18-19.
¹⁸⁹⁰ Gberie, A dirty war, 19.
British declared a protectorate over the immediate environs of the Colony, managing a dual system of direct rule in Freetown and indirect rule in the rest of the territory.\(^{1891}\) British control and their imposition of a ‘hut tax’ led to the short-lived violent ‘Hut Tax War’ in the north and ‘Mende Rising’ in the south in 1898.\(^{1892}\)

With the British showing little economic and political interest in Sierra Leone, most of the first half of the twentieth century remained peaceful, while the country flourished intellectually. Established as Anglican missionary school, the only western-styled university, Fourah Bay College (1872) developed into a lodestone for English speaking Africans in the region.\(^{1893}\) Economically however, Sierra Leone remained impoverished and barely self-sustainable. Until diamonds were discovered in 1931, which in turn led to a British mining monopoly, local illegal trade and large-scale corruption.\(^{1894}\) From the 1950s, forecasts on self-determination opened up a process of democratisation and alienated Sierra Leoneans into opposing factions from the Colony and the Protectorate, each fiercely dedicated to guard the interests of its regional, class or ethnic base.\(^{1895}\) Two political parties rose to prominence: the Sierra Leone People’s Party (SLPP) headed by a Mende, Sir Milton A. S. Margai\(^{1896}\) and the All People’s Congress (APC), led by Siaka Stevens.\(^{1897}\) A continuing struggle for political control, from this time onwards, would progress into a protracted challenge between these political rivals; the APC - appealing to the proletarian masses and the influential tribes of the North - and the SLPP - drawing on the support of the middle class, traditional elite and the ruling houses of the South and East. From the wake of independence in 1961, the Colony-Protectorate dichotomy was ultimately replaced by identity politics and became a basis for prejudice, hostility and conflict in post-colonial Sierra Leone.\(^{1898}\)

Ultimately, the SLPP formed the first postcolonial government, headed by Sir Milton Margai, who was quick to arrest prominent APC members and soon declared the first state of emergency in independent Sierra Leone.\(^{1899}\) After Milton Margai died in office in 1964 and was succeeded by his brother, Albert, political dissidents were violently vetted and Mende appointed in high positions, mostly banishing Krio.\(^{1900}\) Only three years later, Sierra Leone experienced its first military coup, toppling Albert Margai and eventually putting in power the APC’s Prime Minister Siaka Stevens in 1968.\(^{1901}\) Under his authoritative rule, state institutions soon corrupted, parliament was silenced, judges were being bribed and army morale heavily undermined. Protesters were either executed or

\(^{1893}\) The British primarily annexed Sierra Leone in ‘interest of the people’. Gberie, \textit{A dirty war}, p. 19.
\(^{1898}\) Ibidem, pp. 18-19.
\(^{1899}\) Ibidem, p. 24.
\(^{1900}\) Gberie, \textit{A dirty war}, p. 26.
\(^{1901}\) TRCSL, \textit{Witness to truth}, Vol III A, p. 27.
forced to flee. From 1973, Sierra Leone transformed into a de facto one-party state based on a patronal system in which Stevens distributed patronage to loyal clients to ensure political support. After a ‘referendum’ in 1978, Stevens officially declared the country a one-party state, which lasted for seven years. Aged 80, he retired from office at the end of his third term. Major General Joseph Momoh won the subsequent presidential elections as the sole candidate in 1985. His rule of an already corrupt and bankrupt state was marked only by further decline. Bowing to international demands and reacting to national pressure, Momoh moved to reinstate multiparty democracy. In 1991, voters approved a new, more liberal constitution in 1991, and elections were scheduled for later that year.

Anatomy of Sierra Leone’s Inferno (1991-2002)

RUF is fighting to save Sierra Leone
RUF is fighting to save our people
RUF is fighting to save our country
RUF is fighting to save Sierra Leone

Chorus: Go and tell the President, Sierra Leone is my home Go and tell my parents, they may see me no more When fighting in the battlefield I’m fighting forever Every Sierra Leonean is fighting for his land

- RUF/SL

Behind the façade of Momoh’s democratic turn, Sierra Leone descended into a macabre theatre of atrocity war, terrorising its civilians for over a decade. A bold mixture of disgruntlement over frail governance, suppression of opposition, generational differences and economic volatility had been predominantly articulated by young students, who organised themselves into ‘radical’ groups. But their initial rallies, strikes and demands for political change had miscarried in the years 1977-1982. Up to when political scenery in the 1980’s changed. Mixing his Pan-African Policy and stout disdain for Momoh’s rule, Libyan leader Muamar Gaddafi started to funnel assets to radical university students...
students to undermine the government. Trifling demonstrations were organised but rumbled with violence, sparking further radicalisation amongst some of the students. By 1987, a small group of ‘would-be-revolutionaries’ – students, urban youth, and secondary school students – found itself in Libya for military and ideological training at the Mathabh al-Thauriyah al-Alamiyah World Revolutionary Headquarters (WRC), the breeding ground for a complete generation of African revolutionaries.\textsuperscript{1910} As the original ‘revolutionary’ programme stranded, most of the recruits returned home, disillusioned. Some hardliners, however, ensued and embraced a militant agenda. The group was spearheaded by Foday Saybanah Sankoh who advocated for support in the region, particularly amongst Liberians with whom he had trained in Libya in 1987-1988 and reportedly conceived a plan to organise and lead an armed insurgency into Sierra Leone.\textsuperscript{1911}

Sankoh, a professional photographer and a former corporal in the Sierra Leonean army before he was imprisoned for plotting a coup in 1971\textsuperscript{1912} - purportedly with the support of Liberian rebel leader Charles Taylor - succeeded to assemble and train a force of 385 commando’s in Liberia, who became the forerunners (“Vanguards”) of the Revolutionary United Front of Sierra Leone (RUF/SL; RUF hereafter).\textsuperscript{1913} Taylor, in addition, provided almost 2,000 of his National Patriotic Front of Liberia (NPFL) men as Special Forces to the RUF. On 23 March 1991, about one hundred RUF-guerrillas\textsuperscript{1914} attacked the diamond-rich east-Sierra Leonean town of Bomaru, in east Sierra Leone nearing the Liberian border, igniting an eleven-year multidimensional conflict.\textsuperscript{1915} Sankoh’s revolutionary guerrilla army and his vanguard irregular forces officially claimed to dispose Sierra Leone’s corrupt leadership, to liberate the abandoned peasantry and the young poor, and ultimately institute legitimate democracy.\textsuperscript{1916} Its philosophy entailed “the use of weapons to seek total redemption”; “to organise themselves and form a sort of People’s Army”; “to procure arms for a broad-based struggle so that the rotten and selfish government is toppled.”\textsuperscript{1917} Somehow resembling a
conventional army, including a rank system and command structure, their ‘uprising’, however, never really manifested a coherent ideology or even a practical political agenda to tackle Sierra Leone’s problems. Rather, the reckless RUF morphed into a chaotic band of mercenary bandits and abducted children ruled by warlords whose main objective ultimately appeared to be pillaging the countries’ precious resources as a means of survival. Even when democratic elections were held in 1996, the group chose to boycott the ballot box and instead conserved violence against the people it claimed to be fighting for, in contradiction of the spirit of its Codes of Conduct.

**Insurgency and guerrilla**

The Sierra Leonean inferno unfolded at snail’s pace, climaxing into heightened violence in the second half of the 1990s. At first war was fought on two fronts, characterised by voluntary and forced recruitment of civilians – especially youths and children escaping national and local marginalisation - within the scope of NPFL and RUF ranks. At the outbreak of war, the conventional state security apparatus was severely weakened; the Sierra Leonean Army (SLA) was virtually non-existent. Whereas the military was marginalised throughout the 1970’s and 1980’s, the army did not have manageable vehicles, communication facilities were absent and most of the soldiers were not fit for combat and resided in Freetown. In fact, the country lacked an operational army when the RUF entered the country. This being the case, the RUF managed to control a large part of eastern Sierra Leone by July 1991, soon financing its war by selling diamonds in Guinea and Liberia. Momoh failed to gain control over the situation and as a result of non-payment of soldiers a coup was staged and a military junta - the National Provisional Ruling Council (NPRC) - formed in Freetown. In April 1992, Captain Valentine Strasser became the new Head of State and expanded the army – by releasing prisoners and recruiting jobless youngsters - who managed to push the RUF towards the Gola Forest on the Liberian/Sierra Leonean border. By the end of 1993, Strasser declared a cease-fire, giving way for the RUF to regroup. Barely a month later, had the RUF returned to war, but this time with more sinister tactics. As some of the irregulars in the army, who were not receiving salaries, resorted to banditry or even joined the rebels, the situation escalated into widespread chaos. The RUF launched a guerrilla – or ‘bush’ - strategy, becoming less visible, less predictable, less consistent and less distinguishable and expanded its activities into every district of Sierra Leone. During the guerrilla fighting or “Bush war”, the RUF - many times backed by disloyal soldiers - started raiding and
ambushing villages in search for food, medicines and new conscripts, indiscriminately burning parishes, killing citizens and taking hostages. These new tactics of terror created an atmosphere of general insecurity and destructive anarchy as groups of civilians and even soldiers started copying the rebels’ way, carrying out their own attacks in search for plunder.  

In this dissolve violent scenery, new groups came into play or likewise became more prominent. First, many of the irregular government troops became known as ‘sobels’; those who were soldiers by day but ‘rebels’ at night. This new phenomenon referred to either SLA members who joined the RUF still using their SLA uniforms, so people thought they were fighting for the government, or SLA members who, although they did not join the RUF as such, were acting as if they were ‘rebels’, adopting the same behaviour. It was against this background that an age-old system of civil defence was resurrected and grew of importance: the hunting societies of the Tamaboros and the Kamajoisia or better known as Kamajors. Kamajors were already used at the beginning of the war by the army to scout the terrain but the NPRC began to encourage the strengthening of these community defence groups as an alternative security mechanism to replace the distrusted Army. In 1992 the more formalised Kamajor society was formed by former history lecturer Dr. Alpha Lavalie, head of the Eastern Region Defence Committee (Eredcom) and throughout the country local Kamajor militia started operating as civil defence forces fighting the RUF, ‘sobels’, and on a number of occasions, the army. Later the Kamajor militia and other groups were combined under the Civil Defence Forces (CDF).  

From November 1994 the RUF expanded its guerrilla movement deeper into Sierra Leone, establishing various camps and bases in the territory. Its tactics remained the same: violence against the civilian population continued unabated. Widespread burning and looting of civilian residences, killings and sexual violence by drugged RUF forces during multiple raids became a daily reality. Beating, molestation and abduction of both men and women – mostly children - for use as porters to carry stolen property or for conscription into the fighting forces’ ‘small boys’ and ‘small girls’ units continued as well. The RUF assaults, furthermore, resulted in the widespread destruction of public infrastructure such as government offices, hospitals, schools and police barracks. By January 1995, the RUF reached the outskirts of Freetown and Strasser in February reacted by contracting mercenaries to combat the RUF. The junta first contracted the British-based Ghurka

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1928 Gberie, A dirty war, pp. 80-81.
1929 TRCSL, Secondary school version Report, p. 47.
1930 Smith, Conflict Mapping in Sierra Leone, p. 344.
1931 The term Kamajor was originally used to refer to a Mende hunter with specialised knowledge of the forest and was an expert in Bush medicines. Kamajors were also responsible for protecting the community from natural and supernatural threats. In the traditional form the Kamajor system was a process of initiation, including training men to fight and to be unafraid of the battlefield in order to prepare youngsters for traditional warfare and defence of people and property. See: SCSL, Prosecutor against Moinina Fofana and Allieu Kondewa: Judgment (SCSL-04-14-7; 2 August 2007), §§60-61. Also see the anthropological study: Danny Hoffman, The War Machines. Young Men and Violence in Sierra Leone and Liberia (Duke: Duke University Press, 2011), pp. 55-126.
1932 SCSL, Fofana & Kodeva Judgment, pp. 62-64.
1933 Gberie, A dirty war, pp. 82-86.
1934 By 1996, the RUF had expanded its territory to include Kailahun Town, Buedu, Giema, Pendembu, Daru and Segbwema in Kailahun District and the diamond mining area of Tongo Field in Kenema District. See: SCSL, Sesay, Kallon & Gbao Judgement, pp. 238-239.
1935 Smith, Conflict mapping, p. 25.
Security Guards (GSG)\textsuperscript{1936} who went into combat but soon failed because their commander Robert Mckenzie was murdered in an ambush.\textsuperscript{1937} Replacing the GSG in May, the government contracted another private military company Executive Outcomes (EO), a private South African mercenary company who before assisted the Angolan army in combating UNITA.\textsuperscript{1938}

‘Operation stop elections’ and the military junta’s

Executive Outcomes started training activities and formed a Special Task Force (STF) using a large number of demobilised Liberian militia from ULIMO (United Front of Liberia for Democracy), Nigerians, Guineans, and Kamajors. The STF attacked the RUF, chasing them out of the Western Area. Following this, civilians and SLA forces in the Western Area attacked and killed persons suspected to be ‘rebel collaborators’.\textsuperscript{1939} The situation in Sierra Leone came to relative ease after the EO intervention and the junta planned democratic elections in order to return to normalcy. By January 1996 Strasser was overthrown within his own party and replaced by Brigadier Julius Maada Bio, who initiated dialogue between the NPRC and RUF. Bio promised Foday Sankoh to postpone elections so that peace could be negotiated and the RUF could participate. Instead of caving in the RUF launched ‘Operation Stop Elections’ against civilians “as a deliberate ploy to undermine the expression of democratic will by the people of Sierra Leone who participated.”\textsuperscript{1940} Its boycott entailed a sinister campaign of chopping off hands and arms as a symbol of preventing people from voting, which at the time was done by fingerprinting with the thumb.\textsuperscript{1941} Nobody was spared, including those who were not even allowed to vote: men, women, children, and elderly were all assaulted.\textsuperscript{1942} Despite these atrocities, the elections continued and SLPP leader Ahmed Tejan Kabbah came out a winner, grossing 608,419 votes in the run-off.\textsuperscript{1943} Soon after, peace negotiations commenced between the new government and RUF resulting in the signing of an agreement in Abidjan, Côte d’Ivoire.\textsuperscript{1944} Both parties, even when the ink was still to dry, did not adhere to the agreement. Tensions and distrust resulted in neither of them demobilising or disarming their troops. Moreover, Sankoh was arrested in March 1997 in Nigeria on charges of weapon smuggling and was detained there for almost two years.\textsuperscript{1945} It was against this background that Sierra Leone’s situation was on the edge of tumbling into a new round mayhem as a new coup was staged in May 1997.

\textsuperscript{1937} Gberie, A dirty war, 91-92.
\textsuperscript{1939} Smith, Conflict mapping, 27.
\textsuperscript{1940} TRCSL, Witness to Truth, Vol. II, §139.
\textsuperscript{1941} TRCSL, Witness to Truth: Appendix IV- Part one: Amputations in the Sierra Leone Conflict, §85.
\textsuperscript{1942} Ibidem, §150.
\textsuperscript{1944} Peace Agreement between the Government of the Republic of Sierra Leone and the Revolutionary United Front of Sierra Leone (RUF/SL), Abidjan 30 November 1996.
\textsuperscript{1945} Hirsch, Sierra Leone, 54-56.
In January, Kabbah had expelled the EO mercenaries form Sierra Leone and subsequently replaced them by some 900 Nigerian troops who were tasked to provide personal bodyguards but were not able to prevent a new coup. On 25 May, a group of young officers from the SLA overthrew Kabbah and installed themselves as the Armed Forces Revolutionary Council (AFRC), chaired by Major Johnny Paul Koroma. Kabbah fled to Guinea where he established the War Council in Exile, while the AFRC was soon composed of members of the SLA and the RUF, which were invited to join the military junta.

In the following months, the junta controlled Freetown and other major cities throughout the country. Internal resistance was organised by the Civil Defence Forces (CDF), comprised of the institutionalised Kamajor militia. Internationally, the AFRC was not recognised, neither by the Economic Community of West-African States (ECOWAS) nor the UN. Both sanctioned the junta and soon new negotiations were initiated. In the meantime ECOWAS’ Monitoring Group, ECOMOG, was deployed to form a blockade of Freetown.

On 23 October, after negotiations between the putschists and ECOWAS, an agreement calling for the re-instalment of Kabbah by 22 April 1998 was brokered in Conakry, Guinea. The Conakry Agreement further called for the immediate cessations of the violence, the demobilisation of all combatants by ECOMOG, the bringing in of humanitarian assistance, the return of refugees, the granting of immunities to AFRC members and the release of Sankoh. Soon after, however, the junta diluted the execution of the agreement. Instead, the AFRC/RUF started to regroup and re-arm, resulting in serious fighting with ECOMOG. By mid-February 1998, Freetown was taken by ECOMOG with the assistance of 200 mercenaries from yet another private military company, Sandline International. The AFRC/RUF forces fled Freetown leaving a trail of demolition, indiscriminately killing civilians and plundering on a massive scale. In their mass retreat from power, the ousted AFRC dissidents flocked into the northern districts and instituted a campaign of human rights abuses on the populace, including intentional amputations.

Kabbah returned to Sierra Leone on 10 March 1998 and his government reoccupied authority. His government and ECOMOG, however, were not able sustain the revolutionary forces, as AFRC soldiers and RUF units managed to recuperate and even swell. By the end of the year they were already knocking on the doors of Freetown, again. The macabre-titled ‘Operation No Living Thing’ – designed by RUF Battle Field Commander Sam Bockarie to “kill everybody in the country

1947 Hirsch, Sierra Leone, 87.
1950 Adebayo, Building Peace, 87-88.
1951 Ecowas six-month peace plan for Sierra Leone, 23 October 1997 - 22 April 1998 (Conakry, 23 October 1997); Gberie, A dirty war, 114.
1952 Ecowas six-month peace plan for Sierra Leone.
1954 TRCSL, Witness to Truth: Appendix 5: Amputations in the Sierra Leone Conflict.
1955 Peters, Footpaths, 54.
to the last chicken”\(^{1957}\) - in January 1999 saw the most severe horrors of the war unfold as rebels attacked the capital. A nearly two-week reign of nihilistic random terror struck Freetown. Human Rights Watch (HRW) reported that “civilians were gunned down within their houses, rounded up and massacred on the streets, thrown from the upper floors of buildings, used as human shields, and burnt alive in cars and houses. They had their limbs hacked off with machetes, eyes gouged out with knives, hands smashed with hammers, and bodies burnt with boiling water. Women and girls were systematically sexually abused, and children and young people abducted by the hundreds.”\(^{1958}\)

The ‘battle for Freetown’, eventually leaving an estimated 6,000 civilians killed and nearly 100,000 driven from their homes, was in the end halted by ECOMOG. In retaliation, the peacekeeping contingents retaliated with ‘Operation Death Before Dishonour’, systematically beating and publicly executing ‘rebel suspects’ and ‘sympathisers’.\(^{1959}\) As the freshly elected Nigerian president Olusegun Obasanjo in May called for the retreat of Nigerian troops (ECOMOG predominantly consisted of Nigerian soldiers) from Sierra Leone, it now became evident to the Kabbah administration that chances of winning the war were diminishing. RUF atrocities were reported some 30 miles northeast of Freetown\(^{1960}\) and in this weakened state the government signed a cease-fire agreement on 18 May 1999.\(^{1961}\) They retreated to the Togolese capital Lomé to negotiate a peace agreement with the RUF.

The resulting comprehensive ‘Lomé Peace Agreement’ included, among other things, a permanent cease-fire; provisions for demobilisation, disarmament, and reintegration of all combatants; the transformation of the RUF into a political party; the installation of a UN observer mission; the establishment of a truth and reconciliation commission; and new elections.\(^{1962}\) Moreover, in order to consolidate peace and ensure the RUF’s cooperation a highly controversial blanket amnesty was granted to Sankoh –first condemned to be hanged for treason but later released - and to all combatants and officials.\(^{1963}\) A ‘necessary evil’ in the eyes of many observers, the amnesty provision was considered an effective tool to finally end the war. But next to pardoning Sankoh, the Agreement, above-all, made the RUF leader the chairman of the Board of the Commission for the Management of Strategic Resources, National Reconstruction and Development (CMRRD). Charged “with the responsibility of securing and monitoring the legitimate exploitation of Sierra Leone’s gold and diamonds, and other resources that are determined to be of strategic importance for national security and welfare as well as cater for post-war rehabilitation and reconstruction”, Sankoh was given

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\(^{1957}\) Gberie, A dirty war, 120-121.
\(^{1959}\) Adebajo, Building Peace, 95; HRW, Getting Away With Murder, np.
\(^{1961}\) Agreement on Ceasefire in Sierra Leone, Freetown, 18 May 1999.
\(^{1962}\) Peace Agreement between the government of Sierra Leone and the Revolutionary United Front of Sierra Leone. Cynically, the Agreement was signed under the supervision of, inter alia, Charles Taylor.
\(^{1963}\) “In order to bring lasting peace to Sierra Leone, the Government of Sierra Leone shall take appropriate legal steps to grant Corporal Foday Sankoh absolute and free pardon. After the signing of the present Agreement, the Government of Sierra Leone shall also grant absolute and free pardon and reprieve to all combatants and collaborators in respect of anything done by them in pursuit of their objectives, up to the time of the signing of the present Agreement. To consolidate the peace and promote the cause of national reconciliation, the Government of Sierra Leone shall ensure that no official or judicial action is taken against any member of the RUF/SL, ex-AFRC, ex-SLA or CDF in respect of anything done by them in pursuit of their objectives as members of those organisations, since March 1991, up to the time of the signing of the present Agreement. In addition, legislative and other measures necessary to guarantee immunity to former combatants, exiles and other persons, currently outside the country for reasons related to the armed conflict shall be adopted ensuring the full exercise of their civil and political rights, with a view to their reintegration within a framework of full legality”. Lomé Peace Agreement, art. IX.
effective control over Sierra Leone’s diamonds mines. As a cherry on top, the former rebel leader was
made Vice-President and thereby exclusively accountable to the president.1665

Lomé’s accord, which was a dreadful and scandalising agreement according to influential
spectators,1666 did not put an end to hostilities as promised. The country remained divided between
ECOMOG as well as RUF controlled areas. Also, the designed disarmament process stagnated as
many RUF elements refused to hand over their weapons, even with a freshly stationed UN Mission in
Sierra Leone (UNAMSIL) peacekeeping force1667 that replaced ECOMOG and was tasked to assist
the Sierra Leone government in the implementation of the disarmament, demobilisation and
reintegration (the so-called DDR programme) plans.1668 UNAMSIL was not able to stabilise the
situation as it came under constant attack by rebel forces, culminating in the abduction of over 400
newly arrived Zambian, Kenyan and Indian troops in the northeast in May 2000, at the hands of RUF
militia.1669 As a result public perception turned dramatically against the RUF, in particular against
Foday Sankoh as there was a growing belief among the public that he was responsible for the
abduction and molestation of peacekeepers.

5.3 ‘War don Don’

In the night between 7 May and 8 May 2000, a civil society demonstration was organised to demand
the release of the peacekeepers. The protest escalated when an estimated 30000 people approached
Sankoh’s residence, where a riot unfolded leading to the death of scores of civilians. Sankoh
disappeared and was found nine days later near his residence and was apprehended and turned over to
the government.1670 The UN Security Council soon after increased its peacekeeping forces to
13,0001671 troops and in addition embargoed the trade in rough diamonds from Sierra Leone.1672
Diplomacy for an accountability mechanism had also started in May1673 and some months later the
Council likewise decided that, in order to combat the lasting impunity in Sierra Leone a criminal
tribunal should be established.1674 Meanwhile, Sankoh, through the intervention of ECOWAS, was
replaced by RUF commander Hassan Issa Sesay,1675 paving the way for renewed peace-talks in Abuja,
Nigeria, that resulted in a new cease-fire in November 2000. The DDR program was reinstalled and in
March 2001 UNAMSIL was increased to 17,500 troops, becoming the largest peacekeeping force in

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1665 Peace Agreement between the government of Sierra Leone and the Revolutionary United Front of Sierra Leone, arts.: V & VII.
1666 Ghezzi, A dirty war, 158.
1667 UNAMSIL was established on October 22. UNSC, Resolution 1270 (22 October 1999) (S/RES/1270).
1668 Hirsch, Sierra Leone, 86-87.
1670 Scheffer, All the Missing Souls, p. 321.
the world. This together with international sanctions against Liberia and Sierra Leoneans becoming tired of the war, finally made the RUF cooperate with the DDR program. From March 2001 the programme was well underway, and by January 2002 72,490 combatants had been disarmed and a total of 42,000 weapons and 1.2 million rounds of ammunition collected. In the meantime the RUF released hundreds of kidnapped children and other abductees and the government with the help of UNAMSIL was able to re-establish control in former RUF controlled areas.

Parallel to the DDR-program, it became evident that in order to halt demobilised groups destabilising the country, it was necessary to link the programme to long-term reintegration of ex-combatants. Therefore, the government decided to provide all registered former fighters with reintegration packages containing basic needs. The government, in addition, established a reintegration programme basically consisting of five options: re-enlistment in the Sierra Leone Army, going back to or continue education, following skills training, opting for an agricultural package, or enlisting for participation in public works. Despite its shortcomings, the DDR was concluded early 2002 and the President declared that the “War don Don” (Krio for the war is over) and held a symbolic ‘Arms Burning Ceremony’ on 18 January 2002. Two months later, Sankoh, alongside 29 other RUF members and more than 30 AFRC/ex-SLA members, known as the West Side Boys, were brought before Sierra Leonean court and charged with murder and robbery. The war thus had officially come to an end with cease-fire, but left the country shattered in ruins. Thousands died in the course of conflict, children were orphaned or victimised as slaving soldiers, thousands were left with their limbs amputated, women and girls were mentally and physically scarred by sexual abuses, civilians were traumatised by constant insecurity and attacks, and ex-fighters were left lost by their ‘leaders’. In all, the war left a long record of human rights abuses, war crimes and crimes against humanity. Moreover, the country was weaker and more impoverished than before the war. It was against this background of years of state corruption, grievances, youth unemployment, and the apocalyptic war that measures were sought to overcome the heavy burdens of the past as well as daily reality.

Witnessing truth in Sierra Leone

The inspiration is let's sprint; if we can't sprint, let's run; if we can't run, let's walk; if we also can't walk, then let's crawl; but in any way possible, let's keep on moving.

1977 Gbere, A dirty war, pp. 171.
1978 Peters, Footpaths, pp. 120-121.
Mayhem in Sierra Leonean left an atrophied, alienated and disfigured state, which in itself had already collapsed and ‘failed’ since its independence. Yet, the grand finale of hostilities heralded only the inauguration of the confrontations of societal rebuilding. No doubt, it was to be intricate since mass atrocities had been widespread. First and foremost: brutalities were virtually perpetrated universally; by members of the RUF/AFRC, Liberian fighters, government forces, CDF soldiers (Kamajor), mercenaries and ECOMOG peacekeepers. In addition, the liminal spaces between perpetrators, victims and bystanders were blurry. Some of the victims had turned into perpetrators; many children had been kidnapped from their homes, robbed of their childhoods and forced to live a rebel life, filled with hostilities. Crucial as well was the fact that the civil war did not put an end to the era of post-independence corruption, political mal-governance and fiscal deficiency. For Sierra Leone, (re) building the country and preventing future abuses necessarily required rigorous ventures in recuperating the daily economic and social conditions. Cynically, it was particularly the international humanitarian industry that swayed through the country, only to leave again for another crisis elsewhere. The ‘crisis caravan’ pushed for truth, reconciliation and accountability, particularly lobbyed for by international stakeholders, foreign governments and the United Nations. A combined operationalisation of a Truth and Reconciliation Commission (hereafter TRC or Commission) and a Special Court (hereafter SCSL or the Court) were instituted as a vehicle on this route, as part of an overall transitional strategy.

As seen above, with a peace settlement in mind, some transitional justice elements had already been conceived and blueprinted in Lomé, notably the broad amnesty and the TRC. Amnesties were handed out widely, yet an official organism for public truth-telling, styled like its immediate and widely praised predecessor in South Africa, was designed to address impunity, break

186 As in other situations, the question of ‘complex perpetrators’ has become topic of emerging scholarship. Most notably in this scholarship, the case of Dominic Ongwen, a former child soldier-turned commander of Uganda’s Lord’s Resistance Army (LRA), is referenced as a case study. See, for instance: Mark Drumm, “Shifting Narratives: Ongwen and Lubanga on the Effects of Child Soldiering, Justice in Conflict (Blog-text: https://justiceinconflict.org/2016/04/20/shifting-narratives-ongwen-and-lubanga-on-the-effects-of-child-soldiering/ last accessed on 16 September 2016.
188 Linda Polman, War Games: The Story of Aid and War in Modern Times (London: Penguin Group, 2010).
190 Amnesty, prosecutions, truth finding, reconciliation, reparations and re-integration were used in Sierra Leone to transcend to peace. Schotsmans, ‘Blow your mind and cool your heart’, pp. 263-287.
191 Peace Agreement between the government of Sierra Leone and the Revolutionary United Front of Sierra Leone, art. XXVI.
192 Crucially, Francis Okello, the then Special Representative of the UN Secretary-General, present at the signing of the Agreement, appended a handwritten reservation to the effect that the general pardon should not pertain international crimes of genocide, crimes against humanity, war crimes, and other serious violations of international humanitarian law. The United Nations holds the understanding that the amnesty provisions of the Agreement shall not apply to international crimes of genocide, crimes against humanity, war crimes and other serious violations of international humanitarian law.” The statement does not appear in the text of the Agreement published by the United Nations. William Schabas, who served on the Truth and Reconciliation Commission, writes that the TRC was shown an official copy of the Lomé Accord to which the statement was appended in handwriting. See: William A. Schabas, ‘Amnesty, The Sierra Leone Truth and Reconciliation Commission and the Special Court for Sierra Leone’, Davis Journal of International Law and Policy, Vol. 11, (2004), pp. 145-169: 148-149 [note 11]; UNSC, Seventh Report of the Secretary General on the UN Observer Mission in Sierra Leone (S/1999/836; 30 July 1999), §7.
the cycle of violence, serve as a catharsis for victims and perpetrators and to establish an impartial historical narrative of the conflict. On board of the commission was even one of South Africa’s commissioners, Yasmin Sooka. It started its mission in July 2002 and delivered its voluminous report Witness to Truth in October 2004. Meanwhile, the Lomé accord, however, could not guarantee the pledged peace and in the wake of continued human rights abuses and volatility, the Sierra Leonean administration requested the UN to erect a tribunal to bring the RUF leadership to justice. It was established in 2002 in the capital Freetown, to bring those most responsible to justice. The Special Court proceeded independently from the TRC and its most notorious trial was that versus former Liberian president Charles Ghankay Taylor for his alleged involvement in the war. The Special Court heard 315 prosecution witnesses and 240 defence witnesses and delivered judgements in four different cases, sentencing nine convicts, including Charles Taylor, to long-term imprisonment. At the TRC, researchers, investigators and commissioners collected 7,706 statements, heard over 450 witnesses in public hearings, published a voluminous report and made a score of recommendations for further transition. Puzzled together, all the testimonies and produced source materials arguably provide an itinerary through Sierra Leone’s war.

As we shall observe, the Sierra Leonean transitional process was unique for its time because it has been essentially twofold; there was a TRC to unravel the causes of the war and provide a public platform for victims while the ‘big fish’ were being tried before the Special Court. Although the parallel quest for truth and justice seemed to pave the way towards a new paradigm for approaching transitional justice, in which a TRC can also function as a quasi-pre-trial chamber, the relationship proved to be not necessarily successful. From the elitist cosmopolitan perspective, the differences between the institutions may be apparent, but for civilians, distinctions are less

1995 Agreement between the United Nations and the government of Sierra Leone on the establishment of a Special Court for Sierra Leone & Statute of the Special Court for Sierra Leone & Statute of the Special Court for Sierra Leone, art. 1.
1996 SCSL, Prosecutor versus Charles Ghankay Taylor: Amended indictment (SCSL-2003-01-1; 16 March 2006). Since May 2010, the trial was held in Leidschendam, the Netherlands, using the facilities of the Special Tribunal for Lebanon (STL). Before moving to the STL, proceedings took place at one of the trial chambers of the ICC in The Hague. The trial is held in the Netherlands because of security reasons. It was feared that when the proceedings were held in Freetown, among other things, that it would threaten the security situation within the region. See: SCSL Press and Public Affairs Office, Press Release. Special Court President Requests Charles Taylor to be tried in The Hague (Freetown 30 March 2006) & STL, Press Office, Courtroom for Special Tribunal for Lebanon to host Taylor Trial (Leidschendam 17 May 2010).
1999 The TRC collected statements of Sierra Leoneans, living in Sierra Leone and also as refugees in Gambia, Guinea and Nigeria. The statements they gave offer detailed insight into the experience of particular victims or perpetrators, and every statement therefore deserves careful study. TRCSL, Witness to Truth: Appendix I: Statistical Appendix to the Report of the Truth and Reconciliation Commission of Sierra Leone, p. 7.
2001 In regards to East Timor, both trials (Dili Chambers) and truth-finding (Commission of Truth hand Friendship) were organised, yet not simultaneously but subsequently in respectively 2000 and 2004. See for details: UNSC, Report to the Secretary-General of the Commission of Experts to Review the Prosecution of Serious Violations of Human Rights in Timor-Leste (then East Timor) in 1999 (S/2005/458; 15 July 2005)
2002 Rosalind Shaw, Rethinking Truth and Reconciliation Commissions. Lessons from Sierra Leone (United States Institute for Peace; February 2005).
2003 The TRC concluded that ‘notwithstanding the efforts of the Commission and the undertakings of the Prosecutor to distance themselves, a perception developed throughout the country that information provided to the Commission would make its way to the Special Court. A rumour even started circulating that there was an underground tunnel that ran between the two institutions. It did not help in elucidating public perception that both bodies were situated on Jomo Kenyatta Road in Freetown, in close proximity to one another. It is not surprising that many people in Sierra Leone were not able to distinguish between the roles of the two bodies: they both dealt with impunity; they addressed accountability for atrocities committed during the war; and they focussed on violations of international humanitarian law.” TRCSL, Witness to Truth, Vol III B, p. 377.
obvious. As a result, especially perpetrators were hesitant to publicly tell their stories as they feared that the court would still prosecute them. Conceivably, in lieu of the Sierra Leone’s TRC and SCSL, it is also imperative to view the Sierra Leonian experience in perspective to its neighbouring country Liberia, which has also experienced a long period of ‘kleptocratic’ dictatorship and excessive violence and which was strongly involved in the Sierra Leonian war. Not only is the former President of that country, Charles Taylor, believed to be a key player in the region, Liberia also went through a transitional period in which, after the dismantling of the Taylor-regime, a recurrence to peace, democratic elections and institutional reforms have taken place. Furthermore, Liberia has had its very own TRC and it is of utmost interest to see its developments and process in the light of the Sierra Leonian experience. With that in mind, the following sections will explore Sierra Leonian transitional experience, starting with the TRC.

5.4 The Truth and Reconciliation Commission for Sierra Leone

The Commission will investigate and report on the causes, nature and extent of the violations and abuses of human rights and international humanitarian law during the conflict. Of course, it will create an impartial historical record of the atrocities perpetrated against innocent civilians during a ten-year period of the war.

- Ahmad Tejan Kabbah, President

We thank you for coming to participate in this hearing. I want to remind you that this is not a court. It is only a Truth and Reconciliation Commission. Please relax to tell us your experience.

- John Kamara, Commissioner

Discussions on a truth commission already took place from 1999, at sessions of the Sierra Leone Human Rights Committee (SLHRC) in Conakry, Guinea, anticipating the peace negotiations. Mary Robinson, the UN’s High Commissioner for Human Rights (OHCHR) at the time, embraced the idea, endorsed the Human Rights Manifesto and indicated that the UN would facilitate technical assistance necessary for its establishment. Subsequently, in Lomé, the TRC was negotiated “to address impunity, break the cycle of violence, provide a forum for both the victims and perpetrators of...”

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2004 Many witnesses brought this up during the public hearings of the TRC. See for example, the testimony of Master Bowanag. “Master Bowanag: People are saying that the TRC and the Special Court are the same, and if you testify at the TRC, you might end up being arrested. Comm. Bishop Humper: There are thousands of your kinds out there, but people like you will get the others to know that they can come here and tell their stories and they will not be arrested.” TRC, Witness to Truth: Annex 3. Transcripts of TRC Public Hearings (Bo, 1 May 2003), pp. 118-122.


2009 ‘Statement by President H. E. Alhaji Dr. Ahmad Tejan Kabbah on the occasion of the inauguration of the Truth and Reconciliation Commission; Freetown 5 July 2002.


human rights violations to tell their story, get a clear picture of the past in order to facilitate genuine healing and reconciliation”. The addition of accountability. Although not a legal platform to create an impartial historical record of violations and abuses of human rights and international humanitarian law related to the armed conflict in Sierra Leone, from the beginning of the conflict in 1991 to the signing of the Lomé Peace Agreement; to address impunity, to respond to the needs of the victims, to promote healing and reconciliation and to prevent a repetition of the violations and abuses suffered. Overall, the focus of the commission was that of a proto-historian, to bring to light the truth about what had happened. Truth and truth telling, the commission argued, lay at the heart of this, provided that the truth must be known, complete and officially proclaimed and publicly exposed while misrepresentations could be discredited or demystified. Besides looking at the past, the TRC was also instructed to make recommendations for the future, including, inter alia, responding to victim’s needs. In view of promoting healing and reconciliation, the TRC stated that truth was the ultimate route towards fundamental change, given that a common understanding of the past allows both victims and perpetrators to find space to live together in a spirit of tolerance and respect. Further, the commission stipulated that “society cannot simply block out a chapter of its history; it cannot deny the facts of its past, however differently these may be interpreted. Inevitably, the void would be filled with lies or with conflicting, confusing versions of the past. A nation’s unity depends on a shared identity, which in turn depends largely on a shared memory. For the commissioners, the truth would also bring a measure of healthy social catharsis and thereby reconciliation.”

2016 This represented OHCHR’s “first substantial undertaking in support of a transitional justice mechanism anywhere in the world. See: Beth K. Dougherty, ‘Searching for answers: Sierra Leone’s Truth and Reconciliation Commission’, African Studies Quarterly, Vol. 8, No. 1 (2004), pp. 39-56; 42. 2017 Bennett, ‘The evolution of the TRC’. 2018 Concretely, the commission was tasked “to the fullest degree possible, including their antecedents, the context in which the violations and abuses occurred, the question of, whether those violations and abuses were the result of deliberate planning, policy or authorisation by any government, group or individual, and the role of both internal and external factors in the conflict; to work to help restore the human dignity of victims and promote reconciliation by providing an opportunity for victims to give an account of the violations and abuses suffered and for perpetrators to relate their experiences, and by creating a climate which fosters constructive interchange between victims and perpetrators, giving special attention to the subject of sexual abuses and to the experiences of children within the armed conflict; and to do all such things as may contribute to the fulfilment of the object of the Commission”. The Truth and Reconciliation Commission Act 2000, Freetown, February 2000, art. 6 (1). 2019 Like in South Africa, the Sierra Leonean TRC operationalised four different types of truth: factual or forensic truth; personal and narrative truth; social truth; healing and restorative truth. TRCSL, Witness to Truth, Vol I, pp. 80-83. 2020 Its language, however, was at moments soothing and comforting, but mostly framed through a (quasi-) judicial framework that addressed issues of accountability. Although not a legal platform per se, the commission itself defined and operationalised its study field as violations and abuses committed during the conflict. The addition of abuses enlarged the commission’s inquiry as it encompassed human rights violations committed by individuals rather than the state. TRCSL, Witness to Truth, Vol I, pp. 31-33; 32. 2021 Idem, pp. 87-88. 2022 TRCSL, Witness to Truth, Vol I, pp. 43-45. 2023 Idem, pp. 4-8. 2024 TRCSL, Witness to Truth, Vol I, p. 438. 2025 Idem, p. 48.
But besides its Universalist conceptualisation of the power of truth, the commission recognised the importance of ‘traditional’ [i.e. local/customary] values and methods of dealing with conflict, including truth telling, rehabilitation and cleansing. Bearing in mind the importance of local dynamics, the TRC involved traditional and religious leaders in all its activities, including public hearings, statement taking and reconciliation initiatives. Lastly, the commission did not just look into the past but as well envision a future, a feature quite novel to truth commissions. In the Sierra Leoneans context, foresaw the commission, gazing backwards was not sufficient. In a project called the ‘National Vision of Sierra Leone’, the commission attempted to provide Sierra Leoneans with a platform to reflect on the conflict and to describe the ideal future society they wish to live in, sharing their expectations and aspirations. Over the course of two months, the TRC claims it received over 250 contributions representing the efforts of over 300 individuals - men and women of all ages, backgrounds, religions and regions, including adults and children; artists and laymen; amputees, ex-combatants and prisoners - including written and recorded essays, slogans, plays and poems; paintings, etchings and drawings; sculptures, wood carvings and installations. The TRC even received a sea-worthy boat called the "Future Boat", painted in the national colours of green, white and blue. All the contributions were exhibited at the National Museum in Freetown from 15 December 2003. By envisioning the future “Sierra Leoneans of all ages and backgrounds can claim their own citizenship space in the new Sierra Leone and make their contributions to the county's cultural and national heritage,” argued the Commissioners in their report. They went even further to state that “by “memorialising” the harsh realities of the past, the National Vision serves as a form of symbolic reparation to Sierra Leoneans, to whom public forms of acknowledgement reinforce community bonds.

“Make peace sidon na Salone”

“Come blow your mind, come clear your chest”

As the overall situation in Sierra Leone remained insecure, the setting up of the TRC, from February 2000 onwards, suffered several delays but accelerated from March 2001. Commissioners
- four Sierra Leoneans and three internationals were selected by the end of the year, 2040 with Sierra Leonean Bishop Joseph Humper becoming chairman. 2041 Inaugurated on 5 July 2002 and advertised through a public awareness campaign, 2042 practical arrangements 2043 were soon overshadowed by allegations that the TRC was driven by political favouritism, lacked transparency and would not be up for its tasks. 2044 A credibility crisis soon followed and many international donors ceased funding. 2045 As a result, not only the foreseen TRC’s outreach programme was rigorously scaled down, the commission had to cut back on its investigations and public hearings throughout the country. 2046 Despite its “bare bone budget,” 2047 the commission started to carry out its instruction, 2048 calling on Sierra Leoneans to communicate statements or submit information to the commission. 2049 From July 2002 onwards, posters and leaflets announced “Truth hurts, but war hurts more” and radio and television skits and jingles, urged listeners to “come blow your mind; come clear your chest” and to “make peace sidon na Salone” (“sit down in Sierra Leone”). 2050 A message of truth telling was conveyed to Sierra Leoneans, through various channels. Alongside, the commission started its own investigations 2051 and research, 2052 hearing victims and perpetrators, taking individual statements 2053

2040 The TRC Act provided that the members of the Commission shall be persons of integrity and credibility who would be impartial in the performance of their functions under the act and who would enjoy the confidence generally of the people of Sierra Leone; and persons with high standing or competence as lawyers, social scientists, religious leaders, psychologists and in other professions or disciplines relevant to the functions of the Commission. ‘Truth and Reconciliation Act’, art. 3 (2).

2041 In case of the national commissioners, the Selection Coordinator announced the vacancies in the media. Three members of an Advisory Board assisted the Selection Coordinator in short listing the names of nominated individuals. The Advisory Board consisted of representatives of the government, the Inter-Religious Council, and one international, who was a resident of Sierra Leone. The national commissioners were chosen from this list and interviewed by a Selection Panel consisting of representatives from the Government, National Forum for Human Rights, Revolutionary United Front, National Commission for Democracy and Human Rights, and the Inter-Religious Council. The names of candidates approved were then forwarded to the President for appointment. The Office of the United Nations High Commissioner for Human Rights coordinated the selection of the International Commissioners. Nominations were invited from all over the world. The Office of the High Commissioner interviewed many candidates and recommended three. Their names were sent to the Selection Panel for approval. See: Paul James Allen, Shoku. B. S. Lahai & Jamie O’Connell, Sierra Leone’s Truth & Reconciliation Commission and Special Court: A citizen’s Handbook (National Forum for Human Rights & ICTJ; March 2003), p. 10.

2042 Other Sierra Leonean members comprised deputy chair Laura Marcus-Jones, a former arbitrator of the Sierra Leone High Court; Professor John Kamara, a college principal and veterinary surgeon; and Sylvanus Torto, a professor of public administration. The foreign commissioners were Satang Jow, a former Minister of Education in the Gambia; William Schabas, a Canadian human rights lawyer and head of the Irish Centre for Human Rights; and Yasmin Sooka, a South African human rights lawyer who also served on the Truth and Reconciliation Commission in South Africa. Priscilla Hayner, The Sierra Leonean Truth and Reconciliation Commission: Reviewing the first year (ICTJ; January 2004), p. 2.

2043 Bennett, ‘The evolution of the TRC’, 2044 The establishment of office premises; establishing a data base; establishing logistical needs such as communications and transport; establishing a financial management system; negotiating support and assistance by UNAMSIL and other bodies; identifying suitable regional offices; conducting a national public awareness campaign and; developing policy and preparing briefing materials issues such as the relationship with the Special Court, women’s issues, children’s issues, traditional methods of reconciliation and witness protection. See: Witness to Truth, Vol. 1, 56.

2044 ICG, ‘Sierra Leone’s Truth and Reconciliation Commission’, pp. 6-8. The initial budget was set at $ 9.9 million, was adjusted to $ 6.5 million, and another time trimmed down to only $4.5 million. Dougherty notes that in the main truth commissions are capitalised by their national governments, yet the Sierra Leonean administration was not at all capable to offer much support; it donated $97,000 and a building for the Secretariat. See: Dougherty, ‘Searching for answers’, p. 43.

2045 Although attendance of the initial hearings in Freetown, audience numbers increased as the TRC became better known, especially in the districts where most of the atrocities took place. However, in the end, the commission could only spend one week for public hearings in each province. Hayner, The Sierra Leonean Truth Commission, p. 4; Dougherty ‘Searching for answers’, 12043; TRC, Witness to Truth, Vol. 1, p. 180.

2046 “When discussing the budget, the Commission observed “the planning of the budget of the Commission was on the optimistic expectation that the international community would provide the funding required for all activities. This proved to be an unrealistic expectation. The final budget was a bare bones budget. The Commission struggled to implement its activities because of inadequacy of funding and because of delays experienced in the releasing of funds. Nonetheless the Commission is satisfied that it was able to carry out important activities such as statement taking, public hearings, research and investigations which enabled it to deliver a credible final report to the people of Sierra Leone. This was accomplished largely due to the dedication and tireless efforts of the staff and Commissioners”.”

2047 The TRC itself identified five key functions; the creation of a historical record of violations and abuses of human rights and international humanitarian law; to address impunity; to respond to the needs of the victims; to promote healing and reconciliation and; to prevent a repetition of the violations and abuses suffered. TRCSL, Witness to Truth, Vol. I, pp. 31-33.

2048 “Truth and Reconciliation Act”, art. 5.

2049 Shaw, “Rethinking truth commissions”, p. 2.

2050 Including the collection of 1, 316 statements, interviews with experts, selecting “window cases” and identifying mass graves. See: TRCSL, Witness to Truth, Vol. 1, §2§-29 & §3-15.

2051 Based on primary sources and secondary sources, with primacy of original sources. Ibidem, §31-32.

2052 The Commission started its statement-taking phase on 4 December 2002 at Bomu, Kailahun District; the locality, which suffered the first insurgency attack in 1991. A special statement taking form was prepared in English with four major sections: victims, witnesses, perpetrators and people who wished to provide a statement on behalf of someone else. The statement form was also accessible on the Internet for Sierra Leoneans living abroad. See the Statement form, which is reprinted in the TRC Report. Ibidem, pp. 191-230.
and gathering additional information. In the field, mass graves and other atrocity sites were identified, located and mapped. Recording details about atrocities and personal narratives, statement takers collected 7,706 statements collected in 15 different languages, but perpetrators had remained reluctant to cooperate out of fear of the SCSL. Out of a broad variety of testimonies, the commission selected witnesses for its hearings, but not all could be located and in the end a whole range of new witnesses came forward.

Finally, the hearings took place, all following a specific scheme in a designed setting. Outside Freetown, traditional or religious leaders usually opened the hearings with prayers or religious songs and took part in the proceedings. The presiding commissioner then started with administering an oath, either on the Bible or the Koran, to every witness before giving testimony: “I, […] do solemnly swear that the testimony I shall give before this commission, shall be the truth, the whole truth, and nothing but the truth.” After the testimony, the commissioners and present investigators [leaders of evidence] questioned the witness, whom in turn was subsequently invited to ask questions and to make suggestions for the commission’s recommendations. In the case witnesses mentioned the names of perpetrators, the commission tried to locate alleged perpetrators and invited them to make statements or to participate in a hearing and relay their own version of events. Victims were not asked directly by the commission to forgive their perpetrators. It was, however, when victims expressed willingness to meet their perpetrators – and the perpetrators agreed – possible to engage in private meetings organised by the commission. Closed hearing sessions were also held, particularly for victims of sexual violence who were assisted by counsellors to offer emotional support. In exceptional cases, women who were victims of sexual violence gave testimony in public. Further, when children were concerned, the commission conducted vulnerability and safety assessments and consulted with the children and their families. When testimonies of children were approved, they were prepared by a

2054 ‘Truth and Reconciliation Act’, art. 7. By doing so, the commission was given an inclusive set of instruments to secure the realisation of its purpose. First, they could seek support from traditional and religious leaders to facilitate public sessions and in resolving local conflicts in support of reconciliation. Second, the commission was given far-reaching powers to accumulate whichever information from any source; to visit any place without impediment; to interview any individual, group or members of organisations or institutions; to oblige anyone to attend hearings; to require statements to be given under oath; to appeal information from foreign authorities; to issue summonses and subpoenas; and to safeguard police assistance to enforce its powers. ‘Truth and Reconciliation Act’, art. 8.

2055 Investigators were sent to the districts with the following tasks: (a) to identify as many “mass graves” and “other sites” as possible in all districts; (b) to photograph the identified sites; (c) to identify the number of victims; (d) to reveal the identity of the victims; (e) to identify the types of violations committed at the site (human rights/international humanitarian law); (f) to identify the perpetrators; (g) to identify and locate the tools and instruments used in committing the violations; (h) to identify the persons and institutions responsible for the management of the sites; (i) to determine the current uses of the sites (if any); (j) to advise the local community on the protection, preservation and security of the site. The TRC database, containing information collected from the statements made to the TRC, was used as a starting point and guide for the exercise. In gathering the desired information, they relied largely on primary sources, i.e. people who were eyewitnesses to the killing and/or burial. It is the many interviews with these persons that led the investigators to the different sites. TRCSL, Witness to Truth: Appendix 4: Memorials, mass graves and other sites, §15-20. Also see the TRC’s interactive map: www-text: http://www.sierraleonetrc.org/index.php/resources/interactive-map-mass-graves-and-other-sites, visited: 26 May 2015.

2056 A study was released early in September 2002 and showed that ex-combatants from all sides generally support the TRC’s work; in fact, the more the they understood the Commission, the more supportive most became. The majority of former fighters (64% of all positive responses) from across all factions expressed a willingness to give statements to the TRC. See: Post conflict Reintegration Initiative for Development and Empowerment (PRIDE) & ICTJ, Ex-Combatant Views of the Truth and Reconciliation Commission and the Special Court in Sierra Leone (12 September 2002), pp. 11-15.

2057 Criteria included: willingness of statement giver; ethnic, age, political and gender balance; balance of violations; exposure of violations in the presence of a leader; public acknowledgment of violations through first-hand testimony. TRCSL, Witness to Truth, Vol. 1, p. 181.

2058 Out of a broad variety of testimonies, the commission selected witnesses for its hearings, but not all could be located and in the end a whole range of new witnesses came forward.


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2064 Hayner, The Sierra Leonean Truth Commission, p. 5.

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social worker that was also present at a child hearing, offering emotional or other support. After the hearing, the social worker conducted further visits to the child, to ensure no adverse consequences from his or her participation.

Hearing truth

Following a ceremonial opening by President Kabbah on 14 April 2003 and Christian and Muslim prayers, the Commission started its public hearings in Freetown with a testimony from Tamba Finnoh, a former farmer and businessman from Kono who testified about his both hands being cut off by rebels. I have come to explain about the past,” uttered the next witness, Rugiatu Kamara. Shedding tears, she told the commission how her three brothers were decapitated. Three other victims, Alusine Turay, Hassan Turay and Kolley Sesay, narrated their horrific experiences as well on that first day, including how rebels had cut off their ears and had forced them to drink their own blood. On day two, professor William Schabas opened the hearings and after prayers and singing, a retired police officer, who had fled to London, told the TRC about the murder of his children at the hands of soldiers. He felt that for him, “to say the truth, as I am doing today. I know if we had made it very secretive, without the public knowing what happened, the son who is today in another world would continue to torment us; because it would have been a burden. When you have something to say and you don't say it, it is a load.” Other witnesses followed, including a businessman, civilians, a civil servant, a grandmother, a retired captain and many others. Among them was Joe Fancy Yusuf Black Kamara, who like the others took an oath to tell the truth. Before that he told the commission he was testifying because “to blow and clear my chest for the unlawful death of my late father Chief Alhaji Abulagbu Black Kamara, former Temne Tribal headman Western Area and to speak for those who cannot speak for themselves, for the rights of all who are destitute, to defend the rights of the poor and needy in our family. His story, like any other told before the commissioners was gruesome, often detailed. Yet, most witnesses were questioned by either the commissioners or TRC investigators, mostly on the whereabouts of alleged perpetrators. “Can you remember their names?” commissioner Yasmin Sooka asked a victim who was “chopped” by rebels. “I don’t have their proper names,” answered Kadiatu Fofanah, “they were called all sorts of nick names, Colonel Cut foot and the likes.”

From 29 April, the commission moved into the districts, where the audience numbers increased steadily since most of the atrocities took place in or near the headquarter towns. In each
district, one week was devoted to public hearings mostly held in school buildings or community centres often decorated with posters propagating: “Truth Today, A Peaceful Sierra Leone Tomorrow”; “It hurts to speak the truth, but it’s needed to bring peace”; “Save Sierra Leone from another War. Reconcile Now. TRC Can Help”; “Truth Hurts But War Hurts More”; “Bush no då fo tro wå bad pikin” (A popular Krio proverb, implying that whatever a child might do, it cannot be banished [thrown in the bush], but must be forgiven).  

One day was devoted to closed hearings designed for children or victims of sexual abuse to testify in a private setting. Perpetrators or ex-combatants who were reluctant to speak before the public for security or other reasons were also heard in closed session. Besides, the Commission held a series of thematic, institutional and event-specific public hearings in Freetown, featuring testimony from government ministers, political parties, UN agencies, NGOs, civil society institutions and other experts.  

Hearings were also conducted on specific events such as, among others, the AFRC coup of 25 May 1997 and the attack on Freetown in January 1999.  

At the end of each week, the commission organised reconciliation ceremonies where victims and perpetrators were brought together, or where perpetrators who admitted their crimes were washed of their evils through a special cleansing ceremony and reaccepted into the community. Although hearings seldom attracted the hoped for audiences and the fact that the commission faced problems in mobilising enough people to narrate public statements, still between 450 and 500 people testified before the commission in thousands of hours of testimony. In the districts, particularly where the violence had struck the most, there was much more attendance than in the capital where people mainly followed the process through television and radio. Throughout the operational phase, hearings in Freetown and the district headquarters towns were broadcast live on Radio UNAMSIL and SLBS radio while Talking Drum Studios recorded hearings in Freetown and the districts. On selected nights of public hearings, SLBS broadcast a 45-minute television highlights programme featuring footage of the proceedings. The final closing hearing, on 5 August 2003, featured President Kabbah appearing before the commission to provide more than two hours of testimony that stirred much controversy as he declined an invitation to apologise on behalf of the government for the many abuses suffered in Sierra Leone.  

The commission finally observed that many other high-level players who were invited to hearings did not appear. Therefore, subpoenas were issued for five serving ministers and leaders of government institutions, including the Attorney General, and the chairman and

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2070 The following issues were addressed during these hearings: governance; the role of civil society and immigrant communities; mineral resources; corruption; women and girls; children and youths; militias and armed groups; external groupings and international actors; the armed forces and police; civil service; judiciary and the rule of law; media; promoting reconciliation and national reintegration.  
2071 Idem.  
2072 TRCSL, Witness to Truth: Thematic and Institutional Hearings, pp. 1-505.  
2073 Idem.  
2074 The final closing hearing, on 5 August 2003, featured President Kabbah appearing before the commission to provide more than two hours of testimony that stirred much controversy as he declined an invitation to apologise on behalf of the government for the many abuses suffered in Sierra Leone.  
2075 Ibid.  
2078 Hayner, The Sierra Leonean Truth Commission, 5.
secretary of the ruling political party. All this happened despite the president’s public admonition to all public officials at the commencement of hearings to cooperate with the commission, and in spite of the fact that the TRC Act made it mandatory for all public institutions to respond to the commission’s summons. The former head of state, Captain Valentine Strasser who had ignored the commission’s invitation on several occasions was also subpoenaed and compelled to testify.\footnote{TRCSL, \textit{Witness to Truth}, Vol I, p. 97.}

\textit{Truth-telling in an oblivious culture}

Baindu: I have a question. Why is it that after going through all these sufferings with all the pains in our heart, you still ask us to narrate it again?

Chairman Bishop Humper: What you are saying is the opening up of wounds. Some of you will not understand what we are doing now, but later you will. Nobody will tell you that you will ever forget about that. Many things have happened in this country. Until we know what has happened to people like you, we will continue to remain in misery in this country. It takes pain and agony and suffering when talking about it afresh. Do you have any other question?\footnote{TRCSL, \textit{Witness to Truth: Thematic and Institutional Hearings}, p. 200.}

Like most truth commissions, the ideas valorised on the memory practice of truth telling are framed as being universally applicable and perceived to be exportable to different cultural settings, like in Sierra Leone. Strongly borrowing from the truth commission tradition built in Latin America and South Africa, the SLTRC, as outlined above, discoursed that public recounting of memories of violence is helpful. But there are some key caveats. First and foremost, the type of violence matters. Under the South American juntas and Apartheid, violence and repression were somehow ‘deniable’; they included disappearances, secret torture prisons and death squads. After the repression, truth telling was a consistent tool to unveil the former covert state sponsored crimes, reveal clandestine violence, establish accountability and to publicly acknowledge previously suppressed stories and experiences of victims.\footnote{Shaw, ‘Rethinking truth commissions’, p. 2.}

But how to effectuate truth telling in a setting of overt publicly displayed violence, like open air brutalities of Sierra Leone’s civil war? In these cases of unconcealed killing, argues anthropologist Rosalind Shaw, truth telling involves a much different politics of memory, recontextualising debates about the violence by demonstrating that atrocities were committed by each side and confirming that crimes against humanity happened. Thus, in these contexts truth commissions rather become “arenas of contested truths rather than sites for redemption.”\footnote{Shaw, ‘Rethinking truth commissions’, p. 3.} At worse, they can prove to be counterproductive and even deepen social divisions. The latter has been reason for some countries not to pursue a truth commission or related transitional justice mechanisms, like Spain, Mozambique and Burundi.\footnote{Burundi did establish a TRC late 2014, but its process was entirely overshadowed by political infighting and renewed ethnic tensions in 2015.}

\footnote{2079 TRCSL, \textit{Witness to Truth}, Vol I, p. 97.}
\footnote{2079 TRCSL, \textit{Witness to Truth: Thematic and Institutional Hearings}, p. 200.}
\footnote{2080 Shaw, ‘Rethinking truth commissions’, p. 2.}
\footnote{2081 Shaw, ‘Rethinking truth commissions’, p. 3.}
\footnote{2082 Burundi did establish a TRC late 2014, but its process was entirely overshadowed by political infighting and renewed ethnic tensions in 2015.}
In transitional justice, cultural factors matter. What are the memory practices and techniques in a particular region or locality? In Sierra Leone in particular, it is reported that local ways of dealing with the past are at odds with truth telling advocated by truth commissions. Verbalised memories, as enticed by the TRC, were uncommon in strategies to face the violence in Sierra Leone. Instead, a process of what Shaw calls ‘social forgetting’ was in place, “a refusal to reproduce the violence by talking about it publicly.” Almost without exception, concludes Shaw, “people wanted “to forget,” even if such forgetting eluded them, often urging “let’s forgive and forget.” At the TRC, different worldviews and memory cultures collided: liberal western versus Sierra Leonean. Consequently, observes historian Berber Bevernage, “for many Sierra Leoneans, the verbal and public recollection of violent events is, contrary to what the SLTRC says, not desirable because it connects the violence to the person remembering and risks rendering it present again.”

On the cursory outlook, and in theory, there appears to be a conflict: a TRC that entices memory versus a culture that cultivates forgetting. Yet, throughout the hearings that took place in Freetown and in the Districts, a slightly different reality comes to the fore, uncovering paradoxes to these observations. Confused narrations and dialogues sprung off during the public hearings. In the letter, the commission idealised redemptive truth telling and remembering, but in practice too often discoursed the reverse. On many occasions, after swearing that people will tell the truth and nothing but the truth, witnesses “narrated” their experiences, which time and again were unimaginably painful. In reply to frequently detailed stories, which were personally memorised, the commissioners started to tell witnesses to forget. “That also should give you hope and courage to move forward and forget about the past,” Marcus Jones told Adamsay Bangura, the TRC’s 22nd witness. She had just testified that her child was hacked to death, only moments before her own head was slashed, she was raped and her hand was chopped off. Similar responses ensued throughout the public hearings: “We sympathize with you and we hope that you seek medical attention and try to forget all that has happened; “I only hope that with CARITAS you will be able to reshape your life and character again and try to forget about all you have been through”, or “You should remember that it was not your fault. Get yourself totally involved in your studies in order to forget those evil days.”

Throughout the process, in practice, the truth commissioners went from enticing memories to encouraging oblivion, running counter to their initial ideals.

At other times, commissioners would stress “What we are doing, to actually encourage people to forgive and forget is to tell them to look up to God as He gives and takes and that is the only way

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2084 Shaw, ‘Rethinking truth commissions’, p. 9.
2087 Ibidem, p. 56.
2088 Ibidem, pp. 54-56.
2089 Ibidem, p. 436.
2090 Ibidem, p. 753.
2091 Ibidem, p. 978.
we can have everlasting peace: so that what happened cannot repeat itself.\textsuperscript{2092} For witnesses, this seemed to be illogical: “You are still telling us that we should forgive and forget, how can we forgive when I still have tears running down my eyes?”\textsuperscript{2093} Sometimes victims and survivors were made to believe that forgetting would benefit their communities. Fatmata Sillah, for instance, wanted “to thank the Commission because they are teaching us to forgive and forget. I believe God is with us; we are gradually putting the past behind us. I want to know how best the Commission can help us rehabilitate our community and help with the education of our children.”\textsuperscript{2094} The reply almost sounded cynical: “That’s a very good question. We have been asked these questions very often. Somebody like you, who has lost about 31 people in the war, including a house and cash of Le. 3,000,000.00. What do you think anybody can give you that will make you forget?”\textsuperscript{2095} Truth-telling, regardless of cultural incentives or restraints, appeared more and more a cry for financial help or material compensation.\textsuperscript{2096} Bevernage convincingly argues that at “the end of almost every testimony, the commissioners were asked what they planned to do in order to change the victim's state of continuing deprivation.”\textsuperscript{2097}

\textit{The narrative}

We thank you for coming to participate in this hearing. I want to remind you that this is not a court. It is only a Truth and Reconciliation Commission. Please relax to tell us your experience.

- John Kamara, Commissioner\textsuperscript{2098}

We were in Pendembu in 1991. It was on a Saturday morning when we heard that Bomaru was attacked. On that Saturday on March 23, 1991, people were moving from Pendembu. I asked why they were moving and said that the war had reached us. We were told that the attackers were thieves and that they had a deal with the soldiers who refused to pay them. Another attack took place in one week’s time. A large number of people were coming from the area. When they arrived, we asked them why and they told us that the war had finally reached Sierra Leone. […] One day, we saw soldiers coming and at that time my father was a town chief. A soldier came and told my father that the war had entered Sierra Leone and that they could not confront these rebels they are from Liberia. […] Everybody was moving helter skelter. Some went to Daru and others went to other places. I had no chance to move because my parents were blind; I was unable to take them along. I took them to the village. […] The rebels said that they had not come for poor people but for the government. We whom they met in the town were told to get out of the bush and get back to town. The number of rebels from Liberia increased. Some went to Bomaru and others to Pendembu. After a couple of days, they captured so many areas. […] In 1991, we had a Commando called Charles, alias Rambo. His niece came to us and told us that they had killed Rambo. Among those people that brought the news to us were different tribes. There were Kissi, Pele and Gio people.

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\textsuperscript{2090} TRCSL, \textit{Witness to Truth: District Headquarter Transcripts}, p. 588.
\textsuperscript{2091} Ibidem, p. 588.
\textsuperscript{2092} Ibidem, p. 417.
\textsuperscript{2093} Ibidem, p. 588.
\textsuperscript{2094} Bevernage, \textit{History, Memory, and State Sponsored Violence}, p. 78.
\textsuperscript{2095} Idem.
\textsuperscript{2096} TRCSL, \textit{Witness to Truth: District Headquarter Transcripts}, p. 214.
\end{flushleft}
Whilst the fighting was going on the fighters from Liberia were called the vanguards. […] We again witnessed where they forcefully recruited our brothers into the group. When our parents asked them, they said they were going to recruit them. […] If they met you with food, they would take it and rape your wife in front of you. […] Sankoh said that he was the leader of the war and he was not alone. […] Any time they moved they would kill a lot of people. They always told the boys to carry their load. If you refused their orders, they would kill you. […] People were forced to carry heavy loads like freezers. […] Sankoh told us “Gentlemen let me ask you, are you not men in your country? If you are really men, you will not be afraid of these kinds of things. […] There were some boys who were given to him by Charles Taylor; they are called vanguards. They would just look at you and kill you. […] That is what I know about the war.”

- Maya Gaba, Witness

Maya Gaba, who had been forced to work and cook for the RUF, was one of the most elaborate witnesses to appear before the commission. Aside from the well-prepared statements, often read out from paper, by a score of officials at the Thematic and Institutional Hearings, victims, survivors and a handful of perpetrators had provided their “ordeal” in a much less structured manner. With many exceptions to the rule, most testimonies were short, intrinsically personal, sketchy in microscopic detail and particularly ‘local’. Most witnesses would talk about events in their communities and specifically about the violence they had personally seen or experienced. Taken altogether, the public hearings represented a mosaic of diverse stories about the war, its devastating character and the personal – and sometimes communal – impact. The bulk of witnesses, when concluding their story, wished for reparations, most often financially.

**Reporting truth**

As the conflict exploded into appalling brutality against civilians, the world recoiled in horror at the tactics used by the RUF, its allies and opponents. Reports emerged of indiscriminate amputations, abductions of women and children, recruitment of children as combatants, rape, sexual slavery, cannibalism, gratuitous killings and wanton destruction of villages and towns. This was a war measured not so much in battles and confrontations between combatants as in attacks upon civilian populations. Its awesome climax was the destruction of much of Freetown in January 1999”.

When the investigations, research and hearings were finished, the commission embarked on arranging and transmitting its findings into a written account, puzzling together a heap of micro-information that was programmed into a database. Initially to be concluded in January 2004, the report writing was however hampered by various obstacles and ultimately the final printed account “Witness to Truth” was handed to President Kabbah on 5 October 2004. But for technical reasons, the findings did not

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2099 TRCSL, Witness to Truth: District Headquarters Transcripts, pp. 214-217.
2100 Representing Government (Ministers) political parties, the judiciary, the UN (UNDP, UNAMSIL and UNIFEM), the Ombudsman, national and international NGOs, media, churches, industries, military, foreign embassies (UK and USA), the South African TRC, the Lebanese community, the Anti-Corruption Commission, Indian Business Community. TRCSL, Witness to Truth: Thematic and Institutional Hearings, pp. 1-505.
2102 Part of the work of the TRC involved the creation of a database to capture details of the violations, victims and perpetrators described in the more than 7000 statements received by the Commission. The data resulted in two lists of victims. The first is an anonymised list, devoted to 1,012 victims of sexual violence and forced conscription. The second contains 11,991 victims named in TRC statements. See: TRCSL, Witness to Truth, Vol II, pp. 273-503. All the data were further progressed in a statistical report: TRCSL, Witness to Truth, Appendix 1; Statistical Appendix to the Report of the Truth and Reconciliation Commission of Sierra Leone: A Report by the Benetech Human Rights Data Analysis Group to the Truth and Reconciliation Commission (5 October 2004).
find their immediate way back to the agents sharing their narratives and information, the population at large. It took a whole year before the report was publicly distributed because it was sent back to the Ghanaian printer because of typographical errors.\textsuperscript{2103} Since August 2005, the report was available on a specially designed website, but considering the quality and pricing of internet access in Sierra Leone as well as the level of ‘online-literacy’ one can assume that it was not consulted much. Besides this voluminous report – almost 4,000 pages\textsuperscript{2104} – the commission produced a video report,\textsuperscript{2105} a children’s version,\textsuperscript{2106} and a ‘comic’ version for secondary school students,\textsuperscript{2107} bearing in mind the high rate of illiteracy in Sierra Leone.\textsuperscript{2108} Combined, these reports shed as much light as possible on the different facets of the civil war and its previous history, but the commission, from the start did not profess to be all-embracing: “the commission endeavoured to produce an authentic and truthful account of the conflict. The commission does not claim to have produced the complete or exhaustive historical record of the conflict”.\textsuperscript{2109} When reflecting on its own narrative, the commission concluded that factually, it was “the most thorough account of the conflict that has been produced” and that besides “the sheer volume of these [personal narratives] accounts provided a complex, multi-layered vision of the conflict”.\textsuperscript{2110} The ‘narrative’ truth thus made a powerful contribution to the picturing and imagining of the conflict. Although these personal stories do not necessarily carry the factual truth, claimed the commission, the totality of the statements provided a full image of the past. In addition, the commission held the opinion that by its public hearings it had contributed to the establishment of a kind of ‘social truth’; “the discrediting of lies about the past through dialogue.” Finally, the public acknowledgement of people’s pain and suffering throughout the process has laid the groundwork for healing, restoration, and the “quest for reconciliation”.\textsuperscript{2111}

The first volume further deliberates on the mandate, the commission’s history, concepts, and procedures. It also contained a report evaluating the operational phase wherein the commission did not shun self-criticism by stating that it “acknowledges the fact that a measure of internal mismanagement contributed to the many problems experienced by the commission, not only during the start-up phase but also throughout the life of the commission”.\textsuperscript{2112} Nevertheless, the commission was able to congregate enough information to write a comprehensive account of the conflict in the


\textsuperscript{2104} In addition to the report, the commission issued five appendices. One provides a statistical report; two others contain submissions made to the TRC and transcripts of public hearings. The last two are concerned with memorials and mass graves and amputations.

\textsuperscript{2105} TRCSL, Witness to Truth: A Video Report and Recommendations from the TRC of Sierra Leone (2004). This 55 minutes’ video-report was produced by the NGO WITNESS, which was invited by the TRC in late 2003 to produce a video accompaniment to the report. Featuring astonishing testimony given before the Commission, Witness To Truth summarises the report's key findings and recommendations, highlighting the causes and consequences of the war, raising public awareness of the TRC's peace-building efforts throughout the country, and encouraging civil society in Sierra Leone and beyond to hold the government accountable for implementing the binding recommendations issued by the TRC. The video report is for sale on the WITNESS website: http://www.witness.org/squirrelcart/store.php?crn=216&rn=357&action=show_detail (last visit: 17 October 2007).

\textsuperscript{2106} TRCSL, Truth and Reconciliation Commission Report for the Children of Sierra Leone: Child Friendly version (Freetown 2004). This report was made possible with the help of UNICEF, who provided for the design and printing of the child friendly version of the Commission’s Report.

\textsuperscript{2107} TRCSL, TRC Report: A Senior Secondary School Version (Freetown 2005). This report was produced by the Truth and Reconciliation Working Group and funded by the Foreign Office and the Institute for Foreign Cultural Relations of the Federal Republic of Germany.

\textsuperscript{2108} In 2004 the adult literacy rate was a little over 35 % and was projected to increase to almost 50 % in 2015. See: UNESCO Institute for Statistics (UIS), Adult and Youth Literacy. National, regional and global trends, 1985-2015. (Montreal: IUS, June 2013), p. 116.

\textsuperscript{2109} Overview of the Sierra Leone Truth & Reconciliation Report (November 2004), p. 3.

\textsuperscript{2110} TRCSL, Witness to Truth, Vol. I, p. 83.

\textsuperscript{2111} Ibidem, pp. 83-84.

second and third part of its report. The second volume contains the most important findings concerning the roles played by respectively governments, groups, factions, and individuals. At the end of sub-conclusion, the names and positions of persons found to have been its key office-holders are listed. In circumstances where a finding related to the actions of the government, faction or group in question, those office-holders were held responsible, by ‘implication’.

In terms of truth finding, the report has essential limitations. First, considering the factual, forensic or microscopic truth, the commission, through thousands of interviews, independent research, study of documents, and statistical analysis of a comprehensive database, contributed largely to the completion of a portrait of the conflict as provided earlier by journalists, UN reports, individual researchers and NGOs. Until present, the TRC conducted the largest investigation into the history of Sierra Leone ever and in many respects indeed, the commission has “let the chips fall where they may,” and established crucial facts. Second, in terms of personal and narrative truth, the many individual accounts gradually contributed to the more general ‘impartial historical record’ that the TRC was to establish. Next to a history of battles, military leaders and political parties, the witness testimony knitted together a narrative of human suffering, emotions and visions. Although the report merely uses the narrative truth in its report and only selectively highlights quotations from testimony through its macro historical analysis, the transcripts and videos of the hearings form a separate source on the experiences and stories about the past. Thirdly, regarding the most dubious form of truth, healing and restorative truth, it can be said that at least the commission acknowledged what had happened, despite the fact that the violence was carried out in plain daylight. Fourth, in terms of social truth, or rather a commonly held perspective on the past, the TRC was able to bring together all factions of society to debate the past. Remarkably enough – and confrontations on factual details and experiences aside – a high level of consensus emerged about the nature of the conflict.

**Causes of the Conflict and Remedies**

While there were many factors, both internal and external, that explain the cause of the civil war, the Commission came to the conclusion that it was years of bad governance, endemic...
corruption and the denial of basic human rights that created the deplorable conditions that made conflict inevitable. [...] In summary, the commission found that the conflict and the post-independence period reflected a failure of leadership of the government, public life and civil society, which was mainly due to the colonial ‘divide and rule’ strategies. The post-colonial successive political elites were responsible for the fundamental roots of the war: endemic greed, corruption, and nepotism leaving the nation deprived and impoverished as these they plundered the country’s assets and mineral riches. The exploitation of diamonds according to the Commission, however, did not cause the conflict, as many believed. This lawless context provided the breeding grounds for rebels to unleash war wherein the hopeless and disillusioned youths were exploited to avenge the ruling elite. In particular, the commission found that Charles Taylor and Foday Sankoh, played pivotal roles in bringing the mayhem to Sierra Leone. The subsequent war that specifically targeted civilians with indiscriminate violence, was waged by Sierra Leoneans against Sierra Leoneans and broke long-standing rules, besmirched respected traditions, violated human respect, and tore apart the fundamental fabric of society. Although the bulk of victims were adult men, perpetrators particularly singled out and targeted women and children who were abducted for recruitment, raped, forced into sexual slavery, and physically and mentally tortured. The commission held the leaderships all the armed groups to the conflict responsible for either authorising or instigating these human rights violations; failing to stop these abuses or to speak out against them; and for failing to acknowledge the atrocities committed by their followers. The commission found the RUF to have been responsible for most of the human rights violations in the conflict. Moreover, the TRC found that the governments since the outbreak of violence in 1991 neglected to protect its civilians stated that the SLPP government must bear responsibility for the excesses committed by the CDF for failing to stop and address violations. The causes of conflict, the Commission concluded, had still not been adequately addressed at the background of persisting elitist politics, corruption, nepotism, and bad governance in general: “they are potential causes of conflict, if they remain unaddressed”. On that basis, the commission

2116 Omitted text: “The Commission commenced its primary findings with the conclusion that the conflict and the independence period preceding it, represented the most shameful years of Sierra Leone’s history. These periods reflected an extraordinary failure of leadership on the part of many of those involved in government, public life and civil society. No enlightened and visionary leaders emerged to steer the country away from the slide into chaos and bloody civil war, the Commission concluded. [...] The story of the war encapsulated in the TRC Report reveals how Sierra Leoneans were denied their humanity [...]. According to the TRC Report the overwhelming majority of atrocities were committed by Sierra Leoneans against Sierra Leoneans; all the fighting factions targeted civilians, especially women; and Sierra Leone was systematically plundered and looted by all factions in the conflict. [...] The Commission found that the desire to acquire and exploit diamonds was not the cause of the conflict in Sierra Leone; rather it was an element that fuelled the conflict. Diamonds and other mineral resources were used by each of the factions to finance and support their war efforts. [...] The Commission found that former Liberian President Charles Taylor and the National Patriotic Front of Liberia (NPFL) played key roles in bringing the bloody conflict to Sierra Leone. It calls on Liberia to make symbolic reparation to Sierra Leone. It also calls on Libya, which was found to have provided support to the insurgents, to make financial contribution to the War Victims Fund specifically called for by the TRC Report as well as the 1999 Lomé Peace Accord. The Commission laments the fact that the international community, apart from the ECOWAS states, declined to intervene in the unfolding human catastrophe in Sierra Leone until at a very late stage. [...] The Commission found that women and girls suffered uniquely during the conflict. They were raped, forced into sexual slavery and endured acts of sexual violence. [...] The TRC Report also mentioned that Children were singled out for some of the most brutal violations of human rights recorded in any conflict. A pernicious strategy came to characterize the Sierra Leone conflict, whereby most of the factions forced children into combat.” TRCSL, Summary of the Findings and the core Recommendations of the Sierra Leone Truth & Reconciliation commission (TRC) (2004).
brought up a comprehensive set of short-term, long-term and ‘optional’ recommendations,2120 “designed to facilitate the building of a new Sierra Leone based on the values of human dignity, tolerance and respect for the rights of all persons, […] intended to help create an open and vibrant democracy in which all are treated as equal before the law [and to] assist the people of Sierra Leone to rise above the bitter conflicts of the past, which caused unspeakable violations of human rights and left a legacy of dehumanisation, hatred and fear.”2121

Because of the delayed publication of the four-volume final report, people often said they had not received any of their findings.2122 Despite this fact, there were high expectations on how the government would implement the recommendations. These relative positive prospects, however, were soon reversed when the government responded to the report in June 2005, rejecting many of its recommendations in a 17-page policy document, the so-called White Paper. It stated that the government “accepts in principle” the findings on reparations and will implement these “subject to the means available”.2123 Many civil society and human rights observers were profoundly frustrated with this “vague and noncommittal”, “hastily prepared” document on which a coalition of citizens groups commented that it failed to establish a timeline for implementing measures like reparations for war victims, was largely devoid of concrete steps to improve governance or address corruption, and in some cases rejected recommendations, such as the abolition of the death penalty.2124 The White Paper was also criticised for serious lacking of political will and that is was primarily issued to appease the international (donor) community.2125 In addition, many war casualties lamented the government’s commitment to the TRC recommendations, as reparations for amputees and victims -including free health care and monthly pensions – were one of these.2126 Despite continuing pressure2127 and

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2120 The recommendations are divided in several categories: protecting human rights; establishing the rule of law; reorganising Security Services; promoting good governance and the fighting of corruption. Besides, there are recommendations regarding children, youth, women, external actors, and mineral resources. Concerning the TRC itself, recommendations on the relationship with the Special Court, reparations, reconciliation, a national vision for Sierra Leone, archiving of documentation, dissemination of the report and a follow-up committee are made. TRCSL, Witness to Truth. Vol. 1, pp. 123-225.
2122 Government of Sierra Leone, White Paper on the Report of the Truth and Reconciliation Commission, Freetown, 27 June 2005. The white paper said it “accepts in principle” the TRC’s findings and recommendations, adding, “the government will use its best endeavours to ensure the full and timely implementation of various reparations programmes recommended by the commission, subject to the means available to the state […]”.
2123 ‘Sierra Leone: Civil society criticises “vague” government plan for post-war reform’, IRIN, 13 July 2005. (IRIN Integrated Regional Information Networks (www.irin.org) is part of the UN Office for the Coordination of Humanitarian Affairs, but its services are editorially independent.
2124 ‘Sierra Leone: Civil society’. "Sierra Leone: Civilian war casualties urge government to provide reparations", IRIN, 15 September 2005.
2125 By November 2005, in a response to the government’s claim that it lacked expert drafting abilities, the NGOs WITNESS and the ICTJ had prepared draft legislation, the ‘TRC Recommendations Omnibus Bill’ - for the implementation of the recommendations. The Bill, containing provisions for the enactment of the key imperative recommendations, was circulated among senior law officers, parliamentarians, donor representatives, and government members but the government never claimed ownership over the Bill, nor committed itself to pass it through parliament. In the meantime, the National Commission for Social Action (NaCSA), the governmental agency identified by the TRC to implement its recommendations on reparations, has been working on a reparations programme. A Special Fund for War Victims, however, has not been put in place yet since the government constantly met financial and practical obstacles. Also before and during the last elections the implementation of the TRC recommendations came to forefront as many human rights organisations and other stakeholders urged the candidates to address the TRC recommendations. The Sierra Leonean watchdog Sierra Leone Court Monitoring Programme (SLCMP) even made a useful comparison of the party manifesto’s regarding the recommendations. See: ICTJ, Sierra Leone: Peacebuilding Priorities in the Sphere of Transitional Justice. Submitted to the UN Peacebuilding Commission by the International Center for Transitional Justice (27 February 2007), p. 5; REDRESS, Implementation of the Sierra Leone Truth and Reconciliation Commission Recommendations on Reparations. Preliminary options Report (30 January 2007); Sylvanus Joe Fannah, ‘National Challenges in Ensuring Reparations for Victims. Implementing Reparations for Victims in the Context of Societal Transition and Development: Challenges for Sierra Leone’, Lecture presented during the: Conference on Reparations for victims of genocide, crimes against humanity and war crimes: Systems in place and systems in the making. The Peace Palace, The Netherlands. 1-2 March 2007 (2 March 2007); Sierra Leone Court Monitor Program (SLCMP), ‘Elections 2007: A Comparison of Party Manifestos Against the Core Recommendations of the Truth and Reconciliation Commission’, 28 July 2007.
promises by president Ernest Bai Koroma (APC) who promised his government would establish a TRC Follow-Up Committee, none of the recommendations has been implemented so far.

“Thin knowledge”

In line with the criticisms on the Sierra Leonean government to implement the TRC’s recommendations, there is much controversy on the TRC’s process itself. As mentioned there was a lot of discontent among the population and the Commission itself on the substantial lack of funding and the subsequent slow process of starting-up. The budgetary and staffing calamities seriously hampered the course of action and the credibility of the commission. The TRC for these reasons, according to Dougherty, came too late. By the point the commission began taking statements, the DDR programme had already reintegrated ex-combatants into society. Moreover, the lack of funds had forced the commission to cut on its information campaign, while the sensitisation of the population was crucial for the TRC’s success. Awareness among the Sierra Leoneans about the meaning of the TRC’s work was poor. In an early opinion poll on the understanding of the TRC in January 2003, the Campaign for Good Governance concluded that 74 % of the respondents had heard of the Commission, while only 17 % indicated that the understood the purpose of the Commission. The majority of the respondents who had knowledge about the TRC (71 %) heard about it on the radio. Although the representativeness of the poll can be questioned, because first, the percentage of literate respondents (57 %) was relatively high in relation to the national literacy rate, and second, because the poll was held before the TRC started hearings - it can be concluded that most people knew about the TRC but only a minority clearly understood what its function was.

In a later study – conducted in July and August 2005 in Freetown and the Western Area, Tokolili, and Kenema – by Edward Sawyer and Tim Kelsall, 90 % indicated that it had heard of the TRC of which only 10 % had a good understanding of the institution against 52 % with poor understanding. Amadu Sesay’s statistics, based on research in Freetown in early 2006, do not significantly differ from these figures as he concluded that, except for 17, 7 % of the public, in total 93, 8 % of the respondents were aware of the existence of the TRC. The higher number of awareness in Freetown is probably due to the fact that most of the publicity was centred in Freetown. Although Sesay does not provide figures on the understanding of the TRC, the three surveys show an upward number of people who heard about the TRC. Nevertheless, the figures also tend to show that

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2128 Ernest Bai Koroma, leader of the All People’s Congress (APC), was elected President on 17 September 2007. Pauline Bax, ‘Sierra Leone kiest onbekende tot president’, NRC Handelsblad, 18 September 2007. It is interesting to read Koroma’s submission to the TRC – as leader of the APC – wherein he took the opportunity to use the TRC platform to criticise Kabbah’s SLPP for their wrongdoings during the conflict and did not necessarily addressed issues of reconciliation. He did, however, called for reparations for the victims of war and for review of the death penalty. TRCSL, Witness to Truth, ‘Appendix 2’, pp. 1189-1196.
2130 ICG, Sierra Leone’s Truth and Reconciliation Commission, & Hayner, Reviewing the first year.
2132 47 % stated that understood the purpose partially and 36 % had no understanding. See: Campaign for Good Governance (CGG), Opinion Poll Report on the TRC and the Special Court (Freetown 2003), p. 10.
2134 Sesay, Does one size fit all?, p. 34.
the Commission’s popularity was higher after its work than during the process itself. Notwithstanding the relative high awareness figure, it is expedient to relate on the views of Sierra Leoneans on their expectations of the TRC and whether these expectations were met. Sawyer and Kelsall concluded that there is quite some discrepancy in how successful Sierra Leoneans thought the Commission was in reaching its aims. Due to the poor understanding of its work, due to the fact that information on the performance of the TRC was hard to come by or to interpret, and because many were distant from it, there is a high level (42\%) of people ‘not knowing’ how successful the commission had been in reaching its aims.\textsuperscript{2136} 34\% found the commission ‘quite successful’ against 9\% who thought the TRC not successful. Only 15\% found that the commission was very successful.\textsuperscript{2137} Concluding, Kelsall and Sawyer’s findings showed that the TRC had broad public support, although actual knowledge about the institution was thin. A possible reason, that may have confused Sierra Leoneans from all walks of life about what the TRC was there for, was the presence of the Special Court for Sierra Leone. Some field investigators had changed jobs from the TRC to the SCSL or had been ambiguous as for which institution they were working.\textsuperscript{2138} Popular rumours held that there was even an underground tunnel that connected the two transitional justice institutions, which were both based at Jomo Kenyatta Road in Freetown. It would be no surprise if many Sierra Leoneans were not able to distinguish between the roles of the two bodies: they both dealt with impunity; they both addressed accountability for war-time atrocities; they both focussed on violations of international humanitarian law; they both sent investigators into the field; they both heard testimony from witnesses; and they both made promises in terms of justice, truth and reconciliation.

5.5 ‘Hybrid’ justice: The Special Court for Sierra Leone

The Special Court started because Sierra Leoneans asked the world to help them try those people who are alleged to bear the greatest responsibility for crimes that occurred during the recent war. The international community answered that call because they believed that only by holding people accountable will Sierra Leone truly know lasting peace.\textsuperscript{2139} Notwithstanding efforts from both the TRC and the SCSL to overtly expound their exceptional and autonomous roles in Sierra Leone,\textsuperscript{2140} many perpetrators had been loath to appear before the truth commission out of fear that prosecutors would hear their public testimony and pursue them for criminal inquiry. “The Commission’s ability to create a forum of exchange between victims and perpetrators was unfortunately retarded by the presence of the Special Court,” concluded the TRC.\textsuperscript{2141} Possibly, the existence of a truth-seeking mechanism and a prosecutorial mechanism at the very same time disadvantaged the truth-finding expenditure of both institutions in practical terms. A question

\begin{footnotesize}
\begin{enumerate}
\item \textsuperscript{2136} Sawyer, ‘Truth vs. Justice?’, p. 46.
\item \textsuperscript{2137} Idem.
\item \textsuperscript{2138} TRCSL, Witness to Truth, Vol. IIIB, pp. 377-378.
\item \textsuperscript{2139} SCSL & No Peace Without Justice Sierra Leone, Wetin Na Di Specchul Kot? The Special Court made Simple (Freetown 2003), p. 7.
\item \textsuperscript{2140} SCSL, OTP, ‘TRC Chairman and Special Court Prosecutor Join Hands to Fight Impunity’, Press Release (Freetown, 10 December 2002).
\item \textsuperscript{2141} TRCSL, Witness to Truth, Vol. IIIB, p. 378.
\end{enumerate}
\end{footnotesize}
that ascends is also whether the tribunal, with its selective and retributive style of investigation, established any kind of historical record. In the coming sections an attempt to an answer will be formulated. From the outset, while doing so, it is central to keep in mind that the SCSL started off on a different proposition than the TRC. On the one hand, the truth commission was seeking, on the balance of probabilities, answers to broad open questions as to the causes and nature of the conflict (context) in relation to key players, factions and society at large in the conflict [collective agency]. Prosecutors, on the other hand, set out to prove, beyond any reasonable doubt, elements of specifically-framed charges against leading figures in a criminal context, including Foday Sankoh and Charles Taylor [individual agency]. Yet, before going into detail, I will introduce the court, the court’s history and the court’s trials.

Next to the experiment of the South-African styled TRC, Sierra Leone experimented with a new type of international criminal justice, one that was different from the UN-tribunal that dealt with the genocide in Rwanda. Different from the UNICTR, that was strictly international but blocked participation of Rwandan judicial staff, the international community sought to merge international and local realms, creating “products of judicial accountability sharing between the states in which they function and international entities, particularly the UN”.2142 Building on experiences East Timor2143 and Kosovo,2144 Sierra Leone was the situation in which a new type of ‘hybrid’ tribunal2145 was established.2146 But like the TRC that was to unravel the causes of the war, ideas about criminal prosecution of crimes committed in Sierra Leone were already shaped in late 1999 and diplomacy for a court started in May 2000.2147 The arrest of Foday Sankoh by British troops a couple of weeks later2148 shaped the confidence that if such a tribunal were to be established, at least one suspect was already in custody for trial. Pierre-Richard Prosper,2149 the former American prosecutor that had led

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2145 Other hybrid courts followed in Cambodia, Iraq, Bosnia, Lebanon, Chad, Kosovo and the Central African Republic. At the time of writing, ideas, discussions or negotiations are underway for akin courts for the Democratic Republic of the Congo, Burundi, Sri Lanka, South Sudan, Central African Republic and Syria. Law on the Establishment of Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed During the Period of Democratic Kampuchea (NS/KRM/1004/006; Phnom Penh 10 August 2001) & Agreement Between the United Nations and the Royal Government of Cambodia Concerning the Prosecution under Cambodian Law of Crimes Committed During the Period of Democratic Kampuchea (A/RES/57/228; 13 May 2003); Statute of the Iraqi Special Tribunal; BiH Official Gazette: 61/04 (Law on Amendments to the Law on the Court of BiH; Law on Amendments to the Law of the Prosecutor’s Office of BiH; Law on the Transfer of Cases from the ICTY to the Prosecutor’s Office of BiH and the Admissibility of Evidence Collected by ICTY in Proceedings before the Courts in BiH; Law on Amendments to the Law on Protection of Witnesses under Threat and Vulnerable Witnesses; and Law on Amendments to the BiH Criminal Code; UNSC, Resolution 1757 (S/RES/1757: 30 May 2007); Accord entre de Gouvernement de la République du Senegal et l’Union Africaine sur la Creation de Chambres Africaines Extraordinaires au sein des Juridictions Senegalaises (Dakar, 22 August 2012); Republic of Kosovo, Law No.05-L-053, On Specialist Chamber and Specialist Prosecutor’s Office (3 August 2015); UNSC, Resolution 2217 (S/RES/2217; 28 April 2015), pp. 11-12.
2146 The Special Court for Sierra Leone was closed in December 2013. Since then, it was morphed into the Residual Special Court for Sierra Leone (RSCSL), tasked with continuing legal work, including witness protection, supervision of prison sentences and management of the SCSL archives. See: Government of Sierra Leone, ‘The Residual Special Court for Sierra Leone Agreement’, Supplement to the Sierra Leone Gazette, Vol. CXLI, No. 6 (Freetown, 1 February 2012).
2147 Scheffer, All the Missing Souls, p. 321.
2149 A lawyer, who would later succeed David Scheffer as Ambassador-at-large for War Crimes from 2001 to 2005.
the prosecution of Akayesu at the UNICTR, was sent to Freetown to discuss the matter with President Kabbah, who preferred a Security Council tribunal. But the court’s protagonists, in particular administrators from the USA and the UK, were not envisioning another lavish legal bureaucracy, like the UN tribunals for the former Yugoslavia and Rwanda. Alternate proposals to proliferate the UNICTR’s instruction to include the Sierra Leonean war successively stranded. By then, USA diplomats, headed by ‘ambassador at large for war crimes’ David Scheffer, drafted a charter for a special court. It would be locally based but supported internationally, financed on a voluntary basis.2150 But Kabbah was swift to plea for a UN-tribunal. On 12 June 2000, when the groundwork for Sierra Leone’s Truth and Reconciliation Commission was already being laid, he sent UN Secretary General Kofi Annan a letter advising him to “initiate a process whereby the United Nations would resolve on the setting up of a special court for Sierra Leone” for the “purpose of such a court is to try and bring to credible justice those members of the Revolutionary United Front (RUF) and their accomplices responsible for committing crimes against the people of Sierra Leone and for the taking of United Nations peacekeepers as hostages”.2151 Attached to his memo was a proposed charter for the Special Court for Sierra Leone, practically identical to the USA’s design.2152 Against the background of revitalised bloodshed in May, the Sierra Leonean administration found that the setting up of an extraordinary tribunal would be the most muscular approach to bring and to sustain amity and security in Sierra Leone and the West African sub region.2153 Following the call for assistance, a UN information-gathering mission journeyed to Freetown to examine Kabbah’s appeal and determined that an apparent preference was expressed for a national court with a strong international component. It was also decided that, consistent with the reservation entered by the United Nations at the signing of the Lomé Agreement, that the subject-matter power of the court should include international crimes such as genocide, crimes against humanity, war crimes and other serious violations of international humanitarian law. At the same time, crimes under national law would not be excluded.2154

On 14 August 2000, the Security Council conclusively answered to the Sierra Leonean cry for aid, “recognizing” that a trustworthy organism of justice and accountability for the atrocities would help “end impunity and would contribute to the process of national reconciliation and to the restoration and maintenance of peace” in Sierra Leone.2155 The Council evoked the reservation to the amnesty provisions for international crimes of the Lomé Agreement and requested the Secretary-General to discuss an accord with the Sierra Leonean establishment to erect an autonomous special court.2156 In the subsequent months negotiations with the government were conducted and focused on the legal construction and constitutive apparatus of the tribunal: a treaty-court and a governing

2150 Scheffer, All the Missing Souls, pp. 322-325.
2151 Kabbah’s letter is attached to: UNSC, Annex to the letter dated 9 August 2000.
2153 Idem.
2155 UNSC, Resolution 1315 (S/RES/1315; 14 August 2000), preamble.
2156 UNSC, Resolution 1315.
statute.2157 It took a while for the actual materialisation of the tribunal to commence, but by January 2002, a UN Planning Mission prepared the work of the court and signed the formal establishing agreement during a ceremony on 16 January.2159 This signing took place two days before President Kabbah declared the official end of the war. In April 2002, the legislation to enable the effective operation of the Special Court for Sierra Leone was adopted by parliament.2160

Paramount to observe is the fact that the Special Court for Sierra Leone was created amidst growing international cynicism towards the UN tribunals for their unhurried advancement, scarping costs, their distance to the crime scenes and lack of outreach to victims.2161 Thus, from the start, the debates on the erection of a new court therefore focused on reducing budgets, minimising the court’s scope and streamlining its operations.2162 Among the principal hurdles however was the question of how the new criminal body would be financed.2163 As the Security Council was reluctant to compel its members to pay for it – as was the case already for the UNICTY and UNICTR – it proposed to establish the court by bilateral agreement that provided for voluntary funding. Consequently, the Special Court relied on a charitable funding mechanism overseen by the so-called Management Committee comprising the largest donors to the court.2164 As a consequence, the court faced struggles to secure funding throughout its lifespan and situations of near bankruptcy.2165

Another – rather political - issue was the United States’ antagonism to the International Criminal Court in The Hague and a number of observers expressed that the sturdy US support for the SCSL has been enthused by the aspiration to exhibit an alternate – hybrid - mechanism. The Sierra Leonean tribunal was subsequently soon also accused of being an US instrument because of its prominent role in the establishment, funding and leading role in the Office of the Prosecutor (OTP) and other branches in the court structure.2166 The latter was resolved with a reduction of the US positions in the OTP.2167 Financially, however, the SCSL remained highly troubled by insufficient funding.2168

In the end, the court was given the power to prosecute those individuals “who bear the greatest responsibility” for serious violations of international humanitarian law2169 and Sierra Leonean
committed in Sierra Leone since 30 November 1996 – coinciding with the signing of the Abidjan Peace Agreement where after large-scale hostilities soon resumed - including those leaders who have threatened the establishment of and implementation of the peace process in Sierra Leone. Unlike Kabbah’s original request to only try Sankoh and the RUF leadership, the Special Court was to prosecute every individual with a leading role in serious crimes committed; in fact the mandate remained silent on the nationality of suspects so that the court could investigate Charles Taylor.

Although the civil war dates back to 1991, in determining a beginning date of the temporal jurisdiction the UN opted for 1996 as it considered that the court’s prosecutor would not be overburdened and the court overloaded. Besides, the beginning date was thought to correspond to an event or new phase in the conflict without specific political connotations and it should encompass the most serious crimes committed by persons of all political and military groups and in all geographical areas of the country. Despite the fact that observers lamented the late starting date, the court’s jurisdiction remained silent on when it comes to end, as the Statute does not stipulate an end date.

A controversial provision of the SCSL’s Statute was the court’s jurisdiction over children between 15 and 18, or even younger. Positioned as a “moral dilemma,” the topic was hotly debated among academics, NGOs and the UN, but ultimately it was decided that because of the immense number of juvenile offenders of mass violence during the war the clause should be included. Because of the sensitivity of possible prosecutions of children, the Statute provides that in case of prosecution there should be no imprisonment. Instead, restorative or rehabilitative options are offered: care guidance and supervision, community service, counselling, foster care, correctional, educational and vocational training programmes and, as appropriate, any programmes of disarmament, demobilization and reintegration or programmes of child protection agencies.

At the outset, however, the court’s first prosecutor David Crane (USA) stated that “the children of Sierra Leone have suffered enough, both as victims and perpetrators” and that he was “not interested in prosecuting children. “I want to prosecute the people who forced thousands of children to commit unspeakable
Sierra Leoneans and much NGOs who were protecting children’s rights greeted Crane’s decision with great relief.  

**Setting up court**

The tribunal commenced its operations from scratch. There was no appropriate place and so the court had to build its own court — courtrooms, prison facilities and staff offices — in central Freetown on a plot of land donated by the government. Robin Vincent from the United Kingdom was appointed Registrar and David Crane of the United States of America as the Prosecutor. They arrived separately in July and August 2002 with less than half a dozen staff to begin setting up the offices. Eight judges were sworn in in early December. Until the fortified compound was finished, the first hearing was held in an improvised open-air courtroom at the prison of Bonthe Island, while the prosecutor’s office (OTP) was located in a private villa a few kilometres away. It was not transferred to the permanent premises until August 2003.

In their report, the Planning Mission emphasised the importance of a well-thought-out Office of The Prosecutor (OTP). It recommended an advance team to “launch the investigative and prosecutorial process, initiate research on the history of the conflict, take into possession existing evidence from the Sierra Leone Police, UNAMSIL and NGOs and establish an evidentiary basis from which investigations could be launched.” Yet, fundamentally, the missions’ interim prosecutor and investigators already found that the available evidentiary material was of “limited utility.”

According to them, the only reliable material available was held by the Sierra Leonean police, which pertained exclusively to the period following the 1999 Lomé Agreement, partly because of the decimation of the police force and the destruction of the headquarters of the Criminal Investigation Department by rebel forces in 1999. With few exceptions, therefore, there was “virtually no evidentiary material for the bulk of the crimes committed against the people of Sierra Leone in the decade-long conflict.” Thus, the paucity of detailed, reliable evidentiary material would place a significant burden on the investigative functions of the Prosecutor. That was the assessment in early 2002, only months before the actual prosecutor commenced his tasks. Appointed for a three-year term in April 2002, David Crane, a former Pentagon lawyer with a study background in history and
African affairs, arrived in Freetown on 6 August 2002. His office – with the assistance of the Sierra Leonean authorities - was granted the power “to question suspects, victims and witnesses, to collect evidence and to conduct on-site investigations.” Crane wanted to move fast and remarkably swiftly assembled an Office of The Prosecutor, recruiting among his personal connections, former UNICTR and UNICTY staff members, Sierra Leonean expatriates and staff from human rights organisations. Four Sierra Leonean police officers joined the investigations team within the first two weeks of operations to provide local insights and follow leads throughout the process.

Alan White (USA), a close friend and colleague of Crane, was employed as chief investigator, leading a dozen detectives, and made his first rounds through Sierra Leone in July 2002. It was his first time in Africa, but he assumed that war crimes investigations were no different than in any other country. “People are the best source of information and your best source of evidence,” he said, and in “this case, our best evidence is going to be good, credible witness testimony.” According to him, the “most compelling evidence that you have are the first hand, eye-witness accounts of the atrocities,” and therefore his method was “getting out and talking to people, letting them know what our mission is and soliciting their support. Many Sierra Leoneans wanted this special court; they wanted people to be held accountable. I tell them, 'now is your time to step forward.” In the following months, the multicultural investigation team increased to some 20 investigators alongside almost 50 analysts and lawyers. They included seconded staffs from the UNICTY and UNICTR and interns who, “literally followed the bouncing ball,” were proceeding to trials. Split in two task forces on 26 September 2002, investigators cordoned off their first crime scene: a 300 perimeter around a flooded diamond-mining pit in Tombodu in Kono district. Local residents had alleged that the bodies of hundreds of civilians have been dumped there, after being killed in 1998. In other village sites such as houses, numerous human skulls and other remains were found as well, but according to Alan White, these appeared to be tampered with. A renowned forensic anthropologist

2191 The Special Court for Sierra Leone, art. 15 (2).
2192 The Office of The Prosecutor consisted of the Chief Prosecutor, Deputy Prosecutor and encompassed three sections: (1) Investigation (Investigation Team, Intelligence Tracking Team and Crime Scene Investigation Team); (2) Administrative; and (3) Prosecution (Trial Section, Legal Advisory Group and Team Legal Advisors Group). See organisational chart: SCSL, First Annual Report of the President of the Special Court for Sierra Leone for the Period 2 December 2002-June 2003 (Freetown, 2004), p. 34.
2195 Alex Taylor (HRW), ‘Sierra Leone’s Special Court: Will it Hinder or Help?’, AllAfrica, 21 November 2002.
2196 Corrine Dufoa (HRW), ‘Sierra Leone’s Special Court: Will it Hinder or Help?’, SCSL, Press and Public Affairs Office, ‘Special Court Investigators Cordon off their First Crime Scene’, Press Release (Freetown, 27 September 2002).
with global expertise on international crimes, William Haglund, was hired to assist in pathological analysis. In the autumn of 2003, he revisited Sierra Leone to corroborate witness statements, visiting and photographing some 20 burial spots across the country. With the help of local residents and family members he identified four people he had excavated, identifying marks of blunt-force and sharp-force injuries. Yet, aside from the three Argentinians and Haglund’s visits to Sierra Leone, no other forensic examinations were shepherded. Whereas the indictments were filed and suspects arrested, investigative teams were frequently deployed up-country and abroad to interview witnesses and collect evidence throughout 2003.

Across the board, however, the focus of the OTP investigators was on finding witnesses and collecting statements, mostly from victims (crime base) and perpetrators (insiders). While White spent much time following leads that would bring him Charles Taylor, back in Sierra Leone, Canadian investigator Gilbert Morrisette was flipping over potential ‘insider witnesses’. Within the OTP, the “old prosecutorial trick” of flipping potential indictees to testify against their superiors was soon the standard. On that testimonial basis, the first round of investigations that lasted about six months, the first indictments were drawn up, approved and (partially) executed during two targeted missions. Like pursuing the mafia, the investigators went on undercover operations, posing as diamond dealers, in refugee camps to track informants whom they would offer a deal: “testify and you’ll be safe. In return, we’ll take care of you and your family.” All the collected testimonies and witnesses were lined up to lay the evidentiary basis under the four main trials that followed in the court’s history. In a record time, the first eight indictments against high-level suspects were issued and confirmed. By the end of June, another four indictments were completed and by November 2003, thirteen persons had been indicted, ten of whom were then already arrested. Although the Special Court had indicted high-level individuals, bringing them to actual justice soon proved to be a challenge: Taylor went into exile, Sam ‘Mosquito’ Bockarie was killed and Johnny Paul Koroma was hiding. While these three key individuals were either deceased, missing or in exile, suspect

2203 At the request of the United Nations Office of the High Commissioner for Human Rights (OHCHR), three members of the Argentine Forensic Anthropology Team conducted a preliminary forensic examination of alleged killing and burial sites in Sierra Leone from 16 June to 12 July 12, 2002. See: Argentine Forensic Anthropology Team (Equipo Argentino de Antropologia Forense, EAAF), Country Report: Sierra Leone (2002).
2206 Author’s interview, Corrine Dufka, Telephone, 15 March 2015.
2207 Eric Stover et al., Hiding in Plain Sight, p. 261.
2209 Stover et al., Hiding in Plain Sight, p. 261.
2210 Foday Sankoh; Issa Sesay, who replaced Foday Sankoh as leader of the RUF; Morris Kallon and Augustine Gbao, senior RUF commanders; Alex Tamba Brima, Ibrahim “Bazzy” Kamara, and Santigie Kanu, senior members of the AFRC; Sam Hinga Norman, Moinina Fofanah, Director of War for the CDF; and Allieu Kondewa, Chief Initiator and High Priest of the Kamajors. Three accused were at large, dead, or allegedly dead: Sam “Mosquito” Bockarie, former Battlefield commander of the RUF; Johnny Paul Koroma, and Charles Taylor.
2211 The Security Council recently sounded a new international alert for Koroma, “Urging all States to cooperate with and render assistance to the Special Court for Sierra Leone, or any institution to which the Special Court has transferred his case, to bring Johnny Paul Koroma to justice if he is found to be alive, and
‘number one’, Foday Sankoh, only appeared in court twice, but very sick and incapable to communicate.2212 Because of an outstanding travel ban still in place, the court was not in a position to transfer Sankoh to a foreign hospital and he ultimately died on 29 July 2003. “He has been granted the peaceful end that he denied to so many others,” Desmond de Silva, the deputy prosecutor of the court, commented in a statement.2213 His indictment was withdrawn on the same day as Bockarie’s.2214

Trial observers at the time, commented, that “with Sankoh and Bockarie dead, Koroma missing, and Taylor out of reach, the Court may be unable to try its four most prominent suspects. Norman by then was the most high profile individual to come before the Special Court.”2215 Cynically, Taylor was finally arrested in 2006, but on 22 February 2007 Samuel Hinga Norman, after a routine medical check-up, died in a military hospital in Dakar, Senegal.2216 Gberie Lansana, commented that Norman’s death, together with the other two earlier deaths, left the court virtually with empty hands, as all eight left indicted before the court “are virtually unknown, and their fate is of little concern to the public”.2217 With only Charles Taylor left as a ‘big fish’, the court’s success rested on this case. The tribunal’s legacy was thus soon scarred by the deaths of its most prominent suspects, leading observers to note “The Special Court doesn't have a death penalty, but all the big indictees are dying […] No one quite knows who is left.”2218 Notwithstanding these serious hampers, nine suspects were left in the detention centre at the SCSL in Freetown. In January 2004, it was decided to join the trials of all accused in line with the organisations they belonged to with the result that the cases of nine defendants were grouped into three trials of three defendants each.2219 Accordingly, the SCSL’s caseload was grouped into one trial each for the RUF, AFRC, and CDF.2220 At first the prosecution proposed conducting a joint trial of all six alleged RUF and AFRC accused – since they cooperated during the junta period - but judges ruled to try them in separate groups. Although the prosecution’s ‘motion for joinder’ was denied, the charges of the RUF and AFRC indictments are virtually one and the same since both original indictments charged eighteen counts of various crimes committed in nearly identical periods of time and locations.2221 The other - more controversial - case before the court has been the one against alleged members of the Civil Defence Forces (CDF), or Kamajors. The Kamajor hunting societies were widely perceived by most Sierra Leoneans as a powerful resistance
calls on him to surrender. Calling on all States to cooperate with the International Criminal Police Organisation (INTERPOL) in apprehending and transferring Johnny Paul Koroma, if he is found to be alive.” See: UNSC, Resolution 1940 (UN-doc: S/RES/1940 (2010); 29 September 2010).


2215 ICTJ, The Special Court, 7.


2219 SCSL, Second Annual Report of the Special Court for Sierra Leone for the period 1 January 2004 – 31 December 2004 (Freetown, 2005), p. 8. (SCSL-04-12; 22 February 2004); RUF-case: SCSL, The Prosecutor against Issa Hassan Sesay also known as Isaa Sesay, Morris Kallon also known as Billi Kamu, and Augustine Gboss also known as Augustine Bace: Corrected amended indictment (SCSL-04-15; 2 August 2006). AFRC-case: SCSL, The Prosecutor against Alex Tamba Brima also known as Tamba Alex Brima also known as Gullit, Brima Buzzy Kamara also known as Ibrahim Buzzy Kamara, and Satigie Borbor Kamu also known as 55 also known as Five-Five also known as Santigie Kama also known as Santigie Kama also known as Borbor Santigie Kana: Further amended consolidated indictment (SCSL-04-16; 18 February 2005).

2220 Michelle Staggs & Sara Kendall, Interim Report on the Special Court for Sierra Leone: From Mandate to Legacy: The Special Court for Sierra Leone as a Model for “Hybrid Justice” (UC Berkeley War Crimes Studies Center; April 2005), pp. 8-9.
force against the rebels. Samuel Norman was a celebrated hero by many Sierra Leoneans because he was the central player in restoring peace through his efforts in mobilising and coordinating the Kamajor to fight rebel forces. His arrest - Norman at the time was Minister of Interior in the Kabbah government - was widely contested and generated substantial criticism towards the court within the country. Despite this discontent among many Sierra Leones, the court nevertheless proceeded and issued a consolidated indictment, which included eight counts consisting of crimes against humanity and war crimes. In particular, the CDF men were charged with unlawful killings, physical violence and mental suffering, looting and burning, terrorising the civilian population and collective punishments, and recruiting child soldiers.

2222 Staggs, Interim Report, 10-11.
2223 SCSL, Prosecutor against Samuel Hinga Norman et al., §25-29.
5.6 Unfolding the trial narrative

During the trial, the Prosecutor and the Defence will tell the Judges their own version of the facts. The Prosecutor will accuse the indictees of crimes and give all his evidence to the Judges. The indictees will answer the charges with the help of Defence lawyers. Both sides can ask questions and make objections. Both sides are allowed to call witnesses and present evidence. Both sides will try to convince the Judges that they are right. Almost all the testimony is held in public. Trial sessions are closed to the public only when the Judges believe that it is necessary for the security and the safety of witnesses and victims. The judgment that the Judges make in the end is pronounced in public. This means that everyone can find out what is happening during the trials.

– SCSL Outreach

In its lifetime, the two SCSL trial chambers held four substantive trials for international crimes committed in Sierra Leone, including accused from three warring factions. In addition, several persons were prosecuted for interference with the course of justice, particularly interference with witnesses in the main trials. Below, a cursory overview of the cases is provided, followed by an analysis of the historical narratives which transpired in those trials with a highlighted focus on the major case against Charles Taylor.

The CDF case

May it please this Chamber, Your Honours. On this solemn occasion mankind is once again assembled before an international tribunal to begin the sober and steady climb upwards toward the towering summit of justice. The path will be strewn with the bones of the dead, the mourns of the mutilated, the cries of agony of the tortured echoing down into the valley of death below. Horrors beyond the imagination will slide into this hallowed hall as this trek upward comes to a most certain and just conclusion. The long dark shadows of war are retreated. Pain, agony, the destruction and the uncertainty are fading; the light of truth, the fresh breeze of justice moves freely about this beaten and broken land. The rule of law marches out of the camps of the downtrodden onward under the banners of never again and no more [...] Norman, Fofana and Kondewa, individually or in concert, exercised authority, command and control over all subordinate members of the CDF. Their plan and purpose, and that of their subordinates, was to defeat by any means necessary the Revolutionary United Front (RUF) to include the complete elimination of the RUF and members of the Armed Forces Revolutionary Council (AFRC), their supporters, sympathisers and anyone who did not actively resist the RUF/AFRC occupation of Sierra Leone.

- David Crane, Prosecutor

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2225 Originally, the Special Court had two Chambers – a Trial Chamber composed of three Judges and an Appeals Chamber composed of five Judges. The Trial Chamber consisted of two Judges appointed by the UN Secretary-General and one appointed by the Government of Sierra Leone. The Appeals Chamber consisted of three Judges appointed by the UN Secretary-General and two appointed by the Government of Sierra Leone. Pierre Boutet (Canada), Benjamin Mutanga Itoe (Cameroon) and Rosolu John Bankole Thompson (Sierra Leone) were sworn in to sit as the Trial Chamber. George Gelaga King (Sierra Leone), Emmanuel Ayoola (Nigeria), Justice Renate Winter (Austria), Justice Hassan Jallow (The Gambia) and Justice Geoffrey Robertson (United Kingdom) were sworn in to sit as the Appeals Chamber. The composition of the Appeals Chamber changed over time. On 10 March 2004, Justice A. Raja N. Fernando (Sri Lanka) replaced Justice Hassan Jallow following his appointment to the ICTR. On 7 November 2007, Jon Kamanda (Sierra Leone) was sworn in to replace Justice Geoffrey Robertson, whose term of office had ended. On 4 May 2009, following the death of Fernando, Shireen Avis Fisher (United States of America) was sworn in as a Judge of the Appeals Chamber. On 27 February 2012, Philip Nyamu Waki (Kenya) was sworn in as an Alternate Judge to sit in any appeal proceedings, which might arise from the Taylor trial. Considering the foreseeable workload, a second trial chamber was inaugurated in January 2005. On 17 January 2005, Justice Teresa Doherty from Northern Ireland, Justice Julia Sebutinde from Uganda and Justice Richard Lussick from Samoa were sworn in to sit as Trial Chamber II. On 9 May 2007, Justice El Hadji Malick Sow from Senegal was sworn in as an Alternate Judge to sit in any appeal proceedings, which might arise from the Taylor trial. Considering the foreseeable workload, a second trial chamber was inaugurated in January 2005. On 17 January 2005, Justice Teresa Doherty from Northern Ireland, Justice Julia Sebutinde from Uganda and Justice Richard Lussick from Samoa were sworn in to sit as Trial Chamber II. On 9 May 2007, Justice El Hadji Malick Sow from Senegal was sworn in as an Alternate Judge to sit in any appeal proceedings, which might arise from the Taylor trial. Considering the foreseeable workload, a second trial chamber was inaugurated in January 2005. On 17 January 2005, Justice Teresa Doherty from Northern Ireland, Justice Julia Sebutinde from Uganda and Justice Richard Lussick from Samoa were sworn in to sit as Trial Chamber II. On 9 May 2007, Justice El Hadji Malick Sow from Senegal was sworn in as an Alternate Judge to sit in any appeal proceedings, which might arise from the Taylor trial. Considering the foreseeable workload, a second trial chamber was inaugurated in January 2005. On 17 January 2005, Justice Teresa Doherty from Northern Ireland, Justice Julia Sebutinde from Uganda and Justice Richard Lussick from Samoa were sworn in to sit as Trial Chamber II. On 9 May 2007, Justice El Hadji Malick Sow from Senegal was sworn in as an Alternate Judge to sit in any appeal proceedings, which might arise from the Taylor trial. Considering the foreseeable workload, a second trial chamber was inaugurated in January 2005. On 17 January 2005, Justice Teresa Doherty from Northern Ireland, Justice Julia Sebutinde from Uganda and Justice Richard Lussick from Samoa were sworn in to sit as Trial Chamber II. On 9 May 2007, Justice El Hadji Malick Sow from Senegal was sworn in as an Alternate Judge to sit in any appeal proceedings, which might arise from the Taylor trial.
With these dramatic and theatrical phrasings, David Crane unlocked the first trial proceedings before a crowded public gallery in Freetown. In the dock, wearing headphones, were three leaders of the former Civil Defence Forces (CDF).2227 “National Coordinator” Samuel Hinga Norman,2228 “Director of War” Moinina Fofana2229 and “High Priest” Allieu Kondewa2230 All three accused men faced eight counts of serious crimes,2231 to which they pleaded not guilty. Calling 75 live witnesses,2232 the Prosecution presented its case between 3 June 2004 and 14 July 2005, while the defence concluded its presentation of evidence on 18 October 2005, after calling 45 witnesses.2233 In a sweeping turn when the case was already closed and the judges were deliberating their judgement, Norman deceased while receiving medical treatment in Senegal, leading to the dissolution of his case.2234 As a consequence, the trial Judgement, which was rendered on 2 August 2007, only pertained to Fofana and Kondewa, yet it was reached on the consideration of the entirety of the evidence adduced during the trial,2235 including Norman’s testimony, cross-examination and re-examination.2236 With the Sierra Leonean judge, Bankole Thompson, ‘dissenting’,2237 the chamber condemned Fofana and Kondewa for an assortment of crimes, including murder, cruel treatment, pillage, collective punishments and enlistment of child soldiers. But it acquitted them for two counts of crimes against humanity.2238 In lieu of his dissent, Thompson declined to partake in the sentencing of Fofana to six years and...
In their reasoning leading to these relatively low punishments given the gravity of the crimes, the judges took the stance that crimes were grave but that in the CDF case there were no aggravating factors. Instead, they accepted the shown remorse by both convicts to be sincere and deemed the contribution of Fofana and Kondewa to peace and re-establishment of the rule of law in Sierra Leone a meaningful mitigation factor and found that: “a manifestly repressive sentence, rather than providing the deterrent objective which it is meant to achieve, will be counterproductive to the Sierra Leonean society in that it will neither be consonant with nor will it be in the overall interests and ultimate aims and objectives of justice, peace, and reconciliation that this court in mandated to achieve. The motivation of the accused in this case, where they fought to reinstate democracy, and the prevailing circumstances in which their crimes were committed, has therefore been taken into consideration by the Chamber in arriving at an appropriate sentence.” While crediting the role of the CDF and the Kamajors in the ending of the war in Sierra Leone the judges somehow belittled the crimes that were committed in the course of this liberation, implying that the end justified the means. With their reduced punishments the magistrates wished to: “send a message to future pro-democracy armed forces or militia groups that notwithstanding the justness or propriety of their cause, they must observe the laws of war in pursuing of defending legitimate causes, and that they must not recruit or use children as agents or instruments of war. It will, in addition, remind them of their obligations to protect civilians who are unarmed and not participating in hostilities, and whose aspiration is only protection, regardless of their perceived affiliation.” On appeal, both acquittals were reversed and the sentences, which were deemed “manifestly inadequate”, upgraded to 15 years for Fofana and 20 years for Kondewa. In handing down the substantially increased sentences, the majority of the bench held that the Trial Chamber had erred in considering political motives or fighting for a “just cause” as a mitigating factor in sentencing.

With the CDF case, the SCSL Prosecutor had built a controversial legacy from its very beginning, immediately leaving a rather bitter taste with many Sierra Leoneans. Not only did the entire case against the civil defence forces come as an unwanted surprise to many people in Sierra Leone, but also more so, observes Lansana Gberie, the fact the Prosecution opened with it, proved to be a miscalculated strategy. It did not win the hearts and minds of Sierra Leoneans, including victims and survivors. Even more so, it was a great perversion he argues: “its attempt to criminalize legitimate and necessary civilian defence against armed and highly predatory and criminal elements was both an attempt to distort the collective memory of the people of Sierra Leone and to besmirch the reputation

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2239 SCSL, Prosecutor Against Moinina Fofana & Allieu Kondewa: Judgement on the Sentencing of Moinina Fofana and Allieu Kondewa (SCSL-04-14-T; 9 October 2007).
2240 SCSL, Fofana and Allieu Sentencing Judgement, §87-91.
2241 SCSL, Fofana and Allieu Sentencing Judgement, §95.
2242 Ibidem, §96.
2244 SCSL, AC, Fofana & Kondewa Judgement, ‘Disposition’.
of its national heroes. It should have never been allowed to happen.”

After all, it was the RUF that started the war so the choice for the prosecution of the Kamajors – fighting to oust the RUF – as starting case was at minimum an insensitive miscalculation. The RUF had started the war, but the trial against some of its members started a month later than against the CDF figures.

The RUF case

May it please the Court, this is a tale of horror, beyond the gothic into the realm of Dante’s inferno. They came across the border, dark shadows, on a warm spring day, 23 March of 1991. Hardened rebels trained by outside actors from Liberia, Libya and Burkina Faso. These dogs of war, these hounds from hell, unleashed by cynical […] These rebels consisted of Sierra Leoneans and Liberians were assisted by Libyan Special Forces. Among their goals were the diamond fields of eastern Sierra Leone. Their motive: power, riches, and control in furtherance of a joint criminal enterprise that extended from West Africa north into the Mediterranean Region, Europe, and the Middle East. Blood diamonds are the common thread that bound together this criminal enterprise. The rule of the gun reigned supreme. […] The reality of these crimes done in Sierra Leone that were committed by the RUF are so much against nature, against logic, against life itself. These crimes in our joint indictment against Sesay, Kallon and Gbao certainly defy any logic, any reason; the purely evil of these deeds of destruction are so horrific, terrible and devastating in their scope, words in any language do not describe the offences committed by these indictees. We are in the presence of crimes beyond description, but our witnesses, the people of Sierra Leone, will testify in their proud, yet humble, way and relive these crimes for this tribunal.

- David Crane, Prosecutor

Like in the CDF case, Crane, with much histrionic rhetoric, drew the dramatic scenery of the Sierra Leone war and pictured those at trial as brutal men; “the evil spawn of this unholy union, this joint criminal enterprise.” This time, however, his rhetoric was immediately interrupted by defence objections and the presiding judge, Benjamin Itoe, who told Crane: “You will limit your observations to the facts. […] Please, to the facts -- I am not interested in knowing, you know, whether they were trained in Libya or what have you, so please limit your observations to the facts – […] -- which intend to prove the case. Nothing political, please.” On that account, the Prosecution’s second trial focused on three members of the Revolutionary United Front (RUF): Interim leader Issa Hassan Sesay, former commander Morris Kallon, and former senior officer and Chief of Security

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2247 Idem.
2249 For details on the trial, see the trial monitoring reports offered by the War Crimes Center at the University of California Berkeley at www-page: http://wesc.berkeley.edu/tag/RUF/; visited: 6 May 2015.
2250 Issa Hassan Sesay was a former senior officer of the RUF and commander in AFRC. He was born on June 27, 1970 in Freetown, Sierra Leone. He served as area commander of the RUF between early 1993 and early 1997. From this time until December 1999, he also was Battle Group Commander of the RUF subordinated exclusively to the Battlefield Commander of the RUF, Sam Bockarie, also known as Mosquito, and to Foday Sankoh, leader of the RUF and Johnny Paul Koroma, leader of the AFRC. According to the indictment act of the SCSL, he was a member of the governing body of the Junta at the time relevant to the case. From January 2000 to August 2000, he was promoted Battlefield Commander of the RUF. When Foday Sankoh was incarcerated in the Republic of Sierra Leone in May 2000, Issa Hassan Sesay was ordered to direct all RUF activities in Sierra Leone until March 10, 2003 when he was arrested and transferred to the SCSL. After trial, he was imprisoned in Mpanga prison in Nyanza, Rwanda. See also the documentary about his case, including interviews with Sesay: Rebecca Richman Cohen, War Don Don (Racing Horse Productions, 2010).
2251 Morris Kallon was born on January 1, 1964 at Bo, district of Bo in Sierra Leone.183 He was a senior officer and commander in the RUF. In 1991, he was also area commander of the RUF between early 1993 and early 1997. From this time until December 1999, he also was Battle Group Commander of the RUF subordinated exclusively to the Battlefield Commander of the RUF, Sam Bockarie, also known as Mosquito, and to Foday Sankoh, leader of the RUF and Johnny Paul Koroma, leader of the AFRC. According to the indictment act of the SCSL, he was a member of the governing body of the Junta at the time relevant to the case. From January 2000 to August 2000, he was promoted Battlefield Commander of the RUF. When Foday Sankoh was incarcerated in the Republic of Sierra Leone in May 2000, Issa Hassan Sesay was ordered to direct all RUF activities in Sierra Leone until March 10, 2003 when he was arrested and transferred to the SCSL. After trial, he was imprisoned in Mpanga prison in Nyanza, Rwanda. See also the documentary about his case, including interviews with Sesay: Rebecca Richman Cohen, War Don Don (Racing Horse Productions, 2010).
2252 Between January 2000 and March 2003, Kallon served as a member of the governing body of the Junta of the RUF. Following this assignment, he became directly subordinated to Issa Hassan Sesay, Foday Sankoh and Johnny Paul Koroma as Battle Group Commander in the RUF. In June 2001, he became Battlefield Commander of the RUF. According to the indictment act of the Court, Kallon was also a member of the governing body of the
Augustine Gbao.\(^{2252}\) Absent from the trial were those generally held to be the real ‘most responsible’, Foday Sankoh\(^{2253}\) and RUF battlefield commander Samuel Bockarie.\(^{2254}\) All of the three remaining accused were charged with 18 counts,\(^{2255}\) to which they pleaded not guilty. Their case was joined and evidentiary hearings started on 5 July 2004, with the Prosecution calling 85 witnesses and closing its case on 2 August 2006.\(^{2256}\) Sesay’s defence, in particular, took considerable time, from 3 May 2007 to 13 March 2008, with himself on the stand for 25 days\(^{2257}\) and calling Alhaji Dr Ahmad Tejan Kabbah, former President of Sierra Leone\(^{2258}\) and 58 other witnesses to the stand. After hearing testimony for 308 days and admitting 437 exhibits, closing arguments were delivered in early August 2008 and judgement was passed 5 months later.\(^{2259}\) The three men were each found guilty of acts of terrorism, collective punishments, extermination, murder as a crime against humanity, murder as a war crime, rape, sexual slavery, forced marriage as an “other inhumane act”, outrages upon personal dignity, mutilations, physical violence as a crime against humanity, enslavement as a crime against humanity, pillage, intentionally directing attacks against UNAMSIL peacekeepers, and murder in relation to the UNAMSIL peacekeepers. Sesay and Kallon were also found guilty of the crime of using children under the age of 15 years to participate actively in hostilities,\(^{2260}\) with the first receiving a record sentence of 52 years, the latter 40 and Gbao 25 years.\(^{2261}\) Dismissing 96 defence grounds for appeal, the convictions were upheld on appeal, while the Appeals Chamber affirmed that the three convicts had participated in a joint criminal enterprise and affirmed their sentences.\(^{2262}\)
The AFRC case

The facts in this case, we allege, will show pain, agony, suffering, sorrow, and grief far beyond human description, understanding, and reason. Murder, rape, terror, maiming, mutilation, enslavement, sexual slavery, forced marriage, looting, pillaging, and conscripting child soldiers are mere legal terms by which the statute allows us to categorise war crimes and crimes against humanity and other serious violations of international humanitarian law committed by these persons in Sierra Leone, but reality can only be captured by our witnesses, the victims of the egregious crimes that we alleged were committed. Just such a witness is the young man who will testify that during Operation No Living Thing, a cruel military operation that was in effect as the AFRC/RUF forces were leaving Freetown in January and February 1999. He and his two brothers were captured and taken to a rebel base in front of a primary school in Kissy. These three terrified civilians were told that they would be given a message for Tejan Kabbah. Four other men were brought out as well, and one by one they were ordered to extend their hands, and one by one their hands were severed with an axe by a member of the AFRC/RUF forces there. The cuts were not clean, he will testify, and it took four long blows before his hand fell to the ground. The screaming and mutilated civilians were told that Tejan Kabbah had new hands for them. Who are these people, these men of responsibility and command of rebel combatants?

- David Crane, Prosecutor

Third in a row was the AFRC case, the trial against three leaders of the Armed Forces Revolutionary Council (AFRC): Staff Sergeant Alex Tamba Brima (aka “Gullit”), Sergeant Brima Bazzy Kamara and Sergeant Santigie Borbor Kanu (aka “Five-Five”). The indictment contained a total of 14 counts of crimes against humanity and war crimes committed between 25 May 1997 and January 2000 by each of the accused. At their initial appearances, all men pleaded not guilty to all charges. Evidentiary hearings began on 7 March 2005, with the Prosecution closing its case on 29 November 2005 and the defence, after an interlude, on 27 October 2006. Over a total period of 176
trial days, the judges heard testimony from 59 Prosecution witnesses and the 87 Defence witnesses, while admitting 119 exhibits.\textsuperscript{2269} Judgement was delivered in Freetown on 20 June 2007\textsuperscript{2270} and prison sentences between 45 and 50 years handed out a month later.\textsuperscript{2271} After both parties appealed the verdicts and sentences, the Appeals Chambers quashed all defence arguments, upheld the Prosecutor’s argument that convictions for forced marriage should have been entered, declined to enter new convictions and affirmed the sentences.\textsuperscript{2272} A fourth suspect, AFRC Chairman Johnny Paul Koroma, has reportedly been killed in Liberia but whereas his death has not been confirmed his indictment remains vacant.\textsuperscript{2273} If he were to appear the Residual Special Court for Sierra Leone would arrange for him to be brought to trial.

\textbf{Contempt cases}

Apart from tackling substantive international crimes cases, the Special Court expended considerable energy in trying persons who clogged its administration of justice, predominantly contempt of court by means of witness interferences.\textsuperscript{2274} Throughout its lifespan, it shepherded more trials for disrespect of its proceedings than for wartime atrocities.\textsuperscript{2275} A first case arose in 2005, involving the wives and a friend of the accused in the AFRC trial, in which Margaret Fomba Brima, Neneh Bai Jalloh, Esther Kamara and Anifa Kamara pleaded guilty to threatening and intimidating a witness on account of her in court testimony. They were sentenced to ‘probation’.\textsuperscript{2276} Then Brima Samura, an investigator attached to the defence team of Alex Tamba Brima, was prosecuted for disclosing the name of the protected witness in the aforementioned case but found not guilty of knowingly and wilfully violating the protection order.\textsuperscript{2277} In 2012, former RUF member Eric Koi Senessie was convicted for interfering

\begin{footnotes}
\item [2269] SCSL, Prosecutor against Alex Tamba Brima, Brima Bazzy Kamara, Santigie Barbor Kanu: Judgement Annex A: Procedural History (SCSL-04-16-T; 20 June 2007), §58-63.
\item [2270] The three Accused were found guilty of acts of terrorism, collective punishments, extermination, murder, rape, outrages upon personal dignity, physical violence, conscripting or enlisting children under the age of 15 years into armed forces or groups, or using them to participate actively in hostilities, enslavement and pillage. SCSL, Brima, Bazzy Kamara, Barbor Kanu: Judgement, §2121-2123.
\item [2271] SCSL, Prosecutor against Alex Tamba Brima, Brima Bazzy Kamara, Santigie Barbor Kanu: Sentencing Judgement (SCSL-04-16-T; 19 July 2007), pp. 13-18.
\item [2272] SCSL, Appeals Chamber, The Prosecutor against Alex Tamba Brima, Brima Bazzy Kamara, Santigie Barbor Kanu: Judgement (Case No.: SCSL-2004-16-A; 28 February 2008) ‘Disposition’. The Appeals Chamber also reversed a Trial Chamber decision that the Prosecution had not properly pleaded the issue of Joint Criminal Enterprise (JCE). The Appeals Chamber found that the common criminal purpose of the JCE had been correctly pleaded in the indictment, but again refrained from entering additional convictions.
\item [2273] SCSL, The Prosecutor Against Johnny Paul Koroma also known as JPK: Indictment (SCSL-03-I; 3 March 2003); SCSL, The Prosecutor Against Johnny Paul Koroma also known as JPK: Warrant of Arrest and Order of Transfer and Detention (SCSL-2003-03-I; London, 7 March 2003). The Security Council in 2010 sounded a new international alert for Koroma, “Urging all States to cooperate with and render assistance to the Special Court for Sierra Leone, or any institution to which the Special Court has transferred his case, to bring Johnny Paul Koroma to justice if he is found to be alive, and calls on him to surrender. Calling on all States to cooperate with the International Criminal Police Organisation (INTERPOL) in apprehending and transferring Johnny Paul Koroma, if he is found to be alive.” See: UNSC, Resolution 1940 (UN-doc: S/RES/1940 (2010); 29 September 2010).
\item [2274] “(A) The Special Court, in the exercise of its inherent power, may punish for contempt any person who knowingly and wilfully interferes with its administration of justice, including any person who: (i) being a witness before a Chamber, subject to Rule 90(E) refuses or fails to answer a question; (ii) discloses information relating to proceedings in knowing violation of an order of a Chamber; (iii) without just excuse fails to comply with an order to attend before or produce documents before a Chamber; (iv) threatens, intimidates, causes any injury or offers a bribe to, or otherwise interferes with, a witness who is giving, has given, or is about to give evidence in proceedings before a Chamber; or a potential witness; (v) threatens, intimidates, offers a bribe to, or otherwise seeks to coerce any other person, with the intention of preventing that other person from complying with an obligation under an order of a Judge or Chamber; or (vi) knowingly assists an accused person to evade the jurisdiction of the Special Court. See: SCSL, Rules of Procedure and Evidence (London, 7 March 2003), art. 77.
\item [2275] In lieu of one disciplinary hearing against counsels Yada Williams and Ibrahim Yillah, alleging professional misconduct: SCSL, Code of Conduct Hearing: Decision (Freetown, 10 November 2005).
\item [2277] SCSL, Independent Counsel Against Brima Samura: Judgement in Contempt Proceedings (SCSL-2005-01; 26 October 2005).
\end{footnotes}
with several prosecution witnesses in the Taylor trial and sentenced to two years imprisonment. The fourth case involved charges against Charles Taylor’s lead counsel, Courtenay Griffiths. He was found not guilty of “wilfully and knowingly, and/ or with reckless indifference to Court-ordered protective measure” disclosing the identities of seven protected witnesses. On 25 September 2012, four former AFRC leaders (Hassan Papa Bangura, Samuel Kargbo, Brima Bazzzy Kamara and Santigie Borbor Kanu) were convicted of tampering - bribing or otherwise interfering - with a former prosecution witnesses. In the sixth contempt case, former Defence Investigator Prince Taylor was convicted for interference with Prosecution witnesses in Charles Taylor’s trial but later cleared by the Appeals Chamber, in what became the final judgement the court ever delivered.

Case SCSL-03-01

I will be very honest. I was afraid of confrontation. You know, sometimes I just want the war to be out of my memory: it does not help me. So I wanted to forget. So going back to this trial, hear all those stories, I thought, would just affect me more. And I didn’t want to confront Charles Taylor.

– Babah Tarawally

While the UNICTY and UNICTR had just commenced their most critical trials – versus Milošević and Bagosora – in 2002, prosecutors in Freetown had only just commenced inquiries into the atrocities throughout the second half of Sierra Leone’s civil war. Whereas David Crane presented indictments against the leadership of the main Sierra Leonean warring parties, his chief suspect, from the start, was a non-Sierra Leonean. Marked ‘SCSL-03-01’, the first case file and the court’s first indictment concerned Charles Ghankay Taylor, then President of Liberia. Crane had it planned carefully. His plot was “to blow him off the map” in a “psychological operation” that “was to draw him out and corner him politically to a place where he had few options.” ‘Operation Rope’, a textbook sample of ‘law fare’, intended to do just that: lure Taylor out of Liberia to unseal the

2278 He was convicted on eight of nine contempt of court charges alleging that he had attempted to induce five prosecution witnesses who testified in the Taylor trial to recant their testimony. Four of the counts alleged that he had offered a bribe to a witness, and five of the counts alleged that he had attempted to influence a witness. He was convicted on all four counts of offering a bribe to a witness, and on four of the five counts of attempting to influence a witness. SCSL, TCI, Prosecutor v. Eric Senessie: Judgement in Contempt Proceedings (SCSL-2011-01-T; 16 August 2012).


2280 SCSL, Appeals Chamber, The Independent Counsel Against Hassan Papa Bangura, Samuel Kargbo, Santigie Borbor Kanu & Brima Bazzzy Kamara: Judgement in Contempt Proceedings (SCSL-11-02-A).

2281 He was sentenced to serve a total of 2-1/2 years on his conviction on four counts of inducing witnesses who had testified against Charles Taylor to recant testimony and one count of interfering with Eric Kei Senessie at a time when he was a potential witness in contempt proceedings before the court. SCSL, TCII, Independent Counsel v. Prince Taylor: Judgement in Contempt Proceedings (SCSL-12-02-T; 25 January 2013).

2282 A three-judge panel overturned his conviction on the grounds that it relied heavily on testimony by Eric Kei Senessie, who had admitted giving false testimony in his own contempt trial. The Judges found that the evidence used to corroborate Senessie’s testimony was either circumstantial and could be subject to another interpretation, or did not in fact corroborate Senessie’s evidence. By a majority, the court found that no reasonable trier of fact could have placed decisive weight on Senessie’s evidence to convict Prince Taylor, and therefore acquitted him. SCSL, Appeals Chamber, Independent Counsel Against Prince Taylor: Judgement in Contempt Proceedings (SCSL-12-02-T; 14 May 2013).

2283 ‘Babah’s day in court’, The State We’re in, 18 August 2009.

2284 SCSL, First Annual Report of the President of the Special Court for Sierra Leone (Freetown 2003), pp. 14-15.

2285 By November 2003, 13 individuals had been indicted, 10 of whom were in the Special Court’s custody: Foday Sankoh, the RUF founder and former leader; Issa Sesay, who replaced Foday Sankoh as leader of the RUF; Morris Kallon and Augustine Gbao, senior RUF commanders; Alex Tamba Brima, Ibrahim “Bazzy” Kamara, and Santigie Kanu, senior members of the AFRC; Sam Hinga Norman, national coordinator of the CDF and Minister of Internal Affairs and National Security at the time of this arrest; Moinina Fofanah, Director of War for the CDF, and Aliusu Kondewa, Chief Initiator and High Priest of the Kamajors. Three additional accused were at large, dead, or allegedly dead: Sam “Mosquito” Bockarie, former Battlefield commander of the RUF; Johnny Paul Koroma, head of the AFRC; and Charles Taylor, former President of Liberia.

2286 Stover et al., Hiding in Plain Sight, p. 263.

2287 See for a detailed study on Taylor: Waugh, Charles Taylor and Liberia.

indictment, by surprise. It worked.2289 Whilst dispensing several public declarations targeting Taylor and fuelling signals to various Liberian forces that the President was in possible legal trouble, the LURD2290 and MODEL2291 rebellious factions began to move towards Monrovia, mounting pressure led Taylor to voyage to Ghana for peace talks.2292 In the morning of 4 June, Taylor landed in Accra to join the conference. As he was speaking, CNN broke the news that the Special Court for Sierra Leone had indicted Taylor,2293 on no less than seventeen counts of war crimes and crimes against humanity.2294 Yet, after the ceremony, the dismayed, offended and disrespected Ghanaian President, John Kufuor, provided Taylor with a presidential jet, to securely return back to Monrovia,2295 while the talks continued and ultimately led to a peace arrangement 76 days later.2296 Along the time, back in Liberia, Taylor calculated his options. In Accra, the parties insisted on a transitional government, excluding Taylor.2297 A way out was offered by Nigeria, which – with the critical support of the international community - was prepared to offer a safe haven in return for Taylor’s retreat from power. That is what happened exactly. On 11 August 2003 Taylor resigned with the movie-styled words “God willing, I will be back”2298 and flew off to Calabar, a quiet town in south-eastern Nigeria, the settle into three comfortable villas with his close family and his aides.2299 While Taylor was in exile, the prosecution had its indictment amended, reducing it from 17 to 11 counts.2300

With Taylor relishing his new life in Nigeria, the lobby to rescind the asylum deal was immediately kick-started. In Freetown, at the donor-reliant court, there was an urge to get Taylor before its judges to provide the SCSL a crucial boost to ascertain funding and political support.2301 Human rights groups united in the campaign,2302 US Congress issued a $2 million reward for his arrest2303 and the UN Security Council – having already placed travel bans on Taylor when leaving Nigeria – froze Taylor’s assets.2304 After a period of silent petitioning, pressure mounted from early 2005, including from the European Union,2305 followed by the USA2306 and elevated by the United

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2289 Stover et al., Hiding in Plain Sight, p. 267.
2290 Liberians United for Reconciliation and Democracy (LURD)
2291 Movement for Democracy in Liberia (MODEL)
2294 SCSL, The Prosecutor Against Charles Ghankay Taylor also known as Charles Ghankay Macarthur Taylor: Indictment (SCSL-03 – I; 3 March 2003).
2295 Kufuor later recounted the event in an interview in which he narrates how he felt betrayed and that he informed the United States of America (USA) of the embarrassment that the announcement caused. See: Lansana Gberie, Jarlawah Tomp, Efam Dovi and Osei Boateng, ‘Charles Taylor Why Me?, New African, May 2006.
2296 Comprehensive Peace Agreement Between the Government of Liberia and the Liberians United for Reconciliation and Democracy (LURD) and the Movement for Democracy in Liberia (MODEL) and Political Parties (Accra; 18 August 2003), art. XX.
2297 Idem.
2300 (i) Five counts of crimes against humanity, namely: murder (Count 2); rape (Count 4); sexual slavery (Count 5); other inhuman acts (Count 8); and enslavement (Count 10); (ii) Five counts of violations of Common Article 3 and of Additional Protocol II, namely: acts of terrorism (Count 1); violence to life, health and physical or mental well-being of persons, in particular murder (Count 3); out-rages upon personal dignity (Count 6); violence to life, health and physical or mental well-being of persons, in particular cruel treatment (Count 7); and pillage (Count 11); (iii) One count of conscripting or enlisting children under the age of 15 years into armed forces or groups, or using them to participate actively in hostilities (Count 9), a serious violation of international humanitarian law.
Nations, which expanded its Liberian missions’ mandate to arrest and detain the indictee.\textsuperscript{2307} Opportunities rose with the transformation of the political landscape in Liberia. In its first post-conflict polls in October 2005, Ellen Johnson-Sirleaf was voted into the presidency. Pressured by the international community, she officially called on Nigeria to send back Taylor.\textsuperscript{2308} The following days set in motion a rollercoaster. After Obasanjo said Liberia was free to come and get Taylor, the fugitive went ‘missing’ – reportedly escaped -, only to resurface again when US President George Bush threatened to cancel a scheduled meeting with the Nigerian President.\textsuperscript{2309} Hours later, Taylor was arrested and Obasanjo announced at the White House that Taylor was on his way to Liberia.\textsuperscript{2310} He was flown to Monrovia on 29 March and directly transferred by UN peacekeepers to Sierra Leone.\textsuperscript{2311}

Although the proceedings and trials ought to be publicly held in Freetown, concerns emitted about putting Charles Taylor in the dock in West Africa, a region in the midst of transitional justice processes, political changes and rising conflict in Côte d’Ivoire. Court officials feared that his appearance in the courtroom could trigger rescue attempts or spark renewed fighting in Sierra Leone. Regardless of speculations that the USA, the AU, ECOWAS and President Johnson-Sirleaf pushed – and agreed on - for the trial to be held outside of the region,\textsuperscript{2312} the SCSL requested the Netherlands and the International Criminal Court (ICC) to facilitate, by using its own trial chamber, running Taylor’s trial in The Hague.\textsuperscript{2313} Dodging critique from civil society and NGOs that taking the trial elsewhere would restrict the public to attend the trial, the official reasons provided by the court were “concerns about the stability in the region.”\textsuperscript{2314} Taylor opposed such a transfer, citing that he would not have access to family or the witnesses.\textsuperscript{2315} Despite Taylor’s opposition, civil society disappointment, and practical dilemmas and against the spirit of the SCSL to make proceedings accessible to the public in the affected country,\textsuperscript{2316} Taylor was moved to The Netherlands.\textsuperscript{2317} He only spent three months in the heavily fortified walled compound in Freetown. In advance, the United Kingdom agreed, if Taylor was to be convicted and sentenced, to take on the responsibility for

\textsuperscript{2307} “[…] the mandate of the United Nations Mission in Liberia (UNMIL) shall include the following additional element: to apprehend and detain former President Charles Taylor in the event of a return to Liberia and to transfer him or facilitate his transfer to Sierra Leone for prosecution before the Special Court for Sierra Leone […]”. UNSC, Resolution 1638 (S/RES/1638 (2005)), 11 November 2005), §1.

\textsuperscript{2308} Taylor himself testified about his arrest, which took place, according to him, when he was on his way to meet Chad’s President Idriss Déby. He also felt betrayed by Obasanjo, he said: “I would probably want to find out from him, “Why in the hell did you do this?” And maybe the next thing would probably be maybe two former Presidents involved in a little tussle, because I am damn angry of what Obasanjo did to me. He had - until now I do not understand it.” SCSL, Taylor Transcript (14 July 2009), pp. 24347 – 24351.


\textsuperscript{2310} See for a detailed narrative about these events: Tejan-Cole, ‘A Big Man in a Small Cell’, pp.215-221.


\textsuperscript{2313} SCSL, “Special Court President Requests Charles Taylor be Tried in The Hague”, Press Release (30 March 2006).

\textsuperscript{2314} SCSL, PTC, The Prosecutor vs. Charles Ghankay Taylor: Defence Motion For An Order That No Change Of Venue From The Seat Of The Court In Freetown Be Ordered Without The Defence Being Heard On The Issue And Motion That The Trial Chamber Request The President Of The Special Court To Withdraw The Requests Reportedly Made To (1) The Government Of The Kingdom Of The Netherlands To Permit That The Trial Of Charles Ghankay Taylor Be Conducted On Its Territory & (2) To The President Of The Netherlands For Use Of The Ice Building And Facilities In The Netherlands During The Proposed Trial Of Charles Ghankay Taylor (SCSL-03-01-P-T; 6 April 2006).


\textsuperscript{2316} Through bilateral agreement: ‘Headquarters agreement between the Kingdom of the Netherlands and the Special Court for Sierra Leone’, Tractatenblad Koninkrijks Der Nederlanden, Vol. 2006, No. 131 (DJIZ/VE-262/06; 19 June 2006).
overseeing his incarceration in Great Britain. Only Taylor’s first appearance – and a handful of subsequent status conferences - was arranged in Sierra Leone. “Most definitely, Your Honour, I did not and could not have committed these acts against the sister Republic of Sierra Leone,” he told the judges in April 2006. “[…] so most definitely I am not guilty.” With these words, he became the first ousted African head of state to find himself before an international criminal court. Soon, despite the controversial political manoeuvres to dethrone him in Liberia, the controversies surrounding the CDF trial and the deaths of ringleaders of the atrocities, he became the “jewel in the crown” of the SCSL.

The Trial

When in The Hague – paradoxically commencing the first trial ever held in a courtroom at the ICC - the trial that was highly anticipated in Africa and elsewhere had a “false start.” Taylor did not attend the opening of the trial on 4 June 2007, refusing to cooperate. Instead, he only sent his lawyer, Karim Kahn, a former UNICTY Prosecutor, to inform the chamber - through a written letter - he and his defence team had been dismissed from the case. Kahn walked out of the courtroom and Chief Prosecutor Stephen Rapp, whom we know from the ICTR’s media trial, nevertheless gave his opening statement, before an empty dock - but before a fully packed public gallery.

How are we to grasp what happened in Sierra Leone? The world, I think, knows only part of the story. A small West Africa nation on the Atlantic Ocean. From it, in the late 1990s, came images in the media of some of the ugliest scenes of viciousness in recent memory. Human beings, young and old, mutilated. Rebels chopping off arms and legs, gouging out eyes, chopping at ears. Girls and women enslaved and sexually violated. Children committing some of the most awful crimes. The exploitation of the resources of Sierra Leone used not for the benefit of its citizens but to maim and kill its citizens. The very worst that human beings are capable of doing to one another. For those of us who were not there, it is almost impossible, I think, to comprehend the horrors suffered by the people of this small country. How did it happen? To fully understand the crimes that we have described in the indictment and the central role that the accused had in the commission of them, it’s important to look at the history and understand the major political events that led to the campaign of terror against the civilian population of Sierra Leone.

From the start, the Taylor trial seemed to be all about history. But it took some time before the
prosecution could argue this case theory, which held that Taylor was Kingpin in the atrocious history of West-Africa from the 1980s. “If the roots of a mango tree are cut, the tree will die,” Prosecutor Brenda Hollis said, quoting a Sierra Leonean chief. ‘Mr. Taylor was the root which fed and maintained the RUF and kept the AFRC/RUF alliance alive; without him the rebel movement, with its attendant crimes, would have suffered an earlier death,’ she continued.2326 “The evidence in this case shows that the RUF was a terrorist army created and supported and directed by Charles Taylor who, in truth, is the person most responsible for the crimes charged,” Hollis alleged in her final brief.2327 But like the UNICTR, the Special Court was confronted with a complex oral society and an absence of a clear paper trail or forensics. The tribunal therefore heavily relied on testimonial evidence. “Without witnesses, no trials would be possible,” Hollis told the UN Security Council.2328 Consequently, since 2008, testimony on the forgotten cruelties of the Sierra Leonian civil war echoed in the courtrooms. “All this suffering, all these atrocities to feed the greed and lust for power of Charles Taylor,” argued the prosecution.2329 Indeed, Taylor’s crimes in Liberia have now been well documented by historians and truth and reconciliation commissions in Liberia and Sierra Leone.2330 Yet, the biggest hurdles for the prosecution were time and space. As outlined above, the SCSL may only deal with crimes committed in Sierra Leone from November 1996 onwards. But at this time, Taylor was not at this crime scene and is rather infamous for spearheading bloodshed in his own country, a history outside of the scope of the SCSL’s mandate. This restriction, however, did not prevent prosecutors from dwelling into that history.

On the first day of the trial, Stephen Rapp was unambiguous about the role of history in the Prosecution’s case: “Your Honours,” he addressed the court: it's important, I believe, to make a review of the history, not all of the history but the relevant portions, of the execution of this plan, and it really begins, as we indicated, before 1991, before 1996, in 1988 or 1989, with the military training in North Africa of Charles Taylor and Foday Sankoh and other people who later became leaders of the RUF and NPFL.”2331

In line with Rapp’s opening statement, the prosecution’s case summary reads that “the indictment crimes did not happen overnight.”2332 Their case therefore focused on highlighting a long-standing relationship between Taylor and the RUF. The prosecution claims that this bond lasted throughout the 1990s, and when Taylor became president in 1997, Taylor continued to be the “chief,” “father” and
“godfather” of ‘his proxy forces the RUF and later the RUF/AFRC.’ Depicting him as a master of manipulation and a ‘liar’ the prosecution claimed Taylor controlled the RUF from behind the façade of being a regional peace broker. Still, while the bench was extremely compassionate towards the prosecution in allowing evidence falling outside the scope of the indictment, it was hard to present ‘smoking guns’ and precise testimony in support of the Prosecution’s case theory. Particularly, the relationship between Sankoh and Taylor in Libya – the very basis of criminal charges – was a contentious issue. And according to the prosecution Taylor had done everything to conceal his crimes and destroy evidence of links with the RUF rebels, accusing Taylor of killing his ‘favourite’ RUF general Sam Bockarie and AFRC junta leader Johnny Paul Koroma after they were charged by the SCSL.

After the initial hiccupps and Rapp’s opening statement, the trial adjourned for six months, allowing Taylor’s newly furnished defence – this time led by Old Baily Queens Counsel Courtenay Griffiths, Terry Munyany and Adrew Caley - team to get up to speed with the dossier. Then finally, four years after the unleashing of the indictment and toppling of the Taylor regime, the presentation of evidence commenced in January 2008. Rapp had announced the trial was to “go ahead full speed” and would last for some 8 months, in which he would bring to court 54 linkage witnesses, 10 crime-base witnesses and 8 witnesses “who are experts with a historical background in the conflict.” In the following 13 months, the prosecution rolled out its charges and, stretched over 906 hours and 53 minutes, elicited evidence from 94 live witnesses. The strategy embarked on setting the contextual stage: the diamond mining and trade in West-Africa, the historical backgrounds to the deadly conflicts in Liberia and Sierra Leone and the scale of human rights abuses during the wars. Alongside, it called witnesses, from the crime scenes, many of whom with physical scars, to show...
that the crimes listed in the indictment were actually committed.\textsuperscript{2341} Thirdly, the aim was to link Taylor to crimes committed in Sierra Leone through insider witnesses.\textsuperscript{2342} In the end, everything was brought together and reinforced, highlighting Taylor’s criminal responsibility.

Central in their case was the link between Taylor’s alleged greed for diamonds and the atrocities committed in Sierra Leone. In order to contour this narrative, a mixed group of experts was called to the stand. Ian Smillie, a Research Coordinator with Partnership Africa Canada’s “Diamonds and Human Security Project” and a diamond expert, testified about conflict diamonds, detailing the trade trail from RUF’s controlled mines in Sierra Leone, via Liberia into the world market. He was the first witness and the prosecutor had expected him to testify on the history of Sierra Leone. Judge Julia Sebutinde, who was presiding, stopped the prosecutor several times during his examination: “Mr Prosecutor, I have listened with interest to your line of questioning, but with the greatest respect this sounds like a history lesson. We are now into the Jurassic period. Does any of this relate to the Indictment?”\textsuperscript{2343} Earlier on, she had already warned the prosecutor that Ian Smillie has not come here to give his testimony as a historian: “So you cannot ask questions that allude to the history.”\textsuperscript{2344} Next in line was Dr. Stephen Ellis, a British historian. He took the court through a cursory lesson of the history of West African politics and Taylor’s links with Sierra Leone.\textsuperscript{2345} Stephen Smith, a former SCSL investigator and Human Rights Watch researcher, Corinne Dufka,\textsuperscript{2346} detailed – in the capacity of “witness of fact” - the atrocities and abuses she had reported on from the field.\textsuperscript{2347} In between the expert testimonies in the first month of the trial, the prosecution called a handful of crime base-, linkage-, and insider- and fact witnesses,\textsuperscript{2348} asking them to discuss their first-hand experiences and observations of violence, linking

\textsuperscript{2341} For instance, the last prosecution witness, Alusine Conte, entered the court room with his hand wrapped in bandages. He testified as to how the rebels had chopped off both his hands: “So, the civilian raised the axe and hacked once and making it two. Then my child screamed and said, "Soldier, don't cut off my father's hand" and they said the child was causing noise. Then they loosened the child from the mother's back and I said, "What?" I said, "This was my child. Why should you cut his hands off?" And they said, "Oh, you stopping here? You not going?" And I said, "I'm not going. I would rather you cut off both hands. As long as I have even a little, I don't mind." "Oh", they said, "Oh, is that what you're saying?" And I said, "Yes" and they said, "Put it" and I placed my right hand and they hacked it twice.” SCSL, Taylor Trial Transcript, 30 January 2009, p. 24030.
\textsuperscript{2342} From his wheelchair, Mustapha Mansaray, told the court: “Why I was willing to come and testify? It was for one reason: Because there was a man they used to call Charles Taylor. At the time there was war in Liberia he said that that war that had come to Liberia, we would taste the bitterness of that one in Sierra Leone. Everybody heard that in the radio. So if indeed the war came to Sierra Leone, and I am like this, this is my own portion of the bitterness that I tasted. Both of my hands were amputated. What he said was what came to pass. Those were his children who did that.” SCSL, Taylor Transcript (30 October 2008), p. 19629.
\textsuperscript{2343} SCSL, Taylor Transcript (7 January 2007), p. 520.
\textsuperscript{2344} Ibidem, p. 502.
\textsuperscript{2345} SCSL, Taylor Transcript (16 January 2008) & SCSL, Taylor Transcript (18 January 2008). Also see: Stephen Ellis, Report for the Special Court for Sierra Leone: Charles Taylor and the war in Sierra Leone (5 December 2006), p. 3.
\textsuperscript{2346} SCSL, Taylor Transcript (22 September 2008).
\textsuperscript{2347} Between October 2002 and October 2003 she worked with the OTP as Senior Human Rights Advisor. Her duties included: Providing orientation and background on the Sierra Leonean conflict to new members of the investigation and the prosecution teams; Maintaining an archive of reports and historical information on the Sierra Leone armed conflict; locating and conducting in-depth interviews with potential witnesses (victims and perpetrators); collecting evidence; assisting mission planning by providing leads, context, contacts, maps and orientation; Advising OTP on background of potential suspect and witnesses; identifying key overview and expert witnesses; maintaining record of atrocities; liaising with third-party organisations: See: SCSL, OTP, Prosecuting Filing of Expert Report Pursuant to Rule 45bis: Report of Corinne Dufka – Human Rights Watch to the Office of The Prosecutor. Special Court for Sierra Leone (Freetown, 1 June 2007), p. 6.
\textsuperscript{2348} SCSL, Taylor Transcript (21 January 2008).
\textsuperscript{2349} Alex Tamba Teh (TF1-015): Crime base Witness, a Sierra Leonean Pastor, born in Tombodu, in Kono District; Vamunyan Sherif (TF1-406): Linkage Witness, a former member of Taylor’s personal security force (Special Security Service or SSS), born in Voinjama in Liberia; Dennis Koker (TF1-114): Crime base Witness, a former soldier for the NPRC in Sierra Leone, he provided security for the advisor to the President, E.B. Jumu, who was a member of the Supreme Council of State; from the Mende tribe; José Maria Caballero (a.k.a. Father Cheema) (TF1-326): Factual Witness, a Spanish Catholic Priest, working in Sierra Leone, started a program of reintegrating and educating child soldiers; Abu Keita (TF1-276): Linkage Witness, a Mandingo, born in Zorzor, Lofa County, Liberia; he has been in the Armed Forces of Liberia (AFL), the LUDF, ULIMO and ULIMO-K, was deputy Chief of Staff in ULIMO-K and ranked General until disarmed in 1996; TF1-371: Linkage Witness, closed session testimony.
Taylor to crimes and trying to highlight the former Liberian President’s motives. “When they captured somebody they would take a razor blade, or any other sharp object, a knife, or the zinc, and they would write on your chest "RUF" and they would turn you and they will carve on your back "AFRC". Those things I saw,” testified Alex Tamba. The 47-year-old pastor testified to incidents in Koidu town, which he had fled after rebels attacked. He had seen a lot of violence; rebels shooting and killing a man; counting as many as 50 corpses on the way to Sunna Mosque, including men, women and small children; the shooting to death 101 civilian men; the cutting off of arms and legs of a boy; rapes; forced labour; burning down houses. He was a victim himself: a rebel commander had forced Teh to put a stick in his mouth and knocked out most of his teeth on his upper and lower jaw by hitting him with the barrel of a pistol. Teh showed the Court his injuries and the false teeth he wears to assist in speaking. Next on the stand was high-level insider Varmuyan Sherif, a former member of Taylor’s personal Special Security Service (SSS). As a linkage witness, he spoke of Taylor’s radio communications from his Executive Mansion in Liberia with fighters in Sierra Leone, including Sam Bockarie, whom he was instructed to bring to Monrovia. On their way, he saw Bockarie remove a mayonnaise bottle filled with diamonds – destined for Taylor - from his pocket.

On 25 January the curtain were closed down, for a seven day interval of closed session testimony of an insider witness, TFI-371. Thirty-four ‘insiders’ were called to The Hague from the third week of the trial. A score of former RUF, AFRC, NPFL and SSS soldiers and commanders and radio operators testified about events that linked to Charles Taylor to the RUF, diamond mining, weapon trading and the Liberian President’s command over the RUF and AFRC. They told the court about Taylor arranging weapons, troops and finances for the RUF, particularly before the Freetown invasion; all in exchange for diamonds. Allegedly, the RUF used the precious stones to buy Taylor’s support. On his turn, according to the prosecution, control over Sierra Leone’s diamond mines is what drove Taylor to support atrocities. Activities in and around the mines were central in the testimony. They were to prove allegations of forced labour, ill-treatment and a long list of other types of violence against civilians. It was what Taylor had conspired with the RUF: a joint criminal enterprise of gun-running and diamond-smuggling. Many insider witnesses testified about Taylor’s leadership of the RUF, referring to him as “Pa”, “father” or Commander in Chief. Other witnesses highlighted Taylor’s bond with Foday Sankoh, Sam Bockarie and Issa Sesay, prominent rebel figures. Radio officers gave evidence on frequent contact between Taylor and the RUF leadership. Taylor’s involvement in the RUF/AFRC junta was demonstrated by the presence of many Liberian fighters in Sierra Leone, who were under the direct command of Taylor and linked to crimes on the ground, particularly in

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Freetown.2353 Throughout the trial, the only direct evidence connecting a campaign of murder, mutilation and rape in Sierra Leone to Charles Taylor came from insider witnesses, a strategy that followed from the very start of the investigations. But some of them, arguably, had strong reasons to testify against their political rival. Others were downright criminals, like Joseph Marzah. Nicknamed ‘zigzag’, the former secret service agent confessed to mass murder, killing babies, cutting open pregnant women and eating ‘Nigerians and white people as pork,’ during a chaotic and sketchy three day testimony.2354 In rebuttal, the defence did not need too much energy in discrediting the credibility of these kinds of witnesses.

Despite the fact that linkage evidence through insider testimony is most crucial in adjudicating individual criminal responsibility, almost two-third of the Prosecution’s witnesses brought to The Netherlands were victims and eye-witnesses. At the beginning of the trial, when media were still covering the proceedings, the Prosecution had called a handful of these so-called crime base witnesses, people who had seen, experienced or survived violence. But this type of evidence, often provided by traumatised victims, was only strongly featured later on in the trial. From September through October, no less than 39 crime base witnesses were flown in to The Hague, describing their painful ordeals. They were pivotal in establishing the long list of acts that constituted the actual crimes Taylor was accused of. Often, the prosecution also sought to elicit the identity of perpetrators, trying for instance to demonstrate that the reign of ‘terror’ inflicted on civilians were indeed committed by members of the RUF or the AFRC. Most of the witnesses, when asked, talked about the implications of the violence. Some were not able to work, while other suffered from ongoing medical and psychological problems. At the conclusion of its case, in the spring of 2009, the linkage evidence and scarce documentary authentication were only briefly underlined, only to bring again in four victims. The first testified about a massacre of 24 people, the second about the massive use of child soldiers and the third about being raped.2355 As the last witness, the prosecution called an amputation victim.

Seated in the witness chair, Alusine Conteh’s scars from the war were visible. Wrapped in bandage at elbow’s height, he missed both his hands; they were cut off in order to save his child. His left hand was chopped off by rebels during the 1999 rebel invasion of Freetown, only to also have his right amputated as a sacrifice to save his 4-year-old son, Karim, from amputation: “Then my child screamed and said, "Soldier, don't cut off my father's hand" and they said the child was causing noise. Then they loosened the child from the mother's back and I said, “What?” I said, "This was my child. Why should you cut his hands off?" And they said, "Oh, you stopping here? You not going?" And I said, "I'm not going. I would rather you cut off both hands. As long as I have even a little, I don’t

2353 Jennifer Easterday, ‘Charles Taylor Trial Report (December 1, 2008 – February 28, 2009), Sierra Leone Trial Monitoring Program (U.C. Berkeley War Crimes Studies Center), pp. 40-42.
mind." "Oh", they said, "Oh, is that what you're saying?" And I said, "Yes" and they said, "Put it" and I placed my right hand and they hacked it twice. Thus, the prosecution ended with a shock effect and emotional appeal to the judges, highlighting the injuries suffered by Sierra Leonean, rather than stressing the strength of the evidence linking Taylor with those atrocities. Prosecutor Rapp commented his “team had “achieved what we set out to do” with the presentation of testimony in the trial” and praised the contribution to justice made by the victim witnesses: “Brave men, women and children have taken the stand against Charles Taylor and recounted their suffering. They have included amputees, rape victims, former child soldiers, and persons enslaved, robbed, and terrorized. We are awed by their courage and grateful for their willingness to travel thousands of miles to bear witness. The contrast between these victims and the accused could not be starker.” Thus, the trial of the century ended with a shock effect, a display of suffering and an emotional appeal to the judges, highlighting the injuries suffered by Sierra Leonean rather than stressing the strength of the evidence linking them to Taylor’s actions and inactions. Meanwhile, testimony on the main charges – Taylor’s conspiracy with Sankoh – had remained inconclusive. No documentary evidence has shown that the two met each other between 1991 and 1999. Even historian Stephen Ellis could only account - based on interviews with third parties - that the two met ‘sometime between 1987 and 1989.” In contrast, at the trial it was Taylor himself who shed most light on his relation with the RUF, which in his version was to stop rebels from insurgency into Liberia, but only from the early 1990s.

5.7 Competing narrative

A court trying a president cannot escape debating politics and history. And indeed two diametrically opposed narratives about Taylor’s role in West Africa were put before the judges. Producing almost 50 000 pages of transcript and over a thousand exhibits, the Taylor trial offers a unique insight into the Liberian and Sierra Leonean history. In the prosecution’s version, as shown above, for a decade West Africa was the darkest corner of the world. From the trial and the presentation of evidence, two completely different narratives transpire. It is a story of the “Godfather of terror” who brought the “bitterness of war” to Sierra Leone and beyond versus the story of a Pan-Africanist statesman who, like Mandela, fought racism and branded a terrorist by the USA. In brief, the prosecution, as shown above, held that Taylor, over a period of 61 months and 19 days (30 November 1996 - 18 January 2002), was responsible for crimes committed in six Sierra Leonean districts by members of the RUF, AFRC, AFRC/RUF Junta and Liberian fighters. Taylor assisted, encouraged or acted in concert with these groups, who were either under his direction, control or otherwise subordinate to

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2356 SCSL, **Taylor Transcript** (30 January 2009), pp. 24039-24030
2358 SCSL, **Taylor Transcript** (15 January 2008), pp. 1426 & SCSL, **Taylor Transcript** (18 January 2008), p. 1530. Also see: Stephen Ellis, Report for the Special Court for Sierra Leone, p. 3.
2360 Q [Griffiths]: I mean Nelson Mandela was called a terrorist at one time, wasn't he, Mr Taylor? A [Taylor]: Yes, I think for a long time he - even upon becoming President they still had that on certain books in America, SCSL, **Taylor Transcript** (29 July, 2009), p. 25495.
him. His criminal liability, according to the OTP, stemmed either from his actions or his omissions regarding crimes, which he had planned, instigated, ordered or committed. Otherwise he aided and abetted the planning, preparation or execution of these crimes. Or the crimes “amounted to or were involved within a common plan, design or purpose” in which Taylor “participated, or were a reasonably foreseeable consequence of such common plan, design or purpose.”

That was not it. The prosecution alleged “in addition or alternatively” that Taylor, “while holding positions of superior responsibility and exercising command and control over subordinate members of the RUF, AFRC, AFRC/RUF Junta or alliance, and/or Liberian fighters, is individually criminally responsible for the crimes as alleged in the Indictment. It charges that the Accused is responsible for the criminal acts of his subordinates in that he knew or had reason to know that the subordinate was about to commit such acts or had done so and the Accused failed to take the necessary and reasonable measures to prevent such acts or to punish the perpetrators thereof.”

Moving outside of its temporal scope, the prosecution alleged that was the kingpin “in a ten-year campaign of terror,” played a key role in the Freetown invasion, looted diamonds since 1992, knew of the atrocities in Sierra Leone, that the RUF was an extension of Taylor’s NPFL, created and controlled the RUF before 1991, ran his scheme in Sierra Leone through Sam Bockarie and concealed his links with the RUF from its inception to its demise, (even ordering the execution of Bockarie in 2003). From the beginning, the RUF and NPFL “were one family, brothers and sisters.”

Throughout the conflict Taylor further guided his proxy forces, the RUF and AFRC, as a “chief,” “father,” “Papay,” “Pa” and “godfather.”

While the prosecution proclaimed that “all this suffering, all these atrocities” were carried out “to feed the greed and lust for power of Charles Taylor,” Taylor never denied the facts on the ground, nor the personal stories of victims and survivors who had come to trial. In rebuttal, Taylor presented himself not as war criminal but as peacemaker, who was left carrying the can for the international community. In sum, the defence countered the prosecution in its totality. He was not denying that crimes against humanity and war crimes were committed in the armed conflict in Sierra Leone during the period laid out in the indictment, but maintained he was not responsible for them. Pleading not guilty to all charges, he argued he could not have been fighting a war in Sierra Leone and that it ran counter to his interests. Economically, he argued, he was “effectively bankrupt” and

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2361 SCSL, Prosecutor v. Taylor: Prosecution’s Second Amended Indictment (SCSL-03-01-PT-263; 29 May 2007).
2362 SCSL, Taylor: Second Amended Indictment, §34.
2363 SCSL, Taylor: Prosecution Final Brief, §1-8.
2368 Ibidem, §28.
2369 Ibidem, §34-36.
2371 Ibidem, §61.
2372 Ibidem, §54-57.
2373 Ibidem, §§6-60.
faced an arms embargo and thus did not have the means.2375 And even then, he claimed he had no reason to plunder Sierra Leone’s resources since “he had vast amounts of untapped natural resources in Liberia.”2376 Politically, Taylor claims he feared regional instability because of the Sierra Leonean war and it would be “incredulous” if he “would have been in cahoots with the Junta.”2377 Therefore, and most contrary to the prosecutions’ submissions, he claims to have played a substantial role in fostering peace and security in Sierra Leone and that his contribution to the peace process was significant.2378 Taylor, in his defence, refuted the charge that he was at the very centre of the web of these crimes. And according to him, no evidence transpired to the contrary during the trial. “Throw it in the bin. That is what we submit the court should do with this body of evidence: Get rid of it.”2379 That was the message of Taylor’s lawyers throughout the defence case. Witnesses had been paid in exchange for their incriminating testimony, argued the lawyers: “By lavishing funds on witnesses which go well beyond compensating them for their actual expenses or losses consequent on their giving time to the Prosecution, this money, we say, has been used to pollute the pure waters of justice and the court cannot turn a blind eye to the effect that such financial rewards are likely to have on the evidence, and we invite the Court, when considering each and every witness about whom you have heard evidence of receipt of monies, to look very carefully at that witness's evidence.”2380 In their challenging of the publicly held grand narrative – as progressed in the prosecutorial case theory - that he was at the very centre of the web of all the crimes in West Africa, the defence’s main strategy was to cast doubts over the credibility of the insider witnesses and to present the judges with a completely different picture of Taylor’s role. Acknowledging, that “a criminal trial is not a beauty contest,” his defence submitted “that this man, however he has been painted in the public [but] when this indictment is approached in that independent, reasonable, unemotional way, there can only be one verdict on all these counts, and that is a verdict - and those are verdicts of not guilty.”2381

**Taylor on the stand**

Q. [Mr Griffiths]. Now, Mr Taylor, as you're aware you are charged on an indictment containing 11 counts, which alleges that you are everything from a terrorist to a rapist. What do you say about that?

A. [Mr. Taylor]. It is quite incredible that such descriptions of me would come about. Very, very, very unfortunate that the Prosecution, because of disinformation, misinformation, lies, rumours, would associate me with such titles or descriptions. I am none of those, have never been and will never be whether they think so or not. I am a father of 14 children, grandchildren, with love for humanity. I have fought all my life to do what I thought was right in the interests of justice and fair play. I resent that characterisation of me, it is false, it is malicious and I stop there.2382

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2377 Ibidem, §§59.
2378 Ibidem, §§7-102.
From 14 July 2010, Charles Taylor himself took the stand, as the first witness in his own defence. Wearing sunglasses, dressed up in a dark blue suit with a pin depicting the flag of Liberia, the former president commenced his 13-week direct testimony, examined in chief by his lead lawyer Courtenay Griffiths. A clear strategy was in place: presenting an opposite narrative to the case the prosecution painted through its 91 witnesses. Unprecedented in the history of international criminal justice, Taylor was allowed to provide the court with his own version of events, both in Liberia and in Sierra Leone. He did so enthusiastically, delivering his story in an ever eloquent style and in rich detail. And in his version, he is not a war criminal. Rather, he would have had to be a “superman” to run his own war-torn country, while also planning and ordering the commission of crimes on the other side of the border. On the main charge of the conspiracy to attack Sierra Leone he was clear from the beginning:

Q. Now moving on, Mr Taylor, did you knowingly assist Foday Sankoh and the RUF to invade Sierra Leone?
A. I, Charles Ghankay Taylor, never ever at any time knowingly assist Foday Sankoh in the invasion of Sierra Leone.
Q. Did you plan such an invasion with him?
A. I never ever planned any invasion of that friendly country with Foday Sankoh.”

Throughout his testimony and cross-examination that lasted for no less than seven months, Taylor attempted to present to the court - and through the media to the world - his rational, reasonable and empathic character, that of an ‘ordinary man’. Unsurprisingly, most of the content of Taylor’s testimony contained a political rebuttal, not only of the prosecution’s case but also of popular common knowledge about his role in West-Africa. This stage was explicitly set in the opening of the defence case the day before. On 13 July Courtenay Griffiths had made what the defence believed was the undercurrent of the “lofty” prosecution of Taylor, by quoting his fellow countryman Bob Marley: “ ‘working iniquity to achieve vanity’.” He was referring, most notably, to the large involvement of the US government “to publicly strip in front of the world this war lord of his power” through the financing and staffing the court. Alluding to the sentiments of history, the defence uttered that Taylor’s case was political, perhaps even racist: “he [Taylor] was taken in chains from the shores of Africa and taken to Holland, thousands of miles away. The country of one of the colonisers of the black race for centuries. A historically familiar journey for some. So that was the challenge we faced as his Defence.” As the tone of the defence case was set, Taylor’s testimony meandered through
key themes, in a tabulated chronology and in response to every count of the indictment and allegations made by prosecution witnesses against him.

It started with his personality: who is Charles Taylor? From the public impression of Taylor as a ‘lord of war’ and the prosecution’s depiction of him as a terrorist and demon, the defence sought to repaint the picture of a man who made it from rags to riches. Going through his personal and family history by asking him about his social, economic and cultural background, Taylor’s team sought to humanise the former Liberian President. He came from a modest background, growing up in a mud house, without running water. Up to his eighth or ninth year, he walked to kindergarten school bare feet. “No, no, I came up in some very, very, very, very humble circumstances”, he reiterated. Stemming from a mixed Americo-indigenous background and being a self-proclaimed Pan-Africanist, Taylor had shown himself to be self-made man. He highlighted his ambitions as he took the court through his personal history, interwove with the political history of Liberia and West-Africa. Aiming to present Taylor as an ambitious and educated person who struggled to fight for what was best for his country, the defence sought to portray him as an African statesman who eventually became a scapegoat for the international community. Branding himself a peacemaker in the region, he distanced himself from the RUF, shifted the blame to the international community (particularly the USA and UK), highlighted the myriad of regional and international players involved in the Sierra Leone conflict, showed he had good relations with the Sierra Leonean government and was working on his own country’s self-defence against rebels and insurgents: “How could I have been micromanaging a conflict in neighbouring Sierra Leone as alleged when I, as newly elected President of the Republic of Liberia, had so much on my plate to deal with?”

Since its inception in January 2008, the prosecution had used its witness testimony to show that Taylor and RUF leader Foday Sankoh established a relationship in Libya in the late 1980s, and designed a ‘common plan’ to support each other’s efforts to capture political power in their home countries. This bond lasted throughout the 1990s they allege, and when Taylor became president in 1997, he continued to provide support for the RUF and AFRC military junta - even as these groups were committing atrocities in Sierra Leone. Taylor admits to working with the RUF in the early 1990s but says it was to fight rival Liberian rebels operating on the border of Sierra Leone. “My relationship with Sankoh was a pure and simple security relationship to protect my border, that we would fight ULIMO [United Liberation Movement of Liberia for Democracy] in Sierra Leone without having to fight them in Liberia.” But, he insists: “I say it to these judges: I, Charles Ghankay Taylor never talked to Sankoh after May of 1992 until I saw Sankoh in 1999 July in Lomé. I did not.” In order to substantiate the claim Taylor never set foot in Sierra Leone, Griffiths submitted photographs of Taylor travelling abroad in an effort to show that he could not have been in Sierra Leone at the times alleged,

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2389 SCSL, Taylor Transcript (14 July 2010), p. 24362.
2390 SCSL, Taylor Transcript (13 July 2010), p. 24307.
in rebuttal of prosecution witness evidence to regular communications taking place between Taylor and other RUF commanders Sam Bockarie and Issa Sesay. Vital to Taylor’s defence is the claim that he was acting at the behest of both the Economic Community of West African States (ECOWAS) and the United Nations to broker peace between the warring factions in Sierra Leone and negotiate with rebels to release abducted UN peacekeepers. Taylor took on his peacekeeping role, he claims, as the head of the Committee of Five - a group set up by ECOWAS designed to bring calm to Sierra Leone. He says he was actively involved in efforts to get former President of Sierra Leone, Tejan Kabbah, and the RUF leadership to the negotiating table, eventually leading to the signing of the Lomé peace agreement. “I spoke to the RUF many times by inviting the leadership to Liberia, by hosting them, everything with the knowledge and consent of the committee and ECOWAS. […] Of course the United Nations knew because most of my discussions in Sierra Leone I either spoke to Kofi Annan directly or through his special representative in Liberia, where I insisted on making sure that we had notice of communications. All of those are available to present to this Court,” Taylor said. Unlike the prosecution, Taylor’s defence heavily relied on documentary evidence, many coming from Taylor’s personal Presidential archives. In trying to show that Taylor always acted transparently in his dealings with the RUF, Griffiths has been taking the court through scores of cables and memoranda between Taylor, the UN and ECOWAS. Meanwhile, he held that he was a victim of preconceptions. “They had made up their minds, it really did not matter whatever I did,” Taylor told the judges when responding to a 2000 UN Expert Panel Report which forms the core of the prosecution case.

Courtenay Griffiths’ examination in chief came to a final on 10 November 2009. In his ever-eloquent, intelligent and penetrating style, just the day before the British-Jamaican Queen’s Counsel ended by soliciting Taylor reaction to a statement former SCSL prosecutor David Crane presented months before Taylor was surrendered by Obasanjo – saying “the getting a West African’s leader’s attention is cash, plain and simple” – at an official meeting talking about the Taylor case.2391 “One word: Racist”, replied Taylor.2392 The next day, after going through events leading up to his transfer to the court, it was the prosecution’s turn to cross-examine Taylor, the man they had indicted six years before. Having sought to portray himself a decent, informed and forthcoming statesman in the first 13 weeks of his testimony, Taylor’s attitude changed when examined by American trial attorney, Brenda Hollis, who later succeeded Stephen Rapp as Chief Prosecutor. Often argumentative, angry and defiant, his demeanour was challenging and confrontational. His response to the prosecution’s strategy to impeach his prior testimony was at time virtually aggressive, contrary to the image his defence had intended to imprint on the judges. Taylor was full of deceit, as the argument progressed by the prosecution: “Charles Taylor proved himself to be intelligent, charismatic, and quick-thinking. He displayed a wide knowledge of international, regional and Liberian national history and his

2392 SCSL, Taylor Transcript (9 November 2009), pp. 31481-31482.
testimony was well-organized. Honesty, however, was notably absent from Taylor's testimony. On numerous occasions, on matters ranging from details to matters central to the charges, Taylor intentionally lied under oath. His testimony was incredible: much of what he said was contradicted by his own evidence, prosecution witnesses, and even his own defence witnesses and documentary evidence.\textsuperscript{2393} Throughout the cross-examination, the prosecution sought to highlight their assertion that Taylor perjured himself, “repeatedly attempting to conceal his central role in the creation and crimes of the RUF and AFRC/RUF.”\textsuperscript{2394}

When Taylor was finished with his testimony, the defence called another 20 witnesses on his behalf. The list included many Taylor’s former close associates. Yanks Smythe, the second to testify, had served as Taylor’s bodyguard, became the Assistant Director of Operations of the Special Security Services (SSS) and later became Liberia’s ambassador to Libya. Others had been former Liberian RUF or NPFL members, the military, a businesswoman, the widow of Taylor’s former Vice President Enoch Dogolea and SCSL convict Issa Hassan Sesay. In chronology, the witnesses denied Taylor had formed a criminal plan in Libya, that RUF rebels were trained in Liberia and they never heard about RUF rebels giving Taylor diamonds or had joined the RUF voluntarily. A close associate to Foday Sankoh and well respected RUF member, Isatu Kallon, claimed responsibility for the purchase of arms and ammunition, food, and fuel for the RUF from ECOMOG and Guinean soldiers, denying that they came from Taylor in return for diamonds.\textsuperscript{2395} One of the last witnesses, Sesay, who by then was already serving a 52-year sentence, dismissed prosecutors’ claims that he took orders from Taylor and bringing him diamonds: “Has Charles Taylor ever been in charge of the RUF?” asked Taylor’s lawyer Courtenay Griffiths. “As far as I know, no,” Sesay replied. "Have you ever given diamonds to Charles Taylor?" Griffiths continued. "No, I do not remember having given diamonds to Mr. Charles Taylor," the 40-year-old former rebel replied.\textsuperscript{2396}

\textit{The model and the warlord}

Diamonds – which were alleged to be the driving motive behind Taylor’s involvement in Sierra Leone and the cause of the violence – became a hotly contested issue again at the end of the trial. While Sesay was in the midst of giving his testimony, the prosecution sought to enter new evidence – this time through the testimony of three new witnesses. Never had so many court personnel assembled in the courtroom in the trial as on 5 August 2010: all the seats were taken for the first time in the court’s history. The reason was simple: in the dock was supermodel Naomi Campbell. The prosecution had summoned her to relate on events in 1997 at a dinner party in South Africa, hosted by Nelson Mandela. Campbell was there among the VIP guests, alongside actress Mia Farrow, singer Quincy Jones but also the freshly elected President of Liberia, Charles Taylor. After the dinner, Campbell had

\textsuperscript{2393} SCCL, Taylor: Prosecution Final Brief, §497.
\textsuperscript{2394} Ibidem, §497.
\textsuperscript{2395} Open Society Justice Initiative (OSJI), \textit{The Trial of Charles Taylor by the Special Court for Sierra Leone: The Judgment} (April 2012), pp. 8-9.
received diamonds from unidentified men. Gossip through Campbell’s former agent Carole White and Ms. Farrow, the next day during breakfast, suggested that the stones must have come from Taylor. SCSL prosecutors, in search of connecting Taylor to the possession of ‘blood diamonds’, followed up on the story and called the three ladies, Campbell, Farrow and White, to give their versions of the events to corroborate their narrative that Taylor was dealing in illegal diamonds. But in court, the story backfired. Campbell, who was subpoenaed to The Hague since she did not want anything to do with the case against Taylor whom she had looked up “on the internet,” had a different story. She claimed in her short testimony that she had indeed received “dirty pebbles” and had given them to a representative of Mandela’s charity fund for children. But she had no idea who they came from, not even caring about it because she was used to receiving presents all the time and at the strangest hours. Vagueness thus prevailed and court attendance was again at a record low in the afternoon for Sesay’s continued testimony. After the weekend, Taylor’s defence successfully managed to question the credibility of Farrow, portraying her as an activist fighting to get African dictators behind bars, and particularly Carole White. In a dramatic cross-examination, Griffiths highlighted that White had ulterior motives to connect Campbell to Taylor as she was suing her in a separate court case in New York over a million dollars’ business feud. Despite unprecedented media attention for the Hollywood witnesses, the testimony was useless, even up to a point where even Brenda Hollis sought to argue that Campbell was not even a prosecution witness, but a “court witness.” Hoping to present some ‘smoking guns’ at the end of trial, the diamond saga ended with a fizzle for the prosecution.

Judgement

Although attracting the world’s attention once more to the carnage in Sierra Leone and the realm of international justice, the prosecution’s last bid to directly tie Taylor to blood diamonds and prove their key argument that Taylor’s motive was greed did not hold up. But it did not change the course of events. Two years later, Taylor was sentenced to 50 years imprisonment. After 420 trial days, in which Taylor gave testimony for seven months, the Chamber delivered its judgement on 26 April 2012. It shattered the Prosecution’s grand narrative because it found that Taylor’s alleged superior responsibility over the rebels, his participation in a joint criminal enterprise and his orders to the RUF to commit crimes were not proven beyond any reasonable doubt. Instead, the Irish, Samoan and Ugandan judges unanimously found that Taylor aided and abetted a long list of crimes committed by merciless rebels - including acts of terrorism, murder, rape and sexual slavery, enslavement,
pillage, and the conscription and enlistment of child soldiers. In their verdict numbering almost 2500 pages - the three judges also detailed how Taylor took part in planning attacks on Kono, Makeni and Freetown between December 1998 and February 1999 and instructed rebels of the Revolutionary United Front (RUF) and Armed Forces Revolutionary Council (AFRC) to ‘make the operation [s] fearful.’ They further outlined how Taylor had aided and abetted the rebels in committing atrocities by providing arms and ammunition, military personnel, operational support and moral support. For those crimes, Taylor was sentenced to a term of 50 years imprisonment, a term that was upheld – next to almost all convictions – on appeal on 26 September 2013.

Unlike all other SCSL convicts, who are imprisoned in Mpanga prison in Rwanda, Taylor serves his sentence in the HM Prison Frankland, a ‘category A’ men’s prison in Brasside, England. For the SCSL it was a victory. It was the first modern international tribunal that had investigated, prosecuted, judged, convicted and sentenced a former head of state. Only Karl Dönitz had preceded Charles Taylor at the IMT. Taylor furthermore outlived Milošević at the UNICTY and went before Gbagbo and Kenyatta at the ICC. Although popularly celebrated as a shining example of the long arm of international criminal justice, his criminal case was not crystal clear. Joining Bagosora at the UNICTR, his case is emblematic of an erratic balance between history and the law in international trials. Ultimately, his verdict left a legacy of bloodshed unaddressed as most of Taylor’s alleged crimes – particularly in Liberia. This historical episode fell outside the straitjacket of his prosecution. Although the victim testimony on how RUF rebels sowed death and destruction, hacking off limbs, raping women and pillaging diamond mines presented a gruesome picture of what had happened in Sierra Leone and Liberia, tangible evidence that Taylor was directly involved hardly transpired. Moreover, if it was up to one the judges, Taylor should have not been convicted at all, as he alleged that his colleagues had not even deliberated on the evidence, which according to him left too many doubts.

Sitting in the Antonio Cassese courtroom rented from the Special Tribunal for Lebanon (STL) on 26 April 2012, Judge Richard Lussick told Taylor that “the Trial Chamber unanimously finds you guilty of aiding and abetting the commission of the following crimes pursuant to Article 6(1) of the Statute during the indictment period, and planning the commission of the following crimes in the attacks on Kono and Makeni in December 1998, and in the invasion of and retreat from Freetown between December 1998 and February 1999: […]” On the public gallery overlooking the

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2401 In particular by providing assistance in the following ways (while and among others): (i) By providing arms and ammunition, either directly or through intermediaries; (ii) By providing military personnel, including the Scorpion Unit, who helped commit crimes in various operations; (iii) By providing communications sup- port, logistical support, financial support and other operational support (e.g. an RUF guesthouse in Monrovia, safe haven for RUF fighters in Liberia, medical support, food, clothes, cigarettes and alcohol for the RUF); and (iv) By providing moral support through on-going advice and encouragement to senior members of the RUF on tactics.

2402 SCSL, Taylor Judgement.

2403 SCSL, Taylor Sentencing Judgement.

2404 The Appeals Chamber unanimously allowed Charles Taylor’s Ground 11 in part, and revised the Trial Chamber’s Disposition for planning liability under Article 6(1) of the Statute to exclude Kono District under Counts 1-8 and 11; dismissed Taylor’s remaining grounds of appeal and affirmed his convictions and his sentence of 50 years’ imprisonment. SCSL, Appeals Chamber, Prosecutor Against Charles Ghankay Taylor: Judgment (SCSL-03-01-A; 26 September 2013).

2405 SCSL, Taylor Transcript (26 April 2012), pp. 49676-49677.
courtroom, a joyful rendezvous of old friends took place. Former prosecutors David Crane and Stephen Rapp, court staff, diplomats, NGO staffers and a handful of victims, who were invited by the OTP, shook hand and congratulated each other in this “historic verdict.”

In a corner sat Taylor’s family, observing the mini summit of the international justice inner circle. But then a somewhat surrealistic drama evolved in the courtroom. As Lussick and his two colleagues walked out of the courtroom, the alternate judge, El Hadji Malik Sow from Senegal took the floor and stuttered:

The only moment where a Judge can express his opinion is during the deliberations or in the courtroom, and pursuant to the rules, the only place for me in the courtroom. I won’t get – because I think we have been sitting for too long but for me I have my dissenting opinion and I disagree with the findings and conclusions of the other Judges, standard of proof the guilt of the accused from the evidence provided in this trial is not proved beyond reasonable doubt by the Prosecution. And my only worry is that the whole system is not consistent with all the principles we know and love, and the system is not consistent with the values of international criminal justice, and I’m afraid the whole system is under grave danger of just losing all credibility, and I’m afraid this whole thing is heading for failure.”

His words came as a shocking surprise to all; to the lawyers and clerks still in the courtroom and those in the public gallery. But after about a minute, the microphones were cut off and a metal grate was lowered over the glass that separates the courtroom from the public gallery. He could not finish and a few days later, the plenary of judges met and recommended his suspension.

Legal commentators and international justice professionals lamented Sow’s alleged improper behaviour and have argued that because he was an alternate judge, his opinion was not of any significance. Yet, the four-year trial thus ended with a dramatic twist: a judge who had attended all hearings and deliberations for five years publicly posing questions to whether to facts had actually been proved. “Charles Taylor should have walked free,” he said in an interview, months after he censored by his colleagues and his name deleted from the judgement’s cover sheet.

I’m a professional judge,” he continued, “and I’m bound by the evidence. I have serious doubts about the evidence. The prosecution case is altogether very unsatisfactory, inherently disharmonious, and filled with too many confusions and inaccuracies; and this, to my opinion, is fatal to the prosecution’s case. If you don’t see the truth, at least you must see the lies. I have seen too many lies, too many deceptions, and I haven’t seen any proof of guilt of this accused: […] you cannot have such a trial and base your decision on the questionable evidence that we have received in this trial.

Having observed the entire trial as the stand-in judge, Sow’s reasonable doubts speak volumes about the quality of the trial, the evidence and the political nature of the international criminal justice

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2406 Author’s personal observations, 26 April 2012.
2408 SCSL, Taylor Transcript (16 May 2012), pp. 49681 - 49683.
2410 ‘Justice Sow: Charles Taylor should have walked free’, pp. 46-53.
2411 Ibidem, p. 53.
enterprise. His voice has been censored from the trial record, his professional opinion sanctioned and the contents of his message shoved under the carpet as a footnote in the literature. As such, his reasonable doubt, which by his peers was deemed unreasonable – even contemptuous – was not taken into account in the final narrative progressed by the Special Court for Sierra Leone.

Thus, omitting Judge Sow’s name from the judgement, a certain historical narrative about the events in Liberia and Sierra Leone unfolds. In a section of 27 pages (out of 2539 pages), entitled ‘context’, the trial judges set out to provide “an introduction to the politics, personalities and events necessary to understand the allegations against the Accused.” Further, they write “as the Accused is alleged to have participated in the civil war without being physically present on the territory of Sierra Leone, it is necessary to provide a brief outline of the broader geopolitical context in which the civil war took place.” In a cursory and factual tone, they go through the start of the war on 23 March 1991 “when armed fighters known as the Revolutionary United Front (“RUF”) launched an insurgency from Liberia’s Lofa County into Sierra Leone’s Kailahun District” up until the end when “President Ahmad Tejan Kabbah of Sierra Leone announced the cessation of hostilities on 18 January 2002.” Yet, before discussing the war, the judgement highlights key events since Sierra Leone’s independence in 1961, including several coups, the rise of Siaka Stevens, the established a one-party state, economic decline in the 1980s and the rise of Pan-Africanism. Then it outlines the ‘origins’ of the war: “Disenchanted by the political and economic decadence, a dissident group known as the RUF was formed in the late 1980s/early 1990s with the aim of forcibly removing the APC Government and restoring democracy and good governance to Sierra Leone.” From there on, it runs through events during the war, in a monotonous style, bluntly describing undisputed facts during four time frames: “Civil war in Sierra Leone (1991-1996)”; “AFRC/RUF Junta Period (1997-1998)”; “Civil war in Sierra Leone (1998-1999)”; and “Civil war in Sierra Leone (1999-2002).” The most substantial part of the judgement, however, is the discussion on the factual findings concerning

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2412 SCSL, Taylor Judgement, §18-70.
2413 Citing from the testimonies of Stephen Ellis, Charles Taylor and a score of documents from the RUF and Africa Confidential.
2414 In every section, the trial chamber also highlights major areas of dispute between the prosecution and the defence, briefly summarising them.
Taylor, in relation to the specific charges pressed against him. 2415 In doing so, and stretching way beyond the temporal jurisdiction of the court, they observe that they have “considered evidence prior to the Indictment period only for the purposes of clarifying the context, or establishing by inference the elements of criminal conduct.” 2416 On a crucial matter, touching the foundational part of the prosecution narrative, they found that, based on the evidence, 2417 although the exact circumstances of their meeting are not specified, the Trial Chamber is convinced that the Accused met Sankoh while they were both in Libya. However, there is no evidence that Sankoh, the Accused and Dr Manneh all met together in Libya. More significantly, the Trial Chamber notes that no evidence was adduced regarding the content of any alleged meeting if such meetings did take place. Nothing in the Prosecution’s evidence establishes that the Accused, Sankoh and Dr Manneh agreed in Libya on a common plan to terrorize the civilian population to gain control of Liberia and Sierra-Leone. 2418 The pre-indictment period narrative is straightforward:

At the end of the 1980s, a number of West African revolutionaries were trained in Libya, including the Accused, Ali Kabbah and Foday Sankoh from Sierra Leone and Kukoi Samba Sanyang (a.k.a. “Dr Manneh”) from the Gambia. The Accused met Sankoh in Libya, although the exact circumstances of their meeting are not known. Contrary to the Prosecution’s submissions, the evidence did not establish that prior to 1996, the Accused, Sankoh and Dr Manneh participated in any common plan, nor that the three men even met together. After the invasion of Sierra Leone in 1991, the findings of the Trial Chamber relate only to the relationship between Sankoh and the Accused. The Trial Chamber finds that the Prosecution has failed to prove that Sankoh and the Accused established a common plan. The evidence rather shows that the Accused’s NPFL and Sankoh’s RUF had parallel goals and aspirations. During the pre-Indictment period, the Accused provided the RUF with a training camp, instructors, recruits and material support, including food and other supplies. However, again contrary to the Prosecution’s submissions, the evidence did not establish that the RUF was under the superior authority of the Accused or the NPFL chain of command, or that they were instructed in NPFL terror tactics. The Accused supported the invasion of Sierra Leone in March 1991 and NPFL troops actively participated in it. However, the Prosecution failed to prove that the Accused participated in the planning of the invasion. The Prosecution also failed to prove that the support of the Accused for the invasion of Sierra Leone was

2415 The trial chamber, in sum, found that - (i) Between 1986 and 1989, revolutionary movements and their leaders received training in Libya and that at some point, between 1986 and 1989, Taylor, Foday Sankoh and Dr Manneh were in Libya, and that the Accused met Sankoh in Libya during this time; (ii) The prosecution failed to prove that between 1986 and 1989, Taylor, Sankoh and Dr Manneh met together and established a common plan to terrorize the Sierra Leonean population and to forcibly control the population and territory of Sierra Leone; (iii) In 1989, after their training in Libya, Taylor and his Libyan revolutionary group and Dr Manneh and his Gambian revolutionary group went to Burkina Faso; (iv) The prosecution failed to prove that in 1989, Foday Sankoh was also in Burkina Faso and that Taylor, Sankoh and Dr Manneh met and agreed to support each other in their respective wars; (v) From August 1990 until March 1991, Taylor provided the RUF with the training camp of Crab Hole, instructors, recruits and material support, including food and other supplies; (vi) The prosecution failed to prove that from August 1990 until March 1991, as a matter of policy, NPFL instructors in Crab Hole taught terror methods to RUF recruits; (vii) The prosecution failed to prove that Liberian and Sierra Leonean trainees at Camp Naama had no separate chain of command and were treated as one body under the command of Taylor; (viii) The prosecution failed to prove that in Voinjama in March 1991, Taylor, Foday Sankoh and Dr Manneh together with NPFL and RUF commanders held a meeting during which they planned and organised the invasion of Sierra Leone in accordance with the strategy hatched in Libya and Burkina Faso; (ix) Taylor supported the invasion of Sierra Leone; (x) After the invasion, NPFL troops committed crimes against Sierra Leonean civilians; (xi) The prosecution failed to prove that the support of Taylor for the invasion of Sierra Leone was undertaken pursuant to a common purpose to terrorize the civilian population of Sierra Leone; (xii) Around November 1992, Taylor provided Sankoh with arms and ammunition for an attack on Kono; (xiii) During this time Taylor received diamonds from Sankoh; (xiv) The prosecution failed to prove that in 1992 Taylor and Sankoh formed a common plan to capture Kono, or that Taylor directed Sankoh to capture Kono, because it was a diamondiferous area; (xv) In 1993, following a request from Taylor, Sankoh sent RUF personnel under the command of Morris Kallon to Liberia to fight with the NPFL against ULIMO; (xvi) The prosecution failed to prove that Taylor instructed Joseph (a.k.a. Zigzag) Marzah to establish a relationship with persons in Guinea in order to take material into Guinea for the RUF; (xvii) In 1994, Taylor advised Sankoh to attack a major place in Sierra Leone, and pursuant to this advice Sankoh ordered the RUF to attack Sierra Rutile. Following the attack, Taylor gave Sankoh further advice with regard to the use of the money looted and the hostages abducted during the course of the attack on Sierra Rutile; (xviii) In early 1996 before the elections, Foday Sankoh ordered the RUF to attack and burn polling stations in all major towns including Kambia, Bo and Magburaka and to shoot and kill or to amputate the hands or fingers of any civilian believed to participate in the elections, an attack dubbed “Operation Stop Election”; (xix) The Prosecution failed to prove that before ordering Operation Stop Election, Sankoh sought the approval and guidance of Taylor. See SCSL, Taylor Judgement, §2193.

2416 Ibidem, §2195-2227.

2417 SCSL, Taylor Judgement, §2228-2232.
undertaken pursuant to a common purpose to terrorize the civilian population. Rather, the evidence shows that the Accused and Sankoh had a common interest in fighting a common enemy, ULIMO, a Liberian insurgency group in Sierra Leone, and the Sierra Leonean Government forces which was supporting ULIMO. The Accused withdrew his NPFL troops from Sierra Leone after the fallout between the NPFL and RUF troops in 1992, culminating in Operations Top 20, Top 40, and Top Final. While the Defence maintains that the Accused had no further contact or cooperation with Sankoh after 1992 following Top Final, the Trial Chamber has found otherwise. Although the Liberia-Sierra Leone border was closed by ULIMO and the Sierra Leone Government forces, it remained porous, enabling the flow of arms, ammunition and other supplies from Liberia during the remainder of the pre-Indictment period. The Trial Chamber has found that the Accused provided arms and ammunition to Sankoh for an attack on Kono in November 1992, and that he advised Sankoh prior to and following the attack on Sierra Rutile. The Accused also asked Sankoh to send troops in 1993 to help him fight ULIMO. Having failed to prove the existence of a common plan formulated in Libya and Burkina Faso, the evidence relied on by the Prosecution indicates that during this pre-Indictment period Sankoh operated independently of the Accused, and while relying at times on his guidance and support, did not take orders from the Accused.”

Thus, the undercurrent of the prosecution’s case was not proved beyond any reasonable doubt. However, the findings on Taylor’s role during the indictment period do connect Taylor with crimes committed in Sierra Leone. That narrative is much more detailed in fact and it goes way beyond the scope of this research to reproduce it. In sum, however, it still remains a complex story. Crucial findings, which led to convictions, included some key events, particularly between mid-1998 and beginning of 1999. In the lead up to the Freetown invasion in January 1999, Taylor and his subordinates maintained communications with the AFRC/RUF forces, mainly to maintain control over the diamond-rich Kono area, where he instructed attacks and supplied arms and ammunition for the operations. In November/December 1998, Taylor planned a two-pronged attack on Kono, Kenema and Freetown and told Bockarie to make the operation “fearful” in order to pressure the Government of Sierra Leone into negotiations on the release of Foday Sankoh from prison, as well as to use “all means” to get to Freetown. Subsequently, Bockarie named the operation “Operation No Living Thing,” implying that anything that stood in their way should be eliminated. However, it is not clear that Taylor had any level of control over the conduct of these operations. In addition to planning and advising on the Kono-Freetown operation, Taylor provided military and other support, including arms and ammunition, which was used in the attacks on Kono and Kenema in December 1998. Taylor also sent personnel in the form of at least four former Sierra Leone Army (SLA) fighters, who participated in the attack on Kono, as well as 20 former NPFL fighters and a group of 150 fighters from the Scorpion Unit. Next to support for specific military operations, Taylor provided to the RUF, and the RUF/AFRC alliance, sustained and significant communications support, financial support, military training, technical support and other operational support. In Monrovia between 1998 and 2001, Taylor provided the RUF with a guesthouse, equipped with a long-range radio and telephone, RUF radio

2419 Ibidem, §2564-2569.
2420 SCSL, TCII, Prosecutor v. Charles Ghankay Taylor: Judgement Summary (SCSL-03-1-T; 26 April 2011)

318
operators, SSS security, cooks and a caretaker. Although the guesthouse was used by RUF members partly for matters relevant to the peace process or for diplomatic purposes, it was also used to facilitate the transfer of arms, ammunition and funds directly from the Accused to the RUF, and the delivery of diamonds from the RUF directly to Taylor. As to the role of his alibi as a peace maker, the judges found that while Taylor publicly played a substantial role in the Sierra Leone peace process, including as a member of the ECOWAS Committee of Five (later Committee of Six), secretly he was fuelling hostilities between the AFRC/RUF and the democratically elected authorities in Sierra Leone, by urging the former not to disarm and actively providing them with arms and ammunition, acting, as the Prosecution described, as “a two-headed Janus”. 2421

Based on these facts, in its Judgement the trial chamber found that at all times relevant to the Indictment, there was an armed conflict in Sierra Leone involving, among others, members of the RUF, AFRC and CDF, and that the RUF/AFRC directed a widespread and systematic attack against the Sierra Leonean civilian population. Subsequently, Taylor was convicted on all eleven counts of the indictment and found him individually criminally liable for “aiding and abetting” the commission of crimes between 30 November 1996 and 18 January 2002 in the Districts of Bombali, Kailahun, Kenema, Kono, Port Loko and Freetown and the Western Area. 2422 It further found Taylor individually criminally liable for “planning” the commission of crimes, charged in all eleven counts, between December 1998 and February 1999 in the Districts of Bombali, Kailahun, Kono, Port Loko and Freetown and the Western Area and that were committed in the attacks on Kono and Makeni in December 1998, and in the invasion of and retreat from Freetown, between December 1998 and

2421 SCSL, Taylor Judgement Summary, §119.
2422 Count 1: Acts of terrorism, a violation of Article 3 common to the Geneva Conventions and of Additional Protocol II pursuant to Article 3(d) of the Statute in Kenema, Kono, and Kailahun Districts and in Freetown and the Western Area; Count 2: Murder, a crime against humanity pursuant to Article 2(a) of the Statute in Kenema, Kono and Kailahun Districts, and in Freetown and the Western Area; Count 3: Violence to life, health and physical or mental well-being of persons, in particular murder, a violation of Article 3 common to the Geneva Conventions and of Additional Protocol II pursuant to Article 3(a) of the Statute in Kenema, Kono and Kailahun Districts, and in Freetown and the Western Area; Count 4: Rape, a crime against humanity, punishable under Article 2(g) of the Statute in Kono District and in Freetown and the Western Area; Count 5: Sexual slavery, a crime against humanity, punishable under Article 2(g) of the Statute in Kono and Kailahun Districts, and in Freetown and the Western Area; Count 6: Outrages upon personal dignity, a violation of Article 3 common to the Geneva Conventions and of Additional Protocol II pursuant to Article 3(c) of the Statute in Kono District and in Freetown and the Western Area; Count 7: Violence to life, health and physical or mental well-being of persons, in particular cruel treatment, a violation of Article 3 common to the Geneva Conventions and of Additional Protocol II pursuant to Article 3(b) of the Statute in Kono District and in Freetown and the Western Area; Count 8: Enslavement, a crime against humanity pursuant to Article 2(e) of the Statute in Kono and Kailahun Districts, and in Freetown and the Western Area; Count 9: Conscripting or enlisting children under the age of 15 years into armed forces or groups, or using them to participate actively in hostilities, another serious violation of international humanitarian law pursuant to Article 4(c) of the Statute in Tonkolili, Kailahun, Kono, Bombali, and Port Loko Districts and in Freetown and the Western Area; Count 10: Enslavement, a crime against humanity pursuant to Article 2(e) of the Statute in Kenema, Kono and Kailahun Districts, and in Freetown and the Western Area; Count 11: Pillage, a violation of Article 3 common to the Geneva Conventions and of Additional Protocol II pursuant to Article 3(f) of the Statute in Kono, Bombali, and Port Loko Districts and in Freetown and the Western Area. SCSL, Taylor Judgement, §6994 (a).
February 1999. The Trial Chamber found that the Prosecution failed to prove beyond a reasonable doubt that Taylor was criminally liable under Article 6(3) of the Statute.2423

Both parties appealed the judgement. On the prosecution side, four grounds of appeal were filed,2424 while the defence raised 45 grounds on which they say the trial chamber “erred” in fact and in law as they convicted and sentenced Taylor in 2012.2425 In general terms, Taylor’s team argued that the “colossal judgement […] is plagued throughout by internal inconsistencies, misstatements of evidence and conflicting findings, […] errors which reflect the weakness of the case against Mr. Taylor, at whose feet the Chamber has laid responsibility for crimes committed by foreign forces over whom he had no effective control, did not command or instigate, with manifest disregard to his physical and legal remoteness from the events in question.”2426 After more than a year of deliberations however, the five appeals judges did not revise their colleagues’ findings, other than partly allowing one ground of appeal of the prosecution as well as one ground of the defence. As a result, the sole alteration in the original judgement is that Kono District was deleted – under counts 1-8 and 11 – when it came to Taylor’s planning of crimes.2427 Perhaps, the most surprising element in the appeals judgement is ‘Annex D’, a detailed list of “persons,” including RUF/AFRC members and “associates or subordinates of Charles Taylor.”2428 Without any explanation elsewhere in the findings, the appeals judges list the names, alongside their “role in the conflict”, of 41 people. Including all eight other SCSL convicts, the deceased indictees and the remaining fugitive Paul Koroma, the appeals chamber seems to implicitly connect 29 others to the crimes committed in Sierra Leone and even in Liberia. Some had testified about their violent role in the conflict, like Joseph Marzah, but others had not. In all, it appears that the judges, in their very last judgement, wanted to add an extra element to the historical record, but beyond their competence.

Irreversibly, the historical narrative that was foreseen to be established and written by the prosecuting agents of the SCSL did not hold up in court. Only a fraction of it was found to be proved, using the legal standards of proof. From a Godfather, who had prophesised that Sierra Leone would

2423 Count 1: Acts of terrorism, a violation of Article 3 common to the Geneva Conventions and of Additional Protocol II pursuant to Article 3(d) of the Statute in Kenema, Kono, and Kailahun Districts and in Freetown and the Western Area; Count 2: Murder, a crime against humanity pursuant to Article 2(a) of the Statute in Kenema, Kono, and Kailahun Districts, and in Freetown and the Western Area; Count 3: Violence to life, health and physical or mental well-being of persons, in particular murder, a violation of Article 3 common to the Geneva Conventions and of Additional Protocol II pursuant to Article 3(a) of the Statute in Kenema, Kono and Kailahun Districts, and in Freetown and the Western Area; Count 4: Rape, a crime against humanity, punishable under Article 2(g) of the Statute in Kono District and in Freetown and the Western Area; Count 5: Sexual slavery, a crime against humanity, punishable under Article 2(g) of the Statute in Kono and Kailahun Districts, in and Freetown and the Western Area; Count 6: Outrages upon personal dignity, a violation of Article 3 common to the Geneva Conventions and of Additional Protocol II pursuant to Article 3(e) of the Statute in Kono District and in Freetown and the Western Area; Count 7: Violence to life, health and physical or mental well-being of persons, in particular cruel treatment, a violation of Article 3 common to the Geneva Conventions and of Additional Protocol II pursuant to Article 3(a) of the Statute in Kono District and in Freetown and the Western Area; Count 8: Other inhumane acts, a crime against humanity pursuant to Article 2(i) of the Statute in Kono District and in Freetown and the Western Area; Count 9: Conscription or enlisting children under the age of 15 years into armed forces or groups, or using them to participate actively in hostilities, another serious violation of international humanitarian law pursuant to Article 4(c) of the Statute in Tonkolili, Kailahun, Kono, Bombali, Port Loko, Kenema and Koinadugu Districts and in Freetown and the Western Area; Count 10: Enslavement, a crime against humanity pursuant to Article 2 (c) of the Statute in Kenema, Kono and Kailahun Districts, and in Freetown and the Western Area; Count 11: Pillage, a violation of Article 3 common to the Geneva Conventions and of Additional Protocol II pursuant to Article 3(f) of the Statute in Kono, Bombali, and Port Loko Districts and in Freetown and the Western Area. SCSL, Taylor Judgment, §6994 (b).

2424 The OTP sought to find Taylor liable for (1) ordering and (2) instigating the commission of crimes, (3) find him liable for crimes committed in certain locations in five districts on the ground that they fell outside the scope of the indictment and (4) to raise the sentence to 80 years. SCSL, Appeals Chamber, The Prosecutor Against Charles Ghankay Taylor: Public Prosecution Appellant’s Submission (SCSL-03-01-A; 1 October 2012).


2426 SCSL, Taylor Judgment, p. 305.

taste the bitterness of war, his role was reduced to an 'aider and abetter' to crimes committed by a foreign rebel force over the period of four months. From the case, and particularly through Taylor’s own testimony, the narrative that prevails is that Charles "Dankpannah" Taylor, a self-made man, who made it from a mathematics teacher, via a rebel life to become President, had not shunned away from violence. In the end, his career ended in the dock in the Netherlands, far from his home in West Africa and he will spend the remainder of his 50 year prison sentence in a prison in the UK. It reads like a classic script on the rise and fall of a dictator.

Taylor goes into history as the first former African head of state to be judged, convicted and sentenced before an international criminal tribunal. A jewel in the crown of the SCSL, his criminal case was not crystal clear. It is rather characteristic of the tumbling balance between history and the law. In the end, the file left a legacy of bloodshed unaddressed as most of Taylor’s alleged crimes fell outside the straitjacket of his prosecution. Armed with a limited mandate – they could only prosecute crimes committed from November 1996 - prosecutors have had an exceptionally demanding job to criminally tie Taylor to the bloodshed. Consequently, the SCSL’s main shortcoming in this trial was that it could not deal with Taylor’s full role in West Africa’s atrocious history. Taylor’s crimes in Liberia have been well documented by historians and the truth and reconciliation commissions in Liberia and Sierra Leone. The reality is that they remained outside the reach of the SCSL and this has caused problems to their case because they had to establish Taylor’s alleged crimes in Sierra Leone, although it did not prevent prosecutors from delving into history. And the bench was compassionate in allowing evidence falling outside the scope of the indictment. But no ‘smoking guns’ were presented. Like at the UNICTR, the Court was confronted with a complex oral society and an absence of a clear paper trail or forensics. The tribunal therefore almost exclusively relied on testimonial evidence, echoing the forgotten cruelties of the Sierra Leonian civil war in the courtroom. The only direct evidence that connected a campaign of murder, mutilation and rape in Sierra Leone to Charles Taylor came from his own former aides and enemies. But the use of this insider witness testimony had to stand the test of credibility on the grounds of their ethnic/regional/national loyalties, or because of their own implication in crimes. Some of them had strong reasons to testify against their political rival. There is therefore a lack of precision and proof at the heart of the testimony heard in court. The relationship between Sankoh and Taylor in Libya – the very basis of criminal charges - still

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2430 In between he washed dishes and cleaned floors while studying accounting and economics, worked in Plastic factory and entered Diaspora politics in the USA. After spending time in the Liberian government in the early 1980s, returning back to the USA, being arrested on embezzlement charges and breaking out of a maximum security prison in Plymouth, he became a notorious rebel in Liberia, in the end toppling the government of Samuel Doe. See for a detailed study on Charles Taylor and his campaign towards becoming president of Liberia: Waugh, Charles Taylor and Liberia, pp. 228-240. Otherwise the trial transcripts in Taylor’s trial, altogether, provide the view from Taylor himself: SCSL, Taylor Transcript (15 July 2009), pp. 24517-24522; SCSL, Taylor Transcript (16 July 2009).
2431 RSCSL, Public Information, In the matter of Charles Ghankay Taylor: Decision on Charles Ghankay Taylor’s Motion for Termination of Enforcement of Sentence in the United Kingdom and for Transfer to Rwanda AND ON Defence Application for Leave to Appeal Decision on Motion for Termination of Enforcement of Sentence in the United Kingdom and for Transfer to Rwanda (RSCSL-03-01-ES; 21 May 2015).
2432 Thierry Cruvellier, From the Taylor Trial to a Lasting Legacy, p. 5.
2433 Agreement between the United Nations and the government of Sierra Leone on the establishment of a Special Court for Sierra Leone & Statute of the Special Court for Sierra Leone.
2434 See: TRCSL, Witness to Truth; TRCL, Consolidated Final Report.
remains shrouded in mist. No documentary evidence has shown that the two met each other between 1991 and 1999. Historian and expert witness Stephen Ellis could only account that the two met ‘sometime between 1987 and 1989,’ and the court could not make any finding of what had been discussed in the case they had met.

A court trying a former president cannot escape debating politics and history. And in the end, two diametrically opposed narratives about Taylor’s role in West Africa were put before the judges but also the general public. Producing almost 50 000 pages of transcript and over a thousand exhibits, the Taylor trial thus offers a unique tabulated roadmap through competing versions Liberian and Sierra Leonean history, through witness testimony. And so do the other three trials.

Bundled together, the entire SCSL trial record and the archives of the TRC comprise the fullest available collection of information on the Sierra Leonean war. It is no surprise that its sources, as well as its findings, have already made their way into the historiography of the conflict, to a very large degree. Although the conclusion may vary – due to methodological issues – the process of fact-finding has elucidated much detail, to an extent that historians – and most of those specialised in the region have contributed in some way - could have never uncovered in such a relative short time-span. Unprecedented in Sierra Leonean history, up to ten thousand people have provided testimony about their experiences during the war which are transcribed and archived, establishing a unique source of oral history that without the TRC and the SCSL would most likely never had been uncovered.

The SCSL Narrative

Prosecutors at the international criminal tribunals not only use discourses, references and appeals to history, to broach legitimacy to what they do, particularly during opening statements. Even more so, they use the legal arena as a stage to unveil their interpretation of historical events and present a particular narrative thereof. At the SCSL, it was first David Crane who outlined the story of Sierra Leone in general terms and later Stephen Rapp who developed it in a very particular direction in the Taylor case. In the first trial, during opening statements, the Prosecution even went further than outlining facts of the case and made a solemn promise to lay bare the truth about what happened in Sierra Leone. Only four months before the TRC report was publicized and without referencing the truth commission during his entire statement, the Sierra Leonean prosecution counsel Joseph Kamara, uttered in court that it was the SCSL's “obligation to all the people of Sierra Leone and humanity, to show why and how these abominable things happened.”

Moreover, he continued, “the savages of the war are still alive in the minds of the people. Humanity must not and will not allow these savageries to share the conscience of mankind. It is vitally important that the brutality and savagery of this war are exposed and chronicled so that we have an official record of the horrors that befell this

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nation.” However, the narrative progressed during the trials was an uncomplicated and stereotypical story of ‘Third-World ‘evil criminal savagery, spelled out by David Crane:

In the dark corners of the world lurks the future of armed conflict. […] The real threat to humanity on several levels is bred in the fields of lawlessness in the third world. Fertilized by greed and corruption, what grows out of these regions of the world are terror, war crimes, and crimes against humanity. Conflicts in these dark corners are evolving into uncivilized events. They appear to be less political and are more criminal in origin and scope. Combatants lost in this dismal swamp become mere pawns in a deadly joint criminal enterprise started by actors for their own personal criminal gain. […] The impunity by which these warlords move about a region unmolested, or with little accountability, breeds a lack of respect by the populace for the rule of law. The corruption so endemic in these societies fosters a healthy lack of respect for institutions of any kind, certainly a wary distrust.”

Informed on the one hand by the reports of journalists and human rights organisations that had framed the Sierra Leonean war as sheer anarchy and dread and post 9/11 discourse of terrorism, this narrative was progressed throughout the SCSL trials. In the RUF case, Crane said “this is a tale of horror, beyond the gothic into the realm of Dante’s inferno.” A year later, at the beginning of the AFRC trial, Crane talked about events, “unimaginable in their brutality, unspeakable beyond description.” According to him:

if you listen closely to their [witnesses] testimony, you can almost hear the screaming, the rattling of gun fire, the crying of infants being thrown in the fires. By the truth of the witnesses, the past will unfold before you. We must go back in time before Sierra Leone can move forward into the light of a brighter tomorrow.

He raised high expectations of what the court could achieve, but he totally went beyond the finding by the TRC, whose narrative was already much more complicated. Interestingly enough, despite the fact that two fact-finding entities were at play at the same in Sierra Leone, both seeking to unearth what had happened during Sierra Leone’s war, the Prosecution barely talked about the TRC report and subsequently the Special Court for Sierra Leone hardly referred to the TRC’s findings in its four judgements. It somehow was a historiographical surprise. An academic historian and jurist himself, William Schabas, who also happened to be one of the international truth commissioners, notes there were some initial suggestions that the TRC provide historical background to the prosecutions at the SCSL. It would have been an interesting feature of innovative transitional justice dualism, but the idea shipwrecked. At the TRC’s legal counterpart, exactly the reverse was contemplated. In a ruling

2437 Ibidem, pp. 15-16.
2438 Crane. ‘Dancing with the Devil’, p. 4.
2440 SCSL, Brima, Kamara & Kanu Transcript (7 March 2005), pp. 20-21.
2443 Schabas, Unimaginable Atrocities, p. 169.
dismissing the TRC’s request for SCSL’s defendants to give their testimony at the commission. Judge Robertson suggested the TRC issued a preliminary report “and then suspend its operations until the trial process has been completed, when it would reconvene to consider the trial evidence and prepare and publish a final report, incorporating the results of the trials. Consensus on complementarity was thus deadlocked and the two did not come to a common understanding of the history of the conflict. Constricted by its mandate in temporal scope and agency, the Court – in particular the OTP – tended to emphasise external causes, such as political manipulation by foreign political leaders – Gadaffi, Compaoré, and Taylor etcetera – and the international diamond trade. Through its much wider lens, the commission focused on internal factors, such as the despotic rule over several decades by a corrupt oligarchy, while also addressing foreign influences. Commissioner Schabas attributes the dichotomy to the assessments of the individuals – including him - who were involved and the scope of the evidentiary ingredients before each of the bodies. Perhaps such diversity is inevitable, he writes, when different researchers or organisations seek to understand historical truth: they do not always reach the same conclusions.

After over a decade of adjudicating acts of nine individuals during Sierra Leone’s war, the court crafted a sober, concise and regulated historical narrative. In its final report, the court thrifty summarises it back to less than 900 words. Extracted from the four substantive judgements rendered by six judges divided in two trial chambers, the court, recounts that:

Sierra Leone gained independence from Britain on 27 April 1961. In 1978, a one-party state (the All People’s Congress (“APC”)) under President Siaka Stevens was established. In the period that followed, Sierra Leone experienced general economic decline. This coincided with the creation of an armed opposition known as the Revolutionary United Front (RUF) in the late 1980s. Headed by a Sierra Leonean called Foday Sankoh, a former corporal in the Sierra Leone Army (“SLA”), the RUF was comprised of former students of middle class origin, alienated and impoverished youths, former members of the SLA and Liberian fighters from a rebel group led by Charles Taylor known as the National Patriotic Front of Liberia (“NPFL”). The aim of the RUF was to forcibly remove the APC Government and to restore democracy and good governance to Sierra Leone. On 23 March 1991, the RUF launched an invasion into eastern Sierra Leone. This commenced the conflict in Sierra Leone. […] The armed conflict in Sierra Leone spanned a period of eleven years from 1991 to 2002. During that period, Sierra Leone experienced atrocity crimes. These crimes included mass killings, widespread amputation of limbs and mutilation of civilians, sexual violence and the use of children in armed conflict. […] The three judgements rendered in Freetown – in the CDF, RUF and AFRC – leave little room for
historical exposition, let alone discussion on causes and motive of historical agents. In the case of the
civil defence forces, somewhat remarkably, there is hardly even a discussion on the bigger picture, or
context, of the precedents to or the unfolding of the war. It merely summarises key events during the
height of the conflict and the rise of the military junta, but it only does so in order to outline the rise of
civil defence initiatives, the role of ‘secret societies’ and the formal organisation of the CDF.2449 From
thereon, the judgement discusses the crimes committed and the individual roles of the three accused
(although deceased, Norman remains a central figure in the findings) in light of the law. In the AFRC
case, the judgement is only little more informative, dedicating 15 out of 631 pages to historical facts.
Contextualising the alleged crimes, the chamber sweepingly comments on a handful of events since
independence in 1961 before shortly describing crucial moments and events in the war and the
position of the AFRC.2450 Only in the RUF case, the Trial Chamber stepped outside the temporal
scope of the court’s jurisdiction, seeking an explanation for the rise of the RUF. In sum, it concludes
that the country since independence suffered several military coups, became a one-party State and
despite its rich natural resources experienced an economic decline throughout the 1980s and growing
corruption.

As a result of this flagrant corruption an armed opposition group, the Revolutionary United
Front (“RUF”), was formed in the late 1980s with the aim of overthrowing the one-party rule
of the All Peoples Congress (“APC”) Government. […] The leadership of the RUF accused
the APC of endemic corruption and oppression of the people of Sierra Leone. The RUF
professed that the use of arms was the only way to bring democracy to Sierra Leone and to
fight the injustice, nepotism and penury they claimed was prevailing. The RUF was originally
composed largely of former students of middle class origin; alienated and impoverished
youths; former members of the SLA; and Liberian fighters from the National Patriotic Front
of Liberia (“NPFL”).” 2451

Despite underlining internal resentment as the cause of the civil war, the judgement, as a matter of a
side event, mentions that the NPFL – which was a rebel group led by Charles Taylor that initiated and
fought in the Liberian civil war – “provided important military and logistical resources to the RUF
thereby creating an intimate link between the civil wars in Liberia and Sierra Leone.” 2452 A crucial
highlight in the judgement is when the chamber, counters the prosecution narrative that Taylor was
part of a Joint Criminal Enterprise with the RUF arguing that “prior to July 1997, Taylor’s National
Patriotic Front for Liberia (NPFL) was itself a rebel organisation and did not represent the Republic of
Liberia. Although evidence was adduced demonstrating long-standing links between Liberians
including Charles Taylor and the RUF, this evidence was neither sufficiently comprehensive nor
compelling for the Chamber to determine the precise nature and extent of the relationship after July
1997. In our opinion, the evidence does not establish beyond reasonable doubt that Taylor’s

2449 SCSL, CDF Judgement, §§50-86.
2450 SCSL, AFRC Judgement, §§155-209.
2451 Heavily citing HRW reports. SCSL, RUF Judgement, §§7-9.
2452 SCSL, RUF Judgement, §10.
interactions with the RUF leadership were such that he was in a position to exercise overall control over the RUF as an organisation.\footnote{2453} Still, the prosecution maintained this interconnectedness in its major case against Taylor, extending it also to the AFRC, while the Judgement in the latter only mentions Taylor once in an explanatory footnote.\footnote{2454}

**Reviewing the Special Court**

After the closure of the SCSL in 2013, comprehensive academic studies on its historical legacy, if any, have yet to transpire.\footnote{2455} So far, however, practitioners, legal scholars and NGOs have mainly appraised the court,\footnote{2456} while some criticism remains. Some of these criticisms may have tainted the historical record adjudicated. First, on the political level, there was the controversial and prime role played by the USA in the prosecutions against the background of their pre-war interferences in Liberia. Secondly, many possible “most responsible” players identified by the TRC\footnote{2457} including Presidents Gaddafi (Libya), Conté (Guinea), Compaoré (Burkina Faso)\footnote{2458} and Kabbah,\footnote{2459} were not prosecuted, while others deceased before trial or remained at large. Not only did it leave the court with mid-level convicts, it also never touched upon key players and contexts crucial to understand the conflict.\footnote{2460} Related is the fact that the SCSL has not investigated any international or national commercial companies who were involved in illegal diamond trade or gun-smuggling.\footnote{2461} Fourth, the court never fully engaged with the findings by the TRC\footnote{2462} Fifth, Sierra Leoneans felt that the court’s progress was too slow; creating a sensation of impunity, even up to a point leading to ethnic tensions.\footnote{2463} Sixth, some Sierra Leoneans felt they did not find truth at the court, citing the fact that witnesses were allegedly paid for testimony at the court while others argued that Sierra Leone was too
dependent on the West for sorting out its own problems.\textsuperscript{2464} Seventh, although the SCSL’s endeavours in outreach were praiseworthy,\textsuperscript{2465} popular support remained low and understanding thin.\textsuperscript{2466}

From early on, the court was not only concerned with its direct effects on the ground through outreach, but also in actively creating a legacy. In its own words, the court left jurisprudence, it has worked to strengthen the domestic justice system and various national institutions and it educated Sierra Leonean staff.\textsuperscript{2467} In a further self-assessment, surveyed through the NGO No Peace Without Justice (NPWJ) among 2,841 people in Sierra Leone and Liberia, “the overall feeling towards the SCSL and the work it has carried out over the past 10 years is very positive. It is safe to conclude that the SCSL has, on the whole, been successful in achieving what it set out to achieve, which – according to the majority of people in Sierra Leone and Liberia – is first and foremost to carry out prosecutions, with the next most common answers being to bring justice, bring peace and establish the rule of law.” It furthermore applauded the “high awareness of the SCSL, its purposes and work is evident in both countries, with more than 90% of overall respondents having heard of the SCSL, around 65% of people indicating they were interested in the Court’s work and nearly 50% having participated in outreach activities at some point over the 10 years of the Court’s existence, including listening to radio programs.”\textsuperscript{2468} Testing the waters of impact and legacy is a tricky slope, highly depending on momentum. NPWJ’s survey came at the height of the court’s work, during the final stages of its best-known case; the delivery of judgement in the Charles Taylor case. The outcomes of future surveys will ultimately differ. Perhaps it is too early indeed, as Jalloh writes, to appreciate the SCSL’s complete impact. As a lawyer he notes that at least “the SCSL made some useful contributions to the emerging system of international criminal justice”, though it is “not perfect.”\textsuperscript{2469} The primary legacy now, he rightfully continues, is “the trials, guilty verdicts, reasoned judgements, and factual findings bequeathed to the people of Sierra Leone.”\textsuperscript{2470} The secondary, which he does not define, may transpire from that trial record; that is the historical narrative.

5.8 Conclusions

This chapter that has shown that whereas in Rwanda hotly contested narratives about the genocide

\textsuperscript{2465} The Special Court’s Outreach and Public Affairs Section was the first to have a presence on the ground in a post-conflict country, the sub-region and beyond. From January 2003, the Outreach section undertook several activities to endorse understanding of the court by conducting training sessions, an extensive program of activities with schools and colleges nationwide, as well as conducting a series of Victims Commemoration Conferences at the regional and national level with civil society activists and other interested parties. Throughout most of 2005-2006 as the trials were coming to a close, the section focused on increasing public attendance of the trial proceedings by using town-hall meetings, radio programmes, publications, video screenings of trial proceedings, and seminars. It has also expanded its activities to Liberia because of the Charles Taylor trial. Staggs, Interim Report on the Special Court, 32-34; SCSL, Seventh Annual Report, p. 43; SCSL, Eleventh and Final Report, pp. 35-36.
\textsuperscript{2466} Regarding the understanding, perceived success and importance to peace Sawyer and Kelsall concluded that the Special Court still had broad public support but that the actual knowledge of the institution was rather thin – as was also the case regarding the TRC. Overall most people (91%) had knowledge of the court’s existence, but only a relatively small percentage of people (15%) had a good understanding - knowing that it was created to prosecute those most responsible - of the court. A larger 36% understood that the SCSL was to judge people but they would have little appreciation of its restricted mandate. Almost half of the Sierra Leonesans, by contrast, had a poor understanding of what the court is doing often mentioning that it was there to judge people, but not mention the war. Sawyer, ‘Truth vs. Justice?’, pp. 43-46; Stuart Ford, ‘How Special Is the Special Court’s Outreach Section?’ in: Charles Charnor Jalloh, ‘Conclusion’, in: Jalloh, The Sierra Leone Special Court and Its Legacy, pp. 505-526.
\textsuperscript{2467} SCSL, Eleventh and Final Report, p. 39.
\textsuperscript{2468} No Peace Without Justice, Making Justice Count.
\textsuperscript{2469} Charles Charnor Jalloh, ‘Conclusion’, in: Jalloh, The Sierra Leone Special Court and Its Legacy, pp. 770-774.
\textsuperscript{2470} Ibidem, p. 772.
prevail, the debate on the history of the civil war in Sierra Leone has not taken such a virulent turn. There are several reasons, discussed above, that may explain this. First, most atrocities, by all sides to the conflict, are widely known in Sierra Leone. Second, the discourse that animated the violence in Sierra Leone was not deeply ideological and was not framed in a discourse of historical enemies. Third, the nature of the atrocities was not genocidal and there were no specific social categories targeted for extermination and played out against each other as was the case in Rwanda. Accordingly, after the war in Sierra Leone, there was no particular group that came out of the war victorious to the extent that the RPF did in Rwanda. Thus, the dealing with the past through transitional justice was not tarnished by absolute victor’s justice and the shifting of responsibility on one collective, as was the case in Rwanda with Hutu population. Fourth, whereas the RPF complexly constructed the abstract idea that genocide was the historical endgame of Belgian colonial policy in the 1930s, in Sierra Leone the real culprits and instigators of mass atrocity were concrete living human beings who operated from the outside and remained outside during the war. Fifth, there was also no radical ideological regime change as in Rwanda and those in power had no urge, like the authoritarian RPF, to rewrite history and create a new founding narrative that was coerced on society as a whole. A particular version of history in Sierra Leone, although painful, did not become the foundational ideology of the post-conflict state and a rather pluralistic public space to hold one’s own opinion and version about past atrocities has remained. Sixth, Sierra Leone rather aspired a future-making project which focused on a common destiny rather than an articulation of a common past. Finally, Sierra Leone hardly had time to come to terms with the violence as extreme poverty and new crises shifted the focus on the immediate present and future hardships, not so much on the past.

This chapter, in the first place, has shown that the Sierra Leonean case differs fundamentally from Rwanda in terms of the deeply ingrained contestation of narratives about the violent past. Not only was the pre-conflict history strikingly different, the dealing with the past also took a different route. Sierra Leone, embarked on a truth commission process, hardly held national proceedings and pursued, jointly with the United Nations, on a hybrid prosecution and judgement of some of those who were believed to bear to biggest responsibility for atrocity crimes from all sides of the conflict in front of a court that was based in the capital. Crucial as well was the fact that different from the UNICTR, the SCSL had Sierra Leonean judges on the bench.

Another key difference that thesis has uncovered is that, unlike in Rwanda, the process of transitional justice as a whole has had a much bigger role on the historiography of the war, than the UNICTR had on the historiography of the genocide. Absent the government’s active meddling in (re-) writing history and the magnitude of critical historical scholarship on the genocide in Rwanda, basic knowledge on and explanations of key events, issues and agency in Sierra Leone were, and remain to be, particularly established, enticed and narrated through the truth commission and the Special Court for Sierra Leone. Other sources have so far remained relatively scarce and this was also the reason
why in this chapter, the truth commission warranted special attention and broader analysis. Overall, the difference in the narratives between the TRC and the SCSL was that truth commission’s main focus was on national causes and local dynamics of the war, while the court highlighted international causes and macro-dynamics.

There are however, some crucial similarities, in the way transitional justice was done. First, like in Rwanda, the epistemological base for truth-finding was almost entirely witness testimony, enticed through a legalistic lens. Secondly, there was hardly any forensic corroboration possible for those testimonies. Third, the rationale of transitional justice agents was ambitious. Not only, did the truth commission try to unravel and write the first comprehensive and authoritative long history of Sierra Leone, it also set out to, amongst many other things, spark reconciliation, contribute to national healing and forge a vision for the future. At the Special Court it was not different. Prosecutors promised Sierra Leoneans to enlighten them with the truth about what had happened in dark Sierra Leone, while former UNICTR investigators were scrambling for evidence in the Sierra Leonean forests the same way they had done in the Rwandan hills. Also coming from the UNICTR was Stephen Rapp, who had led the media case against Ferdinand Nahimana. His task was to prosecute the SCSL’s main case against Charles Taylor. However, as we have seen, the historical charges levelled against Taylor as a conspirator of mass atrocity and godfather of terror, did not hold up in court, beyond any reasonable doubt. Having said that, I have limited this study to three questions: how to understand the invocations of historical narratives at the SCSL, how do its judgements square with historiography and how to approach the SCSL trials as historical sources.

Regarding the first question, I have shown that the invocation of historical narratives at the SCSL stems from several reasons. First of all, agency mattered. Those doyens, who researched, exposed and publicised the human rights abuses during the war from the mid-1990s onwards were either professional historians, were trained in history or were interested in history. Tribunal staff, some of whom came in from the UNICTR, brought in their experience from working on the Rwanda case, which to some extent became a bit of a blueprinted modus operandi. Yet, as we saw in this chapter, the narrative that was to transpire and was litigated in the SCSL’s main cases in Freetown (CDF, RUF, AFRC) was of a different sophistication than those progressed at the UNICTR. In contrast, the narrative progressed by Prosecutor David Crane was stereotypical, uninformed and uncomplicated and pictured Sierra Leone as a uncivilised place, thrown back to the ages of barbarity and the agents of violence were depicted as monsters. During the trials, however the overall context was not as crucial as at the UNICTR, also because on each bench there was a Sierra Leonean judge, fully aware of what had transpired. Moreover, since the accused on the docket were mainly mid-level personalities close to the atrocities, there was no specific need to delve into macro-historical questions in order to fit their agency in the lexicon of the tribunal’s jurisdiction. Moreover, the fact that there genocide was no part of the allegations did not force the prosecution to highlight complex historical
patterns, social-identity markers and political intentions. History was thus not a key element in the prosecution’s narrative. Different, however, was the Charles Taylor case, a suspect from abroad and whose pre-indictment actions and intentions became fundamental for the prosecution’s case. History was invoked particularly to tie Charles Taylor to events in Sierra Leone, with the OTP progressing the narrative that Taylor had conspired his alleged crimes already in the late 1980s in Libya. Stephen Rapp, who had led the trial of the historians at the UNICTR, ambitiously took on this task. However, as shown above, in the end the SCSL judges could convict Taylor for only a relatively limited period and set of crimes. What turned out was that it was impossible to prove, with the available evidence, a long-standing plan to terrorise and plunder Sierra Leone for Taylor’s private benefit.

Secondly, how do the SCSL judgements square with historiography? In the case of Sierra Leone, the answer appears to more rudimentary than at the UNICTR. While tribunal in Arusha dealt with more 70 cases over a time span of 20 years, the SCSL only concluded nine cases, including four factions, over a period of 11 years. We may, thus, not expect the same kind of sophistication and specialisation at the SCSL. As shown, although expectations were raised to uncover the truth about what had happened, the three judgements rendered in Freetown leave little room for historical exposition, let alone discussion on causes and motive of historical agents. In the case of the civil defence forces, somewhat remarkably, there is hardly even a discussion on the bigger picture, or context, of the precedents to or the unfolding of the war. It merely summarises key events during the height of the conflict and the rise of the military junta, but it only does so in order to outline the rise of civil defence initiatives, the role of ‘secret societies’ and the formal organisation of the CDF. In the AFRC case, the judgement is only little more informative, dedicating 15 out of 631 pages to historical facts. Only in the RUF case, the Trial Chamber stepped outside the temporal scope of the court’s jurisdiction, seeking an explanation for the rise of the RUF. Interestingly, the judgement underlines internal resentment as the cause of the civil war and ruled out Taylor’s overall control over the RUF as an organisation. The Taylor judgement – which rules out Taylor’s agency prior to December 1998 – only depicts the Liberian President as an ‘aider and abetter’ to their atrocities, not as a grand conspirator and terrorist. Overall, the SCSL’s findings largely conflict with the more general historiography, which places Charles Taylor at the heart of the Sierra Leonian war. However, based on the testimonial and circumstantial evidence, no such claims could be substantiated beyond any reasonable doubt. Hence, in terms of its contribution to historiography, the SCSL judgements provide a much more complex discussion, although they were obviously restrained by their mandate.

Thirdly, how to approach the SCSL trials as historical sources? Like at the UNICTR, the SCSL was troubled by a modus operandi of fact finding without facts, relying almost exclusively in troublesome witness testimony. This chapter has shown and critically assessed how this has impacted the truth finding capabilities of the SCSL investigators, prosecutors and judges. So even though, the SCSL collected historically interesting testimonies, they can only be read with due care and in context
of the way they were elicited. On another level, the SCSL court records contain the longest testimony
of a defendant before an international criminal tribunal to date. Taylor testified for over half a year
under oath and this unique material may be specific interest for future historians of West Africa or
social scientists in the field of perpetrator studies. Similarly interesting is that the SCSL trials and
records do not stand in isolation, as is to some extent to case with the UNICTR. The parallel process
of a truth commission cannot be obscured when approaching the trial record. Understanding their
relationship is equally significant. At the time, it was expected that the TRC narrative would provide
the historical basis and background for the SCSL. But what became a historiographical surprise, the
SCSL Prosecution barely talked about the TRC report and subsequently the Special Court for Sierra
Leone hardly referred to the TRC’s findings in its four judgements. Moreover, the SCSL ruled out its
complementary relationship by denying suspects to also testify before the TRC. Subsequently, the
narratives contained in the records, differ significantly. Constricted by its mandate in temporal scope
and agency, the Court emphasised external causes, such as political manipulation by foreign political
leaders and the international diamond trade. Through its much wider lens, the commission focused on
internal factors, such as the despotic rule over several decades by a corrupt oligarchy, while also
addressing foreign influences. Bearing in mind these differences, bundled together, the entire SCSL
trial record and the archives of the TRC comprise the fullest available collection of information on the
Sierra Leonean war. It is no surprise that its sources, as well as its findings, have already made their
way into the historiography of the conflict, to a very large degree. Although the conclusion may vary
– due to methodological issues – the process of fact-finding has elucidated much detail, to an extent
that historians – and most of those specialised in the region have contributed in some way - could
have never uncovered in such a relative short time-span. Unprecedented in Sierra Leonean history, up
to ten thousand people have provided testimony about their experiences during the war which are
transcribed and archived, establishing a unique source of oral history that without the TRC and the
SCSL would most likely never had been uncovered.
6. Cross-examining the past. ICC: Opening Pandora’s box in Congo

Ituri has been described as one of the bloodiest corners of the Democratic Republic of Congo. It is an area known for its abundant gold, diamonds and oil; a place where its people should have been living their lives with their families and benefiting from the riches of their homeland. Instead, it became a place where its people were targeted, terrorized and abused. At least 5,000 civilians reportedly died in direct ethnic violence in Ituri in the seven months between July 2002 and March of 2003 alone.

- Fatou Bensouda, Prosecutor

6.1 Introduction

Both the Rwanda-tribunal (UNICTR) and the Sierra Leonean Special Court (SCSL) experiences have revealed that the international criminal trial setting lacks the capability to validate the more wide-ranging grand narratives on the Rwandan genocide and the Sierra Leonean war respectively. As shown in the chapters above, at the UNICTR, magistrates did not endorse or rubber stamp popularly held interpretations on the alleged conspiracy and long-term planning of the genocide – as was presented in the prosecutor’s case scenarios - before it unfolded from 6 April 1994. It did, however, beyond any legal dispute, ascertain that genocide occurred in Rwanda. That is a highly significant finding. Yet it left more general questions as to why, how, when and by whom it was planned and conspired unanswered. Moreover, it left unanswered the question on who shot down the plane carrying Rwanda’s President Habyarimana, the event that heralded the wide-spread atrocities. Other crucial questions remain. After 20 years of litigation, the tribunal has never convincingly established the number of victims of the genocide. Moreover, it also left unaddressed the alleged abuses by the RPF rebels, crimes that were punishable under its mandate and could have provided a more balanced picture of what had happened in Rwanda in 1994, the full calendar year under the UNICTR’s temporal jurisdiction. Similarly, at the SCSL, prosecutors were impotent to substantiate with irrefutable evidence that Liberia’s former President, Charles Taylor, from the late 1980s masterminded and conspired with others to unleash a campaign of terror in Sierra Leone in order to enrich himself with diamonds. It did nevertheless endorse that large-scale abuses were committed in Sierra Leone by different factions to the conflict and it was because of that, to some extent, more encompassing in reflecting on what transpired in Sierra Leone beyond its mandate.

In legal terms, both tribunals created an important legacy by, for instance, prosecuting the crime of genocide at the UNICTR as well as bringing to account heads of state or governments. In

2472 UNSC, Report on the completion of the mandate of the International Criminal Tribunal for Rwanda, §55.
2473 Only one RPF case file dealt with, but it was referred to Rwanda for national prosecution. It involved Brigadier General Wilson Gumusiriza, Major Wilson Ukwishaka, Captain Dieudonne Rukeba and Captain John Butera. See: Le Tribunal Militaire Seant a Kigali, Nyamirambo Et Y Siegeant En Materie Penale Rend, En Audience Publique, Le Jugement Suivant Au Premier Degre, Dans L’aﬀaire No Rp 0151/08/Tm (Kigali, 24 October 2008); The High Military Court, Sitting in Nyarugunga, In Kicukiro District, Kigali City, on Criminal Cases Rendered The Following Appeal Judge on 25/02/2009, Appeals Judgement No. RPA 0062/08/HCM (Kigali, 25 February 2009).
2474 In the final report the President of the SCSL sets out to reflect “upon the history of the conflict in Sierra Leone and the events that led to the Special Court’s establishment.” See: SCSL, Eleventh and Final Report (December 2013).
other areas of law, such as the prosecution of gender based violence, they were ground-breaking. But whether they have contributed to more ulterior objectives like establishing peace and forging reconciliation remains a question that has so far not been seriously, independently and empirically researched. Appearances, however, are against them. Peace was already there when the tribunals started their work. Reconciliation was on nobody’s mind in Arusha. In Freetown, the idea of reconciliation through a court process was somehow overshadowed with the prosecution of the CDF war ‘heroes’, which made the court unbeloved. In terms of writing historical records their legacy is even much narrower. At a minimum, they established in a score of judgements some detailed facts on the micro level, about the role of individual suspects in their immediate contexts. In Arusha, for example, the UNICTR particularly managed to unravel and picture events in Kibuye, a region that was featured in a dozen trials from the very beginnings of the tribunal’s investigations. At the SCSL, many details transpired on the structures of rebel forces, the use of child soldiers as well as the functioning of civil defence forces. Read in conclave with the report of the Truth and Reconciliation Commission, the SCSL trials in Freetown and The Hague at a minimum presented some explanations for the civil war, yet in terms of fact ascertainment the outcomes remain rudimentary, guesswork and sketchy. What both tribunals also elicited is the testimony of many victims or survivors of mass atrocities, thus shedding light on and putting on record the impact mass atrocity had on the individual level. Again, that is a significant extra-legal heritage, even despite the fact that many testimonies were given in private sessions and much of the content is redacted in the trial record. In terms of core fact ascertainment and establishing individual criminal responsibility however, the almost exclusive reliance on testimonial evidence – provided largely through non-legal third parties like NGOs - continuously proved problematic and erratic when it came to substantiating allegations and case theories. Thus, as Nancy Combs has argued, the factual foundations under the many convictions were uncertain.

Overall, the absence of clear paper trails, forensic data and “smoking-gun-type-of-evidence” has increasingly led judges, most notably at the UNICTR, to be cautious to make sweeping findings on contextual elements in general – beyond the extent necessary to prove that crimes actually took place - as well as particular details concerning defendants. Perhaps their doubts on the evidence grew more ‘reasonable’. What is true though is that their truth finding prism and applied legal standards had become much stricter. In fact, in dealing with testimonial evidence, judges have gradually become more reluctant, more careful and more nuanced in their findings. In contrast however, on the prosecutor’s side it became more difficult to meet this apparent stricter and higher burden of proof and alter their indictments and investigations accordingly, particularly in volatile non-documentary African cases. In extenso of Rwanda and Sierra Leone, a textbook example thereof is the work of the International Criminal Court (ICC), which in many ways – in temporal, geographical and evidentiary

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2475 At the ICTR this was done by Ibuka and at the SCSL particularly through the SCSL investigators, such as Corinne Dufka, who had previously worked for HRW.
terms, but also in relation to court staff - is an offspring of the UNICTR and SCSL and is equally reliant on witness testimony and the agents and methodologies typical of the UNICTR and SCSL in acquiring this type of evidence. Arguably, the first ‘African’ cases – particularly in the Democratic Republic of Congo (DRC) and to a lesser extent in Uganda - at the ICC share many parallels with the SCSL and UNICTR when it comes to the challenges of fact-ascertainment on mass violence. It has led to a turn in prosecution and investigatory strategies, particularly under ICC Chief Prosecutor Fatou Bensouda, who herself learned the tricks of the trade at the UNICTR and faced huge hurdles in the first ICC trials she led regarding the Democratic Republic of the Congo (DRC). After she replaced Luis Moreno-Ocampo, Bensouda, already for a couple of years, became aware that her investigators and prosecutors should adopt a more scientific approach and seek for improvement and alternatives, particularly in the field of cyber investigations, online analysis, video examinations, (smart) phone tracking and satellite imaging. One of the reasons for a revised prosecutorial strategy is that, at least for some international judges, there are cumulative signals of potential witness interference on various levels and thus too much reasonable doubt on the credibility and reliability of witness testimonies and on the way, in which these are gathered, produced and presented.

6.2 The ICC in Africa

As discussed earlier, in Chapter III, unlike the UNICTR and SCSL, the ICC has a long history of coming into being. It is in fact the late offspring of the International Military Tribunals in Nuremberg and Tokyo. Since the founding of the ICC, individual persons who allegedly committed mass atrocities - and in the future, the crime of aggression committed from 1 July 2002 are potential subjects for investigation and prosecution by the ICC. The ICC - as a complementary body to national criminal jurisdictions - functions as a court of last resort. After considering elements of

2476 Particularly the Great Lakes Region (Rwanda, DR Congo, Burundi, Uganda, Central African Republic and Burundi) after the 1994 genocide and West Africa (Sierra Leone, Liberia and Côte d’Ivoire) from the early 1990s. All trials in these ‘situations’ depend almost exclusively on witness testimony.

2477 For example, both the Chief Prosecutor, Fatou Bensouda, and Deputy Prosecutor, James Stewart, were OTP officials at the ICTR. A variety of defence counsel that worked at the ICTR and SCSL, now represent accused persons at the ICC. Some judges, Robert Fremr for example, previously worked at the ICTR before sitting at the bench in the case of Bosco Ntaganda.

2478 The ICC Prosecutor highlights six external challenges: complex security environments; State cooperation; high pace of technological evolution changes the sources of information, and the manner in which evidence is obtained and presented in court; time period between the commission of crimes and the Office’s investigation creates challenges for the preservation of evidence; limited resources; lack of full coordination of efforts amongst all relevant actors makes it difficult to close the impunity gap for atrocity crimes under the Rome Statute as well as related crimes, including transnational and organised crime and acts of terrorism. See: ICC, OTP, Strategic Plan | 2016-2018 (16 November 2015), pp. 5-6.

2479 In Arusha, she was part of the prosecution teams in the cases against Bagosora et al. (Military I) and Protais Zigiranyirazo, two cases discussed in the dissertation.

2480 1 She was Lead Counsel in the trial.


2482 1 BIA, Witnesses before the International Criminal Court.

2483 Only if the person is a national of or acted in a State or on board of a vessels or aircraft registered in a State that is a party to the Rome Statute or State, which has accepted the court’s jurisdiction by declaration.

2484 An agreement on the definition of the crime of aggression was reached at the Review Conference of the International Criminal Court in Kampala, Uganda, in June 2010. The crime is defined as “the planning, preparation, initiation or execution, by a person in a position effectively to exercise control over or to direct the political or military action of a state, of an act of aggression, which, by its character, gravity and scale, constitutes a manifest violation of the Charter of the United Nations.” The agreement only comes into force in 2017. ICC, “Amendments to the Rome Statute of the International Criminal Court on the crime of aggression (Annex 1), Resolution RC/Res.6 (11 June 2010), art. 8 bis.

2485 Rome Statute, art. 5. See for a detailed description: ICC, Elements of Crimes.

case selection and prioritisation, the prosecutor evaluates available open source information during a preliminary examination and commences an investigation proper unless he determines there is no reasonable basis – i.e. lack of jurisdiction, inadmissible, not sufficiently grave and not against the interests of justice - to proceed. In theory, the ICC is determined to act globally, where possible within its limited reach in terms of membership of the court. Yet its caseload (up to mid-2016) exclusively concerned individuals from the African continent. Although the ICC’s global reach may seem to be far-reaching, the court often remains toothless as it depends on state cooperation and the tides in national, regional and international politics. Lacking international political will, at the extreme case, may even frustrate the ICC’s work and defy its legitimacy. In late December 2015, for example, Chief Prosecutor Fatou Bensouda lamented the Security Council’s “empty promises” in relation to her indictments relating to Darfur, a case that was referred to the ICC by the Council itself. Despite the criticism that the ICC has not accomplished much after thirteen years of work, the court has opened formal investigations in ten “situations” [i.e. countries, territories and] conducts a range of preliminary examinations in other countries across the globe. Its judges have delivered four final verdicts. The fastest case so far, after a three day trial and a guilty plea, was concluded on 27 September 2016, with the conviction of Ahmed Al Faqi Al Mahdi from Mali. So far, all the cases deal with African situations. There is however ample variety in crime scenes and contexts, all with their complex socio-political realities and histories. Contrary to the ad hoc tribunals, the ICC divides its attention and resources over the various situations, which practically means it will hardly be able to reach to kind of sophistication in understanding the histories of all those countries. Yet, as time progresses from the ICC’s starting date of July 2002, the substance of cases may grow more historical in the future. Likewise, here it would be impossible to provide the kind of deep understanding of the conflicts as I provided in the two previous chapters. Like the ICC itself, I am bound to restrict my overview of the case-load to basic elements. Below, each of these African situations will be shortly discussed before shifting the main attention to the Congo cases of which some have been concluded. It is particularly in respect to the situation of Congo that we will see that

2487 ICC, OTP, Policy Paper on Case Selection and Prioritisation (15 September 2016).
2489 Rome Statute, art. 53.
2491 The OTP has opened a formal investigation only in one non-African state, namely Georgia. See: ICC, PTC 1, Situation in Georgia. Decision on the Prosecutor’s request for authorization of an investigation (ICC-01/15 Date: 27 January 2016).
2493 As of 1 October 2012: Uganda, Democratic Republic of the Congo, 2 investigations in the Central African Republic (CAR), Sudan (Darfur), Kenya, Libya, Côte d’Ivoire and Mali. Situations “are generally defined in terms of temporal, territorial and in some cases personal parameters.” See: ICC, PTC, Situation en République Démocratique du Congo: Decision sur les demandes de participation à la procédure de VPRS 1, VPRS 2, VPRS 3, VPRS 4, VPRS 5 et VPRS 6 (ICC-01/04, 17 January 2006), §65.
2494 Preliminary examinations refer to the analytical process of by which the OTP assesses whether there is a reasonable basis to proceed with an investigation in a given situation. The OTP follows four steps in this procedure: (phase 1: initial review) proactively gathering and evaluating information from multiple sources, including “communications”, from individuals and parties concerned; (phase 2a jurisdiction) assessing jurisdictional, temporal, territorial and personal jurisdiction; (phase 2b jurisdiction) assessing subject matter jurisdiction; (phase 3 admissibility) assessing complementarity and gravity; and (phase 4 interest) assessing the interests of justice. See: ICC, Office of The Prosecutor (OTP) Policy Paper on Preliminary Investigations: Draft (4 October 2010).
2496 See footnote 892.
2497 ICC, Al Faqi Al Mahdi Judgement.
the problems regarding fact-seeking, fact-finding and fact ascertainment in a non-documentary context are very similar to the ones faced by the UNICTR and the SCSL.

**Uganda (Lord’s Resistance Army)**

In truth, the LRA thinking was very simple. It was a case of "if you're not for us, then you're against us." Any 20 civilian who was unwilling to support their struggle against the government was to be regarded as an enemy, and it was the LRA's policy to kill its enemies.

- Ben Gumpert, Prosecutor

“The conflict in northern Uganda is the biggest forgotten, neglected humanitarian emergency in the world today,” UN officials decried at the end of 2003. But Yoweri Museveni, the country’s President since 1986, lamented the lack of actual international assistance to help stop the Lord’s Resistance Army (LRA), even though the post-9/11 USA administration had declared it a terrorist group in 2001. “Having exhausted every other means of bringing an end to this terrible suffering, the Republic of Uganda now turns to the newly established ICC and its promise of global justice,” Museveni’s Attorney General wrote in a 27-page letter referring the situation to the freshly appointed court’s prosecutor, Luis Moreno-Ocampo. On 16 December 2003 Uganda requested “that investigations focus on the persons most responsible for such crimes, namely LRA members in positions of command and control, especially because a significant proportion of low-ranking perpetrators are forcibly conscripted children that have committed crimes under duress, and thus are themselves victims of the LRA leadership.” Kampala further pledged “its full cooperation to the Prosecutor in the investigation and prosecution of LRA crimes […]” and sent along documentation on LRA atrocities. Acting on the self-referral that was solicited by Ocampo, the ICC opened its second formal investigation (after it started an investigation in the Democratic Republic of the Congo), into crimes committed in Northern Uganda, on 28 July 2004. It concerns crimes committed in Northern Uganda carried out by the LRA, which has carried out an insurgency against the Ugandan government since 1987. Until 2005, the LRA has been directing attacks against both the Ugandan Defence Forces, local civil defence units and against civilians. An internationally listed terrorist organisation, the LRA, infamously guided by the schizophrenic self-proclaimed spokesperson of God, Joseph Kony, brutalised the people it claimed to be fighting for: the Acholi in northern Uganda.

2505 Republic of Uganda, Referral of the situation concerning the Lord’s Resistance Army, §42.
2506 Ibidem, §6.
2507 Prosecutor of the International Criminal Court opens an investigation into Northern Uganda", ICC Press Release, The Hague 29 July 2004. Uganda had specifically referred “the situation on the Lord’s Resistance Army” to the court but Ocampo informed the Ugandan authorities that he was “analysing crimes in northern Uganda by whomever committed.” Yet, as of now, only LRA crimes have been investigated and charged. See: Letter from Luis Moreno-Ocampo to President Phillipe Kirsch, dated 17 June 2004 (annex to: ICC, Situation of Uganda. Decision Assigning the Situation in Uganda to PTCII (ICC-02/04; 5 July 2004). See for a detailed analysis of the investigations in Uganda: Thijs Bouwknegt, ‘Dominic Ongwen: Born at the time of the white ant, tried at the ICC’, African Arguments, 20 January 2015.
Uganda. Instead of fulfilling its dream to fashion a theocracy based on the Bible’s Ten Commandments and Acholi folklore, the LRA embarked on a crusade of terror. Emblematically, the LRA’s ghastly initiation rituals encompassed cutting of limbs, lips and ears of civilians, kidnapping and indoctrinating thousands of kids to serve as soldiers and sex slaves.\(^{2508}\) Today, the LRA - which by the end of 2014 consisted of approximately 150-200 armed elements, split into several highly mobile units - remains a deadly militia in central Africa, attacking civilians in the Democratic Republic of the Congo, the Central African Republic, Sudan (Darfur) and South Sudan.\(^{2509}\) The sectarian group has, in the course of its Ugandan rebellion brutalised civilians in a cycle of murders, kidnappings, sexual enslavement, mutilations, destruction and looting.\(^{2510}\)

Although the investigation was announced at an early stage of the ICC’s life, time passed by as Moreno-Ocampo was still hiring lawyers, analysts and investigators into his newly created, but still small, Office of The Prosecutor (OTP), while also dividing labour between the Democratic Republic of Congo’s war torn-Ituri region and northern Uganda and eyeballing Darfur. A so-called “Uganda joint team” - including a dozen investigators, analysts and trial lawyers, led by American prosecutor Christine Chung – was recruited in early 2004.\(^{2511}\) There was no scarcity of sources. Uganda, as promised in its referral, was a key investigating partner and shipped piles of reports and evidence of LRA activities to The Hague, including intercepted radio and satellite phone communications. With a strong appetite to start trials, prosecutors Ocampo, Bensouda, Chung and Eric MacDonald went into overdrive. Tight deadlines left no time for thorough collection and broad analysis of existing information. But, according to case-leader Chung, in an interview with the Institute for War and Peace Reporting (IWPR) “[…] many think for too long [and] at some point you need to go to the field.”\(^{2512}\)

While the investigations were ongoing in 2004, the pressure was mounting. Moreno-Ocampo was calculating that peace talks between the LRA and Kampala were swiftly progressing and envisioned that he could contribute to a potential peace agreement with international justice. In the event that the LRA militants suddenly came out of the bush, he wanted indictments “ready-to-go.” Rushing to produce arrest warrants, the OTP lawyers, by September, had already selected six local attacks carried out between July 2002 and July 2004, handpicked six specific crime types and identified several suspects for the cases they wanted to present. Under that blueprinted directive, a small multinational investigation team was sent into the field. Astonishingly enough, none of the seven on-ground investigators had a police background. They were often flanked by a couple of analysts from the office’s Jurisdiction, Complementarity and Cooperation Division (JCCD) and trial lawyers Christina Chung and Eric MacDonald. As the six crime scenes in Gulu, Lira and Soroti

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\(^{2508}\) Bouwknegt, 'Dominic Ongwen: Born at the time of the white ant, tried at the ICC'.


\(^{2511}\) ICC, OTP, Statement by Chief Prosecutor Luis Moreno-Ocampo (14 October 2005).

districts were already deemed too old, forensic evidence was not trails. Instead, during over 50 missions in little more than half a year, the investigators identified, heard and collected testimonies from a wide range of witnesses: victims in refugee camps, insiders among LRA defectors within the Ugandan Army and former child soldiers as well as several overview witnesses. Amongst other things, the investigation recorded at least 2,200 and 3,200 abductions in over 850 attacks between July 2002 and June 2004. In contrast to the simultaneously on-going probe in eastern Congo, witnesses in the still volatile Uganda were directly accessible and recourse to the controversial use of intermediaries was unnecessary. In Uganda, the biggest challenge was to keep the number of witnesses small but of “smoking gun” quality, something that, according to former investigators, worked out rather well.

From the outset, the targets were clear: the quasi-military structure of the LRA’s leadership was well known. In July 2005, only ten months after the start of the investigation, and after pre-trial judges Tuiloma Neroni Slade, Mauro Politi and Fatoumata Dembele Diarra reviewed the prosecutor’s evidence and other information, the courts’ first ever arrest warrants were issued on 8 July 2005 against five senior commanders of the LRA: Joseph Kony, Vincent Otti, Raska Lukwiya, Okot Odhiambo and Dominic Ongwen. All were charged with crimes against humanity and war crimes. Despite international pressure on the governments of Uganda, Sudan, the Democratic Republic of the Congo and the Central African Republic – where some of the suspects were believed to be hiding - to hand them over, three of them still remain at large whereas the case against Lukwiya has been withdrawn because he died in 2006. Meanwhile, it has been reported that Vincent Otti and Okot Odhiambo were killed but their indictments remain. In early January 2015, Ongwen was captured in the Central African Republic, allegedly surrendering himself to USA peacekeeping forces. Both a victim and (alleged) perpetrator of LRA atrocities and facing no less than seventy counts of war crimes and crimes against humanity, Ongwen’s trial, which was set to start late 2016, promises to be one of the most complex ones in the history of modern international criminal justice.

2514 Author’s Interview (email), ICC Investigator, 14 January 2015.
2516 Kony: Twelve counts of crimes against humanity (murder, enslavement, sexual enslavement, rape, inhumane acts of inflicting serious bodily injury and suffering) and, twenty-one counts of war crimes (murder, cruel treatment of civilians, intentionally directing an attack against a civilian population, pillaging, inducing rape and forced enlistment of children). The others face similar counts.
2517 ICC, Prosecution’s Request that the Warrant of Arrest for Raska Lukwiya Be Withdrawn and Rendered Without Effect Because of His Death (Public Redacted Version) (ICC-02/04-01/05; The Hague 22 March 2007).
2518 ‘Rebel Leader Kony’s Deputy Otti Still Wanted by International Criminal Court, The Monitor, 15 April 2010; ‘Body of deputy LRA rebel chief may have been found: Uganda’, Agence France Presse, 2 February 2015.
2520 Situation in Uganda in the Case of the Prosecutor v. Dominic Ongwen: Decision on the confirmation of charges against Dominic Ongwen (ICC-02/04-01/15; 23 March 2016).
While serious human rights abuses on the side of the Ugandan military have been reported, the ICC has never investigated nor filed any public indictments against Ugandan officials.2522

Sudan (Darfur)

For over 5 years, millions of civilians have been uprooted from lands they occupied for centuries, all their means of survival destroyed, their land spoiled and inhabited by new settlers. In the camps Al Bashir’s forces kill the men and rape the women. He wants to end the history of the Fur, Masalit and Zaghawa people. […] The Prosecution evidence shows that Al Bashir masterminded and implemented a plan to destroy in substantial part the Fur, Masalit and Zaghawa groups, on account of their ethnicity. […] His motives were largely political. His alibi was a counterinsurgency. His intent was genocide.

- Luis Moreno-Ocampo, Prosecutor

The western regions of Darfur had been the locus of a low intensity conflict and between 1985 and 2003 the violence had been constant, although with repeated massacres of civilians by government-inspired Arab militias.2524 In early 2003, the conflict exploded as Sudanese government forces and “Arab” Janjaweed militia embarked on a scorched earth campaign of ethnic cleansing, massacring and uprooting hundreds of thousands ‘Africans’ (mainly from the Fur, Zaghawa and Masalit groups). Ever since, the war in Darfur has taken place in slow motion and has fluctuated between periods of genocidal violence, ethnic cleansing and periods of counterinsurgency campaigns.2525 A United Nations commission of inquiry, headed by the renowned jurist Antonio Cassese, did not find proof of genocide, but collected evidence indicating the criminal responsibility of government officials, militia and rebel group members and collected officers for serious violations of international human rights and humanitarian law, including crimes against humanity and war crimes.2526 In the light of these findings, the commission recommended the United Nations Security Council to refer the situation to the ICC.2527

In March 2005, two years into the atrocities, the Security Council, acting under Chapter VII of the UN Charter,2528 referred the situation to the ICC prosecutor and enclosed document archives of the commission as well as a sealed list of suspects named by the commission.2529 Ocampo opened the investigation three months later2530 and the first arrest warrants were issued for Ahmad Muhammad

2522 Author’s Interview (email), ICC Investigator, 14 January 2015; Evenson, Unfinished Business, pp. 24-29.
2526 UNSC, Report of the International Commission of Inquiry on Darfur to the Secretary-General (S/2005/60; 1 February 2005), §§4-5.
2528 Articles 39 of the UN Charter reads as follows: “The Security Council shall determine the existence of any threat to the peace, breach of the peace, or act of aggression and shall make recommendations, or decide what measures shall be taken in accordance with Articles 41 and 42, to maintain or restore international peace and security”.
2530 On 7 June 2005, one day after the ICC opened investigations into the events in the Darfur region the Sudanese authorities founded the Special Criminal Court on the Events in Darfur (SCCED) as a means to demonstrate the government’s ability and willingness to start domestic prosecutions. The court has been criticised for not bringing serious cases and as a façade for impunity. See: Decree Establishing the Special Criminal Court on the Events in Darfur, 7 June 2005.
Abakaer Nourain against Trial Chamber IV’s issuance of a warrant of arrest


§29. (ICC

01/09; 12 July 2010).

02/05

02/05

01/07; The Hague 27 April 2007). And ICC, Situation in Darfur, Sudan in the Case of the Prosecutor v. Omar Hassan Ahmad Al Bashir: warrant of arrest for Omar Hassan Ahmad Al Bashir (ICC-02/05-01/07; The Hague 27 April 2007) & ICC, Situation in Darfur, Sudan in the Case of the Prosecutor v. Ahmad Muhammad Harun (“Ahmad Harun”) and Ali Muhammad Al abl-Al-Rahman ("Ali Kushayb") Warrant of Arrest for Ahmad Harun (ICC-02/05-01/07; The Hague 18 May 2009). As of March 2015, it was ten years since the Security Council asked

Proceedings in the case against Jerbo were terminated since the suspect was reportedly killed in April 2013 and Banda’s trial has been postponed indefinitely. As of March 2015, it was ten years since the Security Council asked

At the Council, Prosecutor Bensouda said her office maintained to monitor the movements of suspects, including President Bashir as well as possible on-going atrocities. But she has since then clogged on ground investigations into criminalities in Darfur. She said that, faced with an environment where her office “limited resources for investigations are already overstretched, and

In a separate case concerning a rebel attack on a military base of the joint African Union-United Nations peacekeepers in Haskanita, North Darfur, in September 2007 that killed 12 African Union peacekeepers and injured eight others, three suspects surrendered to the ICC. Darfur rebel Bahr Idriss Abu Garda came to The Hague on 18 May 2009 to deny any involvement in three counts of war crimes. The pre-trial chamber however, did not find that Abu Garda had to go to trial, citing a lack of evidence. Two other Sudanese rebel leaders surrendered to the ICC in June 2010 to answer war crimes charges over an attack that killed 12 peacekeepers. Abdallah Banda Abakaer Nourain and Saleh Mohammed Jerbo Jamus face three counts of war crimes. Procedures in the case against Jerbo were terminated since the suspect was reportedly killed in April 2013 and Banda’s trial has been postponed indefinitely. As of March 2015, it was ten years since the Security Council asked.
given this Council’s lack of foresight on what should happen in Darfur, I am left with no choice but to hibernate investigative activities in Darfur as I shift resources to other urgent cases, especially those in which trial is approaching.”

Thus, overall, the Sudan case is dormant at the time of writing.

**Central African Republic**

Madam President, your Honours, this trial is an opportunity. This is the first trial before the International Criminal Court that concerns command responsibility. […] The responsibility of the superiors and the subordinates in a hierarchical organisation such as an army has been discussed all over the world since ancient times. It was referred to in the famous Sun Tzu Chinese army manual dating back 500 years before 23 Christ. It was also discussed in the Islamic law, and Hugo Grotius in 1625 referred to it in his famous “The Law of War and Peace.

- Luis Moreno-Ocampo, Prosecutor

What can we learn, your Honours, what can we learn from the recent history of the Democratic Republic of the Congo when it comes to the MLC? […] In actual fact, as soon as the Rwandan and Ugandan forces overthrew these forces led by Laurent-Désiré Kabila, as soon as Marshal Mobutu was overthrown by these troops and after the father died, Kabila senior, and then after the -- you see, his son took over. […] But since that time, since this event, there has been no legitimate government in the Congo. That is why there is this-- these rebellions have come about.

- Nkwebe Liriss, Defence Counsel

During the 2002-2003 violent clashes that followed the coup led by Francois Bozizé, the army chief of staff of then-President Ange-Felix Patassé, many civilians were killed and raped while homes and stores were looted. In 2007, the OTP announced the opening of an investigation into these alleged crimes, following a referral by the Central African Republic’s administration. The ICC investigation into international crimes in the CAR has led to one public arrest warrant, for Jean-Pierre Bemba Gombo, who is a Congolese senator and former vice President of the Democratic Republic of the Congo. Patassé had asked Bemba in 2002 to help fight Bozizé's rebellion. Bemba’s private MLC militia left the country in March 2003. Bozizé had taken power while Pattasé went into exile in Togo. Bemba was arrested in Belgium in 2008 and his trial began in The Hague in November 2010. He stands accused of ordering his MLC to rape, murder and plunder in the CAR. Until Patassé’s passing in April 2011, many questioned the prosecutor’s choice not to bring charges against

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2544 ICC, Bemba Gombo Transcript (22 November 2010), p. 56.


2549 ICC, PTCII, Situation in the Central African Republic in the case of the prosecutor v. Jean-Pierre Bemba Gombo: Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo (ICC-01/05-01/08; 15 June 2009).
him in addition to those brought against Bemba. During Bemba’s trial and shortly before Patassé’s death, the CAR Prosecutor-General Firmin Feindiéro testified that a national investigation had implicated both Bemba and Patassé, although neither of the men was tried in CAR. Human rights watchdogs have also called it a “missed opportunity” that court prosecutors did not charge Bemba with any crimes his MLC forces allegedly committed in the DRC’s Ituri region. Victims’ representatives have requested the court to also charge him with these crimes but the court has ruled against this.

After a long and painstaking trial, in the summer of 2016, judges Sylvia Steiner (Brazil), Judge Joyce Aluoch (Kenya) and Judge Kuniko Ozaki (Japan), convicted Bemba, as military commander, for the murders, rapes and pillaging committed by his troops during house-to-house searches. Meanwhile in 2013, in a separate proceeding, Bemba was indicted again in his cell, this time on charges of offences against the administration of justice, in relation to his criminal case. Four others were charged and arrested alongside; including Bemba’s lawyers Aimé Kilolo Musamba and Jean-Jacques Mangenda Kabongo, parliamentarian and MLC vice-Secretary General Fidèle Babala Wandu and Congolese witness Narcisse Arido. The allegations include presenting false or forged evidence and influencing witnesses to provide false testimony. The new arrests had nothing to do with the renewed violence that engulfed the Central African Republic since December 2012. At that time, a new Muslim rebel group called Séléka – a “coalition” backed by forces from Chad and Darfur - from the northeast began a military campaign against Bozizé’s government. By March 2013, the rebels took control of Bangui and installed one of its leaders, Michel Djotodia, as interim president. But Séléka fighters embarked on a campaign of violence, mainly targeting civilians and former government officials whom they blamed for marginalising Muslims. Outside Bangui, villages were attacked and massacres of civilians were reported. The victims were often Christians. In retaliation, self-defence militias, known as anti-balaka (“anti-machete” in Sango) attacked and killed hundreds of Muslim civilians, often by machete. The politico-sectarian conflict left between 3000

2553 ICC, Situation en République Démocratique du Congo. Demande du représentant légal de VPRS 3 et 6 aux fins de mise en cause de Montieur Jean-Pierre Bemba en sa qualité de chef militaire au sens de l’article 28-a du Statut pour les crimes dont ses troupes sont présumées coupables en Ituri (ICC-01/04; 28 June 2010) & ICC, Situation in the Democratic Republic of the Congo. Decision on the request of the legal representative of victims VPRS 3 and VPRS 6 to review an alleged decision of the Prosecutor not to proceed (ICC-01/06; 25 October 2010).
2554 From 22 November 2010, the Chamber sat for 330 working days and heard 77 witnesses, including 40 witnesses called by the Prosecution, 34 called by the Defence, 2 witnesses called by the Legal Representative of Victims and one witness called by the Chamber. The Chamber also permitted three victims to directly present their views and concerns. ICC, TC III, Situation on the Central African Republic. In the case of the Prosecutor v. Jean Pierre Bemba Gombo: Judgment pursuant to Article 74 of the Statute (ICC-01-05-01/08; 21 March 2016), §§5-25.
to 6000 people dead and over half a million displaced and an estimated 300000 Muslims fled the country. An international commission of Inquiry concluded that the anti-Balaka had committed ethnic cleansing against the Muslim populations. Atrocities and massacres continued to be reported into 2015.

ICC Prosecutor Fatou Bensouda had issued several statements during the violence, calling upon all parties involved in the conflict to stop attacking civilians and committing crimes, or risk being investigated and prosecuted and opened a new preliminary investigation in the CAR situation. The newly-elected Interim President Catherine Samba-Panza formally asked her to open an inquiry, affirming that Central African courts are not in a position to carry out the necessary investigations. After an examination of the newly reported crimes, Fatou Bensouda began a second investigation in September 2014, stating that “the list of atrocities is endless” and that she could not “ignore these alleged crimes.” Meanwhile, UN-mandated investigators warned that the “situation in CAR could very much spiral into genocide” and called for a “truly international tribunal with international judges who could objectively investigate and prosecute perpetrators.” On the national level, the Central African Republic has pledged to work on transitional justice in the wake of the violence. On 3 June 2015, it adopted a law that created a new hybrid tribunal, the Special Criminal Court (SCC), which is designed to deal with perpetrators of international crimes.

Kenya

The post-election period of 2007-2008 was one of the most violent periods of the nation’s history.

- Louis Moreno-Ocampo, Prosecutor
On 30 December 2007, closely contested presidential elections in Kenya resulted in a declaration by the Electoral Commission that incumbent President Mwai Kibaki of the Party of National Unity (PNU) was re-elected over the main opposition candidate Raila Odinga of the Orange Democratic Movement (ODM). This triggered a series of violent demonstrations and politico-ethnic targeted attacks throughout Kenya. Between 27 December 2007 to 28 February 2008 - when a power-sharing deal was struck between the two main parties - it is reported that between 1,133 and 1,220 people were killed, 3,561 were injured, and approximately 350,000 were displaced. Large-scale rape, destruction and looting also took place. In May 2010, the OTP started investigations into possible crimes against humanity committed during Kenya’s post-election violence. The prosecutor alleges that ODM supporters were mobilised to attack ethnic Kikuyu and others perceived to have voted for Kibaki. Retaliatory violence was then targeted at Kalenjin, Luo’s and Luhya’s, who were perceived as affiliated with the ODM. There are also allegations of police violence at this time.

It is the first time the prosecutor started a case on his own – *proprò motu* - as Kenya’s parliament blocked legislation to deal with the violence itself. Six Kenyans [dubbed the Ocampo Six] were summoned to appear in The Hague to answer to the charges. Four of them, including President William Ruto and Uhuru Kenyatta, a radio journalist and a police force commander – were committed for trial. Whereas the Kenyan government unsuccessfully tried to fight the jurisdiction of the court, the now vice-President Ruto and former Kass FM broadcaster Sang were on trial in The Hague since September 2013 until 5 April 2016 when the trial chamber terminated the proceedings and vacated their charges for a lack of evidence.

On the brink of the precipice: a Human Rights account of Kenya’s post 2007 election violence. In May 2010, the OTP started investigations into possible crimes against humanity committed during Kenya’s post-election violence. It is reported that between 1,133 and 1,220 people were killed, 3,561 were injured, and approximately 350,000 were displaced. Large-scale rape, destruction and looting also took place. In May 2010, the OTP started investigations into possible crimes against humanity committed during Kenya’s post-election violence. The prosecutor alleges that ODM supporters were mobilised to attack ethnic Kikuyu and others perceived to have voted for Kibaki. Retaliatory violence was then targeted at Kalenjin, Luo’s and Luhya’s, who were perceived as affiliated with the ODM. There are also allegations of police violence at this time.

For trial monitoring reports: Open Society Justice Initiative (OSJI), [International Justice Monitor: Kenya Cases at the International Criminal Court](http://www.ijmonitor.org/category/kenya-cases), visited: 19 January 2015;
However, Kenyatta’s case also collapsed, due to the fact several witnesses died, were scared to testify, withdrew or changed their accounts and the Kenyan government was alleged to block the investigations. His case was withdrawn at the end of 2014.2582

Ever since the launch of the investigations in Kenya, the Kenya cases and trials have been riddled with problems. What appears is that a campaign of intimidation of potential witnesses preceded the investigation, intensified before the trials and continued throughout the proceedings. And it did not only happen in the Kenyatta case, but also in the trial of his deputy President, William Ruto. Throughout the 157 trial days, that were characterised by fierce debates in and out of the courtroom, the chamber only heard the testimony of 30 prosecution witnesses, including two expert witnesses. Seventeen other witnesses, who had already given a statement or had agreed to testify, recanted their stories, withdrew from the case or declined any further cooperation with the Prosecution.2583 As a result, the trial, and subsequently the ICC’s work in Kenya, was buckled. After the prosecution had finished presenting their available witnesses at the end of 2015, the defence sought an intermediate ruling by the court that there was no case to answer and the case be terminated. In what became a controversial ruling, Judge Chile Eboe-Osuji and Judge Robert Fremr, by majority, agreed that the charges were to be vacated and the accused to be discharged.2584 For Fremr, who also presides over the Ntaganda trial, the prosecution had not presented sufficient evidence on which a reasonable conviction could be based and thus considered that there was no reason to call the Defence to bring their case.2585 Judge Eboe-Osuji, also vacated the charges, but on different grounds. For him, the Ruto case had been a mistrial “due to a troubling incidence of witness interference and intolerable political meddling that was reasonably likely to intimidate witnesses.”2586 Although the chamber did not render a Judgement of acquittal nor criticised the OTP for the weakness of their evidence, the Prosecutor lamented the Chambers refusal to preserve the evidence already collected, before key witnesses changed their account of events, and test their “competing versions of events” before chamber.2587

As a result of the alleged political interference in the cases, the OTP investigated incidents of witness intimidation or corruption and issued warrants of arrest, one month after the start of the Ruto
trial, for ex-OTP intermediary Walter Osapiri Barasa, Paul Gicheru and Phillip Kipkoech Bett, on charges of obstructing the course of justice. So far however, none of the three suspects have yet been surrendered to the court.

**Libya**

So why is Colonel Muammar Gaddafi not in the dock?

- Courtenay Griffiths, Defence Counsel

Just 4 months ago, the world requested justice for crimes committed in Libya and the UN Security Council unanimously asked for the intervention of the International Criminal Court. Yesterday, the Court delivered its first decision, it issued arrest warrants against Muammar Gaddafi, his son Saif Al-Islam Gaddafi and Abdullah Al Senussi for shooting civilians on the streets and persecuting alleged dissidents in their homes as crimes against humanity. The Judges considered that they have to be arrested to prevent them from using their powers to continue the commission of crimes.

- Luis Moreno-Ocampo, Prosecutor

Anti-government protests began in Libya on 17 February 2011, following widespread protests in Tunisia and Egypt. Muammar Gaddafi’s Security Forces from that day attacked demonstrators in cities across the country. Civilians were systematically murdered, tortured or raped, while enforced disappearances have been reported as well. The *thuwar* (anti-Gaddafi forces) likewise left a trail of human rights abuses. Nine days into the violence, the UN Security Council decided to refer Libya – not an ICC member - to the ICC prosecutor. After a three-month investigation, Ocampo requested ICC judges to issue arrest warrants against Muammar Abu Minya Gaddafi, his son Saif Al Islam Gaddafi and the head of the Intelligence Services Abdullah Al Sanousi. The warrants for crimes against humanity (murder and persecution) committed between 15 February and 28 February 2011, through the state apparatus and Security Forces, were issued late June. Ever since, Muammar Gaddafi was killed on 20 October 2011, Saif Gaddafi was arrested on 19 November 2011 in Zintan, in Libya and Al-Senussi was arrested on 17 March 2012 in Mauritania. The new Libyan government was quick to conduct its own investigations and announced it will try both man in

2593 ICC, Situation in the Libyan Arab Jamahiriya: Prosecutor’s Application Pursuant to Article 58 as to Muammar Mohammed Abu Minyar Gaddafi, Saif Al-Islam Gaddafi and Abdullah Al-Senussi (ICC-01/11; 16 May 2011).
2595 His case was terminated: ICC, Situation in the Libyan Arab Jamahiriya in the case of the Prosecutor v. Muammar Mohammed Abu Minyar Gaddafi, Saif Al-Islam Gaddafi & Abdullah Al-Senussi: Decision to Terminate the Case Against Muammar Mohammed Abu Minyar Gaddafi (ICC-01-11-01/1; 22 November 2011).
Libya, without the interference of the ICC and looking at crimes committed before February 2011.\footnote{ICC, Third Report of the Prosecutor of the International Criminal Court to the UN Security Council Pursuant to UNSCR 1970 (2011) (New York, 16 May 2012).} The court ruled that it still intends to try Saif Gaddafi;\footnote{ICC, AC, Situation in Libya in the case of the Prosecutor v. Saif Al-Islam Gaddafi and Abdullah Al-Senussi: Judgment on the appeal of Libya against the decision of PTCI of 31 May 2013 entitled “Decision on the admissibility of the case against Saif Al-Islam Gaddafi” (ICC-01/11-01/11 OA 4; 21 May 2014).} while it found that the national proceedings against Sanousi rendered the case at the ICC inadmissible and ended the proceedings against him.\footnote{ICC, AC, Situation in Libya in the case of the Prosecutor v. Saif Al-Islam Gaddafi and Abdullah Al-Senussi: Judgement on the appeal of Mr Abdullah Al-Senussi against the decision of PTCI of 11 October 2013 entitled “Decision on the admissibility of the case against Abdullah Al-Senussi” (ICC-01/11-01/11 OA 4; 21 May 2014).} Back in Libya, where controversial proceedings were initiated against the two men alongside 26 others, a court sentenced both men to death in the summer of 2015.\footnote{The court ruled that it still intends to try Saif Gaddafi; while it found that the national proceedings against Sanousi rendered the case at the ICC inadmissible and ended the proceedings against him. Back in Libya, where controversial proceedings were initiated against the two men alongside 26 others, a court sentenced both men to death in the summer of 2015.}

**Côte d’Ivoire**

First, let me be clear: I have not yet opened an investigation. But, if serious crimes under my jurisdiction are committed, I will do so. For instance, if as a consequence of Mr. Charles Blé Goudé’s speeches, there is massive violence, he could be prosecuted. [...] Violence is not an option. Those leaders who are planning violence will end up in the Hague.


The aftermath of the contested presidential election in Côte d’Ivoire on 28 November 2010 was violent. Losing President Laurent Gbagbo sought to retain power. Soon after the final round of elections, security forces - aided by youth leaders, militias and Libyan mercenaries - launched attacks against perceived supporters of Alassane Ouattara, who had claimed victory. Attacks were carried out in Abidjan and its suburbs, as well as in the western part of Côte d’Ivoire.\footnote{ICC, OTP, ‘Statement by ICC Prosecutor Luis Moreno-Ocampo on the situation in Côte d’Ivoire’, Press Release (ICC-OTP-20101221-PR617; 21 December 2010).} By 25 February 2011, the country had descended into an intra-state conflict between pro-Gbagbo forces and Ouattara’s Forces Nouvelles, the Dozo civil defence group and Burkinabe militiamen. An estimated 3,000 civilians were killed and more than 150 women were raped in a conflict waged along political, ethnic, and religious lines. With French and United Nations military assistance, Gbagbo was defeated and arrested on 11 April 2011.\footnote{United Nations Office for the Coordination of Humanitarian Affairs (OCHA), Côte d’Ivoire: Electoral Violence and Displacement (25 March 2011).} Côte d’Ivoire, which was not yet a subscriber to the Rome Statute,\footnote{See for details on the crisis: United Nations Human Rights Council (HRC), Rapport de la Commission d’enquête Internationale indépendante sur la Côte d’Ivoire (A/HRC/17/48; 14 June 2011); HRW, “They Killed Them Like It Was Nothing.”; ICC, Situation in Côte d’Ivoire. Request for authorisation of an investigation pursuant to article 15 (ICC-02/11; The Hague 23 June 2011); & McGovern, Making War in Côte d’Ivoire.} had already been under preliminary examination by the OTP since 2003 when it received an invitation from Gbagbo’s government to identify, investigate and try ‘the perpetrators and accomplices of acts committed on Ivorian territory since the events of 19 September 2002.’\footnote{République de Côte d’Ivoire, Déclaration de reconnaissance de la Compétence de la Cour Pénale (Abidjan 18 April 2003). Côte D’ Ivoire also created the Commission Dialogue, Vérité et Réconciliation, which is mandated to identify the root causes of the conflict, the acts and patterns of violations, and ways for the country to overcome these legacies through reconciliation and recognition of those who were victimised. See: République de Côte d’Ivoire, Union-Discipline-Travail, ‘Ordonnance No 2011-167 du 13 Juillet 2011 portant création, attributions, organisation et fonctionnement de la Commission, Dialogue, Vérité et Réconciliation’, Point de Presse du Porte-Parole du Président de La Commission Dialogue, Vérité et Réconciliation (CDVR), Edition No 001, (Abidjan 21 July 2011).} Ouattara reconfirmed his country’s commitment to cooperate with the ICC already during the post-
election violence.\textsuperscript{2606} That commitment was materialised by the fact that the West African country transferred the former president to Scheveningen prison on 30 November 2011 on the basis of a sealed indictment.\textsuperscript{2607} The charges were confirmed almost two and a half years later.\textsuperscript{2608} In a separate case, against Charles Blé Goudé, Abidjan chose to transfer the accused to The Hague on 22 March 2014. The former sports and youth minister is charged with the same crimes as the Gbagbo’s, to whose inner circle he belonged.\textsuperscript{2609} The duo is tried in a joint trial, which started in January 2016 and is discussed in the preface.\textsuperscript{2610}

Laurent Gbagbo’s wife, Simone, was charged as well. The court unsealed a warrant for her arrest in November 2012 for four charges of crimes against humanity.\textsuperscript{2611} Despite the fact that Côte d’Ivoire transferred Laurent Gbagbo to The Hague, Abidjan challenged the admissibility of the case against his wife, who is in Ivorian preventive detention since 11 April 2011 in Odienné. The government cites that there are national investigations and proceedings on-going relating to the same crimes as listed in the ICC’s charge sheet, with additional charges of genocide.\textsuperscript{2612} She, alongside with 82 other defendants including her son, was convicted to 20 years imprisonment in early 2015 for undermining state security.\textsuperscript{2613}

**Mali**

In the 15th and 16th centuries, Timbuktu became a regional centre of economic activity and trade. More importantly, it blossomed into one of Africa’s most vibrant intellectual and spiritual capitals. It played an essential role in the expansion of Islam in Africa. […] What happened in Timbuktu is truly a dark page in the history of this city. […] As I have mentioned in prior proceedings in this case: "history itself, whose physical embodiment is at peril through such attacks, will not be generous to our failure to care, or to act decisively."

- Fatou Bensouda, Prosecutor\textsuperscript{2614}

Tuareg rebels of the National Movement for the Liberation of Azawad (MNLA) in January 2012 launched a rebellion for independence, which swiftly overwhelmed the nation’s army. Two months

\textsuperscript{2606} In particular, with respect to crimes and abuses committed since March 2004. See: République de Côte d’Ivoire, Le Président, Conformation de la Déclaration de Reconnaissance (Abidjan 14 December 2010). République de Côte d’Ivoire, Le Président, A Monsieur Moreno Ocampo (Abidjan, 3 May 2011). On 3 October 2011, the PTC authorised the Prosecutor to open an investigation into the situation in Côte d’Ivoire since 28 November 2010. On 22 February 2012, PTCIII decided to expand its authorisation for the investigation in Côte d’Ivoire to include crimes within the jurisdiction of the Court allegedly committed between 19 September 2002 and 28 November 2010.

\textsuperscript{2607} ICC, Situation in Côte d’Ivoire: Warrant Of Arrest For Laurent Koudou Gbagbo (ICC-02/11; 23 November 2011). He is accused of being an indirect co-perpetrator of four counts of crimes against humanity: murder; rape and other sexual violence; persecution; and other inhuman acts, allegedly committed between 16 December 2010 and 12 April 2011. Confirmation of charges hearings were scheduled to take place in August 2012. But because of his alleged bad health conditions, these hearings have been delayed until further notice.

\textsuperscript{2608} The confirmation of charges hearing in the case The Prosecutor v. Laurent Gbagbo took place from 19 to 28 February 2013. On 12 June 2014, PTCI confirmed by majority four charges of crimes against humanity (murder, rape, other inhumane acts or – in the alternative – attempted murder, and persecution) against Laurent Gbagbo and committed him for trial. ICC, Situation in the Republic Côte d’Ivoire: Decision on the Confirmation of Charges against Laurent Gbagbo (ICC-02/11-01-11; 12 June 2014).


\textsuperscript{2611} ICC, Situation in the Republic of Côte d’Ivoire: Warrant Of Arrest for Simone Gbagbo (ICC-02/11-01/12; 29 February 2012).

\textsuperscript{2612} ICC, Situation en République de Côte d’Ivoire Affaire le Procureur c. Simone Gbagbo: "Requête de la République de Côte d’Ivoire sur la recevabilité de l’affaire, le Procureur c. Simone Gbagbo et demande de surris à exécution en vertu des articles 17, 19 et 95 du Statut de Rome" (ICC-02/11-01/12; Paris, 30 September 2013).


\textsuperscript{2614} ICC, Al Faqi Al Mahdi Transcript (22 August 2016), pp. 16, 24.
later, a group of mid-ranking soldiers launched a coup but the north became easy prey and fell to rebel groups. Jihadist groups linked to Al-Qaeda in the Islamic Maghreb (AQIM) took control over the rebellion, while they initially appeared to be fighting with the Tuareg. Sharia law was enforced and many of Mali’s famous ancient shrines – including some in Timbuktu - have been destroyed. The Economic Community of West African States (ECOWAS) posed sanctions on Mali and prepared the deployment of the regional Mission in Mali (MICEMA), a mission that was later taken over by the UN’s Stabilization Mission (MINUSMA).

Soon during the violence, the ICC sent out a public statement warning that it was closely monitoring possible war crimes, crimes against humanity or genocide in Mali since the clashes had erupted. On two occasions, the UN’s Security Council stressed that perpetrators of international crimes should be held accountable. When visiting Mali, Fatou Bensouda said that the destruction of historical monuments is a war crime. Only days later, she received a letter and documentation from Mali’s Minister of Justice referring ‘the situation in Mali since January 2012’ to her office. In its preliminary examination, the OTP found reasonable basis to believe war crimes had been committed (murder, mutilation, cruel treatment, torture, passing sentences and carrying out executions without due process, destroying protected objects, pillage and rape). “Since the beginning of the armed conflict in January 2012, the people of Northern Mali have been living in profound turmoil. [...] I have determined that some of these deeds of brutality and destruction may constitute war crimes,” said Prosecutor Bensouda when she announced to start investigation in the three northern regions of Mali.

On 26 September 2015, Niger surrendered the first Malian suspect to the ICC, Ahmad Al Mahdi Al Faqi (a.k.a. Abu Tourab), a former school teacher and member of the Islamic Police ("Hesbah" -"Manners' Brigade") aligned to Ansar Dine and Al-Qaeda in the Islamic Maghreb (AQIM), in Timbuktu. Al Mahdi is the first to be accused of the war crime of intentionally destroying historic cultural heritage, including mausoleums and a Mosque. In the fastest trial so far, which only lasted three days at the end of the summer of 2016, Al Mahdi pleaded guilty to attacking nine historic and religious mausoleums and a mosque in 2012. Only a month later, he was unanimously convicted of the war crime of intentionally directing attacks against religious and
historic buildings and sentenced to nine years’ imprisonment. Himself a rather low-level perpetrator, Al Mahdi from the day investigators encountered him cooperated with the prosecution.\textsuperscript{2626} From his interviews and statements, as well as from video recordings, it has transpired who were the most responsible. The court was explicit about it:

Mr Al Mahdi was in direct contact with the leaders of Ansar Dine and AQIM, including Iyad Ag Ghaly, the leader of Ansar Dine, Abou Zeid, the ‘Governor’ of Timbuktu under the armed groups, Yahia Abou Al Hammam, an AQIM chief, and Abdallah Al Chinguetti, a religious scholar within AQIM. [...] In late June 2012, the leader of Ansar Dine, Ag Ghaly, made the decision to destroy the mausoleums, in consultation with two prominent AQIM members, Al Chinguetti and Al Hammam. Mr Al Mahdi was also consulted by Abou Zeid before this decision was made. Mr Al Mahdi expressed his opinion that all Islamic jurists agree on the prohibition of any construction over a tomb, but recommended not destroying the mausoleums so as to maintain relations between the population and the occupying groups. Nevertheless, Ag Ghaly gave the instruction to proceed to Abou Zeid, who in turn transmitted it to Mr Al Mahdi in his capacity as the chief of the Hesbah.\textsuperscript{2627}

Distinct from the other ICC trials, the OTP strategy has appeared to have emerged from luck. Arrested by French soldiers, Al Mahdi was an available suspect, who subsequently wanted to come clean and provide a detailed account of his acts, the context and other potential suspects. Although the OTP has always said it was to follow up on its investigations, also to include violence against people, no public arrest warrants had been issued at the time of writing. From the judgement, however, we may have some indication of who is potentially under investigation.

**Guinea Conakry, Nigeria and Burundi**

Besides the formal investigations, the OTP respectively started two preliminary examinations in Africa. This first concerns possible crimes against humanity in Guinea.\textsuperscript{2628} In December 2008, after the death of President Lansana Conté, Captain Moussa Dadis Camara seized power in a military coup. He established a military junta, the Conseil National pour la Démocratie et le Développement (CNDD) and promised to transfer power after holding presidential and parliamentary elections. However, subsequent statements suggested that he might run for another term led to renewed protests by opposition and civil society groups. On Guineas Independence Day - 28 September 2009 – an opposition rally at the national stadium in Conakry was violently suppressed by security forces. At least 156 people were killed, 109 women raped and many others were tortured during the ‘28 September massacre’.\textsuperscript{2629} The OTP opened a preliminary investigation into possible crimes against

\textsuperscript{2626} ICC, *Al Faqi Al Mahdi Transcript* (23 August 2016), pp. 16-19.
\textsuperscript{2627} ICC, *Al Faqi Al Mahdi Transcript* (27 September 2016), pp. 4-6.
Next to Guinea, the ICC started a preliminary examination in Nigeria,\(^\text{2632}\) an enormous and densely populated country with approximately 168 million inhabitants and over 250 ethnic groups. Different groups allegedly committed atrocities at different times in different regions. The Middle-Belt States in Central Nigeria\(^\text{2633}\) have been affected by communal and sectarian violence, the Niger Delta states\(^\text{2634}\) saw violence over control and impact of the oil production in the region and access to resources and the Northern States have been the scene of communal and electoral violence as well as attacks by the Islamist jihadi movement Boko Haram.\(^\text{2635}\) Both the Central and northern parts of Nigeria have been affected by inter-communal, political and sectarian violence. More than 13,500 people have died in clashes since the end of military rule in 1999.\(^\text{2636}\) Nigeria’s Plateau state, where Jos is located, lies in the so-called middle belt between the predominantly Muslim north and the mainly Christian south. Since 2010, the OTP probed whether crimes against humanity were committed in Plateau State.\(^\text{2637}\) The preliminary examination was a response to a massacre that killed over 300 people in January that year. Mass killings took place some 30 kilometres south of the city of Jos, where Christian and Muslim mobs went on a rampage with guns, knives and machetes.\(^\text{2638}\) Included in the probe was also the violence in the Northern Kaduna State, which is deeply rooted in ethnic and religious division between indigenous Hausa-Fulani and the largely Christian Igbo and Yoruba communities.\(^\text{2639}\) Violence occurred in particular around the 2011 elections, during which hundreds of civilians were allegedly killed.\(^\text{2640}\)

The second area, where the ICC focused its attention, concerned the oil-rich Niger Delta Region, which has seen violence among ethnically based gangs, military groups and federal forces. Among the root causes of the violence in the Delta region are the struggle over control and impact of the oil production in the region and access to resources.\(^\text{2641}\) More recently, the probe has focused on Boko Haram.\(^\text{2642}\) The Islamism movement came to prominence in 2009. Through subtle and open harassment, Boko Haram was goaded into an open confrontation with the Nigerian state and violently


\(^{2631}\) ‘Investigations in Guinea: with or without the ICC’, International Justice Tribune, No. 145 (15 February 2012), p. 2. The examination is currently in phase 3 (see note 147) ICC, OTP, OTP Briefing, Issue 131 (12 September – 1 October 2012).

\(^{2632}\) Between 10 November 2005 to 30 September 2012, the ICC’s OTP received 59 communications in relation to the situation in Nigeria, 26 of which were outside the jurisdiction of the Court. The preliminary examination of the situation in Nigeria was made public on 18 November 2010.

\(^{2633}\) The Middle-Belt States include Kwara State, Kogi State, Benue State, Plateau State, Nasarawa State, Niger State, Adamawa State and Taraba State.

\(^{2634}\) Niger Delta region includes the following states: Cross River, Akwa Ibom, Rivers, Bayelsa, Delta and Edo; sometimes it further includes Imo, Abia and Ondo States as they are also oil producers.

\(^{2635}\) For a recent study on Boko Haram: Manon Stravens, De Opstand Van Boko Haram. Hoe een lokale ideologische revolte kon uitgroeien tot een oorlogsmachine (Groot: Conservier, 2015).


\(^{2637}\) ICC, OTP, Letter from M.P. Dillon, Head of the Information & Evidence Unit Office of the Prosecutor (OTP-CR-58/10; 5 November 2010).


\(^{2639}\) HRW, They Do Not Own This Place, Government Discrimination Against ‘Non-Indigenes’ in Nigeria (HRW: New York, April 2006) 48-49.

\(^{2640}\) HRW, Nigeria: Post-Election Violence Killed 800. Promptly Prosecute Offenders, Address Underlying Causes, 17 May 2011.

\(^{2641}\) ICC, OTP, Situation in Nigeria: Article 5 Report (5 August 2013).

suppressed in July 2009. Thereafter, it went underground, rebuilt, and resurfaced in October 2010 and has since changed its tactics to targeted assassinations, drive-by shootings, suicide bombings, kidnapping and hostage taking – most famously the April 2014 abduction of around 200 school girls in Chibok. Boko Haram has tried to mimic and adopt the tactics and strategies of global Salafist movements such as Al-Qaeda and has sworn alliance to ISIL. It rose to notoriety between 3 and 7 January 2015, when it carried out the largest terrorist attack since the ‘9/11’ assault in the USA, infecting – almost on a daily basis – the area surrounding Baga. Isolated from the international media and out of reach of Nigerian government forces, the fishing settlement on the shores of Lake Chad in Borno State saw large scale massacres and burning down of houses. Death tolls in the Baga and 16 surrounding villages range between dozens to 2000 or more. “No one stayed back to count bodies,” a local resident told Human Rights Watch. Before, the ICC reported on the basis of information gathered up to December 2012, that the group has allegedly attacked religious clerics, Christians, political leaders, Muslims opposing the group, members of the police and security forces, “westerners”, journalists, as well as UN personnel. These acts of murder and persecution may be crimes against humanity, Bensouda’s office said.

Next to Guinea and Nigeria, Bensouda opened a preliminary investigation into the situation in Burundi. It follows the political turmoil and subsequent violence as a result of President Pierre Nkurunziza’s March 2015 bid to change to constitution and run for a third turn. In the course of the on-going crisis, more than 430 persons were reportedly killed, at least 3,400 people have been arrested and over 230,000 Burundians forced to seek refuge in neighbouring countries. Bensouda’s office received a number of communications and reports detailing acts of killing, imprisonment, torture, rape and other forms of sexual violence, as well as cases of enforced disappearances. All these acts appear to fall within the jurisdiction of the ICC.

Africa, as seen above, has in the first years been the ICC’s prime area of work, both in terms of investigations and trials. As noted earlier, this had led to much criticism from outside observers who claim the court should be more global and address other conflict situations as well. Imaginably, bearing in mind the various wars and serious violations of human rights elsewhere, the debate is heated, emotional and political. In many respects it is badly informed as well, particularly if one is aware that the ‘anti-ICC’ wave was carefully set into motion by people like Gaddafi, Bashir and Kenyatta – leaders who themselves were suspects in The Hague. Yet, their operationalized words such as ‘biased’, ‘targeted’, ‘politicised’, ‘racist’ and ‘neo-colonial’ have for long dominated the public

2643 ICC, OTP, Statement of the Prosecutor of the International Criminal Court, Fatou Bensouda, on the abduction of schoolgirls in Nigeria, 8 May 2014.
2649 ICC, OTP, Statement of the Prosecutor of the International Criminal Court, Fatou Bensouda, on opening a Preliminary Examination into the situation in Burundi, 25 April 2016.
and media narrative, in Africa but also in African Diaspora’s. But these political, dramatic and yet fashionable headlines that dominate the debate has largely distorted the public understanding of what the court really does and for whom. First of all, the ICC is not a panacea as many want to believe. It is just a court of law, without superpowers. Moreover, it is a court of the ultimate last resort. It only addresses the injustices that fall through the gaps when national courts cannot or will not step in. Secondly, the ICC is not there to appease statesmen but to address crimes that have cost the lives of thousands of African victims, crimes that were allegedly caused by the acts and omissions of the very political agents that oppose the ICC.

But there is more, on another level. Africa is not a country. Out of 54 sovereign nations, the discontent stems only from a handful of countries on the continent. History also tells a different story. Not only were African leaders, civil society and other stakeholders the most passionate supporters of the ICC when it was set up seventeen years ago, African countries still represent the largest regional bloc of states which have ratified the Rome Statute of the ICC, Senegal being the very first. Likewise, after the court opened its doors in July 2002 many serious large scale international crimes were committed. African countries were also the first to call on the ICC by referring situations of mass atrocities for investigation, by cooperating with investigations, by arresting and surrendering individuals and by protecting victims and witnesses. A footnote must be added in this respect since these so-called ‘self-referrals’ were often solicited through intensive lobbying of court officials. On yet another level and contrary to the myth that the ICC is focused exclusively on Africa, the court’s focus is increasingly projected on other situations. For instance, by the end of 2015, the OTP had either concluded or was still busy conducting preliminary examinations in four Asian states (Afghanistan, Iraq, Palestine, Korea), three in Latin America (Colombia, Honduras and Venezuela) and two in Europe (Ukraine and Georgia). In all, the workspace of the ICC has increased a lot in the 14 years it is operational and meanwhile, in some situations, it has almost finished its work, particularly in the Democratic Republic of the Congo (DRC). In the following sections, these cases will be highlighted in order to demonstrate that similar to the UNICTR and SCSL, serious fact-ascertainment problems existed as to what happened and why in the volatile region of Ituri in the east of Congo.

6.3 The Democratic Republic of the Congo (DRC)

Q: [Mr. Biju-Duval, Defence] “[…] Can you tell us precisely on the basis of which document or what other source you can make such a claim?

Out of the preliminary examinations, the first formal investigation may start in Georgia, a situation wherein the prosecutor has requested the PTC to do so. ICC, PTCI, Situation in Georgia: Corrected Version of “Request for authorisation of an investigation pursuant to article 15”, 16 October 2015, ICC-01/15-A-Corr (ICC-01/15; 17 November 2015); ICC, OTP, Summary of the Prosecution’s Request for authorisation of an investigation pursuant to article 15 (13 October 2015).
While the genocide against Rwandan Tutsi received unprecedented judicial attention and the atrocities in Sierra Leone have been addressed legally and were ‘truth commissioned’, the many cyclical episodes of mass violence in the Democratic Republic of Congo (DRC) were only addressed relatively marginally. It goes too far back to outline the entirety of conflicts and episodes of mass violence in Congo. This chapter therefore does not deal with the imprescriptible historical injustices in pre-colonial times (slavery) and the deadly reign of King Leopold (genocide), partly because these are discussed in chapter III. Also, it goes beyond the scope of this chapter to detail and do justice to world historical events, like the murder of Patrice Lumumba in 1961 or the full scope of the first and second Congo wars, which may have been determinate to course of Congolese history. Unlike Rwanda and Sierra Leone, which are relatively small states with relatively comprehensible histories, the Democratic Republic of the Congo is amazingly vast in all aspects conceivable. For this reasons, this chapter has a different composition than those on Rwanda and Sierra and will restrict drastically itself in terms of space and time. Also, rather than discussing historical antecedents, which at the UNICTR, SCSL or Gbagbo trial, were crucial in understanding the type of crimes prosecuted, in the ICC’s Congo prosecutions these turned out not to be vital. When necessary, however, it will highlight contextual connections with Rwanda, which not only borders Congo but also shares the ethnic lineages and above all is heavily involved in Congolese affairs.

Since March 1993, particularly the eastern provinces of Congo – the continent’s second largest, central African, highly populated, mineral-rich, yet deprived, ex-Belgian country – saw ethnic violence, acts of genocide, refugee crises, insurgency, two full-scale international wars, internal rebellion, civil war and plunder of natural resources. Congolese government forces, para-military groups, [foreign] militias, rebel groups, civil defence forces, an array of foreign armies [most notably Rwandan and Ugandan] and UN peacekeepers violated human rights. Violence is ever continuing and since 2013, the UN created an ‘Intervention Brigade’ to take offensive action against militias and permitted the use of unmanned aerial vehicles (UAV’s), known as drones, by the United Nations Organisation Stabilisation Mission in the Democratic Republic of Congo.

2651 ICC, Lubanga Dyslo Transcript (26 March 2009), pp. 94-95. Historian Prunier testified on behalf of the prosecution.
2652 Also see: Gérard Prunier, From Genocide to Continental War; Stearns, Dancing in the Glory of Monsters.
2654 Province Orientale, Nord-Kivu and Sud-Kivu.
2657 UNSC, Resolution 2098 (S/RES/2098 (2013); 28 March 2013).
Omnipresent impunity, prosecutions, truth seeking, demobilisation and re-integration and amnesty were used in Congo to respond to the back-to-back outbreaks of violence. Congo’s 2002 ‘transition’ – towards peace under the new Presidency of Joseph Kabila - was blueprinted in South Africa’s Sun City, at the Inter-Congolese Dialogue, comprising 362 Congolese officials, political opponents, rebel groups and forces vives. They agreed, inter alia, on a truth and reconciliation commission, which was later, enshrined in the 2003 Transitional Constitution and established the following year. A second truth commission since the one that investigated the plunder by King Leopold in 1905, the modern Commission Verité et Reconciliation (CVR) was tasked with investigating political crimes and human rights abuses between Congo’s independence on 30 June 1960 up to prospective “end of the transition” on 30 June 2006. Headed by Bishop Jean-Luc Kuye Ndondo wa Mulemera and seated in Kinshasa, the heavily divided 21 CVR members never embarked on a serious truth-seeking undertaking. Instead, they were caught up with resolving ongoing political disputes and sensitising the public for the 2006 polls, the first multi-party elections in the country in 41 years. At its end, the commission concluded that a new truth commission should be created, something that never happened.

Like in Rwanda and disparate from Sierra Leone, the Congolese judiciary also operated separately from international justice. Numerous military tribunals throughout Congo investigated, prosecuted, judged and sentenced scores of rebel fighters, government soldiers and civil defence warriors for international crimes. Apart from these sedentary tribunals, which for many affected communities are often more than a week’s journey away, a system of mobile courts was introduced from October 2009. Traveling judges, prosecutors, and defence counsel resolved disputes and dispensed justice particularly in relation to sexual offences but also to murder and theft. Developed by the American Bar Association (ABA) and Open Society Justice Initiative (OSJI) but

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2660 Priscilla Hayner writes that only an administrative report - Rapport final des activités de juillet 2003 à février 2007 - was submitted to the government in February 2007 but that no public version was published. It lists meetings but provides no substantive conclusions or commentary about human rights abuses. Hayner, Unspeakable Truths, p. 337, note 55.

2661 The military court structure consists of the Tribunaux Militaires de Garnison (Military Garrison Tribunals, MTG ), at first instance, the Courts Militaire (Military Courts MC) and the Haute Cour Militaire (Military High Court, MHC) as the final court of appeal. These tribunals replaced the Military Order Court, which had operated between 1997 and 2003: OICHR, Report of the Mapping Exercise, p. 394.


2663 Mobile courts, which can be either civilian or military tribunals, are specifically provided for by Congolese law: République du Zaire, Ministère de la Justice, Arrêté d’Organisation Judiciaire 299/79 portant règlement intérieur des cours, tribunaux et parquets (20 August 1979).
The military courts, the ICC and mobile courts have dealt with serious crimes under international humanitarian law. However, debate about the establishment of a specialised mixed jurisdiction for Congo with a longer historical mandate has been on the agenda as well. First calls for special chambers came from civil society organisations from 2004.\(^{2670}\) The idea was reiterated by the United Nations in 2008\(^ {2671}\) and again strappingly advocated for in the 2010 *Mapping Report* – alongside a new truth commission.\(^ {2672}\) Kinshasa promised to follow up but an initial draft law\(^ {2673}\) miscarried in parliament in August 2011. A transformed sketch for a special court is under deliberation at the time of writing.\(^ {2674}\) Nonetheless, at the background of discussions on a special tribunal, amnesties have been dealt out to 271 rebel fighters, including some who have been possibly implicated in crimes under international humanitarian law.\(^ {2675}\) Meanwhile, the incorporation of international crimes into national law has progressed swiftly in 2015 and by 2016 the ICC’s Rome Statute will be domesticated into the Congolese legislation. Outside Congo, a handful of universal jurisdiction cases followed. In 2000, Belgium issued an arrest warrant - on charges of crimes against humanity and war crimes - for Foreign Minister Yerodia Abdoulaye Ndombasi, but the International Court of Justice (ICJ) blocked it.\(^ {2676}\) Two years later, a court in The Netherlands convicted former Colonel Sebastien Nzapali for torture.\(^ {2677}\) Crimes in Congo were listed in the arrest warrant for 40 Rwandans by a Spanish judge in 2008\(^ {2678}\) whereas a German court in Stuttgart started a trial against two Rwandan leaders of the Forces Démocratiques de Libération du Rwanda (FDLR) in 2011.\(^ {2679}\)

Arrested in January 2009 in Rwanda, the judicial faith of Laurent Ngunda Batware remains ambiguous, since Kigali has not ever acted on an extradition request from Kinshasa nor put him on

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\(^{2673}\) Loi organique portant création, organisation et fonctionnement d’une Cour spécialisée, May 2001.


\(^{2678}\) Juzgado Central de instrucción No. 4, Audiencia Nacional, Sumario 3/2-008 – D. Auto (7 February 2008).

trial. In 2014, a criminal complaint was lodged in The Netherlands and in Rwanda against Rwanda’s President Paul Kagame and other officials for alleged crimes, including genocide, in Congo. Other examples may soon transpire and will likely be the topic for future research. Here, in the next paragraphs, however, we will take stock of what the ICC has accomplished in terms of its investigations and prosecutions of several Congolese warlords in the past decade. All of them are related to Ituri.

**Ituri**

This report does not provide you with some kind of a thumbnail sketch of Congolese history, with a digest. It is on the contrary a distillate, the product of thirty-seven years’ experience with the country. Events related here are not listed or offered mechanically. They are put in perspective, discussed, analysed, and reflected upon. Please take time to try to sample them before delving into the private lives and tragedies of the people involved.

- Gérard Prunier, Expert Witness

Whilst the CVR law was still in the making in March 2004, President Joseph Kabila invited Luis Moreno-Ocampo, the then Chief Prosecutor of the International Criminal Court (ICC), to investigate and prosecute possible offenders of crimes of genocide, war crimes or crimes against humanity. Ocampo’s investigations led the arrests of several Congolese militiamen, including Thomas Lubanga Dyilo, Germain Katanga, Mathieu Ngudjolo Chui, and Bosco Ntaganda. As violence has been rampant in the Kivu’s as well, the OTP also investigated the alleged crimes of the Forces Democra"

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2681 Prakken d’Oliveira Human Rights Lawyers, ‘Lyamuremye – Aangifte genocide, misdrijven tegen de menselijkheid, oorlogsmisdrijven, gedwongen verdwijning en foltering Rwanda / Congo (20140254.MP; Amsterdam, 4 April 2014) & Prakken d’Oliveira Human Rights Lawyers, Jean Claude Lyamuremye – Criminal Complaint against President Paul Kagame e.a. for genocide, crimes against humanity, responsibility, war crimes, enforced disappearances, torture and murder, committed in Rwanda & Congo (20140254.A.MP; Amsterdam, 4 April 2014).
2687 As the ICC’s investigations into the FDLR atrocities led to the arrest of Rwandan national Callixte Mbarushimana and a public arrest warrant for Rwandan national Sylvester Mudacumura, the group’s Supreme Commander. They were charged with war crimes and crimes
against humanity committed between 20 January 2009 and September 2010.\footnote{Nine counts of war crimes, from 20 January 2009 to the end of September 2010, in the context of the conflict in the Kivus, including: attacking civilians, murder, mutilation, cruel treatment, rape, torture, destruction of property, pillaging and outrages against personal dignity. ICC, \textit{Situation in the Democratic Republic of the Congo in the Case of the Prosecutor v. Sylvestre Mudacumura: Decision on the Prosecutor’s Application under Article 58} (ICC-01/04-01/12; 13 July 2012), p. 29.} From all the Congolese suspects, Thomas Lubanga and Germain Katanga were convicted, Jean-Pierre Bemba went on trial for events in the Central African Republic, Calixte Mbarushimana was released before trial, Matthieu Ngudjolo was acquitted, Bosco Ntaganda one is on trial and one remains at large.\footnote{ICC, \textit{Demande d’arrestation et de remise de Sylvestre Mudacumura adressée à la République Démocratique du Congo.}} Three other Congolese citizens – alongside one Central African - have been arrested, not for serious crimes but for purportedly forging evidence and influencing witnesses in the trial of Bemba.\footnote{ICC, \textit{Mandat d’arrêt à l’encontre Jean-Pierre Bemba Gombo, Aime Kilolo Musamba, Jean-Jacques Mangenda Kahongo, Fidèle Bahala Wandu et Narcisse.}}
A poised investigation

On the fact that humanitarian groups are lousy investigators, I will not go that far. However, one must concede that the procedure of investigation of humanitarian groups, in my opinion, is more a sort of a general journalism rather than legal type activities of investigators.

- Bernard Lavigne, Investigator2694

In all respects, the Democratic Republic of the Congo (DRC) seemed to be the perfect case file for the newly established permanent court that was set up to prosecute génocidaires, war criminals and criminals against humanity. But the trials in The Hague show the opposite. Congo became the ICC’s Pandora’s Box. “Africa has the shape of a gun, and Congo is its trigger.” An ambitious French human rights lawyer cited Frantz Fanon.2695 His chief, Luis Moreno-Ocampo, had just announced the start of a criminal inquiry into human rights violations in Ituri. It was Wednesday, 23 June 2004;2696 roughly one year after the Argentinean prosecutor took his oath in The Hague.2697 The troubled Congolese province had been on his radar from the very beginning.2698 Just like Iraq, Afghanistan and Colombia. But for the latest international justice experiment, Congo appeared to be a convenient and feasible pick.

In the year before Ocampo set up his Office of The Prosecutor (OTP), 499 ‘communications’ had already been sent to PO Box 19519, the ICC’s fictive address since 1 July 2002.2699 Only six complaints related to Ituri were deposited there, but nonetheless, the isolated region fitted the main selection criteria.2700 On or after July 2002, in a battle for control over the region between at least six militias, some 5,000 civilians were massacred, villages pillaged and women raped.2701 Caught up in the politics of justice, the court’s fiercest critics – the USA and Russia - would not obstruct a judicial intervention in the Congolese ‘bush’ like they obviously would in Iraq. There was no national resistance either. On the contrary. In March 2004, Joseph Kabila had eagerly accepted Ocampo’s invitation to outsource the well-reported crimes to the world’s new war crimes prosecutor.2702 Undoubtedly, the Congolese President saw an open door through which he could send a handful of warlords to The Netherlands. Besides excluding the recalcitrant Iturians from power sharing, Kabila was sure Kinshasa would linger in impunity. He would merely assist the ICC’s work in the rebellious eastern region of his country – a tactic he copy-pasted from Uganda’s President Yoweri Museveni who had only referred LRA crimes to The Hague.2703
July 2004. Kabila’s strategy bore fruits. Serge Brammertz – the then Belgian Deputy Prosecutor in charge of the Court’s investigations – told the USA embassy in Kinshasa that his probe ought not to “derail” Congo’s delicate peace process.2704 It would hence only “focus on abuses committed by actors outside the transition, such as the Ituri armed groups.”2705 But Brammertz also raised concerns about the work terrain: the DRC was “difficult and complex […] for logistical and political reasons.”2706 And indeed, throughout their first field mission to Bunia in September 2004, investigators heard gunshots in the regional capital. Bunians greeted them with suspicion, unsure what and who these foreigners were after. Roadblocks prevented them from leaving the city to visit crime scenes and potential witnesses.2707 Amidst all these security concerns and after many other start-up issues,2708 the first witness in the investigation was not heard before 2005 or mid-2005.2709 Around this time, on 10 January 2005, the Congolese army appointed a number of Iturian ex-combatants to serve as generals. Former rivals Bosco Ntaganda and Germain Katanga were among those who received this ‘promotion’, to the disgust of late Human Rights Watch researcher, UNICTR expert witness and historian on Rwanda, Alison Des For forces, who said “the government needs to take these warlords to court.”2710 She was surprised by the wave of arrests in late February of eight Iturian warlords, including Katanga. The 24-year-old ‘Simba’ – lion in Kiswahili – was accused of the 2002 mass killing of an estimated 1200 Hema and Bira civilians in Nyakunde and ended up in prison in Kinshasa. Just like Thomas Lubanga Dyilo, who was arrested for his purported part in the slaughter of nine Bangladeshi peacekeepers in February 2005.2711 Both men faced serious charges including genocide and crimes against humanity, crimes falling under Ocampo’s Rome Statute.2712

Ntaganda – who since April 2005 also faced a Congolese arrest warrant2713 – fled to Rwanda. In his home country, he was out of reach of the Congolese military courts that were trying dozens of ex-fighters for atrocity crimes.2714 Ocampo’s team followed slowly, but not particularly surely. Initially, ICC investigators spent their time tracking down ‘Bosco’ and lobbying for his arrest with the UN peacekeeping force MONUC. But there were problems. Ocampo’s mood swung and investigators from one day to the other were to shift focus from one target to another. Bernard Lavigne, the lead-investigator later said, that after accumulating a lot of information about one militia, “suddenly, because of a political decision by Louis or his political committee, we were obliged to change our planning and our investigative work and concentrate on a new target. It was completely crazy. ... We

2705 ‘ICC Gearing up to Start Ituri Investigation’.
2706 Idem.
2707 See testimony of investigation team leader Bernard Lavigne: ICC, Lubanga Dyilo Transcript (16 November 2010).
2709 ICC, Lubanga Dyilo Transcript (16 November 2010), p. 43.
2712 HRW, Democratic Republic of the Congo and the International Criminal Court Hearing to Confirm the Charges against Thomas Lubanga Dyilo. Questions and Answers (no date).
2713 Since 12 April 2005, he was under a DRC arrest warrant, issued by the Prosecutor of the Tribunal de Grande Instance of Bunia. The arrest warrant details charges of joint criminal enterprise, arbitrary arrest, torture and complicity of assassination pursuant to Articles 156 to 158, 67, 44 and 45 of the DRC Criminal Code. ICC, PTC I, Situation in The Democratic Republic of the Congo: Decision on the Prosecutor's Application for Warrants of Arrest, Article 58 (ICC-01/04-01/07; 10 February 2006), para.34.
put in danger a lot of people.”²⁷¹⁵ Others in Ocampo’s Office, including Paul Seils, would later say the cases “barely scratched the surface of the conflict.”²⁷¹⁶ But it was exactly that very conflict that also brought along substantial hurdles for the investigators; continuing violence, no permanent office. Besides, the USA, an ICC opponent by heart at that time, restricted MONUC’s assistance to a minimum. While the security concerns dragged down the investigations, the lack of police experience affected its quality. Only two out of the twelve investigators had a police background, including Bernard Lavigne. The team’s leader testified that the others mainly included former NGO researchers, who were not up to the job. All foreigners, the enquirers were instructed to refrain from local contact with chiefs, priests or schoolteachers. It was to protect the identities of witnesses and informants, but it barred them from gaining useful ‘field knowledge’.²⁷¹⁷

More prominently, the team’s immobility obstructed their core business: collecting information and impartially verifying prospective evidence to be used in an international court of law. Instead, the Ituri investigation was outsourced. Intelligence was borrowed from the notes of MONUC police officers and NGO researchers who had previously documented human rights violations. In fact, the very first witness was heard in The Hague “through an NGO, which acted as an intermediary,”²⁷¹⁸ a modus operandi that was soon exported to Bunia. On the advice of human rights researchers, the prosecutor’s bureau commissioned locals to liaise between investigators and potential witnesses. These ‘intermediaries’ – as they were called – carried out the ICC’s essential fact-finding mandate: selecting witnesses, recording their statements and corroborating the information. An anonymous Congolese lawyer put it this way, “investigating cases of child soldiers in Ituri is like picking a ripe mango that fell at your feet. It could not be any easier.”²⁷¹⁹ This gangrenous, dragged down and long-distance OTP methodology was soon criticised by observers as being “amateurish” and “mediocre.”²⁷²⁰ Human Rights Watch at the times was concerned that the investigators efforts would never lay bare the full scope of the atrocities in Ituri, confirms the organisation’s senior Africa researcher Anneke van Woudenberg.²⁷²¹

Based on its minimalistic, delegated and selective enquiry, Ocampo requested the ICC pre-trial chamber to issue two arrest warrants. In January 2006 Ocampo accused Thomas Lubanga Dyilo and Bosco Ntaganda of what observers called a “marginal charge”; the war crimes of enlisting, conscripting and using children younger than fifteen within the ranks of the Patriotic Force for the Liberation of the Congo (FPLC), the armed wing of their Union of Congolese Patriots (UPC) political party.²⁷²² The pre-trial chamber – presided over by the internationally experienced Claude Jorda – was

²⁷¹⁵ Verini, ‘The Prosecutor and the President’.
²⁷¹⁶ Idem.
²⁷¹⁸ ICC, TCI, Prosecutor v. Thomas Lubanga Dyilo: Transcript (ICC-01/04-01/06; 16 November 2010), p. 53.
²⁷²⁰ Idem.
²⁷²¹ Author’s interview (telephone), Anneke van Woudenberg, 27 February 2014.
²⁷²² ICC, OTP, “Prosecutor’s Application for a Warrant of Arrest, Article 58 (12 January 2005).
not content with the evidence and information that Ocampo had disclosed in lieu of his application. From the rather scarce material the chamber had received, they found that Ntaganda’s was not a key actor or most responsible in the DRC situation and only approved the indictment against the more senior suspect Lubanga.2723 Ocampo then needed to move fast. He wanted to have a suspect in The Hague but he also knew that an ICC arrest warrant was no assurance for success. He had no police force to execute it himself like he had experienced in the second and more expedient case he had built in Uganda in the meantime. The five warrants levelled against the leadership of the Lord’s Resistance Army (LRA) were already vacant for eight months.2724 This time however, apprehending Lubanga – in contrast to LRA-leader Joseph Kony – was a realistic opportunity. The former UPC strongman had already been imprisoned by the local Congolese judiciary in Kinshasa on charges of genocide for almost a year and faced possible release under Congolese law.2725 But just in time on 17 March 2006, Ocampo arranged Lubanga’s handover, in an operation assisted by the Congolese authorities, the French military and the UN peacekeeping force MONUC, and he was flown to Scheveningen prison.2726

6.4 Dieumerci

The once-flamboyant rebel leader strolled into the virgin courtroom on a rainy Monday afternoon in March 2006. The ICC-debutant uncomfortably took his place behind his Belgian lawyer, put on his headphones and switched through the channels for court translations. Judge Claude Jorda then asked the accused to introduce himself. “My name is Thomas Lubanga Dyilo […] I am a politician by profession,” the tall man replied softly.2727 Throughout the next six years, he remained a silent spectator. Witnesses came and went and Lubanga attentively observed the trials and errors of his international prosecution. He had hopes of being released. It was no vain optimism. Just before the trial was finally about to start, two years after his first appearance, in July 2008, the chamber froze the proceedings and ordered Lubanga’s immediate release. The judges were dismayed. Ocampo refused to – and argued he could not – disclose to them and the defence more than 200 documents he had obtained under confidentiality agreements, including from the UN. But because some of the material was believed to contain exculpatory evidence the chamber believed in these circumstances a fair trial was impossible without them seeing it. Ocampo found a first-aid solution and the appeals chamber, through legal gymnastics, saved the prosecution from total catastrophe and ordered the trial to go forward.

2723 ICC, PTC I, Decision on the Prosecutor's Application for Warrants of Arrest, Article 58 (ICC-01/04-01/07), §87-89.
2725 On 19 March 2005, Lubanga was arrested and detained by the DRC authorities together with other leaders of Ituri-based military groups. The warrant of arrest, dated 19 March 2005, issued by the competent examining magistrate in the DRC, and the provisional detention of Thomas Lubanga Dyilo is legally based on charges of genocide pursuant to Article 164 of the DRC Military Criminal Code and crimes against humanity pursuant to Articles 166 to 169 of the same code. On 29 March 2005, the DRC authorities issued another arrest warrant against Thomas Lubanga Dyilo, alleging crimes of murder, illegal detention and torture. ICC, PTC I, Decision on the Prosecutor’s Application for Warrants of Arrest, Article 58 (ICC-01/04-01/07), §33.
2727 ICC, Lubanga Dyilo Transcript (20 March 2006), p. 3.
In the meantime, new investigations had been opened in Sudan’s Darfur Provinces (2005) and the Central African Republic, respectively on the invitations of the UN Security Council and President Francoise Bozizé. And Lubanga had received company. The alleged leaders of two former UPC enemies had joined him in Scheveningen: the Patriotic Resistance Forces of Ituri (FRPI) and the National Integrated Front (FNI). Germain Katanga was transferred from his Kinshasa prison cell in October 2007 and Mathieu Ngudjolo Chui, who had not been arrested already by the Congolese judiciary, became the ICC’s first “real” arrestee in February 2008. But Kabila’s blood rival Jean Pierre Bemba was the most senior Congolese suspect to be detained. He was arrested in Brussels in May 2008. But despite the fact that Bemba’s Movement for the Liberation of Congo (MLC) had also fought in Ituri’s bloody war, the former vice-President and senator was charged with atrocities his troops allegedly committed in neighbouring Central African Republic (CAR). Of the four Congolese suspects, Lubanga was the first in the dock.

The trial

The armed conflict in Ituri is connected with the 1994 genocide in Rwanda and the two Congo wars. All of them are rooted in history and colonisation. Let me summarise, Mr. President, some key aspects. After the genocide, hundreds of thousands of persons, including some leaders and perpetrators of mass killings, fled to Rwanda to the two Kivu provinces in the eastern part of the country then called Zaire. Some started to plan attacks against Rwanda, triggering the First Congo War, and this was in 1996. Uganda and Rwanda supported a Congolese rebel group led by Laurent-Desire Kabila against Zaire’s ruler Mobutu Sese Seko. They reached Kinshasa and ousted Mobutu in May of 1997. The second war started in 1998 after relations between Laurent-Desire Kabila, the new president, and his former allies deteriorated. Rwanda and Uganda withdrew to eastern Democratic Republic of the Congo, an area that is rich in natural resources such as gold, diamonds, coltan, timber and oil. Rwanda consolidated its presence throughout the two Kivus, and Uganda did so in large parts of Province Orientale, including Ituri. At least nine African countries and many local militias involved in those wars. From 1991 onwards, the Kivus and Ituri were under the control of a political/military movement, the Rassemblement Congolais pour la Démocratie - Mouvement pour la Libération. This is supported by Uganda and Rwanda. Close to 4 million are estimated to have died in the DRC between 61998 and 2004, in particular due to starvation and disease resulting from war. This, your Honours, is considered the highest number of civilians 8 killed as a consequence of war since the Second World War.

- Fatou Bensouda, Prosecutor

Rooted in this reading of history, the Lubanga trial started in January 2009. “Lubanga’s armed group recruited, trained and used hundreds of young children to kill, pillage and rape,” said Ocampo. “They cannot forget what they suffered.” After his brief opening statement, his passed on the torch to deputy Prosecutor Fatou Bensouda to sketch the contours and context of the case. On the second day, Ocampo was absent, leaving the trial in the hands of Bensouda. It was to the frustration of the defence, but according to the Chamber it was rather a breach of etiquette. In any case, counsels

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2 Ibidem, p. 4.
3 Ibidem.
Catherine Mabille and Jean-Marie Biju Duval (the latter was also Nahimana's lawyer at the UNICTR) were eager to enter into “an adversarial discussion before the Bench,” or order “understand what in the Prosecutor's evidence is close to the truth and what, on the contrary, is far removed from the truth.”

But the OTP narrative was soon shattered, when he called a former child soldier as his first witness. Switching between public and private sessions, it was a chaotic and dramatic scene. For the time in years, he was in the same room with ‘Papa’ Lubanga – a university-trained psychologist – who stared at him intensely from the dock. From his black office chair, the timid boy, who could not remember his date of birth, whispered that as he “gave an oath in court that I would say the truth, the whole truth, and nothing but the truth, I find myself in a delicate position to answer what you have just said.”

A thrill went through the courtroom and the witness was shortly escorted outside for the chamber to discuss what to do in a private session. Upon his return, Bensouda resumed her questioning but the boy answered that “what I said earlier was not what I intended to say. I would like to say what actually happened myself, not say what some other person intended me to say. [...] At the time there was a NGO which was helping children. My friends went there. I also went there, and they took our addresses and told us that they could help us. [...] They told me things which did not help me to remember what happened, but now that I'm here I will tell you exactly what happened.”

At that point Judge Fulford intervened: “This morning you told the Court about a time when you were going home from school when some soldiers from the UPC came and took you and your friends away. Was that story from you true or false?”

“That's not true,” replied the witness, an answer that prompted the chamber to adjourn the examination. Dubbed ‘witness 298’, the young man remained nameless.

All in all, the ICC’s first trial got off problematically. After the first testimony, the Prosecution quickly changed its order of witnesses and sparked instant delays. In order to prevent a repetition of the volatile first witness, the second witness called was a former a Rwandan-trained UPC soldier, who had seen children fight and die in active combat. Thereafter, for three stretched days, the father of the first witness took the stand. He told the court how his son was kidnapped on the way home from school by soldiers and taken to a training camp. However, with the son’s testimony in mind, Lubanga’s defence lawyers fiercely cross-examined the witness about his contacts with ICC investigators and many personal details. Himself a former bodyguard to Lubanga who had deserted the UPC, the witness became clearly agitated, dodging questions and accusing defence lawyer Marc

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2732 ICC, Lubanga Dyilo Transcript (28 January 2009), p. 35.
2733 Ibidem, pp. 40-41.
2734 Ibidem, p. 41.
2735 Idem.
2736 ICC, Lubanga Dyilo Transcript (30 January 2009); ICC, Lubanga Dyilo Transcript (3 February 2009).
2737 ICC, Lubanga Dyilo Transcript (4 February 2009).
Desalliers of “tormenting” him.\textsuperscript{2738} Days later, the judges had put up a curtain in court. It was to block any possible eye contact between Lubanga and the boy who had earlier recanted his testimony. The witness returned to the stand, now under the pseudonym ‘dieumerci’ – ‘thank god’ in French. An unswerving storyteller this time,\textsuperscript{2739} he narrated in a rapid, clear and chronological way how Lubanga’s militia had kidnapped him.\textsuperscript{2740} When the fourth witness was brought to court on the next day, Lubanga shielded his face with his hands, rose up, dried his eyes with a handkerchief and was led out of the courtroom for a moment by security guards.\textsuperscript{2741} Clearly Lubanga and the witness – who was protected under the pseudonym 41 - had known each other already for a long time. Indeed the man turned out to be a former high-ranking UPC official, who testified that Lubanga’s preferred children – some as young as 10 - as his bodyguards, because “[…] when you have a young person as your bodyguard, you look after him because you don't - he doesn't have any children or family members to look after.”\textsuperscript{2742} This practice stopped and the children were demobilised at a certain moment tough, testified the witness, “because we had had difficulties with human rights, and they were accusing us of using child soldiers.”\textsuperscript{2743}

In the subsequent week, the Prosecution took the court through several videos taken in the UPC training camps, some of those depicting young children dressed in military fatigues.\textsuperscript{2744} From 20 February onwards another 8 former Kadogo’s (Swahili for child soldiers) testified about their plight, daily lives in the UPC camps and structure of Lubanga’s organisation. Other Congolese witnesses followed, including a judge (), former UPC officials, a regional politician, a social worker and several victims. A total of 36 witnesses came to The Hague to testify until the prosecution rested its case in July 2009. Among them were three experts: an historian and two x-ray specialists.

In the ninth week of the trial, the Prosecution turned to the renowned historian of the Great Lakes Region Gérard Prunier to go through the details of origins of the ethnic conflicts in Ituri. Going into great depth, Prunier lectured the trial chamber at great length on the long and complex colonial and post-colonial history of Congo. Questioned by the chamber on the nature of the conflict, Prunier concluded that “I would like to say at the beginning it was an economic conflict and that ethnicity was instrumentalised […] as a tool to fuel the conflict. […] the blame falls on the leaders; that is, people who make use of this ethnic diversity in order to increase their political capital or to recruit soldiers

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\item ibidem, p. 44.
\item Judge Fulford at the beginning of the hearing told the boy to take his time and to “tell those of us sitting in court what happened to you […] in your own way.” ICC, Lubanga Dyilo Transcript (28 January 2009), p. 4.
\item “One day when I was coming back from school we encountered UPC soldiers. There was a large number of them. I can't tell you how many. There were five of us - or in fact six, myself and five others. There was no problem. We were just going home from school. And then in Fataki market we encountered these UPC soldiers. They stopped us and said, “You children, we're going to take you for training so that you can become soldiers and ensure the security of our country.” I said, "Listen, I'm a schoolboy, so it's difficult for me to go to the training because we're children." That soldier or those soldiers didn't want us to talk. If anybody tried to talk, they were beaten. They took us all to the training centre. The training centre was in Bule. I think that that is 7 kilometres away, but that's just an estimation. I'm not sure.” ICC, Lubanga Dyilo Transcript (10 February 2009), pp. 4– 34; 5.
\item Author’s observation, ICC, 11 February 2009.
\item ICC, Lubanga Dyilo Transcript (12 February 2009), p. 56.
\item ibidem, p. 42.
\item ibidem, p. 44.
\item ICC, Lubanga Dyilo Transcript (16 February 2009); ICC, Lubanga Dyilo Transcript (17 February 2009); ICC, Lubanga Dyilo Transcript (18 February 2009); ICC, Lubanga Dyilo Transcript (19 February 2009); ICC, Lubanga Dyilo Transcript (20 February 2009).
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because they want to attain certain political ends.\textsuperscript{2745} However, during his testimony, Prunier was not in a position to be precise, to produce tangible sources or to provide straight-forward answers. Throughout the cross-examination, he constantly reminded the court of the difficulties of conducting research in Africa, like he had done already for 39 years, and that for example “you wouldn’t find such sources anywhere, and I cannot be more reliable than the UN for the simple reason that there are a lot of things in the history of that region that you cannot elucidate […] sometimes you have to resign yourself to the fact that it’s difficult to elucidate these things and you may not know everything.”\textsuperscript{2746} The same precision was lacking also in the testimony of the prosecution’s other two expert witnesses. Discussing the x-ray images taken from the 9 former UPC child soldiers who were witnesses in the trial, radiologist Catherine Adamsbaum told the chamber that age determination “is not a totally exact science.”\textsuperscript{2747} Adamsbaum’s testimony was reinforced by her colleague, Caroline Rey-Salmon, a paediatrician and forensic doctor. She testified that the x-ray images were of relatively bad quality, only showed hard-to-interpret jawbones and that their methodology could not always produce the exact age of a person.\textsuperscript{2748} Amidst the trial and in addition to the Prosecution’s specialists, the chamber also called four experts, including Psychologist Elisabeth Schauer\textsuperscript{2749}; Special Rapporteur on the situation of human rights in the Democratic Republic of Congo Roberto Garretón\textsuperscript{2750}; UN Special Representative of the Secretary-General on Children and Armed Conflict Radhika Coomaraswamy\textsuperscript{2751}; and Congolese Historian Kambayi Bwatshia.\textsuperscript{2752} The latter’s testimony would never find it to the court’s judgement, while Garretón’s evidence was cited at length.

Within two weeks of the conclusion of the testimony of Bwatshia, it was the defence its turn. Defence counsel Catherine Mabille laid out its strategy:

There can be no true justice if the very substance of the judicial process has been vitiated. If it is gangrenous in its most fundamental aspects, how can one ensure a fair trial when such a significant part of the trial is based on fabricated evidence? How can judges carry out their role, that is to say, seeking out and establishing the truth if the testimony that they have heard are the result of concerted efforts to deceive them? Is this not a fundamental attack on the integrity of the judicial system?\textsuperscript{2753}

From 27 January 2010, the defence started presenting its counter narrative. Out of a total of 24 witnesses, the defence brought to court a range of people who told the chamber that they had never been child soldiers, that they were coached by intermediaries to produce stories that would incriminate Lubanga and that they had received money for false testimony. All these testimonies led the Trial Chamber to call to stand OTP investigators and some of their intermediaries. But during

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\item ICC, \textit{Lubanga Dyilo Transcript} (31 March 2009), p. 38.
\item Ibidem, p. 14.
\item ICC, \textit{Lubanga Dyilo Transcript} (12 May 2009), p. 80.
\item ICC, \textit{Lubanga Dyilo Transcript} (13 May 2009), pp. 26-29.
\item ICC, \textit{Lubanga Dyilo Transcript} (7 April 2009).
\item ICC, \textit{Lubanga Dyilo Transcript} (17 June 2009).
\item ICC, \textit{Lubanga Dyilo Transcript} (7 January 2010).
\item Ibidem; ICC, \textit{Lubanga Dyilo Transcript} (8 January 2010).
\item ICC, \textit{Lubanga Dyilo Transcript} (27 January 2010), p. 23.
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these hearings, in July 2010, the judges stayed the proceedings and for the second time ordered Lubanga’s release.2754 This time it was because Ocampo refused to reveal the name of an intermediary between the prosecutor’s office and Congolese witnesses. The Appeals Chamber, again, reversed the release order but rebuked Ocampo for flouting court orders.2755 On that notice the trial resumed with the testimony of two other former investigators and several intermediaries. Amidst many delays and subsequent irregularities, the trial forged on into 2011. What had been promised to be the pinnacle of international criminal justice and justice for child soldiers around the world, ended up being an anti-climax.

August 2011: closing arguments. ‘Throughout the course of this trial [...] it has been impossible for me to recognise myself within the context of the actions ascribed to me and the intentions attributed to me,’ says Lubanga.2756 It was a rare moment when he expressed his thoughts since he introduced only shortly himself to the court in 2006. But it was the 92 year-old former Nuremberg prosecutor Benjamin Ferencz who had the last words speaking on behalf of the prosecutor: ‘Let the voice and the verdict of this esteemed global court now speak for the awakened conscience of the world,’ he uttered.2757

On his right in the courtroom: Luis Moreno-Ocampo. Among the spectators in the public gallery: Angelina Jolie, who has been following the summary of the prosecution case. The heart of their scenario: ‘children need mothers, not commanders.’2758 One by one, the full prosecution team outlined why Lubanga was guilty of conscripting, enlisting, and using child soldiers during the ethnic conflict in the Ituri between 2002 and 2003. Then deputy Prosecutor Fatou Bensouda made it clear. She insisted that Lubanga’s guilt stretched beyond the courts threshold of “beyond any reasonable doubt.”2759 It is “beyond any possible doubt,” she ensured.2760 But the next day however, Defence lawyer Catherine Mabille casted overall doubts over that promise saying the Chamber must have seen this product of organised manipulation of witnesses. She pointed out the vital role intermediaries had played in finding witnesses for the prosecution. “The intermediaries knew exactly what story needed to be told,” she said, accusing them of going to Congolese towns “recruiting children, and he would tell the children what they had to say.”2761

Dressed in a white traditional babu, Lubanga sat anxious as he was listening to his judgement on 14 March 2012. But to some extent, it was also levelled against the OTP, against Ocampo who was having his last day in court before handing over the torch to his deputy, Fatou Bensouda. The British Presiding Judge, Adrian Fulford, while reading his summary, lamented the prosecution’s negligence in parts of its investigation: “A series of witnesses have been called during this trial whose evidence,
as a result of the essentially unsupervised actions of three of the principal intermediaries, cannot safely be relied on.”^{2762} The consequence of that “lack of proper oversight of the intermediaries” he further explained, “is that they were potentially able to take advantage of the witnesses they contacted.”^{2763} Therefore, the nine ‘child soldiers’ who had testified for the prosecution were found “unreliable”.^{2764} Lubanga received a very limited conviction, not on the accounts of his alleged victims and neither because he had “meant to” conscript, enlist and use boys and girls in his militia but because, the Chamber said, he “was aware that, in the ordinary course of events, this would occur.”^{2765}

Over two and a half years after he was convicted for three war crimes, the ICC’s Appeals Chamber convened on a cold Monday afternoon to rule on the appeals of the former Congolese politician-styled warlord. His trial was flawed and unfair, Lubanga had argued.^{2766} It runs contrary to the Prosecution’s appeal. They wanted his “manifestly inadequate and disproportionate” 14-year sentence raised, without explicating with how much.^{2767} It was an historic day for international justice. This was the first time the ICC signed off an appeals judgement. But interest has waned, as if the world has forgotten about Lubanga and the endemic conflicts in the east of the Democratic Republic of the Congo (DRC). Empty seats remained in the public gallery, not even half of it to be filled with court staff, a handful of devoted journalists and a single NGO observer. Lubanga himself did not invite his family for the occasion, like most other defendants would do on this type of day. Also shining in absence were his victims. The only Congolese present represent the diplomatic corps. “Is this justice seen to be done?” asked a journalist. “Come on, it is appeals,” replied another.^{2768}

And indeed, 3179 days after Lubanga was brought to The Hague, the trial that dealt with child soldiers in the mass violence that plagued the Congolese Ituri region in the early 2000s, ended with an anti-climax: a sober, legalistic and collegial review of the trial chamber’s first ever verdict and sentence.^{2769} Flanked by four colleagues, Judge Erkki Kourala monotonously read out a summary of the 193-paged appeals judgement and 50-paged sentencing judgement.^{2770} They took a distanced view; they would not assess the evidence again, but would only intervene if the “Trial Chamber’s factual findings were unreasonable.”^{2771} Then, after the chamber dismissed Lubanga’s request to consider three new pieces of evidence, the former UPC leader overheard the rulings on his seven grounds of appeal, alleging abuse of his fair trial rights, a prejudiced Prosecutor and the lack of clear facts underlying his prosecution. Point-by-point, Kourala listed how Lubanga had not substantiated or

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2763 Idem.
2765 ICC, Lubanga Dyilo Judgement.
2766 ICC, AC, Situation: Democratic Republic of the Congo. In the case of The Prosecutor v. Thomas Lubanga Dyilo: Mr Thomas Lubanga’s appellate brief against the 14 March 2012 Judgment pursuant to Article 74 of the Statute (ICC-01/04-01/06; 3 December 2012).
2769 ICC, Lubanga Dyilo Appeals Judgement.
2770 ICC, AC, Lubanga Dyilo Appeals Judgement.
2771 ICC, Lubanga Dyilo Appeals Judgement, §56.
sufficiently argued his complaints, only to rule that the trial chamber had not acted beyond the limits of its discretion and that its findings were “not unreasonable.”

All grounds of appeals were rejected, including those of the Prosecution, and the verdict and sentence rubber-stamped, but only by majority. Judge Sang-Hyun Song only disagreed “partly” with his colleagues, on a legal note. According to the ICC’s President, Lubanga should have been convicted and sentenced for one crime of child soldiering and not separately for three ways of committing it [conscripting, enlisting and using children].

Only the Latvian judge dissented from the majority on fundamental grounds.

If it was up to Judge Anita Ušacka, Lubanga should not have been convicted at all. “In my view the evidence relied upon by the trial chamber to convict Lubanga was not sufficient to reach the threshold of beyond any reasonable doubt,” she explained. “In practice they have applied a lower standard,” because, according to Ušacka, “the trial chamber was motivated more by the desire to create a record of events, rather than to determine the guilt of [the] individual to the standard applicable in criminal proceedings.” On that note, she expressed her hope “that future prosecutions of these crimes at the Court will adduce direct and more convincing evidence and preserve the fairness of proceedings, which lies at the heart of criminal prosecutions and should not be sacrificed in favour of putting historical events on the record.”

Ušacka’s dissent was a sharp indictment against the court’s fact-ascertainment dilemmas. She highlighted two well-known deficiencies in this case: insufficiently detailed charges and the absence of the requisite element of crimes. Regarding the indictment, she said it was mainly based on testimony of nine alleged child soldiers – whose testimony was found to be erratic – but that the “remainder of the allegations regarding a pattern of crime did not contain reference to a single identified victim, while the dates and locations were framed in unacceptably broad terms.” For five years, Lubanga had “no meaningful opportunity to challenge the evidence at trial” which was based on these nine individual cases, “yet he was ultimately convicted of the unspecific charges of a pattern of crime.” This approach has broader implications warned Ušacka, as “ultimately, even the factual conclusions of the Trial Chamber suffered from the same level of imprecision.” On a similar level, Judge Ušacka, considered “that the evidence in this case was, in particular, not sufficient to establish that at least some of children in the UPC/FPLC were under the age of fifteen.” She lamented the Trial Chamber’s cautious approach, saying that “estimating the age of individual based solely on his or her physical appearance is very complex and prone to error, even when scientific methods are

\(2772\) ICC, AC, Lubanga Dyilo Transcript (1 December 2014).
\(2773\) Ibidem, p. 15.
\(2774\) ICC, AC, Lubanga Dyilo Appeals Judgement.
\(2775\) Ibidem.
\(2776\) Ibidem, p. 16.
During trial, she explained, the three judges relied on age estimates given by lay witnesses, who often offered no explanations as to how they knew the age of children. Regarding video evidence, the Trial Chamber simply “found that the images spoke for themselves” while according to Ušacka, the children “are frequently only partly visible and their sizes are unclear in the absence of any objective comparator.”

Ušacka reminded the court of a trial-featured evidentiary video excerpt of a boy playing with an insect, which in her view was “by far the strongest in terms of quality of the lighting, the clarity of the image and the close range of relevant individual.” But after the March 2012 judgement, Lubanga’s defence team had located the boy, named Mbogo Malobi Augustin (a.k.a. Witness D-0040), and called him to testify during the appeals hearings in May 2014 where he indicated his “date of birth is 8 April 1983.” So in fact he was aged between 19 and 20 years at time that the video was filmed. Another similar defence witness, Kpadhigo Logo Justin Nembe a.k.a. Witness D-0041), also testified and said he “was born in 1984 on 2 December” and thus was between the age of seventeen and eighteen when filmed. In Ušacka’s view “in light of the overall weakness of the evidence establishing that some children were under the age of fifteen, the submitted additional evidence in relation to Witnesses D-0040 and D-0041 clearly has the potential to demonstrate that the approach of the Trial Chamber was flawed and thereby have an impact on conviction.” She hence strongly disagreed with the majority of the Appeals Chamber who dismissed the additional evidence only by saying “Lubanga could have presented this evidence at trial and is therefore not persuaded by his arguments as to why he failed to do so.”

With Lubanga’s appeals conviction, the feeble record of what occurred in Congo is now definite, as the majority of an appeals chamber who deemed it “not unreasonable” endorsed it. It is a dry, factual and peripheral account of what transpired in Congo’s Ituri Province between May 1997 and August 2002. Based on the Chamber’s expert Roberto Garretón, Prosecution’s expert historian Gérard Prunier, who “had addressed the DRC’s colonial past in considerable detail,” the court’s factual overview of the background to the conflict in Ituri is summarised in just 8 pages. It is at least an abridged historical record. Ušacka’s dissent, however, will soon become a footnote in the ICC’s final trial record. Moreover, it leaves a rather dubious stain on the “beyond any reasonable doubt” standard applied in international criminal trials: one doubtful judge in a panel of five seems not to be reasonable enough to question the veracity of the evidence leading to convictions. Meanwhile, the OTP has had time to rethink its selection strategy and its investigative methodologies.

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Idem. 2782 Idem. 2783 ICC, AC, Lubanga Dyilo Transcript (1 December 2014), p. 17. 2784 Ibidem, p. 17. 2785 Ibidem, p. 17. 2786 ICC, AC, Lubanga Dyilo Transcript (19 May 2014), p. 7. 2787 Ibidem, p. 29. 2788 Ibidem, p. 27. 2789 ICC, AC, Lubanga Dyilo: Dissenting opinion of Judge Anita Ušacka, p. 27. 2790 ICC, AC, Lubanga Dyilo Transcript (1 December 2014), p. 5. 2791 The Judges in this respect were of the opinion that “Regardless of whether the origins of the conflict the Chamber is concerned with are to be found in that history, it is essentially too remote to be of direct relevance to the present charges.” ICC, Lubanga Dyilo Judgement, §70. 2792 ICC, Lubanga Dyilo Judgment, pp. 41-49.
in the African case-files that have been piling up (now also including Kenya, Libya, Côte d’Ivoire and Mali). Human Rights Watch called upon the office to look into his “unfinished business.” But in spite of that, sources in Bunia reported that after Lubanga’s ‘partner in crime’ Ntaganda handed himself over, OTP investigators retreated to old ‘best practices’. Again, intermediaries were looking for witnesses in the field and the investigators would interview them in groups in a hotel in Bunia. Are the lessons from the past so hard to learn from? Or was the Ituri investigation poised so badly that the antidote cannot be found.

6.5 Bogoro

Although the Ituri trials were problematic, they at least tried to pursue more parties to the conflict. Only four months after they closed their evidence in the Lubanga case, Ocampo and his deputy Bensouda rushed to Trial Chamber II to present evidence in the trial against Lubanga’s former enemies, in what became the ICC’s first murder trial. Katanga and Ngudjolo were tried together, for the alleged mass murder of 200 civilians. Back on 24 January 2002, their shared “plan was to wipe out Bogoro,” not only destroying Lubanga’s UPC camp “but the whole civilian village,” said Ocampo in his opening statement. “This is the plan and this is the position of the prosecutor’s office.” But with the uncertain start of Lubanga’s trial in mind, the judges in this case vigilantly selected the first witness themselves: the head of the team that had investigated the Bogoro case since May 2006. The chamber questioned her about their investigative methodologies: “Could you tell us how you assess the objectivity and credibility of intermediaries?” Presiding Judge Bruno Cotte asked. “I think it is an important question.” It was a query that poured salt in an open wound.

A highly anticipated judgement illustrated the OTP's shortcomings. “Declaring that an accused person is not guilty does not necessarily mean that the Chamber has been convinced of the person’s innocence.” A week before Christmas 2012, Judge Cotte elucidated that “such a decision merely shows that the evidence adduced is insufficient to convince the Chamber beyond all reasonable doubt.” His carefully chosen words were the pretext of what many observers on the public gallery were expecting: the acquittal and release of Mathieu Ngudjolo Chui. The prosecution had alleged that ‘chief rebel commander’-turned-nurse Ngudjolo – had intended and planned to “wipe out Bogoro” during an attack that killed around 200 civilians in Bogoro, a village on the shores of Lake Albert some 23 kilometres away from Bunia. Out of a total of 54, the OTP relied heavily on three “key” witnesses who had themselves being taken part in the attack. The prosecutor ensured they

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2791 Evans, Unfinished Business.
2792 Author’s interview (email), ICC investigator, 12 February 2014.
2795 Ibidem, p. 23.
2796 Ibidem, p. 37.
2797 Ibidem, p. 23.
had “testified as best they could and in light of their own personal situations.” 2800 But for the Chamber “their remarks were too contradictory or too hazy, too imprecise […] to base itself on.” 2801 Again, ICC judges – although Adrian Fulford was more explicit than Bruno Cotte – levelled an indictment against the quality and credibility of the OTP’s evidence.

Ngudjolo, since his acquittal was upheld, 2802 was sent back to Kinshasa a free man after his application for political asylum in The Netherlands was rejected. 2803 Meanwhile, his former co-accused Germain Katanga was found guilty by the same judges and based on the same evidence. 2804 But the outcome in his case was very controversial. In his case, the judges – with Christine van den Wyngaert dissenting “in the strongest possible terms” 2805 - when they separated the two cases, experimented with an extraordinary power they have under the court’s rules: the so-called Regulation 55, in legal parlance. 2806 In its final considerations, the bench changed the contours of the jigsaw puzzle, in order to fit in the pieces at hand. In other words, after the trial has finished they allowed themselves to alter the charges and case narrative according to the evidence. 2807 In Lubanga’s case the chamber likewise decided that Ituri was a national conflict in contrast to the OTP’s version that it was international, thereby unilaterally dissenting historiography. 2808 It goes further in Katanga’s case: he was only officially informed about the exact nature of the charges on which he was found guilty at the day of his judgement. Has the balance of power shifted from the Prosecution to the Judges and have the judges taken over the role of the prosecutor? 2809 On the surface, it appears so. At least to the point where some judges have favoured an inquisitorial approach (in which they are the “ultimate guarantor of the trial achieving objectified goals of truth and justice”) over the adversarial approach (in which the “judge is an observer and umpire”). 2810

This was particularly the case in the Ngudjolo and Katanga trials, where the judges have been actively part of the Bogoro investigation. Why? First of all, it may depend on the judges’ character,
culture and legal background. Agency is thus a critical factor in the management and outcomes of international criminal trials. But there is more. In some cases, judges are in need to review the evidence beyond the scope of having it served on a platter by the Prosecutor. This was the case for Trial Chamber II. Like in Lubanga, the Ngudjolo and Katanga case was based on “witness statements and reports by MONUC investigators or representatives of various NGOs,” while OTP investigators had never even travelled to the home-villages of the accused or places where preparations for the very attack allegedly took place. A forensic investigation in Bogoro was only concluded in late March 2009, six years after the massacre. But its findings were filed too late and lacked “probative value,” the Chamber ruled. Although the chamber acknowledged that the OTP “would have encountered difficulties in locating witnesses with sufficiently accurate recollections of the facts and able to testify without fear, as well as in the collection of reliable documentary evidence necessary for determining the truth in the absence of infrastructure, archives and publicly available information” that “in all probability, the Prosecution’s [case] would have benefitted from a more thorough investigation of these issues, which would have resulted in a more nuanced interpretation of certain facts, a more accurate interpretation of some of the testimonies taken and, again, an amelioration of the criteria used by the Chamber to assess the credibility of various witnesses.” It was against this background that at the end of the trial in January 2012 – when Ngudjolo and Katanga were still believed to have acted together – the entire Trial Chamber travelled to the Iturian towns of Bogoro, Aveba, Zumbe and Kambutso. They visited the alleged crime scenes and the accused and some witnesses’ home villages. Bruno Cotte, Fatoumata Dembele Diarra and Christine Van Den Wyngaert found it essential to “make their own findings and verify various witness accounts.”

Perhaps, this was an even a more critical stance and act than Fulford’s slap on the wrist wrapped in almost 160 pages of the Lubanga judgement. But more so, they did not want to judge the case file from an armchair in The Hague. “It was important for us to go to these places in order to see where the events took place, and to see, with our own eyes, places from the testimonies of some of the witnesses,” said Presiding Judge Cotte. To see is to believe seemed to be their adage.

It is partly from that experience that the majority of the chamber – with Belgian Judge Christine van Den Wyngaert strongly worrying about Katanga’s fair trial rights – ‘re-characterised’ the charges versus Katanga. But they were partly also tempted to do so on the account of his own

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2811 ICC, TCII, Situation in the Democratic Republic of the Congo in the Case of The Prosecutor v. Matthieu Ngudjolo Chui: Judgement pursuant to article 74 of the Statute (ICC-01/04-02/12; 18 December), §117.
2812 ICC, TCII, Situation in the Democratic Republic of the Congo in the Case of The Prosecutor v. Germain Katanga and Matthieu Ngudjolo Chui: Decision on the disclosure of evidentiary material relating to the Prosecutor’s sit visit to Bogoro on 28, 29 and 31 March 2009 (ICC-01/04-01/07-1305, 1345, 1360, 1401, 1412 and 1456 (ICC-01/04-01/07; 9 October 2009).
2813 ICC, Decision on the disclosure of evidentiary material relating to the Prosecutor’s sit visit to Bogoro on 28, 29 and 31 March 2009. 
2814 ICC, Ngudjolo Chui: Judgement, §115-123.
2816 ICC, Site visit in the DRC - ICC Trial Chamber II, January 2012 (video-report: https://www.youtube.com/watch?v=9UXgSE65Sel, visited: 16 December 2015).
2817 ICC, Site visit in the DRC.
2818 “Aside from the opportunity thus afforded to the Chamber to gain a better understanding of the context of the events before it for determination, the main purpose of the site visit was to enable the Chamber to conduct the requisite verifications in situ of specific points and to evaluate the environment and geography of locations mentioned by witnesses and the Accused persons.” See: ICC, Katanga Judgment, §106-108.
testimony. What had happened? The OTP’s original case-theory and charge is that Katanga – jointly with Ngudjolo – indirectly co-perpetrated – using their militiamen and children – crimes in order to carry out their “common plan” to “wipe out Bogoro.” But in his defence Katanga testified under oath that on the eve of the Bogoro attack he simply was a “coordinator” in Aveba, serving as a “mediator between the soldiers in the camp and the people in the town.” In this light, applying Regulation 55, the judges, by majority, found him guilty as an “accessory” to crimes against humanity and war crimes. Judge Cotte said that the Chamber found that the evidence before it “as a whole establish beyond reasonable doubt that Germain Katanga’s contribution to the crimes of murder, attack against the civilian population, destruction and pillaging committed in Bogoro on 24 February 2003 was significant and made in the knowledge of the intention of the group to commit the crimes.”

Katanga did not appeal his conviction – and was brought before the Congolese judiciary for a range of other crimes against humanity and therefore the ‘Bogoro dossier’ came to a close. But it does not put a lid on the Pandora’s Box in Congo altogether. Although he was being tried for crimes in the Central African Republic, Bemba’s three-year trial entered in an equally – arguably even worse - limbo. In November 2013, after his defence had heard its last witness testimonies on the substance of the case, the OTP arrested Bemba in his cell along his lead lawyer, his case manager, a defence witness and a Congolese parliamentarian. Prosecutors had been tapping their phones and emails to find out that Bemba allegedly “engaged in a scheme to corruptly influence witnesses, to bribe them, to encourage or induce their false testimony, to coach their evidence illicitly and to present that false evidence to a Chamber of this Court.” With almost the complete defence team on trial for contempt of court as well as their defence strategy tapped by the OTP, the entire trial entered in an unprecedented evidentiary stalemate and the defence has called his prosecution a mistrial. A cure has not yet been found.

2821 In her dissenting opinion, Judge Van den Wyngaert challenged the change in the characterisation rendered the trial unfair and breached the rights of the Defence, as it did not receive proper notification of the new charges and was not afforded a reasonable opportunity to conduct investigations in order to mount a defence against them. Judge Van den Wyngaert maintained that there was no basis in the evidence for findings beyond reasonable doubt which can be relied on to establish Germain Katanga’s guilt. ICC, Katanga: Minority Opinion of Judge Christine Van den Wyngaert.
2822 The Chamber found that Mr Katanga was the intermediary of choice between the weapons and ammunition suppliers and those who physically committed the crimes using those munitions in Bogoro. He contributed to reinforcing the strike capability of the Ngiti militia to avail itself of logistical means which it did not possess enabling it to operate in an organised and efficient manner. His involvement allowed the militia to avail itself of logistical means which it did not possess enabling it to secure military superiority over its adversary. However, the Chamber dismissed the mode of liability, as principal perpetrator, applied to Germain Katanga, since it was not proven beyond reasonable doubt that Germain Katanga’s contribution to the crimes of murder, attack against the civilian population, destruction and pillaging committed in Bogoro on 24 February 2003 was significant and made in the knowledge of the intention of the group to commit the crimes.
2824 In her dissenting opinion, Judge Van den Wyngaert challenged the change in the characterisation rendered the trial unfair and breached the rights of the Defence, as it did not receive proper notification of the new charges and was not afforded a reasonable opportunity to conduct investigations in order to mount a defence against them. Judge Van den Wyngaert maintained that there was no basis in the evidence for findings beyond reasonable doubt which can be relied on to establish Germain Katanga’s guilt. ICC, Katanga: Minority Opinion of Judge Christine Van den Wyngaert.

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6.6 “Terminator Tango”

Land, your Honours, was a contested issue in Ituri. Beginning in 1999, ethnic tensions between the Hema and the Lendu and competition for land and resources escalated and turned violent. In a bid to gain territory, each side deliberately targeted the civilians of the other side.

- Nicole Samson, Prosecutor

Bosco was someone who would kill people easily; he was a nasty man. In the chain of command, I think he was the third person after Lubanga and Kisembo, the third highest-ranking person. He would kill people very easily. For example, if a soldier killed another soldier, he would be killed.

- ‘Dieumerci’, Witness

The very first witness in the first Ituri trial of Lubanga talked about one of the ICC’s key suspects: Bosco Ntaganda. Many other witnesses followed and in the video’s shown during the Lubanga trial he was seen quite some times, dressed in a purple dress and talking to his forces. For several years, the 42-year old Rwandan-born Tutsi military man spent most his days fighting as a soldier in Congo, defying the ICC arrest warrant against him. After chasing Ntaganda since 2004, his case file “had effectively been dormant for this many years. But all of a sudden, amidst the pandemonium in the Congo proceedings, there was a surprise in 2013. And there he was, out of the blue, knocking on the doors of the USA embassy in Kigali, Rwanda. Quickly – with the smooth assistance of Dutch authorities – he was flown to The Hague. But it was hectic there. Three Kenyans – President Uhuru Kenyatta, his Deputy William Ruto and former radio host Joshua Sang were putting up strong defences at the court and the OTP was trying to keep its head above water as it was losing its prospected witnesses against the Kenyan threesome. In that situation, Ntaganda’s unexpected appearance was perhaps more an inconvenience than a present. Investigators had to go back to Ituri to trace down the old case witnesses and find new ones to support the additional charges Bensouda had levelled against him in 2012, while preparing for a trial.

After renewed investigations, that delayed most of the proceedings, Prosecutor Bensouda returned to court and told the pre-trial chamber that “Bosco Ntaganda, a notorious commander known as "The Terminator" is here before you because of his role in pursuing a campaign of violence and

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2829 ICC, Lubanga Dyilo Transcript (10 February 2009), p. 20.
2830 Ntaganda had long military career, since he was 17 years old, and was trained by Ugandan Rwandan military experts. Amongst other things, he fought with the Rwandan Patriotic Army (RPA) that stopped the genocide and captured power in 1994, before joining a range of Congolese rebel groups. After deserting from the FPLC and the Congolese army, Ntaganda commanded the National Congress for the Defence of the People (CNDP) and the March 23 Movement (or M23). See Jason Stearns, ‘Strongman of the Eastern DRC. A Profile of General Bosco Ntaganda’, Rift Valley Institute Briefing (12 March 2013). Other personal details, to which he testified himself, can be traced in some trial transcripts: ICC, PTCII, Prosecutor v. Bosco Ntaganda: Transcript (ICC-01/04-02/06; 26 March 2013) pp. 5-6; ICC, Ntaganda Transcript (22 June 2016), ICC, Ntaganda Transcript (3 September 2015), pp. 74-75.
terror against civilians and children." Almost two years later, twelve years after the events and 9 years after he was indicted, Ntaganda finally went to trial on 2 September 2015. It was a highly anticipated trial, not just due to the gravity and number of crimes he is accused of but also because after he was indicted he lived openly in eastern Congo and allegedly continued to commit crimes. It was riddled with controversies and allegations against him of witness tampering, prompting the former rebel leader to go on hunger strike and boycott the proceedings. From its advent, it has already showed it was problematically complicated and likely poised by the poor investigations and strategies in the other Congo trials. In any case, his trial will be the last to deal with Ituri, closing the troubled chapter.

At the start of the trial, with her idiosyncratic and potent voice, ICC Chief Prosecutor Fatou Bensouda outlined the crux to the trial:

This trial is about Bosco Ntaganda’s responsibility for the murder and attempted murder, persecution, forcible transfer, rape, sexual slavery, destruction of property, pillage, attacks against civilians and against protected objects committed against Lendu, Ngiti and other non-Hema civilians [...] and for the recruitment, use, rape and sexual slavery of children who were under 15 years of age. This case is about the violence that decimated Ituri, leaving hundreds of civilians dead, thousands living in the forest with nothing and a population devastated by sexual violence.

Positioned on the other side of the courtroom, was Ntaganda. Also dubbed in popular media and NGO reports as Terminator Tango, Ntaganda attentively listened to Bensouda’s allegations that “he and other UPC leaders, including Thomas Lubanga and Floribert Kisembo, united in a plan to control Ituri and they systematically expanded their power in the region.” Ntaganda served as the deputy chief of staff of the Patriotic Forces for the Liberation of Congo (FPLC), the armed wing of the Union of Congolese Patriots (UPC) headed by Lubanga. Their common rationale was, according to the Gambian Prosecutor, military and political reach as well as enormous economic power to the benefit the Hema community. What they unleashed was a bloody campaign of ethnic cleansing, implied Bensouda: “The Lendu, Ngiti and non-Iturian civilian population who occupied desirable land stood...
in the way of this plan. Bosco Ntaganda and those who joined him sought to drive out the population to gain control of the territory, and he ensured that they could not and did not return.²⁸⁴³

Like in any other atrocity trial before international courts and tribunals, Ntaganda’s account of events is diametrically opposed to the one progressed by the prosecution. “I have been described as The Terminator, as an infamous killer, but that is not me,” he told the judges.²⁸⁴⁴ In almost inaudible Kinyarwanda, through interpreters though, he whispered that he “had that reputation not because I did any such thing, but it was because of the hatred against Rwandans. […] I am not ashamed to tell you that I fought in many war fronts in Congo in 2002 and 2003 and, more specifically, in Ituri.”²⁸⁴⁵ Yet he was never part of the plan as described by Bensouda, he explained the court. Instead, he highlighted that the ethnic conflict in Ituri was initiated by the Congolese government in August 1998 with an announcement to kill all the Tutsis or those who looked like them. “It is for this reason that I joined the UPC whose objective was to restore security and protect civilians,” Ntaganda held.²⁸⁴⁶ Was Ntaganda a revolutionary rebel who fought for and not against civilians or was he a cold-blooded warlord who killed at will to enrich himself? How to diverge between the two versions of events, which took place more than a decade ago somewhere in the inhospitable Congo? Imaginably, making sense of what happened there and then and with what intention poses a huge challenge to the mixed panel of three judges from complete different historical, social and cultural backgrounds in the Czech Republic, Japan and Korea.²⁸⁴⁷

But that is not all. At its base, the ICC’s Congo ‘dossier’ is a Pandora’s Box similar to the Rwanda-cases at the UNICTR and prosecutions at the SCSL. Not much has changed. Like in Rwanda, Sierra Leone and other atrocity cases relating to Africa, the evidentiary foundations in Ntaganda’s case are mostly embedded in witness testimony.²⁸⁴⁸ After Bensouda had opened the case, her senior trial lawyer, Nicole Samson – who had also litigated in the other two Congo cases - addressed the base of the case and the nature of the evidence. She told the judges they were going to:

hear from over 80 witnesses, including insiders who worked directly with Commander Ntaganda. […] You will hear from representatives of international organisations who documented events and tried to address the commission of crimes with the UPC president and his staff to no avail. And you will hear accounts of the crimes from many of the victims themselves. […] The Prosecution will also call a number of experts on matters such as the context of the armed conflict, the impact of trauma to a witness's account, the phenomena of sexual violence and children in armed conflict, satellite imagery analysis and exhumations.”²⁸⁴⁹

Thus, from the beginning, the ICC trials expose all the complications and virtual inabilities of the

²⁸⁴⁴ ICC, Ntaganda Transcript (3 September 2015), p. 74.
²⁸⁴⁵ Ibidem.
²⁸⁴⁶ Ibidem.
²⁸⁴⁷ Respectively Presiding Judge Robert Fremr, Judge Kuniko Ozaki and Judge Chang-ho Chung.
²⁸⁴⁸ Author’s observations of the trial.
international justice enterprise to dig up the truth and ascertain even basic facts in non-documentary contexts. As in the Ntaganda trial witnesses would make the case, including testimony from experts on context already heard in another trial, and a Congolese historian. Aside from this testimonial material, more general information would also be tendered, mostly in the shape of contemporaneous reports of the United Nations and non-governmental organisations as well as from local media coverage of events. Yet, in seeking to put more matter to the case, the prosecution promised to also tender tangible evidence in the form of documents. Samson was keen to inform that “some of the evidence in this case, your Honours, will come from the contemporaneous records of the group itself: Bosco Ntaganda’s own radio communications logbook; official UPC documents such as internal reports, requests, orders, letters, decrees and statutes; photographs; videos of training camps where children under the age of 15 were being trained; and videos taken shortly before and after UPC attacks.” Ntaganda’s own handwritten radio communications logbook, she opted, “attests to Commander Ntaganda's prominent position in the UPC/FPLC.”

Introducing this documentary evidence seemed promising, however, from the beginning of the trial the prosecution returned to the old habit of calling witnesses, immediately faced the consequent challenges and fell back to conducting what was supposed to be a public trial in closed sessions with anonymous witnesses. As a result, only bits and pieces of the evidence and cross-examinations made it to the outside world. Public scrutiny of fact and witness credibility is obscured, very similar to the modus operandi at the UNICTR. For example, the first protected witness code-named DRC-OTP-P-0805 – a Lendu victim who used to be business man but became farmer described ethnic massacres to the judges but was mostly heard in private session. Already on his second day of testimony, problems arose. DRC-OTP-P-0805 had also applied to participate in the trial as a victim. In that application he had said UPC fighters had burned down his house while in his trial testimony he had said his house “had had its metal sheeting roof removed.” Explaining the inconsistency, the witness said he had signed a victim’s participation request he had not filled in himself and had no opportunity to read it over. According to the farmer, the intermediary had made an error: “the person who prepared this document made a mistake because in actual fact my house was not burnt down. The roof was taken off it.” After a short hiatus in the proceedings, some UPC

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2850 Former Special Rapporteur for the United Nations Commission for Human Rights on human rights in the Democratic Republic of the Congo (DRC) Roberto Garrettón. The Chilean lawyer only testified for an hour in the Ntaganda case and most of his other evidence that he gave in the trial against Lubanga was admitted. ICC, Ntaganda Transcript (25 September 2015); ICC, TCVI, Situation: Democratic Republic of the Congo. In the case of The Prosecutor v. Bosco Ntaganda: Preliminary ruling on Prosecution application under Rule 68.3(f) of the Rules for admission of prior recorded testimony of Witness P-0931 (ICC-01/04-02/06; 21 September 2015).
2851 Dr. Kambayi Bwatshia. ICC, TCVI, Situation: Democratic Republic of the Congo. In the case of The Prosecutor v. Bosco Ntaganda: Prosecution’s list of expert witnesses and request pursuant to regulation 35 to vary the time limit for disclosure of the report of one expert witness (ICC-01/04-02/06, 16 April 2015).
2853 Ibidem.
2854 Ibidem.
2855 Interestingly, he made the impression that he was a professional witness: “Q. So what is your ethnic origin? A. I am a Lendu person. Q. And in general terms, what is your present occupation? A. Right now I am a witness. Q. And what do you do for a living, sir? A. Before I had a number of business activities, but now I am working as a farmer.” ICC, Ntaganda Transcript (15 September 2015), p. 28.
2856 ICC, Ntaganda Transcript (15 September 2015).
2857 ICC, Ntaganda Transcript (15 September 2015).
2858 Ibidem, p. 50.

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insiders testified, but again, mostly in closed session. By November 2015, the trial became a déjà vu, resembling problems from the ICC’s first trial, against Lubanga. In the courtroom an alleged former child soldier – whose March 2009 testimony in Lubanga’s trial had raised credibility issues - was physically shielded from Ntaganda. This time however, she consistently failed to answer the prosecution’s question, failing to remember anything about the Ntaganda giving her uniforms and a weapon, the names of villages where she fought, or the ethnic communities that lived in the villages where she fought. Ntaganda’s lawyers were quick to respond and charged that the witness’ had made new claims to regain victim’s status and implied her testimony was motivated by personal gain and sought to impeach her. While the matter will in the end be judged by the trial chamber, the trial continued at the time of writing, including with the testimony of Human Rights Watch researcher Anneke van Woudenberg, the author of a report that served as a driver behind the prosecution’s case. Judge Fremr, however, had reservations to admitting her report into evidence and that the chamber would “exercise really high caution in relation to this document because in fact it's mainly based on anonymous sources. And as we already expressed in I would say similar case concerning the previous similar witness, we really see very low relevance on this kind of information coming from that kind of sources.”

What appears is a repetition of moves, inherited from the earlier Congo trials that were marred by controversies over the use of human rights reports, the reliability and credibility of witnesses that were produced in a most troublesome and delegated investigation. In fact, there are striking analogies to the UNICTR and SCSL. The practices at those courts, which often were carried out by the very same investigators, prosecutors, lawyers and judges, simply trickled down to the ICC. In terms of the Congo trials, however, it may not end with Ntaganda. One Congolese suspect remains at large, somewhere in the Kivu Provinces where the prosecution had also opened investigations. Supreme commander Sylvestre Mudacumura is wanted for a campaign of violence by his Hutu militia, the Democratic Forces for the Liberation of Rwanda (FDLR). These remnants of army soldiers and militiamen that had spearheaded the genocide in Rwanda in 1994, had this time carried out attacks against civilians during an upheaval in the Kivu wars between January 2009 and September 2010. Fighting the FDLR, Ntaganda was also implicated in atrocities in Kivu since he had left Ituri in 2005, particularly in Laurent Nkunda’s CNDP and more recently the M23. But again, due

2859 ICC, Ntaganda Transcript (20 September 2015); ICC, Ntaganda Transcript (21 September 2015); ICC, Ntaganda Transcript (25 September 2015); ICC, Ntaganda Transcript (19 October 2015).
2860 In the Lubanga judgment, judges found that they could not rely on “many aspects” of Witness P-010’s testimony due to contradictions between her testimony and documentary evidence regarding her age at the time of the events. They consequently withdrew her status as a victim participating in the Lubanga trial.
2861 ICC, Lubanga Dyilo Transcript (10 November 2015).
2862 ICC, Lubanga Dyilo Transcript (16 November 2015).
2863 ICC, Lubanga Dyilo Transcript (17 November 2010), p. 47.
2864 Bernard Lavigne, the lead investigator in Ituri testified in the Lubanga trial about the work of HRW and other organisations: “On the fact that humanitarian groups are lousy investigators, I will not go that far. However, one must concede that the procedure of investigation of humanitarian groups, in my opinion, is more a sort of a general journalism rather than legal type activities of investigators.” ICC, Ntaganda Transcript (22 June 2016); ICC, Ntaganda Transcript (23 June 2016).
2865 ICC, Ntaganda Transcript (22 June 2016), p. 58.
to the selective prosecution strategy – small yet illustrative and easy to prove crimes – he was not charged for any of those alleged actions. But the reasoning behind that may also be that like in Ituri, conducting investigations in Kivu were considered even more dangerous and problematic. But again, the Kivu-probe also proved to be minimalistic. That fact was painfully illustrated when the ICC had to release Callixte Mbarushimana in 2011, another Rwandan-born suspect. The prosecution did not make it through the test of the confirmation of charges hearings in the case of the Executive Secretary of the FDLR. Their case was almost exclusively built on NGO and UN reports, barely on its own investigations on the ground, if any. In his case, the chamber issued a damning decision citing “inconsistencies”, “lack of independent corroborating evidence” and “assumptions” from third parties. The Rwandan was set free and returned to Paris. Where the ICC has so far failed to deal with the Kivus, a German court has already been more successful in trying FDLR crimes. In November 2015, Mbarushimana’s alleged henchmen, Ignace Murwanashyaka and Straton Musoni, were convicted for international crimes in Stuttgart under the principal of universal jurisdiction. Justice seems be operating elsewhere than in The Hague. Earlier in 2015, in Goma, even the US war crimes diplomat Stephen Rapp reintroduced the idea of a ‘specialised’ Tribunal for Congo with Congolese and international judges.

These alternatives are the implicit antidote to the poised legacy of the ICC’s escapade in Congo. Ituri was the false start of the permanent court that ought to punish and deter mass atrocity. It seemed attractive but soon headed towards disaster. This dramatic course has already infected other cases in The Hague, to an extent that warrants alarm. Its most high-level cases are in jeopardy, particularly because of the troubled OTP’s investigative and prosecutorial workflow and evidentiary challenges. Meanwhile, we witnessed the first trial to collapse before it even started. Kenyatta walked free because the prosecutor lost almost half of her witnesses. In his case, the evidence disappeared like snow before the sun.

6.7 ‘Simply an account’

In all the Congo cases, whether during the investigations, pre-trial phase or the trial, concerns have been raised with regards to what extent the Office of The Prosecutor (OTP) was able to collect sufficient and good quality evidence to support the specific charges as well as contextual elements. Therefore, it is crucial to understand, at minimum, what the prosecutor’s tasks are and what policy decisions have been made so far, particularly in relation to truth seeking and fact ascertainment. At the core, the Rome Statute places the evidentiary burden on the Prosecutor. What is special here and in comparison with the UNICTR and SCSL is that the ICC Prosecutor has the obligation - under

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2868 ICC, PTCI, Situation in the Democratic Republic of the Congo. In the case of the Prosecutor v. Callixte Mbarushimana: Decision on the confirmation of charges (ICC-01/04-01/10; 16 December 2011).
2869 ‘Germany finds Rwandan rebel leaders guilty of war crimes’, Deutsche Welle, 28 September 2015.
Article 54(1)(a) of the Rome Statute - to thoroughly investigate both incriminating and exonerating circumstances equally. In fact, the Prosecutor has to collect materials à charge and à decharge. So far, the Prosecutor has had a difficult time complying with this dual obligation, which is not much of a surprise, and some practitioners have suggested that the defence is in a far better position to search for exonerating evidence than the Prosecutor. For reasons of limited space, this dissertation will not further elaborate on this debate. Within the scope of this research it is suffice to remark that at the ICC, like at the UNICTR and SCSL, the prosecutor is required to establish the truth. In the specific cases at the international courts, witnesses are to tell the truth and nothing but the truth, while deliberate lying is punishable.

When it comes to extra-legal ambitions, the ICC, like the UNICTR and SCSL, was not given an historical mandate, yet the subsequent ICC prosecutors have stressed that they want to give the victims a voice. In The Hague, the first prosecutor reiterated he had no desire to work on historical records about the conflicts he dealt with. According to Moreno-Ocampo, his mandate did not include “the production of comprehensive historical records for a given conflict.” Instead, the prosecutor opted to select a limited number of incidents to provide a sample that is reflective of the gravest incidents and the main types of victimization. Subsequently, he put this vision into practice. In fact, investigators reported that Moreno-Ocampo seemed to see his “shadow-court” not as a forensic body, but rather as a “naming and shaming” organisation, like Human Rights Watch or Amnesty International. In that vein, some say, he let prominence reign over evidence. A former court attorney is reported saying “he would see the leader of a state and say: ‘There must be evidence out there. Go get it for me.’” In a certain way he had radically broken the tradition of UNICTR, SCSL as well as UNICTY prosecutors and adopted an a-historical strategy and has likewise not made any promises that his work will contribute to the writing of history. Bensouda, on the other hand and as evidenced in the trial against Laurent Gbagbo en Charles Blé Goudé, has opted for a different approach, rooted in her UNICTR experience, of framing large case theories and using historically loaded discourse in litigating her cases.

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2872 Rome Statute, art. 69 (1) & 70 (1a).

2873 ICC, OTP, Prosecutorial Strategy 2009 - 2012 (1 February 2010), §20.

2874 Verini, “The Prosecutor and the President”.

2875 For example, the opening statement in the trial vs. Malian suspect Ahmad Al Faqi Al Mahdi over the destruction of sites of cultural heritage in Timbuktu: “Timbuktu's name is one that is commonly associated with a rich history and culture. In the 15th and 16th centuries, Timbuktu became a regional centre of economic activity 23 and trade. More importantly, it blossomed into one of Africa's most vibrant intellectual and spiritual capitals. It played an essential role in the expansion of Islam in Africa. It was, to be sure, the cradle of education, where enlightenment was nurtured for the benefit of generations of students, attracting scholars from far and wide. Some of these sages would be venerated as Muslim saints and mausoleums would be erected on their graves to honour their memory as well as the notable contributions they made to the lives of people of Timbuktu and beyond. These mausoleums, which survived the ravages of time, have continued to play a fundamental, even foundational role in both the life within the city gates and beyond the city's borders. These monuments, your Honours, were living testimony to Timbuktu's glorious past. These mausoleums undoubtedly also served as a unique testament to the city's urban settlements. But above all they were the embodiment of Malian history, captured in tangible form from an era long gone yet still very much vivid in the memory and pride of the people who so dearly cherished them. The mausoleums also testify to the historical role Timbuktu played in the spread of Islam in Africa and in the history of Africa itself. They are relics of a great chapter in human kind's intellectual and spiritual development on the continent, which gave Timbuktu its standing in the world. This is particularly important in a society that is partly rooted in oral tradition.” ICC, Al Faqi Al Mahdi Transcript (22 August 2016), p. 16-17.
As a possible result of the non-litigation of historical charge sheets in the Congo cases, the ICC’s first two judgements do not delve into historical details and contexts. Only in the third judgement, judges found it necessary to do so on their own initiative, actually lamenting “that the Prosecution did not see fit to include a detailed exposition of the main events in Ituri in its Closing Brief,” because according to them “such an account would, however, have greatly facilitated the Chamber’s grasp and understanding, in particular of any points of divergence between the parties.” They then sketched the “main political events and incidents,” but starting “not with an account of the DRC’s colonial past, but with May 1997. In that month President Mobutu fell and Laurent-Désiré Kabila seized power, marking the creation of the new “Democratic Republic of the Congo” to replace “Zaïre”, the name previously used to denote the same territory.”

For the judges in this case, understanding of the historical context was crucial to get understanding of the charges, but they were also careful to state that their narrative was “not limited solely to evidence undisputed by the parties and participants” and "does not constitute a body of findings of fact: it is simply an account, inevitably incomplete.”

6.8 Conclusions

What transpired from the previous chapters is that both the Rwanda-tribunal (UNICTR) and the Sierra Leonean Special Court (SCSL) experiences have revealed that the international criminal trial setting lacks the capability to validate the more wide-ranging grand narratives on the Rwandan genocide and the Sierra Leonean war respectively. Nevertheless, the UNICTR established that, beyond any legal dispute, there was a genocide perpetrated in Rwanda and the SCSL endorsed that large-scale abuses were committed in Sierra Leone by different factions to the conflict. In historiographical terms, at a minimum, they established in a score of judgements some detailed facts on the micro level, about the role of individual suspects in their immediate contexts. In Arusha, for example, the UNICTR particularly managed to unravel and picture events in Kibuye, while at the SCSL, many details transpired on the structures of rebel forces, the use of child soldiers as well as the functioning of civil defence forces. What both tribunals also elicited is the testimony of many victims or survivors of mass atrocities, thus shedding light on and putting on record the impact mass atrocity had on the individual level. In terms of core fact ascertainment and establishing individual criminal responsibility however, the almost exclusive reliance on testimonial evidence – provided largely through non-legal third parties like NGOs -continuously proved problematic and erratic when it came to substantiating allegations and case theories. Overall, the absence of clear paper trails, forensic data and “smoking-
“type-of-evidence” has increasingly led judges at the international level to be cautious to make sweeping findings on contextual elements in general – beyond the extent necessary to prove that crimes actually took place - as well as particular details concerning defendants. In fact, in dealing with testimonial evidence, judges have gradually become more reluctant, more careful and more nuanced in their findings. In contrast however, on the prosecutor’s side it became more difficult to meet this apparent stricter and higher burden of proof and alter their indictments and investigations accordingly, particularly in volatile non-documentary African cases. In *extenso* of Rwanda and Sierra Leone, a textbook example thereof is the work of the International Criminal Court (ICC), which in many ways – in temporal, geographical and evidentiary terms, but also in relation to court staff - is an offspring of the UNICTR and SCSL and is equally reliant on witness testimony and the agents and methodologies typical of the UNICTR and SCSL in acquiring this type of evidence.

After having outlined the basics of the ICC and provided an overview of its case-load, this chapter has shown that the first ‘African’ cases at the ICC share many parallels with the SCSL and UNICTR when it comes to the challenges of fact-ascertainment on mass violence. Although, the analysis is based only the cases in the Democratic Republic of the Congo, the case study really presents how Pandora’s Box was opened in terms of basic finding and its implication for the historical record in broader terms. I will discuss this chapter’s main findings below through answering the three main questions of this study: how to understand the invocations of historical narratives at the ICC, how do its judgements square with historiography and how to approach the ICC trials as historical sources?

Regarding the first question, I have shown that the invocation of historical narratives at the ICC has become rather and exception than a rule. Apart from the Gbagbo case, discussed in the preface, as well as the Al Mahdi case, most cases are not informed by broad interpretations of pre-indictment social, political and historical antecedents. There may be several reasons to explain the absence of historically framed prosecutions and case theories. First of all, the Rome Statute’s jurisdiction only commences after July 2002, meaning that the court is restricted in looking deeper into the past or in accepting out-of-the-temporal-scope-evidence. Second, the first Prosecutor, Luis Moreno Ocampo, explicitly stated he was not interested in writing histories of the potentially many conflict situations that would come before him. Rather he used the court to name and shame sitting leaders in order to scare them off, publicly indict them and possibly deter them from committing crimes. Refraining from historical explanations thus was a matter of perspective and also political decision. Third, bearing in mind that the ICC could never develop into a case-specialised tribunal, such as the UNICTR and SCSL, it opted to target it investigations on easy to prove crime and limit its prosecutions in order to represent the larger scale. In fact, the ICC prosecutor sought to simplify its cases by dehistoricing the case theories. As a consequence, the ICC judges, particularly in the Congo cases, were not concerned with questions regarding the macro historical dimensions of the crimes.
alleged or grand narratives about world historical events, basically because the prosecutor did not bring these into play. During the trials, the only protagonists who sought to introduce historical context were the defence, in order explain away their client’s role in the broader scheme of things, and some judges, who themselves were interested these broader kind of questions. However, agency matters, as we also saw in the chapter on Rwanda and Sierra Leone. Moreno-Ocampo’s successor, Fatou Bensouda who came from the UNICTR, has reintroduced history in her cases. The Gbagbo case is emblematic thereof, but so is the Al Mahdi case, in which the Prosecutor invoked a narrative starting in sixteenth century Mali.

Secondly, how, in the above context, do the ICC judgements square with historiography? To the extent there is any other historiography on the rather contemporaneous conflicts the ICC deals with than NGO and UN reports, this question is difficult to answer. Yet in terms of the DRC, a situation on which a respectable amount of historiography exists, particularly dealing with Rwanda and the outbreak of the two Congo wars in the Great Lakes Region, the ICC judgements are pale in comparison. Only in terms of their depiction of the Ituri conflict as a non-international conflict would suggest a larger break with academic consensus which holds that the conflict was rather international. It is mainly because of the prosecution’s strategy to narrow its scope in its charges and cases that no findings on macro-historical narratives are made. Moreover, since the ICC would only deal with a maximum of a handful of suspects in each situation, the extent to which the court’s knowledge and understanding, through its judgements, on the conflicts and its contexts as a whole is fundamentally limited. On the other hand, however, the ICC judgements arguably fill gaps in the existing historiography on the local, micro-historical, level, even though these are tainted by the many fact-finding deficiencies demonstrated in this chapter.

This fact-finding crisis, as exposed in this chapter, that has come to the fore during the Congo cases, subsequently led to the derailing of the Kenya cases and ultimately poses an existential epistemological challenge to the court in other cases of even larger magnitude, opens up critical insights into what actually international criminal tribunals can achieve. It once more warrants a cautionary approach when using the trials as well as the trial records as historical sources, particularly the troublesome witness testimonies that were collected, produced and heard throughout its trials. What this chapter has shown is that the trial record is ultimately tainted by a troubled process of truth-finding and that this may have, if not understood, larger implications on future historical research on ICC situations using the ICC records.
As some of the first modern-day international (¬ised) ad hoc tribunals and hybrid courts have fulfilled their mandates, time has come to have a first glance at what they have actually accomplished, appraise their inheritance and plunge into the vast archives they have inadvertently produced along the way. Chipping in on what is mostly a theoretical discussion among tribunal staffers and non-historians, this dissertation has confined its scope to the alleged truth-finding, fact ascertainment and history writing function of the international criminal tribunals as well as the archival record they have left behind. Concretely, it has focused on three interrelated questions: How to understand the invocation of historical narratives in international criminal trials; how to position court judgements in the larger historiography on mass violence; and how to approach the courts' trials and the trial records as historical sources? This study has sought to answer these questions by looking at the process of truth seeking, litigation and judging mass atrocities at the UNICTR, the SCSL and ICC in relation to mass atrocities in Rwanda (1990-1994), Sierra Leone (1991-2002) and the Democratic Republic of the Congo (2002 - ). I have argued that at these courts the very process and procedures followed itself as well as individual agency heavily affected the historiographical legacy of these international courts. Also, I problematised the enactment of historical narratives in prosecution case theories and the implications thereof for the historical record in non-documentary – particularly sub-Saharan African contexts and when depending on witness testimony. Throughout the dissertation, the reader will have discovered a three-legged organisation (‘unravelling’, ‘tribunalising’ and ‘cross examining’ the past) and a three-legged conclusion. First, it has showed that witness testimonies about mass violence are complex judicial and historical sources but that they do, at a minimum, present a very specific enticed oral history of mass violence. Second, it demonstrated that trials are theatres of conflicting stories and platforms where truths are litigated within a legal straitjacket and that their narrative outcomes are ultimately tainted by that process. They generate, what I call, transitional truths. Third, it has argued that courts attempt to unravel history but do not necessarily write history; they are rather collectors of historically relevant sources as well as creators of enticed and litigated historical narratives that may not square with historiography.

7.1 Competing narratives in and out of the courtroom

Before discussing the main findings of this dissertation, a short discussion on the legacy of the UNICTR’s sister tribunal, the UNICTY, is at its place to highlight the endurance of competing narratives in and out of the courtroom.

“As a preliminary matter, I wish to define the scope of our judgement. The Chamber’s findings, which I will set out below, do not claim to establish the entire truth about the events that occurred, let alone to recount the complex history of a conflict. The Chamber’s role is limited to providing a legal response to the allegations made in support of the Prosecution’s
theory. Therefore, this judgement is dependent on the limited truth that may or may not have been established by the facts presented before the Chamber."

At the closing hour of the first international ad hoc tribunals, twenty years after they debuted with their mass atrocity trials, conflicting and competing narratives about world historical events and agency persist, in the court records, the academia, the public domain, the political arena and on the individual level. This dissertation has tried to showcase this in particular to the legacy of the United Nations International Criminal Tribunal for Rwanda (UNICTR), the Special Court for Sierra Leone (SCSL) and the International Criminal Court (ICC). These cases are no exceptions, however, as evidenced, for example by two judgements in the flagship trials at the United Nations International Criminal Tribunal for the former Yugoslavia (UNICTY). In terms of the broader implications of this study as such, the problems encountered at the UNICTY inform a larger debate on the impact of the historical truth-finding capacities of legal institutions like international criminal tribunals.

In March 2016, Judge Jean-Claude Antonetti, pronounced that the majority in his three-member trial chamber decided to acquit Vojislav Šešelj, a known Serbian radical nationalist politician who had been charged, amongst other things, of virulent inciting hate speech and running ‘voluntary’ para-military units that were executing crimes against humanity and war crimes in the former Yugoslavia in the early 1990s. Anttonetti principally lamented “a certain lack of precision in the Prosecution’s approach," arguing that the OTP changed from clear charges which at trial were “obscured by subsequent allegations,” including a grand conspiracy theory by a group of Serbs to recreate a “Greater Serbia” through a policy of ethnic cleansing. Regretting this “maximalist approach” the “furrow dug by the Prosecution," the chamber ruled out most of the legal characterisations of events in the 1990s, most notably crimes against humanity. In all, the chamber’s ruling ran counter to generally held conceptions about mass atrocities in Bosnia as well as earlier ‘coherent’ conclusions by other UNICTY judges. Received as a tremor by victims and as a revisionist account of history by a wide range of critics, academics and local communities at large, the judgement has been widely criticised, ridiculed and rebuked as a miscarriage of justice. That is nothing new. Acquittals of personalities of whom the public ‘knows’ they are responsible for a

2881 Šešelj faced 9 counts of which 3 Crimes Against Humanity (persecution, deportation and inhumane act of forcible transfer) and 6 War Crimes (muder, torture and cruel treatment, wanton destruction, destruction or wilful damage done to institutions dedicated to religion or education, plunder of public or private property). He was accused of having directly committed, incited, aided and abetted those crimes committed by Serbian forces during the period from August 1991 until September 1993, or to have been part of their commission through his participation in a joint criminal enterprise (JCE). See full judgement in French: UNICTY, Šešelj Jugement.
2882 Ibidem, p. 17549.
2884 Ibidem, p. 17549.
2885 Ibidem, p. 17549.
2886 Ibidem, pp. 17549-17551.
2887 What they had expected was “an account that clearly shows that civilians who did not participate in combat were targeted en masse.” However, the chamber argued that instead, “the Prosecution does no more than make general statements that fail to account for the specific evidence” heard by the judges. “Under such circumstances”, they wrote “the majority cannot dismiss the Defence’s argument amply supported by some of the testimonies according to which these civilians had fled the combat zones to take refuge in villages inhabited by members of the same ethnic or religious group, that the buses that were provided for this purpose did not constitute operations to forcibly transfer the population, but were in fact provided on humanitarian grounds to assist the non-combatants fleeing combat zones in which they no longer felt safe.” UNICTY, Šešelj Jugement Summary, n.p.
2888 Cognisant, however, of the possible iconoclastic effect on the historical record, the Chamber made the disclaimer cited above, highlighting the restrictive roles they played. Theirs is not that of the professional historian since the chamber is hampered in establishing truth and recounting history by the mere fact that its duty is to test the prosecutor’s case narrative and legal characterisation of events based on the evidence brought before the bench during the trial.
plethora of suffering are never welcomed, as seen in the case of “Mr. Z.” at the UNICTR, arguably even by the very tribunal in whose name they are rendered.2888

Most critics, victims as well as the OTP – which has appealed the judgement - therefore found solace in the opinion of the Italian judge Flavia Lattanzi,2889 who pointed out the “climate of intimidation to which Vojislav Šešelj subjected the witnesses”2890 as well as the “insufficient reasoning […] in light of the evidence on the record.”2891 She concluded that she felt “thrown back in time to a period in human history, centuries ago, when one said – and it was the Romans who used to say this to justify their bloody conquests and murders of their political opponents in civil wars: “silent enim leges inter arma.”2892 Or was it Lattanzi herself who abstained – in times of disagreement the judge falls silent? What is striking in the Šešelj judgement and the dissent by one judge is not only the fact that within the very trial chambers, judges, who are supposed to render verdicts beyond any reasonable doubt, can reach diametrically opposed findings on the factual historical events, their meaning and the role of a particular accused in that context. This occurs not only the level of individual trial judges, who may be doubtful about the reasoning of their colleagues, versus appeals judges. At the UNICTY, trial judges valorised competing narratives in the stretch of merely seven days. One week before Šešelj’s acquittal, three other judges unanimously convicted Radovan Karadžić of genocide, crimes against humanity and war crimes committed by Serb forces – including “Šešelj’s men”2893 - in Bosnia and Herzegovina (BiH) from 1992 until 1995.2894 Furthermore, the judgement2895 puts Karadžić at the helm of a Joint Criminal Enterprise that included a range of people -Momčilo Krajišnik, Nikola Koljević, Biljana Plavšić, Ratko Mladić, Mićo Stanišić, Momčilo Mandić and Željko Ražnatović (Arkan) – but also Šešelj.2896 But then in the judgement against the latter, a totally different interpretation is progressing derailing from the generally accepted narratives in other trials, namely that “the collaboration was aimed at defending the Serbs and the traditionally Serb territories or at preserving Yugoslavia, not at committing the alleged crimes” and “therefore finds that the Prosecution has failed to prove the existence of a joint criminal enterprise.”2897 Moreover, the Karadžić judgement – in which Šešelj’s name is mentioned no less than 241 times – makes substantial findings on Šešelj’s role in the Bosnian war, saying that he “advocated for a homogeneous Greater

2888 Dov Jacobs, “Is the ICTY ashamed by its own Šešelj judgment?”
2889 In contrast to the majority, Lattanzi concluded there was ample evidence establishing, inter alia: (1) crimes against humanity in Croatia and in Bosnia and Herzegovina; (2) the existence of a joint criminal enterprise; (3) the persecution of non-Serbs through Šešelj’s speeches; (4) Šešelj’s influence on violent “volunteers”; and (5) a conspiracy and cooperation among the members of the JCE in furtherance of the criminal purpose of ethnic cleansing. UNICTY, TCIII, The Prosecutor vs. Vojislav Šešelj: Summary of the partially Dissenting Opinion of Judge Lattanzi (IT-03-67-T; 31 march 2016), n.p.
2889 Idem., Dissenting Opinion of Judge Lattanzi.
2890 Idem.
2891 Idem.
2892 They are named in connection to attacks in 45 instances in the judgement.
2893 Karadžić was convicted of genocide in the area of Srebrenica in 1995, of persecution, extermination, murder, deportation, inhumane acts (forcible transfer), terror, unlawful attacks on civilians and hostage-taking. He was acquitted of the charge of genocide in other municipalities in BiH in 1992. The Chamber found that Karadžić committed these crimes through his participation in four joint criminal enterprises (JCE). See: UNICTY, TCIII, Prosecutor v. Radovan Karadžić: Public redacted version of Judgement issued on 24 March 2016 (IT-95-5/18-T; 24 March 2016).
2894 Crucial to the findings in the trial against the former President of Republika Srpska (RS) and Supreme Commander of its armed forces, and different from the findings in the Šešelj case, was that there indeed was an overarching joint criminal enterprise between October 1991 and November 1995, “that included a common plan to permanently remove Bosnian Muslims and Bosnian Croats from Bosnian Serb-claimed territory through the commission of crimes in municipalities throughout Bosnia and Herzegovina.” UNICTY, Karadžić Judgement, §5996.
2895 UNICTY, Šešelj Judgement, §281.
Serbia which involved the unification of all Serb lands and the removal of the non-Serb population […] Confusingly, this finding is much different from the judges that acquitted Šešelj a week later, turning the argument saying that “the propaganda of a nationalist ideology is not in itself criminal” and that “the Chamber by majority, Judge Lattanzi dissenting, was nonetheless unable to find beyond all reasonable doubt that in calling upon the Serbs to cleanse Bosnia of the “pogani” and the “balijas,” Vojislav Šešelj was calling for ethnic cleansing of Bosnia's non-Serbs.2899

Thus, at a point where the tribunal was wrapping up its work, two judges departed from the consistent jurisprudence of the Tribunal and inferred conclusions that are at odds with dozens of previous UNICTY Judgements proclaimed over the past twenty years.2900 To judge Lattanzi, who had also sat through the entire Karadžić trial as a reserve judge and as such may have reasonably be influenced by the arguments, evidence and deliberations heard there,2901 it appeared that her two co-judges consciously progressed this alternative narrative as part of a conspiracy to acquit the Serbian nationalist:

Under the pretext that the Prosecution did not do its job well one can always do better, and the Trial Chamber could have also done better from the outset of this case, notwithstanding the difficulties it encountered during the trial the majority sets aside all the rules of international humanitarian law that existed before the creation of the Tribunal and all the applicable law established since the inception of the Tribunal in order to acquit Vojislav Šešelj.2902

Regardless whether Lattanzi’s accusations are true or not, they would not change the conclusions that are currently published in a publicly available judgement that is being celebrated among right-wing protagonists in Serbia and mourned in Croatia and Bosnia.2903 With the prosecution appealing the judgement, alleging the majority failed to “perform its judicial function,”2904 the ball is now in the court of the Appeals Judges who can on their turn reverse the judgement and thus revise the narrative once more. That is, however, only if the 61-year old Šešelj who suffers from cancer will outlive such a proceeding.

These developments do not occur in isolation at the UNICTY. At the other tribunals, as demonstrated in the chapters before, similar clashes of interpretation between trial chambers as such and between individual trial and appeals judges are a reality within the international criminal justice

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2898 The quote continues “as such he clearly shared the common plan. He sent large groups of SRS volunteer fighters to assist the Bosnian Serbs in BiH in the implementation of the common plan throughout the conflict and contributed to the execution of the common plan as such.” UNICTY, Karadžić Judgement, §3458.
2899 UNICTY, Šešelj Transcript (31 March 2016), p. 17569.
2902 UNICTY, Dissenting Opinion of Judge Lattanzi.
2903 Vukojcic, ‘Šešelj acquitted’.
2904 See: UNMICT, Prosecutor v. Ratko Mladić: order regarding composition of a bench of the trial chamber (IT-95-5/18-T; 4 September 2009).
system, whatever the manifold possible reasons – i.e. legal traditional, procedural, evidentiary or opportunistic - that drive judges to derive at certain conclusions. One would say, irrespective of the *de jure* theoretical professional judicial consistency (precedence and jurisprudence), that judges are critical thinking human individuals and as such are disposed to deviation. That is the *de facto* situation within the system, which as such does not strictly prescribe judges, who are considered to independent triers of fact, to valorise consistent findings about world historical events that are litigated in their courtrooms. Perhaps the problem here is that we expect from all international judges to think alike and we want to believe – and trust - that they will. As argued earlier in this thesis, in law revision is the exemption while in the historical sciences it is the rule. Hence, it is no surprise that disagreements, as seen in this dissertation, often extend beyond the trial chambers, where professional historians may reach other, or rather much deeper, conclusions than judges, based on a review of the same evidence.

7.2 Overpromised, underdelivered

The expectations raised are impossible. We are not historians and we are not rewriting history.

- Alphons Orie, Judge

Seventy years after the Nuremberg judgement, 23 years after the establishment of the modern international criminal tribunals and 14 years after the launch of the permanent ICC, the ‘system of international criminal justice’ has slowly matured and its agents and protagonists have gradually become more realistic in what it can and what it cannot achieve. UNICTY Judge Orie’s recent contribution to the debate on the legacy of the UNICTY, quoted above, is only an example thereof. So far and other than anecdotal evidence, no empirical study has proved that the tribunals have, after their establishment, brought peace or deterred future criminals. A reminder thereof is the massacre at Srebrenica, the Congo wars and ethnic cleansing in the Central African Republic after the subsequent creation of the UNICTY, UNICTR and ICC. In terms of reconciliation, something that is virtually unmanageable to define and assess, the evidence largely points in the opposite direction. Ethnic, national and local tensions persist in both

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2897 Again, the Karadžić case is an example thereof: Robert Donia, a historian who testified for the ICTY’s prosecutors in a dozen trials, encountered Karadžić in a cross-examination and was given access by the prosecution to the thousands of documents – including telephone intercepts and Bosnian Serb Assembly transcripts - that were amassed during the investigations in the case, wrote an insightful biography of Karadžić’s personal transformation from an unremarkable family man to the powerful leader of the Bosnian Serb nationalists. Different from the ICTY’s judgement, in which Donia’s expert report and testimony is cited 88 times as an authority, the American historian’s narrative is much clearer and explanatory. His chronological story recounts the events of the late 1980s and especially early 1990s that transformed Karadžić into a Serbian nationalist willing to employ atrocities against non-Serbs in his quest to secure safety and power for his people. He also concludes that Karadžić was the real champion of the idea of a Greater Serbia, not Serbia’s President Milošević as is generally believed. Of course, Donia, despite testifying on behalf of the ICTY’s prosecution, strives to maintain an academic neutrality. For instance, he claims to not to undertake “the criminal responsibility of any individual, nor have I attributed legal terms or assigned legal categories to any particu

increased suspicion and division. In Rwanda, particularly, the fact that no judgement was ever delivered on the alleged war atrocities by the RPF against Hutu civilians has arguably left a bitter taste amongst many.

What kind of ‘truth’ the tribunals established about the situations they adjudicated also remains debatable. Obviously, there are achievements as well, particularly in the legal realm. Probably the prime accomplishment so far is that the system has managed to investigate, indict, prosecute, judge and, if found guilty, sentence a range of alleged perpetrators of mass atrocity crimes such as genocide, crimes against humanity and war crimes. By doing so, a new jurisprudence has been established. Moreover, on the political level, the tribunals have demonstrated that they were able to put in the dock people of international, national and local notoriety, including Presidents, government officials, military, intelligentsia, mayors and warlords. Some of those indeed turned out to be the most responsible for mass atrocities committed in the recent and remote past in a variety of countries, most recently in Chad. There is no question that the pursuit of suspects was selective at the levels of the investigations and the trials and in the case of Rwanda a clear example of victor’s justice. However, without doubt, the actual prosecution of suspects in an apparent fair trial setting is a major shift from the pre-1945 world order, in which state sovereignty and impunity for large-scale injustices towards civilians was the norm. At some places, however, those norms have not changed or remain to be applied selectively and unscrupulously. Despite the fact that this remains reality, as evidenced in the cases of North Korea, Syria or Nigeria for example, the pursuit for justice is no longer a phantom. History has shown, like in Cambodia, Bangladesh, Guatemala, Ethiopia or Chad, that even decades after mass atrocities the wheels of criminal accountability can still be put into motion, in some cases due to the persistence of victims. Other delayed historic cases may very well follow. Although the so-called system of international criminal justice seems to have come a long way it is also still very young and its ebbs and flows on political tides. In assessing what it has accomplished and what is has not accomplished, observers and critics alike have increasingly shown remarkable impatience. Rome was not built in a day. In some cases, it is simply too soon to render a judgement on the system as a whole. Having said that, this dissertation has principally attempted a preliminary examination of what two courts – the UNICTR and SCSL -have done in the past twenty years and what the ICC, which built on their legacies in Afrian situations, has done much more recently. Although they are critical, the conclusions presented here cannot and will not be the whole nor the conclusive story.

This dissertation is an ambitious endeavour from the start, tackling some major questions and discussing foundational issues regarding transitional justice in general and mass atrocity trial in particular. Inspired by the epistemological debate on ‘ways of knowing after atrocity,’ it delved into the questions of what can be known, what is known, how it is known when studying mass-violence in modern Sub-Saharan Africa by using international criminal trials as historical source. Throughout the dissertation, I argued that atrocity trials consciously offer accounts about the violent past through a
creative process in which they produce narrative representations through case theories and bring about normative experiences through judgements. In the process of dealing with the past, they look at (criminal) acts performed in the past, they uncover sources from the past, they hear testimony about the past and they generate opinions on the past. In one way or another, the mechanisms, the sources and judgements generated and configured by the international criminal courts and tribunals settle in the histories of mass violence and mend into historiographies of atrocious pasts of individual conflicts. Informed by a rising interest in the legacy of international criminal tribunals this dissertation confined its scope to the alleged truth-finding and history writing function of the international criminal tribunals as well as the archival record they have left behind.

By means of a systematic analysis of the UNICTR, SCSL and ICC, this dissertation provided crucial understanding to: (1) invocation of historical narratives in international criminal trials; (2) the position of court judgements in the larger historiography on mass violence; and (3) how to approach the courts' trials and the trial records as historical sources. In sum, this study showed that legal professionals at the international criminal tribunals and courts have a different relationship with the past than historians. Disparate from professional historians, lawyers like to make – and become part of - history themselves, tweak historical narratives according to their argument and like history – like law – to be static, black and white. For the historian, on the other hand, history is object and objective while for the lawyer history is subject and subjective.

Through the process of dealing with the past in the legal setting, prosecutors at the UNICTR, SCSL and to a lesser, but increasing, extent the ICC, invoked historical narratives to fit the legal criteria of the crimes they were litigating, to present judges a case narrative of the context of these crimes and to provide the public with a ‘true’ story that acknowledges what happened. The legacy of this modus operandi is mixed. At the UNICTR, the narrative of the genocide as a form of Tropical Nazism completely collapsed as it did not match the evidence presented at trials, while one side of the story (the RPF) was not dealt with at all. In Sierra Leone, the conspiracy narrative was overly simplistic and in its flagship trial completely outlawed. In both cases, the courts left the questions as to why and how unexplained. The implications thereof however had much larger consequences in Rwanda than in Sierra Leone. In Rwanda, the UNICTR was completely discredited because its findings clash with the state-narrative and a generally accepted historiography that explains the genocide in an analogy to the Nazi murders of Europeans Jews in WWII. In Sierra Leone, the SCSL judgements did not clash to the Rwandan extent with historiography. In fact, the micro-historical findings in relation to mid-level leaders and Charles Taylor can be read in conjunction with the report of the Truth Commission. Although reaching different conclusions as a result of perspective, the SCSL and the TRC became intrinsic part in the relatively small historiography of the Sierra Leonian war. The ICC presents a negative example. In contrast to the UNICTR and the SCSL, the first trials sought to decontextualize crime from the macro-historical dimensions in which they took place, most notably
the aftermath of the genocide in Rwanda. By so doing, the ICC judgements hardly clash with historiography and rather add a critical assessment of micro case studies and specific themes, such as child soldiering and gender-based crimes. What the dissertation shows is that along the way, the extra-legal ambition to write history has been substituted with a more hands on and selective prosecutorial strategy that favours easy to prove crime and a thematic approach. Obviously, exceptions to the rule persist, as I have shown in relation to the Gbagbo case. In all cases, however, this dissertation has demonstrated that not only the trials but also the court records ought to be approached with great care and caution. Besides it has urged future scholars and jurists alike using trial records to inform themselves on the tribunal, trial and case specific context – normative, political, societal, legal and agency – in which the trial record came about.

Next to these key findings, which will be elaborated more broadly below, some questions remain unanswered but I hope to have contributed to ongoing discussions, particularly from the point of view of an across-the-board experience of observation of a dozen transitional justice institutions in Africa and elsewhere. However, despite its limitations in terms of space, sources and overall completeness, this dissertation has filled some gaps in the existing research on transitional justice in general and atrocity trials more specifically.

First of all, it has mapped and brought together some of the more obscure and ‘forgotten’ cases of recent and remote mass atrocities - or historical injustices - in Africa, from Shaka Zulu’s ‘genocidal’ campaigns in the 1820s to the deadly terror campaigns of Boko Haram in Nigeria and electoral ethnic violence in Burundi. Also, this dissertation has traced the comprehensive genealogy – including both positive and negative cases - of transitional justice in Sub-Saharan Africa. Starting at the advent of the twentieth century, this dissertation has conjoined and detailed for the first time the history of truth commissions and atrocity trials in Africa. It has hence contributed largely to the few case studies that are referred to in transitional justice literature and countered the simplistic impression of a continent drenched in impunity and in need of non-African international intervention. We have seen, for example, that Ethiopia really set the stage for post-atrocity justice, not only during WWII but most prominently with the establishment in 1992 of the Derg-tribunal, which was also intended to serve as a mixed judicial truth commission. Furthermore, from the first truth commission avant la lettre in the Congo Free State on King Leopold II’s Rubber Terror to the latest ICC Judgement on the destruction of historic and cultural heritage in Mali, a comprehensive overview has shown trends, parallels and differences in the dealing with mass atrocity violence in Sub-Saharan Africa. Interestingly enough, it is a cyclic narrative that stretches from simply doing nothing - via conscious reckoning through truth commissions, apologies, amnesties, traditional practices and criminal trials – to a much more complex stalemate between the international community, African governments and violence-affected communities. Once more, this historical overview has shown that transitional justice for recent and remote historical injustices is always inherently political and that
societies have come out with lingering competing narratives about the atrocious past. In other cases, like Sudan or Congo, continuing and back-to-back violence has largely overshadowed the older pains of the past and nothing may happen ever to address those events.

Secondly – and largely based on the findings above – this dissertation has questioned the rationales and goals of transitional justice, the normative, positivist and doctrinal post-Cold War human rights movement that set out to create a global world order of rule-of-law democracies. However, as argued, the ideology, instruments and mechanisms progressed by transitional justice protagonists has not turned out to be a panacea to reckon with mass violence. I have shown, through discussing the cases of Rwanda, Sierra Leone and Congo, the ultimate shortcomings of the cosmopolitan transitional justice movement in general and in Africa particularly. Clearly, no one-size fits all different geographical, temporal and cultural arenas. Oftentimes, western-inspired transitional justice goals and methodologies have mismatched with the local realities and demands on the ground. Sometimes they were even counterproductive, sparking distrust or even retraumatisation. In other cases, transitional justice instruments have been used and abused for totally different goals such as whitewashing prior atrocities, veiling accountability or as in the case of Rwanda to repressively control society. Through the many examples given in this dissertation, one can conclude that the normative field of transitional justice – both as ideology, policy and academic framework – demands critical reassessment of what it aims at, what it does, why it does so, who does so and what effects it has. So far, no empirical study has shown the real effects of transitional mechanisms in post-mass atrocity countries. We can however conclude that in more general terms, the field of transitional justice in Africa has been largely overpromised and had mainly underdelivered. This observation has from the beginning of this dissertation led to an approach that is critical, dispassionate, detached and empirical (to the extent possible). It has treated transitional justice not as a framework but rather as a historical phenomenon. By perceiving transitional justice as unique rites de passage in the transition from a violence situation to (relatively) non-violent situation, it has set clearer boundaries that permitted a birds-eye view and assessment not only of the processes itself but also on how agents – society, policymakers, judiciary, jurists and academia – have shaped particular narratives about those processes.

Thirdly, bearing in mind the inherent flaws of transitional justice, this study has endeavoured not only to study the past but also the practical dealing with the past, particularly through international criminal trials. Having traced the advent and subsequent genealogy of mass atrocity trials, one of the key findings is that there is an inherent mismatch between what court creators, protagonists and agents set out to accomplish and the sources they are dependent on to achieve this. Inspired by the a-typical forensic IMT legacy and informed by an understanding of mass atrocity as a crime similar to the WWII Holocaust in Europe, while totally brushing away the much more typical IMTFE experience and crimes in Asia, transitional justice and judicial protagonists have claimed to be able to
unearth the truth about events of mass atrocity and even to establish historical records – explaining why, how and who – of some of these world historical events. Yet, applying the Holocaust lens to understand other cases of mass atrocity has not only misinformed subsequent adjudications of mass violence elsewhere, but also its epistemology. Unlike the IMT, for example, which totally relied on the defendants’ own recordkeeping of carefully planned and executed crimes, the process of prosecuting suspects and finding evidence by other tribunals, including the IMTFE, however, was hampered by the same crucial fact-finding impediments: the absence of documentary evidence. In substantiating case theories and convincing judges of the guilt of the alleged atrocity perpetrators, time and again, there was neither a forensic nor documentary trail left by the alleged perpetrators, the type of evidence that in the western trial setting would typically support findings ‘beyond any reasonable doubt.’ Moreover, whereas in Nuremberg and subsequent Nazi trials including Eichmann, witness testimony served mainly to illustrate and give a human voice to the documentary evidence, at the other tribunals, already at the IMTFE, witnesses served as core evidence, not as an illustration.

In fact, of course with some exceptions, most of the modern-day tribunals have had to rely on witness testimony through their investigations and court hearings or prior recorded anonymous - second-hand - witness testimony through the reports of human rights organisations, UN missions, journalists and academics. But there is inherent problem as to relying on this type of evidence. Not only is witness testimony always a post-facto story about mass atrocity rather than a forensic voice from the past. At its core, as we have seen, testimony from memory is far from reliable and credible as it is tainted by physical, psychological and societal influences and processes. Moreover, in conjunction with the cultural, lingual and class differences between fact-seekers and fact providing witnesses, the reliance on fallible, fluid and often unreliable memory, has made it virtually impossible to entice and establish with certainty the forensic truth about single events or facts. Key examples thereof highlighted in this dissertation are amongst other things: the remaining ambiguities about the assassination of Rwanda’s President Habyarimana; the number of victims in the Rwandan genocide; the alleged meetings between Charles Taylor and Foday Sankoh; the age of alleged child soldiers in Congo; the scope of the massacre in Bogoro; or who carried out attacks in civilians in Côte d’Ivoire. Thus, in this situation of a very rudimentary modus operandi of ‘fact-finding without facts’, it is already a nearly impossible task for judges to render convictions that are beyond any reasonable doubt for the basic facts – on the micro-level - defendants are accused of. If that uncertainty is extended to the meso- and macro-levels of mass atrocity, the ability of judges to make certain findings about the full nature and causes of world historical events ultimately shrinks.

Fourth, this dissertation has shown that relying on court judgements as objective versions of history has far-reaching social, political and historiographical consequences. Regardless of whether judges are willing to write history or not and whether they explicitly claim to do so or not, they have no control over the impact of their judgement, how these are received and for what purposes they are
operationalised. Ultimately, even the most carefully written judgements will start leading their own lives. Depending how favourable they are, people will endorse it as an authoritative record or bluntly put them aside as a malversation of history that bears no credibility. Hence, people would cite judgements opportunistically for various reasons, probably mostly without having read to some times more than one-thousand-page verdicts. So even if the judge, working from a tight legal straitjacket, has already mutilated the historical record, others will do so even more. In the case of Rwanda, for instance, the Bagosora judgement not only fuelled the RPF’s political dislike of the UNICTR as an arrogant western institution that would not understand Rwandan history, for genocide deniers, if read out of the judicial context, it is cited as key document the substantiate claims that the genocide was not planned at all and that it therefore could not be genocide. Cognisant of these uncontrollable effects court judgements may have, this dissertation has shown in particular the danger of raising high expectations of what international criminal trial can actually achieve. As evidenced in the cases of the UNICTR, SCSL and the ICC, most prosecutions start with the promises that not only would tribunals render individualised justice, they would deter others around the globe, bring peace to war-torn countries, reconcile shattered communities, bring closure to victims, repair harm done and, while doing all these thing, establish the truth. Not only are these lofty promises probably not even within the capacity of lawyers and judges, they mostly reach the point of disappointment, disbelief and disillusion.

International criminal investigations hardly start with open questions or at the crime scene. Almost always, the key suspects are already known and the challenge is to collect evidence to prosecute them in a court of law. But particularly in this realm of deductive truth-finding, prosecutors, who carry the burden of evidence in criminal trials, have been struggling with the sources available to them. But besides the evidentiary limitations in the process of litigating crimes such as genocide, crimes against humanity and war crimes, they cannot go around arguing larger patterns of past events and present to judges a case theory. Idyllically, for international prosecutors, academic discussions on history are not the prime focus, mostly for it is not their forte. Instead, the intention is to substantiate the individual criminal responsibility of the accused who they presume to be ‘most responsible’ for the crimes by others. In that process, however, they cannot escape invoking history and employing legal language to frame the complex realities of mass violence – and vice versa. In that process however, prosecutors cherry-pick, infer and frame - or arguably even mutilate - the historical narrative in such a way that best fits the charges. In practice, in order to prove mass criminality, they have litigated a particular version of events.

But in this modus operandi, history often becomes conflated with a prosecutorial case theory that allows no nuance, new insights and revision because otherwise the case will collapse. However, the cocktail of promising to establish to truth whilst progressing an unbendable particular understanding and reading of history is a poisoned one. This dissertation has shown the effects of such a practice. At
the UNICTR, where the Nuremberg-inspired prosecution was informed by a simplistic understanding of the genocide as some kind of tropical Nazi-like conspiracy and litigated cases on that basis, judges were simply not able to infer from the evidence the prosecution’s case theories in its flagship trials beyond the reasonable doubts standards. That does not mean that the genocide did not happen, it simply means that the tribunal ruled out the prosecution’s narrative on when, why and how it was committed. The case of the SCSL, where many UNICTR agents litigated cases, was similar. Based on the evidence, judges ruled out the grand conspiracy theory that “Godfather” Charles Taylor wanted to enrich himself with Sierra Leonean diamonds through a campaign of terrorism. In contrast, the truth commission that was looking into the causes and nature of the conflict in Sierra Leone, which the SCSL hardly cites, reached a much more complex and nuanced reading of the history of the region. Again, also in light of the TRC findings, it does not mean that Taylor’s role in West-Africa’s mass atrocities in the 1990s was of no significance. The court judgement, which is temporally and geographically straightjacketed could just not substantiate the larger historical narrative litigated by the prosecution.

Initially, the strategy of Luis Moreno-Ocampo at the ICC appeared to have broken with the tradition of prosecutors to charge its suspects with major crimes that demand close scrutiny of history. In the first Congo cases, he restricted charges to a minimum, only to include child soldiering and a single-day massacre during Ituri’s complex conflict. Although the defence sought to introduce historical circumstances as mitigating factors, the Lubanga judgement is hardly concerned with historical questions and its contextual chapter is short and to the point. On the other hand, however, it uncovered the Pandora’s Box of post-fact criminal investigations and the reliance on possibly unreliable witness testimony in Sub-Saharan Africa, irrevocably leading to an evidentiary crisis throughout all the ICC’s Africa cases. Within that context, one would have expected the new Prosecutor, Fatou Bensouda, to be vigilant and try not to overcharge and present historically informed case theories. She did not, as we saw in the case of Laurent Gbagbo. Again, coming from the UNICTR tradition and informed by a particular understanding of mass violence, mainly through a Holocaust-lens, the case theory is nearly impossible to substantiate, particularly in light in the witness evidence presented. In fact, the ICC overpromises what it can prove and like the UNICTR and SCSL, may come out of the processes not delivering the goods.

Fifth, next to unravelling the inherent difficulties of litigating historical narratives in international criminal trials when relying on witness testimony, this dissertation has shown the promises and pitfalls of its use of court records as historical source. Despite the shortcomings discussed above, the tribunals have contributed to establishing, for example, that in Rwanda during 1994, there was a genocidal “campaign of mass killing intended to destroy, in whole or at least in very large part, Rwanda’s Tutsi population.” But besides these kinds of significant historical conclusions, courts also collected, produced and brought together a wealth of historical sources: particularly
witness testimony. For historians, the trial records and court’s archives are a unique source in studying mass atrocity, although there may be problems as to confidentially, accessibility and the sheer volume of court material. This dissertation itself is an early example of the practical limitations of using trial records. Out of the amazingly vast number of trial records at the UNICTR, SCSL and ICC, it could only introduce a miniscule fraction thereof. It was only because I attended or otherwise monitored the proceedings myself that I could be confident in my selection and assessment of their accuracy or even availability, as was the case with the Judge Sow’s dissent in the Taylor trial. I have argued, for a variety of reasons, that despite the enormity, court records ought to be read in context and using non-court sources, particularly in those instances where proceedings took place behind closed doors or where the court record is censored otherwise. Historians studying mass atrocities and the subsequent dealings with those mass atrocities by courts and other transitional justice mechanism ought to act careful in using these sources. During and after these trials, we ought to be diligent that the expanding trial records ultimately settle in the histories of mass violence and mend into historiographies of atrocious past of individual conflicts. Thus, while the trial record is an invaluable source for historical research on the situations of mass violence they have adjudicated as well as their discussions on the past, interesting, vital and sometimes deliberate lacuna’s remain and thus ought to be cautiously read with informed knowledge about why, how and under which circumstances they came and in conjunction with independent third-party primary sources.

Ultimately, we also have to recognise that historians may very well – and have done so already – reach very different conclusions than court judges, even in cases where they would rely on each other’s insights and findings. It is because historians are much less restrained than judges. They are not confined by the strict legal straightjacket; they are not dependent solely on the evidence presented to them by the parties in a trial setting; they are not rendering a verdict that may send a person to jail; they do not face the pressure of victims; they (generally) do not publicly operate in a legal, moral and political tense context; and they do not have to reach a final conclusion on responsibility. Moreover, historians apply a much broader truth regime, deal with agency and structure and simply have a different relationship with the past than lawyers and judges; they study it and do not litigate it. Thus, for the historian history is object and objective while for lawyers history is subject and subjective. In all, while analysing the very same evidence historians might very well reach different conclusions than judges. As outlined in this dissertation, this stems not from justice’s powerlessness to judge and write history, but rather from a mismatch between the judges’ application of the restricted standard of proof of ‘beyond reasonable doubt’ to already judicially straitjacketed events and the historian’ standard of proof of balance of probabilities applied to an unrestricted scope of events, structures and agency.
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Summary

Cross-Examining the Past: Transitional Justice, Mass Atrocity Trials and History in Africa

As some of the first modern-day international (-ised) ad hoc tribunals and hybrid courts have fulfilled their mandates, this dissertation provides a first glance at what they have accomplished, appraises their inheritance and plunges into the vast archives they have produced along the way. Chipping in a discussion on the so-called ‘legacy’ of international criminal tribunals, this dissertation particularly scrutinises the alleged truth-finding, fact ascertainment and history writing functions of the tribunals dealing with mass atrocity in Africa including the archival records they have left behind. Concretely, it focusses on three interrelated questions: How to understand the invocation of historical narratives in international criminal trials; how to position court judgements in the larger historiography on mass violence; and how to approach the courts’ trials and the trial records as historical sources?

This study has sought to answer these questions through an in-depth and systematic examination of the investigation, prosecution and litigation procedures of a selection of mass atrocity trials at the United Nations International Criminal Tribunal for Rwanda (UNICTR), the Special Court for Sierra Leone (SCSL) and the International Criminal Court (ICC). By reviewing a selected number of cases at these subsequent courts, this dissertation offers insights into the judicial understanding, framing and explanations of recent and remote historical injustices as well as consequences of the operationalisation of historical discourses in the trial setting for the historical record at large. Based on an effort of a critical, dispassionate and detached understanding of transitional justice goals, this study particularly (1) analyses the uses and abuses of historical narratives about mass atrocity violence, (2) scrutinises the process of historical fact ascertainment during mass atrocity trials and (3) questions the historiographical legacy of international criminal trials. In so doing, it problematises the seemingly uncertain ascertainment of facts in non-documentary ‘African’ contexts and when almost exclusively reliant on witness testimony. On that basis, this dissertation critiques (1) the enactment of historical narratives by prosecutors in case theories, (2) the substantiation of these narratives through witness testimony and (3) the limitations of the trial record as historical source. This dissertation then argues that legally enticed witness testimonies are problematic historical sources, in terms of their genesis, credibility and reliability. Second, the dissertation argues that mass atrocity trials invoke particular channelled readings of history and rather litigate competing narratives about the past through case theories than write history as it was. Third, it argues that relying on isolated trial judgements as seemingly objective, authoritative and true accounts on the history of mass atrocity violence warrants caution. Finally, based on thirteen years of the author’s first-hand trial observations, countless interviews and trial records from UNICTR, SCSL and ICC, this study concluded that trials on the Rwanda genocide, the Sierra Leonean civil war and ethnic cleansing in the Democratic Republic of
the Congo generate a very specific genre of truth: oral histories on (1) the grand-historical developments, (2) individual agency and (3) micro-dynamics of mass atrocity violence through the straitjacketed prism of international criminal law, international criminal procedure and transitional justice discourse. In reaching its conclusions, this dissertation roughly covers four main subjects in one geographical area: mass atrocity violence and international crimes; transitional justice and international criminal trials; fact seeking and fact ascertainment; and judicial and historical narratives on violence in Sub-Saharan Africa. These subjects are organised and discussed using three-pronged analytical framework: (1) unravelling the past, (2) tribunalising the past and (3) cross-examining the past.

Unravelling, Tribunalising and Cross-examining the Past

The first part of the dissertation deals with what I call the ‘unravelling of the past’. It addresses the social, political and legal issue of dealing with remote and recent episodes of mass atrocity violence. This part is informed by the historical question of how can we unravel the atrocious past? First, it discusses the evolution of the legal lexicon of ‘international crimes’ or mass atrocities - such as genocide, crimes against humanity and war crimes – and how these can be applied to cases of imprescriptible mass atrocity violence across the globe and across time. Then it engages in a critical discussion on what is generally known as transitional justice. By perceiving transitional justice as historical phenomena and unique rites de passage in the transition from a violent situation to a (relatively) non-violent situation, this study sets clearer boundaries that permits a birds-eye view and assessment not only of the processes itself but also on how agents – (civil) society, policymakers, judiciary, jurists and academia – have shaped particular, often normative, narratives about transitional justice processes. Accordingly, this dissertation aims at presenting an approach that is critical, detached and empirical (to the extent possible). It has also treated transitional justice not as an academic framework, but rather as a collection of unique historical phenomena that share important similarities. From there on, this dissertation moves to the discussion on truth-seeking, truth-finding and fact ascertainment in transitional justice by first discussing the right to truth and truth commissions before moving to international criminal trials. Subsequently, the dissertation then moves to a critical discussion on the near exclusive dependency of atrocity crime trials on witness testimony. By problematising the core fact-finding capabilities of international tribunals in non-documentary contexts, I then discuss the core question if, how and to what extent criminal trials contribute to the writing of history and how we can use the trial record as historical source and for what purposes.

The second part of the dissertation deals with what I call the ‘tribunalisation of the past’ in Africa. Within the analytical framework of remote and recent mass atrocity violence, as set out in part one, this historical part has mapped and brought together some of the ‘forgotten’ cases of historical
injustices in Africa. Cases include: the pre-colonial Transatlantic Slave trade, Shaka Zulu’s genocidal wars; colonial violence in Congo, Namibia and Ethiopia; postcolonial violence in Burundi and Chad; post-Cold War electoral violence in Kenya and Côte d’Ivoire and terrorist violence in Nigeria and Somalia. Alongside this historical overview, mapping various types of mass atrocity violence, this part provides a genealogy of transitional justice in Africa, starting with the early advent of truth commissions and ending with the large scale adjudication, or ‘tribunalisation’ of mass violence by a plethora of national and international criminal courts. This part brings together an overview of: truth commissions in Africa between 1904 and 2016; national trials in Equatorial Guinea, Ethiopia and Rwanda since 1979; international trials regarding Rwanda, Sierra Leone, the Democratic Republic of the Congo and African ‘situations’ before the International Criminal Court since 1994; and an extraordinary case of universal jurisdiction on Senegal from 2015.

The third part of the dissertation, ‘cross-examining the past’, provides the subsequent histories of mass atrocity violence and transitional justice in the empirical case studies of Rwanda, Sierra Leone and the Democratic Republic of the Congo (DRC) as well as the United Nations International Criminal Tribunal for Rwanda (UNICTR), the Special Court for Sierra Leone (SCSL) and the International Criminal Court (ICC). Each chapter deals with a selection of trials. In the Rwanda case, the flagship trials of Jean Paul Akayesu, Jean Kambanda, Clément Kayishema, Obed Ruzindana, Ferdinand Nahimana and Théoneste Bagosora feature most prominently, but not exclusively. In the Sierra Leonean case, all SCSL trials are featured, but most emphasis is put on the trial of Charles Taylor. Since the SCSL operated not in isolation but rather in conjunction with a truth commission, the Sierra Leone chapter also includes an analysis of the Truth and Reconciliation Commission for Sierra Leone (TRCSL). The third chapter, on Congo, not only features the ‘Ituri’ trials of Thomas Lubanga Dyilo, Germain Katanga, Mathieu Ngudjolo Chui and Bosco Ntaganda, but also highlights trial proceedings stemming from the situations in the Central African Republic, Uganda, Côte d’Ivoire, Mali and Sudan. All the chapters in this part follow the same logic and: to what extent do the historiography and popular knowledge of the subsequent conflicts square with the judicial findings of the trial chambers and how to evaluate the trial records as historical sources? It answers these questions by systematically looking at the available historiographical source material and knowledge prior to the trials, the courts’ pre-trial investigations, the litigation through witness testimony of historically informed and narrated case theories during trials and the judges’ assessment of the evidence in light of the indictments and available evidence. Next to unravelling the inherent difficulties of litigating historically informed narratives in international criminal trials when almost exclusively relying on fallible witness testimony, this part highlights the promises and pitfalls of the use of court records as historical source.

What transpires from the three cases is that through the process of cross-examining past mass atrocities, prosecutors at the UNICTR, SCSL and to a lesser extent the ICC, willingly and unwillingly,
invoked historical narratives about the past to fit the legal criteria of the crimes they were litigating under international criminal law, to present judges a case narrative of the context of these crimes and to provide the public with a final and ‘true’ story about what happened. The legacy of this modus operandi is a mixed bag. For example, the UNICTR has importantly contributed to legal history and in establishing that in Rwanda during 1994, there was a genocidal “campaign of mass killing intended to destroy, in whole or at least in very large part, Rwanda’s Tutsi population.” But beyond that, the UNICTR, where the Nuremberg-inspired and idealistic prosecution was informed by a popularised understanding of the genocide as some kind of tropical Nazi-like conspiracy and litigated cases on that basis, judges were simply not able to infer from the evidence the prosecution’s case theories in its flagship trials beyond its reasonable doubt standards. That does not mean that the genocide did not happen, it simply means that the tribunal ruled out the prosecution’s narrative on when, why, by whom and how it was committed, during the trials it brought before the court. The case of the SCSL, where many former UNICTR and future ICC agents litigated cases, was similar. Based on the evidence presented at trial and within the restricted mandate of the court, judges ruled out the grand conspiracy theory that “Godfather” Charles Taylor wanted to enrich himself with Sierra Leonean diamonds through a systematic campaign of destabilising terrorism in neighbouring Sierra Leone. In contrast, the truth commission that was looking into the causes and nature of the conflict in Sierra Leone, which the SCSL hardly cites, reached a much more complex and nuanced reading of the history of the region, because of its much wider mandate and more historical burden of proof. Again, also in light of the TRC findings, it does not mean that Taylor’s role in West-Africa’s mass atrocities in the 1990s was of no significance. The court judgement, which is temporally and geographically straightjacketed could just not substantiate the larger historical narrative - on which there is broader consensus among historians - litigated by the prosecution.

Ultimately, in the Rwanda and Sierra Leonian cases, the courts left the questions as to why and how mass atrocities unexplained, even after two decades of cross-examining it. Although this was never the mandate of the tribunals, the implications thereof however had much larger consequences in Rwandan society than in Sierra Leone. In Rwanda, the UNICTR was completely discredited because its findings in key cases are not in par with the state’s grand historical narrative and a generally held historiography that explains the genocide in an analogy to the Nazi murders of Europeans Jews in WWII. In Sierra Leone, the SCSL judgements did not clash to the Rwandan extent with historiography. In fact, the micro-historical findings in relation to mid-level leaders and Charles Taylor can be read in conjunction with the report of the truth commission and historiography. Although reaching different conclusions as a result of perspective, mandate and methodology, the SCSL and the TRC became intrinsic part in the relatively small, rather uncontested historiography of the Sierra Leonian civil war. The ICC presents a negative example. In contrast to the UNICTR and the SCSL, the first trials sought to decontextualize individual criminality from the macro-historical
dimensions in which they took place, even in cases of high-level accused. By so doing, the ICC judgements hardly clash with historiography and rather add a critical assessment of micro case studies and specific themes, such as child soldiering, gender-based crimes and the destruction of cultural heritage. However, in light of some trials regarding different situations, namely Côte d’Ivoire and Mali, prosecutors are gradually shifting towards more historically informed case scenarios. At the ICC, like at the UNICTR and SCSL, the evidence presented at trial remains largely testimonial and this situation has led already to an epistemological and reliability crisis at the court in some situations.

Finally, this dissertation shows that relying on court judgements as objective versions of history has far-reaching social, political and historiographical consequences. Regardless of whether judges are willing to write history or not and whether they explicitly claim to do so or not, they have no control over the impact of their judgements, how these are received and for what purposes they are operationalised. Ultimately, even the most carefully written judgements, like in Bagosora trial, will start leading their own lives. Depending on how favourable or unfavourable they are to a particular reading of history, people will endorse them either as an authoritative record or bluntly put them aside as a malversation of history that bears no credibility. Hence, affected communities, members of society at large, media, NGOs, policy makers, scholars and jurists would cite judgements opportunistically for various political reasons, probably mostly without ever having attended the trials, heard the type of evidence presented and then read the lengthy verdicts from cover to cover. Therefore, even if the judge, working from a tight legal straitjacket, has already redacted and given an opinion on the historical record and agency therein, others will do so even more. However, many are not even basically informed about and interested in the complex details. In the case of Rwanda, for instance, the Bagosora judgement not only fuelled the RPF’s political dislike of the UNICTR as an arrogant ‘western’ – even denialist - institution that would not understand Rwandan history, for genocide deniers, if read out of the judicial context, it is cited as a key document to substantiate claims that the genocide was not planned at all and that it therefore could not be genocide. Cognisant of the uncontrollable effects court judgements may have, this dissertation has shown in particular the danger of raising high expectations of what international criminal trials can actually achieve in terms of truth finding, fact ascertainment and subsequent history writing.
Samenvatting

_Kruisverhoor van het verleden. Massaal Geweld, Overgangrecht en Geschiedenis in Afrika._

Is het mogelijk na een periode van massaal geweld geschiedenis en gerechtigheid met dezelfde pen te schrijven? Sinds de processen van Neurenberg tegen de kopstukken van Nazi-Duitsland tussen 1945 en 1948 zijn op deze vraag uiteenlopende antwoorden gegeven. Aan de ene kant, de meest dogmatische, heerst scepsis. Het moge duidelijk zijn dat historici niet over schuld en straf kunnen oordelen zoals rechters dat doen.

Rechters zijn anderzijds geen historici en schrijven dus geen geschiedenis. Het is hun taak in hun vonnissen te oordelen over schuld en onschuld en straffen op te leggen waar sprake is van schuld. Aan de andere kant van het spectrum wordt juist wel aangenomen dat rechters ook fungeren als ‘protohistorici’, die door hun uitspraken ook geschiedenis schrijven, en een visie op het verleden produceren die op grond van de juridische procedure een zekere autoriteit kan worden toegedicht. Dit proefschrift toont aan dat historische interpretaties van massaal geweld en de juridische procedures ter bestraffing van de gepleegde misdrijven zich op diverse manieren uiterst problematisch tot elkaar verhouden.

_Het verleden ontrafeld, getribunaliseerd en verhoord_

Dit onderzoek beslaat vier thema’s binnen een specifieke geografische setting: massaal geweld en internationale misdrijven; _transitional justice_ en internationale strafprocessen; waarheidsvinding; en juridische en historische narratieve over geweld in Sub-Sahara Afrika. Het proefschrift behandelt deze thema’s in drie delen: (1) het ontrafelen van het verleden, (2) het tribunaliseren van het verleden en (3) het verleden onder kruisverhoor.

Deel 1 betreft het conceptuele en theoretische kader alsmede het academisch debat: hoe het gewelddadige verleden te ontrafelen en te bestuderen. Wat zijn internationale misdrijven, wat is _transitional justice_ en welke mechanismen zijn er om het gewelddadige verleden te onderzoeken. Dit deel bakent massaal geweld af binnen de contouren van de juridische begrippen genocide, misdrijven tegen de menselijkheid en oorlogsmisdrijven. Vervolgens bezie en beschrijf ik _transitional justice_ niet als wetenschappelijke discipline, politiek instrument of als na te streven doel, maar juist als historisch maatschappelijk fenomeen dat op verschillende plekken verschillende vormen aannemt, als ware het _rites de passage_ waarin samenlevingen een transitie doorgaan van een periode van geweld naar en periode zonder geweld. Het doel is om _transitional justice_ kritisch te benaderen, buiten het traditionele _transitional justice_ framework om. Deel 1 geldt als analytisch kader voor de volgende twee delen van het proefschrift.
Deel 2 draait om wat ik de ‘tribunalisering van het verleden’ noem. Het bespreekt eerst de historische gevallen van massaal geweld die we vandaag de dag als internationale misdrijven zouden beschrijven. Dit deel beslaat geweld, of historisch onrecht, vanaf de trans-Atlantische slavernij, via koloniaal en postkoloniaal geweld tot het terroristische geweld in Nigeria anno 2016. Aan de hand van dit historische overzicht, geeft dit deel een gedetailleerde geschiedenis van transitional justice in Afrika, beginnend met een overzicht van waarheidscommissies sinds 1904 en eindigend met een bespreking van nationale, internationale en semi-nationale strafprocessen wegens internationale misdrijven tussen 1979 en 2016.

Deel 3, ‘het kruisverhoor van het verleden’, bespreekt de empirische analyse van de dissertatie. Het vertelt achtereenvolgens in afzonderlijke hoofdstukken de geschiedenis van massaal geweld alsook de geschiedenis van de omgang met dat geweld in respectievelijk Rwanda, Sierra Leone en de Democratische Republiek Congo (DRC). Elk hoofdstuk behandelt vervolgens de belangrijkste processen bij het Rwanda-tribunaal (UNICTR), het Special Hof voor Sierra Leone (SCSL) en het Internationaal Strafhof (International Criminal Court; ICC). Deze hoofdstukken volgen dezelfde opbouw en logica: tot op welke hoogte zijn de historiografie en algemene historische verklaringen van massaal geweld verenigbaar met de bevindingen van de internationale tribunen en wat is de waarde van het procesarchief? Elk hoofdstuk kijkt vervolgens naar het beschikbare historiografische bronnenmateriaal dat beschikbaar was voor de processen, de vooronderzoeken van de tribunen, de processen zelf en de vonnissen. Elk afzonderlijk hoofdstuk ontvouwt de inherente problematiek van tribunen wanneer zij historische misdrijven onderzoeken, berechten en beoordelen terwijl zij bijna volledig afhankelijk zijn van de verklaringen van getuigen. De processen zelf leggen de beloftes en uitdagingen van het gebruik van het procesarchief als historische bron bloot.

_Hoge verwachtingen, beperkt resultaat_

Het is bij uitstek het internationale strafrecht inzake internationale misdrijven van genocide, misdrijven tegen de menselijkheid en oorlogs misdrijven dat discussies oproept over de bijdrage die vonnissen leveren aan een beter begrip van de geschiedenis van de desbetreffende conflicten. In sommige gevallen, zoals met het Internationale Tribunaal voor het voormalige Joegoslavië (UNICTY), wordt geclaimd dat de aanklagers, verdedigers en rechters in de afgelopen 20 jaar door de talrijke procedures een enorme hoeveelheid kennis en inzicht hebben bijgedragen aan de historiografie over de oorlogen op de Balkan. In andere gevallen, bijvoorbeeld bij het Cambodja-tribunaal (ECCC), bestaat er veel meer reserve over de historische betrouwbaarheid van de feiten die de rechtspraak tijdens twee processen over de gruweldaden van de Rode Khmer, gepleegd tussen 1975 en 1979, heeft vastgesteld. In beide gevallen wordt overigens ook het tegenovergestelde beweerd, door evenveel overtuiging gedreven.
Dit historisch proefschrift stelt de oude vraag in een nieuw epistemologisch daglicht, namelijk dat van de moderne strafhoven die vrijwel exclusief afhankelijk zijn van getuigenverklaringen als bewijs: hoe verhouden waarheidsvinding over het gewelddadige verleden, rechtpraak over het gewelddadige verleden en geschiedvorsing zich tot elkaar? Wát kunnen juristen én historicici, elk op grond van hun eigen discipline weten, hoe kunnen we weten en wat weten nu echt wanneer het gaat om grootschalig geweld? Deze vraagt klemt bij uitstek voor ‘niet-documentaire conflictisituaties’, vooral aan te treffen in sub-Sahara Afrika, waar mondelinge bronnen, de herinneringen en verklaringen van getuigen, veelal de enige bronnen van feitenkennis zijn. Dit onderzoek verschijnt op een moment dat een aantal van de internationale strafhoven die sinds het begin van de jaren 1990 zijn opgericht, waaronder de VN-tribunalen voor Rwanda (UNICTR) en Joegoslavië (ICTY), hun werkzaamheden hebben af gesloten, of dat in de nabije toekomst zullen doen. Tegelijkertijd rondt het permanente Internationaal Strafhof (ICC) de eerste zaken in bepaalde conflictgebieden af, zoals in het geval van de Democratische Republiek Congo. Nu is het dus een goed moment om terug te blikken en een eerste balans op te maken. Dit proefschrift heeft als eerste doel licht te werpen op de werking en nalatenschap van de internationale strafhoven die zich hebben beziggehouden met de bestraffing van massaal geweld in Afrikaanse conflictgebieden, waarop de meeste internationale strafprocessen betrekking hebben. Hoe zijn ze te werk gegaan, welke doestellingen hebben ze bereikt, welke niet en waarom? Maar ook: wat laten ze na aan getuigenissen, bewijsmateriaal en oordelen, welke rol speelt dit materiaal in de publieke verwerking van deze misdrijven en bovendien, hoe moet deze nalatenschap vanuit het perspectief van de rechts- en geschiedwetenschap benaderd worden?

Al deze vragen behoren tot het bredere debat over de grote beloftes van het alles overkoepelende veld van transitional justice. Dit omvat het stelsel van strategieën, doeleinden en mechanismen dat samenlevingen toepassen om een periode van extreem geweld te boven komen. Recht spreken, vrede stichten en ontwrichte samenlevingen verzoenen dwingt vaak tot onderzoek naar wát er precies is gebeurd. De strategische opvatting hierachter is dat kennis over het verleden het beste tegengif zou zijn om tegen de nawerkingen van het vergiftigde verleden te strijden. Internationale rechtpraak is potentieel een krachtig mechanisme om de feiten in de context van een strafproces boven tafel te brengen.

In dit proefschrift wil ik in de eerste plaats aan het licht brengen hoe internationale strafhoven waarheid zoeken, vinden en formuleren; hoe ze feiten vaststellen en beoordelen; en over hoe zij hun oordeel onderbouwen om boven elke gerede twijfel verheven te kunnen oordelen over de schuldvraag met betrekking tot misdrijven gepleegd in het kader van een specifiek conflict. Om tot een synthese te komen over deze gang van zaken richtte het onderzoek zich op drie samenhangende vragen over de interactie tussen de historische en juridische disciplines. Ten eerste: hoe maken internationale strafprocessen gebruik van historische narratieven ter onderbouwing van strafrechtelijke oordelen?
Ten tweede: welke rol spelen procesarchieven in de historiografie over massaal geweld? En tenslotte: wat is de waarde van de procesarchieven als historische bron?

Om deze vragen te beantwoorden heb ik systematisch en diepgaand onderzoek gedaan naar de procedures gevoerd door het Internationale Straftribunaal voor Rwanda (UNICTR), het Speciale Hof voor Sierra Leone (SCSL) en het Internationaal Strafhof (ICC). Als journalist en wetenschapper was ik tussen 2004 en het verschijnen van dit proefschrift in 2017 in staat om meer dan 50 zaken te volgen, zowel in Afrika als in Den Haag. Niet al die processen komen uitvoerig aan bod, maar wel behandel ik een brede, chronologische en relevante selectie van zaken die het beste inzicht bieden in de internationaal-strafrechtelijke omgang met een breed scala aan misdrijven gerelateerd aan massaal geweld.

Voor een goed begrip is het belangrijk onder ogen te zien dat de opbouw van de bewijslast en daarmee de oordeelsvorming in deze gevallen voor het overgrote deel was gebaseerd op mondelinge getuigenissen, in de rechtszaal uitgesproken door slachtoffers, verdachten, getuigen en getuigen-deskundigen. Anders dan in Neurenberg, of in het geval van ex-Joegoslavië, was er nauwelijks bewijsmateriaal in de vorm van documenten beschikbaar. Interessant genoeg produceerden de ‘Afrikaanse’ strafhoven juist door deze gang van zaken wel een grote papieren nalatenschap ter documentatie van het desbetreffende massageweld.

Het gaat mij nu in dit kader in de eerste plaats om de manier waarop historische narratieve over de aard, oorzaken, achtergronden en toedracht van de onderliggende conflicten in de juridische oordeelsvorming hebben gespeeld. Een belangrijke conclusie is dat tribunals, en in het bijzonder de aanklagers, er maar in beperkte mate, of in zelfs het geheel niet, in geslaagd zijn hun oordelen boven elke vorm van twijfel verheven te onderbouwen door historische expertise. Ze waren er namelijk primair in geïnteresseerd om de misdrijven, op doelmatig, strategische en deterministische wijze, zo te _framen_ en uit te leggen dat de historische context als het ware de verklaring aanreikte. Hun doel om de rechter ervan te overtuigen dat hun versie van het verhaal de ware versie is mislukte nog al eens. Bij het Rwanda-tribunaal bijvoorbeeld, in het Bagosora-proces, trachten de aanklagers de genocide uit te leggen als een lang vooruit gepland misdrijf, gebaseerd op een complot tussen 29 verdachten dat al in 1990 gesmeed was. De rechters echter, verwierpen deze uitleg in hun vonnis, omdat het aangereikte bewijsmateriaal voor de stelling van de aanklager ook anders kon worden geïnterpreteerd of in sommige gevallen onbetrouwbare was.

Op zijn best, zo kunnen we vaststellen, genereerden deze procedures zeer specifieke dataverzamelingen en daaraan verbonden interpretaties, die hooguit als versies van ‘de waarheid’ kunnen worden beschouwd, namelijk: een orale geschiedenis van (1) de grote lijnen van het historisch kader waarin de misdrijven plaats vonden, (2) de rol van individueel agency onder die omstandigheden en (3) de micro-dynamiek van massaal geweld. Dit is doorgaans ook nog bezien
vanuit een strikt juridisch perspectief en in de positivistisch-normatieve context van een globaal *transitional justice* discours. Het procesarchief bevat aldus een kolossale verzameling verklaringen, aanklachten, bewijsstukken, moties, beslissingen, transcripten en vonnissen, die ik naast mijn primaire observaties bij de zittingen heb geraadpleegd. De waarde daarvan kan groot zijn, mits de onderzoeker zich bewust is van hoe deze tot stand zijn gekomen.

Uit onderzoek van het procesarchief, de waarnemingen en een kritische analyse van literatuur, blijkt vooraleerst dat internationale strafprocessen niet alleen reacties zijn op het gewelddadige verleden, maar ook dat tribunalen het verleden weer oproepen, tot leven brengen en dit op een specifieke manier her-vertellen teneinde daders te kunnen vervolgen, berechten en bestraffen. De rechtspraak en het gebruik van de geschiedenis zijn dus nauw met elkaar verweven wanneer het gaat om de inhoud.

Mijn analyse van de gevoerde processen laat vooral zien dat deze in het kader van het ideaal van *transitional justice* beperkingen kennen. Vooral de beloftes dat tribunalen eens en voor altijd de waarheid boven tafel zouden krijgen en de getroffen samenlevingen konden voorzien van een gezaghebbende en verbindende post-conflict geschiedenis is heel moeilijk te realiseren. Met name het Rwanda-tribunaal faalde om de beloftes van een ‘Afrikaans Neurenberg’ waar te maken en de ware aard, de oorzaken en de redenen van de genocide bloot te leggen. De versie van de geschiedenis zoals door de aanklagers werd gepresenteerd als ware de genocide in Rwanda een vorm van ‘tropisch Nazisme’ werd niet onderbouwd door het beschikbare bewijs en maakte daarom ook geen deel uit van de uitspraken. Dit betekent niet dat de genocide, als misdrijf, niet is gepleegd, zoals de rechters keer op keer hebben bevestigd. Wel hebben de rechters de hele historische onderbouwing die de aanklagers hebben geproduceerd over wanneer, waarom, door wie en hoe het massale geweld is gepleegd. Veel vragen bleven onbeantwoord en de puzzel blijft zodoende incompleet.

Bij het Speciale Hof voor Sierra Leone blijkt de situatie vergelijkbaar te zijn geweest. In dit geval konden de rechters niet bewezen achten dat de ex-president van Liberia, ‘Godfather’ Charles Taylor, aan het hoofd had gestaan van een maffia-achtig complot om zichzelf te verrijken met diamanten door terreur te zaaien in Sierra Leone. Interessant is dat de waarheidscommissie in Sierra Leone zelf, die niet door juridische, politieke en praktische obstakels werd beperkt in zijn werk, een veel genuanceerder versie van de geschiedenis vertelt, maar dat het Speciale Hof daar nauwelijks naar verwijst. Uiteindelijk hebben de tribunalen voor Rwanda en Sierra Leone de grote vragen rondom het hoe en waarom er massaal geweld heeft plaatsgevonden vrijwel onbeantwoord gelaten. Hoewel geschiedschrijving nooit de formele opdracht was, heeft deze beperking toch belangrijke consequenties, zeker ook in Rwanda. Het Tribunaal werd en wordt in Rwanda zelf namelijk als ongeloofwaardig instituut gezien, juist omdat de Rwandees zagen dat het niet kon bevestigen wat toch algemeen wordt aanvaard. In Sierra Leone kwam het niet zover, vooral omdat de vonnissen niet
werkelijk in strijd waren met de algemene lezing van wat er was gebeurd. In feite droeg het Speciale Hof, samen met de waarheidscommissie in Sierra Leone, wel in belangrijke mate bij aan de historiografie over de burgeroorlog. Dat komt ook omdat er geen werkelijke, dipegewortelde controverse over de feitelijke toedracht is.

In het geval van het International Criminal Court ligt de zaak juist weer ingewikkelder. In tegenstelling tot het Rwanda-Tribunaal probeerde de eerste aanklager in zijn eerste zaken betreffende gebeurtenissen in Oeganda, de Democratische Republiek Congo en de Centraal Afrikaanse Republiek zoveel mogelijk de misdrijven te scheiden van de historische context waarin ze zijn gepleegd, zelfs ook in het geval van hooggeplaatste verdachten. Hij wilde overzichtelijke en snelle zaken construeren. De aanklager van het Strafhof wilde geen geschiedenis schrijven maar zich juist richten op thema’s als kindsoldaten en seksueel geweld en er is als zodanig weinig of geen conflict met de heersende historiografie. Toch is er sinds 2012, toen er een nieuwe aanklager kwam, verandering zichtbaar bij het Strafhof. In de zaken die zij aanbracht, voornamelijk met betrekking tot Ivoorkust en Mali, presenteren de aanklagers weer grote ‘historische’ aanklachten en zelfs scenario’s die teruggrijpen op oude complotten of vergezochte verklaringen. Aan de andere kant, hebben de zaken bij het Internationaal Strafhof, dat net als de eerdergenoemde tribunalen voor Rwanda en Sierra Leone afhankelijk is van getuigenverklaringen, de doos van Pandora geopend. Het gaat niet te ver om in dit opzicht te spreken van een epistemologische crisis met betrekking tot het gebruik, de betrouwbaarheid en geloofwaardigheid van getuigen in strafprocessen. Deze heeft er inmiddels toe geleid dat zes zaken, waaronder die tegen President Uhuru Kenyatta van Kenia, in duigen zijn gevallen.

Dit proefschrift legt ook een ander kernprobleem van de praktijk van het internationaal strafrecht bloot, dat ook van invloed kan zijn op de historiografie over massaal geweld. Het gaat om de vraag welke bronnen over massaal geweld beschikbaar zijn. In Neurenberg, dat achteraf gezien een uitzonderlijk tribunaal was, werden getuigen vooral opgeroepen om een menselijke stem te laten horen naast de stapels onomstotelijk documentair bewijsmateriaal dat de Nazi’s hadden achtergelaten. Wat blijkt is dat in veel gevallen, en zeker ‘niet-documentaire samenlevingen’ – en ook op plaatsen delict elders, waar geen tastbare forensische, schriftelijke of audiovisuele sporen zijn achtergebleven - de bron van de kennis over het misdadige verleden vele malen problematischer is. In internationale strafprocessen is vanaf het eerste vooronderzoek tot aan de inhoudelijke behandeling vrijwel alle informatie over internationale misdrijven direct dan wel indirect afkomstig van getuigen, hun herinneringen en hun verklaringen, en dan ook nog vaak jaren na de gebeurtenissen afgelegd. Het gaat om diverse categorieën: slachtoffers, omstanders en daders en in sommige gevallen wetenschappelijke ‘experts’ als getuigen-deskundigen, en om buitenlandse journalisten.

Eerder onderzoek met betrekking tot Rwanda, Sierra Leone en Oost-Timor heeft al laten zien dat deze praktijk van ‘fact-finding without facts’ op zijn minst een fragiele juridische basis is voor
belangrijke en historische vonnissen. In dit proefschrift wordt deze bevinding verder uitgewerkt door
ze te problematiseren en toe te passen op het historische relaas van de getuigen zelf en de weerslag
daarvan in de procesdossiers, de gerechtelijke vonnissen en het uiteindelijk narratief dat een tribunaal
als zijn waarheid vastlegt. Uit dit proefschrift blijkt dat aanklagers steeds grote moeite hebben om
historisch onderbouwde aanklachten wegens genocide en misdrijven tegen de menselijkheid te staven
met een grote diversiteit aan micro-getuigenverklaringen. Zulke verklaringen zijn niet zelden
gerekruteerd, gemanipuleerd, geforceerd, gecontroleerd en verkeerd geïnterpreteerd, hetgeen altijd tot
vragen rondom geloofwaardigheid en betrouwbaarheid leidt. Ze zijn dus niet alleen lastig als bewijs
tegen een verdachte op zich – in de rechtszaal – maar produceren ook veel beperkingen, valkuilen en
lacunes voor wie op zoek is naar een historische interpretatie. Procesgetuigen in de rechtszaal – zoals
ook weergegeven in procestranscripten – zijn daarmee niet gediskwalificeerd als historische bron. Feit
blijft dat het problematische bronnen zijn. Ze zijn gebaseerd zijn op menselijke geheugen – dat is wel
te overkomen-, maar het zijn ook bronnen die zich hadden te voegen naar een formeel, strikt
gecontroleerd en juridisch afgebakend kader.

Dit epistemologische basisprobleem rondom het juridische proces van waarheidsvinding
omtreft massaal geweld heeft implicaties voor tal van wetenschappelijke disciplines, niet alleen voor
de rechts- en geschiedwetenschap, maar ook voor de sociale en politieke wetenschappen en het veld
van genocide studies, uiteindelijk ook voor samenlevingen in het algemeen. Het is dus essentieel om
voorzichtigheid te betrachten wanneer men een strafrechtelijk vonnis zou willen gebruiken als
objectieve bron van kennis voor een beter begrip van de geschiedenis van een bepaald conflict. Het
zijn bronnen over het verleden, niet uit het verleden. Dit proefschrift laat de lezer zien hoe de
procesarchieven te overzien, te interpreteren en te beoordelen. Of rechters nu geschiedenis willen
schrijven of niet, ze hebben nooit controle over welke impact hun vonnissen hebben, hoe deze worden
ontvangen en voor welke redenen ze worden aangewend. De meest a-historische vonnissen kunnen
worden ingezet voor de grootste historische claims. Ook de meest voorzichtig geformuleerde en
zorgvuldig onderbouwde vonnissen kunnen een eigen leven gaan leiden. Het is afhankelijk van hoe
bruikbaar een vonnis is voor een specifieke versie van de geschiedenis of ze worden gelaauwerd als
officiële lezing over het verleden of worden afgedankt als een malversatie van de geschiedenis en naar
de prullenbak wordt verwezen.

Slachtoffers, daders, samenlevingen, media, pressiegroepen, beleidsmakers, academici en
juristen gebruiken allen en met evenveel gemak juridische uitspraken voor allerlei politieke, sociale of
morele doeleinden zonder dat zij ooit de processen hebben bijgewoond, zich bewust zijn van de
bewijsvoering of een vonnis van kaft tot kaft te hebben gelezen. De meeste mensen zijn simpelweg
niet geïnformeerd of geïnteresseerd in de juridische overwegingen, de details van het bewijs of de
nuances in een proces en in het vonnis. Het belangrijkste Rwanda-vonnis (Bagosora) wekte politieke
verontwaardiging onder de heersende elite in Rwanda, die het gehele tribunaal daarom wegzette als
een arrogant, westers en zelfs genocide-ontkennend instituut dat niets heeft begrepen van de Rwandese geschiedenis. Aan de andere kant is het vonnis voer voor genocide-ontkenners en de basis om te beweren dat de hele genocide in Rwanda nooit was gepland en dus geen genocide kon zijn. Juist in dit licht – het oncontroleerbare effect dat juridische procedures en uitspraken kan hebben – laat dit proefschrift het gevaar zien van het wekken van grote verwachtingen, hoe nobel deze ook kunnen zijn, door transitional justice mechanismen als tribunals ook grote teleurstellingen teweegbrengen en juist het tegenovergestelde bereiken: ongeloof en frustratie.
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