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Transitional justice, mass atrocity trials and history in Africa

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Cross-Examining the Past
Transitional Justice, Mass Atrocity Trials and History in Africa

ACADEMISCH PROEFSCHRIFT

ter verkrijging van de graad van doctor

aan de Universiteit van Amsterdam

op gezag van de Rector Magnificus

prof. dr. ir. K.I.J. Maex

ten overstaan van een door het College voor Promoties ingestelde commissie,

in het openbaar te verdedigen in de Aula der Universiteit

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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

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 Gbagbo¹

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*.² 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.³ 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.⁴ On my way to the ICC, on 28 January 2016, I overheard the swelling hymns of a crowd chanting "Libérez Gbagbo! ("Free Gbagbo!")."⁵ 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.⁶ 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.⁷ 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.⁸ Inside the courtroom, the atmosphere was tense. One could hear a pin drop. It was the ICC's first trial against a former President.⁹ 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

¹ Cited in: Stephen W. Smith, 'The Story of Laurent Gbagbo', London Review of Books, Vol. 33, No. 10 (19 May 2011), pp. 10-12: 12.

² ICC, *Official Opening of the ICC Permanent Premises - 19 April 2016* (YouTube video: <https://www.youtube.com/watch?v=tDbuVtODUBw>, visited: 19 July 2016).

³ See: Thijs B. Bouwknegt, 'In Afrika hebben ze geen trek in een Strafhof dat alleen daar kijkt', *NRC Next*, 9 September 2013.

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.

⁵ Author's attendance at ICC on 28 January 2016. Parts of this preface contain elements of the author's report on the trial proceedings between January and July 2016: Thijs B. Bouwknegt, 'Gbagbo: Lost in History', *International Justice Tribune*, 15 July 2016.

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.

⁷ ICC, TC I, *Prosecutor v. Laurent Gbagbo and Charles Blé Goudé: Transcript* (ICC-02/11-01/15; 28 January 2016), p. 19.

⁸ United Nations General Assembly (UNGA), *Report of the International Commission of Inquiry on Côte d'Ivoire* (A/HRC/17/48; 1 July 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.”¹⁰ 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.”¹¹

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.¹² And perhaps, after a protracted trial that is projected to hear over 138 prosecution witnesses,¹³ 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.¹⁴ 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 2011.¹⁵ Goudé is additionally charged with a fifth assault.¹⁶ In reality however, Bensouda’s underlying case theory cultivates such a Manichean narrative on Gbagbo’s decade-long presidency and his virtually despotic 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.¹⁷

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 Ivorian 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.¹⁸ In The

¹⁰ ICC, *Gbagbo - Blé Goudé Transcript* (28 January 2016), p. 3.

¹¹ *Idem*.

¹² Smith, ‘The Story of Laurent Gbagbo’, pp. 10-12.

¹³ ICC, *Gbagbo - Blé Goudé Transcript* (28 January 2016), p. 36.

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; other inhumane 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).

¹⁶ ICC, PTC I, *Situation: Côte d’Ivoire. In the case of The Prosecutor v. Charles Blé Goudé: Decision on the confirmation of charges against Charles Blé Goudé* (ICC-02/11-02/11; 14 December 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 “senats” which were scattered in the Ivorian 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.

¹⁸ Smith, ‘The Story of Laurent Gbagbo’, pp. 10-12.

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.¹⁹ 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.”²⁰ 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.”²¹ 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.²² 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.²³ In his opinion, Bensouda, who had monitored Côte d’Ivoire before she became Chief Prosecutor,²⁴ 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.”²⁵ Initially, the pre-trial chamber was sceptical too towards the evidentiary basis of the Prosecutor’s case, which was built mainly on third party

¹⁹ Thijs B. Bouwknecht, ‘Gbagbo ICC file: fit for a president?’, *International Justice Tribune*, No. 141 (7 December 2011), p. 1.

²⁰ ICC, *Gbagbo - Blé Goudé Transcript* (12 February 2016), pp. 36-37.

²¹ ICC, PTC I, *Situation: Republic of Côte d’Ivoire. In the case of The Prosecutor v. Laurent Gbagbo: Confirmation of Charges Hearing Transcript* (ICC-02/11-01/11; 28 February 2013), p. 47.

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 (IHAAA). Cyril K. Daddich, *Historical Dictionary of Côte d’Ivoire (The Ivory Coast)*, Third Edition (London: Rowman & Littlefield, 2016), p. 261.

²⁴ Thijs Bouwknecht & Richard Walker, ‘Interview: Fatou Bensouda: ICC crimes monitor’, *International Justice Tribune*, No. 129 (25 May 2011), p. 6.

²⁵ ICC, *Gbagbo Confirmation Transcript* (28 February 2013), pp. 44-45.

information.²⁶ 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

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.

²⁷ 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. Dissenting Opinion of Judge Christine Van den Wyngaert* (ICC-02/11-01/11; 12 June 2014), §1-12.

²⁸ ICC, OTP, ‘ICC Prosecutor’s statement at press conference, ahead of the trial-start of the Prosecution’s case against Messrs. Laurent Gbagbo and Charles Blé Goudé’, *Press Release*, 27 January 2016.

²⁹ “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, TC I, *Situation: Côte d’Ivoire. The Prosecutor v. Laurent Gbagbo and Charles Blé Goudé: Corrected version of Prosecution’s pre-trial brief* (ICC-02/11-02/11; 28 July 2015), §5.

³¹ ICC, *Gbagbo - Blé Goudé: Corrected version of Prosecution’s pre-trial brief*, §5.

³² *Ibidem*, §5.

³³ 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).

³⁴ 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.

³⁸ Francis Akindès, ‘Cote d’Ivoire: Socio-political Crises, ‘Ivoirité’ and the Course of History’, *African Sociological Review*, Vol. 7, No. 2 (2003), pp. 11-28.

³⁹ Scott Straus, *Making and Unmaking Nations. War, Leadership, and Genocide in Modern Africa* (Ithaca: Cornell University Press, 2015), pp. 123-168; Mike McGovern, *Making War in Côte d’Ivoire* (London: Hurst & Company, 2011).

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 Victor’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.

⁴⁵ Straus, *Making and Unmaking*, pp. 123-168; Stephen Smith, ‘En Côte d’Ivoire, le spectre du Rwanda’, *Le Monde*, 24 October 2002;

⁴⁶ 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: 189.

also history with a capital “H” that is being written.”⁴⁷ 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.”⁴⁸ 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.⁴⁹

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,⁵⁰ 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.”⁵¹ 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.”⁵² 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.⁵³ 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.”⁵⁴ 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,”⁵⁵ 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

⁴⁷ ICC, *Gbagbo Confirmation Transcript* (19 February 2013), p. 7.

⁴⁸ ICC, *Gbagbo Confirmation Transcript* (19 February 2013), p. 7.

⁴⁹ During his detention, Gbagbo co-authored with French journalist François Mattei the biography ‘*For Truth and Justice: Revelations on a French Scandal*’, in which he sketches a political self-portrait that Gbagbo would like his readers to see. See: Sophie T. Rosenberg, ‘A Portrait from The Hague: All You Need to Know About What Laurent Gbagbo Wants You to Know’, *Justice in Conflict*, 20 January 2016 (www-blog: <https://justiceinconflict.org/2016/01/20/a-self-portrait-from-the-hague-all-you-need-to-know-about-what-laurent-gbagbo-wants-you-to-know/>; last visit on 9 May 2016).

⁵⁰ 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 agorae in Abidjan such as *La Sorbonne*, during the crisis. Ba, ‘The Court Is the Political Arena’, pp. 174-189.

⁵¹ ICC, *Gbagbo - Blé Goudé Transcript* (28 January 2016), p. 70.

⁵² Idem.

⁵³ Straus, *Making and Unmaking Nations*, pp. 131-138.

⁵⁴ ICC, *Gbagbo - Blé Goudé Transcript* (28 January 2016), pp. 72-73.

⁵⁵ ICC, *Gbagbo - Blé Goudé: Corrected version of Prosecution’s pre-trial brief*, §439-440.

insider witnesses.”⁵⁶ 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 try to retrace here in this court room reflects not only the past, but also the present and the future.”⁵⁷ 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 the defence version, Gbagbo, “as all people of Côte d’Ivoire and all Africans know,” is a true democrat who had always “promoted a multiparty system” and had even “established a remarkable system of free mandatory education.”⁵⁸ 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.”⁵⁹ By omitting charges⁶⁰ 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.”⁶¹ 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 respectively⁶²– lays a moot responsibility. It is expected from them to sift

⁵⁶ ICC, *Gbagbo - Blé Goudé Transcript* (28 January 2016), p. 64.

⁵⁷ ICC, *Gbagbo - Blé Goudé Transcript* (29 January 2016), p. 59.

⁵⁸ ICC, *Gbagbo - Blé Goudé Transcript* (1 February 2016), pp. 11-12.

⁵⁹ *Ibidem*, pp. 14; 12.

⁶⁰ Bensouda swore, however, “This is our first case to reach trial in the Situation of Côte d’Ivoire. There will be others as our independent and impartial pursuit to hold those most responsible for the post-election violence in the country, irrespective of political affiliation or side, remains firm. We will not falter, Mr President, until this work is done.” ICC, *Gbagbo - Blé Goudé Transcript* (28 January 2016), p. 50.

⁶¹ ICC, *Gbagbo - Blé Goudé Transcript* (1 February 2016), pp. 12; 66; 43.

⁶² Judge Tarfusser (Italy), Judge Olga Herrera-Carbuccia (The Dominican Republic) and Judge Geoffrey Henderson (Trinidad and Tobago).

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.⁶³ 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.”⁶⁴ 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.⁶⁵

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 Ivoirian 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.”⁶⁶ 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.”⁶⁷ 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.”⁶⁸ 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.⁶⁹ 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

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.

⁶⁵ ICC, *Gbagbo - Blé Goudé Transcript* (10 May 2016), p. 40 onwards.

⁶⁶ ICC, *Gbagbo - Blé Goudé Transcript* (15 March 2016), pp. 73-74.

⁶⁷ *Ibidem*, p. 74.

⁶⁸ *Ibidem*, pp. 74-75.

⁶⁹ HRW, “*They Killed Them Like It Was Nothing.*” *The Need for Justice for Côte d’Ivoire’s Post-Election Crisis* (New York, October 2011).

by the defence on the investigative methodology and alleged bias of his organisation.⁷⁰ 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 2006,⁷¹ events from four years before the crimes charged occurred.⁷²

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,⁷³ 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."⁷⁴ 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.

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.

⁷⁴ ICC, *Gbagbo - Blé Goudé Transcript* (28 June 2016), pp. 39-40.