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### Cross-examining the past

*Transitional justice, mass atrocity trials and history in Africa*

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## 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<sup>75</sup>

### 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.<sup>76</sup> 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.<sup>77</sup> 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.<sup>78</sup> It is a slippery slope and its occurrence in history is only relatively recent.<sup>79</sup> 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.<sup>80</sup> In fact, writing in July 2016, after 22 weeks of proceedings and hearing testimony from 13 witnesses<sup>81</sup> 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.<sup>82</sup> 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

<sup>75</sup> Mark Osiel, 'Ever Again: Legal Remembrance of Administrative Massacre', *University of Pennsylvania Law Review*, Vol. 144, No. 2 (December 1995), pp. 463-704: 520.

<sup>76</sup> 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 Bouwknecht, *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. Bouwknecht, '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.

<sup>77</sup> HRW, "They Killed Them Like It Was Nothing".

<sup>78</sup> 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.

<sup>79</sup> For a broader study on high-level atrocity crime trials: Ellen L. Lutz & Caitlin Reiger, *Prosecuting Heads of State* (Cambridge: Cambridge University Press, 2009).

<sup>80</sup> Respectively at the UNICTY, SCSL, Extraordinary Chambers in the Courts of Cambodia (ECCC) and the ICC.

<sup>81</sup> 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.

<sup>82</sup> Although, up to a degree, the Khmer Rouge trials before the ECCC, in Asia, are similarly complicated. See: Thijs Bouwknecht, '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.<sup>83</sup> As in most international cases concerning atrocities in Sub-Saharan Africa, virtually all the evidence is testimonial.<sup>84</sup>

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,”<sup>85</sup> 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.<sup>86</sup> Like in Gbagbo’s case.<sup>87</sup> In order to comprehend, understand and apprehend the very dynamic process of fact litigation, it is essential to attend these live hearings.<sup>88</sup> 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<sup>89</sup> 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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<sup>83</sup> See also: Richard Ashby Wilson, *Writing History in International Criminal Trials* (Cambridge: Cambridge University Press, 2011), p. 205.

<sup>84</sup> There are exceptions however, but they are rare. At the ICC, only in the case of Malian war crimes suspect Ahmed 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, PTC I, *Situation: Mali. The Prosecutor v. Ahmad Al Faqi Al Mahdi: 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).

<sup>85</sup> A term coined in: Sylvia Ntube Ngane, *The Position of Witnesses before the International Criminal Court* (Leiden & Boston: Brill Nijhoff, 2015), pp. 35-50.

<sup>86</sup> 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.

<sup>87</sup> 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.

<sup>88</sup> 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.

<sup>89</sup> Hannah Arendt, ‘A Reporter at large. Eichmann in Jerusalem – I’, *The New Yorker* (16 February 1963) 40-113; Hannah Arendt, ‘A Reporter at large. Eichmann in Jerusalem – II’, *The New Yorker* (23 February 1963) 40-111; Hannah Arendt, ‘A Reporter at large. Eichmann in Jerusalem – III’, *The New Yorker* (2 March 1963) 40-91; Hannah Arendt, ‘A Reporter at large. Eichmann in Jerusalem – IV’, *The New Yorker* (9 March 1963) 48-131; Hannah Arendt, ‘A Reporter at large. Eichmann in Jerusalem – V’, *The New Yorker* (16 March 1963) 58-134. The articles rose to notoriety when they were – in abbreviated form - published as a book: Hannah Arendt, *Eichmann in Jerusalem. A Report on the Banality of Evil* (New York: Penguin Books, 1963).

trials.<sup>90</sup> 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<sup>91</sup> 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.<sup>92</sup> 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.<sup>93</sup> Those studies on the relationship between history and atrocity trials, for years already, are the prime reference points in research.<sup>94</sup> 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.<sup>95</sup> 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,<sup>96</sup> I raise the questions to what extent criminal trials can at all unravel – let alone explain - historically significant crimes while simultaneously adjudicating

<sup>90</sup> An exception may be the UNICTY. Wilson, *Writing History in International Criminal Trials*; Navenka Tromp, *Prosecuting Slobodan Milošević. The Unfinished Trial* (New York: Routledge, 2016).

<sup>91</sup> 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: Scott Straus, *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.

<sup>92</sup> As recent as 2016, academic literature is based on these ‘classic’ western cases: Lawrence Douglas, ‘Truth and Justice in Atrocity Trials’, in: William Schabas, *Cambridge Companion to International Criminal Law* (Cambridge: Cambridge University Press, 2016), pp. 34-51. Only Richard Wilson scratched the surface on trials on Rwanda and the Democratic Republic of the Congo (DRC): See also: Wilson, *Writing History*.

<sup>93</sup> 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 4,000 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 of America Department of State, ‘Report of Robert H. Jackson, United States Representative to the International Conference on Military Trials, London, 1945’, *International Organization and Conference Series II, European and British Commonwealth I* (Publication 3080; February 1949); International Military Tribunal (IMT), ‘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 Goring, Rudolf Hess, Joachim Von Ribbentrop, Robert Ley, Wilhelm Keitel; Ernst Kaltenbrunner, Alfred Rosenberg, Hans Frank, Wilhelm Frick, Julius Streicher, Walter Funk, Hjalmar Sci-Iacht, 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-Litischen Leiter Der Nationalsozialistischen Deutschen Arbeiterpartei (Leadership Corps Of The Nazi Party); Die Schutzstaffeln Der Nationalsozialistischen Deutschen Arbeiter-Partei (commonly known as the "SS") and including Der Sicherheitsdienst (commonly known as the "SD"); Die Geheime Staatspolizei (Secret State Police, commonly known as the "Gestapo"); Die Sturmteilungen Der NSDAP (commonly known as the "SA"); and the General Staff and High Command of the German Armed Forces, all as defined in Appendix B of the Indictment, Defendants: Judgement’ in: 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), pp. 171-341: 173.

<sup>94</sup> Popular works include, *inter alia*: Arendt, *Eichmann in Jerusalem*; Richard J. Evans, ‘History, Memory and the Law: The Historian and Expert Witness’, *History and Theory*, Vol. 41, No. 3, pp. 326-345; Mark Osiel, *Mass Atrocity, Collective Memory and the Law*. New Brunswick: Transaction, 2000; Henry Rousso, ‘What historians will retain from the last trial of the purge; in: Richard J. Golsan (ed.), *Memory, the Holocaust, and French Justice: The Bousquet and Touvier Affairs*. Hanover, NH and London: University Press of New England, 1996; Martin Koskeniemi, ‘Between Impunity and Show Trials’, *Max Planck Yearbook of United Nations Law*, Vol. 6 (2000), pp. 1-35; Donald Bloxham, *Genocide on Trial: War Crimes Trials and the Formation of Holocaust History and Memory* (Oxford: Oxford University Press, 2001); Robert J. Donia, *Radovan Karadžić. Architect of the Bosnian Genocide* (Cambridge: Cambridge University Press: 2015); Christopher Browning, *Ordinary Men. Reserve Battalion 101 and the Final Solution in Poland* (London: Penguin Books, 1992).

<sup>95</sup> 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 Smeulers, 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.

<sup>96</sup> 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<sup>97</sup> 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.<sup>98</sup> 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.<sup>99</sup> 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.<sup>100</sup> 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,<sup>101</sup> 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.

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<sup>97</sup> 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, Runda (Rwanda); 3 at Appeals Court, The Hague (The Netherlands); 9 at SCSL; 15+ at UNICTR; 10+ at United Nations International Criminal for the former Yugoslavia (UNICTY).

<sup>98</sup> See: Thijs Bouwknecht, 'Justitia & Memoria', *Zam Africa Magazine*, Vol. 15, No. 4 (2011), pp. 24-43.

<sup>99</sup> Journalist Thierry Cruvellier observation that "the more trials you follow, to 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.

<sup>100</sup> Nancy Amoury Combs, *Fact-Finding Without facts. The Uncertain Evidentiary Foundations of international Criminal Convictions* (Cambridge: Cambridge University Press, 2010).

<sup>101</sup> 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.<sup>102</sup> 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’,<sup>103</sup> 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.<sup>104</sup> 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.<sup>105</sup> Chipping in on what is mostly a theoretical discussion among tribunal staffers<sup>106</sup> and non-

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<sup>102</sup> Borrowed from: Antoon De Baets, ‘Waarheidscommissies als proto-historici’, *V.V.N.–Berichten, Tijdschrift van de Vereniging voor de Verenigde Naties*, Vol. 117, No. 4 (2002), pp. 3–19: 1.

<sup>103</sup> See for insightful discussion on the topic: Sara Kendall & Sarah Nouwen, ‘Speaking of legacy: Toward an ethos of modesty at the International Criminal Tribunal for Rwanda’, *Legal Studies Research Paper Series*, Paper No. 20/2016 (Cambridge University, April 2016).

<sup>104</sup> Kamari Maxine Clarke, *Fictions of Justice: The International Criminal Court and the Challenge of Legal Pluralism in Sub-Saharan Africa* (Cambridge: Cambridge University Press, 2009), pp. 63-65.

<sup>105</sup> See: Thijs Bouwknecht, ‘Sobering up international justice’, *Newsletter Criminology and International Crimes*, Vol. 8, No. 2 (December 2013), pp. 4-6.

<sup>106</sup> Thijs Bouwknecht, ‘ICTY: Thinking about legacy. Interview with Judge Patrick Robinson’, *International Justice Tribune*, No. 101 (10 March 2010); Interview with ICTY registrar John Hocking, The Netherlands, 29 May 2013; Interview with ‘Legacy officer’ Amanda Grafstrom, Arusha, 3 July 2014; Interview with Prosecution Counsel James Arguin, Arusha, 4 July 2014.

historians,<sup>107</sup> 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.

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<sup>107</sup> See for instance: Carsten Stahn's paper, *Re-Constructing History Through Courts. Legacy in International Criminal Justice* (www-text: [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2616491](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2616491), visited: 6 August 2016).

### 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.<sup>108</sup> 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.<sup>109</sup> 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.<sup>110</sup> 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<sup>111</sup> and based on a liberal philosophy of history,<sup>112</sup> 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).<sup>113</sup> 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.<sup>114</sup> Transitional Justice policies are designed to break with the dark past and establish a pathway towards a brighter future.<sup>115</sup> 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.<sup>116</sup> Depending on temporal, political and cultural contexts, inclinations for historical reckoning may ebb and flow.<sup>117</sup> 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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<sup>108</sup> See on violence: Abram De Swaan, *The Killing Compartments. The Mentality of Mass Murder* (New Haven: Yale University Press, 2015), pp. 1-18.

<sup>109</sup> See for a detailed study: Devon E. Hinton & Alexander L. Hinton (eds.), *Genocide and Mass Violence. Memory, Symptom & Recovery* (New York: Cambridge University Press, 2014).

<sup>110</sup> Analogous to: Luc Huyse, *All Things Pass Except the Past* (Van Halewyck: Kessel-Lo 2009), p. 15.

<sup>111</sup> Makau Mutua, *Human Rights Standards. Hegemony, Law, and Politics* (New York: State University of New York Press, 2016), pp. 1-5; Micheline R. Ishay, *The History of Human Rights. From Ancient Times to the Globalization Era* (Berkeley: University of California Press, 2008), pp. 245-314.

<sup>112</sup> Pierre Hazan, 'Transitional Justice After September 11. A New Rapport with Evil', in: Rosalind Shaw & Lars Waldorf (eds.), with Pierre Hazan, *Localizing Transitional Justice. Interventions and Priorities After Mass Violence* (Stanford: Stanford University Press, 2010), pp. 49-65: 55.

<sup>113</sup> As a novel human rights framework, TJ and its broad plurality of mechanisms have evolved alongside the genealogy of the Holocaust (1945 -), political transcendence (1980s), mass violence (1990s), historical injustices (2000s) and international politicking (2010s). Ruti Teitel, *Globalizing Transitional Justice. Contemporary Essays* (Oxford: Oxford University Press, 2014), pp. 49-80; United Nations, *Guidance Note of the Secretary General. United Nations Approach to Transitional Justice* (March 2010).

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

<sup>115</sup> Nanci Adler, 'Remembering History in Post-Soviet Russia: A Case Study in Challenges to Transitional Justice', *Inaugural lecture*, University of Amsterdam (UvA), 14 April 2016.

<sup>116</sup> Compare to recent argument put forward by Makua 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." Makua Mutua, 'What is the Future of Transitional Justice?', *International Journal of Transitional Justice* (2015), pp. 1-9: 5.

<sup>117</sup> See: Rosalind Shaw & Lars Waldorf, 'Introduction. Localizing Transitional Justice', in: Rosalind Shaw & Lars Waldorf (eds.), with Pierre Hazan, *Localizing Transitional Justice. Interventions and Priorities After Mass Violence* (Stanford: Stanford University Press, 2010), pp. 3-27.

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.<sup>118</sup> Typically, transitional justice mechanisms are directed towards unveiling brutality, unravelling its embroidery and identifying the designers.<sup>119</sup> 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,”<sup>120</sup> is hardly contested.<sup>121</sup> And undeniably, in these activist *politics of memory* violent pasts increasingly find their ways back into the present. Doctrines like *Imprescriptibility*<sup>122</sup> 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*<sup>123</sup> and *universal jurisdiction*<sup>124</sup> – 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.<sup>125</sup> 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.<sup>126</sup> Accordingly, history, or at least the past, is the spine of transitional justice in general and international criminal justice in

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<sup>118</sup> Antoon De Baets, Na de genocide: Waarheidsstrategieën van rechters en historici”, in: F. R. Ankersmit, R. Peters, M. Grever, E. Jonker, & K. Ribbens (eds.), *Het drama Srebrenica: Geschiedtheoretische beschouwingen over het NIOD-rapport* (Assen: Koninklijke Van Gorcum), pp. 28–46.

<sup>119</sup> Human rights fact-finding has proliferated in recent years and has become more sophisticated and complex. For a comprehensive overview of the field of practice and theory: Philip Alston & Sarah Knuckey (eds.), *The Transformation of Human Rights Fact-Finding* (Oxford: Oxford University Press, 2016).

<sup>120</sup> George Santayana, *The Life of Reason or the Phrases of Human Progress. Reason in Common Sense* (London: Archibald Constable & CO. Ltd, 1906), p. 284.

<sup>121</sup> 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 atrocity, 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).

<sup>122</sup> Antoon De Baets, ‘Historical Imprescriptibility’, *Storia della Storigrafica*, 59-60 (2011), pp. 125-146.

<sup>123</sup> Mark Drumbl, *Atrocity, Punishment and International Law* (New York 2007), p. 8: note 54.

<sup>124</sup> M. Cherif Bassiouni, ‘Universal Jurisdiction for International Crimes: Historical Perspectives and Contemporary Practice,’ *Virginia Journal of International Law*, Vol. 42, No. 1 (2001-2002), pp. 82-162.

<sup>125</sup> Vasuki Nesiiah, ‘Delimiting Accountability: Writing History Out of Justice’, Rapoport Center Workshop on Human Rights and Justice (5 November 2007).

<sup>126</sup> See for these arguments: Nesiiah, ‘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.<sup>127</sup> 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.<sup>128</sup>

#### 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<sup>129</sup>

Historians, like Laurent Gbagbo, are rare defendants at the international criminal tribunals,<sup>130</sup> arena's that naturally adjudicate agency within the wider spectrum of historical events.<sup>131</sup> 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.<sup>132</sup> 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.<sup>133</sup> Building on a larger, perhaps more obscure history<sup>134</sup> and as part of the larger transitional justice field, from the mid-1990s, the world has seen a *tribunalisation* of

<sup>127</sup> Berber Bevernage. *History, Memory, and State-Sponsored Violence. Time and Justice* (New York: Routledge, 2011), pp. 66-67.

<sup>128</sup> The Turkish Courts-Martial (1919-1920) in the wake of the large scale massacres of Armenians (1915-1918) are a good example of the limitations of transitional justice, where findings on past atrocities were submerged under new nationalist priorities, such as those of modern-day Turkey. Despite the clear and official acknowledgement of the genocide provided by the post-war government and as found in the trial verdicts, denialism has prevailed and court records buried and obscured. Jennifer Balint, 'The Ottoman State Special Military Tribunal for the Genocide of the Armenians: 'Doing Government Business'', in: Kevin Jon Heller & Gerry Simpson (eds.), *The Hidden Histories of War Crimes Trials* (Oxford: Oxford University Press, 2013), pp. 77-102: 100. A similar trend can be seen in Liberia, only several years after its Truth and Reconciliation Commission: Aaron Weah, 'Post-Truth and Reconciliation Commission Revisionism in Liberia', *Front Page Africa*, 5 August 2006 (www-text: <http://www.frontpageafricaonline.com/index.php/op-ed/1623-post-truth-and-reconciliation-commission-revisionism-in-liberia>, visited: 7 August 2016).

<sup>129</sup> Cited in: Philip Gourevitch, 'Mass Murder Relies on People Like Us: An Interview with Thierry Cruvellier', *The New Yorker* (15 May 2014).

<sup>130</sup> 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 & Hassan Ngeze: Judgement and Sentence* (ICTR-99-52-T; 3 December 2003). ECCC, Office of the Co-Investigating Judges, *Closing Order* (002/19-09/2007-ECCC-OCJI; Phnom Penh, 15 September 2010), §996.

<sup>131</sup> 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.

<sup>132</sup> 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 Imprescriptibility', p. 132.

<sup>133</sup> 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 (1970/80s), the genocide of the indigenous Ixil Maya's in Guatemala (1980s), ethnic persecutions and widespread torture in Chad (1980s), the Balkan wars (1990s), 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.

<sup>134</sup> 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.”<sup>135</sup> History - or events from the past - is both background, middle ground and foreground in international criminal justice and essentially, it is historical injustices that catalyse these justice initiatives, which in their turn summon history, historical sources or historical testimony in order to render an opinion on the past.<sup>136</sup> This occurs at least at four different levels. First, *as a starting point*. Historically relevant sources on large scale human rights abuses can lead to trials.<sup>137</sup> Often the dictatorship’s formerly secret archives of repression were used there as well.<sup>138</sup> Also, 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.<sup>139</sup> 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 dockets.<sup>140</sup> Second, *at the pre-trial phase*, historians or ‘experts’ on the history of particular contexts are often consulted in the early life’s of tribunals, during investigations and preparations of indictment.<sup>141</sup> Sometimes they are hired consultants to prosecutors, advising them on possible sources, contextual information and case theories.<sup>142</sup> 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.<sup>143</sup> Historical expert witnessing, however, has not been a new

<sup>135</sup> 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, DOHARA, Kenji, HASHIMOTO, Kingoro, HATA, Shunroku, HIMANUMA, Kiichiro, HIROTA, Koki, HOSHINO, Kaoki, ITAGAKI, Seishiro, KAYA, Okinori, KIDO, Koichi, KIKURA, Heitaro, KOISO, Kuniaki, MATSUI, Iwane, MATSUOKA, Yosuke, MINAMI, Jiro, MUTO, Akira, MAGANO, Osami, OKA, Takasumi, OKAWA, Shumei, OSHIMA, Hiroshi, SATO, Kenryo, SHIGEMITSU Mamoru, SHIMADA, Shigetaro, SHIRATORI, Toshio, SUZUKI, Teiichi- TOGO. Shigenori, TOJO, Hideki, OMEZU, Yoshijiro: Judgment of The International Military Tribunal* [trial transcript] (Tokyo, 4 November 1948), pp. 48428.

<sup>136</sup> Nesiiah, ‘Delimiting Accountability’.

<sup>137</sup> In Argentina, Guatemala and Chad, for example, prosecutors have built criminal cases on the records of truth commissions. Comisión Nacional sobre la Desaparición de Personas (CONADEP), *Nunca Más: Informe de la Comisión Nacional sobre la Desaparición de Personas* (Buenos Aires: Eudeba, 1984); Comisión para el Esclarecimiento Histórico, *Guatemala, Memoria del Silencio* (June 1999); Ministère Tchadien de la Justice, *Les crimes et détournements de l'ex président Habré et de ses complices: rapport de la Commission d'Enquete Nationale* (Paris: l'Harmattan, 1993). These reports were used in Argentina’s junta trials, Guatemala’s trial against Efraín Ríos Montt and the prosecution of Chad’s former President Hissène Habré.

<sup>138</sup> Anton De Baets, ‘The Dictator’s Secret Archives: Rationales for Their Creation, Destruction, and Disclosure’, In: Alasdair MacDonald & Arend H. Huussen, jr. (eds.), *Scholarly Environments: Centres of Learning and Institutional Contexts 1600–1960* (Louvain: Peeters, 2004), pp. 181–196.

<sup>139</sup> At the UNICTR, all new staff was virtually required to read Alison Des Forges’ standard work on Rwanda history, before entering any courtroom. Alison Des Forges, *Leave None to Tell the Story: Genocide in Rwanda* (New York: HRW/Fédération Internationale des Ligues des Droits de l’Homme, 1999).

<sup>140</sup> As research officer at the Documentation and Information Sections at the UNICTR (2004) and ICC (2006), I personally embarked on this work.

<sup>141</sup> Doris Buss, ‘Expert Witnesses and International War Crimes Trials’, in: Dubravka Zarkov & Marlies Glasius (eds.), *Narratives of Justice in and Out of the Courtroom. Former Yugoslavia and Beyond* (Heidelberg: Springer, 2014), pp. 23–45.

<sup>142</sup> At the UNICTY, historians were formally represented in the Leadership Research Team (LRT), which was headed by a historian, Patrick J. Treanor. But we also see it at the national level, in domestic cases of universal jurisdiction. For instance: the special Team on International Crimes within the Dutch Police Force has two historians on staff, on a permanent basis. Interview, Jeroen Toor, Team Leader International Crimes Unit, 30 April 2014.

<sup>143</sup> Many became regular witnesses, like, *inter alia*, the late Alison Des Forges in ten trials at the UNICTR: Akayesu [February 1997], Media [May 2002], Butare [June 2004], Military 1 [September–November 2002], Military 2 [September 2006], Gatumbitsi [August 2003], Renzaho [March 2007], Ndindabahizi [September 2003], Zigiranyirazo [March 2006], Rwamakuba [July 2005]. David Chandler testified in two trials at the ECCC, Stephen Ellis in one trial at the SCSL and Gérard Prunier in one trial at the ICC. Robert Donia perhaps tops the list, with testimony in at least 15 trials at the ICTY. Donia, *Radovan Karadžić*.

phenomenon introduced by the tribunals,<sup>144</sup> but it has remained a continuing practice at the international courts<sup>145</sup> and often times spark heated debates, particularly between experts and defence teams.<sup>146</sup> 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.<sup>147</sup> 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.<sup>148</sup> 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.”<sup>149</sup> In tradition of the International Military Tribunal in Nuremberg<sup>150</sup> - as noted above - they have ascribed to themselves a plethora or other noble extra-legal goals and powers.<sup>151</sup> 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.*”<sup>152</sup> Courts unstitch history, but they do not necessarily write history. By nature, the tribunals themselves are historical phenomena with retrospective mandates, which through 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

<sup>144</sup> Vladimir Petrović, *The Emergence of Historical Forensic Expertise. Clio Takes the Stand* (New York: Routledge, 2017).

<sup>145</sup> In the Hissène Habré case before the Extraordinary African Chambers (EAC), Chadian historian Arnaud Dingamadjji 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 Dingamadjji* (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.trustafrica.org/images/ICJ\\_reports/EAC-%20Trial%20Hearing%20Report%20-%209th%20September%202015%20-%20English.pdf](http://www.trustafrica.org/images/ICJ_reports/EAC-%20Trial%20Hearing%20Report%20-%209th%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.

<sup>146</sup> 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-Yj\\_8s](https://www.youtube.com/watch?v=0lVeu-Yj_8s)), at 7:20 minutes; ECCC, *Press Statement by Defence Support Section*, 5 August 2016; George Wright, ‘ECCC Defense Support Section Rejects Claim that Lawyers Are ‘Criminal’’, *The Cambodia Daily*, 6 August 2016.

<sup>147</sup> 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 – such as “the making of a record of the Hitler regime which would withstand the test of history, [...] – 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.*” Arendt, ‘A reporter at large ~ V’, p. 101.

<sup>148</sup> 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.

<sup>149</sup> Philip Gourevitch, ‘Mass Murder Relies on People Like Us: An Interview with Thierry Cruvellier’, *The New Yorker*, 15 May 2014.

<sup>150</sup> 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.

<sup>151</sup> See also: Thijs Bouwknecht, ‘Nothing but Verdicts. The Purpose of Tribunals’, *Justice in Conflict*, 25 September 2013 (www-blog: <https://justiceinconflict.org/2013/09/25/nothing-but-verdicts-the-purpose-of-tribunals/>, visited: 9 May 2016).

<sup>152</sup> District Court of Jerusalem, *Attorney General v. Adolf Eichmann: Judgement* (40/61; Jerusalem, 11 December 1961), §2.

will itself be subject to historiographical scrutiny.”<sup>153</sup> 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.<sup>154</sup> 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,<sup>155</sup> 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.<sup>156</sup> 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. It therefore is a very specific and constrained kind of normative *agency history*, whereas historical writing focuses on *agency* as well as *structure*.<sup>157</sup> 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<sup>158</sup> but is an uneasy one.<sup>159</sup> 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.”<sup>160</sup> 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.<sup>161</sup> Tribunals prosecute only a limited

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<sup>153</sup> Mark Osiel, ‘Ever Again: Legal Remembrance of Administrative Massacre’, p. 522.

<sup>154</sup> 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.

<sup>155</sup> The word history derives from the ancient Greek *ιστορία* (*historia*, “learning through research, narration of what is learned”), from *ιστορέω* (*historēō*, “to learn through research, to inquire”), from *ιστορ* (*histōr*, “the one who knows, the expert, the judge”).

<sup>156</sup> Antoon De Baets, ‘Na de genocide: Waarheidsstrategieën van rechters en historici’, *Tijdschrift voor Geschiedenis*, Vol. 116, Nr. 2 (2003), pp. 212-230: 229.

<sup>157</sup> De Baets, ‘Na de genocide: Waarheidsstrategieën van rechters en historici’, p. 219.

<sup>158</sup> See also: Lawrence Douglas, ‘Truth and Justice in Atrocity Trials’, in: William Schabas, *Cambridge Companion to International Criminal Law* (Cambridge: Cambridge University Press, 2016), pp. 34-51: 47.

<sup>159</sup> Dubravka Zarkov & Marlies Glasius (eds.), *Narratives of Justice In and Out of the Courtroom* (Heidelberg: Springer, 2014); William Schabas, ‘History, International Justice, and the Right to Truth’, in: William Schabas, *Unimaginable Atrocities. Justice, Politics, and Rights at the War Crimes Tribunals* (Oxford: Oxford University Press, 2002), pp. 153-162; Fergal Gaynor, ‘Uneasy Partners: Evidence, Truth and History in International Trials’, *Journal of International Criminal Justice*, 10 (5) (2012), pp. 1257-1275.

<sup>160</sup> Wilson, *Writing History*, p. 13.

<sup>161</sup> In civil law jurisdictions, investigative judges do play an important role, yet their investigations are sparked by criminal complaints. See for instance: Thijs Bouwknecht, ‘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.<sup>162</sup> 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.<sup>163</sup> Fourth, there are also bars concerning the types of protagonists of violence. In theory,<sup>164</sup> tribunals are supposed to deal with most senior leaders - intellectual actors - suspected of being “most responsible,” potential barring agency at mid- and low levels.<sup>165</sup> 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.<sup>166</sup> Often times, investigators simply follow leads and direct their focus and resources towards single suspects while not pursuing others.<sup>167</sup> 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.<sup>168</sup> International judges are triers of fact, but in most cases they are not independent seekers of evidence.<sup>169</sup> 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 Orié 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.”<sup>170</sup> 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.<sup>171</sup> Although addressing interpretations of history and limiting the cope

<sup>162</sup> UNSC, *Resolution 955. Annex: Statute of the International Tribunal for Rwanda* (S/RES/955 (1994), 8 November 1994).

<sup>163</sup> *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)

<sup>164</sup> 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.

<sup>165</sup> On the completion strategy of the ICTY and ICTR: UNSC, *Resolution 1534 (2004)* (S/RES/1534(2004), 26 March 2004).

<sup>166</sup> ICC, OTP, *Paper on some policy issues before the Office of the Prosecutor* (September 2003).

<sup>167</sup> Author's Interview, Jeroen Toor, Team Leader International Crimes Unit of Dutch Police, Woerden, 2 October 2013.

<sup>168</sup> With exception of the ECCC and EAC, there are no investigative judges at the tribunals.

<sup>169</sup> 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.

<sup>170</sup> UNICTY, TC I, *Prosecutor v. Ratko Mladic: Transcript* (IT-09-92-T; 1 December 2015), p. 42068.

<sup>171</sup> *Chambre Africaine Extraordinaire D’Assises (CAE), Ministère Public c. Hisssein 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.”<sup>172</sup>

## 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?<sup>173</sup> 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.<sup>174</sup> 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).<sup>175</sup> 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.<sup>176</sup> 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.<sup>177</sup>

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.”<sup>178</sup> In Nuremberg and at the modern tribunals it was no different.<sup>179</sup> 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.”<sup>180</sup> 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

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<sup>172</sup> Juan E. Méndez, ‘backflip’, Wilson, *Writing History*.

<sup>173</sup> Wilson, *Writing History*, p. 15.

<sup>174</sup> Cruvellier, *The Master of Confessions*, p. 80.

<sup>175</sup> Leopold von Ranke, ‘Preface: Histories of the Latin and Germanic Nations from 1494–1514’ in: Fritz Stern (ed.) *The Varieties of History: From Voltaire to the Present* (Cleveland: World, Meridian, 1956), p. 57.

<sup>176</sup> See also for a discussion on the “Rankean rage” in periods of deep-rooted political transitions from repression: Antoon De Baets, *Censorship of Historical Thought. A World Guide, 1945-2000* (Westport & London: Greenwood Press, 2002), p. 22.

<sup>177</sup> Philip Gourevitch, ‘Mass murder relies on people like us: an interview with Thierry Cruvellier’, *The New Yorker*, 15 May 2014.

<sup>178</sup> Gideon Hausner, *Justice in Jerusalem* (New York: Harper & Row, 1966), pp. 291-292.

<sup>179</sup> 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.

<sup>180</sup> ECCC, Trial Chamber, *Transcript of Proceedings - “Duch” Trial Public* (001/18-07-2007-ECCC/TC; Phnom Penh, 31 March 2009), p. 3.

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 tribunals, 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.<sup>181</sup> 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.<sup>182</sup> 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.<sup>183</sup> Conflating history with a prosecutorial case theory and then over-promising that courts will establish the truth about past events has increasingly proved to be a recipe for public disappointment and disillusion.<sup>184</sup> 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 ends<sup>185</sup> - 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.

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<sup>181</sup> In the ICC’s Gbagbo trial for example, the most crucial omission, perhaps, in the Prosecutor’s narrative of the Ivorian 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).

<sup>182</sup> 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.

<sup>183</sup> In the ICC’s Gbagbo trial for example, the most crucial omission, perhaps, in the Prosecutor’s narrative of the Ivorian 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).

<sup>184</sup> 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 (murder, 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). 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, TCII, *Le Procureur c/ Vojislav Šešelj: Jugement* (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://dovjacobs.com/2016/03/31/is-the-icty-ashamed-by-its-own-seselj-judgment/>), last visit on 21 April 2016; Smiljana Vukojcic, ‘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).

<sup>185</sup> See: Andrew Mamo, ‘History and the Boundaries of Legality: Historical Evidence at the ECCC’, May 2013 (www-text: <https://dash.harvard.edu/handle/1/10985172>), visited: 6 August 2016).

Trials and their end judgements may lead to historically empty narratives or “mediocre historical accounts of the origins and causes of mass crimes.”<sup>186</sup> 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.<sup>187</sup> Besides limited but significant historical conclusions, courts collect a wealth of historically relevant sources.<sup>188</sup> 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.<sup>189</sup> 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.”<sup>190</sup> 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 cruellest 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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<sup>186</sup> Wilson, *Writing History*, p. 1.

<sup>187</sup> 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 Eduard Karemera, Mathieu Ndirumpatswe, Joseph Nzirorera: Decision on Prosecutor’s Interlocutory Appeal Decision on Judicial Notice* (ICTR-98-44-AR73(C); 16 June 2006).

<sup>188</sup> 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.

<sup>189</sup> 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.unmict.org/en/about/witnesses>, last visit on 9 May 2016).

<sup>190</sup> Tim Kelsall, *Culture under Cross-Examination. International Justice and the Special Court for Sierra Leone* (Cambridge: Cambridge University Press, 2009), p. 17.

memories of what they have experienced or witnessed themselves or through hearsay.<sup>191</sup> 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.<sup>192</sup> 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.<sup>193</sup> Dubbed a procedure of “fact-finding without facts” in a groundbreaking study by Nancy Combs,<sup>194</sup> 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,<sup>195</sup> of what really is an existential ‘truth-finding crisis’, has particular opened itself in the ICC’s Congo and Kenya cases.<sup>196</sup> 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.<sup>197</sup> When it comes to an international criminal judgement, its foundation may be “uncertain” and may “often be little more than an act of faith.”<sup>198</sup> 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

<sup>191</sup> De Swaan, *The Killing Compartments*, pp. 227-228.

<sup>192</sup> Martin Witteveen, ‘Dealing with Old Evidence in Core International Crimes Cases: The Dutch Experience as a Case Study’, in: Morten Bergsmo and Cheah Wui Ling (eds.), *Old Evidence and Core International Crimes* (Beijing: Torkel Opsahl Academic E-publisher, 2012), pp. 65-108: 71-72.

<sup>193</sup> For an analysis: Robert Cryer, ‘A Long Way from Home: Witnesses before International Criminal Tribunals’, *International Commentary on Evidence*, 4 (2006), art. 8.

<sup>194</sup> Nancy Combs, ‘Grave Crimes and Weak Evidence: A Fact-Finding Evolution in International Criminal Law’, *Harvard International Law Journal* (25 April 2016); Nancy Amoury Combs, *Fact-Finding Without facts. The Uncertain Evidentiary Foundations of international Criminal Convictions* (Cambridge: Cambridge University Press, 2010).

<sup>195</sup> Also see: Bouwknecht, ‘How did the DRC becomes the ICC’s Pandora’s Box?’.

<sup>196</sup> Caroline Buisman, ‘Delegating Investigations: Lessons to be Learned from the Lubanga Judgement’, *Northwestern Journal of International Human Rights*, Vol. 11, No. 3 (Summer 2013), pp. 30-82.

<sup>197</sup> ICC, OTP, *Situation on the Republic of 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); ICC, TCV(a), *Situation in the Republic of Kenya. The Prosecutor v. William Samoei Ruto and Joshua Arap Sang: Public redacted version of Decision on Defence Applications for Judgments of Acquittal* (ICC-01/09-01/11; 5 April 2016). See for an excellent autopsy of the Kenya cases: James Verini, ‘The Prosecutor and the President’, *New York Times Magazine*, 22 June 2016.

<sup>198</sup> Cruvellier, *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 Arnestad (dir.), *Telling Truths in Arusha* [Documentary film] (SF Norge A/S, 2010).

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.<sup>199</sup> 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

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<sup>199</sup> 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.<sup>200</sup> These multifocal sources, the cacophony of early analyses combined with newly discovered information are harmonised in the evaluation after the events.<sup>201</sup> 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 Congo<sup>202</sup> or 'no-go' area of Darfur.<sup>203</sup> 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.<sup>204</sup> 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

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<sup>200</sup> 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.

<sup>201</sup> 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; Luc Reydam, 'NGO justice. African Rights as Pseudo Prosecutor of the Rwandan Genocide', *Human Rights Quarterly*, Vol. 38, No. 3 (August 2016), pp. 547-588.

<sup>202</sup> 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).

<sup>203</sup> ICC, *Situation in Darfur, Sudan in the Case of the Prosecutor vs. Abdallah Banda Abakaer Nourain and Saleh Mohammed Jerbo Jamus: Defence Request for a Temporary Stay of Proceedings* (ICC-02/05-03/09; 6 January 2012).

<sup>204</sup> 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,<sup>205</sup> 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.<sup>206</sup> 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.<sup>207</sup>

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.<sup>208</sup> 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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<sup>205</sup> See this argument in: Nancy Amoury Combs, *Fact-Finding Without facts. The Uncertain Evidentiary Foundations of international Criminal Convictions* (Cambridge 2010).

<sup>206</sup> 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>.

<sup>207</sup> 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 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, TCII, ‘Annexe 2 - Rappel De La Procédure’, *Sešelj: 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/>, consulted on 22 April 2016).

<sup>208</sup> 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,<sup>209</sup> including the court's flagship trial of alleged genocide 'mastermind'<sup>210</sup> Théoneste Bagosora,<sup>211</sup> 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<sup>212</sup> and Alison Des Forges from the USA.<sup>213</sup> 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.<sup>214</sup> 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).<sup>215</sup> 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.<sup>216</sup> From 2007, when I became a full-time war crimes trials correspondent,<sup>217</sup> I covered dozens war crimes proceedings at all the international tribunals, the ICC

<sup>209</sup> One of the three trial chambers condemned former Rusomo mayor Sylvestre Gacumbitsi in June 2004, followed a month later by Emmanuel Nindabahizi, who had been the finance Minister during the 1994 genocide. Appeals judges sustained the verdict of former information Minister Elizer Niyitegeka, just six days before former businessman Gaspard Kanyarukiga pleaded not guilty to genocide charges at his initial appearance on 22 July. Opening statements were delivered in three trials. The first concerned former army commander Aloys Simba in August and the second, on 20 September, Father Athanase Seromba. A second joint trial, dubbed 'Military II', against prominent military figures Augustin Bizimungu, Augustin Nindiliyimana, Francois-Xavier Nzuwonemeye and Innocent Sagahutu started on the same day. UNICTR, *The Prosecutor v. Sylvestre Gacumbitsi: Judgment* (ICTR-2001-64-T; 17 June 2004); UNICTR, *The Prosecutor v. Emmanuel Nindabahizi: Judgment and Sentence* (ICTR-2001-714; 15 July 2004); UNICTR, Appeals Chamber, *Elizer Niyitegeka (Appellant) v. The Prosecutor (Respondent): Judgment* (ICTR-96-14-A; 9 July 2004); UNICTR, 'Kanyarukiga. Initial Appearance', *Minutes of Proceedings* (ICTR-02-78-I; 22 July 2004); UNICTR, TCI, *The Prosecutor of the Tribunal v. Aloys Simba: Transcript* (ICTR-01-76-T; 16 August 2004); UNICTR, TCH, *The Prosecutor of the Tribunal v. Athanase Seromba: Transcript* (ICTR-2001-66-I; 20 September 2004); <sup>209</sup> UNICTR, TCH, *The Prosecutor of the Tribunal v. Augustin Nindiliyimana, François-Xavier Nzuwonemeye, Innocent Sagahutu & Augustin Bizimungu: Transcript* (ICTR-00-56-I; 20 September 2004).

<sup>210</sup> See: Thierry Cruvellier, 'ICTR: Rwandan genocide – No Masterplan', *Radio Netherlands Worldwide International Justice*, 19 December 2011 ([www-text: http://www.rnw.nl/international-justice/article/brainless-genocide](http://www.rnw.nl/international-justice/article/brainless-genocide), visited: 30 September 2016).

<sup>211</sup> UNICTR, (OTP), *The Military Leaders Trial. Prosecutor v. Bagosora, Prosecutor v. Nsengiyumva, Prosecutor v. Kabiligi & Ntabakuze: Prosecution Opening Statement* (ICTR-98-41-T; 2 April 2002).

<sup>212</sup> UNICTR, TCI, *Prosecutor v. Théoneste Bagosora, Gratién Kabiligi, Aloys Ntabakuze & Anatole Nsengiyumva: Transcript* (ICTR-98-41-T; 15 September 2004). Continued testimony on: 16, 17, 20, 21 & 21 September 2004.

<sup>213</sup> Her titanic book on the genocide fashioned the narratives of the key trials in Arusha – and Rwanda trials elsewhere in the world - in which she had given expert information as a prosecution witness. According to the UN Dr. Des Forges testified in ten cases before the ICTR, spending a total of over one hundred days on the stand (<http://www.un.org/en/preventgenocide/rwanda/resources/podcasts.shtml>). According to others, she testified in 11 trials. The author verified the following ten trials, involving 24 accused individuals: Akayesu [February 1997], Media [May 2002], Butare [June 2004], Military I [September-November 2002], Military 2 [September 2006], Gatsumbitsi [August 2003], Renzaho [March 2007], Nindabahizi [September 2003], Zigranyirazo [March 2006], Rwamakuba [July 2005]. Des Forges was testifying in June 2004 for 8 days "as an expert in Rwandan history and in the history of the genocide" in what became international justice's longest and most expensive ever trial against six individuals from Butare, on which judgement delivery I reported from inside of the courtroom in 2011. UNICTR, TCH, *The Prosecutor of the Tribunal v. Pauline Nyiramasuhuko, Arsène Ntahobali, Sylvain Nsabimana, Alphonse Nteziryayo, Joseph Kanyabashi, Elie Ndayambaje: Transcript* (ICTR-98-42-T; Arusha, 7 June 2004) pp. 22. Testimony continued on 8, 9, 10, 14, 15, 16, 17 June 2004. The Butare trial included the tribunal's only female suspect Pauline Nyiramasuhuko, her son Arsène Shalom Ntahobali and the local officials Joseph Kanyabashi, Elie Ndayambaje, Sylvain Nsabimana and Alphonse Nteziryayo. Having started in 2001, the trial only came to an end on appeal in December 2015, the very month the ICTR closed its doors: See: UNICTR, Appeals Chamber (AC), *The Prosecutor v. Pauline Nyiramasuhuko, Arsène Shalom Ntahobali, Sylvain Nsabimana, Alphonse Nteziryayo, Joseph Kaynabashi and Elie Ndayambaje: Judgment* (ICTR-98-42-A; Arusha, 14 December 2015); UNSC, 'Security Council Press Statement on Closure of International Criminal Tribunal for Rwanda', *Press Release* (SC/12188-AFR/3296-L/3249; 31 December 2015).

<sup>214</sup> On various occasions, I was contacted by prosecution authorities or defence lawyers for consultancy, investigation or expert testimony in trials relating to Rwanda as well as other situations. In order to maintain academic integrity and independence, I have always principally declined such requests.

<sup>215</sup> As such, I contributed research and trial reporting to several public reports, papers and media advisories.

<sup>216</sup> The cases, and only one trial, on those situations are not part of this dissertation. It did however inform me on the methodologies applied examinations conducted at the ICC at that time, which in principle did not differ much from academic open source research.

<sup>217</sup> At Radio Netherlands Worldwide (RNW), the International Justice Tribune (IJT), Hironelle News Agency, France24 and a variety of Dutch and international media, including print, web and audio-visual.

and a range of domestic jurisdictions in Europe, Africa and Asia.<sup>218</sup> 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.<sup>219</sup> 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.<sup>220</sup>

Next to primary trial observation and court records,<sup>221</sup> 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. In 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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<sup>218</sup> 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, Ratko Mladic, Laurent Gbagbo, Uhuru Kenyatta, Nuon 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.

<sup>219</sup> 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. Baas and Wilson also raised a campaign and petition to maintain and open the records and archives of the UN's International Criminal Tribunal for the former Yugoslavia (ICTY) at: <http://www.ictylegacy.org/>. 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.

<sup>220</sup> 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).

<sup>221</sup> 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.<sup>222</sup> 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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<sup>222</sup> See: De Baets, 'Historical Imprescriptibility', p. 132.

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.