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2. Unravelling the Past: Transitional Justice

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

- Teju Cole²²³

2.1 Introduction

What is mass violence and how does it fit the classifications of the legal lexicon of transnational atrocity criminalities? Writing on these issues necessitates sharp operationalisation, description and demarcation of terminology. Noticeably, it does not comprise everyday ‘ordinary’ aggressive violence, like pub fights, bank robberies or manslaughter.²²⁴ Nor are serial killings or terrorist attacks,²²⁵ but even those acts are not automatically included in the framework, notwithstanding the fact that they may cause lot of victims and that it can certainly be part of mass violence.²²⁶ Also, violations of the bulk of internationally recognised human rights are not necessarily ingredients of the mass violence corpus.²²⁷ All these crimes aside, the crux of the notion of international crimes lies in the unusual, systematic and macro-unsettling nature of the violence, as well as the socio-political situations in which it takes place.²²⁸ Often this type of violence is deemed so “serious” or so “unimaginable” that it “deeply shock[s] the conscience of humanity.”²²⁹ Seldom does this ‘ultraviolence’ transpire in peacetime. Neither does it often appear within the borders of democracy-styled or so-called rule of law nations, although these states or their nationals can be involved in them elsewhere.²³⁰ More common backgrounds and triggers of mass violence involve, amongst other things, war, civil conflict, insurgency, state repression, revolution, rapid political change or ecological

²²³ Teju Cole, ‘The white-Savior Industrial Complex’, *The Atlantic*, 21 March 2012.

²²⁴ Although, some criminologists argue that “magnitude aside, genocide is similar in many ways to ordinary violent crime and can be profitably studied in the ways that ordinary violent crime is studied.” Nicole Rafter. *The Crime of All Crimes. Toward a Criminology of Genocide* (New York & London: New York University Press, 2016), e-book.

²²⁵ Although terrorism is defined in international law and applied by an international criminal tribunal, but it typically is not included in the lexicon of international crimes. Yet, some jurisdictions, like The Netherlands, adjudicate crimes of terrorism within the International Crimes Chamber. See: Special Tribunal for Lebanon (STL), Appeals Chambers, *Interlocutory Decision on the Applicable Law: Terrorism, Conspiracy, Homicide, Perpetration, Cumulative Charging* (STL-II-OI11; 16 February 2011), art. 58; Rechtbank Den Haag, *Vonnis* (09/827101-16; 22 July 2016).

²²⁶ For instance, General Stanislav Galic was convicted for war crimes of having conducted, between September 1992 and August 1994, a campaign of sniping and shelling attacks on the civilian population of the Bosnian capital Sarajevo, causing death and injury to civilians, “with the primary purpose of spreading terror among the civilian population.” UNICTY, TCI, *Prosecutor v. Stanislav Galic*: Judgement (IT-98-29-T; 5 December 2003), §26-49.

²²⁷ In jargon, only those human rights violations are included which are deemed “serious human rights violations.” The first set is generally dealt with at national jurisdictions or specialised regional human rights courts, including the European Human Court of Human Rights (HCHR), the Inter-American Court of Human Rights (IACHR) or the African Court on Human and Peoples’ Rights (ACHPR). See: Andrew Clamham, ‘Human rights and international criminal law’, in: William A. Schabas, *The Cambridge Companion to International Criminal Law* (Cambridge: Cambridge University Press, 2016), pp. 11-33.

²²⁸ Susanne Karstedt, ‘Contextualizing mass atrocity crimes: The dynamics of ‘extremely violent societies’’, *European Journal of Criminology*, Vol. 9, No. 5 (September 2012), pp. 499-513; Christian Gerlach, *Extremely violent societies. Mass Violence in the Twentieth-Century World* (Cambridge: Cambridge University Press, 2010), pp. 1-16.

²²⁹ Analogous to, for instance: Schabas, *Unimaginable Atrocities*.

²³⁰ Examples include the role of the United States of America (USA) and the United Kingdom (UK). Historical cases, in northern Africa, include cases such as Chad and Algeria. HRW, *Enabling a Dictator. The United States and Chad’s Hissène Habré, 1982-1990* (New York: HRW, 2016); Martin Evans, *Algeria. France’s Undeclared War* (Oxford: Oxford University Press, 2012); The Iraq Inquiry, *The Report of the Iraq Inquiry* (London, 6 July 2016).

change.²³¹ Crucially, mass violence stretches beyond individual isolated incidents and is rather a state of affairs over a period of time, which typically involves larger groups of perpetrators and victims and affects comprehensive parts of communities or societies as a whole.²³² War can be so. But conventional warfare itself is not *per se* illegal. Generally, it is rather symmetric²³³ and battled out between professionally organised and recognisable armed units, such as military, gendarmerie, paramilitary, militias or mercenaries.²³⁴ Mass violence differs for it typically involves the asymmetric, and often systematic, targeting of numerous unprofessional, unorganised and unarmed civilians, regularly by a large group of organised and armed people.²³⁵ When talking about mass violence, we mean those situations in which human integrity (*humanity*) is violated beyond the individual and where numerous killings – or other types of physical and psychological violence - of civilian non-combatants occur.

What is in a name? Mass murder, mass killing, massacre, pogrom, extermination, annihilation, ethnic cleansing, persecution, political violence, state crime and genocide may all sound the same and these types of mass violence could all be thought of as gross human rights violations, crimes against humanity or war crimes. And indeed they are interchangeably – and often confusingly and instrumentally - used in public, policy and academic vernaculars.²³⁶ Technically however, particularly when applying the operative legal definitions of these crimes, the terms imply diverse performances of violence, committed with dissimilar motives, in specific contexts and are sometimes targeted at differentiated victim groups. For example, genocide can involve extermination by mass killing, but exterminatory mass slaughter is not automatically genocide. Yet it surely is a crime against humanity. At least this would be the case for jurists, who would refer to the legal definitions and handle large-scale, methodical and group-selective violence from the strict juridical perspective. Social and political scientists, on their turn, tend to be more creative and flexible and tend to apply their own theoretical framework and self-styled definitions to “mass categorical violence” and may apply the genocide terminology²³⁷ in alternative academic definitions.²³⁸ Although often confusing for general audiences, the apparent dichotomy between the disciplines is that lawyers pursue to *judge*

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

²³² Straus would define it as “large-scale, systematic violence against civilian populations”. Straus, *Fundamentals of Genocide*, p. 31.

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

²³⁴ Alex Alvarez, *Genocidal Crimes* (Abingdon: Routledge, 2010), pp. 74-99.

²³⁵ De Swaan, *The Killing Compartments*, pp. 9-11.

²³⁶ Mahmood Mamdani, ‘The Politics of Naming: Genocide, Civil War, Insurgency’, *London Review of Books*, Vol. 5, No. 8 (March 2007), pp. 5-8.

²³⁷ See for example: Straus, *Making and Unmaking Nations*, p. 17.

²³⁸ Over 30 such diverging scholarly definitions – that propose alterations in the meaning of intentionally, the range of the protected groups or the specific genocidal acts - can be distilled from the literature since 1959. See for a sample of 22 definitions: Adam Jones, *Genocide. A Comprehensive Introduction. Second Edition* (Abingdon: Routledge, 2011), pp. 16-20. New definitions continue to transpire and often they strikingly resemble other crimes, such as crimes against humanity. See for example: “Genocide can be defined as a complex process of systematic persecution and annihilation of a group of people by a government.” Uğur Ümit Üngör, ‘Introduction. Genocide, an Enduring Problem of our Age’, in: Uğur Ümit Üngör (ed.), *Genocide. New Perspectives on its Causes, Courses, and Consequences* (Amsterdam: Amsterdam University Press, 2016), p. 15.

perpetrators, sociologists and criminologists try to understand the underlying processes and historians opt to reconstruct and explain the events within a larger historical context. To outlaw such puzzlement in this thesis, though, I will discuss below the operational definitions applied in this study.

2.2 Genocide

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

- Alain Mabanckou²³⁹

Perhaps the most ambiguous, frequently contested and sturdily politicised tag of mass violence is genocide,²⁴⁰ an ideologically based and discriminatory crime *per se*. Etymologically and substance-wise, the term has a resilient antecedent in Zulu (*Izwekufa*),²⁴¹ German (Völkermord)²⁴² and possibly other languages. But it was not Shaka Zulu's campaign of expansion and extermination in present-day South Africa and Zimbabwe in the early nineteenth century,²⁴³ nor Germany's mass killing of Herero's in present-day Namibia²⁴⁴ that gave birth to the concept as we know it since the second half of the twentieth century. Informed by other historical precedents, including the Turkish massacres of Armenians between 1915 and 1918,²⁴⁵ the current word surfaced during the Second World War and in context of the persecutory and exterminatory policies by the Axis powers in Europe. Stringing together the ancient Greek word for race or tribe (*genos*) with the Latin suffix for killing (*cide*), the term was first authored by the Polish public prosecutor and commercial lawyer Raphael Lemkin.²⁴⁶ Conceived "to denote an old practice in its modern development", he described genocide as "the destruction of a nation or of an ethnic group."²⁴⁷ In the popularly assumed hierarchy of crimes,²⁴⁸

²³⁹ Alain Mabanckou, *Broken Glass* (London: Serpents Tail, 2009), p. 116.

²⁴⁰ In the past decades, in academia, an interdisciplinary non-legal field of genocide studies has emerged, which features academic journals (*Journal of Genocide Research*, *Holocaust and Genocide Studies* and *Genocide Studies and Prevention*), academic organisations (*International Association of Genocide Scholars* and *International Network of Genocide Scholars*) and graduate study programmes (for instance *Holocaust & Genocide Studies* at the University of Amsterdam UvA). The genocide literature is vast, but several works provide a useful itinerary through the field: Donald Bloxham & A. Dirk Moses (eds.), *The Oxford Handbook of Genocide Studies* (Oxford: Oxford University Press, 2010); and Dan Stone (ed.), *The Historiography of Genocide* (Basingstoke: Palgrave Macmillan, 2008).

²⁴¹ The term stems from the Zulu *izwe* (nation, people, polity) and *ukufa* (death, dying, to die). *Izwekufa* is very identical – in meaning and etymology – to genocide. Michael R. Mahoney, 'The Zulu kingdom as a genocidal and post-genocidal society, c. 1810 to the present', *Journal of Genocide Studies*, Vol. 5, No. 2 (June 2003), pp. 251-268: 255.

²⁴² Kurt Jonassohn with Karin Solveig Björnson, *Genocide and Gross Human Rights Violations. In Comparative Perspective* (New Brunswick & London: Transaction Publishers, 1999), p. 141.

²⁴³ Mahoney, 'The Zulu kingdom as a genocidal and post-genocidal society', pp. 251-268.

²⁴⁴ Germany has only acknowledged its colonial massacres of an estimated 110,000 Herero and Nama people as genocide and a precursor to the Holocaust more than hundred-twelve years after the event. Justin Huggler, 'Germany to recognise Herero genocide and apologise to Namibia', *The Telegraph*, 14 July 2016.

²⁴⁵ Events that were dealt with in high level trials before Courts-Martial in Istanbul, including – *in absentia* – the leadership of the CPU. The indictments and judgements, uttered *avant-la-lettre* language of genocide and crimes against humanity. See: Jennifer Balint, 'The Ottoman State Special Military Tribunal for the Genocide of the Armenians: 'Doing Government Business'', in: Heller & Simpson, *The Hidden Histories of War Crimes Trials*, pp. 77-102.

²⁴⁶ See for a detailed biography: Philippe Sands, *East West Street. On the origins of "genocide" and "crimes against humanity"* (New York: Alfred A. Knopf, 2016), p. 141-190.

²⁴⁷ Raphael Lemkin, *Axis Rule in Occupied Europe. Laws of Occupation. Analysis of Government. Proposals for Redress* (Washington: Carnegie Endowment for International Peace, 1944), p. 79. In footnote 1, he furthermore states that "Another term could be used for the same idea, namely, *ethnocide*, consisting of the Greek word "ethnos" – nation – and the Latin word "cide"."

²⁴⁸ Yet, prosecutors may argue differently, according to their strategy: See for instance the Prosecution opening statements in the genocide trial against former Khmer Rouge figures: ECCC, Trial Chamber, *Transcript of Proceedings* (Case File N° 002-02/19-09-2007-ECCC/TC; Phnom Penh, 17 October 2014), p. 38; Bouwknecht, 'Khmer Rouge Trials', pp. 8-10.

genocide, a crime against groups rather than individuals,²⁴⁹ is often considered to be the vilest, the most devilish and destructive human sin; it is denoted as the ‘crime of crimes.’²⁵⁰ Historically, genocide as a term and historical framework is connoted with the racist, discriminatory and industrial obliteration of millions of European Jews and other socially categorised groups by Nazi Germany.²⁵¹ In fact, the term itself was crafted and enshrined in law with that very exterminatory violence - within its immediate European political, social and continental context - in mind.²⁵² Ever since, the usage of the word has been a sensitive matter; ranges of besieged groups have claimed to be targets of genocide and have sought to have their plight acknowledged as such, while suspected culprits vehemently deny their violence was genocidal.²⁵³ Genocide is an emotionally, morally, legally and politically delicate and polemic subject.²⁵⁴ Victims, perpetrators, politicians, civil society agents, journalists, academics and even judges can therefore not agree on which events in history constitute genocides – and under which definition, legal or non-legal - and which not.²⁵⁵ Actually, the very conception of the *Genocide Convention* in 1948 was already the result of four years of political diplomacy and compromise.²⁵⁶ As it is beyond the scope of this thesis to look at alternative academic definitions, this study operationalises the description treasured in the *Convention on the Prevention and Punishment of the Crime of Genocide*, which since its adoption in 1948 and entry into force in 1951 remains the most widely accepted, adopted and applied legal definition.²⁵⁷ Unaltered ever since and featuring in the statutes of the tribunals and courts dealt with in this dissertation,²⁵⁸ genocide means killing,²⁵⁹ causing serious bodily or mental harm,²⁶⁰ deliberately inflicting conditions of life to bring about physical destruction,²⁶¹ imposing measures intended to prevent births²⁶² and, or, forcibly

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

²⁵⁰ Many books and articles on genocide carry this adjective. See for instance: Rafter, *The Crime of All Crimes*; William Schabas, *Genocide in International Law. The Crime of Crimes* (Second Edition; Cambridge: Cambridge University Press, 2009). The UN uses similar language: ‘UN marks first International Day to commemorate victims of genocide; the ‘crime of crimes,’ *UN News Centre*, 9 December 2015.

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

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

²⁵³ Michael J. Kelly, ‘Genocide – The Power of a Label’, *Case Western Reserve Journal of International Law*, Vol. 40, No. 1 (2007-2008), pp. 147-162.

²⁵⁴ See for an insightful discussion of the pitfalls and problems of genocide research: Uğur Ümit Üngör, ‘Studying Mass Violence: Pitfalls, Problems, and Promises’, *Genocide Studies and Prevention*, 7, No. 1 (2012) 68-80, there: 69-73.

²⁵⁵ Interesting in this respect is the expert report [“On the Aetiology and Genesis of Genocides and other Mass Crimes Targeting Specific Groups”] and trial cross-examination of sociologist Ton Zwaan at the UNICTY on the topic of genocide: UNICTY, *The Prosecutor v. Slobodan Milošević: Prosecution Submission of Expert Statement Pursuant to Rule 94bis* (IT-02-54-T; 3 December 2003) addendum; UNICTY, *The Prosecutor v. Slobodan Milošević: Transcript* (IT-02-54-T; 20 January 2004); UNICTY, *The Prosecutor v. Slobodan Milošević: Transcript* (IT-02-54-T; 21 January 2004).

²⁵⁶ See for the comprehensive history, through the original sources, of the Convention: Hiram Abtahi and Philippa Web, *The Genocide Convention. The Travaux Préparatoires* (Leiden & Boston: Martinus Nijhoff Publishers, 2008).

²⁵⁷ 147 nations are State Parties, through signature and ratification, accession or succession, to the Convention, which entered into force on 12 January 1951. The first country to ratify the convention was Ethiopia (1 July 1949) and the last to accede was Tajikistan (3 November 2015). One country, the Dominican Republic, has signed (11 December 1948) but not ratified the Convention. United Nations Treaty Collection, *Convention on the Prevention and Punishment of the Crime of Genocide* (www-text: https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtldsg_no=IV-1&chapter=4&clang=en#1, visited: 8 August 2016).

²⁵⁸ The UNICTY, UNICTR, ECCC, ICC and EAC copy-pasted and operationalised the exact wording of the *Convention*. Only the Rome Statute of the ICC does not reproduce the acts that are punishable like, *inter alia*, conspiracy to commit genocide: *Rome Statute*, art. 6. See commentary: Jens Meierhenrich, *Genocide. A Reader* (Oxford: Oxford University Press, 2014), p. 67.

²⁵⁹ The perpetrator killed – or caused death to – one or more persons. ICC, *Elements of Crimes* (ICC-ASP/1/3 (part II-B); 9 September 2002), art. 6 (a) (1).

²⁶⁰ The perpetrator caused serious bodily or mental harm to one or more persons, including, but not necessarily restricted to, acts of torture, rape, sexual violence or inhuman or degrading treatment. ICC, *Elements of Crimes*, art. 6 (b) (1).

²⁶¹ The perpetrator inflicted certain conditions of life upon one or more persons. The conditions of life – including but not restricted to deliberate deprivation of resources indispensable for survival, such as food or medical services, or systematic expulsion from homes - were calculated to bring about the physical destruction of that group, in whole or in part. *Ibidem*, art. 6 (c) (1) & (4).

transferring children²⁶³ “with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such.”²⁶⁴ A perpetrator of the crime of genocide, in the legal meaning but operationalised throughout this dissertation,²⁶⁵ is any person who was found by a court of law to have committed, conspired, directly or indirectly incited, attempted or was complicit in one or more of these acts, while having the intent that these acts would bring about the partial or complete destruction of any of the four specific groups.²⁶⁶

Genocide, as enshrined in the *Convention* is a crime against many, but it first and foremost serves a legal concept and instrument for prosecution and individual punishment,²⁶⁷ despite the fact that the *Convention* also talks about prevention.²⁶⁸ In the legal setting, proving the crime of genocide commands two basic requirements to prove its perpetration: the physical element *actus reus* (the committed or omitted acts) and the mental or moral element *mens rea*²⁶⁹ (intent and ‘specific intent’ [*dolus specialis*]).²⁷⁰ All components, starting with the alleged underlying facts must be proved beyond any reasonable doubt.²⁷¹ For instance, the specific genocidal acts – killing, causing seriously bodily or mental harm, deliberately inflicting conditions of life calculated to bring about physical destruction, imposing measures intended to prevent births and forcibly transferring children – necessitate, without exception, that the victim belonged to either a national, ethnical, racial or religious group whilst the offender envisioned to destroy that particular group as such in whole or in part. Crucial, at the ICC,²⁷² is that the perpetrator acted “in the context of a manifest pattern of similar conduct directed against that group or was conduct that could itself effect such destruction.”²⁷³ There

²⁶² The perpetrator imposed certain measures upon one or more persons. The measures imposed were intended to prevent births within the particular group. ICC, *Elements of Crimes*, art. 6 (d) (1) & (4).

²⁶³ The perpetrator forcibly transferred one or more persons under the age of 18. The transfer was from the one particular group to another group. The perpetrator knew, or should have known, that the transferred person or persons were under the age of 18 years. The term “forcibly” is not restricted to physical force, but may include threat of force or coercion, such as that caused by fear of violence, duress, detention, psychological oppression or abuse of power, against such person or persons or another person, or by taking advantage of a coercive environment. *Ibidem*, art. 6 (e) (1), (4), (5) & (6).

²⁶⁴ UNGA, *A. Adoption of the Convention on the Prevention and Punishment of the Crime of Genocide (A/RES/260 (III))*, 9 December 1948), arts. 2-3.

²⁶⁵ Social science uses the concept of perpetrator or perpetration of genocide much more broadly and generally. In order not to confuse, this dissertation uses perpetrator only in case of legal conviction. When talking in broader terms, I will use either alleged perpetrator or the more generic term *génocidaire*.

²⁶⁶ UNGA, *Genocide Convention*, art. 3.

²⁶⁷ Although matters of interpretation persist in light of the preparatory works and intentions of the drafters of the Convention. Most notably the question if the required intent exclusively pertains to physical or biological destruction of the group or if it also includes the intent to stop it from functioning as a whole (“cultural genocide”). The latter was defined as “any deliberate act committed with the intent to destroy the language, religion or culture of a national, racial, or religion or culture of a national, racial or religious group on grounds of national or racial origin or religious belief as such: (1) prohibiting the use of language of the group in daily intercourse or in schools, or the printing and circulation of publications in the language of the group; (2) destroying, or preventing the use of, libraries, museums, schools, historical monuments, places of worship or other cultural institutions and objects of the group.” This definition was envisaged in the *travaux préparatoires* of the Convention but eventually dropped. See: United Nations Economic and Social Council (UNESCO), Ad Hoc Committee on Genocide (5 April – 10 May 1948), *Report of the Committee and Draft Convention Drawn up by the Committee (E/794)*, art. III.

²⁶⁸ However, the *Convention* does not define the scope of prevention. Only the ICJ, made a ruling in relation to prevention, judging that Serbia breached the *Convention* by not intervening, and possibly preventing, the massacres in Srebrenica in July 1995. See: William Schabas, ‘The Law and Genocide’, in: Donald Bloxham and A. Dirk Moses (eds.), *The Oxford Handbook of Genocide Studies* (Oxford: Oxford University Press, 2010), pp. 123-141.

²⁶⁹ The Rome Statute defines the mental element as follows: “a person shall be criminally responsible and liable for punishment for a crime [...] only if the material elements are committed with intent and knowledge. [...] A person has intent where: (a) In relation to conduct, that person means to engage in the conduct; (b) In relation to a consequence, that person means to cause that consequence or is aware that it will occur in the ordinary course of events. [...] ‘Knowledge’ means awareness that a circumstance exists or a consequence will occur in the ordinary course of events. ‘Know’ and ‘knowingly’ shall be construed accordingly. *Rome Statute*, art. 30.

²⁷⁰ Genocide requires the existence of (1) the *intent* to commit the actual acts in addition to (2) the *specific* “intent to destroy, in whole or in part, a national, ethnical, racial or religious group as such,” which distinguishes it from other serious crimes. See: International Court of Justice (ICJ), *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia): Judgment* (The Hague; 3 February 2015), §130-166; William A. Schabas, *Genocide in International Law: The Crime of Crimes* (2nd edn) (Cambridge: Cambridge University Press, 2009), pp. 172, 177, 256-57, 260, 264-65. [Reprinted in: Jens Meierhenrich, *Genocide. A Reader* (Oxford: Oxford University Press, 2014), pp. 65-67.]

²⁷¹ This is the general standard of proof applied at (international) criminal courts. The ICJ is different in its wording, stating that it requires “evidence that is fully conclusive” and adds to that it requires that it be fully convinced that allegations made in the proceedings, that the crime of genocide or the other acts enumerated in Article III have been committed, have been clearly established.” International Court of Justice (ICJ), *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia): Judgment* (The Hague; 3 February 2015), §177-179.

²⁷² At the other earlier courts, this was not a necessary requirement. In practice, however, indeed genocidal intent was inferred from such patterns but legally this is not a requirement of genocide.

²⁷³ “The term “in the context of” would include the initial acts in an emerging pattern”. ICC, *Elements of Crimes*, art. 6.

is no doubt that this crime is difficult to prove. So far, on the level of international criminal tribunals, only the UNICTY and UNICTR have rendered verdicts on genocide – on the basis of the *Convention* - crimes perpetrated by individual actors.²⁷⁴ Just one other international judicial forum, the International Court of Justice (ICJ), found that genocide occurred: the July 1995 massacres in Srebrenica.²⁷⁵ In Phnom Penh, the first genocide trial started in October 2014, concerning Khmer Rouge killings of ethnic Cham Muslims and Vietnamese nationals between 1975 and 1979.²⁷⁶ At the ICC, there is one outstanding arrest warrant for three counts of genocide on the Fur, Masalit and Zaghawa peoples in Darfur, allegedly committed by Sudan’s President Omar al Bashir.²⁷⁷ In the context of these and other criminal cases and for the purpose of this study, genocide is thus understood to be a criminal offence as defined above, committed in the past.²⁷⁸ Whereas non-legal disciplines, such as political science, sociology and anthropology, may be helpful in providing insightful theory to help understand the phenomenon and its assumed general processes more in-depth and comparatively,²⁷⁹ this study restricts itself to the post-facto juridical framing of mass violence, its epistemology and historiography: how it is dealt with, framed and debated in the trial setting and how it is proved.

2.3 Crimes against humanity

Genocide has been doused with demonic superlatives, often accrediting it with the title “crime of crimes.”²⁸⁰ However, it is closely related to the concept of crimes against humanity. Not only were genocide and crimes against humanity immediate conceptual responses to the Nazi crimes in the 1940s, its two designers, Raphael Lemkin and Hersh Lauterpacht, came from the same multi-ethnic Polish city (Lwów, now Lvov in Ukraine), studied at the same law school (Jan Kazimierz University, Lwów) and competitively advocated their theories to be included at the International Military Tribunal (IMT) in Nuremberg.²⁸¹ Although strongly disagreeing on how to legally encapsulate the Nazi atrocities, both their concepts are now firmly – and often in conjunction – established as moral,

²⁷⁴ UNICTY, TC, *Prosecutor v. Radislav Krstic: Judgement* (IT-98-33-T; 2 August 2001). In early 2015, the ICTY for the first time in its history rubberstamped a judgement on “conspiracy to commit genocide” when the Appeals Chamber entered this conviction for Vujadin Popović and Ljubiša Beara. UNICTY, Appeals Chamber, *Prosecutor v. Vujadin Popovic, Ljubisa Beara, Drago Nikolic, Radivoje Miletic & Vinko Pandurevic: Judgement* (IT-05-88-A; 30 January 2015), §2117.

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

²⁷⁶ Bouwknecht, ‘Khmer Rouge Trials’, pp. 8-10; ECCC, Trial Chamber, *Case File No 002/19-09-2007-ECCC/TC: Transcript of Proceedings* (002/2; Phnom Penh, 17 October 2014).

²⁷⁷ ICC, PTC1, *Situation in Darfur Sudan. The Prosecutor v. Omar Hassan Ahmad Al Bashir: Second Decision on the Prosecution’s Application for a Warrant of Arrest* (ICC-02/05-01/09; 12 July 2010); ICC, PTC1, *Situation in Darfur Sudan. In the Case of The Prosecutor v. Omar Hassan Ahmad Al Bashir (“Omar al Bashir”): Second Warrant of Arrest for Omar Hassan Ahmad Al Bashir* (ICC-02/05-01/09; 12 July 2010).

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

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

²⁸⁰ See for instance: William A. Schabas, *Genocide in International Law: The Crime of Crimes* (2nd edn.) (Cambridge: Cambridge University Press, 2009).

²⁸¹ The story is recounted by many, including: Philippe Sands, *East West Street. On the origins of “genocide” and “crimes against humanity”* (New York: Alfred A. Knopf, 2016); and Ana Filipa Vrdoljak, ‘Human Rights and Genocide: The Work of Lauterpacht and Lemkin in Modern International Law, *European Journal of International Law*, Vol. 20, No. 4 (2009), pp. 1163-1194.

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

Brutal wars, mass murders and ethnic cleansing²⁸⁸ – with strong inter-ethnic, group-selective and large-scale exterminatory dimensions - in the former Yugoslavia and Rwanda led the UN’s Security Council to establish its two *ad hoc* tribunals.²⁸⁹ But for UNICTY and UNICTR prosecutors, genocide proved a difficult crime to establish, particularly for its special *mens rea* requirement that “intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such.” As historian, legal professor and practitioner William Schabas outlines, the prosecution must establish that the offender must have had a ‘specific intent’ (*dolus specialis*), as discussed above. If not established, the act remains punishable, not as genocide, but it may be classified as a crime against

²⁸² Apart from genocide, however, there exists no convention on crimes against humanity. For a general background with respect to the emergence of the concept of crimes against humanity as an aspect of international law, its application by international courts and tribunals and its incorporation in the national laws of some states, see: UNGA, *First Report on Crimes Against Humanity*. By Sean D. Murphy, *Special Rapporteur* (A/CN.4/680; 17 February 2015).

²⁸³ The terms first use was recorded in relation to the policy of Belgium’s King Leopold II in Congo Free State in 1890. See: George Washington Williams, *An Open Letter to His Serene Majesty Leopold II, King of the Belgians and Sovereign of the Independent State of Congo By Colonel, The Honorable Geo. W. Williams, of the United States of America*, 18 July 1890; Norma Geras, *Crimes Against Humanity: Birth of a Concept* (Manchester: Manchester University Press, 2011), p. 4. On the international stage, the Allies of the Triple Entente first used the expression in May 1915 to depict the “new crimes of Turkey against humanity and civilization” for “massacring Armenians.” See: ‘Les Massacres en Arménie. La Triple-Entente tiendra pour responsable le gouvernement turc’, *Le Matin*, No. 11410 (25 May 1915), p. 3.

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

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

²⁸⁶ 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 Schacht, Gustav Krupp Von Bohlen Und Halbach, Karl Donitz, Erich Raeder, Baldur Von Schirach, Fritz Sauckel, Alfred Jodl, Martin Bormann, Franz Von Papen, Arthur Seyss-Inquart, Albert Speer, Constantin Von Neurath, And Hans Fritzsche, Individually And As Members Of Any Of The Following Groups Or Organizations To Which They Respectively Belonged, Namely: Die Reichs- Regierung (Reich Cabinet); Das Korps Der Politischen Leiter Der Nationalsozialistischen Deutschen Arbeiterpartei (Leadership Corps Of The Nazi Party); Die Schutzstaffeln Der Nationalsozialistischen Deutschen Arbeiterpartei (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 Sturm-Abteilungen 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, Defendants: Indictment* (Berlin, 6 October 1945) Count 4 (A) & (B).

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

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

²⁸⁹ See for a contextualised history of the establishment of these, and other, international courts: Scheffer, *All the Missing Souls*.

humanity or simply a crime under ordinary criminal law.²⁹⁰ In a similar vein, at the UNICTY, the lexicon of crimes against humanity became a practical alternative as prosecutors needed only to prove that widespread or systematic violent acts were “directed against any civilian population”, rather than against a designated and objective social group.²⁹¹ For prosecutors at the UNICTR the alternative of charging crimes against humanity was harder since the mandate puts crimes against humanity nearly on the same level as genocide as they required evidence of discriminatory elements.²⁹² Next to “any civilian population” it adds in its definition “on national, political, ethnic, racial or religious grounds”, nearly equalling it with genocide crimes and thus placing a heavy burden on the prosecution at the tribunal to establish that crimes were directed at specific groups.²⁹³

Crimes against humanity have now become a preferred and prominent legal framework – but not an alternative to genocide - at international tribunals and particularly at the ICC and countries that have incorporated the *Rome Statute* into national law.²⁹⁴ By now, it is the most comprehensive and universally accepted definition, since no convention of crimes against humanity exists.²⁹⁵ Likewise, the Rome Statute’s definition is the conceptualisation this study uses, except when explicitly noted differently. Thus, for the purposes of this dissertation, crimes against humanity encompass the broad set of ‘inhumane acts’²⁹⁶ of murder,²⁹⁷ extermination,²⁹⁸ enslavement,²⁹⁹ deportation,³⁰⁰ imprisonment,³⁰¹ torture,³⁰² sexual violence,³⁰³ persecution,³⁰⁴ enforced disappearances³⁰⁵ and

²⁹⁰ William A. Schabas, *Genocide in International Law: The Crime of Crimes* (2nd edn.) (Cambridge: Cambridge University Press, 2009), p. 257.

²⁹¹ At the UNICTY, crimes against humanity consist of acts of (a) murder; (b) extermination; (c) enslavement; (d) deportation; (e) imprisonment; (f) torture; (g) rape; (h) persecutions on political, racial and religious grounds; and (i) other inhumane acts. UNSC, *Statute of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991* (S/25704; 3 May 1993), art. 5. The first conviction on crimes against humanity was rendered on Duško Tadić: UNICTY, *Prosecutor v. Duško Tadić a/k/a “Dule”*: *Opinion and Judgement* (IT-94-1-T; 7 May 1997).

²⁹² See for a useful discussion: Wilson, *Writing History*, pp. 187-191; and Doris Buss, ‘Expert Witnesses and International War Crimes Trials: Making Sense of Large-Scale Violence In Rwanda’, in: Dubravka Zarkov and Marlies Glasius (eds), *Narratives of Justice In and out of the Courtroom. Former Yugoslavia and Beyond* (New York, Dordrecht & London: Springer International Publishing, 2014), pp. 23-44: 26.

²⁹³ UNSC, *ICTR Statute*, art. 3. Only the ECCC, that deals with the Khmer Rouge crimes between 1975 and 1979, have a similar discriminatory requirement for crimes against humanity: *Law on the Establishment of the Extraordinary Chambers, with inclusion of amendments as promulgated on 27 October 2004* (NS/RKM/1004/006), art. 5. The Special Court for Sierra Leone lists the same offences but does not add the discriminatory requirements: *Agreement between the United Nations and the government of Sierra Leone on the establishment of a Special Court for Sierra Leone & Statute of the Special Court for Sierra Leone*, art. 2.

²⁹⁴ The case against Laurent Gbagbo and Charles Blé Goudé at the ICC, as discussed in the preface, is an example thereof. The case theory reads like a case of genocide, but its legal framing is crimes against humanity.

²⁹⁵ Although work continues towards such a convention, spearheaded by the UN’s International Law Commission. See: Sean Murphy, ‘Toward a Convention on Crimes Against Humanity?’, *La Revue des droits de l’homme*, 7 (2015), p. 1-8.

²⁹⁶ “Other inhumane acts”: The perpetrator inflicted great suffering, or serious injury to body or to mental or physical health, by means of an inhumane act, similar to the explicitly defined acts. The perpetrator was aware of the factual circumstances that established the character of the act. ICC, *Elements of Crimes*, art. 7 (1) (k).

²⁹⁷ Killing or causing death of one or more persons. Ibidem, art. 7 (1) (a).

²⁹⁸ Directly or indirectly killing, or causing death to, one or more persons, including by inflicting conditions of life calculated to bring about the destruction of part of a population, constituting, or taking part of, a mass killing of members of a civilian population. ICC, *Elements of Crimes*, art. 7 (1) (b).

²⁹⁹ The perpetrator exercised any or all of the powers attaching to the right of ownership over one or more persons, such as by purchasing, selling, lending or bartering such a person or persons, or by imposing on them a similar deprivation of liberty. Ibidem, art. 7 (1) (c).

³⁰⁰ The perpetrator deported or forcibly transferred without grounds permitted under international law, one or more persons to another State or location, by expulsion or other coercive acts. Such person or persons were lawfully present in the area from which they were so deported or transferred. Ibidem, art. 7 (1) (d).

³⁰¹ The perpetrator imprisoned one or more persons or otherwise severely deprived one or more persons of physical liberty. ICC, *Elements of Crimes*, art. (1) (e).

³⁰² The perpetrator inflicted severe physical or mental pain or suffering upon one or more persons. Such person or persons were in the custody or under the control of the perpetrator. Such pain or suffering did not arise only from, and was not inherent in or incidental to, lawful sanctions. Ibidem, art. 7 (1) (f).

³⁰³ The perpetrator committed an act of a sexual nature – including rape, sexual slavery, enforced prostitution, forced pregnancy and enforced sterilization - against one or more persons or caused such person or persons to engage in an act of a sexual nature by force, or by threat of force or coercion, such as that caused by fear of violence, duress, detention, psychological oppression or abuse of power, against such person or persons or another person, or by taking advantage of a coercive environment or such person’s or persons’ incapacity to give genuine consent. ICC, *Elements of Crimes*, art. 7 (1) (g)-1-6.

³⁰⁴ The perpetrator severely deprived, contrary to international law, one or more persons of fundamental rights. The perpetrator targeted such person or persons by reason of the identity of a group or collectivity or targeted the group or collectivity as such. Such targeting was based on political, racial, national, ethnic, cultural, religious, gender as defined in article 7, paragraph 3, of the Statute, or other grounds that are universally recognized as impermissible under international law. Ibidem, art. 7 (1) (h).

³⁰⁵ The perpetrator: (a) Arrested, detained or abducted one or more persons; or (b) Refused to acknowledge the arrest, detention or abduction, or to give information on the fate or whereabouts of such person or persons. Such arrest, detention or abduction was followed or accompanied by a refusal to acknowledge that deprivation of freedom or to give information on the fate or whereabouts of such person or persons; or (b) Such refusal was preceded or accompanied by that deprivation of freedom. The perpetrator was aware that:(a) Such arrest, detention or abduction would be followed in the ordinary course of events by a

apartheid,³⁰⁶ “when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack.”³⁰⁷ Breaking up the constitutive elements of crimes against humanity, four crucial contextual factors come to the fore. First, crimes against humanity concern the repeated commission of violent acts, not an isolated incident.³⁰⁸ Either quantitatively, the violence can be widespread in that it concerns, for example, large numbers of victims or extends over a broad geographic area. Or qualitatively, the violence can be systematic for its organisational nature. Secondly, although some level of predetermined planning often animates attacks, the existence of a plan is not a necessary requirement but according to the ICC legal framework, such violent acts ought to be carried out “pursuant to or in furtherance of a State or organizational policy to commit such attack.”³⁰⁹ Thirdly, CAH do require a *mens rea*, but it differs from the genocidal intentionality – to destroy a group in whole or in part – in that it suffices for the perpetrator to have knowledge of the attacks and “intended to further such an attack” and purposefully perpetrate the underlying crimes, such as murder or torture.³¹⁰ Like genocide, fourthly, which focuses on group-discriminatory destruction, crimes against humanity are defined by its victims. In this case, rather than solely protecting members – which may include non-civilians – of a national, ethnic, racial or religious social group, CAH include targeting of ‘any civilian population’, and not necessarily in a group-discriminatory manner. For instance, persecution as the only explicitly discrimination-based CAH is carried out on “political, racial, national, ethnic, cultural, religious, gender or other grounds that are universally recognized as impermissible under international law”³¹¹ while extermination includes the mass killing of member of any civilian population, irrespective of its discriminatory or not motives. Although, genocide and crimes against humanity can have overlapping contextual grounds and do not necessarily exclude their parallel perpetration, in times of war or peace, the latter provides a much broader framework in that captures more acts, events or policies and is not limited to intended group-oriented destruction.³¹² Thus, ambiguous terminology such as genocidal acts, genocidal violence and even ethnic cleansing may post-facto not legally be labelled as genocide as a crime, but rather as crimes against humanity.

2.4 War crimes

Next to genocide and crimes against humanity, war crimes take an important place in the lexicon of

refusal to acknowledge that deprivation of freedom or to give information on the fate or whereabouts of such person or persons; or (b) Such refusal was preceded or accompanied by that deprivation of freedom. Such arrest, detention or abduction was carried out by, or with the authorization, support or acquiescence of, a State or a political organization. Such refusal to acknowledge that deprivation of freedom or to give information on the fate or whereabouts of such person or persons was carried out by, or with the authorization or support of, such State or political organization. The perpetrator intended to remove such person or persons from the protection of the law for a prolonged period of time. ICC, *Elements of Crimes*, art. 7 (1) (i).

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

³⁰⁷ Rome Statute, art. 7; ICC, *Elements of Crimes*, art. 7.

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

³⁰⁹ ICC, *Elements of Crimes*, art. 7.

³¹⁰ *Idem*.

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

³¹² Straus, *Fundamentals of Genocide*, p. 36.

this study, as it features not only in the statutes of the courts under study but also because it is often used as overlapping terminology when talking about mass atrocity, perpetration or the colloquial use of ‘war crimes trials’. Often, mass atrocities, even if they describe genocide or crimes against humanity, are simply referred to as war crimes and their agents as war criminals. In the legal realm, however, war crimes are very specific. Historically evolved as part of customary law and international humanitarian law (IHL),³¹³ the rules governing the conduct of violent warfare automatically led to the incorporation of violations or ‘grave breaches’ of these rubrics.³¹⁴ The concept of war crimes matured in the wake of World War I. It was introduced in the Peace Treaty of Versailles in 1919³¹⁵ and after World War II the wording was used in the London Agreement setting up the International Military Tribunal (IMT).³¹⁶ One year after the subsequent adoption of the Genocide Convention and the Universal Declaration of Human Rights in 1948 saw the drafting of the Geneva Conventions, which referenced to “grave breaches”³¹⁷ which were updated in 1977.³¹⁸ From 1993, both UN tribunals included war crimes – more commonly known as *serious violations of international humanitarian law* - in their respective statutes,³¹⁹ yet the most current, comprehensive and detailed definition is provided in the *Rome Statute*. It lists no less than 50 specific offences³²⁰ divided over four chapters: (a) grave breaches of the Geneva Conventions of 12 August 1949, namely, acts against persons or property; (b) other serious violations of the laws and customs applicable in international armed conflict, within the established framework of international law; (c) Article 3 common to the four Geneva Conventions of 12 August 1949, namely, acts committed against persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed *hors de combat* by sickness, wounds, detention or any other cause; and (d) other serious violations of the laws and customs applicable in armed conflicts not of an international character, within the established framework of international law.³²¹ Seen altogether, the extensive list of specific war crimes includes acts very similar to genocide or crimes against humanity³²² but the context in which they are committed differs. War crimes are specifically carried out during international or non-international

³¹³ Constituted, until the Second World, by the various Hague Conventions of 1907 and the two 1929 Geneva Conventions. See for a comprehensive overview of International Humanitarian Law Treaties: International Committee of the Red Cross (ICRC), ‘Treaties and States Parties to such Treaties’ (<http://www.icrc.org/applic/ihl/ihl.nsf/vwTreatiesByDate.xsp>, last visit: 12 May 2014).

³¹⁴ See for a comprehensive analysis: Anthony Cullen, ‘War Crimes’, in: William A. Schabas & Nadia Bernaz, *Routledge Handbook of International Criminal Law* (Routledge: London, 2010), pp. 139-154.

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

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

³¹⁷ *Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field*, 14 August 1949; *Geneva Convention for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of Armed Forces at Sea*, 14 August 1949; *Geneva Convention relative to the Treatment of Prisoners of War*, 14 August 1949; and *Geneva Convention relative to the Protection of Civilian Persons in Time of War*, 14 August 1949.

³¹⁸ *Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts* (Protocol I), 8 June 1977; *Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts* (Protocol II), 8 June 1977; and *Protocol additional to the Geneva Conventions of 12 August 1949, and relating to the Adoption of an Additional Distinctive Emblem* (Protocol III), 8 December 2005.

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

³²⁰ ICC, *Elements of Crimes*, art. 8.

³²¹ *Rome Statute*, art. 8.

³²² Such as: killing, torture, directing attacks against civilian populations, attacking civilian objects, destroying historical, social or religious buildings.

armed conflicts. Also, war crimes are not as group-selective as genocide or crimes against humanity. However, the law on war crimes protects civilians and non-combatants and shield them from deliberate violence in times of war, a context often animating genocide or crimes against humanity.³²³

³²³ *Straus, Fundamentals of Genocide*, p. 39.

2.5 Recent and Remote Mass Atrocities and Atrocity Trials

Altogether, genocide, crimes against humanity and war crimes constitute the main corpus of what is generally known as gross human rights violations, international crimes³²⁴ or atrocity crimes.³²⁵ Again, the overarching lexicon has historically evolved. From the mid-2000s, the dominant framework gradually became encapsulated under the concept of atrocity crimes, in order to separate the political use of genocide from its legal definition as a crime of individual responsibility.³²⁶ In extension of this wording, but including the non-legal concept of ethnic cleansing,³²⁷ which also seems to bridge a definitional and colloquial gap between the reality on the ground, the law and social science – all of which deal with mass violence - I will use throughout the thesis the term mass atrocity.³²⁸ This serves two purposes. First, as a legal concept, it is clear which broad range of crimes are covered, without continuously having to refer to specific details if not particularly necessary. Secondly, applying the term to different historical events, contexts or processes, it remains clear under what comparative legal framework these can be understood. In operationalising the generic term of mass atrocity, rather than mass violence, I take note of the fact that when discussing history, the problem arises that some of the underlying legal concepts, like genocide, were not in place yet when events occurred that retroactively may actually be determined to be genocide. Ergo, anachronisms may arise. Yet, in this respect, I employ the concept of 'historical imprescriptibility', as coined by Antoon De Baets, and which is informed by the notion of 'legal imprescriptibility' – the principle that atrocity crimes have to be investigated, prosecuted, and punished regardless of the passage of time, that is regardless of time bars or statutes of limitations. Legal imprescriptibility, however, can only pertain to 'recent' mass atrocities of which at least some perpetrators or (direct and indirect) victims are still alive. When there are no more such agents that could pull past events into the scope of atrocity law, atrocities enter the realm of history. Yet, invoking the principle of historical imprescriptibility, these past events can be analysed as historical crimes: crimes of the past *similar* to genocide, crimes against humanity and war crimes.³²⁹ Applying this perspective, this dissertation employs the terms mass atrocities, both for recent historical events as well as remote historical events.³³⁰ In consistency with all the above, when discussing trials, I will employ the term atrocity trials, rather than the somehow standardised, yet often misapplied, terminology of 'war crimes trials'. In conjunction with the imprescriptibility

³²⁴ Alette Smeulers & Fred Grünfeld, *International Crimes and other Gross Human Rights Violations. A Multi- and Interdisciplinary Textbook* (Leiden: Martinus Nijhoff, 2011).

³²⁵ William A. Schabas, 'Atrocity crimes (genocide, crimes against humanity and war crimes)', in: William Schabas, *Cambridge Companion to International Criminal Law* (Cambridge: Cambridge University Press, 2016), pp. 199-213.

³²⁶ David Scheffer, 'Genocide and Atrocity Crimes', *Genocide Studies and Prevention: An International Journal*, Vol. 1, No. 3 (2006), pp. 229-250.

³²⁷ Originating from the context of the wars in the former Yugoslavia, ethnic cleansing is not listed as an international crime but it overlaps conceptually and materially with genocide and crimes against humanity. It differs, particularly in purpose from genocide and crimes against humanity in that it is aimed not at destruction but on group removal, but remains necessarily group-selective. Straus, *Fundamentals of Genocide*, pp. 37-38; UNSC, *Interim Report of the Commission of Experts Established Pursuant to Security Council Resolution 780 (1992) (S/25274; 26 January 1993)*, art. 16; UNSC, *Final Report of the Commission of Experts Established Pursuant to United Nations Security Council Resolution 780 (1992) (S/1994/674; 27 May 1994)*, Annex, at 3, 33; UNGA, *Resolution adopted by the General Assembly on 16 September 2005: 60/1. 2005 World Summit Outcome (A/RES/601; 24 October 2005)*.

³²⁸ Its use has become dominant, both in the international policy spheres and non-legal academia: See, for example: United Nations, *Framework for Analysis for Atrocity Crimes. A tool for Prevention* (2014); Martha Minow, 'Naming Horror: Legal and Political Words for Mass Atrocities', *Genocide Studies and Prevention: An International Journal*, Vol. 2, No. 1 (2007), pp. 37-41.

³²⁹ De Baets, 'Historical Imprescriptibility', pp. 125-146.

³³⁰ For example, the historical case of the deliberate mass killing of Herero and Nama peoples by German colonial military could retroactively be termed genocide.

principles, I employ the term atrocity trial for all criminal and civil trials that in one way or the other deal with atrocity crimes, irrespective of when they took place or whether they addressed recent or remote atrocities. Furthermore, I will also employ the terminology of mass atrocities, in broader discussions on transitional justice and similar responses to either recent or remote historical episodes of mass violence.

2.6 Configuring transitional justice

Recent or remote cases of mass atrocity, as conceptualised and operationalised above, led to conscious legal and non-legal encounters with their occurrences. Although this study focuses on legal atrocity trials and international criminal justice, these and a broad variety of non-legal dealings with the past reside under what is known as transitional justice (TJ).³³¹ Writing about it, demands clear operationalisation of the term as well as demarcating the specific elements that are subject of this book: dealing with the past, criminal trials and to some extent truth commissions. Also, it needs to be clear what, for the purposes of this dissertation, is understood when talking about transitional justice. From the outset, as I have already observed in the introduction, transitional justice, as a social, political and legal concept is an impractical and normatively problematic neologism. For starters, the nearly utopic, positivist idealism and the prophetic Universalist realm in which it is framed, rests on a set of amorphous, almost mythical, notions like closure, reconciliation, truth and justice.³³² Second, the moral, political and activist field comprises an excess of mechanisms, goals and applications, which often even compete with one and another and occasionally have counterproductive results.³³³ Yet these are all currently accumulated in a blueprinted international prescriptive first-aid-kit policy framework full of cleansing rituals ready for export to potential, real-time or post-conflict situations.³³⁴ But do these transitional scripts offer realistic plots? Indeed, increasingly criticised as having become a paternalistic, orientalist and imperialistic “cottage industry” of ‘the West’, serious concerns have been voiced about its successfulness in repairing human relationships in post-conflict

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

³³² See also the critique in: Harvey M. Weinstein, ‘Editorial Note: The Myth of Closure, the Illusion of Reconciliation: Final Thoughts on Five Years as Co-Editor-in-Chief’, *International Journal of Transitional Justice*, Vol. 5, No. 1 (2011), pp. 1-10.

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

³³⁴ For example, the European Union Foreign Affairs Council “recognises that transitional justice is an integral and important part of state and peace building and therefore must be integrated in the wider crisis response, conflict prevention, post-conflict recovery, security and development efforts of the EU.” The UN appointed a ‘Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence’, while underlying “the fact that, when designing and implementing strategies, policies and measures to address gross human rights violations and serious violations of international humanitarian law, the specific context of each situation must be taken into account with a view to preventing the recurrence of crises and future violations of human rights, to ensure social cohesion, nation-building, ownership and inclusiveness at the national and local levels and to promote reconciliation. The UN Secretary-General before outlined that “Transitional justice processes and mechanisms are a critical component of the United Nations framework for strengthening the rule of law [...] Whatever combination is chosen must be in conformity with international legal standards and obligations.” European Union Foreign Affairs Council, *EU’s support to transitional justice - Council conclusions (16 November 2015)* (13576/15; Brussels, 16 November 2015), §3; UNGA, *Resolution adopted by the Human Rights Council 18/7: Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence* (A/HRC/RES/18/7; 13 October 2011), p. 2.

and especially post-colonial settings.³³⁵ Vocal observers and stakeholders from the ‘non-western’ world – or ‘global south’ - are therefore urging thinkers and actors in transitional justice to consider context and location, reconstruct notions of transitional justice that are informed by a wider moral and social universe and to craft an agenda that assumes a more holistic approach.³³⁶ On the other side of the spectrum, however, we observe activist historians to become more and more engaged in the field, as participants, even arguing that historical research and writing in a *preventive manner* would facilitate goodwill and shared empathy among peoples.³³⁷ Academically, the debate on transitional justice is at least of a bipolar nature in that there is a striking contrast between activists and critics. An overview of the current state of affairs, debates and criticism would fill a separate book and is not at the heart of this study. I would therefore stop at the point where, non-historians have dubbed the post-Cold War period the age of global transitional justice.³³⁸ It may carry some etymological truth, but the meanings, goals and uses of transitional justice policies are strikingly different from when the field erupted after the Second World War.

As a novel human rights framework, TJ and its plurality of mechanisms have evolved through the dealing with the Second World War (1940s), political transcendence (1980s), mass violence (1990s), historical injustices (2000s) and international politicking (2010s).³³⁹ Interestingly, the field matured alongside the evolution of human rights law and atrocity law specifically. As a starting point, transitional justice was rather synonymous to post-WWII prosecutions at the International Military Tribunals and Allied war crimes trials.³⁴⁰ Modern transitional justice surfaced and evolved from the late 1980s, early 1990s, parallel to the tumbling of one-party regimes and impervious dictatorships in Eastern Europe, Latin America, Africa and Asia.³⁴¹ How to realise ‘justice in transition’? The principal ethical, legal and practical question among human rights activists, lawyers and legal scholars, policy makers, journalists, donors and political scientists was how successor regimes could deal with the abusive legacies of their precursors.³⁴² The practices were not new at the conclusion of

³³⁵ Makua Matua, ‘What is the Future of Transitional Justice?’, pp. 1-9: 5.

³³⁶ Matua, ‘What is the Future of Transitional Justice?’, p. 5. UN, *Guidance Note of the Secretary General*.

³³⁷ Elazar Barkan, ‘Historical Dialogue and the Prevention of Atrocity Crimes’, in: Sheri P. Rosenberg, Tibi Galis, Alex Zucker (eds.), *Reconstructing atrocity prevention* (New York: Cambridge University Press, 2016), pp. 175-195: 176.

³³⁸ Ruti Teitel, ‘Rethinking Jus Post Bellum in an Age of Global Transitional Justice: Engaging with Michael Walzer and Larry May’, *The European Journal of International Law*, Vol. 24, No. 1 (2013), pp. 335-342.

³³⁹ 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).

³⁴⁰ For ‘internationalised’ post-WWII prosecutions, see: Yuma Totani, *Justice in Asia and the Pacific Region, 1945-1952. Allied War Crimes Prosecutions* (Cambridge: Cambridge University Press, 2015).

³⁴¹ See for the origins of the wording: Paige Arthur, ‘How “Transitions” Reshaped Human Rights: A Conceptual History of Transitional Justice’, *Human Rights Quarterly*, Vol. 31, No. 2 (May 2009) 321-367; Christine Bell, ‘Transitional Justice, Interdisciplinarity and the State of the ‘Field’ or ‘Non-Field’’, *International Journal of Transitional Justice*, Vol. 3, (2009), pp. 5-27. John Elster states that the origins of transitional justice are as old as democracy. In 411 B.C and 404-403 B.C Athenians saw oligarchs overthrowing democracy, followed by their defeat and the restoration of democracy. In both instances, retributive measures were taken against the oligarchs in the process of recuperation to democracy. John Elster, *Closing the Books. Transitional Justice in Historical Perspective* (New York 2004) 3-24. Modern, post-war, transitional justice, however, can be traced back to World War I and became more prominent after World War II. The ending of the Cold War – and its consequent wave of democratisation -, thereafter, saw a new phase of transitional justice. At present, Transitional Justice is much associated with enduring international and intra-national conflicts and its resolution. See: Ruti G. Teitel, ‘Transitional Justice Genealogy’, *Harvard Human Rights Journal*, Vol. 16 (2003), pp. 69-94.

³⁴² Paige Arthur lists a series of conferences were convened in order to compare experiences and discuss ‘transitional’ options: the 1988 Aspen Institute conference, “State Crimes: Punishment or Pardon,”; the 1992 Charter 77 Foundation conference in Salzburg, Austria, “Justice in Times of Transition,”; and the 1994 Institute for Democracy in South Africa (IDASA) conference, “Dealing with the Past.” Each of the conferences had many overlapping participants, including Jose Zalaquett, Malamud-Goti, Aryeh Neier, Juan E. Méndez, Diane Orentlicher, Lawrence Weschler, Alice Henkin, Tim Phillips, and Adam Michnik. All conferences dealt with a distinct set of measures—prosecutions, truth-telling, restitution or reparation, and reform of abusive state institutions—whose aims were to provide justice for victims and to facilitate the transition in question. Paige Arthur, ‘How “Transitions” Reshaped Human Rights: A Conceptual History of Transitional Justice’, *Human Rights Quarterly*, Vol. 31, No. 2 (May 2009), pp. 321-367: 325.

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

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

³⁴³ Matua, ‘What is the Future of Transitional Justice?’, p. 1.

³⁴⁴ Neil J. Kritz (ed.), *Transitional Justice. How Emerging Democracies Reckon with Former Regimes*, III Volumes (Washington DC: United States Institute of Peace Press, 1995).

³⁴⁵ Another word was *Geschichtsbewältigung*. See for a useful introduction to and discussion on of these phenomena: Anette Weinke, “West Germany: A case of Transitional Justice *Avant la Lettre?*” in: Nico Wouters (ed.), *Transitional Justice and Memory in Europe (1945-2013)* (Cambridge: Intersentia, 2014), pp. 25-62.

³⁴⁶ Timothy Garton Ash, ‘The Truth about Dictatorship’, *New York Review of Books* (19 February 1998), pp. 35–40: 35.

³⁴⁷ Teitel, *Globalizing Transitional Justice*, p. 63.

³⁴⁸ Ruti Teitel, a leading scholar on Transitional Justice defines transitional justice as “the conception of justice in periods of political transition.” Later, she updated it: “Transitional justice can be defined as the conception of justice associated with periods of political change, characterized by legal responses to confront the wrongdoings of repressive predecessor regimes.” Ruti Teitel, *Transitional Justice* (Oxford: Oxford University Press, 2000) 3; Ruti Teitel, ‘Transitional Justice Genealogy’, *Harvard Human Rights Journal*, Vol. 16 (2003) 69-94: 69. According to the United Nations (UN), “Transitional justice initiatives promote accountability, reinforce respect for human rights and are critical to fostering the strong levels of civic trust required to bolster rule of law reform, economic development and democratic governance. Transitional justice initiatives may encompass both judicial and non-judicial mechanisms, including individual prosecutions, reparations, truth seeking, institutional reform, vetting and dismissals. See: UNSC, *The rule of law and transitional justice in conflict and post-conflict societies. Report of the Secretary-General (S/2011/634, 12 October 2011)*, §17. According to the ICTJ “Transitional justice refers to the set of judicial and non-judicial measures that have been implemented by different countries in order to redress the legacies of massive human rights abuses. These measures include criminal prosecutions, truth commissions, reparations programs, and various kinds of institutional reforms. Transitional justice is not a ‘special’ kind of justice, but an approach to achieving justice in times of transition from conflict and/or state repression. By trying to achieve accountability and redressing victims, transitional justice provides recognition of the rights of victims, promotes civic trust and strengthens the democratic rule of law. See: ICTJ, *What is Transitional Justice?* (www-text: <http://www.ictj.org/about/transitional-justice/>, visited: 8 August 2014). The specialised Oxford Encyclopaedia says “Transitional Justice comprises a variety of judicial and non-judicial means through which states and societal groups seek to come to terms with past human rights violations by providing truth, justice, redress, and reconciliation. In some cases, this occurs in the context of a state’s transition to democracy from repressive rule or to peace from violent conflict. In others, established democracies confront past serious injustices, sometimes generations after they were committed.” Lavinia Stan & Nadya Nedelsky (eds.), *Encyclopaedia of Transitional Justice*. Volume 1 (Cambridge: Cambridge University Press, 2013), pp. xli.

³⁴⁹ Since 2011, the UN’s Human Rights Council has called into life a Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence: UNGA, Human Rights Council, *Resolution 18/7 (A/HRC/RES/18/7; 13 October 2011)*. The position is filled by Pablo de Greiff (Colombia) since 1 May 2012.

³⁵⁰ See for instance: Diane Orentlicher, “‘Settling Accounts’ Revisited: Reconciling Global Norms with Local Agency”, *International Journal for Transitional Justice*, 1 (2007), pp. 10-22.

³⁵¹ Transitional justice has become a popular field of study within a variety of academic disciplines. There are at least two specialised journals on the topic: *International Journal of Transitional Justice* (Oxford University Press: 2009 - present) and *Transitional Justice Review* (Open access: 2012 – present).

³⁵² United Nations Office of the High Commissioner for Human Rights (UNHCHR), *Transitional Justice and Economic, Social and Cultural Rights* (New York & Geneva, 2014).

³⁵³ Phil Clark & Nicola Palmer, ‘Challenging Transitional Justice’, in: Nicola Palmer, Phil Clark, Danielle Granville (eds.), *Critical Perspectives in Transitional Justice* (Antwerp: Intersentia, 2012), pp. 1-16.

there is alleged justified transitional justice what then is unjustified transitional justice and who is the judge on that matter? Is there such a thing as transitional *injustice*? Conservative transitional justice is a normative and a mostly positivist activist-inspired constellation, to a large extent also within academia. Its processes are framed in a dominant Universalist human rights discourse that they offer a good [just] roadmap for successful transitions [to democratic or rule-of-law-states or to peace]. ‘Negative’ transitions, departing from democratic rule or from peace, fall outside its scope,³⁵⁵ despite the fact that transitional justice mechanisms such as prosecutions and amnesties can be ‘unjustly’ applied. Hence, transitional justice – in its totality - is an extremely dynamic and multi-faceted concept, without a forthright definition. There is an important pitfall, however. That is that just like another delicate and emotionally loaded field like genocide studies – as briefly discussed above - transitional justice is a viable academic concept only “if protected from moral, legal, political and emotional constraints. It *should* [my emphasis] be approached in a dispassionate, amoral, non-juridical and apolitical way” to the largest extent possible.³⁵⁶

In all, and perhaps at best, transitional justice could be understood as the acquired diversity of human rights related practices, mechanisms, policies and trepidations guiding societal and political transitions, aimed at confronting real or perceived injustice.³⁵⁷ As much as these processes are perceived to succour rather lofty ends such as truth, accountability, reconciliation and redress, they are not evidenced models with guaranteed outcomes.³⁵⁸ In real life, they can also be ignored, deficiently executed or managed, neglected, misplaced, utilised to reach the contrary or they can turn out not to have these intended effects at all.³⁵⁹ The success of transitional justice is simply in the eye of the beholder, often depending on its heirs.

For the sake of clarity and useful empirical operationalisation, this study departs from the use of transitional justice as framework and rather opts to treat transitional justice endeavours as historic phenomena, or historical *rites de passage*: case, local and culturally specific cleansing rituals guiding deep-rooted social and/or political change from widespread atrocity violence to the absence thereof.³⁶⁰ Breaking down the elements of this operative description, this thesis applies the following criteria. First, transitional justice is a liminal moment; it takes place at certain times and certain places for a certain time. It is transitory as it strives for closing and resolution. Second, transitional justice rituals

³⁵⁴ Makau Mutua, *Human Rights Standards. Hegemony, Law, and Politics* (New York: State University of New York Press, 2016).

³⁵⁵ Relative few case studies exist on this topic, such as: Klaus Bachmann, ‘The Polish Paradox: Transition from and to Democracy’, in: Nico Wouters (ed.), *Transitional Justice and Memory in Europe (1945-2013)* (Cambridge, Antwerp & Portland: Intersentia, 2014), pp. 327-350.

³⁵⁶ Analogous to: Üngör, ‘Studying Mass Violence’, pp. 68–80.

³⁵⁷ Frequently these include, alone or in tandem and inexhaustively: nothing [let bygones be bygones, impunity], amnesties [political prisoners, perpetrators], purges [vetting, lustration], prosecutions [national, regional and international], truth seeking [inquiry, exhumation, documentation], mediation, reparations [monetary, moral, symbolic], memorialisation [*lieux de memoires*, commemorations, arts], social engineering [(re)conciliation, cohabitation, dialogue, rehabilitation], remedy [counselling, trauma healing, healthcare] and institutional, educational and socio-economic reforms.

³⁵⁸ Kai Ambos writes “obtaining empirical data on transitional justice is difficult and reaching reliable findings about its efficiency is even more challenging.” Kai Ambos, ‘Efficiency of Transitional Justice’, in: Lavinia Stan & Nadya Nedelsky (eds.) *Encyclopaedia of Transitional Justice*. Volume I (Cambridge: Cambridge University Press, 2013), pp. 175-180: 176.

³⁵⁹ Cilliers et al., ‘Reconciling after civil conflict’, pp. 787-794.

³⁶⁰ The French Ethnologist Arnold van Gennep described *rites de passage*, as rituals marking significant transitions in human lives, such as birth, puberty, marriage and death. He introduced the concept of *liminality* to describe the time in which people are on the threshold of entering a new phase in their life, having left the previous one behind. The ceremonies marking this transition enable people to experience this liminal phase, losing and then recreating their identity. See: Arnold van Gennep, *Les rites de passage* (Paris: Emile Nourry, 1909).

can be both actions as well as inactions: for instance, to face the past or to not face it. Third, the change – or transition – applies to or has far-reaching implications for societies at large, or at minimum, significant parts thereof. Habitually, but not always necessarily, transitions are political, are escorted by political reconfigurations or have some kind of political consequences. Fourth, this study is particularly concerned with changes from a situation of widespread atrocious violence to a situation of non-widespread atrocious violence: the *rites de passage* of reckoning with mass atrocities as defined earlier in this introduction, irrespective of the political nature of the new regime. Fifth, the prime focus is on transitional fact finding agents, particularly criminal trials and (semi-) truth commissions. Sixth, despite its historical and global occurrence, this study focuses on these mechanisms in modern sub-Saharan Africa.

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

2.7 Studying transitional justice

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

³⁶¹ For an empirical approach to using TJ databases see: Louise Mallinder & Catherine O’Rourke, ‘Databases of Transitional Justice Mechanisms and Contexts: Comparing Research Purposes and Design’, *International Journal of Transitional Justice*, Advance Access (10 August 2016).

³⁶² Aeschylus (525/524 BC - 456/455 BC).

³⁶³ See for an important discussion on this issue: Antoon De Baets, ‘A Theory of the Abuse of History’, In: Antoon De Baets, *Responsible History* (Oxford 2009), pp. 9-48. De Baets outlines that the natural habitat of abuses of history is a non-democratic environment but that its traces are also present in many democracies.

physical conflict, deeply simmering for generations to come and lingering like phantom pains.³⁶⁴ The essence of history is that it epitomises the route taken to the present. But it is the here and now that defines and shapes the representation of that passageway. Milan Kundera, the Czech novelist, elegantly described the process. According to him “we pass through the present with our eyes blindfolded. We are permitted merely to sense and guess at what we are actually experiencing. Only later when the cloth is untied can we glance at the past and find out what we have experienced and what meaning it has.”³⁶⁵ But history is also given meaning, through the way one wants to perceive it.

Historians, thus, do not just deal with the past, but also critically monitor and scrutinise the dealing with the past: how it is approached, unravelling and how narratives *about the past* come about. And for what reasons? Shortly, how is history used and possibly abused? Manifestly, criminal trials, as well as truth commission, warrant the historian’s notice because these are *historical events*, in which the *past is on the agenda* and where *historical sources* are used, created and verified. Also, their protagonists promise that these *non-academic* ventures will write ‘official’ and authoritative history. Simultaneously, transitional justice *rites de passages – or cleansing rituals – are* often presented as the closing ceremonies of violent eras as well as windows onto non-violent futures. But objective history is hardly the ultimate goal, because transitional justice formalities always take place in the contentious arena of *truth politics*: *who* decides *what* is to be known, *can* and *may* be known, *by whom, how, where* and *when*?³⁶⁶ Goals may heavily differ per agency group. Where victors, victims and survivors may want to seek, establish and reveal details about the repression, losers, perpetrators or bystanders rather distort, veil or obliterate those facts. Moreover, vanquishers without a clean slate can themselves employ transitional justice instruments to veil impunity, to whitewash prior crimes or to legitimise social engineering or foreign intervention.³⁶⁷ In the light of either these enactments or non-enactments of history, in particular the recent past remains emotionally, morally, politically and legally litigious and contested narratives and different truths about the past will always persist.

Narratives about the past frame history and the way it is experienced in many ways. The South African experience is a good example. For Archbishop Desmond Tutu, stories about the past bestowed a roadmap to “another country”, which landscape is versatile: “The way its stories are told and the way they are heard change as the years go by. The spotlight gyrates, exposing old lies and illuminating new truths.”³⁶⁸ In Tutu’s mind, the foreign past represented a jigsaw puzzle. Piece by piece, a fuller portrait emerges. But “it is not and cannot be the whole story,” Tutu writes in his preface to the ample report that concluded South Africa’s Truth and Reconciliation Commission

³⁶⁴ Analogous to: Huyse, *All Things Pass Except the Past*, p. 15.

³⁶⁵ Milan Kundera, *Laughable Loves* (New York: Harper Collins, 1999), p. 5.

³⁶⁶ Writer Teju Cole, noted in this respect, that the USA hoards information about its deployment of violence. For example, the only person in prison for the Central Intelligence Agency’s (CIA) torture regime is John Kiriakou, the whistle blower. Teju Cole, ‘Unmournable bodies’, *The New Yorker*, 9 January 2015.

³⁶⁷ For instance: Thijs Bouwknecht, ‘Time will tell: Ouattara’s quest for truth and justice’, *Radio Netherlands Worldwide*, 19 May 2011.

³⁶⁸ Truth and Reconciliation Commission of South Africa (TRCSA), *Truth and Reconciliation Commission of South Africa Report*, Volume. I (Cape Town: Truth and Reconciliation Commission, 1998), p. 4.

(TRC) process in the mid-1990s.³⁶⁹ Nonetheless, he continues, its account provides a “perspective” as well as a “road map to those who wish to travel into our past.”³⁷⁰ And the voluminous TRC report definitely offers a guide alongside the country’s meandering pathways from Apartheid to egalitarianism, the ‘rainbow country’ spirited in *Ubuntu*.³⁷¹ However, as a piece of history writing, the report was fundamentally constrained, in particular by the immediate transitional political context in which it was conceived, its objective of promoting national unity and reconciliation and the legal, geographical and temporal extent of its mandate.³⁷² Furthermore, throughout its mandate, South Africa’s inquisitorial commission amassed some thousands of individual memories through testimony, *viva voce* or by affidavit.³⁷³ ‘Truth telling’, as the process was dubbed, enabled victims as well as perpetrators to memorise and narrate publicly, without much reservation. Lifting the veil of secrecy that had covered South Africa, formerly repressed memories, sentiments and opinions were allowed to enter the public sphere. But they were not always of the same nature. It was therefore that throughout its process of public hearings as well as report writing, the TRC held four different notions of truth and operationalised them at various levels, balancing between the objective and subjective dimensions of its mandate:³⁷⁴ factual or forensic truth,³⁷⁵ narrative truth,³⁷⁶ dialogical truth³⁷⁷ and healing or restorative truth.³⁷⁸ In addition to these notions, a fifth conception, punitive truth, could be added, which is similar to a process of naming and shaming.³⁷⁹ Particularly in South Africa, the TRC operationalised truth as a form of public and official acknowledgement of previously denied, obscured or rationalised crimes against humanity.³⁸⁰ As a result, a register of various truths told by thousands of victims, perpetrators and bystanders moulded one official account of the past: a transitional truth, the product of a negotiated politics of memory. Although the TRC’s historical narrative is now part of South Africa’s rich historiography, conflicting narratives about the history of Apartheid persist well into the future. Thus, the past has not been settled.

³⁶⁹ TRCSA, *Report*, Volume. I, p. 2.

³⁷⁰ *Ibidem*, p. 2.

³⁷¹ Archbishop Desmond Tutu, the TRC’s President, described the Nguni Bantu term Ubuntu [“human kindness”] as a social harmony, in which “a person is a person through other persons.” Desmond Tutu, *No Future Without Forgiveness* (New York: Doubleday, 1999), p. 29.

³⁷² The objective of the TRC, as enshrined in its mandate, was “To provide for the investigation and the establishment of as complete a picture as possible of the nature, causes and extent of gross violations of human rights committed during the period from 1 March 1960 to the cut-off date contemplated in the Constitution, within or outside the Republic, emanating from the conflicts of the past, and the fate or whereabouts of the victims of such violations; the granting of amnesty to persons who make full disclosure of all the relevant facts relating to acts associated with a political objective committed in the course of the conflicts of the past during the said period; affording victims an opportunity to relate the violations they suffered; the taking of measures aimed at the granting of reparation to, and the rehabilitation and the restoration of the human and civil dignity of, victims of violations of human rights; reporting to the Nation about such violations and victims; the making of recommendations aimed at the prevention of the commission of gross violations of human rights; and for the said purposes to provide for the establishment of a Truth and Reconciliation Commission, comprising a Committee on Human Rights Violations, a Committee on Amnesty and a Committee on Reparation and Rehabilitation; and to confer certain powers on, assign certain functions to and impose certain duties upon that Commission and those Committees; and to provide for matters connected therewith. Republic of South Africa, ‘Promotion of National Unity and Reconciliation Act 34 of 1995’, *Government Gazette*, Vol. 361, No. 16579 (26 July 1995).

³⁷³ It received over 21000 statements from individuals alleging they were victims of human rights abuses and 7124 from people requesting amnesty for acts they had committed, authorised or failed to prevent. See: TRCSA, *Report*, Volume. I, p. 1.

³⁷⁴ See also for a discussion: Audrey R. Chapman and Hugo van der Merwe (eds.), *Truth and reconciliation in South Africa. Did the TRC deliver?* (Pennsylvania: University of Pennsylvania Press, 2008), pp. 13-14.

³⁷⁵ On a personal (who, what, where and when) and social (context, causes and patterns) level. TRCSA, *Report*, Volume. I, p. 110-114.

³⁷⁶ The truth as it unfolds when individuals recount on their pasts. In this process of truth-telling, observations, stories, myths, and experiences are recorded in order to recollect the national memory as it was suppressed in the past. *Idem*.

³⁷⁷ Truth in the process of truth finding and interaction - through debate and dialogue between different factions in society. *Idem*.

³⁷⁸ Through public acknowledgment and exposure of the realities of past injustices *can* lead to societal healing, historical fairness and rehabilitation of human dignity. TRCSA, *Report*, Volume. I, p. 110-114.

³⁷⁹ In the South African context where perpetrators were given to chance to come clean publicly – they were offered amnesty in exchange for the truth – it was viewed that public shame during these ‘confessions’ could serve as an alternative form of justice. Paul Gready, *The Era of Transitional Justice: The Aftermath of the Truth and Reconciliation Commission in South Africa and Beyond* (New York: Routledge, 2011), pp. 21-23.

³⁸⁰ Gready, *The Era of Transitional Justice*, pp. 20-21. Under international law, Apartheid is accepted as a crime against humanity: UNGA, ‘Resolution 3068 of 30 November 1973 (International Convention on the Suppression and Punishment of the Crime of Apartheid, *United Nations Treaty Series*, No. 14861 (1976); and *Rome Statute*, art. 7 (1) (j). See also the discussion on Apartheid as a crime against humanity: TRCSA, *Report*, Vol. I, pp. 94 – 102.

That these macro remembrances, or history, transform continuously and can strongly differ from objective truth, as they happened, in the Rankean sense, is hardly a surprise.³⁸¹ Already on the level of the individual, human memory is dominated by discard, selectivity and forgetting,³⁸² as was brilliantly illustrated by Luis Borges. Through *Funes the Memorious*,³⁸³ the Argentinean fictionist illuminates why the human brain does not and cannot catalogue all particulars witnessed by our five senses so we can use them to fully reconstruct the past; it would paralyse and confuse us. Also, these accounts of the past are never finished. Instead, they evolve in response to the needs of the present, in dialogue with others and with our own imagination.³⁸⁴ Further objective particulars of the past then often get lost in translation in the process of storing memories in the form of language. Recollections become narratives and the revival of them relies mainly on verbal associations.³⁸⁵ And indeed, from the micro to macro scales of events, “facts, in the field of history, come wrapped in words”³⁸⁶ and are thus interpreted, arranged and presented in narratives. This trickles down into the setting of criminal trials, in which memory and truth politics might obscure the truthfulness of facts about the past and cause confusion and disorientation.

In the court setting, enticed, constructed and contested narratives often outweigh the forensic, or Rankean, truth. Law in itself is not an exact science; in the words of Charles Dickens “it is an ass – a idiot.”³⁸⁷ Rather, as a medley of moral agreements, rituals and interpretations, its stringent self-referential application is predominantly about words and their enactment. What appears, for instance, from the Gbagbo proceedings is that international trials, which argue the law, are layered word games.³⁸⁸ What the Gbagbo trial further demonstrates is that history is used in case theories and abused as rhetorical window-dressing for both legal and extra-legal purposes. Trials represent a legal politics of memory; the transformative and political ways in which violent political events are recalled, recounted and framed and the larger role legal institutions play in modelling and controlling historical memory about those events.³⁸⁹ Tribunals are also affected by macro levels of memory

³⁸¹ See: Katharine Hodgkin and Susannah Radstone, ‘Introduction: Contested Pasts’, in: Idem (eds.), *Contested Pasts. The Politics of Memory* (London & New York: Routledge, 2003), pp. 1-22.

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

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

³⁸⁴ Michael Jackson, *The Politics of Storytelling: Violence, Transgression, and Intersubjectivity* (Copenhagen: Museum Tusulanum Press, 2002), p. 15.

³⁸⁵ Draaisma, *Forgetting*, pp. 22.

³⁸⁶ Istvan Rev, *Retroactive Justice. Pre-history of Post-Communism* (Stanford: Stanford University Press, 2005), p. 2.

³⁸⁷ Charles Dickens, *Oliver Twist. Vol. III* (London: Richard Bentley, 1839), p. 279.

³⁸⁸ Folkert Jensma, ‘Het recht gebruikt taal als toverstokje, met eigen spreuken’, *NRC Handelsblad*, 26 October 2013.

³⁸⁹ In the larger filed of transitional justice the politics of memory was understood to consist “of policies of truth and justice in transition (*official or public memory*); more widely conceived, it is about how a society interprets and appropriates its past, in an ongoing attempt to mould its future (*social memory*). [...] Historical memories and collective remembrances can be instruments to legitimate discourse, create loyalties, and justify political options. Thus, control over the narrative of the past means control over the construction of narratives for an imagined future. Memory is a struggle over power and who gets to decide the future. What and how societies choose to remember and forget largely determines their future options.” Alexandra Barahona de Brito, Paloma Aguilar, Carmen González-Enríquez, ‘Introduction’, in: Alexandra Barahona de Brito, Paloma Aguilar, Carmen González-Enríquez (eds.), *The politics of memory. Transitional Justice in Democratizing societies* (Oxford: Oxford University Press, 2001), pp. 37-38.

policies. In fact, their creators decide on their itinerary. Politics, law and pragmatism each in one or another way, escort, outline and contract transitional programmes. Thus, these backward-looking ventures are consistently confined and straitjacketed by mandates, policies and funds. Different from professional historians, judiciaries or truth commissions are set up to target and criminalise demarcated acts, during precise episodes and carried out by particular agents, often ignoring interconnected events, wider contexts and pivotal actors. The parallel, or even sequential, quest for truth and justice, as a consequence, is hardly ever a harmonious process.³⁹⁰

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

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

³⁹¹ Antoon De Baets, *Censorship of Historical Thought. A World Guide, 1945-2000* (Westport: Greenwood Press, 2002), pp. 17, 18 & 25.

2.8 The right to historical truth

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

- Dennis Byron, Judge³⁹²

Out of the great variety of transitional justice mechanisms, this study's emphasis is unambiguously on African atrocity trials. Yet, closely related are truth commissions, particularly when it comes to unravelling mass atrocities and picturing a violent past.³⁹³ Whereas truth commissions are very different – they explain rather than judge³⁹⁴ – they often play a role prior, during or after national or international atrocity trials.³⁹⁵ In some exceptional African cases, like in Ethiopia³⁹⁶ and Rwanda,³⁹⁷ individual prosecutions and historical fact finding were pursued simultaneously by the same mechanism. In other cases, as we will see in Sierra Leone, trials and truth commissions operated at the same time.³⁹⁸ In Argentina, the truth commission's report and victim's testimonies became a crucial source for prosecutors³⁹⁹ in the trials of former junta leaders.⁴⁰⁰ Only in Colombia, at the time of

³⁹² UNICTR, *The Prosecutor of the Tribunal v. Edouard Karemera, Mathieu Ngirumpatse & Joseph Nzirorera: Transcript* (ICTR-98-44-T; 2 November 2006), pp. 28-29. Also cited in: Nigel Eltringham, "'We are not a truth commission': Fragmented Narratives and the Historical Record at the International Criminal Tribunal for Rwanda', *Journal of Genocide Research*, 11 (1) (March 2009), pp. 55-79: 56. Eltringham, omits to identify the trial as well as the date of this courtroom quote, but was so kind to inform me where it came from.

³⁹³ Sometimes they are called commission of inquiry, commission of historical clarification, reconciliation commission, historical commission of inquiry, truth and reconciliation commission, or truth commission. There is no straightforward definition of what a truth commission constitutes, but the description given by Priscilla Hayner - however still general - seems to comprehend the phenomenon: "A truth commission is an official, temporary body set up to investigate a period of past human rights violations or violations of human rights law. After taking statements from victims, witnesses, and others, a truth commission produces a final report that is usually made public and serves as an official acknowledgement of what was often before either widely denied or little understood." According to the UN "These commissions — officially sanctioned, temporary, non-judicial investigative bodies — are granted a relatively short period for statement-taking, investigations, research and public hearings, before completing their work with a final public report. While truth commissions do not replace the need for prosecutions, they do offer some form of accounting for the past, and have thus been of particular interest in situations where prosecutions for massive crimes are impossible or unlikely — owing to either a lack of capacity of the judicial system or a de facto or de jure amnesty." A myriad of studies is dedicated to the work of truth commissions. See for references: Priscilla B. Hayner, *Unspeakable Truths: Transitional Justice and the Challenge of Truth Commissions* (2nd edition: New York 2011); Mark Freeman, *Truth Commissions and Procedural Fairness* (Cambridge 2006); Paul Greedy, *The Era of Transitional Justice. The aftermath of the Truth and Reconciliation Commission in South Africa and Beyond* (New York 2011); Berber Bevernage, *History, Memory, and State-Sponsored Violence. Time and Justice*. (New York 2011); Robert I. Rotberg & Dennis Thompson (eds.), *Truth versus Justice. The morality of Truth Commissions* (Princeton & Oxford 2000); Mark Freeman & Priscilla Hayner, 'Truth-Telling', in: David Bloomfield, Teresa Barnes & Luc Huyse (eds.), *Reconciliation after violent conflict. A handbook* (Stockholm 2003); Trudy Huskamp Peterson, *Final Acts. A Guide to Preserving the Records of Truth Commissions* (Baltimore 2005). Priscilla B. Hayner, 'Truth Commissions', in: Dinah L. Shelton (ed.), *Encyclopaedia of Genocide and Crimes Against Humanity, Vol. III* (Detroit 2005), pp. 1045-1047. Quotes appear in: Hayner, *Unspeakable Truths*, pp. 14-23, there: 14; Office of the United Nations High Commissioner for Human Rights (OCHR), *Rule-of-Law-Tools for Post-Conflict States. Truth Commissions* (UN-doc.: HR/PUB/06/1; New York & Geneva 2006), p. 1.

³⁹⁴ As explained by the truth commission in Guatemala: "*La Comisión no fue instituida para juzgar, pues para esto deben funcionar los tribunales de justicia, sino para esclarecer la historia de lo acontecido durante más de tres décadas de guerra fratricida.*" [The Commission was not established to judge - that is the function of the courts of law - but rather to clarify the history of the events of more than three decades of fratricidal war]. Comisión para el Esclarecimiento Histórico, *Guatemala, Memoria del Silencio* (June 1999), p. 15.

³⁹⁵ Notably, in Guatemala, the Commission for Historical Clarification's report was instrumental in many subsequent prosecutions and convictions, including the country's former President Efraín Ríos Montt. The Commission's findings are heavily cited and relied upon throughout the judgement. It features, amongst many other things, its historical findings and corroborative testimony: Tribunal Primero de Sentencia Penal, Narcoactividad y Delitos Contra el Ambiente, *Sentencia* (C-01076-2011-00015 of .2; Guatemala City; 19 May 2012), pp. 662-665. Similarly, before the Extraordinary African Chambers, Chad's truth commission's report was used to highlight historical background, archival material, testimony and other evidence. The president of the truth commission was among the first to also give testimony during the trial. See discussion in: Chambre Africaine Extraordinaire D'Assises, *Ministère Public c. Hissain Habré: Jugement* (Dakar, 30 May 2016), §238-251.

³⁹⁶ The Office of the Chief Special Prosecutor of the Transitional Government of Ethiopia (SPO) was tasked to prosecute perpetrators but also record the crimes of Ethiopia's Red Terror period. Its cited objective included: "To establish for public knowledge and for posterity a historical record of the abuses of the Mengistu regime." See: Ethiopia: *Report of the Office of the Special Prosecutor: The Special Prosecution Process of War Criminal and Human Rights Violators in Ethiopia* (February 1994); Sarag Vaughan, 'The Role of the Special Prosecutor's Office', in: Kjetil Tronvoll, Charles Schaefer & Girmachew Alemu Aneme (eds.), *The Ethiopian Red Terror Trials: Transitional Justice Challenged* (Woodridge: James Currey, 2009), pp. 51-67.

³⁹⁷ The first objective of Rwanda's Inkiko Gacaca was "identifying the truth about what happened during the genocide." See: Republic of Rwanda, *Summary of the report presented at the closing of Gacaca courts activities* (Kigali, June 2012), p. 29.

³⁹⁸ For example, in East Timor, where next to the Special Panels for Serious Crimes the Commission for Reception, Truth and Reconciliation was holding hearings. Caitlin Reiger & Marieke Wierda, *The Serious Crimes Process in Timor-Leste: In Retrospect* (New York: ICTJ, March 2006).

³⁹⁹ Author's interview with Luis Moreno-Ocampo, Prosecutor, Nairobi, 15 May 2010.

writing, in what may become the boldest transitional justice experiment ever, if eventually approved and implemented, will operate a complex system in which trials and a truth-endeavour conjoin to an extent not experienced before.⁴⁰¹ In fact, truth commissions deal with similar atrocities as courts – and can de facto operate as a kind of inquiry chamber or pre-trial investigative body - but they do so differently.⁴⁰² A main difference is that trials are centred on individual agency on the context of atrocities, whereas recording the atrocities themselves and their societal impact run central at truth commissions. But, in both settings, the testimonies of both agents are often central features. However, it is safe to say that, more than trials, truth commissions are about history and the historical narratives. At times, they have been described as archaeologists of the atrocious past and as venues for a collective *rendezvous* with past atrocity.⁴⁰³ With their wider mandates and looser truth regimes, they are perhaps better equipped to reveal the underneath, or truth, of the mass atrocity than trials.⁴⁰⁴ As such, truth commissions, or other specialised commissions of inquiry, have been credited as significant accountability tools for meeting the desire, need or legal right to truth and right to know.⁴⁰⁵ As such they can fill a gap left by trials,⁴⁰⁶ for instance on missing persons and continuing crimes such as enforced disappearances⁴⁰⁷ or non-legalised crimes such as cultural genocide.⁴⁰⁸

The right to truth about mass atrocities,⁴⁰⁹ on both the individual and societal level, poses a direct obligation on those in power to protect these rights to know and to conduct effective and transparent investigations into human rights violations and state sponsored violence in order to ‘fight

⁴⁰⁰ On 9 December 1985, a civilian court, the Cámara Federal de Apelaciones en lo Criminal (the Cámara), convicted and sentenced Lieutenant General Jorge Rafael Videla of the Army and Admiral Emilio Massera of the Navy to prison for life; Brigadier General Orlando Ramón Agosti of the Air Force, Lieutenant General Eduardo Viola (Army) and Admiral Armando Lambruschini (Navy) were sentenced to prison for four and a half, seventeen, and eight years, respectively; Brigadier General Omar Graffigna (Air Force), Lieutenant General Leopoldo Galtieri, Admiral Jorge Anaya, and General Basilio Lami Dozo went free. *Cámara Nacional de Apelaciones en lo Criminal y Correccional Federal de la Capital Federal. Causa N° 13/84, “Causa originariamente instruida por el Consejo Supremo de las Fuerzas Armadas en cumplimiento del decreto 158/83 del Poder Ejecutivo Nacional”, sentencia del 9 de diciembre de 1985* (Buenos Aires, 9 December 2015). For and analysis of the trial see: Paula K. Speck, ‘The Trial of the Argentine Junta: Responsibilities and Realities’, *University of Miami Inter-American Law Review*, Vol. 18, No. 3 (1986-1987), pp. 491-534.

⁴⁰¹ Colombia’s transitional justice scheme includes, inter alia: the Commission for Elucidation of the Truth, Coexistence and Non-Repetition; the Historical Commission of the Conflict and its Victims; the Special Unit for the Search of People deemed as Missing with the context and due to the conflict; the Special Jurisdiction for Peace. See: *Acuerdo sobre las Víctimas del Conflicto: “Sistema Integral de Verdad, Justicia, Reparación y No Repetición”, incluyendo la Jurisdicción Especial para la Paz; y Compromiso sobre Derechos Humanos* (Havana, 15 December 2015), pp. 6-7.

⁴⁰² William Schabas, ‘Introduction’, in: William Schabas and Shane Darcy (eds.), *Truth Commissions and Courts. The Tension Between Criminal Justice and the Search for Truth* (Dordrecht: Kluwer Academic Publishers, 2004), p. 2.

⁴⁰³ Antoon De Baets, ‘Archeologen van de repressie. De eerste stappen van waarheidscommissies op het pad van de geschiedbeoefening’, *Nieuwste Tijd*, Vol. 1, No. 3 (2001), pp. 48-61.

⁴⁰⁴ According to Yasmin Naqvi, the following points about truth can be adduced within transitional justice: (1) truth is a social matter. It may be generated by social procedures and structures; (2) it is something that can be verified or at least corroborated by evidence; (3) it may consist of an official statement or judgment about events that occurred; (4) truth implies an obligation to say that what happened did indeed happen (this implies an action of good faith and takes the form of an obligation of means, rather than result, much in the same way as the obligation to properly investigate crimes); (5) such a “statement” may take various forms of expression: visual, aural, artistic, etc.; (6) “truth” is relative to present needs and to its consequences; (7) there may be different accounts of “truth” or differing “truths” provided these are verifiable. See: Jasmin Naqvi, ‘The right to the truth in international law: fact or fiction’, *International Review of the Red Cross*, 862 (June 2006), pp. 253-254.

⁴⁰⁵ The right to truth of victims, their relatives, survivors and entire societies about historical injustices, at present, is commonly accepted as an inalienable and non-derogable right recognised in multiple international treaties, jurisprudence and UN resolutions. It explicitly brings along the duty of states to meet this rights. In an early study on combating impunity, the so-called ‘Right to know’ was first defined by Louis Joinet as one of 42 principles for the protection and promotion of human right after conflict. See these infamous ‘Set of principles for the protection and promotion of human rights through action to combat impunity’: United Nations Economic and Social Council (UNESCO), Question of the impunity of perpetrators of human rights violations (civil and political): revised final report prepared by Mr. Joinet pursuant to sub-commission decision 1996/119 (CN.4/Sub.2/1997/20/Rev.1; 2 October 1997). See for more detail: United Nations Economic and Social Council (UNESCO), *Study on the right to the truth, Report of the Office of the United Nations High Commissioner for Human Rights* (E/CN.4/2006/91; 8 February 2006).

⁴⁰⁶ Compare: *Article 19, Who wants to forget? Truth and access to information about past human rights violations* (London 2000), p. 1.

⁴⁰⁷ Comissão Nacional da Verdade, *Relatório*, Volume I (Rio de Janeiro, December 2015), pp. 500-592.

⁴⁰⁸ Truth and Reconciliation Commission of Canada, *Honouring the Truth, Reconciling for the Future. Summary of the Final of the Truth and Reconciliation Commission of Canada* (2015), p. 1.

⁴⁰⁹ Defined as: “[...] the entitlement to seek and obtain information on: the causes leading to the person’s victimization; the causes and conditions pertaining to the gross violations of international human rights law and serious violations of international humanitarian law; the progress and results of the investigation; the circumstances and reasons for the perpetration of crimes under international law and gross human rights violations; the circumstances in which violations took place; in the event of death, missing or enforced disappearance, the fate and whereabouts of the victims; and the identity of perpetrators” UNESCO, *Study on the Right to Truth*, §38.

impunity'.⁴¹⁰ Truth commissions, or commissions of inquiry,⁴¹¹ are increasingly established to fulfil this obligation.⁴¹² Although, still, they may also be used as an opportunistic cover up or surrogate for prosecutions, like the first such commission in Uganda in 1974.⁴¹³ In this light, the first ever modern truth commission has thus been totally discarded from the transitional justice literature – the 1986 Uganda's second truth commission did not even mention its predecessor.⁴¹⁴ It was only later that countries in transition to forms of democratic rule used them to settle with past injustices, often as a - temporary - substitute to criminal trials, particularly in Latin America.⁴¹⁵ Many similar truth commissions – or commissions of inquiry – have been established around the globe ever since.⁴¹⁶ In Africa alone, there have already been more than fifteen with its most famous example being the *Truth and Reconciliation Commission for South Africa* (1995-1998), which dealt with human rights abuses during the Apartheid-era.⁴¹⁷ Irrespective of all the varying objectives between past, present and future truth commissions,⁴¹⁸ their common perspective is to establish a narrative about the past. But, like trials, truth commission are likely to only reduce the number of lies about the past,⁴¹⁹ uncover partial truths⁴²⁰ or just tips of an iceberg of truth.⁴²¹ And like judges, truth commissioners occasionally

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

⁴¹¹ Note that commissions of inquiry come in various shapes. They are increasingly called upon to determine whether international crimes have been committed in a given situation of armed conflict or distress, a practice that is recognised by the UN (UNGA, *Declaration on Fact-finding by the United Nations in the Field of the Maintenance of International Peace and Security* (A/RES/46/59; 9 December 1991). Various UN bodies created a myriad of fact-seeking 'commissions', including most recently the situations in Eritrea (2014; OHCHR) Central African Republic (2014; UNSC), Gaza (2014; OHCHR), Sri Lanka (2014; OHCHR Democratic People's Republic of Korea (2013; OHCHR), Syrian Arab Republic (2011; OHCHR). See for a helpful and comprehensive overview of various other UN inquiries: Larissa van den Herik and Catherine Harwood, 'Sharing the Law: The Appeal of International Criminal Law for International Commissions of Inquiry', *Grotius Centre Working Paper*, 2014/016-ICL (29 January 2014).

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

⁴¹³ Such as the first ever example of such an organ was set in Uganda, when in June 1974, then president, Idi Amin Dada, established a commission of inquiry to investigate and report on disappearances in the first years – from 25 January 1971 to July 1974 – of his own government. Himself an abusive autocrat, he purportedly set it up to whitewash his own abuses. But instead, it heard 545 witnesses, identified culprits and people still see its concluding report – which documented 308 cases of disappearances - as quite a critical marker as to what took place. At the time, the report was not made public, none of its recommendations were ever adopted, and by large the report had no impact on the practices of Amin's government. The commission was given the full name: *Commission of Inquiry into the Disappearances of People in Uganda since 25 January 1971*. It was comprised of an expatriate Pakistani Judge, two Ugandan police superintendents and a Ugandan army officer. Priscilla B. Hayner, 'Fifteen Truth Commissions-1974 to 1994: A Comparative Study', *Human Rights Quarterly* 16, No. 4 (1994), pp. 597-655: 612; Thijs Bouwknegt, 'Unspeakable truths: Interview Priscilla Hayner', *International Justice Tribune*, No. 115, 20 October 2010; *Report of the Commission of Inquiry into the Disappearance of people in Uganda since the 25th January, 1971* (Available at [www-text: http://www.usip.org/sites/default/files/resources/collections/truth_commissions/Uganda74-Report/Uganda74-Report_sec1.pdf](http://www.usip.org/sites/default/files/resources/collections/truth_commissions/Uganda74-Report/Uganda74-Report_sec1.pdf), visited: 6 January 2015).

⁴¹⁴ Hayner, *Unspeakable truths*, pp. 51-52.

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

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

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

⁴¹⁸ Mark Freeman & Priscilla Hayner, 'Truth-Telling', in: David Bloomfield, Teresa Barnes & Luc Huyse (eds.), *Reconciliation after violent conflict. A handbook* (Stockholm 2003), pp. 125-126.

⁴¹⁹ Ignatieff, 'Articles of faith', *Index On Censorship*, 5/96 (September 1996), p. 113.

⁴²⁰ Janet Cherry, 'Historical Truth: Something to fight for' in: Charles Villa-Vicencio & Wilhelm Verwoerd (eds.), *Looking back, Reaching Forward: Reflections on the Truth and Reconciliation Commission of South Africa* (Cape Town 2000), pp. 134-143, there: 143.

⁴²¹ Charles Villa-Vicencio & Wilhelm Verwoerd, 'Constructing a report. Writing up the "truth"', in: Robert I. Rotberg & Dennis Thompson (eds.), *Truth versus Justice. The morality of Truth Commissions* (Princeton & Oxford 2000), pp. 288-289.

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

2.9 Judging the past: international criminal trials

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

⁴²² The South African TRC, for example, clarified that its report “tries to provide a window on this incredible resource, offering a road map to those who wish to travel into our past. It is not and cannot be the whole story; but it provides a perspective on the truth about a past that is more extensive and more complex than any one commission could, in two and a half years, have hoped to capture.” TRCSA, *Report*, Volume 1, p. 2.

⁴²³ Mark Freeman & Priscilla Hayner, ‘Truth-Telling’, in: David Bloomfield, Teresa Barnes & Luc Huyse (eds.), *Reconciliation after violent conflict. A handbook* (Stockholm: IDEA, 2003), p. 125.

⁴²⁴ The South African Truth and Reconciliation Commission held four different notions of truth and utilised them at various levels. First, there is factual or forensic truth on a personal (who, what, where and when) and social (context, causes and patterns) level. Second, the commission recognised vast importance to so-called personal or narrative truth, meaning the truth as it unfolds when individuals recount on their pasts. In this process, observations, stories, myths, and experiences are recorded in order to recollect the national memory as it was suppressed in the past. A third notion was the social or dialogical truth – truth in the process of truth finding and interaction - through debate and dialogue between different factions in society. These truths are finally utilised in order to serve ‘healing’ and ‘restoration’. Public acknowledgement and disclosure of the truth about past injustices could – according to the commission – lead to social ‘healing’, historical ‘justice’ and restoration of human dignity. In addition to these notions, a fifth conception, punitive truth, could be added. In the South African context where perpetrators were given to chance to come clean publicly – they were offered amnesty in exchange for the truth – it was viewed that public shame during these ‘confessions’ could serve as an alternative form of justice. TRCSA, *Report*, Volume 1, pp. 110-114.

⁴²⁵ Dozens of truth commissions have been operating as truth and reconciliation commissions. Although heavily debated among academia and practitioners, it is assumed by many that truth commissions can promote tolerance and understanding within society by allowing conflicting parties – victims, offenders and/or other individual or community members – to hear and tell each other’s grievances and suffering in a safe and impartial forum.

⁴²⁶ Martha Minow, *Between Vengeance and Forgiveness: Facing History after Genocide and Mass Violence* (Boston: Beacon Press, 1999), pp. 66-74.

⁴²⁷ Paul Gready and Simon Robins, ‘From Transitional to Transformative Justice: A new agenda for practice’, *Briefing Note*, TFIJ-01 (University of York, June 2004).

⁴²⁸ Thijs Bouwknecht, ‘Sobering up international justice’, *Newsletter Criminology and International Crimes*, Vol. 8, No. 2 (December 2013), pp. 4-6.

International Criminal Court (ICC) has taken permanent seat in The Hague, The Netherlands.⁴²⁹ Thomas Lubanga Dyilo,⁴³⁰ who was once a flamboyant politician and militia leader in the Ituri province in the Democratic Republic of the Congo (DRC), was the first to be convicted by the ICC and joined the illustrious but select group of convicted mass-atrocity perpetrators.⁴³¹ In the arena of the public international (-ised) courtroom these figures have become the emblems of evil and the heralded trophies of the ever growing field of transitional justice. By reducing mass crime back to ‘those most responsible’, criminal justice has anthropomorphised and to a certain degree personalised mass atrocities. Thus, whereas truth commissions are interested in macro questions of history, trials deal with micro individual agency focused history.

Only fourteen years old, the ICC took over sixty years to be established. It follows in the footsteps of the International Military Tribunal (IMT)⁴³² and the International Military Tribunal for the Far East (IMTFE)⁴³³ for the trials of “major war criminals” in Germany and Japan. After these first two international tribunals, the UN set in motion the idea for a permanent tribunal, most notably to prosecute the crime of genocide.⁴³⁴ But it was not until 1993 that the UN International Criminal Tribunal for the Former Yugoslavia (UNICTY) – set up “for the sole purpose of prosecuting persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia”⁴³⁵ - became the third international criminal tribunal.⁴³⁶ Almost seventeen months later, the UN decided on a second *ad hoc* tribunal, this time “for the sole purpose of prosecuting persons responsible for genocide and other serious violations of international humanitarian law committed in the territory of Rwanda and Rwandan citizens responsible for genocide and other such violations committed in the territory of neighbouring States.”⁴³⁷ Almost fifty years after the adoption of the Genocide Convention, the UNICTR was the first international court to convict an individual on the basis of the *Convention*, in 1998.⁴³⁸

⁴²⁹ Teitel, *Globalizing Transitional Justice*, p. 63.

⁴³⁰ Thomas Lubanga Dyilo was convicted on three charges of war crimes committed in the Democratic Republic of the Congo, including enlisting, conscripting and using child soldiers. He was sentenced to 14 years’ imprisonment. ICC, TCI, *Situation in the Democratic Republic of the Congo: The Prosecutor vs. Thomas Lubanga Dyilo: Judgment pursuant to Article 74 of the Statute* (ICC-01/04-01/06; 16 March 2012) & ICC, *Situation in the Democratic Republic of the Congo: The Prosecutor vs. Thomas Lubanga Dyilo: Decision on Sentence pursuant to Article 74 of the Statute* (ICC-01/04-01/06; 10 July 2012); ICC, AC, *Situation in the Democratic Republic of the Congo: The Prosecutor vs. Thomas Lubanga Dyilo: Judgment on the appeal of Mr Thomas Lubanga Dyilo against his conviction* (ICC-01/04-01/06 A 5; 1 December 2014).

⁴³¹ By 2013, in 65 years of international criminal justice, nine past and present international criminal courts and tribunals concluded 172 cases in which over 250 judges and 23 Chief Prosecutors were involved. All in all, 745 suspects were indicted, 356 were actually tried and, of these, some 281 defendants were convicted. The ‘average’ convicted perpetrator is male, aged 40 and a member of a military or paramilitary organisation from Europe, Asia or Africa who is acting on behalf of his government. See: Alette Smeulers, Barбора 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.

⁴³² *Agreement by the Government of the United States Of America, the Provisional Government of the French Republic, the Government of the United Kingdom Of Great Britain and Northern Ireland and the Government of the Union of Soviet Socialist Republics for the Prosecution and Punishment of the major war criminals of the European Axis* (‘London Agreement’, 8 August 1945). The Charter of the International Military Tribunal is annexed to the agreement.

⁴³³ Supreme Commander for the Allied Forces, ‘Charter of the International Military Tribunal for the Far East’, General Order No 1 (Tokyo, 19 January 1946).

⁴³⁴ UNGA, *Genocide Convention, art. I & IV*; UNGA, B. *Study by the International Law Commission on the Question of an International Criminal Jurisdiction* ((A/RES/260 (III); 9 December 1948).

⁴³⁵ UNSC, *Resolution 827 (S/RES/827 (1993) 25 May 1993)*.

⁴³⁶ UNSC, *Statute of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991 (S/25704; 3 May 1993)*, art. 4.

⁴³⁷ UNSC, S/RES/955 (1994) 8 November 1994. The International Criminal Tribunal for Rwanda (ICTR) was established upon a request by Rwanda – then a non-permanent Security Council member. See: UNSC, *Letter from the Permanent Representative of Rwanda to the President of the Security Council* (S/1994/1115 (1994), 28 September 1994).

⁴³⁸ UNICTR, TCI, *Prosecutor versus Jean Paul Akayesu: Judgement* (ICTR-96-4-T; 2 September 1998) and UNICTR, TCI, *Prosecutor versus Akayesu: Sentence* (ICTR-96-4-T; Arusha, 4 October 1998).

The two temporary UN tribunals - which have jointly morphed into a new tribunal, the United Nations Mechanism for International Criminal Tribunals - were geographically and temporally specific, in contrast to the permanent ICC. The latter has enduring jurisdiction to potentially examine, investigate, prosecute, try and judge atrocity crimes across the globe.⁴³⁹ By the time of writing, it has examined and investigated alleged crimes in over a dozen countries or nationalities, covering Africa,⁴⁴⁰ the Americas,⁴⁴¹ Asia⁴⁴² and Europe.⁴⁴³ As a result of this wide-ranging fusion of atrocity situations, the ICC as a whole can be seen as a broad collection of mini *ad hoc* tribunals. Still, however, because of the ICC's remaining temporal and jurisdictional limits,⁴⁴⁴ other specialised tribunals, with international features,⁴⁴⁵ have been erected, including⁴⁴⁶ the Special Court for Sierra Leone (SCSL),⁴⁴⁷ the Special Panels for Serious Crimes (SPSC; East Timor),⁴⁴⁸ the Iraqi Higher Criminal Court (IHCC),⁴⁴⁹ the Extraordinary Chambers in the Courts of Cambodia (ECCC),⁴⁵⁰ the Special Tribunal for Lebanon (STL),⁴⁵¹ the Extraordinary African Chambers (EAC)⁴⁵² and the Kosovo Relocated Specialist Judicial Institution (KRSJI).⁴⁵³ At the time of writing, highly politicized discussions on internationalized – hybrid – tribunals were ongoing in relation to atrocities in the Central African Republic, South Sudan, Sri Lanka and Syria.

Lubanga's case was the debut trial of what is the pinnacle of the twentieth century's evolution in international criminal justice. All these *ad hoc*, 'special' or 'extraordinary' international or internationalised trial systems have been scrutinised ever since their creation. However, critical, distant and empirical historiography, written by historians, on the modern panels has only gradually emerged. In the infancy days of the UN and hybrid tribunals as well as the ICC, studies were commonly conducted by a generation of its founders: a community of activists, judges, prosecutors,

⁴³⁹ *Rome Statute & United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court*. Rome, 15 June - 17 July 1998, *Official Records. Volume II: Summary records of the plenary meetings and of the meetings of the Committee of the Whole (A/CONR183/13(Vol.II))*; New York 2002), p. 121.

⁴⁴⁰ Democratic Republic of the Congo, Uganda, Central African Republic, Kenya, Libya, Sudan, Mali, Côte d'Ivoire, Nigeria, Guinea (Conakry), Burundi, Gabon, Comoros.

⁴⁴¹ Colombia, Venezuela, Honduras.

⁴⁴² Republic of Korea, Iraq, Afghanistan, Palestine.

⁴⁴³ UK, Georgia, Ukraine.

⁴⁴⁴ Temporally, the ICC can only deal with crimes committed from July 2002. Geographically or personally, the ICC is limited in its power towards countries that are members of the court, countries that have accepted its jurisdiction only for certain 'situations' or the permanent Security Council members.

⁴⁴⁵ Either established by treaty (IMT, IMTFE, ICC), the UN (ICTY & ICTR) or in conjunction with the UN (SCSL, SPSC, ECCC, STL), the African Union (EAC), the European Union (KRSJI) or foreign powers (IHCC).

⁴⁴⁶ Other jurisdictions included strong international dimensions, including in Kosovo and the War Crimes Chamber in the Court of Bosnia Herzegovina. United Nations Mission in Kosovo (UNMIK), *Regulation no. 2000/64 on assignment of international judges/prosecutors and/or change of venue (UNMIK/REG/2000/64; 15 December 2000)*; Law on the amendments to the law on the court of Bosnia and Herzegovina', *Official Gazette of Bosnia and Herzegovina*, No. 61.04 (January 2005).

⁴⁴⁷ Set up "to prosecute persons who bear the greatest responsibility for serious violations of international humanitarian law and Sierra Leonean law committed in the territory of Sierra Leone." *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*.

⁴⁴⁸ United Nations Transitional Administration in East Timor (UNTAET), *Regulation no. 2000/11 on the organization of courts in East Timor (UNTAET/REG/2000/11; 6 March 2000)*.

⁴⁴⁹ Republic of Iraq, 'Law No. (10) 2005. Law of The Iraqi Higher Criminal Court' *Al-Waqa' Al-Iraqiya. Official gazette of the Republic of Iraq*, Vol. 47, No. 4006 (18 October 2005).

⁴⁵⁰ Set up to "....to trial senior leaders of Democratic Kampuchea and those who were most responsible for the crimes and serious violations of Cambodian penal law, international humanitarian law and custom and international conventions recognised by Cambodia." *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, UNTS 2329-I-41723).

⁴⁵¹ Set up in relation to February 2004 attack in Beirut and similar terrorist attacks, killing and injuring of Prime Minister Rafiq Hariri and others *Agreement between the United Nations and the Lebanese Republic on the establishment of a Special Tribunal for Lebanon* (6 February 2007). Annex to: UNSC, *Resolution 1757 (S/RES/1757 (2007))*, 30 May 2007).

⁴⁵² *Accord entre le gouvernement de la République du Sénégal et l'Union Africaine sur la création de chambres africaines extraordinaires au sein des juridictions Sénégalaises* (Dakar, 22 August 2012).

⁴⁵³ Koninkrijk der Nederlanden 'Agreement between the Kingdom of the Netherlands and the Republic of Kosovo concerning the Hosting of the Kosovo Relocated Specialist Judicial Institution in the Netherlands. Pristina, 15 February 2016', *Tractatenblad*, 4 (2016) No. 1.

lawyers and legal scholars (most of who have been involved themselves in “the justice project” in one way or another). Describing the trials and errors of a maturing criminal justice system, they mostly celebrated the precedents they shaped. Gradually, political scientists, practitioners and non-governmental lobby groups entered the sheltered and self-referential realm of international criminal justice. Only more recently anthropologists and historians started to observe courtroom rituals and debate legacies of modern international trials.⁴⁵⁴

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

⁴⁵⁴ See for instance: Kelsall, *Culture under Cross-Examination*; Wilson, *Writing History*; Kamari Maxine Clarke, *Fictions of Justice: The International Criminal Court and the Challenge of Legal Pluralism in Sub-Saharan Africa* (Cambridge 2009); Donia, *Radovan Karadžić*.

⁴⁵⁵ See in Rwanda: Ubutabera, *Hirondelle News Agency*, *International Justice Tribune* covered the day to day proceedings at the ICTR and SCSL.

⁴⁵⁶ Kelsall, *Culture under Cross-Examination*, p. 17.

2.10 History writing in international criminal trials

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

- Christine van den Wyngaert, ICC Judge⁴⁵⁷

How do law and history relate to each other? Are they incompatible, as many from both professions maintain,⁴⁵⁸ or, are they intimately connected, as many from both professions also argue?⁴⁵⁹ Much has been said and written about it, in general terms and in specific cases.⁴⁶⁰ Yet, it was German trial reporter on the Eichmann case in Jerusalem, Hannah Arendt, who put the debate on the map. Famously, she observed:

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

⁴⁵⁷ Dissenting Opinion of Judge Christine van den Wyngaert. Annex to: ICC, *Situation en République Démocratique du Congo. Affaire le Procureur c. Germain Katanga et Mathieu Ngudjolo Chui: Décision relative à la mise en œuvre de la norme 55 du Règlement de la Cour et prononçant la disjonction des charges portées contre les accusés* (ICC-01/04-01/07; 21 November 2012), pp. 33-61.

⁴⁵⁸ Tristram Hunt, ‘Whose Truth? Objective Truth and a Challenge for History’, *Criminal Law Forum*, Vol. 15, No. 1 (2004), pp. 193-198; Carlo Ginzburg, *The Judge and the Historian* (Verso, 2002); Pieter Lagrou, “Historical Trials”: Getting the Past Right — or the Future?” in: Christian Delage and Peter Goodrich (eds.), *The Scene of the Mass Crime: History, Film, and International Tribunals* (Routledge, 2013), pp. 9–22.

Richard J. Evans, History, Memory and the Law: The Historian and Expert Witness’, *History and Theory*, vol. 41, No. 3 (2002), pp. 326–345.

⁴⁵⁹ Lawrence Douglas, *The Memory of Judgment: Making Law and History in the Trial of the Holocaust* (Yale: Yale University Press, 2001); N. Tromp-Vrkić, *The Unfinished Trial of Slobodan Milošević: Justice Lost, History Told* (Dissertation, University of Amsterdam, 2015); Richard Wilson, ‘Judging History: The Historical Record of the International Criminal Tribunal for the Former Yugoslavia’, *Human Rights Quarterly*, Vol. 27, No. 3 (August 2005), pp. 908-942; Richard Wilson, ‘Humanity’s Histories: Evaluating the Historical Accounts of International Tribunals and Truth Commissions’, *Politix*, Vol. 20, No. 80 (2007), pp. 31-59.

⁴⁶⁰ 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; 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: Schabas, *Unimaginable Atrocities*, pp. 153-162; Gaynor, ‘Uneasy Partners’; Berber Bevernage, ‘Transitional Justice And Historiography: Challenges, Dilemmas and Possibilities’, *Macquarie Law Journal*, Vol. 15 (2014), pp. 7-24.

⁴⁶¹ Arendt, ‘A reporter at large. Eichmann in Jerusalem ~ V’, p. 101.

deeds, not the sufferings of the Jews, not the German people or mankind, not even anti-Semitism and racism.”⁴⁶²

In Arendt’s view, courts deal with individual criminal responsibility and should not be blinded by the historical political and social circumstances in which the defendant operated.⁴⁶³ More than fifty years later, including more than 20 years of passionate international judicial reckoning with atrocities around the globe, no real consensus has been reached on the matter, particularly among the non-historians. However, social anthropologist Richard Wilson, in his landmark book on the topic, summarises it effectively: “courts of law produce mediocre historical accounts of the origins and causes of mass crimes.”⁴⁶⁴ Wilson, who is not a trained historian himself, divides the debate into different schools. In Arendt’s tradition, first there is the ‘justice-and-nothing-more-doctrine, which asserts liberal legalist view that justice agents should not attempt to write history at all, that it would even be inappropriate. In this view, extra-judicial historical probes should not overshadow due process, fair trial and the principles of law. Law-and-society adherents,⁴⁶⁵ who take it a step further, maintain that even if they try, courts will fail in their endeavour.⁴⁶⁶

Wilson offers four reasons for law’s incapability to deal with history.⁴⁶⁷ First, historians and judges apply different methodologies and truth regimes: academic discussion versus cross-examination and balance of probabilities versus beyond any reasonable doubt. They also reach different conclusions: provisional and interpretative versus definite, verifiable and revisable (*ne bis idem*). Second, if history does not fit law’s templates and principles, then the historical narrative is bent in such a way that it will, not vice versa. Law ultimately distorts history. Third, not the full historical story may come up in the trial setting, but just parts of it, simply because law does not cover certain events or law agents choose not to deal with them. Fourth, the historical dimensions or narratives are overshadowed by the procedural technicalities, complexities and details of international trials. ‘Slow-trials’ spark boredom and lose historical momentum and their presumed educational functionality as ‘show trials’.⁴⁶⁸ Two differences must be added. The first concerns the topic; judges concentrate on individual responsibility for specific actions and thus on the behaviour and motives of

⁴⁶² Arendt, ‘A reporter at large. Eichmann in Jerusalem ~ I’, p. 40.

⁴⁶³ Perhaps she lent her insights from the court’s own perspective, which from the start clarifies that: “In this maze of insistent questions, the path of the Court was and remains clear. It cannot allow itself to be enticed into provinces which are outside its sphere. The judicial process has ways of its own, laid down by law, and which do not change, whatever the subject of the trial may be. Otherwise, the processes of law and of court procedure are bound to be impaired, whereas they must be adhered to punctiliously, since they are in themselves of considerable social and educational significance, and the trial would otherwise resemble a rudderless ship tossed about by the waves. It is the purpose of every criminal trial to clarify whether the charges in the prosecution’s indictment against the accused who is on trial are true, and if the accused is convicted, to mete out due punishment to him. Everything which requires clarification in order that these purposes may be achieved, must be determined at the trial, and everything which is foreign to these purposes must be entirely eliminated from the court procedure. Not only is any pretension to overstep these limits forbidden to the court - it would certainly end in complete failure. The court does not have at its disposal the tools required for the investigation of general questions of the kind referred to above. For example, in connection with the description of the historical background of the Holocaust, a great amount of material was brought before us in the form of documents and evidence, collected most painstakingly, and certainly in a genuine attempt to delineate as complete a picture as possible. Even so, all this material is but a tiny fraction of all that is extant on this subject. According to our legal system, the court is by its very nature “passive,” for it does not itself initiate the bringing of proof before it, as is the custom with an enquiry commission. Accordingly, its ability to describe general events is inevitably limited. As for questions of principle which are outside the realm of law, no one has made us judges of them, and therefore no greater weight is to be attached to our opinion on them than to that of any person devoting study and thought to these questions.” “District Court of Jerusalem, *Attorney General v. Adolf Eichmann: Judgement* (40/61; Jerusalem, 11 December 1961), §2.

⁴⁶⁴ Wilson, *Writing History*, p. 1.

⁴⁶⁵ Like legal sociologist Mark Osiel, who said “that the attempt to combine the two endeavours is very likely to produce poor justice or poor history, probably both.” Mark Osiel, *Mass atrocity, Collective Memory, and The Law* (New Brunswick & London: Transaction Publishers, 1997), p. 80.

⁴⁶⁶ Wilson, *Writing History*, pp. 2–6.

⁴⁶⁷ He describes them as (1) “incompatibility theory”; (2) “Legal Exceptionalism, or “The Law Is a Ass””; (3) “The Partiality Thesis” (4) “boredom on a Huge, Historic Scale.” *Ibidem*, pp. 6-12.

⁴⁶⁸ Wilson, *Writing History*, pp. 6-13.

unique and atypical individuals. Historians call this approach to the past *agency* or *event* history, while they themselves emphasise *agency and structure*. They focus on the acting of persons and the structure and context in which they do.⁴⁶⁹ Secondly, and what we will see in this dissertation, is that lawyers have a different relationship with the past than historians. Disparate from professional historians, lawyers like to make – and become part of – history themselves, tweak historical narratives according to their argument and like history – like law – to be static. Thus, for the historian history is object and objective while for the lawyer history is subject and subjective.

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

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

⁴⁶⁹ Antoon De Baets, ‘Na de genocide: Waarheidsstrategieën van rechters en historici’, *Tijdschrift voor Geschiedenis*, Vol. 116, Nr. 2 (2003), pp. 212-230: 229.

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

⁴⁷¹ Wilson, *Writing History*, p. 13.

⁴⁷² *Ibidem*, p. 15.

⁴⁷³ *Ibidem*, p. 69.

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

Trials excavate data and create cradles of information useful to historians, but they may significantly vary in quantity and quality, depending on the specific conflict and locality. And indeed, the UNICTY – from which most of Wilson’s empirical data derives – was a rather ‘forensic’ tribunal: witnesses were introduced to introduce material evidence. But the practice at the UNICTR, SCSL were and the ICC is different. Rather, they can be considered as being almost exclusively ‘testimonial’ courts: the evidence came *from* witnesses. So their evidentiary source legacy is crucially divergent and the historically substantial facts uncovered there are reasonably scarce. Other than at the UNICTY, if history was written at these courts, it ought to be valued much more like a narrative oral history *from the perspective* of victims, survivors, bystanders and perpetrators than as a collection of physical data *introduced by witnesses*. It is thus a dissimilar history, based on complex memory sources enticed in an arena where not only perceptions of justice may differ, but also where entire reference frame works – in particular cultural and linguistic – may clash and cause crucial misconceptions and decisive lost-in-translation-situations. And whereas the valorisation of victim testimony – as experienced facts - indeed increased from the mid-1980s and found its way into the international court rooms in the 1990s,⁴⁷⁴ judges have increasingly struggled to use eye witnesses as reliable and verifiable evidence in complicated cases, particularly in non-western settings where there is no – or hardly any - tangible forensic corroborative material available. It lays bare an old problem of western-style fact-finding in non-western oral societies, considerable time after the events: fact-finding without facts.⁴⁷⁵ In that context, witness testimony about the atrocious past, arguably, tells an ambiguous story about the past and leads to shallow historical findings.

⁴⁷⁴ Nanci Adler & Selma Leydesdorff (eds.), *Tapestry of Memory. Evidence and Testimony in Life-Story Narratives* (New Brunswick & London: Transaction Publishers, 2013), p. xiii.

⁴⁷⁵ See for a detailed analysis on this issue the paper by former ICC investigator and investigative judge at The Hague International Crimes Chamber Martin Witteveen: M. R. Witteveen, ‘De nieuwe battleground in ons strafproces: hoe toetst de rechter de betrouwbaarheid van getuigenverklaringen?’, *Strafblad*, Vol. 10, No. 5 (November 2012), pp. 366-373; & 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 Epublisher, 2012), pp. 65-108.

2.11 Historical trial testimony

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

- Jan Vansina⁴⁷⁶

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

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

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

⁴⁷⁶ Jan Vansina, *Oral Tradition as History* (Madison: University of Wisconsin Press, 1985), p. xi.

⁴⁷⁷ UNICTR, *Rules of Procedure and Evidence* (adopted on 29 June 1995) rule 90 (b). Similar witness oaths apply at other international[ised] courts and tribunals. See: UNICTY, *Rules of Procedure and Evidence* (adopted on 11 February 1994) rule 90 (a); United Nations Transitional Administration in East Timor (UNTAET), *Regulation No. 2000/30 on Transitional Rules of Criminal Procedure* (UNTAET/REG/2000/30; 25 September 2000) section 36 (2); SCSL, *Rules and Procedure and Evidence of the Special Court for Sierra Leone* (adopted 16 January 2002) rule 90 (b) & ICC, 'Rules of Procedures and Evidence', *Official Records of the Assembly of States Parties to the Rome Statute of the International Criminal Court, First session, New York, 3-10 September 2002* (ICC-ASP/1/3 and Corr.1), part II.A, rule 66; ECCC, *International Rules* 12 June 2007 rule 24 (1); Special Tribunal for Lebanon (STL), *Rules of Procedure and Evidence* (adopted on 20 March 2009) rule 150 (2). At the time of writing no Rules of Procedure and Evidence have been established at the Extraordinary African Chambers (EAC) [from French: *Chambres Africaines Extraordinaires*] in Senegal. The post-Second World War tribunals held that "Before testifying before the Tribunal, each witness shall make such oath or declaration as is customary in his own country": International Military Tribunal (IMT), *Rules of Procedure* (adopted 29 October 1945) rule 6 (a); International Military Tribunal for the Far East (IMTFE), *Rules of Procedure of the International Military Tribunal for the Far East* (adopted 25 April 1946) rule 4 (a).

⁴⁷⁸ Dielika Diallo, 'Hampate Ba: the great conciliator', *UNESCO Courier* (January 1992), p. 13.

⁴⁷⁹ Diallo, 'Hampate Ba: the great conciliator', p. 13.

⁴⁸⁰ Cited in: Norbert Rouland, *Legal Anthropology* (London 1994), p. 19.

⁴⁸¹ Latha Varadarajan, 'The trials of imperialism. Radhabinod Pal's dissent at the Tokyo tribunal', *European Journal of International Relations*, Vol. 21, No. 4 (2005), pp. 793-815: 794.

⁴⁸² See for an insightful analysis of this type of "white men's justice": Kelsall, *Culture under Cross-Examination*, pp. 1-16.

⁴⁸³ In Japan, for instance, there was hardly any cultural basis for international trials; "situational ethics" were, at the time, inherently unlegalistic. Judith N. Shklar, *Legalism. Law, Morals, and Political Trials* Cambridge: Harvard University Press, 1964), pp. 179-181.

is western in its very origin and it is run by a politics of fact positivism. At the two tribunals that dealt with atrocities in Europe, the IMT and UNICTY, lawyers could operate relatively successfully as documentary and forensic evidence was abundant. The situation at the other tribunals, however, was strikingly different as the forensic basis for prosecutions was particularly absent, necessitating a strong reliance on testimonial evidence.

Hearing oral testimony however is not an exclusive characteristic of the contemporary atrocity tribunals. But it is mainly its purposes, meaning and weight that differ.⁴⁸⁴ Witnesses performed already in Nuremberg, although extremely modestly. Justice Robert Jackson, the IMT's first Chief Prosecutor wanted "to put on no witnesses we could reasonably avoid"⁴⁸⁵ particularly because of questions regarding their reliability.⁴⁸⁶ As the prosecution was running a 'paper trial', offering thousands of documents - found in German army headquarters, government buildings, salt mines, buried in the ground, hidden behind false walls and other secret places - they only featured thirty-three witnesses, but mainly to authenticate or explain documents.⁴⁸⁷ Sixty-one witnesses were put before the bench by the defence in rebuttal, alongside the live testimony of nineteen of the defendants. The Tribunal itself heard twenty-two witnesses.⁴⁸⁸ Whereas Nazi archives were the substantial underpinnings of the case,⁴⁸⁹ the more laborious Tokyo trial of 28 Japanese war crimes suspects⁴⁹⁰ - stretching over 818 public sessions - heard live testimony from 419 witnesses, permitted 779 witness depositions and affidavits and introduced expert evidence (including from historians).⁴⁹¹ But unlike its Nuremberg-twin, which worked on the basis of masses of documents, the 'Far East'-court was generally "disappointed by a large part of this evidence" as it regarded itself "handicapped" in its "search for facts" by the absence of official records. Most archives were either burned during the bomb raids on Japan or the deliberate destruction after the surrender, which the tribunal found a "disservice to the cause of international justice."⁴⁹² Halfway through the trial, after the prosecution

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

⁴⁸⁵ Telford Taylor, *The Anatomy of the Nuremberg Trials* (Knopf Doubleday Publishing Group, 1992), p. 148.

⁴⁸⁶ Eric Stover, *The Witnesses. War Crimes and the Promise of Justice in The Hague* (Philadelphia: University of Pennsylvania Press, 2007), pp. 19-20.

⁴⁸⁷ Stephan Landsman, 'The Eichmann Case and the Invention of the Witness-Driven Atrocity Trial', *Columbia Journal of Transnational Law*, Vol 51, No. 69 (2012), pp. 69-119: 75-77.

⁴⁸⁸ International Military Tribunal, 'Judgement', in: International Military Tribunal, *Trial of The Major War Criminals Before the International Military Tribunal. Nuremberg, 14 November - 1 October 1946* (Nuremberg, 1947), pp. 171-341: 172.

⁴⁸⁹ Patricia Waldt, 'Note from the Field. Dealing with Witnesses in War Crime Trials: Lessons from the Yugoslav Tribunal', *Yale Human Rights & Development Law Journal*, Vol. 5 (2002), pp. 217 - 239: 217 (note 1).

⁴⁹⁰ The charges were grouped into (1) crimes against peace, (2) murder and (3) other conventional war crimes and crimes against humanity committed between 1 January 1928 and 2 September 1945. See: International Military Tribunal for the Far East (IMTFE), No. 1. *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, DOHIHARA, Kenji, HASHIMOTO, Kingoro, HA T A, 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: Indictment*, reprinted in: United States of America, Department of State, *Trial of Japanese War Criminals* (Washington: United States Government Printing Office, 1946), pp. 45-76.

⁴⁹¹ For a discussion of the testimonies: Yuma Totani, *The Tokyo War Crimes Trial. The Pursuit of Justice in the Wake of World War II* (Cambridge & London: Cambridge University Press, 2008), pp. 122-128; 38-40.

⁴⁹² International Military Tribunal for the Far East (IMTFE), *Judgement*, pp. 48427-48434.

rested its case, the tribunal relaxed its burden of proof by introducing a ‘rule of best evidence’.⁴⁹³ Much hearsay evidence was introduced, and besides lamenting the slowing down the proceedings because of live testimony, the chamber in its judgement found many witnesses unreliable as they had met the bench “with prolix equivocations and evasions, which only arouse distrust.”⁴⁹⁴ A major trial of victor’s justice in Asia,⁴⁹⁵ complicated by matters of translation, lengthy cross-examinations and six months of drafting a 1218-page opinion, the IMTFE produced a long trial record, almost reaching 50,000 pages of transcript. Arguably it is an invaluable source for historians. Occupied with penning down an official history, the majority devoted 1,050 pages to findings of fact, on the basis of which – through command responsibility – the Japanese leaders were found guilty of conspiracy to commit aggression and the aggression itself.⁴⁹⁶ But unlike Nuremberg, which rendered a unanimous verdict, five IMTFE judges, including the most outspoken, Judge Radhabinod Pal from India, contested this version of history. In his drawn-out dissenting opinion which meticulously exposes the lack of linkage testimonies and other direct evidence against the accused, Pal reasoned he would render a finding of not-guilty on all the accused: “The devilish and fiendish character of the alleged atrocities cannot be denied. I have indicated against each item the nature of the evidence adduced in support of the occurrence. However unsatisfactory this evidence may be, it cannot be denied that many of these fiendish things were perpetrated. But those who might have committed these terrible brutalities are not before us now.”⁴⁹⁷

In fierce wordings, the Tokyo tribunal has been castigated for its cultural narrowness, ethical dogmatism and historical emptiness and its impact on the popular memory of Japanese was practically nihil.⁴⁹⁸ Nevertheless, it is reported that the “Tokyo Trial View of History” in the end became widely accepted among the populace, as it attributed the blame for the register of misconduct on its military leaders – not on the people themselves.⁴⁹⁹ Years later, in Jerusalem, acceptance was not enough. When Adolf Eichmann was brought before the Israeli court in 1960, shock therapy, identity-formation and social education were on the Prosecutor’s agenda.⁵⁰⁰ Even though it would have been sufficient to secure Eichmann’s conviction by letting the archives speak, it was particularly through the personal experiences of victims, so believed state prosecutor Gideon Hausner, that the trial could “superimpose on a phantom a dimension of reality,” a “living record of a gigantic human and national disaster.”⁵⁰¹ And indeed, the court – despite the reservations of presiding judge Mosche Landau towards a

⁴⁹³ Richard M. Minear, *Victor’s Justice. The Tokyo War Crimes Trial* (Princeton: Princeton University Press, 1971), p. 122. The initial rule on admissibility read: “The Tribunal shall not be bound by technical rules of evidence. It shall adopt and apply to the greatest possible extent expeditious and non-technical procedure, and shall admit any evidence which it deems to have probative value. See: ‘Charter of the International Military Tribunal for the Far East’, reprinted in: United States of America, Department of State, *Trial of Japanese War Criminals* (Washington: United States Government Printing Office, 1946), pp. 39-44., art. 13.

⁴⁹⁴ International Military Tribunal for the Far East (IMTFE), *Judgement*, p. 48433.

⁴⁹⁵ Compare: Yuki Tanaka, Tim McCormack & Gerry Simpson (eds.), *Beyond Victor’s Justice? The Tokyo War Crimes Trial Revisited* (Leiden: Martinus Nijhoff Publishers, 2011).

⁴⁹⁶ Minear, *Victor’s Justice. The Tokyo War Crimes Trial*, pp. 125-159.

⁴⁹⁷ ‘The United States of America and others versus Araki Sadao and others. Judgement of Hon’ble Mr. Justice Pal. Member from India’, printed in: *International Military Tribunal for the Far East: Dissident Judgement of Justice Pal* (Tokyo: Kokusho – Kankokai, Inc., 1999), pp. 620; 697-701.

⁴⁹⁸ Kelsall, *Culture under Cross-Examination*, p. 11.

⁴⁹⁹ Osiel, *Mass atrocity*, pp. 181-183.

⁵⁰⁰ *Ibidem*, pp. 15-17.

⁵⁰¹ Hausner, *Justice in Jerusalem*, pp. 291-292.

theatrical, educational and political trial – opened up its doors to the testimony of 121 Holocaust survivors.⁵⁰² Gruesome personal stories were narrated by a carefully selected cross-section of victims: professors, housewives, artisans, writers, farmers, merchants, doctors, officials and labourers.⁵⁰³ An interlaced story about the entire Holocaust echoed through the courtroom, but none of it was directly related to Eichmann who was in fact for a lengthy part of the trial virtually forgotten.⁵⁰⁴ Thus, despite the strict legal positivism driving the court in its judgement,⁵⁰⁵ the court approved its public and widely televised trial hearings to become an extraordinary forum for history telling, victim narratives and collective memory consolidation. Still, regardless of their evidentiary lenience – including witness testimony⁵⁰⁶ - the three-panelled bench, in its judgement, was not shy to underline that “without a doubt, the testimony given at this trial by survivors of the Holocaust, who poured out their hearts as they stood in the witness box, will provide valuable material for research workers and historians, but as far as this Court is concerned, they are to be regarded as by-products of the trial.”⁵⁰⁷ What remained was a decision that very precisely described Eichmann’s particular crimes as well as the limits of his responsibility, mainly based on his own admissions and documentary proof.

The Eichmann trial is not only pivotal in the maturation of the internationalised justice venture, tackling international crimes crossing borders and time, it also set a particular precedent in terms of legal procedure, evidence, testimony and theatrical setting. Narrative content based on victims’ memories became an important feature of criminal procedure, next to adjudicating personal criminal responsibility. Extravagant trials about extravagant crimes demanded extravagant proceedings. The liberal show trial for administrative massacre was born. Displaying the horrific consequences of the illiberal vices and elucidating the human drama of mass violence, atrocity trials morphed into social and cultural performances involving historical reflection, social education and to some degree reconciliation of society by means of legal or other ritual procedures.⁵⁰⁸ Witness-driven mass atrocity prosecutions became the standard after the Eichmann trial. The model entered into full swing across the globe, including other Holocaust related hearings in Israel (Demjanjuk) and Canada (Finta). But also the junta trials in Argentina and the red terror cases in Ethiopia and profoundly influenced the proceedings at international tribunals.⁵⁰⁹ In their fashioning of grand-narratives on the wars in the former Yugoslavia, prosecutors weaved together testimony of large numbers of witnesses.

⁵⁰² Leora Bilsky, ‘The Eichmann Trial. Towards a Jurisprudence of Eyewitness Testimony of Atrocities’, *Journal of International Criminal Justice*, 12 (2014), pp. 27-57: 39.

⁵⁰³ Hausner, *Justice in Jerusalem*, pp. 295-296.

⁵⁰⁴ Stephen Landsman, *Crimes of the Holocaust: The Law Confronts Hard Cases* (Philadelphia: University of Pennsylvania Press, 2005), pp. 94.

⁵⁰⁵ The chamber was quite clear on its stand: “In this maze of insistent questions, the path of the Court was and remains clear. It cannot allow itself to be enticed into provinces which are outside its sphere. The judicial process has ways of its own, laid down by law, and which do not change, whatever the subject of the trial may be. Otherwise, the processes of law and of court procedure are bound to be impaired, whereas they must be adhered to punctiliously, since they are in themselves of considerable social and educational significance, and the trial would otherwise resemble a rudderless ship tossed about by the waves. It is the purpose of every criminal trial to clarify whether the charges in the prosecution’s indictment against the accused who is on trial are true, and if the accused is convicted, to mete out due punishment to him. Everything which requires clarification in order that these purposes may be achieved must be determined at the trial, and everything which is foreign to these purposes must be entirely eliminated from the court procedure. Not only is any pretension to overstep these limits forbidden to the court - it would certainly end in complete failure.” District Court of Jerusalem, *Attorney General v. Adolf Eichmann: Judgement* (40/61; Jerusalem, 11 December 1961), §2.

⁵⁰⁶ Landsman, ‘The Eichmann Case’, pp. 69-119: 81-82.

⁵⁰⁷ District Court of Jerusalem, *Eichmann Judgement*, §2.

⁵⁰⁸ Osiel, *Mass atrocity*, pp. 15-17; 67.

⁵⁰⁹ Landsman, ‘The Eichmann Case’, pp. 69-119:

During the first six-month trial, against low-level Bosnian Serb camp guard *Duško Tadić*, they called no less than 76 witnesses, many of whom were victims.⁵¹⁰ All the subsequent trials saw a parade of over 4500 witnesses traveling to The Hague.⁵¹¹ In Arusha, at the Rwanda-tribunal, a total of 3378 witnesses have testified at trial.⁵¹² Their role, however, changed significantly over time.

When the UNICTY was established in 1993, it faced a different landscape than its predecessor in Nuremberg and to a lesser extent Tokyo. A most important variance was that the Bosnian war was not over; some of the fiercest atrocities had not yet occurred, including the massacres in Srebrenica in July 1995. Politics were at play as well. Five years of war, disintegration and subsequent peace negotiations had left no clear winners or losers.⁵¹³ In this context, state cooperation became the biggest obstacle for the tribunal.⁵¹⁴ In particular, fact-finding through criminal investigations was thus a huge challenge. Serbia, Croatia, and Republika Srpska in Bosnia-Herzegovina had become practically inaccessible to the UNICTY investigators, who could not obtain critical documents (if they even existed) held by authorities unsympathetic to the Tribunal's existence or goals.⁵¹⁵ Political transitions in these countries gradually led to increased assistance. But documents, defendants and witnesses were only slowly secured. Yet, when the UNICTY's workload increased from 1997 onwards, prosecutors faced the reality that they could not depend as heavily on paper trails as they had hoped. Offenders in the Balkans had simply not been meticulously documenting their actions and particularly their individual involvement in possible crimes, as did the Nazi's. And even if they did, the documents did not always end up on the tribunal's desks.⁵¹⁶ Therefore, in The Hague, most early cases required substantial numbers of eyewitnesses to prove the very occurrence of crimes. Only in the first years already, 971 victim-witnesses came to The Hague to testify. The first genocide trial, involving Radislav Krstić, involved 103 prosecution witnesses, twelve defence witnesses and two Chamber witnesses.⁵¹⁷ But already in his case, glitches ascended. Some massacres had been so effective that they left no survivors and thus no corroborating witnesses, prompting the prosecution to exclude episodes from their case.⁵¹⁸

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

⁵¹⁰ UNICTY, *Tadić Opinion and Judgement*, p. 11.

⁵¹¹ In total, approximately 7,700 witnesses, including multiple and video-linked testimonies and support persons, have testified and assisted the ICTY (www-text: <http://www.unmict.org/en/about/witnesses>, visited: 27 March 2015). Almost two-thirds of all witnesses have testified on behalf of the Prosecution. About a third has testified for the Defence. Two percent have been called by the Chambers. UNICTY, *Witness Statistics* [as of 2 February 2013] (www-text: <http://www.icty.org/sid/10175>, visited: 27 March 2015). Also see the documentary: UNICTY, *Through their eyes. Witnesses to Justice* (The Hague: UNICTY, 2014).

⁵¹² For the prosecution: 1782. For the defence: 1420. Expert witnesses: 176. Eighty-three per cent of the witnesses, including detainees, have benefited from protection measures. The remaining seventeen per cent of the witnesses, who were not provided protection, consisted of experts, non-protected detainees, and witnesses who otherwise waived protection. Email correspondence with Sera Ameso Attika, ICTR Witness Support and Protection Unit, dated 8 July 2013.

⁵¹³ *General Framework Agreement for Peace in Bosnia and Herzegovina*, 21 November 1995 (S/1995/999; 30 November 1995). Better known as "Dayton Agreement."

⁵¹⁴ Julian Borger, *The Butcher's Trail. How the Search for Balkan War Criminals Became the World's Most Successful Manhunt* (New York: Other Press, 2016).

⁵¹⁵ Waldt, 'Note from the Field', pp. 218-219.

⁵¹⁶ Nancy Amoury Combs, *Fact-Finding Without facts. The Uncertain Evidentiary Foundations of international Criminal Convictions* (Cambridge: Cambridge University Press, 2010), p. 12.

⁵¹⁷ Waldt, 'Note from the Field', p. 219.

⁵¹⁸ *Ibidem*, p. 220.

At the ICC, in its first case for stance, the heart of the case was the question if Thomas Lubanga Dyilo had conscripted, enlisted and used children under the age of fifteen in his militia.⁵¹⁹ But throughout the case⁵²⁰ the essential baseline element – that the children alleged to be children were indeed younger than fifteen – was hotly contested.⁵²¹ As we will see in the chapter on Congo, the Congolese defendant was ultimately convicted, by majority, for three war crimes,⁵²² but the evidentiary basis, nine alleged former child soldiers, was at least flimsy.⁵²³ The dissenting appeals judge, who deemed the evidence to be insufficient, expressed the hope “that future prosecutions of these crimes at the Court will adduce direct and more convincing evidence and preserve the fairness of proceedings, which lies at the heart of criminal prosecutions and should not be sacrificed in favour of putting historical events on the record.”⁵²⁴ Essentially, the Lubanga judgement, in a detailed manner, narrated the court’s baseline truth-finding crisis.⁵²⁵ Lubanga’s case rested almost exclusively on *viva voce* witness testimony, collected by three Congolese intermediaries as well as other third-party interviews with witnesses, most notably the UN and Human Rights Watch. Hardly any first-hand *onsite* investigations had been conducted and, as a result, the prosecutor had introduced no relevant forensic evidence during trial, not even concerning the ages of the alleged child soldiers. With two exceptions,⁵²⁶ all the tribunals, more or less, faced this fact-finding obstacle and therefore have no direct access to untarnished forensics and first hand witness testimony.⁵²⁷ Consequently, the bulk of collected evidence consists of eyewitness testimony gathered by prosecutors and featured in reports by non-governmental organisations (NGOs).⁵²⁸ But judges have increasingly discredited witness testimony as being possibly manipulated, unreliable, inconsistent or vague and deemed several NGO reports to lack corroborative value.⁵²⁹

⁵¹⁹ ICC, PTCL, *Situation on the Democratic Republic of the Congo in the Case of The Prosecutor vs. Thomas Lubanga Dyilo: Document Containing the Charges, Article 61 (3)(a)* (ICC-01/04-01/06; 28 August 2006).

⁵²⁰ The Chamber heard a total of 67 witnesses over 204 days of hearings: 36 Prosecution witnesses, including three experts and nine former child soldiers, 24 Defence witnesses, three victims called as witnesses following requests from their legal representatives and four expert Chamber witnesses. A total of 1,373 items of evidence (368 by the prosecution and 992 by the defence) were admitted into evidence. ICC, *Lubanga Dyilo Judgment*, §12; For a discussion on the evidence: Caroline Buisman, ‘Delegating Investigations: Lessons to be Learned from the Lubanga Judgment’, *Northwestern Journal of International Human Rights*, Vol. 11, No. 3 (Summer 2013), pp. 30-82.

⁵²¹ Thijs Bouwknegt, ‘Judges Deliberate First Judgement’, *International Justice Tribune*, No. 134 (31 August 2011), p. 1.

⁵²² ICC, *Lubanga Dyilo Appeals Judgement*.

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

⁵²⁴ ICC, AC, *Lubanga Dyilo Transcript* (1 December 2014), p. 18. See for full analysis of Appeals Judgement: Thijs B. Bouwknegt, ‘Lubanga trial ends with (un) reasonable dissent? Some observations’, *Newsletter International Crimes and Criminology*, Vol. 9, No. 2 (December 2014), pp. 12-14.

⁵²⁵ ICC, *Lubanga Dyilo Judgement*, pp. 50-228.

⁵²⁶ The Special Panels for Serious Crimes in East Timor received much forensic evidence relevant to the indictments as UN-mandated forensic experts were soon present at the scene after the violence to conduct exhumations and autopsies. See: Nancy Amoury Combs, *Fact-Finding Without Facts*, p. 13; Mohamed C. Othman, *Accountability for International Humanitarian Law Violations: The Case of Rwanda and East Timor* (Berlin: Springer, 2005), pp. 106-107. The Special Tribunal for Lebanon also received forensic details from crime scene investigations carried just after the Bomb attack on former Prime Minister Rafiq Hariri. See: UNSC, *Report of the International Independent Investigation Commission established pursuant to Security Council resolution 1595 (2005)* (S/2005/662; 20 October 2005), pp. 20-36.

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

⁵²⁸ As a result of belated investigations, investigators and prosecutors have turned heavily to second-hand primary sources, particularly UN missions, humanitarian organisations, human rights advocacy groups, journalists and academia from various disciplines. Their reports, information and assistance are often very useful as the starting point, providing basic information, leads, possible witnesses and sometimes documentary evidence. A recurring problem, however, is that these sources often cite witness testimony themselves, which can hardly be corroborated later. Former ICC investigation team leader Bernard Lavigne compared the procedure of investigation of humanitarian groups to general journalism. ICC, *Lubanga Dyilo Transcript* (17 November 2010), p. 47.

⁵²⁹ ICC, *Situation in the Democratic Republic of the Congo in the Case of the Prosecutor v. Callixte Mbarushimana; Decision on the confirmation of charges* (ICC-01/04-01/10; 16 December 2011); ICC, *Lubanga Judgment*; ICC, *Situation en République Démocratique du Congo. Affaire le Procureur c. Mathieu Ngujolo: Jugement rendu en application de l’article 74 du Statut* (ICC-01/04-02/12; 18 December 2012).

It lays bare the problem that in remote, unfamiliar and mostly non-documentary contexts, answering seemingly simple, yet basic, questions like what happened to whom, where and when already proves to be problematic. While journalists, human rights researchers, academics and the public easily pinpoint culprits, criminal investigators face problems corroborating these allegations *beyond reasonable doubt*.⁵³⁰ Courts, thus, appear to be less competent *chroniquers* about mass atrocity as is generally believed.⁵³¹ In fact, when confronted with non-documentary societies such as Rwanda,⁵³² inaccessible areas⁵³³ or when documents have been destroyed as in Japan, their groundwork is often uncertain. Practically, that means trial judges have to determine individual responsibility for the most serious crimes almost exclusively on the basis of witness accounts which are given five, ten, sometimes 20 years or even longer after the facts have occurred.⁵³⁴ It poses a complex fact-finding challenge: the data of atrocity crimes is embedded in the fallible memories of people close to the violence,⁵³⁵ which in turn ultimately results in simplistic and distorted images of mass violence.⁵³⁶

Recent studies, alongside legal practice and trial proceedings, demonstrate how this state of affairs impairs fact-finding processes and truth-ascertaining capacities.⁵³⁷ According to Nancy Combs, eyewitness testimony - which requires coerced, enticed and contextualised remembering - at international tribunals is of highly questionable reliability.⁵³⁸ She describes their modus operandi as ‘fact-finding without facts’. Combs has shown that witnesses at the Rwanda, Sierra Leone and East Timor tribunals have a hard time providing the kind of testimony that fact finders need to receive to determine with any kind of certainty basic facts like who did what to whom. Oral testimony at these tribunals is frequently vague, lacks detail and is often inconsistent with previous written statements. These deficiencies stem from multiple causes: witnesses’ lack of education, investigator errors, language interpretation, cultural divergences between the witnesses and courtroom, evasion or perjury.⁵³⁹ Crucial is that it is almost impossible for judges to separate one from the other and Combs therefore argues that international tribunals purport a fact-finding competence they do not possess. She concludes that international criminal trials appear on the surface to be western-style trials, but that they constitute a much less reliable fact finding mechanism.⁵⁴⁰ An additional complicating factor to

⁵³⁰ William A. Schabas, *The UN International Criminal Tribunals. The Former Yugoslavia, Rwanda & Sierra Leone* (Cambridge 2006), pp. 463-467.

⁵³¹ See: William Schabas, ‘History, International Justice and the Right to Truth’, in *Unimaginable Atrocities. Justice, Politics, and Rights at the War Crimes Tribunals* (Oxford 2012), pp. 153-172; Gaynor, ‘Uneasy Partners’; and Wilson, *Writing History*.

⁵³² The most extreme example can be found in Rwanda, where hardly any relevant document exists on the execution of the genocide and the roles of individuals therein. Even video footage of the killings themselves or related events are extremely rare. Witteveen, ‘Dealing with Old Evidence’, pp. 71-72.

⁵³³ The ICC was hindered in its investigations in the dense and volatile jungles of the Democratic Republic of the Congo or ‘no-go’ area of Darfur in Sudan. See the testimony of former team leader at the Office of The Prosecutor (OTP) Bernard Lavigne about the Congo investigations: ICC, *Lubanga Dyilo Transcript* (16 November 2010) & ICC, *Lubanga Dyilo Transcript* (17 November 2010); 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).

⁵³⁴ Martin Witteveen, ‘Dealing with Old Evidence’, pp. 71-72.

⁵³⁵ For an analysis: Robert Cryer, ‘A Long Way from Home: Witnesses before International Criminal Tribunals’, *International Commentary on Evidence*, 4 (2006), art. 8.

⁵³⁶ See: Gerhard Anders, ‘Testifying about ‘Uncivilized Events’: Problematic Representations of Africa in the Trial against Charles Taylor’, *Leiden Journal of International Law*, 24 (2011), pp. 937-959; Richard Ashby Wilson, ‘Through the Lens of International Criminal Law: Comprehending the African Context of Crimes at the International Criminal Court’, *Studies in Ethnicity and Nationalism*, 11 (1) (2011), pp. 106-115.

⁵³⁷ Martin Witteveen, R. Horselenberg & A.W.E.A. de Zutter, ‘Tijd. Training en Tolk. De drie T’s die leiden naar meer valide getuigenverklaringen in het internationaal strafrecht’, *Strafblad*, Vol. 12, No. 5 (November 2014), pp. 365-373; Buisman, ‘Delegating Investigations’, pp. 30-82.

⁵³⁸ Combs, *Fact-Finding Without facts*, p. 4.

⁵³⁹ Julia Romasevych & Paul Anstiss, ‘When facts are thin.’ Interview: Nancy Combs’, *International Justice Tribune*, 112 (8 September 2010), pp. 4.

⁵⁴⁰ Romasevych & Anstiss, ‘When facts are thin,’ p. 4; Combs, *Fact-Finding Without facts*, p. 176.

these fractures in the fact-finding process is that the brain endures physical and psychological erosion. Witness' memories tend to simply be selective and poisoned with trauma and they often fade, distort or get influenced over time. This corrosion combined with the protracted proceedings leaves trial judges with the extremely difficult task of assessing witness credibility and reliability of the information rendered by witnesses and to ensure that the content of what has been said has been accurately conveyed in the trial setting.

The arena for international justice is the closed courtroom and its formal decorum. African witnesses travel miles away from home and end up in serene courtrooms where they are to perform an unfamiliar legal ritual, largely in the absence of supporters or spectators from home. Besides the often-frightening face-to-face meeting with the accused, the witnesses are confronted with robed judges and foreign lawyers who cross-examine them via invisible interpreters. The questions are complicated, direct and it is expected that the answers follow the same style. Sometimes it takes hours before it is established that witness "TFI1" or "XRA" walked from point A to B and that it took him about 5 minutes. Translations go from Kinyarwanda, Lingala, Swahili or Arabic into French and then into English. Very often, the very essence of testimony literally gets lost in translation.⁵⁴¹ The translated words spoken however, find it to a final transcript.⁵⁴² But once the witness takes the stand, her or his chronicle may only be channelled through the designated subject: the role of the accused in criminal activities. There is hardly any room for dwelling of topic. Contrary to the customary storytelling and narrative traditions of witnesses, international procedures limit the natural flow of narrative. They exclude everything deemed 'inadmissible' or 'irrelevant' to the crimes charged in the indictment and to the role of the accused therein. Although 'Victims and Witness Support Units' carefully take the witnesses through process of testifying,⁵⁴³ the very stage of the courtroom has often been hostile to international witnesses. Witnesses giving evidence at the UNICTR, SCSL and ICC have complained on being in the intimidating plain view of the perpetrators they are testifying against.⁵⁴⁴ Similarly, they have shied away from testifying about sexual violence before a gender-mixed panel and public they do not know.⁵⁴⁵ The very scenery often clashes with African customary law, which is more informal. Besides, particularly in the Francophone countries, it is often inquisitorial instead of adversarial.

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

⁵⁴¹ Cryer, 'A Long Way from Home', p. 1-54.

⁵⁴² At the ICTR and ICC, transcripts are only produced in the working languages, English and French, not in the local 'African' languages. At the SCSL, all the transcripts are in English, not in Krio.

⁵⁴³ See for instance: SCSL, *Best-Practice Recommendations for the Protection & Support of Witnesses* (SCSL 2008).

⁵⁴⁴ Author's observations.

⁵⁴⁵ *Idem*.

dates, time, distances or colours and others struggle to identify exhibits as maps, photographs and video's. They often do not speak tribunal's *lingua franca* French or English. Then there is the temporal distance between the crimes and the testimony: memories fade and details corrode while outside information interferes. A fundamental problem, however, is often the 'witnessing' itself. In several instances, witnesses have recounted facts or events they did not observe themselves but instead learned from others or via media.⁵⁴⁶ In all, most often, testimony lacks the desired detail and is often fuzzy.

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

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

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

⁵⁴⁷ UNICTR, *Akayesu Judgement*, §145.

⁵⁴⁸ *Ibidem*, §155.

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

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

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

⁵⁴⁹ Ibidem, §156.

⁵⁵⁰ Quantification of these instances proves to be challenging because a sheer amount of information is unavailable. A bulk of ICTR transcripts are not posted to the online Judicial Database ([www: http://trim.unict.org](http://trim.unict.org)) but much testimony within the transcripts that are posted was held in closed sessions and show many redactions.

⁵⁵¹ But for judges at the ICTR publicity did not seem to be a primary concern. As a former ICTR vice president, Judge Erik Mose once remarked in the media trial: “Public access is less important than the speed of the trial.” Quoted in: Thierry Cruvellier, *Court of Remorse. Inside the International Criminal Tribunal for Rwanda* (Wisconsin 2010), p. 53.

centre. The defence often downplays the crimes and presents the accused as a bystander or peace broker. Both parties present their narratives through witness testimony. The judge is to make findings on the witness' credibility and the truthfulness of his testimony. As we have observed, this is already a delicate practice, which is further complicated by inter-cultural misunderstanding in most Sub-Saharan African atrocity trials.

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

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

⁵⁵² Jennifer Easterday, 'Asylum applicants to be released from ICC custody', *The Trial Of Germain Katanga and Mathieu Ngudjolo Chui*, 10 October 2012 ([www-text: http://www.katangatrial.org/2012/10/asylum-applicants-to-be-released-from-icc-custody/](http://www.katangatrial.org/2012/10/asylum-applicants-to-be-released-from-icc-custody/), last visit 19 October 2012).

⁵⁵³ Jennifer Easterday, 'ICC Judges Visit Bogoro and Surrounding Villages', *The Trial Of Germain Katanga and Mathieu Ngudjolo Chui*, 30 January 2002 ([www-text: http://www.katangatrial.org/2012/01/icc-judges-visit-bogoro-and-surrounding-villages/](http://www.katangatrial.org/2012/01/icc-judges-visit-bogoro-and-surrounding-villages/), last visit 17 October 2012).

people from there. To see is to believe is their credo.⁵⁵⁴ Other trial chambers are considering holding *in situ* hearings, hoping for public exposure and scrutiny.

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

2.12 Trials and Trial Records as Historical Sources

After having outlined the conceptual framework of this dissertation, the following paragraphs discuss the trial record and archives of international criminal tribunals and its promises and pitfalls of its use as historical source. In light of the tribunalisation of mass atrocities and at the closure of some tribunals, this question becomes pertinent. In December 2015, the UNICTR's Appeals Chamber delivered its final judgement and shape shifted into the Arusha branch of the UN's Mechanism for International Criminal Tribunals (UNMICT).⁵⁵⁶ Other tribunals, like the SCSL and the Special Panels in East Timor have already finalised their mandates, while the UNICTY and the short-lived Extraordinary African Chambers (EAC) are winding down. At the same time, a plethora of courts, like the ICC, the Extraordinary Chambers in the Courts of Cambodia (ECCC) and the Special Tribunal for Lebanon (STL) are in full operation. At this transitional juncture, lawyers and judges make room for archivists and historians. Archivists become the custodians of the court record and historians stand in line to consult them as source material for research on the trials themselves as well as the conflicts they have adjudicated.⁵⁵⁷ Whereas some of the international courts have already started to include archivists already during the process, historians similarly do not only step in after the events. Importantly, it ought not just the post-trial trial record that should interest historians, but also the trials themselves as well as the pre-trial proceedings. In these specific areas, historians assess the retroactive processes, methodologies and subsequent possible biases of fact-finding and truth ascertainment on the past. Moreover, understanding the trials, such as in the case of Laurent Gbagbo,

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

⁵⁵⁵ Portions of this text stem from: Thijs Bouwknegt, 'Struggling With Unreliable Witnesses', *Wordt Vervolgd*, 7/8 (July/August 2012), pp. 14-15. [In Dutch: 'Worstelen met onbetrouwbare getuigen']. Also: Author's Interview, Caroline Buisman, Assistant Counsel Germain Katanga, 6 February 2012; Franck Petit, 'Judge Cotte: "We are making progress"', *International Justice Tribune*, 154 (20 June 2012), pp. 2.

⁵⁵⁶ UNICTR, AC, *The Prosecutor v. Pauline Nyiramasuhuko, Arsène Shalom Ntahobali, Sylvain Nsabimana, Alphonse Nteziryayo, Joseph Kayabashi and Élie Ndayambaje: Judgement* (ICTR-98-42-A; 14 December 2015); UNSC, 'Security Council Press Statement on Closure of International Criminal Tribunal for Rwanda', *Press Release* (SC/12188-APR/3296-L/3249; 31 December 2015).

⁵⁵⁷ Some significant studies based on trial records of the UNICTR and UNICTY already transpired: André Guichaoua, *Rwanda. De la Guerre au Génocide. Les Politiques Criminelles au Rwanda (1990-1994)* (Paris: La Découverte, 2010) & Donia, *Radovan Karadžić*.

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

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

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

⁵⁵⁸ 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.

⁵⁵⁹ UNSC, *Report on the completion of the mandate of the International Criminal Tribunal for Rwanda*, §55; UNICTR, *Karemera, Nzirorera: Judicial Notice*.

⁵⁶⁰ Erin Jessee, ‘Forensic Investigations’, in: Lavinia Stan and Nadya Nedelsky (eds.), *Encyclopaedia of Transitional Justice*, Vol. 1 (Cambridge: Cambridge University Press, 2013), pp. 27-32; Caroline Buisman, *Ascertainment of the Truth in International Criminal Justice* (Ph. D dissertation; January 2012), pp. 199-200.

⁵⁶¹ For instance, approximately 11.100 witnesses, including multiple and video-linked testimonies and support persons, have testified and assisted the ICTY (7.700) and ICTR (3.400). (www-text: <http://www.unmict.org/en/about/witnesses>, last visit on 9 May 2016).

⁵⁶² For instance, the UN’s Mechanism for International Criminal Tribunals (UNMICT), tightly controls all inactive records and archives of the UNICTR, UNICTY and the UNMICT itself. Exempt from disclosure are: (a) Records and information received or transmitted on a confidential basis or with the expectation of confidentiality, including any confidential information from or sent to third parties; (b) Records and information whose disclosure is likely to endanger the safety or security of any individual, violate his or her rights or invade his or her privacy. This shall include records and information related to the protection of witnesses, victims and other vulnerable individuals referred to in the evidence presented before the ICTR, ICTY or Mechanism or otherwise related to the judicial process, including records which contain information which, if disclosed without appropriate authorization, would reveal the identity and location of protected witnesses, victims and other vulnerable individuals. This shall also include personal information related to persons, or families of such persons, who have been or are currently detained by the ICTR, ICTY or Mechanism; (c) Records and information whose disclosure is likely to endanger the security of Member States or prejudice the security or proper conduct of any operation or activity of the United Nations; (d) Records and information covered by legal privilege or related to internal investigations, including judicial records classified by the submitting party or by order or decision of Chambers as “confidential” or “strictly confidential” and all information related to the deliberations of Chambers, as well as the records and information of the OTP which, if disclosed without appropriate authorization, would jeopardize investigations or prosecutions; (e) Internal inter-office or intra-office documents, including draft documents, if disclosure would undermine the Mechanism’s free and independent decision-making process; (f) Commercial records and information, if disclosure would harm either the financial interests of the Mechanism or those of other parties involved; (g) Other kinds of records and information, which because of their content or the circumstances of their creation or communication must be deemed confidential. United Nations, Mechanism for International Criminal Tribunals (UNMICT), *Access Policy for the Records held by the Mechanism for International Criminal Tribunals* (UNMICT/17; 12 August 2016).

historians, after twenty years of international atrocity trials is that the trial records of the tribunals have grown to such enormity that it is an indigestible labyrinth for newcomers.⁵⁶³ Aside from the millions of pages of evidence, testimony, motions, decisions and judgements, the trial against Charles Taylor and Radovan Karadzic, for example, also produced thousands of pages of transcripts, worth months of reading. Even the experienced judge, assisted by a dozen staff members, needs time. In the ten-year trial against the Serbian nationalist politician *Vojislav Sešelj*, judge Mandiaye Niang, who replaced a colleague after the trial was closed, took 1,5 year to “familiarise” himself with the case record, on the basis of which he had to pronounce a judgement.⁵⁶⁴ Robert Donia, a historian who testified for the UNICTY’s prosecution and wrote a biography on Karadzic for instance explained that over the years, he was only able to sift through a segment of the evidence.⁵⁶⁵ Thus, in tandem with the immediacy of trial proceedings and the continuous creation of new records, trial observers may be crucial to our understanding of trials, in lieu of the trial record. A pioneer in this respect is Hannah Arendt. In her journalistic observations, representations and opinions in the *New Yorker* about the Eichmann trial in Jerusalem, she not only showed that trials are dynamic processes and historical events on their own, but also their banality. From my own experience, covering proceedings since 2003, I came to understand that, in all respects, trials are real-time performances, which require real-time observation and study – their meaning gets lost when read from the armchair at university offices or legal libraries. Unfortunately for the post-trial researcher, most of the courtroom drama and theatrics cannot be captured in legal filings, written testimonies and documents, or out of their context. From the transcribed trial record, we cannot see the tears, hear the voices of witnesses or feel the tension in the courtroom and public galleries. For example, from the transcript we cannot read: the applause by Gbagbo supporters in the ICC’s public gallery when ‘their defendant’ made a court entrance;⁵⁶⁶ that the Rwandan singer Simon Bikindi sang his closing statements at the UNICTR;⁵⁶⁷ and how Thomas Lubanga through his intense staring confused a former child soldier witness who accordingly recanted his testimony at the ICC.⁵⁶⁸ These trial events are often not even captured on the redacted video- or audio recordings, which are recorded, edited and distributed by the courts. Legally speaking, these things may be irrelevant, but for the social sciences and historians who need to contextualise their sources these are crucial. In this respect, one would bring back to memory the popular saying that ‘journalism is the first draft of history.’ At the UNICTY, trials were relatively continuously covered by journalists from the region as well as by the international press corps.⁵⁶⁹ At the ICC, which deals with an increased case-load from many situation countries, the reporting by

⁵⁶³ Only see the Judicial Records and Archives Database (JRAD), which provides access to all UNMICT public judicial records, as well as to the public judicial archive records of the ICTR. The JRAD includes filings from parties and non-parties to trials; exhibits tendered in court; transcripts and audio-visual recordings of court hearings. Available at: <http://jrad.unmict.org>.

⁵⁶⁴ UNICTY, TCH, ‘Annexe 2 - Rappel De La Procédure’, *Sešelj Jugement*, pp. 5-6.

⁵⁶⁵ Donia, *Radovan Karadžić*; ‘Interview Robert Donia’.

⁵⁶⁶ ICC, *Gbagbo - Blé Goudé Transcript* (28 January 2016).

⁵⁶⁷ As observed by the author on 30 September 2009.

⁵⁶⁸ ICC, *Lubanga Dyilo Transcript* (28 January 2009).

⁵⁶⁹ Since 1998 SENSE had been continuously producing daily news reports and a weekly television program entitled The Tribunal for TV networks in Bosnia & Herzegovina, Croatia, Serbia & Montenegro. See: http://www.sense-agency.com/home/home_4.html?verz=2; Thomas Verfuss, ‘Trying Poor Countries’ Crimes in a Rich City: Problems of the Press from the former Yugoslavia, *Journal of International Criminal Justice*, Vol. 2, No. 2 (2004), pp. 509-515.

‘locals’ is mixed, while international journalists are increasingly organised and specialised.⁵⁷⁰ For the more obscure or distant trial settings that was not the case. Conceivably, we owe it to the endeavours of contemporary independent investigative journalists like Thierry Cruvellier that we know at least some critical details about the many trials and errors at the UNICTR in Arusha between the crucial years of 1997 and 2002.⁵⁷¹

Arendt, Cruvellier and many other investigative reporters were capable of providing critical understanding into these daily realities of the trial, vital data that can hardly be distilled from the trial record or from the pre-selected official “outreach” of the tribunals.⁵⁷² Observers also highlight the critical moments in trials, which in daily reality are tirelessly boring, banal and disillusioning. But there is something else. The post-trial researcher can of course use the official court transcripts, videos and audio from the trial record to corroborate basic facts, like quotes, dates and names etcetera. But regrettably, the trial record is not always complete.⁵⁷³ Often because evidence was not used at trial, documents are confidential, or huge parts of the trial took place behind closed curtains or because documents were later redacted, or in the most extreme cases because it was censored. For instance, only those present at the delivery of judgement in Charles Taylor’s trial, including the author, were witness to the strong disagreement from the alternate judge. Malick Sow, from Senegal, who had sat through the entire trial, said he found the prosecution case was “not proven beyond any reasonable doubt” and that “there had been no deliberations” and that he feared the international justice system “was heading to disaster.”⁵⁷⁴ But, during his statement, the tribunal was quick to cut off the microphone and lower the blinds in the public gallery. Afterwards, his statements were deleted from the court’s video record and from the court transcript. His name was initially not even published on the written Judgement.⁵⁷⁵

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

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

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

⁵⁷² See, for published books by journalists: Stéphanie Maupas, *Le Joker des puissants. Le grand roman de Cour Pénale Internationale* (Paris: Don quichote éditions, 2016); Tjitske Lingsma, *All Rise. De Grote ambities van het Internationaal Strafhof en de Weerbarstige werkelijkheid* (Amsterdam: Ipso Facto, 2014).

⁵⁷³ Richard A. Wilson, Robert J. Donia & Saskia Baas, Safeguarding The Hague Tribunal’s Unique War Archives, *Balkan Transitional Justice*, 30 March 2016 (www-text: <http://www.balkaninsight.com/en/article/safeguarding-the-yugoslavia-tribunal-s-unique-war-archives-03-29-2016>).

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

⁵⁷⁵ William Schabas, ‘What Happened to Judge Sow?’, *PhD studies in human rights*, 25 May 2012 (www-blog: <http://humanrightsdoctorate.blogspot.nl/2012/05/what-happened-to-judge-sow.html>).

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

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

⁵⁷⁶ At the ICC, for instance, this is confidential, including the Operations Manual. Author's email exchange with Michel de Smedt, the ICC's Head of Investigations, 15 May 2015.

work.⁵⁷⁷ The ICC, in its three Judgements, has opened up an interesting insight into the prosecutor's investigations in the Democratic Republic of the Congo.⁵⁷⁸ Particularly, the Lubanga judgement is interesting in this respect.⁵⁷⁹ But we also continue to learn more in the Kenyan cases as lawyers have been calling for an independent investigation of the OTP's modus operandi of alleged witness tampering.⁵⁸⁰ Thus, as the trials continue, the trial record expands and our understanding of it increases.

⁵⁷⁷ For instance, through the testimony of former investigators: ICC, *Lubanga Dyilo Transcript* (16 November 2010); ICC, *Lubanga Dyilo Transcript* (17 November 2010); ICC, TCH, *Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui: Transcript* (ICC-01/04-01/07: 25 November 2009); Buisman, *Ascertainment of the Truth*.

⁵⁷⁸ Bouwknegt, 'How did the DRC becomes the ICC's Pandora's Box?'

⁵⁷⁹ ICC, *Lubanga Dyilo Judgment*; Buisman, 'Delegating Investigations', pp. 30-82.

⁵⁸⁰ ICC, TC V (A), *Situation in the Republic of Kenya in the case of The prosecutor v. William Samoei Ruto and Joshua Arap Sang: Public redacted version of "Ruto defence request to appoint an amicus prosecutor* (ICC-01/09-01/11; 2 May 2016).

2.13 Conclusions

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

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

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

justice is a viable academic concept and can solely be convincingly investigated only if approached in a dispassionate, amoral, non-judicial and apolitical way to the largest extent possible.

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

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

about why, how and under which circumstances they came and in conjunction with independent third-party primary sources.