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### Cross-examining the past

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

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### 3. Tribunalising the past. African mass atrocity trials

[...] until the basic human rights are equally guaranteed to all without regard to race - until that day, the dream of lasting peace and world citizenship and the rule of international morality will remain but a fleeting illusion, to be pursued but never attained.

- Haile Selassie I<sup>581</sup>

#### 3.1 Introduction

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

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

<sup>581</sup> UNGA, Eighteenth Session, *Address by His Imperial Majesty Haile Selassie I, Emperor of Ethiopia*, 1229<sup>th</sup> Plenary Meeting (A/PV.1229; 4 October 1963), pp. 3.

<sup>582</sup> Roughly, Africa can be divided into five sub-regions: North Africa, West Africa, East Africa Central Africa and Southern Africa. When using the, although ambiguous, term Sub-Saharan Africa, I particularly mean West -, East - and Central Africa.

<sup>583</sup> The legal and social science literature on transitional justice in various African countries is abundant, yet no comprehensive historical overview exists so far. Chandra Lekha Sriram and Suren Pillay (eds.), *Peace versus Justice? The Dilemma of Transitional Justice in Africa* (Scottsville: University of KwaZulu-Natal Press, 2009); Moses Chrispus Okello et al. (eds.), *Where Law Meets Reality. Forging African Transitional Justice* (Cape Town: Pambazuka Press, 2012); Gerhard Anders & Olaf Zenker (eds.), *Transition and Justice. Negotiating the Terms of New Beginnings in Africa* (West Sussex: Wiley Blackwell, 2015); John Perry & T. Debey Sayndee (eds.), *African Truth Commissions and Transitional Justice* (Lanham: Lexington Books, 2015); Chacha Murungu & Japhet Biegon (eds.), *Prosecuting International Crimes in Africa* (Cape Town: Pretoria University Press, 2011); Christian De VOs, Sara Kendall and Carsten Stahn, *Contested Justice. The Politics and Practice of International Criminal Court Interventions* (Cambridge: Cambridge University Press, 2015).

<sup>584</sup> See for databases: *The Uppsala Conflict Data Program (UCDP)*, 'Africa' (www-text: <http://www.ucdp.uu.se/gdatabase/search.php#>, visited: 23 February 2015); Robert S. Strauss Center, *Armed Conflict Location & Event Data Project* (www-text: <http://www.acleddata.com/data/version-5-data-1997-2014/>, visited: 23 February 2015); *Political Terror Scale* (www-text: <http://www.politicalterrorsscale.org/countries.php?region=Africa>, visited: 23 February 2015); Toyin Falola & Raphael Chijioke Njoku (eds.), *War and Peace in Africa* (Durham: Carolina Academic Press, 2010).

<sup>585</sup> See in particular: Timothy J. Stapleton, *The Military History of Africa, Vol. One: The Pre-Colonial Period: From Ancient Egypt to the Zulu Kingdom (Earliest Times to c.1870)* (Westport: Praeger Security International, 2013); Timothy J. Stapleton, *The Military History of Africa, Vol. Two: The Colonial Period: From the Scramble for Africa to the Algerian Independence War (c.1870-1963)* (Westport: Praeger Security International, 2013); Timothy J. Stapleton, *The Military History of Africa, Vol. Three: The Era of Independence: From the Congo Crisis to Africa's World War, c.1963-2012* (Westport: Praeger Security International, 2013); Straus, *Making and Unmaking*; Scott Straus, 'Wars do end! Changing patterns of political violence in sub-Saharan Africa', *African Affairs*, Vol. 111, No. 443 (2012), pp. 179-201.

<sup>586</sup> Famously, Georg Hegel remarked that Africa has no history: "At this point we leave Africa, not to mention it again. For it is no historical part of the World: it has no movement and development to exhibit". Georg Wilhelm Friedrich Hegel, *The Philosophy of History* (New York: Cosimo Classics, 2007), p. 99.

<sup>587</sup> Walter Rodney, *How Europe Underdeveloped Africa* (Cape Town: Pambazuka, 2012).

<sup>588</sup> *General Act of the Conference at Berlin of the Plenipotentiaries of Great Britain, Austria-Hungary, Belgium, Denmark, France, Germany, Italy, The Netherlands, Portugal, Russia, Spain, Sweden and Norway, Turkey and The United States*, (Berlin: 26 February 1885).

peripheral fertilisation, most post-colonial African states went through a gradual fruition from despotic, military or one-party systems towards democratic electoral competition from the 1990s onwards.<sup>589</sup> The third locus is violence. Through all three timeframes, wars, rebellions, coups, insurgencies and atrocity violence contoured the public aura of Africa, as a bloodstained continent. Evidence suggests that two-thirds of post-independence states on the continent saw some kind of armed combat, which in some instances slipped into mass killing of civilians (38%).<sup>590</sup> But since the late 2000s, large-scale violence has been declining and wars have been altering: they became small-scale, peripheral, border crossing and typically implicate factionalised insurgents, militia, para-militaries, mercenaries and criminal bands.<sup>591</sup> New as well is regionalised Islamist terrorism, evidenced by the rise of groups like *Al Qaeda* in Sudan, *Al Shabaab* in Somalia, *Boko Haram* in Nigeria, *Al Qaida in the Islamic Maghreb* (AQIM) in Mali and the *Islamic State in Iraq and the Levant* (ISIL; a.k.a. ISIS or IS) spreading from north Africa.<sup>592</sup>

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

But the past never dies. Africa went through fundamental transitions in the past four centuries. In all, various past incidences of mass atrocities across the continent could – retroactively – well fit the different operative legal concepts of atrocity crimes: genocide, crimes against humanity and war crimes. Bearing in mind the *imprescriptibility* of this index of atrocity, countless past incidents could possibly be inscribed. Arguably, the so-called ‘white man’s burden’<sup>593</sup> in Africa can be read as a form of cultural genocide; a policy of attempted forced cultural assimilation of ‘savage’ African peoples by ‘civilised’ Europeans.<sup>594</sup> Ancient political, social and spiritual orders were – partly or wholly - extinguished and substituted by norms, values and laws inspired by western Judeo-Christian values, the Enlightenment and social Darwinism. Commerce was also devastating. Now lucidly outlawed as crimes against humanity,<sup>595</sup> the large-scale abduction, imprisonment, deportation, forcible transfer and enslavement of millions of African civilians and its encompassing murder, torture, sexual violence, inhuman acts and subsequent apartheid in the ‘new world’ is ingrained in the historiography and collective memory in African countries and throughout diaspora communities.<sup>596</sup> Now often dubbed the ‘African Holocaust’ or *Maafa*,<sup>597</sup> the Trans-Atlantic slave enterprise between the 16<sup>th</sup> and 19<sup>th</sup> century is perhaps one of the largest crimes of dehumanisation in the history of mankind. Yet, this

<sup>589</sup> Matt Golder & Leonard Wantchekon, ‘Africa: Dictatorial and Democratic Electoral Systems since 1946’, in: Joseph Colomer (ed.), *Handbook of Electoral System Design* (London: Palgrave, 2004), pp. 401-418.

<sup>590</sup> Straus, *Making and Unmaking*, pp. 89-91.

<sup>591</sup> Scott Straus, ‘Wars do end! Changing patterns of political violence in sub-Saharan Africa’, *African Affairs*, Vol. 111, No. 443 (2012), pp. 179-201.

<sup>592</sup> Nick Ridley, *Terrorism in East and West Africa. The Under-focused Dimension* (Cheltenham: Edward Elgar Publishing Limited, 2014); ‘Libya’s new agony; The spread of Islamic State’, *The Economist* (21 February 2015), pp. 44.

<sup>593</sup> Rudyard Kipling, ‘The White Man’s Burden: The United States & The Philippine Islands, 1899’, in: *Rudyard Kipling’s Verse: Definitive Edition* (Garden City: Doubleday, 1929), p. 312.

<sup>594</sup> Dominik J. Schaller, ‘Genocide and Mass Violence in the ‘Heart of Darkness’: Africa in the Colonial Period’, in: Donald Bloxham and A. Dirk Moses (eds.), *The Oxford Handbook of Genocide Studies* (Oxford: Oxford University Press, 2010), pp. 345-364.

<sup>595</sup> *Rome Statute*, art. 7 (c).

<sup>596</sup> ‘Enslavement’, *Rome Statute*, art. 7 (c). ‘Enslavement’ means the exercise of any or all of the powers attaching to the right of ownership over a person and includes the exercise of such power in the course of trafficking in persons, in particular women and children.

<sup>597</sup> Swahili for “disaster, terrible occurrence or great tragedy.” Usage of the term was introduced by Marimba’s Ani’s book *Let the Circle Be Broken: The Implications of African Spirituality in the Diaspora* and popularised in the 1990s. David M. Crowe, *War Crimes, Genocide, and Justice. A Global History* (New York: Palgrave Macmillan, 2014), p. 69.

dark chapter remains an obscurity within the genocide framework, as one of the silences in mankind's graveyard.<sup>598</sup> Transitional justice has remained largely absent, apart from moral apologies.<sup>599</sup> Memorialisation on the slave trade was debated during the World Conference against Racism, Racial Discrimination Xenophobia and Related Intolerance in 2001, in Durban, South Africa. In its concluding declaration, states acknowledged that slavery is a crime against humanity and called "upon States concerned to honour the memory of the victims of past tragedies and affirm that, wherever and whenever these occurred, they must be condemned and their recurrence prevented."<sup>600</sup> Noting that some had taken steps expressing regret, remorse or apologies, they called upon other states concerned to honour the memories of the victims of past tragedies.<sup>601</sup> But the deliberations were particularly stormy, as some Western countries feared that an obligation to express repentance would lead to increased claims for financial compensation.<sup>602</sup> Internationally, the process of recognition and remembrance has been painstaking. Yet, in early 2015, a permanent memorial to the victims of slavery and the transatlantic slave trade was erected at the UN's headquarters in New York. Named the 'Ark of Return', UN Secretary General Ban Ki Moon, expressed the hope that "this poignant and powerful memorial helps us to acknowledge the collective tragedy that befell millions of people. It encourages us to consider the historical legacy of slavery and, above all, it ensures that we never forget."<sup>603</sup>

Africans were also part in the slave trade arrangements, raiding, kidnapping and retailing 'human cargo.' It was thus not just outsiders who inflicted mass atrocity and agony in Africa. In pre-modern Africa, many brutal wars were fought between indigenous peoples, tribes, clans, chiefdoms, kingdoms or other group-entities.<sup>604</sup> Most have remained unaccounted for in a transitional justice setting, nationally as well as internationally, although even in the framework of the mass atrocity lexicon, etymologically, the term genocide has a resilient antecedent in Zulu: *Izwekufa*.<sup>605</sup> Shaka Zulu's forces labelled their vicious operation of empire building and rampant annihilation of peoples between 1810 and 1828 in present-day South Africa and Zimbabwe as such. Zulu armies often aimed not only at defeating enemies but also at "their total destruction."<sup>606</sup> Those exterminated included not only whole armies, but also prisoners of war, women, children, and even dogs.<sup>607</sup> Southern Africa was further engulfed by violence and demographic and social transformation after Shaka became emperor

<sup>598</sup> Adam Jones, *Genocide. A Comprehensive Introduction*, Second Edition (London & New York: Routledge, 2011), pp. 39-42.

<sup>599</sup> Some scholars have called for reparations and even a truth commission to tackle the legacy of Slavery: Rhoda E. Howard-Hassmann & Anthony P. Lombardo, *Reparations to Africa* (Philadelphia: University of Pennsylvania Press, July 2008), pp. 1-18.

<sup>600</sup> UNGA, *Report of the Special Rapporteur in the field of cultural rights, Farida Shaheed: Memorialization processes* (A/HRC/25/49; 23 January 2014), p. 34.

<sup>601</sup> World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance, *Declaration* (A/CONF.189/12; Durban, 8 September 2001), art. 98-101.

<sup>602</sup> UNGA, *Memorialization processes*, p. 34.

<sup>603</sup> 'UN unveils permanent memorial to victims of transatlantic slave trade', *Press Release*, 25 March 2015.

<sup>604</sup> Timothy J. Stapleton, *The Military History of Africa, Vol. One: The Pre-Colonial Period: From Ancient Egypt to the Zulu Kingdom (Earliest Times to c. 1870)* (Westport: Praeger Security International, 2013).

<sup>605</sup> "Death of a Nation." The term stems from the Zulu "izwe" (nation, people, polity) and "ukufa" (death, dying, to die). *Izwekufa* is very identical – in meaning and etymology – to genocide. Michael R. Mahoney, 'The Zulu kingdom as a genocidal and post-genocidal society, c. 1810 to the present', *Journal of Genocide Studies*, Vol. 5, No. 2 (June 2003), pp. 251-268: 255; Jeremy Sarkin, *Colonial Genocide and Reparations Claims in the 21<sup>st</sup> Century. The Socio-Legal Context of Claims under International Law by the Herero against Germany for Genocide in Namibia, 1904-1908* (Westport: Praeger Security International, 2009), p. 99.

<sup>606</sup> According to contemporary reports, in 1928, Shaka literally destroyed the Ndwandwe tribe which numbered at least 40,000. Cited in: William D. Rubinstein, *Genocide* (Abingdon: Routledge, 2014), e-book.

<sup>607</sup> Mahoney, 'The Zulu kingdom as a genocidal and post-genocidal society', p. 254.

of the Zulu Kingdom in 1817: the *Mfecane*.<sup>608</sup> Reaching genocidal proportions, this period of exterminatory warfare between various peoples cost the lives of an estimated two million people in the 1820s and 1830s. Infamous were the widespread killings, forced migration and ethnic reorganisations by the forces of Matabele king Mzilikazi.<sup>609</sup> In all, the mass killings in Southern Africa have been largely forgotten and appear only as footnotes in the genocide studies and transitional justice literature.

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

<sup>608</sup> In Zulu: "crushing". In Sesotho (Difaqane): scattering, forced dispersal or forced migration.

<sup>609</sup> Stapleton, *Military History of Africa*, pp. 199-260.

<sup>610</sup> For general accounts: Arthur Keith, *The Belgian Congo and the Berlin Act* (Clarendon Press, 1919); Martin Ewans, *European Atrocity, African Catastrophe: Leopold II, the Congo Free State and its Aftermath* (Routledge, 2002), pp. 95-103.

<sup>611</sup> Joseph Conrad, an Anglo-Polish novelist, was among the first to lay bare the violence in Congo in his famous essay 'Heart of Darkness', detailing the horror arising from the methods and effects of colonialism in the Congo Free State. See: Joseph Conrad, *Youth. A narrative and two other stories* (London: Blackwood and Sons, 1902), pp. 49-182; Joseph Conrad, "Geography and Explorers," in: Joseph Conrad, *Last Essays* (London: J.M. Dent & Sons, 1926), p. 25.

<sup>612</sup> Michiko Kakutani, "King Leopold's Ghost: Genocide With Spin Control", *New York Times Books*, 1 September 1998.

<sup>613</sup> David van Reybrouck, *Congo. The Epic History of a People* (New York: HarperCollins Publishers, 2014), pp. 104-105.

<sup>614</sup> *La guerre du blanc* (the white man's war), or, in the Mongo language, *Lokeli*, "the overwhelming. See Adam Hochschild, *King Leopold's Ghost. A story of Greed, Terror and Heroism in Colonial Africa* (London: Macmillan, 2006), p. 300. Adam Jones claims Lokeli comes from the Longo language: Jones, *Genocide*, p. 23.

<sup>615</sup> Hochschild, *King Leopold's Ghost*, p. 4.

<sup>616</sup> Martin Ewans, *European Atrocity, African Catastrophe: Leopold II, the Congo Free State and its Aftermath* (London: Routledge Curzon, 2002), p. 3.

<sup>617</sup> Kakutani, "King Leopold's Ghost".

<sup>618</sup> Hochschild, *King Leopold's Ghost*, pp. 225-233.

<sup>619</sup> Reybrouck, *Congo*, pp. 90-91.

<sup>620</sup> The genocide question has lingered for a long time. A full historical investigation has not transpired in Belgium so far, despite promises to do so. The Belgian government has never acknowledged it as such as well, despite a British motion that called "upon the Belgian government to publish all the evidence that is available and to apologise to the people of the Congo for the tragedy of King Leopold's regime, which can only be classed as genocide." 'House of Commons, 'Early day motion 2251: Colonial Genocide and The Congo' (24 May 2006).

colonialist with racist views on African peoples,<sup>621</sup> included the Congolese case in his historical reference to genocide, although tracing the atrocities back to African “native militia” whom he described as “an unorganized and disorderly rabble of savages [...]”<sup>622</sup>

At the time, however, a type of transitional justice *avant la lettre* was playing out and ultimately led Leopold to sell off his property.<sup>623</sup> Reports on the systematic and widespread human rights abuses from the far-off country and calls for accountability only surfaced gradually. Talking about crimes against humanity, George Washington Williams was the first, a north-American historian and lawyer, who called on Leopold to “answer at the bar of Public Sentiment for the misgovernment of a people, whose lives and fortunes were entrusted to you.”<sup>624</sup> Edmund Dene Morel, a former British shipping-company employee and journalist, publicly pondered why ships filled with rubber and ivory arrived in Belgium only to set sail back to Congo with hardly any other cargo than guns, chains, ordnance and explosives.<sup>625</sup> In 1904, Morel’s friend Roger Casement, an Irish member of the British consular service, sent home a stream of dispatches about the atrocities to the British parliament.<sup>626</sup> Hoping to counter the swelling criticism, the King himself directed an international commission of inquiry to Congo to “investigate whether, in certain areas, acts of abuse were committed against natives, either by individuals or by state officials, possibly report useful improvements and to formulate, in case the investigation would have found abuse, proposals on the best ways to end it for the welfare of the inhabitants and good government of the territories.”<sup>627</sup> But the Belgian, Swiss and Italian magistrates operated as a truth commission *avant la lettre*.<sup>628</sup> The team organised public sessions, hearing hundreds of testimonies, bundling complaints and unravelling the commercial embroidery of Leopold’s outpost.<sup>629</sup> It was the nail in the coffin. In 1908, Leopold effectively sold Congo to the Belgian government but destroyed his tracks before handing it over. He had the Free State archives burned before the takeover by its new owner. Reportedly, they “[...] burned for eight days turning most of the Congo state records to ash and smoke in the sky over Brussels” and Leopold said he “will give away my Congo [...] but they have no right to know what I did there.”<sup>630</sup> Up to present, the ‘Congolese question’ of Leopold’s mass atrocities remain largely unaddressed in Belgium.<sup>631</sup>

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<sup>621</sup> Lemkin considered the “civilisation” of Congo and other African countries to be a necessary task and found Leopold’s ideas “admirable”. Dominik J. Schaller, ‘Raphael Lemkin’s view of European colonial rule in Africa: between condemnation and admiration’, in: Dominik J. Schaller & Jürgen Zimmerer (eds.), *The origins of Genocide. Raphael Lemkin as a historian of mass violence* (Abingdon: Routledge, 2009), pp. 87-94: 92.

<sup>622</sup> Cited in: Schaller, ‘Raphael Lemkin’s view of European colonial rule in Africa’, p. 91.

<sup>623</sup> Although the literature does not use the terminology of transitional justice, it does describe a process that resembles some of its key features. See, for instance: Martin Ewans, *European Atrocity, African Catastrophe*, pp. 175-234.

<sup>624</sup> 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.

<sup>625</sup> Reybrouck, *Congo*, pp. 96-97. Morel was a fierce critic and member of the Congo Reform Association. He authored two books on Congo: ‘King Leopold’s Rule in Africa’ (1904) and ‘Red Rubber’ (1906).

<sup>626</sup> Roger Casement, ‘On the Administration of the Congo Free State, 1903’ in *British Parliamentary Papers*, LXII, Cd. 1933 (1904); Kakutani, ‘King Leopold’s Ghost’.

<sup>627</sup> ‘Rapport De La Commission D’enquête’, *Bulletin Officiel de l’Etat Indépendant du Congo*, Vol. 21, Nos. 9 & 10 (21 October 1905), p. 2.

<sup>628</sup> Reybrouck, *Congo*, pp. 97; Jean Stengers, ‘Le Rôle de la Commission d’Enquête de 1904-1905 au Congo’, *Annuaire de l’Institut de Philologie et d’Histoire Orientales et Slaves*, 10 (1950), pp. 701-726.

<sup>629</sup> ‘Rapport De La Commission d’Enquête’.

<sup>630</sup> Hochschild, *King Leopold’s Ghost*, p. 294.

<sup>631</sup> Idesblad Goddeeris & Sindani E. Kiangu, ‘Congomania in Academia. Recent Historical Research on the Belgian Colonial Past’, *BMGN – Low Countries Historical Review*, Vol. 126, No. 4 (2011), pp. 54-74.

Whilst the Congolese ‘blood rubber’ condition was ruffling feathers and heating up heads, a harsh extermination war was unleashed in German South-West Africa (GSWA), present-day Namibia.<sup>632</sup> Hunting season on the Herero people was opened by an explicit order issued by General Adrien Dietrich Lothar von Trotha in October 1904:

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

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

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

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<sup>632</sup> See for detailed studies: Jeremy Sarkin-Hughes, *Germany’s genocide of the Herero: Kaiser Wilhelm II, his General, his settlers, his soldiers* (Cape Town: UTC Press, 2011); Jürgen Zimmerer, *Von Windhuk nach Auschwitz?: Beiträge zum Verhältnis von Kolonialismus und Holocaust* (Berlin: Lit Verlag, 2011); Jones, *Genocide*, pp. 122-124; David Olusoga & Casper W. Erichsen, *The Kaiser’s Holocaust. Germany’s Forgotten Genocide and the Colonial Roots of Nazism* (London: Faber & Faber Ltd., 2010); Jan Bart Gewald, ‘Colonisation, Genocide and Resurgence: The Herero of Namibia, 1890-1923’, in: J. Zimmerer & J. Zeller (eds.), *Genocide in German South-West Africa: The Colonial War of 1904-1908 and its aftermath* (Monmouth: Merlin Press, 2007), pp. 123-142; David Olusoga, ‘Genocide & The Second Reich’, *BBC Four* (Documentary: October 2004).

<sup>633</sup> “I the great General of the German soldiers send this letter to the Herero people. The Herero’s are no longer German subjects [...] The Herero people, however, must leave the country. If the people do not do this, I will force it to do so with the cannon. With the German border, every Herero, with or without a gun, with or without cattle, will be shot, I do no longer accept women and children, I will drive them back to their people or will let them be shot at. These are my words to the Herero people.” ‘Aufruf an das Volk der Herero’, Abschrift zu O.K. 17290 Osombo-Windembe, den 2.10.1904 Kommando der Schutztruppe (J.Nr. 3737). The original handwritten and signed order is reprinted in: Jan-Bart Gewald, ‘The Great General of the Kaiser’, *Botswana Notes and Records*, Vol. 26 (1994), pp. 67-76: 73.

<sup>634</sup> See: United Nations Economic and Social Council (UNESCO), *Revised and updated report on the question of the prevention and punishment of the crime of genocide prepared by Mr. B. Whitaker* (E/CN.4/Sub.2/1985/6; 2 July 1985), §24. In 2012, the German Parliament refused to recognise the massacres as genocide: Johanna Schmeller, ‘Germany refuses to acknowledge Herero massacres as genocide’, *Deutsche Welle*, 23 March 2012.

<sup>635</sup> Olusoga & Erichsen, *The Kaiser’s Holocaust*.

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

<sup>637</sup> They declared: “Let us die fighting rather than die as a result of maltreatment, imprisonment, or some other calamity.” Quoted in Mark Levene, *Genocide in the Age of the Nation State, Vol. 2: The Rise of the West and the Coming of Genocide* (London: I.B. Tauris, 2005), p. 248.

<sup>638</sup> James Stuart Olson, Robert Shadle (eds.), *Historical Dictionary of European Imperialism* (New York: Greenwood Press, 1991), p. 281.

money. Only following this cleansing can something new emerge, which will remain.”<sup>639</sup> On that unambiguous proposition of ethnic cleansing, on 11 August 1904, Trotha’s *Schutztruppe* embarked on an annihilation war against the Herero, ‘pursuing’ them into the Kalahari Desert and orchestrating extermination.<sup>640</sup> In October, Von Trotha then issued his ‘Vernichtungsbefehl’ (‘destruction order’; cited above) and Herero’s were chased into the Omahake desert. Thousands died from starvation and dehydration. All those who survived were machine-gunned, strangled by fencing wire and then hung up, burnt to death, while young women and girls were often raped before being fatally bayoneted.<sup>641</sup> When the killing order was rescinded in December 1904, Herero’s were relocated to lethal concentration camps throughout the country, as slave labourers, pseudo-scientific racial experiment objects<sup>642</sup> and murder victims. The Namaqua (or Nama), who also unsuccessfully rebelled the Germans, were deported to an extermination camp known as “Shark Island,” where they faced a slow but certain death.<sup>643</sup> When the concentration camps were shut down in 1908, the brutalities left approximately 60-80,000 Herero (about 66-75 %) and almost half of the Nama people dead.<sup>644</sup> The surviving Herero and Nama people were sold off to white farmers as slaves. Interestingly, Raphael Lemkin, who coined the word genocide, never applied the term genocide to the Namibian case, although it would fit his definition very well. Instead, he saw the Herero as already helpless victims and believed that they had been committing national or race suicide: “having nothing left to exist for as a nation any longer, national suicide was started by birth control of a rigorous nature and artificial abortion.”<sup>645</sup>

Overshadowed by this kind of tenacious racism and imperialism towards African peoples in Europe, the outbreak of two world wars and mass atrocities in Europe, the Namibian genocide was obliterated. It was not until Namibia’s independence from South Africa in 1990 that the ‘Herero and Nama question’ was aroused from its dormant status and publicised. But the new administration elected not to deal with the haunting past, apparently for the sake of reconciliation between the resident communities.<sup>646</sup> Repeated calls for a truth commission were dodged, as were the 90 years old land claims.<sup>647</sup> From the German side, an agenda of non-recognition of the massacres as genocide has ever prevailed, notwithstanding survivor’s descendant’s petitions for excuses and compensations.<sup>648</sup> The lone *mea culpa* came from a German development-aid minister, Heidemarie Wieczorek-Zeul. In 2004 she stated, “[...] the atrocities committed at that time would today be termed genocide – and nowadays a General von Trotha would be prosecuted and convicted.” She added “Germans accept our

<sup>639</sup> Cited in: Jan-Bart Gewald, *Herero Heroes: A Socio-political History of the Herero of Namibia, 1890-1923* (Athens: Ohio University Press, 1999), p. 174.

<sup>640</sup> Isabel V. Hull, *Military Culture and the practices of war in imperial Germany* (Ithaca: Cornell University Press, 2005), pp. 45-53.

<sup>641</sup> Adam Jones, *Genocide*, p. 122.

<sup>642</sup> Conducted by, *inter alia*, Eugen Fischer.

<sup>643</sup> Of 1795 captives, 1032 died. Hull, *Military Culture*, p. 87.

<sup>644</sup> Isabel V. Hull, *Military Culture* p. 88.

<sup>645</sup> Cited in: Schaller, ‘Raphael Lemkin’s view of European colonial rule in Africa’, p. 90.

<sup>646</sup> Sarkin, *Colonial Genocide and Reparations Claims*’, p. 3.

<sup>647</sup> *Ibidem*, p. 4.

<sup>648</sup> Henning Melber, ‘Contested notions of genocide and commemoration’, in: Nigel Eltringham & Pam Maclean, *Remembering Genocide* (Abingdon and New York: Routledge, 2014), pp. 152-175.



historical and moral responsibility and the guilt incurred by Germans at that time.”<sup>649</sup> Gripping as her statement was, its message was later officially dismissed as a “purely personal remark, not representing government policy.”<sup>650</sup> When the Namibian parliament gave backing to Herero and Hama claims for compensation, the German political elite feared legal and moral consequences, in particular payment of reparations. As a result, the German Parliament threw out an opposition motion calling on the official recognition of genocide in 2012.<sup>651</sup> Only in 2016 was the matter again tabled - quite oddly in the wake of the German recognition of the Armenian genocide – and, at the time of writing, it is expected that an official recognition is imminent.<sup>652</sup>

Imperialist atrocities persisted in Sub-Saharan Africa.<sup>653</sup> In terms of material substance and transitional justice questions, Abyssinia, present-day Ethiopia, stands out.<sup>654</sup> For centuries, the empire had remained out of reach of European intrusion. That changed in 1935 when Italy’s army attacked and overwhelmed emperor Haile Selassie I’s legion, using modern tanks, planes and flame-throwers. The invasion and its subsequent occupation in 1936 came with a plethora of mass atrocities: the use of chemical weapons, the bombing of Red Cross-hospitals and ambulances and the execution of war prisoners.<sup>655</sup> Mass graves filled up as traditional storytellers (oral historians), Coptic deacons and monks and intelligentsia were persecuted and massacred by the fascists.<sup>656</sup> Emblematical was a three-day bloodbath in Addis Ababa from 19 February 1937, in which the ‘Black shirts’ armed with rifles, pistols, bombs and flame-throwers “cleaned up” up to 6000 Ethiopians.<sup>657</sup> When Italy’s occupation ended in 1941 - and Ethiopia was put under British control - some 760.300 Ethiopians were killed.<sup>658</sup>

In June 1936, at the League of Nations, employing a Lemkin-like language, Emperor Haile Selassie I mourned Italy’s “systematic extermination of a nation by barbarous means” involving “death-dealing rain to kill off systematically all living creatures” and the international community’s “refusal to stop an aggressor.”<sup>659</sup> He demanded “[...] justice which is due to my people, and the assistance promised to it eight months ago, when fifty nations asserted that aggression had been

<sup>649</sup> Speech by Federal Minister Heidemarie Wiecek-Zeul at the commemorations of the 100th anniversary of the suppression of the Herero uprising, Okakarara, on 14 August 2004.

<sup>650</sup> Johanna Schmeller, ‘Germany refuses to acknowledge Herero massacres as genocide’, *Deutsche Welle*, 23 March 2012.

<sup>651</sup> Schmeller, ‘Germany refuses to acknowledge Herero massacres as genocide’.

<sup>652</sup> Vartan Estukyan, ‘Germany continues to confront its history with Herero Genocide’, *Agos*, 29 July 2016.

<sup>653</sup> For instance, Britain in Matabeleland and Mashonaland (1896-1897), during the French pacification of Ivory Coast and French Congo, the Germans against the Hehe (1891-1898) and the Maji Maji (1905-1907) in German East Africa and in Kamerun (1903-1908). See for a detailed discussion on these cases: Kurt Jonassohn & Karin Solveig Björnson, *Genocide and Gross Human Rights Violations in Comparative Perspective* (New Brunswick and London: Transaction Publishers, 1998), pp. 233-252.

<sup>654</sup> Although, in Lemkin’s seminal work, “the international outrages in Ethiopia” are solely mentioned in a footnote, Ethiopia, because of its experiences, was a leading protagonist for atrocity trials and the adoption of the Genocide Convention. Lemkin, *Axis Rule in Occupied Europe*, p. 115, note 34.

<sup>655</sup> Richard Pankhurst, ‘Italian Fascist War Crimes in Ethiopia: A history of Their Discussion, from the League of Nations to the United Nations’, *Northeastern African Studies*, Vol. 6, No. 12 (1999), pp. 83-140: 83.

<sup>656</sup> See for more detail: Angelo Del Boca, *The Ethiopian War 1935-1941* (Chicago & London: University of Chicago Press, 1965); A.J. Barker, *The Rape of Ethiopia 1936* (New York: Ballantine Books Inc., 1971); Alberto Sbacchi, *Legacy of Bitterness. Ethiopia and Fascist Italy, 1935-1941* (Asmara: The Red Sea Press, 1997); Asfa-Wossen Asserate & Aram Mattioli (eds.), *Der erste faschistische vernichtungskrieg. Die italienische Aggression gegen Äthiopien 1935-1941* (Köln: SH-Verlag, 2006).

<sup>657</sup> Kurt Jonassohn & Karin Solveig Björnson, *Genocide and Gross Human Rights Violations in Comparative Perspective* (New Brunswick and London: Transaction Publishers, 1998), pp. 344.

<sup>658</sup> Angelo Del Boca, *The Ethiopian War 1935-1941* (Chicago & London: University of Chicago Press, 1965), p. 275. A far more conservative death toll is estimated at a minimum of 330.000, see: Aram Mattioli ‘Ein vergessenes Schlüsselereignis der Weltkriegsepoche’, in: Asfa-Wossen Asserate & Aram Mattioli (eds.), *Der erste faschistische vernichtungskrieg. Die italienische Aggression gegen Äthiopien 1935-1941* (Köln: SH-Verlag, 2006), pp. 9-26: 21.

<sup>659</sup> Haile Selassie I, ‘Appeal to the League of Nations’, *Speech at the League of Nations*, 30 June 1936.

committed in violation of international treaties.”<sup>660</sup> A year later, he bid the League of Nations’ Secretary General to assign a commission of inquiry to “investigate the horrors committed in Ethiopia by the Italian government.”<sup>661</sup> But the matter was overshadowed and Ethiopia side-lined. In 1943, when the Axis’ atrocities in Europe were widely reported, the empire was barred from the UN War Crimes Commission (UNWCC), which also disqualified Italian delinquencies committed preceding the outbreak of the European war in 1939. As Ethiopia was one of the first sufferers at the hands of the Axis nations, Addis Ababa adhered to the London Agreement, which laid the groundwork for the Prosecution and Punishment of the Major War Criminals of the European Axis.<sup>662</sup> Haile Selassie hoped for an international court to pursue Italian war crimes, resembling the military tribunals in Nuremberg and Tokyo, which were putting to trial Nazi and Japanese war crimes suspects.<sup>663</sup>

Meanwhile, anticipating the international community’s averseness to try Italians, Ethiopia erected its own War Crimes Commission in 1946,<sup>664</sup> mandated with “full authority for and charged with the functions of assembling evidence of war crimes in Ethiopia and of bringing and instituting charges and criminal proceedings against Italian individuals who have committed major war crimes against Ethiopia and the Ethiopian people.”<sup>665</sup> Investigations were propelled into fifty suspects and Ethiopia informed the UNWCC that it ascertained ample evidence to bring to trial General Pietro Badoglio<sup>666</sup>, for the use of poison-gas, Rodolfo Graziani<sup>667</sup>, for crimes against humanity during the 1937 Addis Ababa massacre, and eight other Italian officials.<sup>668</sup> Although the UNWCC had recognised the cases *prima facie*, the Brits and the French in 1949 unilaterally waived their backing for Ethiopia’s plans to set up an international Nuremberg-Tokyo-styled military panel and alternatively supported Italy’s national prosecution of Graziani for collaboration with the Germans while it deemed Badioglo too old to stand trial. Both men were never extradited and Ethiopia reposed its war crimes cases. Instead, as a final act, Ethiopia’s Justice Ministry published the two-volume *Documents on Italian War Crimes submitted to the United Nations War Crimes Commission*.<sup>669</sup> Next to reproducing official telegrams, circulars and orders relating to “pacification”, it contained witness

<sup>660</sup> Haile Selassie I, ‘Appeal to the League of Nations’.

<sup>661</sup> United Nations War Crimes Commission, *History of the United Nations War Crimes Commission and the Development of the Laws of War* (London 1948), pp. 189–190.

<sup>662</sup> *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, 8 August 1945); Department of State, ‘Report of Robert H. Jackson, United States Representative to the International Conference on Military Trials. London, 1945’, *Publication 3080. International Organization and Conference Series II, European and British Commonwealth* (Washington: Department of State, 1949).

<sup>663</sup> Aram Mattioli, ‘Das sabotierte Kriegsverbrechertribunal’, in: Asfa-Wossen Asserate & Aram Mattioli (eds.), *Der erste faschistische vernichtungskrieg. Die italienische Aggression gegen Äthiopien 1935-1941* (Köln: SH-Verlag, 2006), pp. 153-161:154.

<sup>664</sup> *Ethiopian Imperial Order No. 1784*.

<sup>665</sup> Richard Pankhurst, ‘Italian Fascist War Crimes in Ethiopia: A history of Their Discussion, from the League of Nations to the United Nations’, *Northeastern African Studies*, Vol. 6, No. 12 (1999), pp. 83-140: 113.

<sup>666</sup> Commander-in-Chief of Italian forces in East Africa, at the time of the invasion.

<sup>667</sup> Commander of Italian forces in Somalia, and later Governor-General of Italian East Africa, and Viceroy of Ethiopia.

<sup>668</sup> Ministry of Justice, *Documents on Italian war crimes, submitted to the United Nations War Crimes Commission by the imperial Ethiopian Government* (Addis Ababa, 1948). At the same time, the Ethiopian Government published *La civilisation de l’Italie fasciste*. It contained texts of Fascist telegrams ordering atrocities: the use of poison-gas, the mass execution of prisoners of war, the shooting of “witch doctors” and “sooth-sayers” and the killing of the monks of Däbrä Libanos. Pankhurst, ‘Italian Fascist War Crimes in Ethiopia’, p. 124.

<sup>669</sup> Pankhurst, ‘Italian Fascist War Crimes in Ethiopia’, pp. 134-135.

testimonies of Ethiopians who had seen atrocities, suffered torture or had been confined in concentration camps.<sup>670</sup> The case was thereafter closed, never to be opened again.

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

After the Second World War, mass atrocities persisted across the continent.<sup>671</sup> A few cases stand out. Ever troubled, the Great Lakes Region saw a handful of cases of genocidal violence and ethnic pogroms. In the wake of the 1959 Hutu revolution, the successive independence from Belgium and several attempted invasions by Tutsi refugees (*Inyenzi*), tens of thousands of Tutsi were butchered in reprisal killings between 1962 and 1964 in Rwanda.<sup>672</sup> In neighbouring Burundi, in 1972, military-led massacres killed between 100,000 and 200,000 Hutu civilians.<sup>673</sup> From October 1993, ethnic violence peaked again and acts of genocide against Tutsi and indiscriminate killings of Hutu cost the lives of an estimated 300,000 Burundians.<sup>674</sup> A year later, over a half a million Tutsi were massacred in Rwanda and in 1996-1997 over 200,000 Hutu refugees were slaughtered in Zaire.<sup>675</sup> Subsequent wars – and their side effects - in what became the Democratic Republic of the Congo cost the lives of over an estimated 4 million people.<sup>676</sup> Up north, in Uganda, the subsequent despots Idi Amin Dada and Milton Obote had also been ruthless. Between 1971 and 1979, the mercurial Amin liquidated supposed political and civilian antagonists, persecuted Langi and Acholi speakers, tortured elites and expelled the Asian community, causing between 50,000 and 300,000 deaths and thousands of displacements. Obote's track record reaches similar numbers. Persecuting and murdering Baganda, Banyarwanda and perceived insurgents, his army killed over 200,000 people between 1980 and 1985.<sup>677</sup> In West Africa, the best-known humanitarian catastrophe unrolled in Nigeria's secessionist enclave Biafra.<sup>678</sup> During the fratricidal war (1967-1970), the federal state unpacked a deadly policy of starving, bombing and massacring Igbo civilians. Reaching genocidal proportions, the civilian death toll is estimated between one and 1.5 million.<sup>679</sup> Down south on the continent, another mass atrocity is documented: the *Gukurahandi* in Zimbabwe.<sup>680</sup> Shortly after independence, Robert Mugabe's North Korean trained "Brigade 5" brutally suppressed opposition by mass killings, targeted assassinations, disappearances, public beatings, detentions and torture of particularly Ndebele in the

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<sup>670</sup> Ministry of Justice, *Documents on Italian War Crimes submitted to the United Nations War Crimes Commission* (Addis Ababa, 1949-1950).

<sup>671</sup> See for a detailed and comprehensive table of large-scale violence against civilians in sub-Saharan Africa between 1960 and 2008: Straus, *Making and Unmaking Nations*, pp. 96-97.

<sup>672</sup> J. J. Carney, *Rwanda Before the Genocide: Catholic Politics and Ethnic Discourse in the Late Colonial Era* (Oxford: Oxford University Press, 2014), pp. 175-184; Straus, *The Order of Genocide*, pp. 184-189; René Lemarchand, *Rwanda and Burundi* (London: Praeger Publishers, 1970), pp. 145- 227; Aaron Segal, *Massacre in Rwanda* (London: Fabian Society, 1964).

<sup>673</sup> René Lemarchand, *Burundi. Ethnic Conflict and Genocide* (Cambridge: Woodrow Wilson Center Press & Cambridge University Press, 1996).

<sup>674</sup> UNSC, *Final Report of the International Commission of Inquiry for Burundi* (S/1996/682; 22 August 1996), §483-487.

<sup>675</sup> UNSC, *Preliminary report of the Independent Commission of Experts established in accordance with Security Council resolution 935* (1994) (S/1994/1125; 4 October 1994); United Nations Office of the High Commissioner for Human Rights (OHCHR), *Democratic Republic of the Congo, 1993-2003. Report of the Mapping Exercise documenting the most serious violations of human rights and international humanitarian law committed within the territory of the Democratic Republic of the Congo between March 1993 and June 2003* (Geneva, August 2010), pp. 78-117.

<sup>676</sup> International Rescue Committee (IRC), *Mortality in the Democratic Republic of the Congo. An Ongoing Crisis* (IRC, 2007).

<sup>677</sup> Straus, *Making and Unmaking Nations*, pp. 109-11.

<sup>678</sup> See for literary works: Chinua Achebe, *There was a country* (New York: Penguin Group, 2012); Chimamanda Ngozi, *Half of a yellow sun* (New York: Anchor Books, 2006); Wole Soyinka, *The man died: prison notes of Wole Soyinka* (New York: Noonday Press, 1988 [1971]).

<sup>679</sup> Straus, *Making and Unmaking Nations*, pp. 100-103; Lasse Heerten & A. Dirk Moses, 'The Nigeria-Biafra war: postcolonial conflict and the question of genocide', *Journal of Genocide Research*, Vol. 16, No. 2-3 (Special Issue; 2014), pp. 169-203.

<sup>680</sup> Shona: "the early rain, which washes away the chaff before the spring rains."

south-western parts of the country, leaving an estimated 6.000 to 20,000 dead between 1980 and 1988.<sup>681</sup> Apart from these examples, mass atrocities were committed, or as in Sudan continue to be perpetrated, in a dozen African countries. Some of those will be discussed below, in a broader discussion on transitional justice to provide the historical context of the three case studies: Sierra Leone, Rwanda and the Democratic Republic of the Congo.

Ever since the commission of inquiry in the Congo Free State and the investigations by the Ethiopian War Crimes Commission, a myriad of quasi-legal official and unofficial transitional justice processes have been carried out in response to mass atrocities in Africa. Next to prosecutions, the localisation and apparent ‘retraditionalisation’ of mediation mechanisms,<sup>682</sup> truth commissions or similar-styled panels of inquiry have mushroomed in Sub-Saharan Africa. The latest in a row deals with international crimes committed stretching a period of no less than 46 years in Burundi.<sup>683</sup> Taking office in December 2014 after a troubled and protracted establishment period,<sup>684</sup> 11 commissioners of the Truth and Reconciliation Commission embarked on their four year mandate to contribute, through investigations, public hearings and a documentary report, to the “rewriting of Burundian history to provide a widely shared and accepted version of events.”<sup>685</sup> Turning the stones of the country’s lengthy legacy of ethnic animosity and cycles of reciprocal genocides between Hutu and Tutsi, however, soon promised to be an arduous test, chiefly since transitional justice matters in the past have been marred by political and ethnic rivalries.<sup>686</sup> And indeed, since Burundi was again on the brink of mass atrocities from 2015 onwards, the commission has been inactive.<sup>687</sup>

Burundi’s case adds to the numerous truth commissions that have operated in Sub-Saharan Africa. Aside from the truth commission *avant la lettre* for Leopold’s Congo, the ‘truth-finding’ model was also set in Uganda. In June 1974, then President Idi Amin Dada established a commission of inquiry to investigate and report on mass disappearances at the hand of military forces in the first years of his own government.<sup>688</sup> Himself an abusive autocrat, he purportedly set it up to whitewash his own abuses. But in its place, the four members heard 545 witnesses in public hearings, identified culprits and observers still see its concluding report – which documented 308 cases of disappearances

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<sup>681</sup> Catholic Commission for Justice and Peace in Zimbabwe (CCJPZ), *Breaking the Silence. Building True Peace. A Report on the Disturbances in Matabeleland and the Midlands 1980-1988* (Harare: CCJPZ, 1997).

<sup>682</sup> Best known examples are Rwanda’s Inkiko Gacaca and Abunzi, Uganda’s Matu Oput, Sierra Leone’s Fambul Tok, Burundi’s Bashingantahe, Liberia’s Palava Huts, Mozambique’s Curandeiros and many others. See: Tom Bennett, Eva Brems, Giselle Corradi, Lia Nijzink and Martien Schotmans (eds.), *African Perspectives on Tradition and Justice* (Cambridge, Antwerp & London: Intersentia, 2012); Luc Huyse & Mark Salter (eds.), *Traditional Justice and Reconciliation after Violent Conflict. Learning from African Experiences* (Stockholm: International IDEA, 2008).

<sup>683</sup> Genocide, war crimes and crimes against humanity committed between 1 July 1962 and 4 December 2008. See: République du Burundi, Cabinet de Président, *Loi no 1/18 du 15 Mai 2014 Portant Création, Mandat, Composition, Organisation et Fonctionnement de la Commission Vérité et Réconciliation* (Bujumbura, 14 May 2014), arts. 1 (d) and 6 (1).

<sup>684</sup> Impunity Watch, *Policy Brief. Sincerity of Burundi’s Commitment to TJ under Scrutiny as TRC Commissioners Sworn In; Four-Year TRC Mandate Officially Begins* (Burundi Country Programme, December 2014); Stef Vandeginste, ‘Burundi’s Truth and Reconciliation Commission: How to Shed Light on the Past while Standing in the Dark Shadow of Politics?’, *International Journal of Transitional Justice*, Vol. 6, No. 2 (2012), pp. 355-365.

<sup>685</sup> République du Burundi, *Loi no 1/18 du 15 Mai 2014*, arts. 4 (5) and 74 (g).

<sup>686</sup> Stef Vandeginste, *Stones Left Unturned. Law and Transitional Justice in Burundi* (Antwerp: Intersentia, 2010).

<sup>687</sup> UN, ‘Statement by Adama Dieng, Special Adviser of the Secretary-General on the Prevention of Genocide on Mission to Burundi’, *Press Release*, 30 May 2015.

<sup>688</sup> 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. See: Republic of Uganda, *Legal Notice No. 2 of 1974* (30 June 1974); Priscilla B. Hayner, ‘Fifteen Truth Commissions-1974 to 1994: A Comparative Study’, *Human Rights Quarterly* 16, No. 4 (1994), pp. 597-655: 612; Bouwknecht, ‘Unspeakeable truths’,

- as quite a critical marker as to what took place.<sup>689</sup> At the time however, the report was not made public,<sup>690</sup> the commissioners were harassed,<sup>691</sup> none of its recommendations – to reform the police and the armed forces - were ever adopted and by large the report had no impact at all on the abusive practices of Amin's government.<sup>692</sup>

The first ever modern truth commission in the post-colonial era, set up by the “butcher of Africa,” has thus been totally forgotten. Even Uganda’s second truth commission that was established by Yoweri Museveni twelve years later did not mention its predecessor.<sup>693</sup> Hundreds of thousands of civilians had lost their lives under Amin and his successor Milton Obote between 1971 and 1985. In May 1986, Museveni’s Justice Ministry set up a Commission of Inquiry into Violations of Human Rights (CIHVR) to investigate mass murders, arbitrary arrests, torture, forced displacement, disappearances and discrimination under the previous governments from the time of independence in 1962.<sup>694</sup> Despite the lack of further political support and financial backing, the commission held public hearings – some were broadcasted on national radio and television – in which it heard 608 witnesses.<sup>695</sup> Foul horror was revealed to the commission. And with imminent prosecutions in mind the commission worked together with the Criminal Investigations Department and the Director of Public Prosecutions to corroborate the data and produced 18 bound tomes of transcribed narrated testimony. But when the final report was finally presented in 1994 without much public fanfare and no distribution, people “had already largely forgotten about the struggling Commission” and the testimonies were stored away in a “bug-infested closet in an unused building at Makerere University.”<sup>696</sup> Like in Amin’s case, Museveni used the commission to add legitimacy to his new government, rather than to genuinely examine past abuses, address violence by his own rebel force and commit to respect for human rights. It would become a tactic in his arsenal to dodge accountability, embarked on later when asking the ICC prosecutor to only investigate crimes committed by the Lord’s Resistance Army (LRA) and not the atrocities by the Ugandan Defence Forces.<sup>697</sup>

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

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<sup>689</sup> *Report of the Commission of Inquiry into the Disappearance of people in Uganda since the 25th January, 1971*; Hayner, *Unspeakable truths*, pp. 51-52.

<sup>690</sup> Amnesty International has a copy of the report on microfiche. See: Huskamp Peterson, *Final Acts*, p. 79.

<sup>691</sup> Hayner, ‘Fifteen Truth Commissions’, p. 612.

<sup>692</sup> *Report of the Commission of Inquiry into the Disappearance of people in Uganda since the 25th January, 1971*; Hayner, *Unspeakable truths*, pp. 51-52.

<sup>693</sup> Hayner, *Unspeakable truths*, 51-52.

<sup>694</sup> Republic of Uganda, *Legal Notice No. 5. Creating the Commission of Inquiry into Violations of Human Rights* (16 May 1986), reprinted in: Neil Kritz (ed.), *Transitional Justice. How emerging democracies reckon with former regimes, Vol III: Laws, Rulings and Reports* (Washington DC: United States Institute of Peace, 1995), pp. 255- 257.

<sup>695</sup> Joanna R. Quinn, ‘Constraints: The Un-Doing of the Ugandan Truth Commission’, *Human Rights Quarterly*, 26 (2004), pp. 401-427.

<sup>696</sup> Quinn, ‘Constraints: The Un-Doing of the Ugandan Truth Commission’, pp. 401-427: 416.

<sup>697</sup> F.J. Ajume, Attorney General Republic of Uganda. *Letter of Referral of the Situation Concerning the Lord’s Resistance Army* (16 December 2003).

Matabeleland (see *Gukurahandi* above) ignited a national and international row and led then Prime Minister Robert Mugabe to form a ‘Commission of Inquiry into the Matabeleland Disturbances’ (also known as the Chihambakwe Commission), to investigate the killing of 1,500 political dissidents and other civilians in the Matabeleland region in 1983 and to gather testimony.<sup>698</sup> Yet, after some months of investigations and evidence collecting, the commission forwarded its report directly to Mugabe who up to today has not made it public, claiming it would spark ethnic conflict.<sup>699</sup> Over a decade later, two Zimbabwean human rights organisations sought to break the silence and launched an unofficial inquiry, interviewing “a few hundred people.” In its widely distributed report, it details more than 20,000 civilians killed by security forces and locates mass graves as well as mine shafts where bodies had been deposited.<sup>700</sup>

In Central Africa, in Chad, also after a violent succession, a commission of inquiry was established to look into past crimes, particularly illegal detentions, assassinations, disappearances, tortures, barbarity and a score of human rights abuses under the regime of Hissène Habré.<sup>701</sup> Set up by Idriss Déby Itno, himself a former Minister of Defence under Habré, the 12 commissioners, who were housed in the former torture centres they were investigating, had a troubled start and faced difficulties in interviewing victims as well as members of the former secret police. Witnesses were being intimidated, but in the end the investigators managed to collect 1726 testimonies.<sup>702</sup> Published in France, the report was meticulous, outlining and describing the involvement of the USA, ethnic persecutions, tortures and massacres; it even features graphic drawings of torture practices. In what the commission called a “veritable genocide”, at least 37,800 Chadians were killed.<sup>703</sup> A first to do so, the commission named several perpetrators, some of whom were later accused by the Extraordinary African Chambers,<sup>704</sup> went on trial in Chad<sup>705</sup> or became important insider witnesses.<sup>706</sup> As a register through Chad’s violent history, the commission’s report and its archives became an important

<sup>698</sup> It was led by the lawyer Simplicius Chihambakwe. Another Commission of Inquiry was established simultaneously, to look into clashes between two former rival liberation armies in Bulawayo in 1981. See: Richard Carver, *Who Wants to Forget? Truth and Access to Information about past Human Rights Violations* (London: Article 19, 2000), n.p.

<sup>699</sup> Hayner, *Unspeakable Truths*, pp. 242-243.

<sup>700</sup> Catholic Commission for Justice and Peace in Zimbabwe (CCJPZ), *Breaking the Silence. Building True Peace. A Report on the Disturbances in Matabeleland and the Midlands 1980-1988* (Harare: CCJPZ, 1997).

<sup>701</sup> The President of the Council of State, Chief of State, *Decree No.014/P.CE/CJ/90* (29 December 1990), art. 2, reprinted in: Neil Kritz (ed.), *Transitional Justice. How emerging democracies reckon with former regimes, Vol III: Laws, Rulings and Reports* (Washington DC: United States Institute of Peace, 1995), pp. 48-50.

<sup>702</sup> 662 former political detainees 786 close relatives to victims, 236 former prisoners of war, 30 former DDS agents and 12 high-ranking officials. The questionnaires were very specific and list over up to 50 questions. See: *Questionnaire for the Taking of Testimony from a Former Political Detainee; Questionnaire for the Taking of Testimony from the Relative of a Victim; Questionnaire for the Taking of Testimony from an Ex-DDS Agent*; reprinted in: Neil Kritz (ed.), *Transitional Justice. How emerging democracies reckon with former regimes, Vol III: Laws, Rulings and Reports* (Washington DC: United States Institute of Peace, 1995), pp. 94-100.

<sup>703</sup> Ministère Tchadien de la Justice, *Les crimes et détournements de l'ex président Habré et de ses complices: rapport de la Commission d'Enquête Nationale* (Paris: l'Harmattan, 1993), pp. 68-69. In the English summary report: National Commission of Inquiry, ‘Report of the Commission of Inquiry into the Crimes and Misappropriations Committed by ex-President Habré, his Accomplices and/or Accessories’ (N'djamena, 7 May 1992), reprinted in: Neil Kritz (ed.), *Transitional Justice. How emerging democracies reckon with former regimes, Vol III: Laws, Rulings and Reports* (Washington DC: United States Institute of Peace, 1995), pp. 51-93: 79.

<sup>704</sup> Hissène Habré Guihini Koreï, Abakar Torbo Rahama, Mahamat Djbrine. Chambres Africaines Extraordinaires (CAE), La Chambre d'Instruction, *Ordonnance de non-lieu partiel, de mise en accusation et de renvoi devant la Chambre Africaine Extraordinaire d'Assis* (01/13; Dakar, 13 February 2015).

<sup>705</sup> ‘Chad: Torture Detailed at Trial. Court Hears Evidence against 21 Agents of Ex-Dictator Hissène Habré’, *HRW*, 16 January 2015.

<sup>706</sup> Particularly Bandjim Bandoum: See: ‘PV d’audition de Bandjim Bandoum du 16/01/2014 en France (D2146/19)’ & PV d’audition de Bandjim Bandoum du 17/01/2014 (D 2146/18), cited 70 times in the Habré et. al Indictment: CAE, *de mise en accusation*.

reference in these legal cases, with the commission's president, Mahamat Hassan Abakar, testifying at both forums.<sup>707</sup>

Most renowned, publicised and idolised is the Truth and Reconciliation Commission for South Africa (1995-2002), set up to smoothen the transformation from forceful Apartheid into a democracy-like state.<sup>708</sup> Led by the charismatic Desmond Tutu, the commission set a unique example on how to deal with political crimes and gross human rights violations and its blueprint was soon exported to other countries in Africa, in the belief it would work there as well. But while the success and legacy of South Africa's commission remains an issue of social, political and academic contention within the country itself and abroad, its application elsewhere was deemed inappropriate, impossible or unsuitable. Or it simply failed. In Rwanda, after the genocide, the idea was found to be grossly inadequate to address the still raw feelings about the killings and the deep entrenched culture of impunity.<sup>709</sup> Down south, in Burundi, facilitator Nelson Mandela managed to incorporate the noble truth model into a peace agreement that ended years of ethnic violence and genocide.<sup>710</sup> But the political and ethnic landscape was on such a fault that Burundians did not desire to open up wounds immediately and the matter was stalled for 15 years.<sup>711</sup> Only in Sierra Leone, after a decade of rebel warfare, resource plunder and a litany of violence, was the South Africa model mostly copied and inaugurated, except for the amnesty for truth provisions.<sup>712</sup> Yet, as we will see in Chapter 6, despite that it collected 7706 statements<sup>713</sup> and heard 500 persons in public hearings, public attendance was low<sup>714</sup> and it had lesser social impact than in South Africa, amongst other things because it was somehow competing with the Special Court for Sierra Leone.<sup>715</sup>

There were more, but predominantly unnoticed in the transitional literature, truth commissions that dealt in one way or the other with serious human rights abuses. Most set up shop in West Africa: Nigeria (1999-2002),<sup>716</sup> Ghana (2002-2004),<sup>717</sup> Liberia (2006-2009)<sup>718</sup> and Togo (2009-

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<sup>707</sup> HRW 'Chad: Torture Detailed at Trial'.

<sup>708</sup> The TRC 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." See: Government of South Africa, Office of the President, *Promotion of National Unity and Reconciliation Act of 1995 [Act 95-34, 26 July 1995]*, Notice, No. 1111 (26 July 1995).

<sup>709</sup> Gerald Gahima, *Transitional Justice in Rwanda. Accountability for Atrocity* (Abingdon: Routledge, 2013), p. 65.

<sup>710</sup> *Arusha Peace and Reconciliation Agreement* (28 August 2000), art. 5.

<sup>711</sup> See for an insight in the popular perceptions towards transitional justice: Ann Nee and Peter Uvin, 'Silence and Dialogue. Burundians' Alternatives to Transitional justice', in: Rosalind Shaw et al., *Localizing Transitional Justice*, pp. 157-182.

<sup>712</sup> 'Truth and Reconciliation Act 2000', *Supplement to the Sierra Leone Gazette*, Vol. CXXXI, No. 9 (Freetown 10 February 2000).

<sup>713</sup> TRCSL, *Witness to Truth: Appendix 1: Statistical Appendix to the Report of the Truth and Reconciliation Commission of Sierra Leone*, p. 3.

<sup>714</sup> TRCSL, *Witness to Truth*, Vol. 1, pp. 97-99.

<sup>715</sup> See: Edward Sawyer & Tim Kelsall, 'Truth versus Justice? Popular views on the Truth and Reconciliation Commission and the Special Court for Sierra Leone', *Online Journal of Peace and Conflict Resolution*, No. 7.1 (2007), pp. 36-68; Alpha Sesay, 'To compete or to Complement? Assessing the Relationship between the Sierra Leone Special Court and Truth and Reconciliation Commission', in: Charles Chernor Jalloh (ed.), *The Sierra Leone Special Court and Its Legacy: The Impact for Africa and International Criminal Law* (New York: Cambridge University Press, 2014), pp. 481- 504.

<sup>716</sup> Human Rights Violations Investigations Commission (HRVIC), *Synoptic Overview of HRVIC Report: Conclusions and Recommendations (Including Chairman's Foreword)* (May 2002).

<sup>717</sup> Republic of Ghana, National Reconciliation Commission, *The National Reconciliation Commission Final Report* (Accra: National Reconciliation Commission, 2004).

<sup>718</sup> Republic of Liberia, Truth and Reconciliation Commission of Liberia (TRC), *Consolidated Final Report* (Monrovia: Twidan Grafix, 30 June 2009).

2012).<sup>719</sup> Others rose in Morocco (2004-2006),<sup>720</sup> DR Congo (2004-2006),<sup>721</sup> Mauritius (2009-2011),<sup>722</sup> Solomon Islands (2009 – 2012)<sup>723</sup> and new ones were more recently inaugurated in Tunisia (2014),<sup>724</sup> Mali (2014)<sup>725</sup> and Burundi (2015).<sup>726</sup> The results are mixed, throughout the line. The Congolese commission, for example, was heavily divided and never produced a report other than recommending a new commission. In Nigeria, the process of looking into 15 years of rights abuses under its former military regime had a shaky start but gained much public attention when it was holding hearing almost full-time for over a year throughout the country.<sup>727</sup> More recent however, truth commissions have been used by new regimes to façade a culture of impunity and to circumvent legal accountability. Kenya is a good example. Years of corruption and ethnic political violence culminated in a transitional process from 2008, after yet another round of post-electoral violence. When international pressure swelled to install prosecutions and finally the International Criminal Court intervened, Nairobi decided to launch the Truth, Justice and Reconciliation Commission (TJRC). But it was highly politicised, compromised and criticised.<sup>728</sup> A 6-volume report was published,<sup>729</sup> after the government censored out parts of it that detailed abuses by sitting high-officials including the current President Uhuru Kenyatta, his father Jomo Kenyatta, as well as excluded the dissenting opinion of three of the international commissioners.<sup>730</sup> In early 2015, the official TJRC website was taken down, thus making the report unavailable to the public.<sup>731</sup> Against this background, Kenyatta officially apologised “for all past wrongs” and pledged to set up a fund “for restorative justice.”<sup>732</sup> The same kind of controversy surrounds the Commission for Truth, Justice and Dialogue ((*Commission Dialogue, Vérité et Réconciliation*, or CDVR) in Côte d’Ivoire. Set up in 2011 in the wake of mass violence surrounding highly contested election, the new President Alassane Ouattara cherry-picked from the transitional justice toolbox. He first solicited the assistance of the ICC to prosecute the losing candidate Laurent Gbagbo (see preface) and also embarked on a truth commission.<sup>733</sup> But the commission was ambivalent, unsupported and financially restrained. Tens of thousands statements were collected, but victims were hardly granted a platform and the first report in 2013 saw low

<sup>719</sup> République Togolaise, Commission Vérité, Justice et Réconciliation, *Rapport Final* (Lomé, 3 April 2012).

<sup>720</sup> Royaume de Maroc, Commission Nationale pour la Vérité, l’équité et la Réconciliation, *Rapport Final* (1 December 2005). [Summary Report, the original is in Arabic].

<sup>721</sup> République Démocratique de Congo, Commission Vérité et Réconciliation, *Rapport final des activités de juillet 2003 à février 2007* (February 2007).

<sup>722</sup> Truth and Justice Commission, *Report of the Truth and Justice Commission* (TRC, October 2011).

<sup>723</sup> Solomon Islands Truth and Reconciliation Commission, *Final Report: Confronting the Truth for a Better Solomon Islands* (Honiara, February 2012).

<sup>724</sup> “Instance de la Vérité et de la Dignité”: République Tunisienne, Ministère des Droits de l’Homme et de la Justice Transitionnelle, *Loi organique relative à l’instauration de la justice transitionnelle et à son organisation* (December 2013), arts. 16-65.

<sup>725</sup> “Truth, Justice and Reconciliation Commission”, set up in December 2013. UNGA, *Report of the independent expert on the situation of human rights in Mali, Suliman Baldo* (A/HRC/25/72; 10 January 2014), §40.

<sup>726</sup> République du Burundi, *Loi no 1/18 du 15 Mai 2014*.

<sup>727</sup> The government, under Olusegun Obasanjo, was initially hesitant to publish the report but bowed under public pressure to do so in 2005. Hakeem O. Yusuf, ‘Travails of Truth: Achieving Justice for Victims of Impunity in Nigeria’, *International Journal of Transitional Justice*, Vol. 1, No. 1 (2007), pp. 268–286.

<sup>728</sup> Christopher Gitari Ndungú, ‘Lessons to Be Learned: An Analysis of the Final Report of Kenya’s Truth, Justice and Reconciliation Commission’, *ICTJ Briefing* (Nairobi: ICTJ, May 2014).

<sup>729</sup> Truth, Justice and Reconciliation Commission, *Report of the Truth, Justice and Reconciliation Commission* (Nairobi: TJRC, 3 May 2013).

<sup>730</sup> ‘Dissenting Opinion With Respect to Chapter 2 of Volume 2B of the Final Report of the Truth, Justice and Reconciliation Commission of Kenya. Judge Gertrude Chawatama, Ambassador Berhanu Dinka & Professor Ronald C. Slye’, *Statement by TJRC Commissioners Chawatama, Dina and Slye* (Nairobi, 3 May 2013).

<sup>731</sup> Email exchange with Ronald C. Slye, former commissioner, dated 14 March 2015. The report is now available at: <http://digitalcommons.law.seattleu.edu/tjrc/>, visited: 23 March 2015.

<sup>732</sup> Speech by his Excellency hon. Uhuru Kenyatta, c.g.h., president and commander in chief of the defence forces of the Republic of Kenya during the state of the nation address at parliament buildings, Nairobi on Thursday, 26th march, 2015.

<sup>733</sup> Thijs Bouwknecht, ‘Ivory Coast: truth or justice?’, *International Justice Tribune*, 27 April 2011; Thijs Bouwknecht, ‘Time will tell: Ouattara’s quest for truth and justice’, *Radio Netherlands Worldwide*, 19 May 2011.



distribution.<sup>734</sup> Hearings were finally held from September 2014, almost three years after the panel's 11 members were sworn in. Its chairman, former Prime Minister Charles Konan Banny, a fierce Gbagbo-opponent, said “in the museum of horrors, we want to show Ivoirians that we went too far.”<sup>735</sup> Public hearings were held for three weeks in Abidjan, the Ivoirian capitol. Some eighty people, including victims and perpetrators, were heard but a lack of television broadcasts from the commission and low-key media coverage meant that powerful witness statements had little impact across the country.<sup>736</sup> The commission has been criticised at large, for being incompetent to deal with a legacy of violence, political bias and serving victor’s justice.<sup>737</sup> Its report was presented to president Ouattara in December 2014, but it was not made public. Neither was the Commission’s deliberations made known to the media.<sup>738</sup>

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

### 3.4 Tribunalisation of mass atrocity in Africa

The first case of post-atrocity judicial reckoning has remained an obscurity in the transitional justice literature and brings us back to Equatorial Guinea.<sup>739</sup> It is a remarkable omission since it was the first time a former head of state was tried for international crimes – including genocide - in his own country. Between 1969 and 1979 the former Spanish micro colony of Equatorial Guinea on the coast of mid-west Africa was the scene of a virtually continuous political purge of anyone suspected of opposing President’s Francisco Macias Ngwema’s brutal and unpredictable regime.<sup>740</sup> Executions, torture, imprisonments, forced exiles and disappearances were common markers of repression, mostly targeting church clergy and “intellectuals” without making ethnic distinctions. Ranging estimates put the number of casualties between 5,000 and 20,000.<sup>741</sup> After Macias was deposed in a coup in August 1979, the new regime brought him and ten of his collaborating officials to trial before five judges of a Special Military Tribunal that took seat in a cinema hall in the town of Malabo from 24 September 1979.<sup>742</sup> Amongst others, charges in the “summary military trial” included “genocide”, “mass

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<sup>734</sup> ‘Côte d'Ivoire truth panel seen faltering’, *IRIN News*, 13 January 2014.

<sup>735</sup> Joris Fioriti, ‘Delayed Ivory Coast inquiry into past violence opens’, *Agence France-Presse*, 8 September 2014.

<sup>736</sup> Joris Fioriti, ‘Ivory Coast truth commission testimony ends’, *Agence France-Presse*, 30 September 2014.

<sup>737</sup> HRW, *Turning Rhetoric into Reality. Accountability for Serious International Crimes in Côte d'Ivoire* (New York: HRW, 2013), pp. 32-34.

<sup>738</sup> United Nations Office of the High Commissioner for Human Rights (UNOHCHR), ‘Human Rights Committee considers report of Côte d'Ivoire’, *Press Release*, 19 March 2015.

<sup>739</sup> Straus, *Making and Unmaking Nations*, pp. 116-117.

<sup>740</sup> Robert H. Jackson & Carl G. Rosberg, *Personal Rule in Black Africa. Prince, Autocrat, Prophet, Tyrant* (Berkeley and Los Angeles: University of California Press, 1982), pp. 245-251.

<sup>741</sup> Straus, *Making and Unmaking Nations*, pp. 116-117.

<sup>742</sup> Alejandro Artucio, *The Trial of Macias in Equatorial Guinea. The Story of a Dictatorship* (Geneva: International Commission of Jurists, 1979).

murder”<sup>743</sup> and systematic violations of human rights.<sup>744</sup> A drawn-up list of 474 Guineans assassinated under Macias’ regime served as an indicator of the extent of the brutality and during trial a dozen witnesses testified on their occurrence and patterns.<sup>745</sup> Evidently, “numerous and horrifying murders of political prisoners and opponents were proved, but not genocide,” reported a trial monitor, who cited the absence of substantial considering of the protected groups and “the intent to destroy.”<sup>746</sup> The first trial of a former head of state on genocide charges in sub-Saharan Africa was thus legally confusing and lacked opportunity for appeal.<sup>747</sup> Nonetheless, Macias was tried, convicted and executed five hours later on 29 September 1979.<sup>748</sup>

The second, and almost equally under researched, under reported<sup>749</sup> and obscured domestic legal reckoning for genocide took place in Ethiopia.<sup>750</sup> Haile Selassie I’s government was the first to ratify – but also to modify – the *Genocide Convention*, on 1 July 1949.<sup>751</sup> With the Italian WWII war crimes issue deposited in history books, Ethiopia was plagued by many other domestic and regionalised armed conflicts, particularly between 1974 and 1991. At least four deadly wars were fought: against separatists from Tigray, Eritrea, Ogaden and Oromo.<sup>752</sup> Severe famines throughout the country and popular uprisings in Addis Ababa meanwhile set in motion the downfall of the age-old Solomonic dynasty and the takeover by the extremist Maoist *Provisional Military Administration Council of Ethiopia* - or *Derg* (or Dergue; Amharic for committee).<sup>753</sup> Effectively led by General Mengistu Haile Mariam, the junta had any political opposition crushed with suppressive atrocity, peaking during the Red Terror between 1976 and 1978.<sup>754</sup> During this period, the Derg had urban dweller associations (‘kebeles’), militias and revolutionary guards kill, torture and maim any person suspected of being ‘subversive’, ‘anti-revolutionary’, ‘counter-revolutionary’ or ‘anti-people’. At least 9,546 lives were spilled during these political cleansing campaigns in Ethiopia’s main cities<sup>755</sup>, while the civilian death toll during the Derg’s entire reign possibly reaches 1.5 million as a mixed outcome of its further campaigns of collectivisation, forced resettlement, state-orchestrated famine and aerial bombings in the 1980s.<sup>756</sup>

<sup>743</sup> The charges were drawn up under the Spanish civil and military codes but during the trial reference was made to the Genocide Convention, to which Equatorial Guinea was not a party. John Quigley, *The Genocide Convention. An International Law Analysis* (Aldershot: Ashgate, 2006), pp. 31-32.

<sup>744</sup> The other charges included: embezzlement of public funds, material injury and treason.

<sup>745</sup> Artucio, *The Trial of Macias*, pp. 32-33.

<sup>746</sup> *Ibidem*, p. 31.

<sup>747</sup> Quigley, *The Genocide Convention*, pp. 31-32.

<sup>748</sup> Artucio, *The Trial of Macias*, pp. 54-55. Six co-accused were also sentenced to death, 2 received a sentence of little more than 14 years and 2 of 4 years.

<sup>749</sup> Largely sponsored through aid from Scandinavian countries, the US Carter Center and The Netherlands, international jurists were consulted for legal assistance, foreign forensic investigators were called in the exhumed mass grave and foreign observers were flown in to report on the proceedings through interpretation. Yet, because of war in the former Yugoslavia and the establishment of the UNICTY, interest in the Ethiopian trials soon evaporated. Author’s Interview, Luc Huysse, former SPO trial observer, Brussels, 5 February 2012; Tore Sverdrup Engelschjøn, ‘War Crimes and Violations of Human Rights’, *Military Law and Law of War Review*, Vol. 34, No. 9 (1995); Todd Howland, Learning To Make Proactive Human Rights Interventions Effective: The Carter Center And Ethiopia’s Office Of The Special Prosecutor, *Wisconsin International Law Journal*, Vol. 18 (2000), pp. 407-435.

<sup>750</sup> See for detailed analysis: Kjetil Tronvoll et al., *The Ethiopian Red Terror Trials. Transitional Justice Challenged*.

<sup>751</sup> United Nations, ‘No 1021. Convention on the Prevention and Punishment of the Crime of Genocide Adopted by the General Assembly on 9 December 1948’, *Treaty Series*, Vol. 78 (1951), p. 278.

<sup>752</sup> Straus, *Making and Unmaking Nations*, pp. 106-109.

<sup>753</sup> Barhu Zewde, ‘The History of the Red Terror. Context and Consequences’, in: Tronvoll et al., *The Ethiopian Red Terror Trials*, pp. 17-32.

<sup>754</sup> Africa Watch, *Evil Days. 30 Years of War and Famine in Ethiopia* (London: September 1991), pp. 98-104.

<sup>755</sup> Firew Kabebe Tiba, ‘Mass Trials and Modes of Criminal Responsibility for International Crimes: The Case of Ethiopia’, in: Kevin Jon Heller & Garry Simpson, *The Hidden Histories of War Crimes Trials* (Oxford: Oxford University Press, 2013), pp. 306-324: 308-309.

<sup>756</sup> Africa Watch, *Evil Days*, p. 15.

In 1991, the Derg was defeated and ousted by the *Ethiopian People's Revolutionary Democratic Front: EPDRF*). Mengistu had fled into exile to Zimbabwe, just before the Transitional Government of Ethiopia (TGE) had rounded up some 2,000 high Derg officials and civilians brought in a range of mid-level officials.<sup>757</sup> The following year, the TGE decided to bring Mengistu and his immediate accomplices to trial for human rights abuses and created the *Special Prosecutor's Office (SPO)*. The establishing proclamation mandated the SPO to investigate and prosecute "any person having committed or responsible for the commission of an offence by abusing his position in the party, the government or mass organisations under the Derg-regime".<sup>758</sup> But it also ascribed a historical mandate to the Prosecutor Girma Wakjira, to "establish for public knowledge and for the posterity a historical record of the abuses of the Mengistu regime."<sup>759</sup> Dubbed an 'African Nuremberg',<sup>760</sup> the SPO somehow constituted the first-ever 'truth-tribunal' of its kind, although, in the underreported trial proceedings, stories were "mainly told through the official channels of court documents and witness testimonies in an adversarial setting."<sup>761</sup> But like the German Nazi's, the ultra-communist Derg had been meticulous in documenting its meetings, decisions, directives, orders and actions. The Red Terror had been publicly proclaimed,<sup>762</sup> execution orders were issued and reports on torture and killings were received.<sup>763</sup> During two years of high-security investigations, the 34 Special Prosecutors amassed a wealth of documentary evidence, including over 309,778 pages of archived Derg documents and video- and audiotapes. The papers range from death warrants to calculations of the cost of executions to films of torture sessions and bombings. Aside, the investigators collected 5000 witness statements and an Argentinean forensic team exhumed numerous mass graves.<sup>764</sup> According to the SPO, it had "ten times more evidence than needed to successfully prosecute several of the detained and many of the exiles for serious criminal offences."<sup>765</sup>

The first charges against 73 high level officials, including Colonel Mengistu himself, policy and decision makers, senior government officials and senior military commanders, were filed in the Central High Court in Addis Ababa in October 1994.<sup>766</sup> The Act of Indictment in this so-called Mengistu-case, based on five thousand pages of signed execution orders, videos of torture sessions

<sup>757</sup> HRW, *Ethiopia. Reckoning under the law* (December 1994), pp. 14-15.

<sup>758</sup> 'Proclamation Establishing the Office of the Special Prosecutor, Proclamation 22/1992', *Negarit Gazette* (8 August 1992). Reprinted in: Kritz, *Transitional Justice*, pp. 556-558: art. 6.

<sup>759</sup> Office of the Special Prosecutor, *The Special Prosecution Process of War Criminals and Human Rights Violators in Ethiopia* (February 1994). Reprinted in: Kritz, *Transitional Justice*, p. 559.

<sup>760</sup> John Ryle, 'Letter from Ethiopia. An Ethiopian Nuremberg', *The New Yorker*, (2 October 1995), pp. 50-57.

<sup>761</sup> Firew Kabebe Tiba, 'Mass Trials', pp. 310-311.

<sup>762</sup> Provisional Military Government of Ethiopia, *Proclamation No. 121/1977* (February 1977).

<sup>763</sup> Edward Kissi, *Revolution and Genocide in Ethiopia and Cambodia* (Lenham: Lexington Books, 2006), pp. 118-119.

<sup>764</sup> Firew Kabebe Tiba, 'Mass Trials', p. 312; Sarah Vaughan, 'The Role of the Special Prosecutor's Office', in: Tronvoll et al. *The Ethiopian Red Terror Trials*, pp. 51-67; Argentine Forensic Anthropology Team, *Bi-Annual Report 1994-1995*, (New York, 1995), pp. 117-142; HRW, *Ethiopia. Reckoning under the law* (December 1994), pp. 23

<sup>765</sup> Office of the Special Prosecutor, *The Special Prosecution Process*, p. 560.

<sup>766</sup> Ethiopian Federal High Court, *Special Prosecutor v. Colonel Mengistu Hailamariam et al* (File No. 1/87).

and testimony, charged the accused with participating in 211 acts of genocide<sup>767</sup> and in multiple violations of human rights.<sup>768</sup> Since December 1994, a total of 5,119 Ethiopians were tried in various courts around the country for Derg-era crimes, with 3,583 convicted and sentenced to death or to lengthy prison sentences.<sup>769</sup> After 12 years, the main trial against Mengistu ended on 12 December 2006.<sup>770</sup> Judges Medhin Kiros, Nuru Saiid and Solomon Emeru of the Federal High Court, found all, except one, guilty of genocide<sup>771</sup> and 11 January 2007, the accused were sentenced to long prison sentences. Mengistu received a life term in absentia.<sup>772</sup> On appeal, 18 of the convicts, including Mengistu, saw their sentences increased to the death penalty.<sup>773</sup> Ethiopia's mass prosecution of mass crimes has left a divided and even more unknown history. Like most criminal cases regarding atrocity crimes, much criticism has been levelled against it; for being one-sided, its slowness, trying accused *in absentia*, breaching defendants' rights and for operating in isolation from the public. Nonetheless, the courts have heard testimony from over 2500 eyewitnesses and at least managed to collect and document the story of the victims of the Red Terror.<sup>774</sup> Despite the fact that the prosecutor's strategy of presenting witness testimony as evidence – and thus creating a type of truth commission forum for victims<sup>775</sup> – the trial record remains largely inaccessible for the wider public as the vast trove of evidentiary materials remains to be digitised and disclosed.<sup>776</sup> In absence of a centralised archive of the SPO in Ethiopia, the legacy of Africa's first home-grown mass transitional justice endeavour remains thus a bit of an obscurity.<sup>777</sup> International crimes cases relating to the Derg-period have only come back to the fore more recently, in The Netherlands, as part of a universal jurisdiction case. After years of investigations by the International Crimes Division at the Dutch Public Prosecutor's Office, in 2015 an Ethiopian suspect, Eshetu Alemu, who was tried by the SPO in absentia,<sup>778</sup> was arrested by

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

<sup>768</sup> In: KebdeTiba, 'Mengistu Genocide trial', 518; Jackson Nyamuya Maogoto, 'Reading the Shadows of History: The Turkish and Ethiopian 'Internationalized' Domestic Crime Trials', in: Heller et al., *The Hidden Histories of War Crimes Trials*, pp. 302-303.

<sup>769</sup> Nyamuya Maogoto, 'Reading the Shadows of History', p. 304.

<sup>770</sup> AI, *Amnesty International World Report 2007. The state of the world human rights* (AI: London, 2007), pp. 114-115.

<sup>771</sup> With judge Saiid dissenting on the genocide convictions, the majority of the accused were convicted for aggravated homicide, public incitement to commit genocide, abuse of power, unlawful arrest and detention. First Criminal Bench, *Special Prosecutor v. Colonel Mengistu Hailemariam et al.: verdict* (1/87; Addis Ababa, 12 December 2006). Cited in: Kjetil Tronvoll, Charles Schaefer & Girmachew Alemu Aneme, 'Concluding the Main Red Terror Trial. *Special Prosecutor v. Colonel Mengistu Hailemariam et al.*', in: Tronvoll et al., *The Ethiopian Red Terror Trials*, pp. 137-138.

<sup>772</sup> 'Ethiopia: Dictator In Exile Gets Life Term', *The New York Times*, 12 January 2007.

<sup>773</sup> Federal Supreme Court, *Appellant – Special Prosecutor v. Respondents- Colonel Mengistu Hailemariam et al.: Judgement* (30183; Addis Ababa, 26 May 2008). Cited in: Kjetil Tronvoll, Charles Schaefer & Girmachew Alemu Aneme, 'Concluding the Main Red Terror Trial. *Special Prosecutor v. Colonel Mengistu Hailemariam et al.*', in: Tronvoll et al., *The Ethiopian Red Terror Trials*, pp. 143-149.

<sup>774</sup> Ethiopian Red Terror Documentation & Research Center, 'Red Terror Trials', (www-text: <http://ertdrc.com/index/cms/33>, visited: 12 March 2015).

<sup>775</sup> Firew Kabebe Tiba, 'The Trial of Mengistu and other Derg Members for Genocide, Torture and Summary executions in Ethiopia', in: Chacha Murungu & Japhet Biegon (eds.), *Prosecuting International Crimes in Africa* (Pretoria: Pretoria University Law Press, 2011), pp. 163-183: 173-176.

<sup>776</sup> Firew Kabebe Tiba, 'Mass Trials', pp. 223-324.

<sup>777</sup> Author's Interview, Tadesse Simie Metekia, Jurist at Netherlands Public Prosecutor's Office, Groningen, 4 February 2016.

<sup>778</sup> Rechtbank 's-Gravenhage, *Uitspraak* (AWB 11/5965; 20 January 2012).

Dutch authorities on four charges of war crimes allegedly committed in Gojjam Province under the Derg regime.<sup>779</sup> At the time of writing, the case was scheduled to go to trial in November 2016.<sup>780</sup>

In Equatorial Guinea and in Ethiopia, the criminal prosecution of former leaders for state-led human rights abuses and mass violence followed instantly after the tumbling of the *ancient regime*. But not in Chad, which experienced one of the longest civil wars in Central Africa. A blend of sharp ethnic, religious and north-south rivalry against a background of a failing state, underdevelopment and Cold War politics spiralled repression, outside intervention and combat through the former French colony since independence in 1960.<sup>781</sup> Entangled in a web of political turmoil, civil war and chronic conflict with Muammar Gadhafi's Libya, Chad entered a particular vicious era of state repression when *Hissène* (Hissein) Habré took control in 1982.<sup>782</sup> Backed by the United States of America (USA) and dubbed by the CIA as its “quintessential desert warrior”,<sup>783</sup> the ethnic Gorane from the north, persecuted, tortured and massacred non-Gorane rebel and civilian opposition in the South and Hadjaraïs and Zaghawa in Central and East Central Chad. A reported 37,800 Chadians were killed during what a national truth commission called Habré's “veritable genocide.”<sup>784</sup> Among the regime's casualties were also thousands of people who bore the brunt of the political police services, the dreaded *Direction de la Documentation et de la Sécurité* (Documentation and Security Directorate; *DDS*).<sup>785</sup> From its immediate creation in early 1983, Habré's Gestapo-like institution became the principal emblem of repression, mass arrests, secret imprisonment, torture and assassination of anybody suspected to oppose the regime.<sup>786</sup> Scores of Chadians ended up in secret prisons in Ndjamena or in the provinces where they were water boarded, asphyxiated, starved, electrocuted and fatally tied up (“Arbatachar”) by DDS ‘interrogators’.<sup>787</sup> One of those prisons was built in the garden of the Habré presidential residence.<sup>788</sup>

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<sup>779</sup> The investigation by the Netherlands International Crimes Unit focuses on specific individual cases of detention, torture and killings in the prison camps of Debre Marcos and Metekel. On the orders of the suspect, in 1978, dozens of prisoners were allegedly killed, after which their bodies were dumped in a mass grave. See: Openbaar Ministerie, ‘Dutch arrest for Ethiopia War Crimes’, *Press Release*, (12 November 2015); For more details: Rechtbank 's-Gravenhage, *Uitspraak* (AWB 11/5965; 's-Gravenhage, 20 January 2012).

<sup>780</sup> Email correspondence with Researcher war crimes at National Prosecutor's Office The Netherlands, August 2016.

<sup>781</sup> See for a historical overview and analysis: Mario J. Azevedo, *Roots of Violence. A History of War in Chad* (London & New York: Routledge, 1998), pp. 64-97; Straus, *Making and Unmaking*, pp. 112-115.

<sup>782</sup> See: Romesh Silva, Jeff Klingner & Scott Weikart, *State Violence in Chad. A Statistical Analysis of Reported Prison Mortality in Chad's DDS Prisons and Command Responsibility of Hissène Habré, 1982-1990* (Palo Alto: The Benetech Initiative, 2010); HRW, *La Plaine de la Mort. Le Tchad de Hissène Habré 1982-1990* (Barcelona: Black Print CPI Ibérica, 2013).

<sup>783</sup> Michael Bronner, ‘Our man in Africa. The Dictator America Created, the Blood He Shed, and the Reckoning to Come’, *Foreign Policy*, (January/February 2014), pp. 36-47.

<sup>784</sup> Ministère Tchadien de la Justice, *Les crimes et détournements de l'ex président Habré et de ses complices: rapport de la Commission d'Enquête Nationale* (Paris: l'Harmattan, 1993), pp. 68-69. In the English summary report: National Commission of Inquiry, ‘Report of the Commission of Inquiry into the Crimes and Misappropriations Committed by ex-President Habré, his Accomplices and/or Accessories’ (Njamena, 7 May 1992), reprinted in: Neil Kritz (ed.), *Transitional Justice. How emerging democracies reckon with former regimes, Vol III: Laws, Rulings and Reports* (Washington DC: United States Institute of Peace, 1995), pp. 51-93: 79.

<sup>785</sup> Established by: *Décret No 005/PR* (26 January 1983). It was supported by subsidiary organs including the Renseignement Généreux (RG), Sécurité Présidentielle (SP), Service d'Investigation Présidentielle (SIP), Brigade Spéciale d'Intervention Rapide (BSIR) and ‘Union Nationale pour l'Indépendance et la Révolution (UNIR). See: Chambres Africaines Extraordinaires, La Chambre d'Instruction, *Ordonnance de non-lieu partiel, de mise en accusation et de renvoi devant la Chambre Africaine Extraordinaire d'Assis* (01/13; Dakar, 13 February 2015), pp. 21-29.

<sup>786</sup> Chambre Africaine Extraordinaire D'Assises (CAE), *Prononce et Résumé Du Jugement Dans L'affaire Le Parquet General Contre Hissein Habré* (30 May 2016), §13.

<sup>787</sup> The Commission of Inquiry lists a range of methods that have been described by survivors and names 12 of “The Most Feared Torturers”. National Commission of Inquiry, ‘Report of the Commission of Inquiry into the Crimes and Misappropriations Committed by ex-President Habré, his Accomplices and/or Accessories’ (Njamena, 7 May 1992), reprinted in: Neil Kritz (ed.), *Transitional Justice. How emerging democracies reckon with former regimes, Vol III: Laws, Rulings and Reports* (Washington DC: United States Institute of Peace, 1995), pp. 51-93: 71-72.

<sup>788</sup> Chambres Africaines Extraordinaires, La Chambre d'Instruction, *Ordonnance de non-lieu partiel, de mise en accusation et de renvoi devant la Chambre Africaine Extraordinaire d'Assis* (01/13; Dakar, 13 February 2015), pp. 32.

Just before he was deposed and fled to Senegal in December 1990, Habré reportedly had the Presidential Guard kill 300 political prisoners at the President's headquarters and stole over four millions dollars from the national treasury.<sup>789</sup> Only 29 days later, the new president Idriss Déby Itno – who is still in power - set up a commission of inquiry, “to investigate the illegal imprisonments, detentions, assassinations, disappearances, tortures and acts of barbarity, the mistreatment, the other attacks on the physical and mental integrity of persons, and all violations of human rights and illicit trafficking in narcotics.”<sup>790</sup> Thirteen months later, after some hasty reconstruction work, prosecutor Mohamat Hassan Abakar set up office in the loathsome DDS headquarters. There, his investigators stumbled upon the detailed reports of executions, destruction of villages and a massacre in the DDS archives. And over the next 17 months, they exhumed gravesites and collected 1726 witness statements of former detainees, victims' relatives, prisoners of war, DDS agents and senior officials. From these sources, the commission counted at least 54.000 detainees in Habré's prisons and possibly 40.000 deaths.<sup>791</sup> But Déby's government – of which many officials and the president himself were involved in Habré's crimes – did not pursue any justice<sup>792</sup> and even locked away the truth commission's files.<sup>793</sup>

The solid truth commission account, alongside a report by a French medical team, which treated 581 torture victims, and 792 transcribed witness accounts embraced the documentary core of what became the first step in an "interminable political and legal soap opera – one that requires tabulated chronologies<sup>794</sup> to navigate the labyrinths of international law.”<sup>795</sup> “Je ne reconnais pas les faits qui me sont reprochés. Je n'ai jamais commis de tels actes.”<sup>796</sup> This scarce verse of renunciation was the single thing Hissène Habré wished to share with a judge on 3 February 2000 in a courtroom in Dakar's Regional Court, where he was for the first time charged as an accomplice to torture and crimes against humanity and was placed under virtual house arrest. After the initial civil complaints in Senegal stranded at the highest court<sup>797</sup>, the Habré case went through a lexicon of courts<sup>798</sup> all the way up to the International Court of Justice.<sup>799</sup> Yet, pivotal was the four year investigation by the Belgian judge Daniel Franssen - who in 2005 charged Habré with grave violations of humanitarian law, torture,

<sup>789</sup> Reed Brody, ‘The Prosecution of Hissène Habré - An “African Pinochet”’, *New England Law Review*, Vol. 35, No. 2 (2001), pp. 321-335: 323.

<sup>790</sup> The President of the Council of State, Chief of State, *Decree No.014/P.CE/CJ/90* (29 December 1990), art. 2..

<sup>791</sup> National Commission of Inquiry, ‘Report of the Commission of Inquiry into the Crimes and Misappropriations Committed by ex-President Habré, his Accomplices and/or Accessories’ (N'djamena, 7 May 1992), pp. 53-57.

<sup>792</sup> Chad called for a special court to try Habré's crimes: *l'ordonnance N° 004/PR/MJ/93 du 27/02/1993*. In 2001, however, it was decided that the Chadian judiciary was incompetent to deal with the case: Conseil Constitutionnel, *Decision N°002/PCC/SG/001. Sur l'exception d'inconstitutionnalité soulevée par les victimes des crimes et répressions politiques relative au dossier pénal ouvert contre les agents de la DDS de Monsieur HISSEINE HABRE* (N'djamena, 6 April 2001).

<sup>793</sup> Reed Brody, ‘The Prosecution of Hissène Habré’, p. 323; Hayner, *Unspeakable Truths*, pp. 245-247.

<sup>794</sup> HRW, *Chronology of the Hissène Habré Case* (13 March 2014); FIDH, *Chronology of the Hissène Habré Case* (16 July 2013). International Court of Justice (ICJ), *Questions Relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal): Judgement* (20 July 2012), §15-42.

<sup>795</sup> Leela Jacinto, ‘Hissène Habré's elusive trial: an African 'legal soap opera'’, *France24*, 11 July 2011.

<sup>796</sup> Cour d'appel de Dakar, Tribunal Régional Hors Classe de Dakar, Cabinet de M. Demba Kandji, Juge d'instruction, *Procès-Verbal d'Interrogatoire de première comparution* (No du Parquet : 482; No de l'instruction: 13/2000).

<sup>797</sup> La Cour de Cassation, Première Chambre Statuant en Matière Pénale, *Souleymane Guengueng et Autres Contre Hissène Habré: Arrêt* (Arrêt no. 14 du 20-3-2001 Pénal; Dakar, 20 March 2001).

<sup>798</sup> The Court of Justice of the Economic Community of States of West Africa (ECOWAS), *Hissein Habré vs. Republic of Senegal: Judgement* (NO:ECW/CCJ/JUD/06/10; Abuja, 18 November 2010).

<sup>799</sup> International Court of Justice (ICJ), *Questions Relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal): Judgement* (20 July 2012).

genocide, crimes against humanity and war crimes<sup>800</sup> and requested his extradition<sup>801</sup> – that finally led to the creation of African Union (AU) backed special chambers in the Senegalese courts to try international crimes under the Habré regime: the Extraordinary African Chambers (EAC).<sup>802</sup> Under the principle of universal jurisdiction, the court can adjudicate genocide, crimes against humanity, war crimes and torture committed in Chad. It also has a strong historical focus, covering the period between 7 June 1982 and 1 December 1990<sup>803</sup> and will warrant historians' attention. And indeed, like at the UN tribunals, the court appointed Arnaud Dingammadji, a Chadian historian as expert witness to lay out the contours of Habré's rule,<sup>804</sup> to which he later testified at trial.<sup>805</sup> Fransen had taken copies of Habré's DDS files, received the truth commission dossiers and compiled 27 binder files of evidence, which were sent to the EAC.<sup>806</sup> With those in hand, four investigative judges amassed additional evidence in Chad and France, including over 2500 testimonies and expert witness reports. They formally charged Habré, together with five co-accused (in absentia), in early 2015 with crimes against humanity, war crimes and torture.<sup>807</sup> After 52 trial days – the case was concluded with closing statements in early February 2016.<sup>808</sup> Habré himself rejected the tribunal's authority and managed to forestall the proceedings for a short period until the court appointed three Senegalese lawyers to defend him. When he was first brought in to the court by force, he was kicking and screaming but later throughout the proceedings Habré remained silent, even when the prosecutor tried to question him. Altogether, 96 witnesses testified, the majority from Chad.<sup>809</sup> They comprised victims who described their experience in prisons and camps, but also a range of experts, including the 1992 Chadian truth commission president, former members of Habré's political police, the DDS, Judge Daniel Fransen, a French doctor, researchers from Amnesty International and Human Rights Watch, and forensic, statistical and handwriting experts.<sup>810</sup> Back in Chad, the trial was streamed live on the internet and broadcasted on national television.<sup>811</sup> In this remarkable trial on historic crimes, which was also a litmus test for Pan-African Justice,<sup>812</sup> judgement, in first instance, was rendered on 30 May 2016 and Habré was sentenced to life imprisonment for rape, enslavement, murder, summary

<sup>800</sup> Arrondissement de Bruxelles, Tribunal de Première Instance, Cabinet de juge d'instruction D. Fransen, *Pro Justitia \* Mandat d'Arrêt International par défaut* (2001/002; Bruxelles, 19 September 2005);

<sup>801</sup> Ambassade de Belgique, *Letter to Ministry of Foreign Affairs of the Republic of Senegal in Dakar* (No 05/01788, Order No 432; Dakar, 22 September 2005).

<sup>802</sup> *Accord entre de Gouvernement de la République du Sénégal et l'Union Africaine sur la Création de Chambres Africaines Extraordinaires au sein des Juridictions Sénégalaises* (Dakar, 22 August 2012).

<sup>803</sup> *Statut des Chambres africaines extraordinaires au sein des juridictions sénégalaises pour la poursuite des crimes internationaux commis au Tchad Durant la période du 7 juin 1982 au 1er décembre 1990*, annexed to: *Accord entre de Gouvernement de la République du Sénégal et l'Union Africaine sur la Création de Chambres Africaines Extraordinaires au sein des Juridictions Sénégalaises* (Dakar, 22 August 2012), art. 3-4.

<sup>804</sup> Chambres Africaines Extraordinaires (CAE), La Chambre d'Instruction, *Ordonnance de désignation d'expert* (Case No 01/13; Dakar, 2 August 2013); Chambres Africaines Extraordinaires, *Rapport d'expertise sur le contexte historique du Tchad sous le régime de Hissène Habré de Arnaud Dingammadji* (Case Document D1235).

<sup>805</sup> Trust Africa, 'Summary of the fifth hearing held on 9 September 2015', *The Public Prosecution versus Hissène Habré* (www-text: [http://www.trustafrica.org/images/ICJ\\_reports/EAC-%20Trial%20Hearing%20Report%20-%209th%20September%202015%20-%20English.pdf](http://www.trustafrica.org/images/ICJ_reports/EAC-%20Trial%20Hearing%20Report%20-%209th%20September%202015%20-%20English.pdf), visited: 8 January 2016)

<sup>806</sup> Author's Interview (telephone), Franck Petit, Head of EAC Outreach Unit, 24 February 2015.

<sup>807</sup> The co-accused are: Saleh Younouss, Guihini Korei, Abakar Torbo Rahama, Maharat Djibrine (El Djonto) and Zakaria Berdei. Only Habré face the charge of war crimes. CAE, La Chambre d'Instruction, *Ordonnance de non-lieu partiel, de mise en accusation et de renvoi devant la Chambre Africaine Extraordinaire d'Assises* (01/13; Dakar, 13 February 2015), pp. 1 & 7-10.

<sup>808</sup> Chambre Africaine Extraordinaire D'Assises, *Ministère Public c. Hissène Habré: Jugement* (Dakar, 30 May 2016), §125.

<sup>809</sup> CAE, *Habré Jugement*, §116.

<sup>810</sup> HRW, 'Hissène Habré Trial: Witness Hearings Ending. Final Arguments, Decision Expected in Early 2016', *Press Release*, 13 December 2015.

<sup>811</sup> Mostly organised through the public outreach organisation *Forum Interactif sur les Chambres Africaines Extraordinaires* (www-text: [http://www.forumchambresafriaines.org/V1\\_ficae/](http://www.forumchambresafriaines.org/V1_ficae/)).

<sup>812</sup> See: Thijs B. Bouwknecht, 'Chad – Dakar: Habré trial is litmus test for Pan-African justice', *African Arguments*, 1 June 2015.

executions, torture, inhumane treatment, illegal detention, cruel treatment.<sup>813</sup> Covering 680 pages, the judgement narrates events from the 1980. It is a tapestry of DDS documents, referenced with truth commission report findings, accentuated by testimony. Punctiliously, it breaks down the historical context before and during Habré's rule,<sup>814</sup> the political and legal, military architecture of his regime<sup>815</sup> and a litany of mass atrocities.<sup>816</sup> All, of these qualified as either crimes against humanity, war crimes or torture. When reading a summary of the Judgement, presiding judge Gberdao Gustave Kam said that Habré "had control over most of the security apparatus" as well the army during his eight-year rule over Chad, from June 1982 to December 1990, when Habré and his security organs "created a system where impunity and terror were the law".<sup>817</sup>

Unique for a number of reasons, the Habré trial was a particular *rendezvous* with Chad's atrocious history, more so than other atrocity trials.<sup>818</sup> Key to this case was that it was sparked by the victims themselves, with support of human rights organisations. It was for the first time in the history of international criminal justice that victims' voices had been so dominant in a case and a trial. At the end of the hearings, they rejoiced loudly, while Habré remained silent, his face hidden behind sunglasses and a scarf.<sup>819</sup> The whole trial<sup>820</sup> was a stark contrast with the other, rather expensive and inefficient, international tribunals, which had solely centred on the perpetrators. Apart from that, contrary to the adversarial common law procedures in which prosecutors bring cases, the EAC operated in the civil law tradition of inquisitorial justice. Also in this case, the French-speaking prosecutors and judges stem from Africa and were arguably much more comfortable with the case, the witnesses and contextual elements than would, for example, an Argentinean prosecutor. On those terms, localised justice is probably better equipped in dealing with past atrocities than strictly international justice. Apart from these advantages, critical gaps remain. Although Habré was the most powerful man during his reign, others have remained out of reach of the court, including Chad's current President Déby (Habré's former army chief), his political backers from the United States of America and France and Libyans. As such, the trial verdict only covers a fraction of the history of Chad and presents a petite scope on questions of historical responsibility. Also, since Habré himself had refused to acknowledge and participate in the trial, key information on the rationales for the violence remains absent. On the other hand, although the African Union has endorsed and praised the Extraordinary African Chambers-precendent as a home-grown alternative to international justice, a genuine commitment to taking responsibility for crimes committed by its current leaders is virtually nihil. From that perspective, indeed, the EAC trial may well stand out as an exception in the history of

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<sup>813</sup> CAE, *Habré Jugement*, p. 536.

<sup>814</sup> *Ibidem*, §288-345.

<sup>815</sup> *Ibidem*, §346-480.

<sup>816</sup> Including: mass arrests; torture; summary executions; sexual violence; repression of Arabs; repression of CODOS and southern peoples; the repression of the Hadjeraï; repression of the Zaghawa; massacres; attacks in villages; treatment of prisoners of war. *Ibidem*, §481-1351.

<sup>817</sup> CAE, *Prononce et Resume Du Jugement*, §77.

<sup>818</sup> Author's Interview, Reed Brody, Counsel HRW, The Hague, 9 December 2015.

<sup>819</sup> Forum interactif sur les CAE, *Video Verdict Procès Hissene Habré (30 mai 2016)*, (www-video: [https://www.youtube.com/watch?v=T74\\_bGLTWaQ](https://www.youtube.com/watch?v=T74_bGLTWaQ), last visit on 19 August 2016.

<sup>820</sup> All of the sessions are publicly available on YouTube: <https://www.youtube.com/channel/UCgING8GqD65mKzs8NALpd2g>



transitional justice in Africa rather than a precedent.<sup>821</sup> As a tool of African universal jurisdiction, yet mostly financed through western governments,<sup>822</sup> it was a historical case in the sense that it was a one-time occasion, as evidenced by a rising critique with in the African Union of the system as a whole.<sup>823</sup>

### 3.5 ‘African Criminal Court’

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

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

<sup>821</sup> Also see: Thierry Cruvellier, ‘Habr : The benefits and fragile hopes of a new model’, *International Justice Tribune*, 31 May 2016.

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

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

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

<sup>825</sup> *Genocide Convention*, art. 1 & IV & UNGA, *B. Study by the International Law Commission on the Question of an International Criminal Jurisdiction* ((A/RES/260 (III); 9 December 1948).

<sup>826</sup> *Draft Statute for An International Criminal Court*, (Annex to the Report of the Committee on International Criminal Jurisdiction, 31 August 1951) (UN. GAOR, 7th Session, Supp. No. 11, A/2136 (1952)).

<sup>827</sup> *Revised Draft Statute for an International Criminal Court* (Annex to the Report of the 1953 Committee on International Criminal Jurisdiction on its Session held from 27 July to 20 August 1953) (GA., 9th Sess., Supp. No. 12, A/2645, 1954).

<sup>828</sup> The International Law Commission, a UN Commission of legal experts, continued to work on a code of crimes against the peace and security of humankind intermittently for the next four decades, but not directly on a court that could try these crimes. See more on the history of the ICC: Cherif Bassiouni, *The Statute of the International. A documentary history* (Dordrecht 1999); William A. Schabas, *An Introduction to the International Criminal Court* (2<sup>nd</sup> edition; Cambridge 2004); Marlies Glasius, *The International Criminal Court. A global civil society achievement* (Abingdon 2006); Scheffer, *All the Missing Souls*; David Bosco, *Rough Justice. The International Criminal Court in a World of Power Politics* (Oxford: Oxford University Press, 2014), pp. 11-51.

<sup>829</sup> The original request dealt with questions concerning international drug trafficking. United Nations (UN), *Request for the Inclusion of a Supplementary Item in the Agenda of the Forty-fourth session, International Criminal Responsibility of Individuals and Entities Engaged in Illicit Trafficking in Narcotic Drugs and across National Frontiers and Other Transnational Criminal Activities: Establishment of an International Criminal Court with Jurisdiction over Such Crimes, Letter dated 21 August 1989 from the Permanent Representative of Trinidad and Tobago to the United Nations addressed to the Secretary-General, 21 August 1989* (Un.doc: Doc. A/44/195; 21 August 1989).

Assembly<sup>831</sup> set up the Preparatory Committee for an International Criminal Court (PREPCOM). It convened an international meeting in Rome, Italy, from 15 June to 17 July 1998.<sup>832</sup> During this *United Nations Conference of Plenipotentiaries on the establishment of an International Criminal Court*<sup>833</sup> the Statute of the International Criminal Court (the *Rome Statute*) was adopted.<sup>834</sup> South Africa, like other African countries, was a staunch supporter of the court. An African state, Senegal, was the first to ratify the Statute, on 2 February 1999.<sup>835</sup> A phantom court for four years,<sup>836</sup> the minimum number of sixty ratifications was reached in April 2002<sup>837</sup> and the Rome Statute subsequently entered into force on 1 July 2002 and the court was established.<sup>838</sup>

Persons<sup>839</sup> who committed any of the crimes described in the Rome Statute – genocide, crimes against humanity, war crimes and in the future, the crime of aggression<sup>840</sup> - committed from 1 July 2002 are potential subjects for investigation and prosecution by the ICC.<sup>841</sup> Victims of the crimes have a right to participate in proceedings through representation and may seek reparations, a novelty in the international criminal justice system.<sup>842</sup> The ICC - as a complementary body to national criminal jurisdictions - functions as a court of last resort.<sup>843</sup> It may only step in when alleged crimes are not investigated or prosecuted by a capable state because it is either unwilling or unable to genuinely start investigations.<sup>844</sup> Even when that is the case, only a state party or the United Nations Security Council can refer a ‘situation’ to the Office of The Prosecutor (OTP), which itself can also start, upon approval by the pre-trial chamber, an investigation of a situation *proprio motu*.<sup>845</sup> Then the prosecutor evaluates the available information during a preliminary examination<sup>846</sup> and can decide to commence an

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<sup>830</sup> UNGA, ‘Report of the International Law Commission on the work of its forty-sixth session, 2 May - 22 July 1994’, *Official Records of the General Assembly, Forty-ninth session*, Supplement No. 10 (UN. doc. A/49/10 ).

<sup>831</sup> It is significant to note that the UN played a pivotal role in the establishment of the ICC, the court is however an independent institution working in close relationship with the UN system, with the *Assembly of States Parties*<sup>831</sup> being the management, oversight and legislative body of the International Criminal Court. See also: *Negotiated Relationship Agreement between the International Criminal Court and the United Nations*, (ICC-ASP/3/Res.; 14 October 2004).

<sup>832</sup> All of the basic documents of the drafting history of the Statute, including the draft statute prepared by the International Law Commission, have been reproduced in M. Cherif Bassiouni (ed.), *The Statute of the International Criminal Court: A Documentary History*, (Dordrecht 1998). The website of the Permanent Secretariat of the Assembly of States Parties to the Rome Statute hosts official records related to the establishment of the International Criminal Court: www-text: <http://untreaty.un.org/cod/icc/index.html>, last visit 28 September 2012.

<sup>833</sup> With the participation of representatives of 160 States, 33 intergovernmental organisations and a coalition of 236 NGOs. See for a full list: United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court. Rome, 15 June - 17 July 1998, *Official Records*, Volume I (A/CONF.183/13(Vol. I); New York 2002) annexes II, III & IV.

<sup>834</sup> *Rome Statute*. 120 countries voted in favour, 7 against and 21 abstained. See for more details on the establishment of the ICC and the Rome conference. 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/CONF.183/13(Vol. II); New York 2002), p. 121.

<sup>835</sup> United Nations Secretary General, *Depositary Notification: Rome Statute of the International Criminal Court. Senegal: Ratification* (C.N.21.1999.TREATIES-3; 3 February 1999).

<sup>836</sup> See for a detailed analysis of the ratification politics, debates and practice: David Bosco, *Rough Justice. The International Criminal Court in a World of Power Politics* (Oxford: Oxford University Press, 2014), pp. 52-78.

<sup>837</sup> Bosnia-Herzegovina, Bulgaria, Cambodia, the Democratic Republic of the Congo, Ireland, Jordan, Mongolia, Niger, Romania and Slovakia. ‘Ratification ceremony at UN paves way for International Criminal Court’, *United Nations News Centre*, 11 April 2002 (www-text: on file with author).

<sup>838</sup> The Rome Statute stipulated that the court would come into being on the first day of the month, sixty days after the sixtieth ratification: *Rome Statute*, art. 126(1). The date of entry into force – 1 July 2002 – is an important one, if only because the Court cannot prosecute crimes committed prior to entry into force.

<sup>839</sup> Only if the person is a national of or acted in a State or on board of a vessels or aircraft registered in a State that is a party to the Rome Statute or State, which has accepted the court’s jurisdiction by declaration.

<sup>840</sup> An agreement on the definition of the crime of aggression was reached at the Review Conference of the International Criminal Court in Kampala, Uganda, in June 2010. The crime is defined as “the planning, preparation, initiation or execution, by a person in a position effectively to exercise control over or to direct the political or military action of a state, of an act of aggression, which, by its character, gravity and scale, constitutes a manifest violation of the Charter of the United Nations.” The agreement only comes into force in 2017. ICC, ‘Amendments to the Rome Statute of the International Criminal Court on the crime of aggression (Annex 1), *Resolution RC/Res.6* (11 June 2010), art. 8 bis.

<sup>841</sup> *Rome Statute*, art. 5. See for a detailed description: ICC, *Elements of Crimes*.

<sup>842</sup> ICC, Victims Participation and Reparations Section (VPRS), *Victims Before the International Criminal Court. A Guide for the Participation of Victims in the Proceedings of The Court* (undated document).

<sup>843</sup> ICC, OTP, *Informal expert paper: The Principle of Complementarity* (The Hague: ICC-OTP, 2003).

<sup>844</sup> *Rome Statute*, art. 17.1.

<sup>845</sup> Note: A non-state party can also accept the ICC’s jurisdiction over a particular temporal and geographical situation within its own territory.

<sup>846</sup> ICC, OTP, *Policy Paper on Preliminary Examinations* (November 2013).

investigation<sup>847</sup> unless he determines there is no reasonable basis – i.e. lack of jurisdiction, inadmissible, not sufficiently grave<sup>848</sup> or against the interests of justice - to proceed.<sup>849</sup> The ICC is determined to act globally but its current caseload only concerns individuals from the African continent. This has led to a staunch criticism from African academics, African leaders and the African Union, where concerns are ventilated that the ICC is exclusively targeting Africa.<sup>850</sup> Indeed, former Chief Prosecutor Luis Moreno-Ocampo (2003-2012) and his successor Fatou Bensouda (2012-2021)<sup>851</sup> have brought cases before the court, almost exclusively dealing with crimes committed in Africa.<sup>852</sup> They respectively opened the cases in Kenya<sup>853</sup> and Côte d'Ivoire,<sup>854</sup> while the other cases, however, were referred to the court by governments<sup>855</sup> or the United Nations Security Council.<sup>856</sup> Although state or supranational mandates may seem to be far-reaching, the court often remains toothless as it depends on state cooperation international politics. The ICC has no police force to arrest suspects and countries can frustrate investigations in myriad ways while the Security Council may defer investigations or prosecutions.<sup>857</sup> Moreover the permanent members of the Security Council are not all subscribers<sup>858</sup> to the court and have proved to be politically divided over judicial interventions in certain conflict areas.<sup>859</sup> Yet, after ten years of work, the court – headquartered in The Hague, The Netherlands<sup>860</sup> - has opened formal investigations in ten<sup>861</sup> ‘situations’ [i.e. countries, territories]<sup>862</sup> and conducts preliminary examinations<sup>863</sup> in over a dozen<sup>864</sup> others. The Office of the

<sup>847</sup> ICC, OTP, *Strategic Plan. June 2012-2015* (11 October 2013).

<sup>848</sup> *Rome Statute*, art. 53.

<sup>849</sup> *Ibidem*, arts. 13-15.

<sup>850</sup> African Union (AU), *Decision on the Implementation of the Decisions on the 2 ICC - Doc. EX.CL/731(XXI)* (Assembly/AU/Dec.419 (XIX); Assembly of the Union Nineteenth Ordinary Session, Addis Ababa, 15-16 July 2012) & African Union (AU), *Decision on the Abuse of the Principle of Universal Jurisdiction Doc. EX.CL/731(XXI)* (Assembly/AU/Dec.420(XIX); Assembly of the Union Nineteenth Ordinary Session, Addis Ababa, 15-16 July 2012). See more on the Africa discussion: David Hoile, *Justice Denied. The Reality of the International Criminal Court* (London: The Africa Research Centre, 2014).

<sup>851</sup> Bensouda served as Moreno-Ocampo's deputy prosecutor from August 2004. Between 2001 and 2004 she respectively worked as a legal adviser, trial attorney and head of the Legal Advisory Unit at the International Criminal Tribunal for Rwanda (ICTR). ‘Curriculum Vitae Fatou B. Bensouda (LLB (Hons), BL, LL.M. Deputy Prosecutor (Prosecutions) International Criminal Court’, annexed to: International Criminal Court, Assembly of States Parties, *Report of the Search Committee for the Position of the Prosecutor of the International Criminal Court* (ASP/2011/117; New York, 24 October 2011); Thijs Bouwknecht, ‘Bensouda: An African Heritage’, *International Justice Tribune*, No. 142 (21 December 2011), p. 4.

<sup>852</sup> See for a critical study on the case selection: Elizabeth Evenson, *Unfinished Business. Closing Gaps in the Selection of ICC Cases* (1-56432-810-4; New York: HRW, 2011).

<sup>853</sup> ICC, *Situation in the Republic of Kenya: Request for authorization of an investigation pursuant to Article 15* (ICC-01/09; 26 November 2009).

<sup>854</sup> ICC, *Situation in the Republic of Côte d'Ivoire: Request for authorization of an investigation pursuant to Article 15* (ICC-02/11; 23 June 2011).

<sup>855</sup> Uganda (December 2003): ICC, *President of Uganda refers situation concerning the Lord's Resistance Army (LRA) to the ICC* (Press Release ICC-20040129-44; 29 January 2004). Democratic Republic of the Congo (March 2004): Letter of Mr. Joseph Kabila to Luis Moreno Ocampo, dated 3 March 2004 (Doc. No. ICC-01/04-01/06-39-AnxB1); The Hague 18 March 2006). Central African Republic (December 2004): ICC, *Situation in the Central African Republic: Decision Assigning Situation in the Central African Republic to PTC III* (ICC-01/05-1; 19 January 2005). Mali (July 2012): République de Mali, Ministère de la Justice, *Renvoi de la situation de Mali* (Bamako, 3 July 2012).

<sup>856</sup> Sudan (Darfur): UNSC, *Resolution 1539* (S/RES/1593 (2005); 31 March 2005). Libya (2011): UNSC, *Resolution 1970* (S/RES/1970 (2011); 26 February 2011).

<sup>857</sup> For instance, the Sudanese government does not allow persons associated with the ICC into the country. See for a detailed overview of problems: ICC, *Situation on the Darfur, Sudan in the Case of the Prosecutor v. Abdallah Banda Abakaer Nourain & Seleh Mohamed Jerbo Jamus: Defence Request for a Temporary Stay of Proceedings* (ICC-02/05-03/09; 6 January 2012). Regarding deferrals see: *Rome Statute*, art. 16.

<sup>858</sup> The United States of America and the Russian Federation have signed (2000) and unsigned (resp. 2002-2016). The People's Republic of China has not signed. Other non-members include: Israel (signed 2000, not ratified), Iran (signed 2000, not ratified), Syria (signed 2000, not ratified), Sudan (signed 2000, not ratified), Libya, Pakistan, Iraq and India.

<sup>859</sup> For instance, Russia and the Russian Federation vetoed a resolution to refer the situation in Syria to the court. UNSC, *Record of 7180th Meeting* (UN doc: S/PV.7180; New York, 22 May 2014). Exemplary were the staunch reactions from Israel and the USA to the announcement that the court opened a preliminary examination into alleged crimes “in the occupied Palestinian territory, including East Jerusalem, since June 13, 2014, right after the accession to the Court by Palestine and its referral of this situation. See: ICC-OTP, ‘The Prosecutor of the International Criminal Court, Fatou Bensouda, opens a preliminary examination of the situation in Palestine’, *Press Release* (ICC-OTP-20150116-PR1083; 16 January 2015).

<sup>860</sup> Although the permanent seat of the ICC is the court can decide to conduct trials elsewhere. *Rome Statute*, art. 62.

<sup>861</sup> As of 2 March 2017: Uganda, Democratic Republic of the Congo, Central African Republic, Sudan (Darfur), Kenya, Côte d'Ivoire, Mali, Central African Republic II and Georgia.

<sup>862</sup> Situations “are generally defined in terms of temporal, territorial and in some cases personal parameters.” See: ICC, PTC, *Situation en République Démocratique du Congo: Décision sur les demandes de participation à la procédure de VPRS 1, VPRS 2, VPRS 3, VPRS 4, VPRS 5 et VPRS 6* (ICC-01/04; 17 January 2006), §65.

<sup>863</sup> Preliminary examinations refer to the analytical process of by which the OTP assesses whether there is a reasonable basis to proceed with an investigation in a given situation. The OTP follows four steps in this procedure: (phase 1: initial review) proactively gathering and evaluating information from multiple sources, including “communications”, from individuals and parties concerned; (phase 2a jurisdiction) assessing jurisdictional, temporal, territorial and personal jurisdiction; (phase 2b jurisdiction) assessing subject matter jurisdiction; (phase 3 admissibility) assessing complementarity and gravity; and (phase 4 interest) assessing the interests of justice. See: ICC, Office of The Prosecutor (OTP) *Policy Paper on Preliminary Investigations: Draft* (4 October 2010).

Prosecutor issued public indictments against thirty-six persons<sup>865</sup> of whom ten have been arrested,<sup>866</sup> two surrendered<sup>867</sup> while nine have come to The Hague voluntarily.<sup>868</sup> Its judges have delivered four final verdicts,<sup>869</sup> while the case of Gbagbo, Goudé, Bosco Ntaganda and Dominic Ongwen are ongoing at the time of writing. All the cases at trial deal with African situations. As shown in the final chapter of this dissertation, there is however much diversity in crime scenes and contexts.

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

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<sup>864</sup> Situations include(ed): Afghanistan, Central African Republic (II), Colombia, Comoros, Gabon, Georgia, Guinea, Honduras, Iraq/UK, Korea, Nigeria, Registered Vessels of Comoros, Greece and Cambodia, Ukraine, Venezuela.

<sup>865</sup> Sudan: Ahmad Harun, Ali Kushayb, Abdel Raheem Muhammad Hussein, Omar Hassan Ahmad al Bashir, Bahr Idriss Abu Garda, Abdallah Banda Abakaer Nourain and Saleh Mohamed Jerbo Jamus. DRC: Thomas Lubanga Dyilo, Germain Katanga, Mathieu Ngudjolo Chui, Bosco Ntaganda, Sylvestre Mudacumura and Callixte Mbarushimana. Central African Republic: Jean Pierre Bemba Gombo, Aime Kilolo Musamba, Jean-Jaques Mangenda Kabongo, Fidele Babala Wandu and Narcisse Arido. Uganda: Joseph Kony, Vincent Otti, Okot Odhiambo, Dominic Ongwen and Raska Lukwiya (deceased). Kenya: William Samoei Ruto, Henry Kiprono Kosgey, Joshua Arap Sang, Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali. Libya: Muammar al-Gaddafi (deceased), Saif al-Islam al-Gaddafi and Abdullah Al-Senussi. Côte d'Ivoire: Laurent Koudou Gbagbo, Simone Gbagbo and Ble Goude.

<sup>866</sup> Lubanga, Katanga, Ngudjolo, Bemba, Mbarushimana (released), Gbagbo, Ble Goude, Aime Kilolo Musamba, Jean-Jaques Mangenda Kabongo, Fidele Babala Wandu and Narcisse Arido.

<sup>867</sup> Bosco Ntaganda & Dominic Ongwen.

<sup>868</sup> Abu Garda, Banda, Jerbo, Ruto, Kosgey, Sang, Muthaura, Kenyatta and Ali.

<sup>869</sup> (1) Thomas Lubanga Dyilo was convicted on three charges of war crimes committed in the Democratic Republic of the Congo, including enlisting, conscripting and using child soldiers. He was sentenced to 14 years' imprisonment. ICC, *Lubanga Dyilo Judgment & ICC, Lubanga Dyilo Sentence*. (2) Mathieu Ngudjolo Chui was acquitted and the Prosecutor has appealed: ICC, *Situation En République Démocratique Du Congo. Affaire Le Procureur c. Mathieu Ngudjolo: Jugement rendu en application de l'article 74 de Statut* (ICC-01/04-02/12; 18 December 2012). (3) Germain Katanga was found guilty, as an accessory, of one count of crime against humanity and four counts of war crimes. He was sentenced to 12 years' imprisonment. Both the OTP and the Defence discontinued their appeals against the judgement. ICC, *Situation En République Démocratique Du Congo. Affaire Le Procureur c. Germain Katanga: Jugement rendu en application de l'article 74 de Statut* (ICC-01/04-01/07; 7 March 2014) & ICC, 'Defence and Prosecution discontinue respective appeals against judgement in the Katanga case', *Press Release* (25 June 2014). (4) Ahmad Al Faqi Al Mahdi was convicted of war crime of destructing cultural property after his confession and sentenced to 9 years. ICC, TC VIII, *Situation: in the Republic of Mali in the case of The Prosecutor v. Ahmad Al Faqi Al Mahdi: Judgment and Sentence* (ICC-01/12-01/15; 27 September 2016).

<sup>870</sup> See for a detailed study: Evelyn A. Ankumah (ed.), *The International Criminal Court and Africa. One Decade On* (Antwerp & The Hague: Intersentia & African Legal Aid, 2016).

<sup>871</sup> Committee of Intelligence and security Services of Africa (Cissa), *Kigali Declaration on the Growing Threat of Abuse of Universal Jurisdiction Against Africa* (CNF/13/OR/7; Kigali, 6 August 2016), §5.

welcoming indicted genocide suspects such as Omar al-Bashir on their soil.<sup>872</sup> Thus, irrespective of a long tradition of transitional justice, as evidenced by the trials in Equatorial Guinea, Ethiopia, Senegal, fears within the echelons of power, that this historical evolution progresses to the extent that would bring them in the docks, have led to endeavours to halt these developments, particularly against universal jurisdiction and the ICC.

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

Within the realm of the historical context of mass atrocity and transitional justice in Africa analysed above, our three case studies really were the precedent and the pinnacle of the evolution of post-Cold War transitional justice. In light of the growing tendency of some African leaders, Rwanda's position is particularly interesting. The genocide in 1994 sparked a level of home grown atrocity prosecutions to the extent never seen before. Since the first condemnation before a specialised chamber in the ordinary Rwandan criminal courts in 1997,<sup>873</sup> thousands of Rwandan *génocidaires* have reportedly been brought before a variety of courts in Rwanda and throughout the world.<sup>874</sup> It was rather from the Rwandan immediate experience than the Ethiopian trials that the tribunalisation of African mass atrocity took off. It was then extended to Sierra Leone.<sup>875</sup> Then, while the UNICTR was delivering its first verdicts and the SCSL opening up its doors, the International Criminal Court (ICC) came into play, which in its first decade of work exclusively dealt with conflicts in Sub-Saharan and North Africa and has subsequently, been dubbed African Criminal Court.<sup>876</sup> Below, in order to complete the picture on the evolution of the tribunalisation of mass atrocity in Africa, I will concisely outline this dissertations' case studies transitional justice context. Each case study thereafter will be analysed in-depth in a separate chapter, particularly its judicial aftermath.

### 3.7 Case Study 1: Rwanda

Between October 1990 and July 1994, the Republic of Rwanda experienced rebel insurgency, intra-state warfare, ethno-political violence and genocide. At its climax from 6 April 1994, political moderates and UN peacekeepers were assassinated, genocide was committed against Tutsi. Hutu, on their turn, fell victim to political and subsequent reprisal killings.<sup>877</sup> In these four years, the Rwandan

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<sup>872</sup> The Supreme Court of Appeal of South Africa, *Judgement* (867/15; 15 March 2016); Eugene Kwibuka, 'Bashir is our guest and can't be arrested here, Mushikiwabo says', *The New Times*, 15 July 2016.

<sup>873</sup> Tribunal de Première Instance de Kigali, Chambre Spécialisée, *Ministère Public C/ Karamira: Jugement* (No.7; Kigali, 14 February 1997).

<sup>874</sup> Thijs B. Bouwknegt, 'Ubutabera: courts of genocide', *LoveRadio*, April 2014 (www-text: <http://www.loveradio-rwanda.org/episode/5/info/essay>, visited: 17 March 2015).

<sup>875</sup> *Agreement between the United Nations and the government of Sierra Leone on the establishment of a Special Court for Sierra Leone & Statute of the Special Court for Sierra Leone*.

<sup>876</sup> Besides similar fact-finding challenges faced by the *ad hoc* tribunals because of its almost extensive reliance on direct witness testimony. International Bar Association (IBA), *Witnesses before the International Criminal Court. An International Bar Association International Criminal Court Programme report on the ICC's efforts and challenges to protect, support and ensure the rights of witnesses* (IBA, July 2013), pp. 14-15.

<sup>877</sup> See for detailed studies, *inter alia*: African Rights, *Rwanda. Death, Despair and Defiance* (London; 2<sup>nd</sup> revised edn. 1995); Gérard Prunier, *The Rwanda crisis. History of a genocide* (London 1995); Filip Reyntjens, *Rwanda: trois jours qui ont basculé l'histoire* (Paris 1995.); Jean Pierre Chrétien, Jean-François Dupaquier, Marcel Kambanda, and Joseph Ngarambe (eds.), *Rwanda: les médias du génocide* (Paris 1995); *Des Forges, Leave None*; Mahmoud Mamdani, *When Victims Become Killers: Colonialism, Nativism, and the Genocide in Rwanda* (Princeton: Princeton University Press, 2001); Straus, *The Order of Genocide*; Lee-Anne Fujii, *Killing Neighbors: Webs of Violence in Rwanda* (Ithaca 2009); Guichaoua, *Guerre au Genocide*. For regional studies: Gerard

Armed Forces (FAR), *Interahamwe* and *Impuzamugambi* militias, civilians, Burundian refugees and the Rwandan Patriotic Army/Front (RPA/F) all reportedly committed human rights violations and at least half a million Rwandan citizens were killed. After the dust settled on 19 July 1994, with the victory of the RPF and the installation of a transitional government, Rwanda used prosecutions, truth finding, reconciliation initiatives, reintegration, re-education and reparations to transcend towards internal<sup>878</sup> peace.<sup>879</sup> Already during the war, after a two-week mission in January 1993, an international non-governmental commission of inquiry – comprising jurists, historians and journalists - documented government and rebel human rights violations and concluded that the Rwandan state, its army and aligned militia's committed acts of genocide against Tutsis.<sup>880</sup> Days into the 1994 massacres - on 13 April 1994 - the RPF envoy at the UN requested the Security Council to institute a “war crimes tribunal and apprehend persons responsible for the atrocities,”<sup>881</sup> but no official request was endorsed as the Rwandan regime held a rotating seat.<sup>882</sup> The transitional government filed a new request,<sup>883</sup> while a UN Commission of Experts concluded that individuals from both sides to the armed conflict had committed crimes against humanity and that acts of genocide were committed against the Tutsi group and the International Criminal Tribunal for Rwanda (UNICTR) was set up shortly after.<sup>884</sup> It was tasked with prosecuting “persons responsible for serious violations of international humanitarian law committed in the territory of Rwanda and Rwandan citizens responsible for such violations committed in the territory of neighbouring States, between 1 January 1994 and 31 December 1994.”<sup>885</sup> In 22 years, the tribunal tried 82 Rwandans and one Belgian, while nine suspects remain at large.<sup>886</sup> Its residual work, after its closure in 2016, has been taken over by the Mechanism for International Criminal Tribunals (UNMICT).<sup>887</sup>

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Prunier, *From Genocide to Continental War. The 'Congolese' Conflict and the Crisis in Contemporary Africa* (London 2009); Filip Reyntjens, *The Great African War: Congo and Regional Geopolitics, 1996-2006* (Cambridge 2009).

<sup>878</sup> Most of the former Hutu-Power regime – or Interim Government -, army, militias and civilians who had taken part in the genocide had fled to Zaire (present days Democratic Republic of the Congo), from where they regrouped and launched attacks on Rwandan territory. RPF-forces, under the guise of the new Rwandan government launched counter attacks in Zaire and went to full war in October 1996, transplanting violence over the border.

<sup>879</sup> Besides the mechanisms further discussed in this paper, Rwanda established various post-genocide TJ initiatives: National Unity and Reconciliation Commission (NURC 1999); Ingando (solidarity camps); Abakangurambago (reconciliation volunteers); Ubusabana (community celebrations); Itorero (civic education); National Commission for the Fight Against Genocide (CNLG, 2007); Compensation and Reparation policy. See: Charles Villa-Vicencio, Paul Nantulya Tyrone Savage, *Building Nations. Transitional Justice in the African Great Lakes Region: Burundi, The DRC, Rwanda, Uganda* (Cape Town 2005), pp. 86-95.

<sup>880</sup> HRW (New York), the International Federation of Human Rights (Paris), the International Center of Human Rights and Democratic Development (Montreal), and the Interafrican Union of Human Rights (Ouagadougou). Among its members were two trained historians: Alison Des Forges and William Schabas. *Rapport de la commission internationale d'enquête sur les violations des droits de l'homme au Rwanda depuis 1er Octobre 1990 (7-21 janvier 1993). Rapport Final* (March 1993) or HRW, *Report of the International Commission of Investigation on Human Rights Violations in Rwanda since October 1, 1990 (January 7-21, 1993)* (New York: HRW, 1993); HRW, 'Rwanda: Human Rights Developments.' In: HRW, *World Report 1994: Events of 1993* (www-text: <http://www.hrw.org/reports/1994/WR94/Africa-06.htm>; last accessed September 20 2012); Priscilla B. Hayner, "Fifteen Truth Commissions - 1974 to 1994," *Human Rights Quarterly*, 16 (1994), pp. 597-633; 629-632; Hayner, *Unspeakable Truths*, p. 16; Paul Christophe Bornkamm, *Rwanda's Gacaca Courts: Between Retribution and Reparation* (New York: Cambridge University Press, 2012), pp. 22.

<sup>881</sup> UNSC, *Report of the Independent Inquiry into the Actions of the United Nations During the 1994 Genocide in Rwanda* (S/1999/1257, 15 December 1999), p. 68.

<sup>882</sup> Kingsley Moghalu, *Rwanda's Genocide: The Politics of Global Justice* (New York: Springer, 2005), p. 20.

<sup>883</sup> UNSC, *Letter Dated 28 September 1994 from the Permanent Representative of Rwanda to the United Nations addressed to the president of the Security Council* (S/1994/1115, 29 September 1994), p. 4.

<sup>884</sup> UNSC, *Preliminary Report of the Independent Commission of Experts established in accordance for Security Council Resolution 935 (1994)* (S/1994/1125, 4 October 1994), pp. 1-2.

<sup>885</sup> UNSC, *ICTR Statute*.

<sup>886</sup> Hannah van der Heijde & Thijs Bouwknegt, 'Ubutabera: Facts and case files from the International Criminal Tribunal for Rwanda (ICTR), *Transitional Justice Report* (4 January 2017).

<sup>887</sup> UNICTR, *Mechanism for International Criminal Tribunals (MICT) begins work in Arusha* (press release: ICTR/INFO-9-2-725.EN, 2 July 2012); UNSC, 'Annex 1: Statute of the International Residual Mechanism for Criminal Tribunals,' *Resolution 1966* (S/RES/1966, 22 December 2010).

On the national stage, the RPF reportedly arrested between 120,000 and 135,000 people, intending to criminally prosecute everyone involved in the massacres.<sup>888</sup> Simultaneously, the new Rwandan government, led by President Pasteur Bizimungu, convened an international conference to discuss its transitional justice strategy,<sup>889</sup> resulting in the establishment of specialised chambers in the ordinary and military courts to try genocide and crimes against humanity committed since October 1994.<sup>890</sup> Genocide offences were categorised<sup>891</sup> and a confession procedure<sup>892</sup> was put in place. The first trials began in December 1996 and from 1997 through June 2002, 7,211 persons were tried - of whom 1,386 were acquitted.<sup>893</sup> Several hundred people were sentenced to death but no public executions have been carried out since 24 April 1998.<sup>894</sup> Classic trials soon proved to be inadequate to criminally prosecute over a hundred thousand suspects in and outside the country and Rwanda established *Inkiko Gacaca*<sup>895</sup> – or *lawn courts* in Kinyarwanda – in 2001.<sup>896</sup> Thousands of *Inyangamugayo* – lay judges - were nominated to oversee the process of (1) truth finding; (2) speeding up trials; (3) combating impunity; (4) sparking national unity and reconciliation; and (5) demonstrating that Rwandans can resolve their own problems'.<sup>897</sup> From 10 March 2005 until the closing of Gacaca in June 2012, 12,103<sup>898</sup> grassroots courts throughout the whole country had tried 1,003,227 people in 1,958,634 cases.<sup>899</sup> Although the Gacaca procedures in Rwandan communities has met with praise and criticism from inside and outside Rwanda,<sup>900</sup> its process has microscopically documented its genocide to an unprecedented extent.<sup>901</sup> Besides Rwandan and supranational schemes, other models of inquiry and justice have dealt with the aftermath of the Rwandan genocide. Parliaments in Belgium, Switzerland and France installed special commissions of inquiry<sup>902</sup> while the

<sup>888</sup> Bornkamm, *Rwanda's Gacaca Courts*, p. 22.

<sup>889</sup> The conference stressed the need of bringing perpetrators of genocide to justice, rejected any consideration of amnesty and discussed two alternative proposals of specialised tribunals: a specialised court for genocide cases or a specialised chamber in ordinary courts. Besides criminal prosecutions, the conference discussed the possibility of a truth commission, traditional courts (Gacaca) and alternative sanctions. *Recommendations of the Conference held in Kigali from November 1<sup>st</sup> to November 5<sup>th</sup>, 1995* (Kigali, December 1995), pp. 8-9 & 16-24.

<sup>890</sup> *Organic Law No 08/96 of 30<sup>th</sup> August 1996 on The Organization of the Prosecutions for Offences Constituting the Crime of Genocide or Crimes Against Humanity Committed since 1 October 1990*, Official Gazette of the Republic of Rwanda, Year 35, No. 17 (1 September 1996), art. 1.

<sup>891</sup> Category 1: a) planners, organisers, instigators, supervisors and leaders; 1b) official, military, religious or militia perpetrators and fosterers; c) notorious murderers; d) sexual offenders; Category 2: perpetrators, conspirators or accomplices of murder; Category 3: persons who assaulted others; Category 4: persons who committed offences against property. *Organic Law No 08/96 of 30<sup>th</sup> August 1996*, art. 2.

<sup>892</sup> Confessions required: (a) a detailed description of all the offences, including the date, time and the scene of each act, as well as the names of victims and witnesses; (b) information with respect to accomplices, conspirators and all other information useful to the exercise of public prosecution; (c) an apology; (d) an offer to plead guilty.

<sup>893</sup> Alison Des Forges & Timothy Longman, 'Legal Responses to Genocide in Rwanda' In: Eric Stover & Harvey M. Weinstein (eds.) *My Neighbour, My Enemy. Justice and Community in the Aftermath of Mass Atrocity* (Cambridge University Press 2004), pp. 49-68: 59; William Schabas estimated 10,000 cases by 2005: William A. Schabas, 'Genocide Trials and Gacaca Courts', *Journal of International Criminal Justice*, No. 3 (2005), pp. 879-895; Nicholas A. Jones, *The Courts of Genocide. Politics and the Rule of Law in Rwanda and Arusha* (New York: Routledge, 2010), pp. 88; HRW, *Law and Reality. Progress in Judicial Reform in Rwanda* (New York: HRW, 2008).

<sup>894</sup> Des Forges, 'Legal Responses to Genocide in Rwanda', pp. 60-61. The death penalty was abolished in 2007: *Organic Law No 31/2007 of 25 July 2007 relating to the abolition of the death penalty*, Official Gazette of the Republic of Rwanda, Year 46, No, special (25 July 2007).

<sup>895</sup> Bert Ingelaere, *Peasants, Power and the Past. The Gacaca Courts and Rwanda's Transition From Below* (Doctoral dissertation; Antwerp 2012); Bornkamm, *Rwanda's Gacaca Courts*; Phil Clark, *The Gacaca Courts and Post-Genocide Justice and Reconciliation in Rwanda: Justice without Lawyers* (Cambridge: Cambridge University Press, 2010).

<sup>896</sup> 'Organic Law N° 40/2000 Of 26/01/2001 Setting up "Gacaca Jurisdictions" and Organizing Prosecutions for Offences Constituting the Crime of Genocide or Crimes against Humanity Committed Between October 1, 1990 and December 31, 1994', *Official Gazette of the Republic of Rwanda*, n°6 (15 March 2001). The law was thoroughly amended the process: 15 July 2001; 19 June 2004; 12 July 2006; 1 March 2007; and 1 June 2008.

<sup>897</sup> Republic of Rwanda, National Service of Gacaca Courts (NSGC), *Summary of the Report Presented at the Closing of Gacaca Courts Activities* (Kigali, June 2012), p. 34.

<sup>898</sup> Gacaca was carried out at three levels of jurisdiction: the Gacaca Court of the Cell, the Gacaca Court of the Sector, and the Gacaca Court of Appeals. In total there were 9,013 Cell Courts; 1,545 Sector Courts (plus 1,803 additional benches to complement these courts; 1545 Courts of Appeal (plus 412 additional benches). See: NSGC, *Summary Report*, p. 33.

<sup>899</sup> For a complete overview of cases, convictions, guilty pleas as well as a timeline see: NSGC, *Summary Report*, pp. 34-39.

<sup>900</sup> For instance: HRW, *Rwanda. Justice Compromised. The Legacy of Rwanda's Community-Based Gacaca Courts* (New York: HRW, 2011).

<sup>901</sup> The Gacaca archive currently consists of some 20,000 boxes, which are kept in 1,000 square meters large building at the National Police Headquarters in Kigali.

<sup>902</sup> Joseph Voyame, Richard Friedli, Jean-Pierre Gern & Anton Keller, *La Cooperation Suisse au Rwanda. Rapport du Groupe d'Etude institue par le DFAE* (Departement Federal des Affaires Etrangeres; Bern 1996); Senat de Belgique, Commission d'Enquete parlementaire concernant les evenements au Rwanda, *Rapport fait au nom de la commission d'enquete par MM Mahoux et Verhofstadt*, Senat de Belgique, session de 1997-1998 (6 December 1997); and France:

UN and the Organisation of African Unity (now African Union: AU) investigated the 1994 bloodbath on their behalf.<sup>903</sup> In addition to these fact-finding exercises, a range of non-African countries opted for criminal prosecutions under the principle of *universal jurisdiction*.<sup>904</sup> Some of these countries have sent criminal files to Arusha or *vice versa*, including transfers to a specialised international crimes chamber in Rwanda.<sup>905</sup>

### 3.8 Case Study 2: Sierra Leone

While the genocide against Tutsi received unprecedented judicial attention, responses to the large-scale killings, amputations and annihilation in Sierra Leone took place in the shadow of Rwanda. Between March 1991 and January 2002, the Republic of Sierra Leone saw insurgency, civil war, a military junta and foreign intervention.<sup>906</sup> The Revolutionary United Front (RUF), the Armed Forces Revolutionary Council (AFRC), the Civil Defence Forces (CDF), the Sierra Leonean Army (SLA), ECOMOG peacekeepers and (foreign) mercenary groups are all reported to have perpetrated mass atrocities.<sup>907</sup> In 1999, violence paused after the signing of a peace agreement in Lomé (*Lomé Agreement*), which, *inter alia*, provided for disarmament, amnesty<sup>908</sup> and a truth and reconciliation commission.<sup>909</sup> Hostilities resumed in May 2000 and a month later, President Tejan Kabbah invited the UN to set up a tribunal “to try and bring to credible justice those members of the Revolutionary United Front (RUF) and their accomplices [...]”<sup>910</sup> He declared that the war was over during a symbolic ‘Arms Burning Ceremony’ on 18 January 2002.

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Assemblée Nationale, *Rapport D'Information Par la Mission D'Information de la Commission de le Defense Nationale et des Forces Armees et de la Commission des Affaires Etrangères, sur les opérations militaires menées par la France, d'autres pays et l'ONU au Rwanda entre 1990 et 1994* (December 1998).

<sup>903</sup> UNSC, *Independent Inquiry into the Actions of the United Nations During the 1994 Genocide in Rwanda*; Organisation of African Unity: International Panel of Eminent Personalities to Investigate the 1994 Genocide in Rwanda and the Surrounding Events, *Rwanda. The preventable genocide* (Organisation of African Unity 2000).

<sup>904</sup> Judiciaries in Belgium, The Netherlands, Canada, Switzerland, France, Finland, Germany, the United Kingdom (UK), the United States of America (USA), Denmark, Sweden, Norway and Spain have investigated, indicted or tried dozens of Rwandans suspected of crimes committed in 1994. Most cases concerned genocide crimes, while few dealt with alleged crimes committed by the Rwandan Patriotic Front (RPF). Judge Jean Louis Bruguiere indicted nine RPF staff members, including the present Minister of Defence James Kabarebe, for having been involved in the assassination of President Habyarimana in the airplane attack on 6 April 1994. See: Tribunal de Grande Instance de Paris, *Délivrance de Mandats D'Arrêts Internationaux* (Parquet 972952303/0, Cabinet 41; Paris 17 November 2006). Spanish Investigative Judge Andreu Merelles indicted 40 high ranking Rwandan officials: *Juzgado Central de instruccion No. 4, Audiencia Nacional, Sumario 3/2.008 – D. Auto* (7 February 2008). See also: International Federation for Human Rights (FIDH) & Redress Trust (REDRESS), *Universal Jurisdiction Trial Strategies. Focus on victims and witnesses. A report on the Conference held in Brussels, 9-11 November 2009* (November 2010).

<sup>905</sup> Cour de Cassation (ch. des vac.), *Proc. gén., demandeur en désaisissement, en cause B T* (n° P.96.0869 F; 9 July 1996); The Court of *Interlocutory decision*. L.J.N: BB8462 (Rechtbank 's-Gravenhage, 09/750009-06 + 09/750007-07 English translation; 24 July 2007); UNICTR, ‘Tribunal Transfers Two Accused to France for Trial, *Press Release* (ICTR/INFO-9-2-538.EN; 20 November 2007); and UNICTR, ‘Munyarugarama Case Transferred to Rwanda’, *Press Release* (ICTR/INFO-9-2-724.EN; 28 June 2012).

<sup>906</sup> See for a selection of studies on Sierra Leone: Rosalind Shaw, *Memories of the slave trade. Ritual and the historical Imagination in Sierra Leone* (Chicago & London 2002); John L. Hirsch, *Sierra Leone: Diamonds and the Struggle for Democracy* (London 2001); Christopher Fyfe, *A history of Sierra Leone* (Aldershot 1993); Lansana Gberie, *A dirty war in West Africa. The R.U.F and the destruction of Sierra Leone* (London 2005); David Keen, *Conflict and Collusion in Sierra Leone* (New York 2005); Adekeye Adebajo, *Building Peace in West Africa. Liberia, Sierra Leone, and Guinea-Bissau* (London 2002), pp. 80-81; Paul Richards, *Fighting for the rain forest. War, youth & Resources in Sierra Leone* (Oxford 2002); Krijin Peters, *Footpaths to reintegration. Armed Conflict, Youth and the Rural Crisis in Sierra Leone* (Wageningen 2006); William Reno, *Corruption and State Politics in Sierra Leone* (Cambridge 1995); Ibrahim Abdullah (ed.), *Between Democracy and Terror. The Sierra Leone civil war* (Dakar 2004); L. Alison Smith, Catherine Gambette and Thomas Longley, *Conflict Mapping in Sierra Leone: Violations of International Humanitarian Law from 1991 to 2002* (No Peace without justice; March 2004).

<sup>907</sup> TRCSL, *Witness to Truth*, Vol. II, pp. 3-22.

<sup>908</sup> During the signing ceremony, the UN representative, Moses Okello, added a last-minute handwritten disclaimer for international crimes to the broad amnesty provisions. It reads: “The UN holds the understanding that the amnesty provisions of the Agreement shall not apply to international crimes of genocide, crimes against humanity, war crimes and other serious violations of international humanitarian law.” William A. Schabas, ‘Amnesty, the Sierra Leone Truth and Reconciliation Commission and the Special Court for Sierra Leone’, *Davis Journal of International Law & Policy*, 11 (2004), pp. 145-169; 148 & 149 & Priscilla Hayner, *Negotiating peace in Sierra Leone: Confronting the Justice Challenge* (Geneva 2007), pp. 17-18.

<sup>909</sup> *Peace Agreement between the government of Sierra Leone and the Revolutionary United Front of Sierra Leone*, 7 July 1999 (S/1999/777; 12 July 1999).

<sup>910</sup> UNSC, *Annex to the letter dated 9 August 2000 from the Permanent Representative of Sierra Leone to the United Nations addressed to the President of the Security Council* (S/2000/786; 10 August 2000).



Amnesty, prosecutions, truth finding, reconciliation, reparations and re-integration were used in Sierra Leone to transcend to peace.<sup>911</sup> The government and the UN jointly established the Special Court for Sierra Leone (SCSL).<sup>912</sup> Based in Freetown, Leidschendam and The Hague, this *hybrid* and self-sufficient court investigated and prosecuted those who bear the ‘greatest responsibility’ for violations of international humanitarian law and Sierra Leonean law committed in Sierra Leone since 30 November 1996.<sup>913</sup> Nine Sierra Leoneans (three RUF, two CDF and three AFRC) and the former Liberian president Charles Taylor have been tried and convicted. Other prime suspects died in detention were murdered or remain at large.<sup>914</sup> *In lieu* of the blanket amnesty, national courts in Sierra Leone refrained from prosecuting pre-Lomé atrocities. However, in 2005 and 2006, the High Court in Freetown held two trials against 88 individuals for war related crimes perpetrated in 2000. It convicted ten members of the RUF/P and seven members of the West Side Boys (WSB).<sup>915</sup> Next to international prosecutions, a truth and reconciliation commission<sup>916</sup> carried out its work between 2002 until 2004.<sup>917</sup> It was mandated to establish an impartial historical record of the conflict and human rights abuses, to address impunity, to respond to the needs of victims, to promote healing and reconciliation and to prevent recurrence of violence.<sup>918</sup> But the SCSL and TRC formal processes were driven by concepts of justice,<sup>919</sup> truth and reconciliation, which were alien to local communities.<sup>920</sup> In this vacuum, non-governmental initiatives sought to build a bridge between *high-level* and *low-level* transitional justice. An exemplary mechanism is *Fambul Tok* (‘Family Talk’ in Krio), which facilitated unofficial community-based reconciliation gatherings.<sup>921</sup> Through drawing on age-old customs of confession, apology and forgiveness, communities throughout the country have been organising ceremonies that included truth-telling *bonfires* and cleansing ceremonies.<sup>922</sup>

<sup>911</sup> Martien Schotsmans, ‘Blow your mind and cool your heart’: can tradition-based justice fill the transitional justice gap in Sierra Leone?, in: Nicola Palmer, Phil Clark and Danielle Granville (eds.), *Critical Perspectives in Transitional Justice* (Intersentia 2012), pp. 263-287.

<sup>912</sup> *Agreement between the United Nations and the government of Sierra Leone on the establishment of a Special Court for Sierra Leone & Statute of the Special Court for Sierra Leone*.

<sup>913</sup> *Statute of the Special Court for Sierra Leone*.

<sup>914</sup> RUF: SCSL, Appeals Chamber, *The Prosecutor against Issa Hassan Sesay, Morris Kallon & Augustine Gbao: Judgement* (SCSL-04-15-A; 26 October 2009); CDF: SCSL Appeals Chamber, *The Prosecutor against Moinina Fofana & Allieu Kondewa: Judgement* (SCSL-04-14-A; 28 May 2008); AFRC: SCSL Appeals Chamber, *The Prosecutor against Alex Tamba Brima, Brima Bazzy Kamara, Santigie Barbor Kanu: Judgement* (Case. No.: SCSL-2004-16-A; 28 February 2008); and SCSL, *Prosecutor versus Charles Ghankey Taylor: Judgement* (SCSL-03-01-T; The Hague 18 May 2012). Prime suspects Foday Saybana Sankoh (RUF) & Samuel Hinga Norman (CDF) died in prison. Samuel Bockarie (RUF) was killed. Johnny Paul Koroma (AFRC) remains at large.

<sup>915</sup> Sigall Horowitz, *Sierra Leone: Interaction between International and National Responses to the Mass Atrocities*, (DOMAC, 2009), pp. 26 – 30.

<sup>916</sup> ‘The Truth and Reconciliation Commission Act 2000’, *Supplement to the Sierra Leone Gazette Vol. CXXXI*, (Freetown, 10 February 2000).

<sup>917</sup> On the difficulties caused by this coexistence, see William A. Schabas, *The Relationship between Truth Commissions and International Courts: The Case of Sierra Leone*, *Human Rights Quarterly*, 2003, 1035-1066.

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

<sup>919</sup> Schotsmans, ‘Blow your mind and cool your heart’, 263-287; Joe A.D. Alie, ‘Reconciliation and traditional justice: tradition-based practices of the Kpaa Mende in Sierra Leone’ in: Luc Huysse and Mark Salter, eds., *Traditional Justice after Violent Conflict. Learning from African experiences* (Stockholm 2008), pp. 123-146.

<sup>920</sup> Although customary justice systems existed among communities in Sierra Leone they are reported to be insufficient to reckon with the scale of the atrocities. Kelsall, *Culture under Cross-Examination*; Edward Sawyer & Tim Kelsall, ‘Truth versus Justice? Popular views on the Truth and Reconciliation Commission and the Special Court for Sierra Leone’, *Online Journal of Peace and Conflict Resolution*, No. 7.1 (2007), pp. 36-68; & Martien Schotsmans, ‘Blow your mind and cool your heart’, pp. 263-287.

<sup>921</sup> Developed by the Sierra Leonean *Forum of Conscience* and *Catalyst for Peace* (USA), *Fambul Tok* incorporated as an international non-governmental organisation, *Fambul Tok International* (FTI), in late 2009. *Fambul Tok International*, ‘About us’ (www-text: <http://www.fambultok.org/about-us>, last visit: 4 February 2013).

<sup>922</sup> Elizabeth Hoffman, ‘Reconciliation in Sierra Leone: Local Processes Yield Global Lessons’, *The Fletcher Forum of World Affairs*, 32 (2) (Summer 2008), pp. 129-141; 132; Schotsmans, ‘Blow your mind and cool your heart’, 263-287; Katerina Werkman, *Seeking community reconciliation through traditional practice. The Sierra Leonean experience* (PhD Thesis; Prague 2012); and *Fambul Tok* (www-text: <http://www.fambultok.org>, last visit 25 September 2012).

Liberia's back-to-back conflicts [1989-2003] were closely intertwined with the Sierra Leonean war. Charles Taylor, the former Liberian president, played a central role in west-African politics and was a prime subject in transitional justice enterprises in the region.<sup>923</sup> He stepped down after the Special Court warranted his arrest in 2003, leading to a Liberian peace agreement that called for a truth and reconciliation commission.<sup>924</sup> Established in 2005, the TRC was to investigate Liberia's 'turbulent history' between 1979 and 2003 and recommend steps towards peace, justice, and reconciliation.<sup>925</sup> The first hearing began on 8 January 2008, one day after the first prosecution witness appeared in the trial against Taylor in The Hague.<sup>926</sup> The commission released its final report in June 2009<sup>927</sup> and recommended reparations, memorialisation, purges, institutional reform and criminal accountability.<sup>928</sup> Among the key advices is the erection of an Extraordinary Criminal Court, before which Charles Taylor was listed to be prosecuted, among others.<sup>929</sup> Unique to Liberian TRC was that it also sought to include Liberians abroad. It established a Diaspora Committee that, with assistance from the NGO *Advocates for Human Rights*, gathered statements from Liberians living in the United States of America (USA), the United Kingdom (UK) and Ghana and held public hearings in St. Paul, Minnesota (USA), in June 2008. The Diaspora Project published its own report, documenting experiences by members of the Diaspora during their flight through Liberia and across international borders, while living in refugee camps in West Africa and in resettlement in the US and UK.<sup>930</sup> In line with the historical connections and Diaspora representation, the USA judiciary tried Charles Taylor his son – Roy Belfast – or better known as “Chuckie” Taylor - for torture committed by Taylor's Anti-Terrorist Unit (ATU). He was sentenced to 97 years in prison.<sup>931</sup> Another case concerning serious crimes committed in Liberia is due for retrial at a Dutch appeals court, against

<sup>923</sup> Colin M. Waugh, *Charles Taylor and Liberia. Ambition and Atrocity in Africa's Lone Star State* (London & New York: Zed Books, 2011); Adebajo, *Building Peace in West Africa*; Adekeye Adebajo, *Liberia's civil war. Nigeria, ECOMOG, and Regional Security in West Africa* (Boulder & London 2002); AI, *Liberia: Truth, Justice, Reparation for Liberia's victims* (AI Index: AFR 34/001/2007; 15 February 2007);

<sup>924</sup> Abdul Tejan-Cole, 'A Big Man in a Small Cell: Charles Taylor and the Special Court for Sierra Leone', in: Ellen L. Lutz & Caitlin Reiger (eds), *Prosecuting Heads of State* (Cambridge 2009), pp. 205-233; SCSL, *The Prosecutor against Charles Ghankay Taylor also known as Charles Ghankay MacArthur Dapkpama Taylor: indictment* (SCSL-03-1; 3 March 2003); *Comprehensive Peace Agreement Between the Government of Liberia and the Liberians United for Reconciliation and Democracy (LURD) and the Movement for Democracy in Liberia (MODEL) and Political Parties* (Accra, 18 August 2003); and Priscilla Hayner, "Negotiating Peace in Liberia: Preserving the possibility for Justice," (Humanitarian Dialogue Center: 2007).

<sup>925</sup> Ministry of Foreign Affairs [Liberia], *An Act to Establish the Truth and Reconciliation Commission (TRC) of Liberia. Approved June 10, 2005* (Monrovia, 22 June 2005), art. IV.

<sup>926</sup> Gibson W. Jerue, 'Liberians exhume the catalogue of horrors', *International Justice Tribune*, 81 (21 January 2008), pp. 3-4.

<sup>927</sup> Republic of Liberia Truth and Reconciliation Commission (TRCL), *Volume I: Preliminary Findings and Determinations Consolidated Final Report* (Monrovia 2009) & Republic of Liberia Truth and Reconciliation Commission (TRCL), *Volume II: Consolidated Final Report* (Monrovia 30 June 2009). A unique feature of the Liberian TRC was that it gathered statements from Liberians living in the United States of America (USA), the United Kingdom (UK) and Ghana, held public hearings in St. Paul, Minnesota (USA) and published a separated Diaspora report. Republic of Liberia Truth and Reconciliation Commission (TRCL), *Volume III, Appendix VII: A House with Two Rooms Final Report of the Truth and Reconciliation Commission of Liberia Diaspora Project: Executive Summary and Priority Recommendations* (Monrovia 2009) & The Advocates for Human Rights, *A House with Two Rooms: Final Report of the Truth and Reconciliation Commission of Liberia Diaspora Project* (St. Paul 2009). For a broader analysis: Laura A. Young & Rosalyn Park, 'Engaging Diasporas in Truth Commissions: Lessons from the Liberia Truth and Reconciliation Commission Diaspora Project', *International Journal for Transitional Justice*, Vol. 3 (2009), pp. 341-361.

<sup>928</sup> The recommendations include: an extraordinary criminal tribunal; a domestic criminal court to prosecute 58 individuals for gross violations of human rights, violations of international humanitarian law and domestic crimes: reprieve from prosecution for 38 individuals who cooperated with the TRC admitted to committing crimes; lustration, purification or banning of 49 individuals, including President Ellen Johnson Sirleaf from public office for 30 years; traditional truth-seeking and reconciliation processes through a "Palava Hut" system; a Reparations Trust Fund; observance of a national memorial and unification day; protection and promotion of the rights of women and children. Other recommendations include further investigations into the activities of listed individuals with regard to economic crimes, the confiscation and seizure of private and public properties, repatriation of unlawfully acquired monies, and the building of a new culture and integrity in politics, as well as in the administration of justice.

<sup>929</sup> See: 'Annex 2. Draft Statute: Extraordinary Criminal Court', in: TRCL, *Report*, Vol. II, pp. 426-459.

<sup>930</sup> TRCL, *Volume III, Appendix VII: A House with Two Rooms Final Report of the Truth and Reconciliation Commission of Liberia Diaspora Project: Executive Summary and Priority Recommendations* (Monrovia 2009) & The Advocates for Human Rights, *A House with Two Rooms: Final Report of the Truth and Reconciliation Commission of Liberia Diaspora Project* (St. Paul 2009). For a broader analysis: Laura A. Young & Rosalyn Park, 'Engaging Diasporas in Truth Commissions: Lessons from the Liberia Truth and Reconciliation Commission Diaspora Project', *International Journal for Transitional Justice*, Vol. 3 (2009), pp. 341-361.

<sup>931</sup> Department of Justice, 'Roy Belfast Jr., A/K/A Chuckie Taylor, Sentenced on Torture Charges', *Press Release* (09-021; 9 January 2009) & United States Court of Appeals for the Eleventh Circuit, *United States of America versus ROY M. BELFAST, JR., a.k.a. Chuckie Taylor, a.k.a. Charles McArthur Emmanuel, a.k.a. Charles Taylor, Jr. a.k.a. Charles Taylor, II: Appeal from the United States District Court for the Southern District of Florida* (09-10461; 15 July 2010).

Guus Kouwenhoven. The former Businessman allegedly breached the UN arms embargo for Liberia.<sup>932</sup>

### 3.9 Case Study 3: The Democratic Republic of the Congo

While the genocide against Rwandan Tutsi received unprecedented judicial attention and the atrocities in Sierra Leone have been addressed legally and were ‘truth commissioned’, the many cyclical episodes historical mass atrocity in the eastern parts of the Democratic Republic of Congo (DRC<sup>933</sup>) were addressed relatively marginally. Yet, they were closely related to events in bordering Rwanda.<sup>934</sup> Unlike Rwanda and Sierra Leone, which are relatively small states with relatively comprehensible histories, Congo is amazingly vast in not just these two respects, it also relates to other countries, specifically bordering Rwanda.<sup>935</sup> Since March 1993,<sup>936</sup> particularly the eastern provinces<sup>937</sup> of Congo saw ethnic violence, acts of genocide, refugee crises, insurgency, two full-scale international wars, internal rebellion, civil war and plunder of natural resources. Congolese government forces, paramilitary groups, militias, rebel groups, civil defence forces, an array of foreign armies and UN peacekeepers all reportedly committed atrocities in the past.<sup>938</sup> Despite the presence of UN forces,<sup>939</sup> violence is ever continuing.<sup>940</sup> Omnipresent impunity, prosecutions, truth seeking, demobilisation and re-integration and amnesty<sup>941</sup> were used in Congo to respond to the back-to-back outbreaks of violence.

Congo’s 2002 ‘transition’ – towards peace under the new Presidency of Joseph Kabila - was blueprinted in South Africa’s Sun City, at the Inter-Congolese Dialogue, comprising 362 Congolese officials, political opponents, rebel groups and *forces vives*.<sup>942</sup> They agreed, *inter alia*, on a truth and

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<sup>932</sup> Hoge Raad Der Nederlanden, *Uitspraak* (LJN: BK8132, Hoge Raad, 08/01322; 20 April 2010) or Supreme Court of The Netherlands, *Summary judgment in Guus K. case* (www-text: <http://www.rechtspraak.nl/Organisatie/Hoge-Raad/Supreme-court/Summaries-of-some-important-rulings-of-the-Supreme-Court/Pages/Summary-judgment-in-Guus-K-case.aspx>, last visit: 27 September 2012).

<sup>933</sup> As the DRC was formerly known as “Zaire”, this name may appear in this dissertation for the period between 1971 and May 1997. The names of the territory - ‘Congo Free State’, ‘Belgian Congo’ and ‘Republic of the Congo’ - refer the pre-1971 situation. For the sake of clarity, this country should not be confused with the much smaller bordering territory of the Republic of the Congo (also known as Congo-Brazzaville). When writing ‘Congo’ in this dissertation, it refers to Zaire or the DRC, unless otherwise specified.

<sup>934</sup> René Lemarchand, *The Dynamics of Violence in Central Africa* (Philadelphia: University of Pennsylvania Press, 2009).

<sup>935</sup> See in this respect: Gérard Prunier, *From Genocide to Continental War. The ‘Congolese’ Conflict and the Crisis of Contemporary Africa*. (London: Hurst Publishers, 2009); Jason Stearns, *Dancing in the Glory of Monsters. The Collapse of the Congo and Great war of Africa* (New York: Public Affairs, 2011).

<sup>936</sup> Violence in Zaire/DRC can be traced back to much earlier times and many other instances. Yet, for the sake of clarity, I choose March 1993, analogous to the two so-called *UN Mapping Report*. March 1993 corresponds with the Ntoto market massacre of Banyarwanda (‘People from Rwanda’) peasants and Hutu civilians in North Kivu, which triggered wider ethnic conflict. See: OHCHR, *Report of the Mapping Exercise*, p. 2: note 3; 58. The Congolese Truth and Reconciliation Commission divides it mandated period in two: 1960 to 1992 and 1993-2006. The latter period corresponds with the democratisation process under Joseph Mobutu Sese Seko.

<sup>937</sup> Province Orientale, Nord-Kivu and Sud-Kivu.

<sup>938</sup> See for instance: Reybrouck, *Congo*; Stearns, *Dancing in the Glory of Monsters*; OHCHR, *Report of the Mapping Exercise*; Filip Reyntjens, *The Great African War. Congo & Regional Politics 1996-2006* (Cambridge 2009); Gerard Prunier, *Africa’s World War: Congo, the Rwandan genocide and the making of a catastrophe* (Oxford 2009).

<sup>939</sup> Since 2013, the UN created an ‘Intervention Brigade’ to take offensive action against militias and permitted the use of unmanned aerial vehicles (UAV’s), known as drones, by the United Nations Organisation Stabilisation Mission in the Democratic Republic of the Congo (MONUSCO). UNSC, *Resolution 2098* (S/RES/2098 (2013); 28 March 2013); Michelle Nichols, ‘U.N. Security Council allows drones for eastern Congo’, *Reuters*, 24 January 2013.

<sup>940</sup> See, *inter alia*, the subsequent reports – since 2004 - of the Group of Experts submitted through the UN Security Council Committee concerning the Democratic Republic of the Congo (www-page: <http://www.un.org/sc/committees/1533/egroup.shtml>; last visit: 5 May 2014). Established through: UNSC, *Resolution 1533* (S/RES/1533 (2004); 12 March 2004).

<sup>941</sup> République Démocratique du Congo, Ministère de La Justice et Droits Humains, *Arrêté Ministériel No 109/CAB/MIN/J&DH/2014 du 14 AVR 2014 Relatif à l’Exécution de la Loi No 14/006 du 11 Février 2014 Portant Amnistie pour Faits Insurrectionnels, Faits de Guerre et Infractions Politiques*, Kinshasa, 14 April 2014. And subsequently: Idem, *Arrêté Ministeriel No 110, 111, 112, 113, 114 & 120*.

<sup>942</sup> A detailed account on the negotiations can be found in: ICG, ‘Storm Clouds over Sun City: The Urgent Need to Recast the Congolese Peace Process’, *ICG Africa Report*, No. 44 (Brussels & Nairobi, 14 May 2002).

reconciliation commission,<sup>943</sup> which was later, enshrined in the 2003 Transitional Constitution<sup>944</sup> and established the following year.<sup>945</sup> The *Commission Verité et Reconciliation* (CVR) was tasked with investigating political crimes and human rights abuses between Congo's independence on 30 June 1960 up to prospective "end of the transition" on 30 June 2006.<sup>946</sup> Largely ineffective,<sup>947</sup> the commission concluded that a new truth commission should be created, something that never happened.<sup>948</sup> Whilst the CVR law was still in the making in March 2004, Congo invited the ICC to investigate and prosecute possible offenders of crimes of genocide, war crimes or crimes against humanity.<sup>949</sup> The ICC investigations in the Ituri Provinces<sup>950</sup> led the arrests of several Congolese militiamen, including Thomas Lubanga Dyilo,<sup>951</sup> Germain Katanga, Mathieu Ngudjolo Chui,<sup>952</sup> and Bosco Ntaganda.<sup>953</sup> Further investigations in the Kivu Provinces into atrocities by the *Forces Democratiques de Liberation de Rwanda* (FDLR) - a militia formed out of the ranks of former Rwandan *génocidaires* -<sup>954</sup> led to the arrest of Rwandan national Callixte Mbarushimana<sup>955</sup> and a public arrest warrant for Rwandan national Sylvestre Mudacumura,<sup>956</sup> both on atrocity charges.<sup>957</sup>

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

<sup>944</sup> Cabinet de Président de la République, 'Constitution de la Transition', *Journal Officiel de la République Démocratique du Congo*, 44eme Année, Numéro Spécial (5 April 2003), art. 154-160.

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

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

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

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

<sup>949</sup> République Démocratique du Congo, Le Président, *A Monsieur Luis Moreno Ocampo. Procureur près Cour Pénale Internationale de La Haye à Amsterdam (Pays-Bas)*, Kinshasa, 3 March 2004 (Doc. No. ICC-01/04-01/06-39-AnxB1; The Hague 23 March 2006). See also: ICC, 'ICC – Prosecutor receives referral of the Situation on the Democratic Republic of the Congo', *Press Release* (Doc. No. ICC-OTP-20040419-50; 19 March 2004).

<sup>950</sup> ICC, 'ICC – The Office of the Prosecutor of the International Criminal Court opens its first investigation', *Press Release* (Doc. No. ICC-OTP-20040623-59; 23 June 2006). Also see: Bouwknecht, 'How did the DRC become the ICC's Pandora's Box?'

<sup>951</sup> Leader Union des Patriotes Congolais (UPC) and its military wing, Forces Patriotiques pour la Libération du Congo (FPLC). ICC, *Situation en République Démocratique du Congo Affaire le Procureur c/ Thomas Lubanga Dyilo: Mandat d'arrêt* (ICC-01/04-01/06; The Hague 10 February 2006).

<sup>952</sup> Former leaders of – respectively - the Force de Résistance Patriotique en Ituri ("FRPI") and Front des Nationalistes et Intégrationnistes (FNI). ICC, *Situation in the Democratic Republic of the Congo: The Prosecutor V. Germain Katanga and Mathieu Ngudjolo Chui: Decision on the Joinder of the Cases against Germain Katanga and Mathieu Ngudjolo Chui* (ICC-01/04-01/07; 10 March 2008).

<sup>953</sup> ICC, *Situation in the Democratic Republic of the Congo: The Prosecutor v. Bosco Ntaganda. Warrant of Arrest* (ICC-01/04-02/06; 22 August 2006). A second extended arrest warrant and charge sheet were issued 6 years later, but do not include Ntaganda's alleged criminal record as leader of the CNDP: ICC, *Situation in the Democratic Republic of the Congo: The Prosecutor v. Bosco Ntaganda. Decision on the Prosecutor's Application under Article 58* (ICC-01/04-02/06; 13 July 2012).

<sup>954</sup> See for background reports: HRW, *Democratic Republic of the Congo. "You Will Be Punished." Attacks on Civilians in Eastern Congo* (New York 2009); OHCHR, *Report of the Mapping Exercise*.

<sup>955</sup> See for a personality profile: Thijs Bouwknecht, 'ICC aims at Mbarushimana', *International Justice Tribune*, No. 135 (14 September 2011), p. 3.

<sup>956</sup> ICC, *Situation en République Démocratique du Congo: Affaire le Procureur c. Sylvestre Mudacumura. Demande d'arrestation et de remise de Sylvestre Mudacumura adressée ala République Démocratique du Congo* (ICC-01/04-01/12; 28 August 2012).

<sup>957</sup> Nine counts of war crimes, from 20 January 2009 to the end of September 2010, in the context of the conflict in the Kivus, including: attacking civilians, murder, mutilation, cruel treatment, rape, torture, destruction of property, pillaging and outrages against personal dignity. ICC, *Situation in the Democratic Republic of the Congo in the Case of the Prosecutor v. Sylvestre Mudacumura: Decision on the Prosecutor's Application under Article 58* (ICC-01/04-01/12; 13 July 2012), p. 29.

Next to the ICC's interventions,<sup>958</sup> numerous military tribunals throughout Congo<sup>959</sup> investigated, prosecuted, judged and sentenced scores of rebel fighters, government soldiers and civil defence warriors for international crimes.<sup>960</sup> Apart from these 'sedentary' tribunals, a system of mobile courts<sup>961</sup> was introduced in October 2009.<sup>962</sup> Apart from these scattered courts, debate about the establishment of a specialised mixed jurisdiction for Congo with a longer historical mandate – alongside a new truth commission<sup>963</sup> – has been on the agenda as well,<sup>964</sup> but at the time of writing it has not been established.<sup>965</sup> Against this background, the cooperation between Congolese authorities and the ICC have matured.<sup>966</sup> Along the way, outside Congo, a handful of universal jurisdiction cases against Congolese failed<sup>967</sup> but increasingly led to success in The Netherlands<sup>968</sup> and Germany.<sup>969</sup> Crimes in Congo were listed in the arrest warrant for 40 Rwandans by a Spanish judge in 2008.<sup>970</sup> Arrested in January 2009 in Rwanda, the judicial faith of Laurent Nkunda Batware remains

<sup>958</sup> The ICC's cases resulted in three convictions, one acquittal and one release before trial. Three other Congolese went on trial, not for atrocities but for contempt charges. ICC, *Situation in the Democratic Republic of the Congo. Prosecutor vs. Lubanga: Judgment pursuant to Article 74 of the Statute* (16 March 2012); & ICC, *Situation en République Démocratique du Congo. Affaire le Procureur c. Germain Katanga: Jugement rendu en application de l'article 74 de Statut* (ICC-01/04/01/07; 7 March 2014); ICC, *Situation in the Central African Republic in the Case of the Prosecutor v. Jean-Pierre Bemba Gombo: Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo* (ICC No. ICC-01/05-01/08; 15 June 2009); 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, *Situation en République Démocratique du Congo. Affaire le Procureur c. Mathieu Ngudjolo: Jugement rendu en application de l'article 74 du Statut* (ICC-01/04-02/12; 18 December 2012); ICC, *Ntaganda. Warrant of Arrest* (22 August 2006). A second extended arrest warrant and charge sheet were issued 6 years later: ICC, *Situation in the Democratic Republic of the Congo: The Prosecutor v. Bosco Ntaganda. Decision on the Prosecutor's Application under Article 58* (ICC-01/04-02/06; 13 July 2012); ICC, *Situation en République Démocratique du Congo. Affaire le Procureur c. Sylvestre Mudacumura: Demande d'arrestation et de remise de Sylvestre Mudacumura adressée à la République Démocratique du Congo* (ICC-01/04-01/12; 28 August 2012); ICC, *Situation en République Centrafricaine. Affaire Le Procureur c. Jean-Pierre Bemba Gombo, Aime Kilolo Musamba, Jean-Jacques Mangenda Kabongo, Fidele Babala Wandu et Nercisse Arido: Mandat d'arrêt à l'encontre Jean-Pierre Bemba Gombo, Aime Kilolo Musamba, Jean-Jacques Mangenda Kabongo, Fidele Babala Wandu et Nercisse Arido* (ICC-01/05-01/13; 20 November 2013).

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

<sup>960</sup> By 2008, according to HRW researchers, trials involving grave violations of international humanitarian law had been conducted before the following courts: military tribunal of Bunia, military tribunal of Songo Mboyo, military tribunal of Mbandaka, military tribunal of Gbadolite, military tribunal of Beni and the military tribunal of Katanga. Geraldine Mattioli & Anneke van Woudenberg, 'Global Catalyst for National Prosecutions? The ICC in the Democratic Republic of the Congo', in: Nicholas Waddell and Phil Clark (eds.), *Courting Conflict. Justice, Peace and the ICC in Africa* (London: Royal African Society, 2008), pp. 55-64. See for several case studies, including Bunia and Bakavu in the east of the country: Avocats Sans Frontiers (ASF), *Case Study: The Application of the Rome Statute of the International Criminal Court by the Courts in the Democratic Republic of the Congo* (Brussels/Kinshasa: ASF, 2009), pp. 99-112. For other cases in Équateur Province, Katanga Province, Maniema Province, Orientale Province and North Kivu and South Kivu Provinces: OHCHR, *Report of the Mapping Exercise*, pp. 398-410.

<sup>961</sup> Mobile courts, which can be either civilian or military tribunals, are specifically provided for by Congolese law: République du Zaïre, Ministère de la Justice, *Arrêté d'Organisation Judiciaire 299/79 portant règlement intérieur des cours, tribunaux et parquets* (20 August 1979).

<sup>962</sup> Traveling judges, prosecutors, and defence counsel resolved disputes and dispensed justice particularly in relation to sexual offences but also to murder and theft. Developed by the American Bar Association (ABA) and Open Society Justice Initiative (OSJI) but run by Congolese staff, the courts in Maniema and South Kivu Provinces heard 382 cases, with 204 convictions for rape and 82 convictions for other offenses and 67 acquittals in three years. Open Society Justice Initiative (OSJI), *Justice in DRC. Mobile Courts Combat Rape and Impunity in Eastern Congo* (New York: OSJI, January 2013); Kelly Askin, 'Fizi mobile court: rape verdicts', *International Justice Tribune*, No. 123 (2 March 2011), pp. 1; Lisa Clifford, 'Open air justice in DR Congo', *International Justice Tribune*, No. 124 (26 March 2011), p. 4; Passy Mubalama & Simon Jennings, 'Roving Courts in Eastern Congo', *Institute for War and Peace Reporting (IWPR)*, ACR Issue 339 (13 February 2013). Also see the documentary film: Femke van Velzen & Ilse van Velzen, *Justice for Sale* (IF Productions 2011).

<sup>963</sup> OHCHR, *Report of the Mapping Exercise*, p. 31.

<sup>964</sup> HRW, *Accountability for Atrocities Committed in the Democratic Republic of the Congo* (1 April 2014) ([www-text: http://www.hrw.org/news/2014/04/01/accountability-atrocities-committed-democratic-republic-congo](http://www.hrw.org/news/2014/04/01/accountability-atrocities-committed-democratic-republic-congo); last visit: 1 May 2014). OHCHR, *Report of the Mapping Exercise*, p. 432; United Nations Human Rights Council (UNHC), *Report of the Special Rapporteur on the independence of judges and lawyers*, Leandro Despouy. Addendum: Mission to the Democratic Republic of the Congo (A/HRC/8/4/Add.2; 11 April 2008), §88.

<sup>965</sup> Kinshasa promised to follow up but an initial draft law miscarried in parliament in August 2011. A transformed sketch for a special court is under deliberation at the time of writing. *Loi organique portant création, organisation et fonctionnement d'une Cour spécialisées*, May 2001; HRW, *Accountability for Atrocities*. Also see letter from 146 Congolese civil society and international human rights organisations to Congolese authorities: *Democratic Republic of the Congo: No More Delays for Justice. Establish Specialized Mixed Chambers and Adopt ICC Implementing Legislation During the Current Parliamentary Session*, Kinshasa, 1 April 2014.

<sup>966</sup> Paul Seils and Myriam Raymond-Jetté, 'New Katanga trial shows DRC's potential to try complex international crimes', *OpenDemocracy*, 16 August 2016 ([www-text: https://www.opendemocracy.net/author/paul-seils](https://www.opendemocracy.net/author/paul-seils)).

<sup>967</sup> In 2000, Belgium issued an arrest warrant – on charges of crimes against humanity and war crimes – for Foreign Minister Yverodia Abdoulaye Ndombasi, but the International Court of Justice (ICJ) blocked it. International Court of Justice (ICJ), *Case Concerning the Arrest Warrant of 11 April 2000* (Democratic Republic of the Congo v. Belgium): Judgment of 14 February 2002 (14 February 2002).

<sup>968</sup> A court in The Netherlands convicted former Colonel Sebastien Nzapali for torture. Rechtbank Rotterdam, *Vonnis* (LJN: A07178, Rechtbank Rotterdam, 10/000050-03; 7 April 2004); Hoge Raad der Nederlanden, *Arrest* (LJN: B15627, Hoge Raad, 07/12112, 1 December 2009).

<sup>969</sup> Ignace Murwanashyaka and Straton Musoni were arrested in November 2009 and convicted in Stuttgart in 2015 for crimes against humanity and war allegedly committed in East Congo between 2008 and 2009. See: Thijs Bouwknecht, 'FDLR - Waging war by phone and emails', *International Justice Tribune*, No. 128 (11 May 2011), pp. 2; Oberlandesgericht Stuttgart, 'OLG Stuttgart verurteilt Funktionäre der "FDLR"', *Pressemitteilung*, 28 September 2015. Arrested in December 2012, three other Rwandan/Germans – Bernard Twagiramungu, Felicien Barabwiriza and Jean Bosco Uwihanganyo went on trial in November 2013 for alleged involvement in FDLR crimes in Congo. See: Oberlandesgericht Düsseldorf, 'Prozessbeginn gegen drei mutmaßliche Mitglieder der „Forces Démocratiques de Libération du Rwanda (FDLR)“', *Pressemitteilung*, No. 27/2013 (Düsseldorf, 11 November 2013).

<sup>970</sup> *Juzgado Central de Instrucción No. 4, Audiencia Nacional, Sumario 3/2.008 – D. Auto* (7 February 2008).

ambiguous, since Kigali has not ever acted on an extradition request from Kinshasa nor put him on trial.<sup>971</sup> In 2014, a criminal complaint was lodged in The Netherlands and in Rwanda against Rwanda's President Paul Kagame and other officials for alleged crimes, including genocide, in Congo.<sup>972</sup>

### 3.10 Conclusions

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

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

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<sup>971</sup> See: Thijs Bouwknegt, 'Laurent Nkunda's fate still unclear', *Radio Netherlands Worldwide*, 19 January 2010.

<sup>972</sup> Prakken d'Oliveira Human Rights Lawyers, *Iyamuremye – Aangifte genocide, misdrijven tegen de menselijkheid, oorlogsmisdrijven, gedwongen verdwijning en foltering Rwanda / Congo* (20140254.MP; Amsterdam, 4 April 2014) & Prakken d'Oliveira Human Rights Lawyers, *Jean Claude Iyamuremye – Criminal Complaint against President Paul Kagame e.a. for genocide, crimes against humanity, responsibility, war crimes, enforced disappearances, torture and murder, committed in Rwanda & Congo* (20140254A.MP/ns; Amsterdam, 4 April 2014).

requests, excluded Ethiopia from the War Crimes Commission and only set up the tribunals in Nuremberg and Tokyo. In the post-WWII era, mass atrocities continued to be perpetrated across the continent, including genocide in Nigeria, Burundi, Zimbabwe, Ethiopia, Chad, Rwanda, Sudan and elsewhere. In most cases impunity reigned supreme, in other cases quasi-judicial truth commissions were established while in Equatorial Guinea, Ethiopia, Rwanda and Chad national prosecutions were heralded. In contrast to popular belief, the advent and evolution of international criminal justice really took place in Africa, not so much in Nuremberg or at the UNICTY.

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