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Cross-examining the past

Transitional justice, mass atrocity trials and history in Africa

Bouwknegt, T.B.

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7. Conclusion & Discussion

As some of the first modern-day international (-ised) *ad hoc* tribunals and *hybrid* courts have fulfilled their mandates, time has come to have a first glance at what they have actually accomplished, appraise their inheritance and plunge into the vast archives they have inadvertently produced along the way. Chipping in on what is mostly a theoretical discussion among tribunal staffers and non-historians, this dissertation has confined its scope to the alleged truth-finding, fact ascertainment and history writing function of the international criminal tribunals as well as the archival record they have left behind. Concretely, it has focused on three interrelated questions: How to understand the invocation of historical narratives in international criminal trials; how to position court judgements in the larger historiography on mass violence; and how to approach the courts' trials and the trial records as historical sources? This study has sought to answer these questions by looking at the process of truth seeking, litigation and judging mass atrocities at the UNICTR, the SCSL and ICC in relation to mass atrocities in Rwanda (1990-1994), Sierra Leone (1991-2002) and the Democratic Republic of the Congo (2002 -). I have argued that at these courts the very process and procedures followed itself as well as individual agency heavily affected the historiographical legacy of these international courts. Also, I problematised the enactment of historical narratives in prosecution case theories and the implications thereof for the historical record in non-documentary – particularly sub-Saharan African - contexts and when depending on witness testimony. Throughout the dissertation, the reader will have discovered a three-legged organisation ('unravelling', 'tribunalising' and 'cross examining' the past) and a three-legged conclusion. First, it has showed that witness testimonies about mass violence are complex judicial and historical sources but that they do, at a minimum, present a very specific enticed oral history of mass violence. Second, it demonstrated that trials are theatres of conflicting stories and platforms where truths are litigated within a legal straitjacket and that their narrative outcomes are ultimately tainted by that process. They generate, what I call, transitional truths. Third, it has argued that courts attempt to unravel history but do not necessarily write history; they are rather collectors of historically relevant sources as well as creators of enticed and litigated historical narratives that may not square with historiography.

7.1 Competing narratives in and out of the courtroom

Before discussing the main findings of this dissertation, a short discussion on the legacy of the UNICTR's sister tribunal, the UNICTY, is at its place to highlight the endurance of competing narratives in and out of the courtroom.

“As a preliminary matter, I wish to define the scope of our judgement. The Chamber's findings, which I will set out below, do not claim to establish the entire truth about the events that occurred, let alone to recount the complex history of a conflict. The Chamber's role is limited to providing a legal response to the allegations made in support of the Prosecution's

theory. Therefore, this judgement is dependent on the limited truth that may or may not have been established by the facts presented before the Chamber.”²⁸⁸⁰

At the closing hour of the first international *ad hoc* tribunals, twenty years after they debuted with their mass atrocity trials, conflicting and competing narratives about world historical events and agency persist, in the court records, the academia, the public domain, the political arena and on the individual level. This dissertation has tried to showcase this in particular to the legacy of the United Nations International Criminal Tribunal for Rwanda (UNICTR), the Special Court for Sierra Leone (SCSL) and the International Criminal Court (ICC). These cases are no exceptions, however, as evidenced, for example by two judgements in the flagship trials at the United Nations International Criminal Tribunal for the former Yugoslavia (UNICTY). In terms of the broader implications of this study as such, the problems encountered at the UNICTY inform a larger debate on the impact of the historical truth-finding capacities of legal institutions like international criminal tribunals.

In March 2016, Judge Jean-Claude Antonetti, pronounced that the majority in his three-member trial chamber decided to acquit Vojislav Šešelj, a known Serbian radical nationalist politician who had been charged, amongst other things, of virulent inciting hate speech and running ‘voluntary’ para-military units that were executing crimes against humanity and war crimes in the former Yugoslavia in the early 1990s.²⁸⁸¹ Antonetti principally lamented “a certain lack of precision in the Prosecution's approach,”²⁸⁸² arguing that the OTP changed from clear charges²⁸⁸³ which at trial were “obscured by subsequent allegations,”²⁸⁸⁴ including a grand conspiracy theory by a group of Serbs to recreate a “Greater Serbia” through a policy of ethnic cleansing. Regretting this “maximalist approach” the “furrow dug by the Prosecution,”²⁸⁸⁵ the chamber ruled out most of the legal characterisations of events in the 1990s, most notably crimes against humanity.²⁸⁸⁶ In all, the chamber’s ruling ran counter to generally held conceptions about mass atrocities in Bosnia as well as earlier ‘coherent’ conclusions by other UNICTY judges.²⁸⁸⁷ Received as a tremor by victims and as a revisionist account of history by a wide range of critics, academics and local communities at large, the judgement has been widely criticised, ridiculed and rebuked as a miscarriage of justice. That is nothing new. Acquittals of personalities of whom the public ‘knows’ they are responsible for a

²⁸⁸⁰ UNICTY, TCIII, *Prosecutor vs. Vojislav Šešelj: Transcript* (IT-03-67-T; 31 march 2016), p. 17543.

²⁸⁸¹ Šešelj faced 9 counts of which 3 Crimes Against Humanity (persecution, deportation and inhumane act of forcible transfer) and 6 War Crimes (murder, torture and cruel treatment, wanton destruction, destruction or wilful damage done to institutions dedicated to religion or education, plunder of public or private property). He was accused of having directly committed, incited, aided and abetted those crimes committed by Serbian forces during the period from August 1991 until September 1993, or to have been part of their commission through his participation in a joint criminal enterprise (JCE). See full judgement [in French]: UNICTY, *Šešelj Jugement*.

²⁸⁸² UNICTY, *Šešelj Transcript* (31 march 2016), p. 17549.

²⁸⁸³ *Ibidem*, p. 17549.

²⁸⁸⁴ *Ibidem*, p. 17549.

²⁸⁸⁵ *Ibidem*, pp. 17549-17551.

²⁸⁸⁶ What they had expected was “an account that clearly shows that civilians who did not participate in combat were targeted en masse.” However, the chamber argued that instead, “the Prosecution does no more than make general statements that fail to account for the specific evidence” heard by the judges. “Under such circumstances”, they wrote “the majority cannot dismiss the Defence’s argument amply supported by some of the testimonies according to which these civilians had fled the combat zones to take refuge in villages inhabited by members of the same ethnic or religious group; that the buses that were provided for this purpose did not constitute operations to forcibly transfer the population, but were in fact provided on humanitarian grounds to assist the non-combatants fleeing combat zones in which they no longer felt safe.” UNICTY, *Šešelj Jugement Summary*, n.p.

²⁸⁸⁷ Cognisant, however, of the possible iconoclastic effect on the historical record, the Chamber made the disclaimer cited above, highlighting the restrictive roles they played. Theirs is not that of the professional historian since the chamber is hampered in establishing truth and recounting history by the mere fact that its duty is to test the prosecutor’s case narrative and legal characterisation of events based on the evidence brought before the bench during the trial.

plethora of suffering are never welcomed, as seen in the case of “Mr. Z.” at the UNICTR, arguably even by the very tribunal in whose name they are rendered.²⁸⁸⁸

Most critics, victims as well as the OTP – which has appealed the judgement - therefore found solace in the opinion of the Italian judge Flavia Lattanzi,²⁸⁸⁹ who pointed out the “climate of intimidation to which Vojislav Šešelj subjected the witnesses”²⁸⁹⁰ as well as the “insufficient reasoning [...] in light of the evidence on the record.”²⁸⁹¹ She concluded that she felt “thrown back in time to a period in human history, centuries ago, when one said – and it was the Romans who used to say this to justify their bloody conquests and murders of their political opponents in civil wars: “*silent enim leges inter arma.*”²⁸⁹² Or was it Lattanzi herself who abstained – in times of disagreement the judge falls silent? What is striking in the Šešelj judgement and the dissent by one judge is not only the fact that within the very trial chambers, judges, who are supposed to render verdicts beyond any reasonable doubt, can reach diametrically opposed findings on the factual historical events, their meaning and the role of a particular accused in that context. This occurs not only the level of individual trial judges, who may be doubtful about the reasoning of their colleagues, versus appeals judges. At the UNICTY, trial judges valorised competing narratives in the stretch of merely seven days. One week before Šešelj’s acquittal, three other judges unanimously convicted Radovan Karadžić of genocide, crimes against humanity and war crimes committed by Serb forces – including “Šešelj’s men”²⁸⁹³ - in Bosnia and Herzegovina (BiH) from 1992 until 1995.²⁸⁹⁴ Furthermore, the judgement²⁸⁹⁵ puts Karadžić at the helm of a Joint Criminal Enterprise that included a range of people - Momčilo Krajišnik, Nikola Koljević, Biljana Plavšić, Ratko Mladić, Mićo Stanišić, Momčilo Mandić and Željko Ražnatović (Arkan) – but also Šešelj.²⁸⁹⁶ But then in the judgement against the latter, a totally different interpretation is progressed derailing from the generally accepted narratives in other trials, namely that “the collaboration was aimed at defending the Serbs and the traditionally Serb territories or at preserving Yugoslavia, not at committing the alleged crimes” and “therefore finds that the Prosecution has failed to prove the existence of a joint criminal enterprise.”²⁸⁹⁷ Moreover, the Karadžić judgement – in which Šešelj’s name is mentioned no less than 241 times – makes substantial findings on Šešelj’s role in the Bosnian war, saying that he “advocated for a homogeneous Greater

²⁸⁸⁸ Dov Jacobs, ‘Is the ICTY ashamed by its own Šešelj judgment?’

²⁸⁸⁹ In contrast to the majority, Lattanzi concluded there was ample evidence establishing, *inter alia*: (1) crimes against humanity in Croatia and in Bosnia and Herzegovina; (2) the existence of a joint criminal enterprise; (3) the persecution of non-Serbs through Šešelj’s speeches; (4) Šešelj’s influence on violent ‘volunteers’; and (5) a conspiracy and cooperation among the members of the JCE in furtherance of the criminal purpose of ethnic cleansing. UNICTY, TCIII, *The Prosecutor vs. Vojislav Šešelj: Summary of the partially Dissenting Opinion of Judge Lattanzi* (IT-03-67-T; 31 March 2016), n.p.

²⁸⁹⁰ UNICTY, *Dissenting Opinion of Judge Lattanzi*.

²⁸⁹¹ *Idem*.

²⁸⁹² *Idem*.

²⁸⁹³ They are named in connection to attacks in 45 instances in the judgement.

²⁸⁹⁴ Karadžić was convicted of genocide in the area of Srebrenica in 1995, of persecution, extermination, murder, deportation, inhumane acts (forcible transfer), terror, unlawful attacks on civilians and hostage-taking. He was acquitted of the charge of genocide in other municipalities in BiH in 1992. The Chamber found that Karadžić committed these crimes through his participation in four joint criminal enterprises (JCE). See: UNICTY, TCIII, *Prosecutor v. Radovan Karadžić: Public redacted version of Judgement issued on 24 March 2016* (IT-95-5/18-T; 24 March 2016).

²⁸⁹⁵ Crucial to the findings in the trial against the former President of Republika Srpska (RS) and Supreme Commander of its armed forces, and different from the findings in the Šešelj case, was that there indeed was an overarching joint criminal enterprise between October 1991 and November 1995, “that included a common plan to permanently remove Bosnian Muslims and Bosnian Croats from Bosnian Serb-claimed territory through the commission of crimes in municipalities throughout Bosnia and Herzegovina.” UNICTY, *Karadžić Judgement*, §5996.

²⁸⁹⁶ *Idem*.

²⁸⁹⁷ UNICTY, *Sešelj Judgement*, §281.

Serbia which involved the unification of all Serb lands and the removal of the non-Serb population [...] ²⁸⁹⁸ Confusingly, this finding is much different from the judges that acquitted Šešelj a week later, turning the argument saying that “the propaganda of a nationalist ideology is not in itself criminal” and that “the Chamber by majority, Judge Lattanzi dissenting, was nonetheless unable to find beyond all reasonable doubt that in calling upon the Serbs to cleanse Bosnia of the “pogani” and the “balijas,” Vojislav Sešelj was calling for ethnic cleansing of Bosnia's non-Serbs. ²⁸⁹⁹

Thus, at a point where the tribunal was wrapping up its work, two judges departed from the consistent jurisprudence of the Tribunal and inferred conclusions that are at odds with dozens of previous UNICTY Judgements proclaimed over the past twenty years. ²⁹⁰⁰ To judge Lattanzi, who had also sat through the entire Karadžić trial as a reserve judge and as such may have reasonably be influenced by the arguments, evidence and deliberations heard there, ²⁹⁰¹ it appeared that her two co-judges consciously progressed this alternative narrative as part of a conspiracy to acquit the Serbian nationalist:

Under the pretext that the Prosecution did not do its job well one can always do better, and the Trial Chamber could have also done better from the outset of this case, notwithstanding the difficulties it encountered during the trial the majority sets aside all the rules of international humanitarian law that existed before the creation of the Tribunal and all the applicable law established since the inception of the Tribunal in order to acquit Vojislav Šešelj. ²⁹⁰²

Regardless whether Lattanzi's accusations are true or not, they would not change the conclusions that are currently published in a publicly available judgement that is being celebrated among right-wing protagonists in Serbia and mourned in Croatia and Bosnia. ²⁹⁰³ With the prosecution appealing the judgement, alleging the majority failed to “perform its judicial function,” ²⁹⁰⁴ the ball is now in the court of the Appeals Judges who can on their turn reverse the judgement and thus revise the narrative once more. That is, however, only if the 61-year old Šešelj who suffers from cancer will outlive such a proceeding.

These developments do not occur in isolation at the UNICTY. At the other tribunals, as demonstrated in the chapters before, similar clashes of interpretation between trial chambers as such and between individual trial and appeals judges are a reality within the international criminal justice

²⁸⁹⁸ The quote continues “as such he clearly shared the common plan. He sent large groups of SRS volunteer fighters to assist the Bosnian Serbs in BiH in the implementation of the common plan throughout the conflict and contributed to the execution of the common plan as such.” UNICTY, *Karadžić Judgement*, §3458.

²⁸⁹⁹ UNICTY, *Šešelj Transcript* (31 march 2016), p. 17569.

²⁹⁰⁰ See: Marko Milanovic, ‘The Sorry Acquittal of Vojislav Sešelj’, *EJIL: Talk. Blog of the European Journal of International Law*, 4 April 2016 ([www-text: http://www.ejiltalk.org/the-sorry-acquittal-of-vojislav-seselj/](http://www.ejiltalk.org/the-sorry-acquittal-of-vojislav-seselj/), visited: 22 April 2016).

²⁹⁰¹ See: UNICTY, *Prosecutor v. Radovan Karadžić: order regarding composition of a bench of the trial chamber* (IT-95-5/18-T; 4 September 2009).

²⁹⁰² UNICTY, *Dissenting Opinion of Judge Lattanzi*.

²⁹⁰³ Vukojčić, ‘Sešelj acquitted’.

²⁹⁰⁴ By, according to the OTP: “failing to consider large parts of the evidentiary record; failing to provide proper reasons for its conclusions; failing to properly apply the ‘beyond reasonable doubt’ standard; failing to consider the charges against Vojislav Sešelj in light of the pervasive pattern of crimes proved; failing to distinguish between the ultimate political objective pursued by the joint criminal enterprise members and the criminal means employed to achieve it; making unreasonable and conflicting factual findings; and failing to properly apply the elements of modes of liability such as joint criminal enterprise and aiding and abetting in accordance with established case-law.” See: UNMICT, Prosecutor, ‘Statement by UNMICT Prosecutor Serge Brammertz Regarding Appeal of the Vojislav Sešelj Trial Judgement’, *Press Release* (6 April 2016).

system, whatever the manifold possible reasons – i.e. legal traditional, procedural, evidentiary or opportunistic - that drive judges to derive at certain conclusions. One would say, irrespective of the *de jure* theoretical professional judicial consistency (precedence and jurisprudence), that judges are critical thinking human individuals and as such are disposed to deviation. That is the *de facto* situation within the system, which as such does not strictly prescribe judges, who are considered to independent triers of fact, to valorise consistent findings about world historical events that are litigated in their courtrooms. Perhaps the problem here is that we expect from all international judges to think alike and we want to believe – and trust - that they will. As argued earlier in this thesis, in law revision is the exemption while in the historical sciences it is the rule. Hence, it is no surprise that disagreements, as seen in this dissertation, often extend beyond the trial chambers, where professional historians may reach other, or rather much deeper, conclusions than judges, based on a review of the same evidence.²⁹⁰⁵

7.2 Overpromised, underdelivered

The expectations raised are impossible. We are not historians and we are not rewriting history.

- Alphons Orie, Judge²⁹⁰⁶

Seventy years after the Nuremberg judgement, 23 years after the establishment of the modern international criminal tribunals and 14 years after the launch of the permanent ICC, the ‘system of international criminal justice’ has slowly matured and its agents and protagonists have gradually become more realistic in what it can and what it cannot achieve. UNICTY Judge Orie’s recent contribution to the debate on the legacy of the UNICTY, quoted above, is only an example thereof. So far and other than anecdotal evidence, no empirical study has proved that the tribunals have, after their establishment, brought peace or deterred future criminals. A reminder thereof is the massacre at Srebrenica, the Congo wars and ethnic cleansing in the Central African Republic after the subsequent creation of the UNICTY, UNICTR and ICC. In terms of reconciliation, something that is virtually unmanageable to define and assess, the evidence largely points in the opposite direction. Ethnic, national and local tensions persist in both the former Yugoslavia, Rwanda, Congo or other situations of mass atrocity violence. Court proceeding and judgements in this respect have arguably rather led to

²⁹⁰⁵ Again, the Karadžić case is an example thereof. Robert Donia, a historian who testified for the ICTY’s prosecutors in a dozen trials, encountered Karadžić in a cross-examination and was given access by the prosecution to the thousands of documents – including telephone intercepts and Bosnian Serb Assembly transcripts - that were amassed during the investigations in the case, wrote an insightful biography of Karadžić’s personal transformation from an unremarkable family man to the powerful leader of the Bosnian Serb nationalists. Different from the ICTY’s judgement, in which Donia’s expert report and testimony is cited 88 times as an authority, the American historian’s narrative is much clearer and explanatory. His chronological story recounts the events of the late 1980s and especially early 1990s that transformed Karadžić into a Serbian nationalist willing to employ atrocities against non-Serbs in his quest to secure safety and power for his people. He also concludes that Karadžić was the real champion of the idea of a Greater Serbia, not Serbia’s President Milošević as is generally believed. Of course, Donia, despite testifying on behalf of the ICTY’s prosecution, strives to maintain an academic neutrality. For instance, he claims to not undertake “the criminal responsibility of any individual, nor have I attributed legal terms or assigned legal categories to any particular deed.” But then, only two sentences later he admits to “have freely judged particular deeds and acts as morally right or wrong, good or bad” arguing that “such judgements are of a different nature than an individual’s innocence or guilt as determined by a court of law.” Yet, two years before the ICTY made a legal ruling to that effect, in the title of his book he already calls Karadžić the “architect of the Bosnian genocide” who through self-mythologizing became “a dedicated, hardworking and highly effective leader, at times for good and at other times for the worst evil.” UNICTY, TCHII, *Prosecutor v. Radovan Karadžić: Transcript* (IT-95-5/18-T; 31 May 2010), pp. 3067-3068; Continued testimony on 31 May and 1, 2, 3, 7, 8, 9, 10 June 2010. UNICTY, TCHII, *Prosecutor v. Radovan Karadžić: Transcript* (IT-95-5/18-T; 31 May 2010) pp. 2067-3731; ‘Interview Robert Donia’; Donia, *Radovan Karadžić*, pp. 1-2; 309; 17; 58.

²⁹⁰⁶ Public debate, ProDemos, The Hague, 9 September 2016.

increased suspicion and division. In Rwanda, particularly, the fact that no judgement was ever delivered on the alleged war atrocities by the RPF against Hutu civilians has arguably left a bitter taste amongst many.

What kind of ‘truth’ the tribunals established about the situations they adjudicated also remains debatable. Obviously, there are achievements as well, particularly in the legal realm. Probably the prime accomplishment so far is that the system has managed to investigate, indict, prosecute, judge and, if found guilty, sentence a range of alleged perpetrators of mass atrocity crimes such as genocide, crimes against humanity and war crimes. By doing so, a new jurisprudence has been established. Moreover, on the political level, the tribunals have demonstrated that they were able to put in the dock people of international, national and local notoriety, including Presidents, government officials, military, intelligentsia, mayors and warlords. Some of those indeed turned out to be the most responsible for mass atrocities committed in the recent and remote past in a variety of countries, most recently in Chad. There is no question that the pursuit of suspects was selective at the levels of the investigations and the trials and in the case of Rwanda a clear example of victor’s justice. However, without doubt, the actual prosecution of suspects in an apparent fair trial setting is a major shift from the pre-1945 world order, in which state sovereignty and impunity for large-scale injustices towards civilians was the norm. At some places, however, those norms have not changed or remain to be applied selectively and unscrupulously. Despite the fact that this remains reality, as evidenced in the cases of North Korea, Syria or Nigeria for example, the pursuit for justice is no longer a phantom. History has shown, like in Cambodia, Bangladesh, Guatemala, Ethiopia or Chad, that even decades after mass atrocities the wheels of criminal accountability can still be put into motion, in some cases due to the persistence of victims. Other delayed historic cases may very well follow. Although the so-called system of international criminal justice seems to have come a long way it is also still very young and its ebbs and flows on political tides. In assessing what it has accomplished and what it has not accomplished, observers and critics alike have increasingly shown remarkable impatience. Rome was not built in a day. In some cases, it is simply too soon to render a judgement on the system as a whole. Having said that, this dissertation has principally attempted a preliminary examination of what two courts – the UNICTR and SCSL -have done in the past twenty years and what the ICC, which built on their legacies in African situations, has done much more recently. Although they are critical, the conclusions presented here cannot and will not be the whole nor the conclusive story.

This dissertation is an ambitious endeavour from the start, tackling some major questions and discussing foundational issues regarding transitional justice in general and mass atrocity trial in particular. Inspired by the epistemological debate on ‘ways of knowing after atrocity,’ it delved into the questions of what *can* be known, what *is* known, *how* it is known when studying mass-violence in modern Sub-Saharan Africa by using international criminal trials as historical source. Throughout the dissertation, I argued that atrocity trials consciously offer accounts about the violent past through a

creative process in which they produce narrative representations through case theories and bring about normative experiences through judgements. In the process of dealing *with* the past, they look at (criminal) acts performed *in* the past, they uncover sources *from* the past, they hear testimony *about* the past and they generate opinions *on* the past. In one way or another, the mechanisms, the sources and judgements generated and configured by the international criminal courts and tribunals settle in the histories of mass violence and mend into historiographies of atrocious pasts of individual conflicts. Informed by a rising interest in the legacy of international criminal tribunals this dissertation confined its scope to the alleged truth-finding and history writing function of the international criminal tribunals as well as the archival record they have left behind.

By means of a systematic analysis of the UNICTR, SCSL and ICC, this dissertation provided crucial understanding to: (1) invocation of historical narratives in international criminal trials; (2) the position of court judgements in the larger historiography on mass violence; and (3) how to approach the courts' trials and the trial records as historical sources. In sum, this study showed that legal professionals at the international criminal tribunals and courts have a different relationship with the past than historians. Disparate from professional historians, lawyers like to make – and become part of – history themselves, tweak historical narratives according to their argument and like history – like law – to be static, black and white. For the historian, on the other hand, history is object and objective while for the lawyer history is subject and subjective.

Through the process of dealing with the past in the legal setting, prosecutors at the UNICTR, SCSL and to a lesser, but increasing, extent the ICC, invoked historical narratives to fit the legal criteria of the crimes they were litigating, to present judges a case narrative of the context of these crimes and to provide the public with a 'true' story that acknowledges what happened. The legacy of this modus operandi is mixed. At the UNICTR, the narrative of the genocide as a form of Tropical Nazism completely collapsed as it did not match the evidence presented at trials, while one side of the story (the RPF) was not dealt with at all. In Sierra Leone, the conspiracy narrative was overly simplistic and in its flagship trial completely outlawed. In both cases, the courts left the questions as to why and how unexplained. The implications thereof however had much larger consequences in Rwanda than in Sierra Leone. In Rwanda, the UNICTR was completely discredited because its findings clash with the state-narrative and a generally accepted historiography that explains the genocide in an analogy to the Nazi murders of European Jews in WWII. In Sierra Leone, the SCSL judgements did not clash to the Rwandan extent with historiography. In fact, the micro-historical findings in relation to mid-level leaders and Charles Taylor can be read in conjunction with the report of the truth commission. Although reaching different conclusions as a result of perspective, the SCSL and the TRC became intrinsic part in the relatively small historiography of the Sierra Leonean war. The ICC presents a negative example. In contrast to the UNICTR and the SCSL, the first trials sought to decontextualize crime from the macro-historical dimensions in which they took place, most notably

the aftermath of the genocide in Rwanda. By so doing, the ICC judgements hardly clash with historiography and rather add a critical assessment of micro case studies and specific themes, such as child soldiering and gender-based crimes. What the dissertation shows is that along the way, the extra-legal ambition to write history has been substituted with a more hands on and selective prosecutorial strategy that favours easy to prove crime and a thematic approach. Obviously, exceptions to the rule persist, as I have shown in relation to the Gbagbo case. In all cases, however, this dissertation has demonstrated that not only the trials but also the court records ought to be approached with great care and caution. Besides it has urged future scholars and jurists alike using trial records to inform themselves on the tribunal, trial and case specific context – normative, political, societal, legal and agency – in which the trial record came about.

Next to these key findings, which will be elaborated more broadly below, some questions remain unanswered but I hope to have contributed to ongoing discussions, particularly from the point of view of an across-the-board experience of observation of a dozen transitional justice institutions in Africa and elsewhere. However, despite its limitations in terms of space, sources and overall completeness, this dissertation has filled some gaps in the existing research on transitional justice in general and atrocity trials more specifically.

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

societies have come out with lingering competing narratives about the atrocious past. In other cases, like Sudan or Congo, continuing and back-to-back violence has largely overshadowed the older pains of the past and nothing may happen ever to address those events.

Secondly – and largely based on the findings above – this dissertation has questioned the rationales and goals of transitional justice, the normative, positivist and doctrinal post-Cold War human rights movement that set out to create a global world order of rule-of-law democracies. However, as argued, the ideology, instruments and mechanisms progressed by transitional justice protagonists has not turned out to be a panacea to reckon with mass violence. I have shown, through discussing the cases of Rwanda, Sierra Leone and Congo, the ultimate shortcomings of the cosmopolitan transitional justice movement in general and in Africa particularly. Clearly, no one-size fits all different geographical, temporal and cultural arenas. Oftentimes, western-inspired transitional justice goals and methodologies have mismatched with the local realities and demands on the ground. Sometimes they were even counterproductive, sparking distrust or even retraumatisation. In other cases, transitional justice instruments have been used and abused for totally different goals such as whitewashing prior atrocities, veiling accountability or as in the case of Rwanda to repressively control society. Through the many examples given in this dissertation, one can conclude that the normative field of transitional justice – both as ideology, policy and academic framework – demands critical reassessment of what it aims at, what it does, why it does so, who does so and what effects it has. So far, no empirical study has shown the real effects of transitional mechanisms in post-mass atrocity countries. We can however conclude that in more general terms, the field of transitional justice in Africa has been largely overpromised and had mainly underdelivered. This observation has from the beginning of this dissertation led to an approach that is critical, dispassionate, detached and empirical (to the extent possible). It has treated transitional justice not as a framework but rather as a historical phenomenon. By perceiving transitional justice as unique *rites de passage* in the transition from a violence situation to (relatively) non-violent situation, it has set clearer boundaries that permitted a birds-eye view and assessment not only of the processes itself but also on how agents – society, policymakers, judiciary, jurists and academia – have shaped particular narratives about those processes.

Thirdly, bearing in mind the inherent flaws of transitional justice, this study has endeavoured not only to study the past but also the practical dealing with the past, particularly through international criminal trials. Having traced the advent and subsequent genealogy of mass atrocity trials, one of the key findings is that there is an inherent mismatch between what court creators, protagonists and agents set out to accomplish and the sources they are dependent on to achieve this. Inspired by the atypical forensic IMT legacy and informed by an understanding of mass atrocity as a crime similar to the WWII Holocaust in Europe, while totally brushing away the much more typical IMTFE experience and crimes in Asia, transitional justice and judicial protagonists have claimed to be able to

unearth the truth about events of mass atrocity and even to establish historical records – explaining why, how and who – of some of these world historical events. Yet, applying the Holocaust lens to understand other cases of mass atrocity has not only misinformed subsequent adjudications of mass violence elsewhere, but also its epistemology. Unlike the IMT, for example, which totally relied on the defendants’ own recordkeeping of carefully planned and executed crimes, the process of prosecuting suspects and finding evidence by other tribunals, including the IMTFE, however, was hampered by the same crucial fact-finding impediments: the absence of documentary evidence. In substantiating case theories and convincing judges of the guilt of the alleged atrocity perpetrators, time and again, there was neither a forensic nor documentary trail left by the alleged perpetrators, the type of evidence that in the western trial setting would typically support findings ‘beyond any reasonable doubt.’ Moreover, whereas in Nuremberg and subsequent Nazi trials including Eichmann, witness testimony served mainly to illustrate and give a human voice to the documentary evidence, at the other tribunals, already at the IMTFE, witnesses served as core evidence, not as an illustration.

In fact, of course with some exceptions, most of the modern-day tribunals have had to rely on witness testimony through their investigations and court hearings or prior recorded anonymous - second-hand - witness testimony through the reports of human rights organisations, UN missions, journalists and academics. But there is inherent problem as to relying on this type of evidence. Not only is witness testimony always a post-facto story *about* mass atrocity rather than a forensic voice *from* the past. At its core, as we have seen, testimony from memory is far from reliable and credible as it is tainted by physical, psychological and societal influences and processes. Moreover, in conjunction with the cultural, lingual and class differences between fact-seekers and fact providing witnesses, the reliance on fallible, fluid and often unreliable memory, has made it virtually impossible to entice and establish with certainty the forensic truth about single events or facts. Key examples thereof highlighted in this dissertation are amongst other things: the remaining ambiguities about the assassination of Rwanda’s President Habyarimana; the number of victims in the Rwandan genocide; the alleged meetings between Charles Taylor and Foday Sankoh; the age of alleged child soldiers in Congo; the scope of the massacre in Bogoro; or who carried out attacks in civilians in Côte d’Ivoire. Thus, in this situation of a very rudimentary modus operandi of ‘fact-finding without facts’, it is already a nearly impossible task for judges to render convictions that are beyond any reasonable doubt for the basic facts – on the micro-level - defendants are accused of. If that uncertainty is extended to the meso- and macro-levels of mass atrocity, the ability of judges to make certain findings about the full nature and causes of world historical events ultimately shrinks.

Fourth, this dissertation has shown that relying on court judgements as objective versions of history has far-reaching social, political and historiographical consequences. Regardless of whether judges are willing to write history or not and whether they explicitly claim to do so or not, they have no control over the impact of their judgement, how these are received and for what purposes they are

operationalised. Ultimately, even the most carefully written judgements will start leading their own lives. Depending how favourable they are, people will endorse it as an authoritative record or bluntly put them aside as a malversation of history that bears no credibility. Hence, people would cite judgements opportunistically for various reasons, probably mostly without having read to some times more than one-thousand-page verdicts. So even if the judge, working from a tight legal straitjacket, has already mutilated the historical record, others will do so even more. In the case of Rwanda, for instance, the Bagosora judgement not only fuelled the RPF's political dislike of the UNICTR as an arrogant western institution that would not understand Rwandan history, for genocide deniers, if read out of the judicial context, it is cited as key document the substantiate claims that the genocide was not planned at all and that it therefore could not be genocide. Cognisant of these uncontrollable effects court judgements may have, this dissertation has shown in particular the danger of raising high expectations of what international criminal trial can actually achieve. As evidenced in the cases of the UNICTR, SCSL and the ICC, most prosecutions start with the promises that not only would tribunals render individualised justice, they would deter others around the globe, bring peace to war-torn countries, reconcile shattered communities, bring closure to victims, repair harm done and, while doing all these thing, establish the truth. Not only are these lofty promises probably not even within the capacity of lawyers and judges, they mostly reach the point of disappointment, disbelief and disillusion.

International criminal investigations hardly start with open questions or at the crime scene. Almost always, the key suspects are already known and the challenge is to collect evidence to prosecute them in a court of law. But particularly in this realm of deductive truth-finding, prosecutors, who carry the burden of evidence in criminal trials, have been struggling with the sources available to them. But besides the evidentiary limitations in the process of litigating crimes such as genocide, crimes against humanity and war crimes, they cannot go around arguing larger patterns of past events and present to judges a case theory. Idyllically, for international prosecutors, academic discussions on history are not the prime focus, mostly for it is not their forte. Instead, the intention is to substantiate the individual criminal responsibility of the accused who they presume to be 'most responsible' for the crimes by others. In that process, however, they cannot escape invoking history and employing legal language to frame the complex realities of mass violence – and *vice versa*. In that process however, prosecutors cherry-pick, infer and frame - or arguably even mutilate - the historical narrative in such a way that best fits the charges. In practice, in order to prove mass criminality, they have litigated a particular version of events.

But in this modus operandi, history often becomes conflated with a prosecutorial case theory that allows no nuance, new insights and revision because otherwise the case will collapse. However, the cocktail of promising to establish to truth whilst progressing an unbendable particular understanding and reading of history is a poisoned one. This dissertation has shown the effects of such a practice. At

the UNICTR, where the Nuremberg-inspired prosecution was informed by a simplistic understanding of the genocide as some kind of tropical Nazi-like conspiracy and litigated cases on that basis, judges were simply not able to infer from the evidence the prosecution's case theories in its flagship trials beyond the reasonable doubts standards. That does not mean that the genocide did not happen, it simply means that the tribunal ruled out the prosecution's narrative on when, why and how it was committed. The case of the SCSL, where many UNICTR agents litigated cases, was similar. Based on the evidence, judges ruled out the grand conspiracy theory that "Godfather" Charles Taylor wanted to enrich himself with Sierra Leonean diamonds through a campaign of terrorism. In contrast, the truth commission that was looking into the causes and nature of the conflict in Sierra Leone, which the SCSL hardly cites, reached a much more complex and nuanced reading of the history of the region. Again, also in light of the TRC findings, it does not mean that Taylor's role in West-Africa's mass atrocities in the 1990s was of no significance. The court judgement, which is temporally and geographically straightjacketed could just not substantiate the larger historical narrative litigated by the prosecution.

Initially, the strategy of Luis Moreno-Ocampo at the ICC appeared to have broken with the tradition of prosecutors to charge its suspects with major crimes that demand close scrutiny of history. In the first Congo cases, he restricted charges to a minimum, only to include child soldiering and a single-day massacre during Ituri's complex conflict. Although the defence sought to introduce historical circumstances as mitigating factors, the Lubanga judgement is hardly concerned with historical questions and its contextual chapter is short and to the point. On the other hand, however, it uncovered the Pandora's Box of post-fact criminal investigations and the reliance on possibly unreliable witness testimony in Sub-Saharan Africa, irrevocably leading to an evidentiary crisis throughout all the ICC's Africa cases. Within that context, one would have expected the new Prosecutor, Fatou Bensouda, to be vigilant and try not to overcharge and present historically informed case theories. She did not, as we saw in the case of Laurent Gbagbo. Again, coming from the UNICTR tradition and informed by a particular understanding of mass violence, mainly through a Holocaust-lens, the case theory is nearly impossible to substantiate, particularly in light in the witness evidence presented. In fact, the ICC overpromises what it can prove and like the UNICTR and SCSL, may come out of the processes not delivering the goods.

Fifth, next to unravelling the inherent difficulties of litigating historical narratives in international criminal trials when relying on witness testimony, this dissertation has shown the promises and pitfalls of its use of court records as historical source. Despite the shortcomings discussed above, the tribunals have contributed to establishing, for example, that in Rwanda during 1994, there was a genocidal "campaign of mass killing intended to destroy, in whole or at least in very large part, Rwanda's Tutsi population." But besides these kinds of significant historical conclusions, courts also collected, produced and brought together a wealth of historical sources: particularly

witness testimony. For historians, the trial records and court's archives are a unique source in studying mass atrocity, although there may be problems as to confidentiality, accessibility and the sheer volume of court material. This dissertation itself is an early example of the practical limitations of using trial records. Out of the amazingly vast number of trial records at the UNICTR, SCSL and ICC, it could only introduce a miniscule fraction thereof. It was only because I attended or otherwise monitored the proceedings myself that I could be confident in my selection and assessment of their accuracy or even availability, as was the case with the Judge Sow's dissent in the Taylor trial. I have argued, for a variety of reasons, that despite the enormity, court records ought to be read in context and using non-court sources, particularly in those instances where proceedings took place behind closed doors or where the court record is censored otherwise. Historians studying mass atrocities and the subsequent dealings with those mass atrocities by courts and other transitional justice mechanism ought to act careful in using these sources. During and after these trials, we ought to be diligent that the expanding trial records ultimately settle in the histories of mass violence and mend into historiographies of atrocious past of individual conflicts. Thus, while the trial record is an invaluable source for historical research on the situations of mass violence they have adjudicated as well as their discussions on the past, interesting, vital and sometimes deliberate lacuna's remain and thus ought to be cautiously read with informed knowledge about why, how and under which circumstances they came and in conjunction with independent third-party primary sources.

Ultimately, we also have to recognise that historians may very well – and have done so already – reach very different conclusions than court judges, even in cases where they would rely on each other's insights and findings. It is because historians are much less restrained than judges. They are not confined by the strict legal straightjacket; they are not dependent solely on the evidence presented to them by the parties in a trial setting; they are not rendering a verdict that may send a person to jail; they do not face the pressure of victims; they (generally) do not publicly operate in a legal, moral and political tense context; and they do not have to reach a final conclusion on responsibility. Moreover, historians apply a much broader truth regime, deal with *agency* and *structure* and simply have a different relationship with the past than lawyers and judges; they study it and do not litigate it. Thus, for the historian history is object and objective while for lawyers history is subject and subjective. In all, while analysing the very same evidence historians might very well reach different conclusions than judges. As outlined in this dissertation, this stems not from justice's powerlessness to judge and write history, but rather from a mismatch between the judges' application of the restricted standard of proof of 'beyond reasonable doubt' to already judicially straitjacketed events and the historian' standard of proof of balance of probabilities applied to an unrestricted scope of events, structures and agency.