

9 Unravelling Atrocity

Between Transitional Justice and History in Rwanda and
Sierra Leone

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Q: [Mr. Biju-Duval]: “[...] Can you tell us precisely on the basis of which document or what other source you can make such a claim?”

A: [Dr. Gerard Prunier]: “Well, sir, we’re dealing with Africa. Pity, please, a little common sense. This isn’t how things work there.”

ICC Trial Chamber¹

Quality fact-finding is vital in the study of mass violence, and transitional justice offers a tempting pallet of formulas to exhume the violent past. Its privileged truth-finding protagonists are [international] tribunals and truth commissions. International criminal justice systems are credited in particular as reliable, truth-ascertaining forums. However, when confronted with African conflicts, this claim appears simplistic. Recent International Criminal Court (ICC) decisions highlight substantial failures to adequately investigate mass crimes and generate solid proof. The bulk of collected evidence consists of [unverified] eyewitness testimony and NGO reports.² However, judges have discredited some witnesses as being possibly manipulated or as providing testimonies that were unreliable, inconsistent or vague.³ In remote non-documentary contexts, answering seemingly simple questions such as what happened to whom, where, and when proves to be problematic. While journalists, human rights researchers, academia, and

1 International Criminal Court (ICC), *Situation in the Democratic Republic of Congo: The Prosecutor vs. Thomas Lubanga Dyilo: Transcript* (Case No. ICC-01/04-01/06; The Hague, 26 March 2009) 94-95. Historian Prunier testified on behalf of the prosecution.

2 Former ICC investigation team leader Bernard Lavigne compared the procedure of investigation of humanitarian groups to general journalism. ICC, *Prosecutor vs. Lubanga: Transcript Rule 86 Deposition* (The Hague, 17 November 2010) 47.

3 ICC, *Situation in the Democratic Republic of Congo in the Case of the Prosecutor v. Callixte Mbarushimana; Decision on the confirmation of charges* (Case No. ICC-01/04-01/10; The Hague, 16 December 2011); ICC, *Prosecutor vs. Lubanga: Judgment pursuant to Article 74 of the Statute* (The Hague, 16 March 2012); ICC, *Situation en Republique Democratique du Congo. Affaire le Procureur c. Mathieu Ngudjolo: Jugement rendu en application de l'article 74 du Statut* (Case No. ICC-01/04-02/12; The Hague, 18 December 2012).

the public easily pinpoint culprits, criminal investigators face problems corroborating these charges beyond a reasonable doubt.⁴

What can we know, what do we know, and how do we know it? With these epistemological queries in mind, this article seeks to examine the uncomfortable equilibrium between legal findings and historiography in the context of mass atrocities in sub-Saharan Africa. The post-violence experiences in Rwanda and in Sierra Leone are good illustrations of this dichotomy. The sections below detail how prosecutors at the International Criminal Tribunal for Rwanda (ICTR) and the Special Court for Sierra Leone (SCSL) struggled to unveil the rationales behind the Rwandan genocide and the civil war in Sierra Leone. By examining the cases of Theoneste Bagosora and Charles Taylor, this essay presents a roadmap to understanding how these discrepancies come about and assesses the impact of atrocity trials on historical records.

Truth Strategies

As the full scale of mass atrocities gradually comes to light after the dust has settled, the question becomes how this should be confronted. There are roughly five strategies to deal with the aftermath of genocide and mass murder: the first three – forgetting, denying, and explaining – concern the violence itself, while purging and judging concerns punishing the perpetrators.⁵ However, there is no globally accepted formula for watertight metamorphoses. Although violence occurs in distinct temporal, political, and cultural contexts, it is commonly framed in universal norms [genocide, crimes against humanity, war crimes, torture]. Yet the aftermaths of the violence vary as much as their internal dynamics. Some societies place a moratorium on the past, or deny it or look forward, while others document, open up archives, or discuss. Perpetrators can be punished, rehabilitated, or amnestied. Victims can be heard, compensated, or silenced. Some countries seek external humanitarian, judicial, or truth interventions, whilst local communities retreat into customary practices. Most often, however, societies choose a melange of these strategies.

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

5 Antoon De Baets, 'After the Genocide: Truth Strategies of Judges and Historians', in: Frank Ankersmit et al (eds), *The Srebrenica Drama: Historical-Theoretical Reflections on the NIOD Report* (Assen: Van Gorcum, 2003), 28-46 [in Dutch].

The discourse that frames and generates post-violence responses and policies embraces historical adages like ‘never again’, ‘historical clarification’, or ‘closing the books’. The imprescriptability⁶ of breaches of international humanitarian law has pulled past violence back into the contemporary realm. In lieu of the globalization of legal norms – *jus cogens*⁷ and universal jurisdiction – atrocities no longer have nationalities. Although history is the spine, law, politics, and pragmatism constrict it. Mandates, policies, and funds frequently confine and straitjacket investigations into the past. Judicial institutions or truth commissions single out and criminalize specific historical episodes and actors, while related events or broader contexts remain untouched. Throughout transitional periods, brutalities are often treated as sealed events, as the aim is to symbolically send the violent past back to the past.⁸

The last three decades have seen the industrialization of past, present, and future scenes of large-scale human rights abuses. Policymakers, activists, lawyers, and academia all assembled under the umbrella of transitional justice. This human rights framework is occupied with [re-] establishing openness [truth], accountability [justice], social cohesion [(re) conciliation], and the rule of law [democracy].⁹ Among its regime change strategies and instruments, the quest for justice and truth has particularly triumphed, as they are often credited as vehicles for peace, reconciliation, and democratic rule. Fact-finding through criminal investigations, commissioned inquiries, and human rights monitoring has been directed towards unveiling brutality, unravelling its architecture, and pointing out those responsible. Truth politics [seeking, revealing, establishing, as well as distorting, veiling and burying] are the core of transition schemes. On the one hand, these rites de passage are the closing ceremonies of violent eras as well as windows to non-violent futures. On the other hand, transitional justice instruments can be used to veil impunity, to whitewash prior crimes, or to legitimize social engineering or foreign intervention.

6 Antoon De Baets, ‘Historical Imprescriptibility’, *Storia della Storiografia*, 59–60 (2011) 125–146.

7 Mark Drumbl, *Atrocity, Punishment and International Law* (New York: Cambridge University Press, 2007) 8: note 54.

8 Berber Bevernage, *History, Memory, and State-Sponsored Violence. Time and Justice* (New York: Routledge, 2011).

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

Transitional truths are both contentious and instrumental. Judging and fact-finding rituals are creative processes and generate normative experiences [guilt and punishment] and narrative representations [verdicts, testimony, and reports] of the past. They are the accounts of mass violence through the prism of transitional justice. Meanwhile, in the process of historical explanation, accounts of the past continually evolve in response to the needs of the present, in dialogue with others and with our own imagination.¹⁰ Current facts can later be revealed as semi-truths, lies, or vice versa. The discovery of new facts as well as debate and reinterpretation continually improve our insight into and understanding of historical events. Historians therefore not only study the past but also the way in which the past is dealt with – how is it used and how is it abused.

Agents of Justice and Truth

A dominant response to mass crime is supranational criminal justice. Its agents aim to pursue the chief violators of international humanitarian law and to discourage potential offenders. The ICC is the system's permanent representative. It took the ICC one decade to complete its first trial, against Thomas Lubanga Dyilo.¹¹ The Congolese militiaman joined the assembly of mass atrocity convicts, alongside Herman Goring, Adolf Eichmann, Théoneste Bagosora, Charles Taylor, and Kang Kek Iew. Their faces are emblematic of historical injustices and illustrate the twentieth-century evolution and application of international criminal law.¹²

10 Michael Jackson, *The Politics of Storytelling: Violence, Transgression, and Intersubjectivity* (Copenhagen: Bjørnlund, 2002) 15.

11 Lubanga Dyilo was convicted for enlisting, conscripting, and using child soldiers in Congo and was sentenced to 14 years' imprisonment. ICC, *Prosecutor vs. Lubanga: Judgment*; and ICC, *Prosecutor vs. Lubanga: Decision on Sentence pursuant to Article 74 of the Statute* (The Hague, 10 July 2012).

12 International Military Tribunal (Nuremberg; IMT); International Military Tribunal for the Far East (Tokyo; IMTFA); United Nations International Criminal Tribunal for the Former Yugoslavia (UN/ICTY); United Nations International Criminal Tribunal for Rwanda (UN/ICTR); Special Court for Sierra Leone (SCSL); Extraordinary Chambers in the Courts of Cambodia (ECCC); Regulation '64 panels in Kosovo ('64 Panels); War Crimes Chamber in the Court of Bosnia and Herzegovina (CtBiH); Iraqi High Tribunal (IHT); Special Panels for Serious Crimes in East Timor (ETSPSC); Special Tribunal for Lebanon (STL); Extraordinary African Chambers (EAC). Similar models have been discussed in relation to Burundi, Sudan, Afghanistan, Palestine and the Occupied Territories, Liberia, Democratic Republic of Congo and Sri Lanka. Sarah Williams, *Hybrid and Internationalised Criminal Tribunals. Selected Jurisdictional Issues* (Hart Publishing 2012) & Yves Beigbeder, *International Criminal Tribunals Justice and Politics* (New York 2012).

After the Nuremberg and Tokyo trials, the Genocide Convention defined and criminalized organized, large-scale, and destructive violence targeted at national, ethnic, racial, or religious groups.¹³ The United Nations simultaneously explored the ‘desirability and possibility’ of a judicial organ to try violators of the Convention.¹⁴ But it was not until 1993 that the first international court to investigate and prosecute genocide was established – the UN International Criminal Tribunal for the Former Yugoslavia (ICTY).¹⁵ Its counterpart for Rwanda (ICTR) was the first international court to convict on the basis of the Convention in 1998.¹⁶ The ICC has enduring jurisdiction to try genocide crimes – alongside crimes against humanity, war crimes, and aggression¹⁷ – although only if these crimes were committed after July 2002.¹⁸ Out of thirty-one suspects, the ICC has so far only charged President Omar Al Bashir with genocide, allegedly committed in Sudan’s Darfur region.¹⁹

The ICC is a court of last resort. It may only intervene when states are unwilling or unable to investigate and prosecute crimes.²⁰ In those cases, ICC member states, the UN Security Council,²¹ or the Office of The Prosecutor (OTP) can trigger investigations. The prosecutor then decides if there are reasonable grounds to proceed.²² So far, the court has opened

13 United Nations General Assembly (UNGA), *A. Adoption of the Convention on the Prevention and Punishment of the Crime of Genocide* (UN-doc. A/RES/260 (III); 9 December 1948) art. 2.

14 UNGA, *Convention on the Prevention and Punishment of the Crime of Genocide* art. I & IV & UNGA, *B. Study by the International Law Commission on the Question of an International Criminal Jurisdiction* ((UN-doc. A/RES/260 (III); 9 December 1948).

15 United Nations Security Council (UNSC), *Statute of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991* (UN-doc. S/25704; 3 May 1993) art. 4.

16 United Nations International Criminal Tribunal for Rwanda (UN/ICTR), *Prosecutor versus Jean Paul Akayesu: Judgement* (Case No. ICTR-96-4-T; Arusha, 2 September 1998) and UN/ICTR, *Prosecutor versus Akayesu: Sentence* (Arusha, 4 October 1998).

17 Jurisdiction commences 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.

18 *Rome Statute of the International Criminal Court* (UN-doc. A/CONF/183/9*; 17 July 1998) & 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* (UN-doc. A/CONR183/13 (Vol. II); New York 2002) 121.

19 ICC, *Situation in Darfur, in the case of the Prosecutor v. Omar Hassan Ahmad Al Bashir: warrant of arrest for Omar Hassan Ahmad Al Bashir* (Case No. ICC-02/05-01/09; The Hague 12 July 2010).

20 *Rome Statute*, art. 17.1.

21 The United States of America (USA) has signed (2000) but not ratified the Rome Statute. The Russian Federation has also signed (2000) but not ratified the statute. The People’s Republic of China has not signed.

22 *Rome Statute*, arts. 13–15.

formal investigations in Uganda, the Democratic Republic of Congo, the Central African Republic, Sudan, Kenya, Libya, Cote D'Ivoire, and Mali. It has conducted preliminary examinations in seven other countries.²³ Whereas the UN ad hoc tribunals – and other multinational courts – dealt with specific geographical areas, the ICC can potentially investigate crime scenes around the world. Nevertheless, Africa remains its only playground.

Except for the Ethiopian Red Terror truth prosecutions (1992-2008),²⁴ African atrocity trials have not been designed to expose the past or to write history. Instead, they present simplified glimpses of it as they apply the law to cases they are presented with. Truth commissions are alternative or complementary venues for a rendezvous with past violence. They are better equipped to reveal the underbelly of mass atrocity and to meet the longing or the right to know.²⁵ Although Ugandan President Idi Amin Dada was the first to initiate such an organ in 1974,²⁶ truth commissions became prevalent instruments to settle with past repressive regimes in

23 Preliminary examinations assess whether to proceed with a formal investigation. ICC, Office of The Prosecutor (OTP) *Policy Paper on Preliminary Investigations: Draft* (The Hague, 4 October 2010). As of February 2013: Afghanistan, Georgia, Guinea, Columbia, Honduras, Korea, and Nigeria. The Prosecutor closed pre-investigations in Iraq, Palestine, and Venezuela. ICC, OTP, *OTP Briefing*, Issue 131 (12 September – 1 October 2012). The OTP issued public indictments against thirty-one persons, of whom six persons have been arrested and have come to The Hague voluntarily. Its judges have delivered two verdicts [Lubanga & Matthieu Ngudjolo Chui] and are set pronounce a third in 2013 [Katanga]. For a critical review on the case selection, see: Human Rights Watch (HRW), *Unfinished Business. Closing Gaps in the Selection of ICC Cases* (1-56432-810-4; New York 2011).

24 The Office of the Chief Special Prosecutor of the Transitional Government of Ethiopia (SPO) was tasked to prosecute perpetrators but also record the crimes of Ethiopia's Red Terror. Sarag Vaughan, 'The Role of the Special Prosecutor's Office', in: Kjetil Tronvoll, Charles Schaefer & Girmachew Alemu Aneme (eds.), *The Ethiopian Red Terror Trials: Transitional Justice Challenged* (Rochester 2009) 51-67.

25 The right to truth about historical injustices is commonly accepted as an inalienable and non-derogable right recognized in multiple international treaties, jurisprudence, and UN resolutions. It explicitly brings along the duty of states to meet this rights. United Nations Economic and Social Council (UNESCO), *Question of the impunity of perpetrators of human rights violations (civil and political): revised final report prepared by Mr. Joinet pursuant to sub-commission decision 1996/119* (UN-doc. CN.4/Sub.2/1997/20/Rev.1; 2 October 1997); UNESCO, *Study on the right to the truth, Report of the Office of the United Nations High Commissioner for Human Rights* (UN-doc. E/CN.4/2006/91; 8 February 2006); and Jasmin Naqvi, 'The right to the truth in international law: fact or fiction', *International Review of the Red Cross*, 862 (June 2006) 253-254.

26 Commission of Inquiry into the Disappearances of People in Uganda since the 25th of January 1971, *Report of the Commission of Inquiry into the Disappearances of People in Uganda since the 25th of January 1971* (1975).

South America.²⁷ In Africa, at least fifteen truth-revealing mechanisms were set up, including the famous post-Apartheid Truth and Reconciliation Commission for South Africa (1995-1998).²⁸ Although these truth-seeking or truth-revealing bodies differ in scale, mandate, and name, they share the common feature that they have sought to investigate past human rights abuses, unravel its architecture, and fashion a final record.²⁹ They produce a collective, authoritative, and reconciliatory narrative about the past.

Truth commissions are ambitious projects, and critics have argued that they can merely uncover partial truths.³⁰ Nevertheless, they can at least reduce the number of lies about the past³¹ and possibly defy distorted versions of history, propagated by an outgoing regime or defeated military junta. Besides, they can bring the scale and impact of a violent past to the public consciousness and identify what has happened to people who 'disappeared' or are buried in unknown mass graves.³² Truth and reconciliation commissions – like trials – opt for 'usable truths' and employ the process of truth-finding as a vehicle to promote reconciliation, prevention, and national unity.³³ Some organize public hearings [oral history events] and

27 Subsequently: Bolivia; Argentina; Uruguay; Chile; El Salvador; Honduras; Haiti; Ecuador; Guatemala; Uruguay; Panama; Peru; Chile; Paraguay; Ecuador; Brazil; and Suriname.

28 Uganda [II]; Chad; Zimbabwe; Ethiopia; Rwanda (II); South Africa (III); Democratic Republic of Congo; Ghana; Guinea; Togo; Morocco; Liberia; Sierra Leone; Rwanda; Nigeria; Kenya; Cote D'Ivoire. A TRC for Tunisia is the making and there are prospects for one in Burundi.

29 See for references: Priscilla B. Hayner, *Unspeakable Truths: Transitional Justice and the Challenge of Truth Commissions* (New York: Routledge, 2011); Mark Freeman, *Truth Commissions and Procedural Fairness* (Cambridge: Cambridge University Press, 2006); Paul Gready, *The Era of Transitional Justice. The aftermath of the Truth and Reconciliation Commission in South Africa and Beyond* (New York: Routledge, 2011); Berber Bevernage, *History, Memory, and State-Sponsored Violence. Time and Justice*. (New York: Routledge, 2011); Robert I. Rotberg & Dennis Thompson (eds.), *Truth versus Justice. The morality of Truth Commissions* (Oxford: Oxford University Press, 2000); Mark Freeman & Priscilla Hayner, 'Truth-Telling', in: David Bloomfield, Teresa Barnes & Luc Huyse (eds.), *Reconciliation after Violent Conflict. A Handbook* (Stockholm: IDEA, 2003); Trudy Huskamp Peterson, *Final Acts: A Guide to Preserving the Records of Truth Commissions* (Baltimore: Johns Hopkins University Press, 2005).

30 Janet Cherry, 'Historical Truth: Something to fight for' in: Charles Villa-Vicencio & Wilhelm Verwoerd (eds.), *Looking back, Reaching Forward: Reflections on the Truth and Reconciliation Commission of South Africa* (Cape Town: UCT Press, 2000), 134-143, there: 143; Charles Villa-Vicencio & Wilhelm Verwoerd, 'Constructing a report. Writing up the "truth"', in: Robert I. Rotberg & Dennis Thompson (eds.), *Truth versus Justice. The morality of Truth Commissions* (Oxford: Oxford University Press, 2000) 288-289.

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

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

33 The South African TRC held four different notions of truth and utilized them at various levels: (1) factual and forensic truth on a personal [who, what, where, and when] and social

catalyze collective debate on complex social, political, and legal issues. Alternatively, truth commissions can also be used to veil the past. New regimes use them as a façade for impunity, to whitewash criminal records, or to accept non-legal responsibility. Truth commissions can also distort, falsify, or revise the historical record and use it for social engineering, gaining trust, and feigning legitimacy.

Fact-finding Without Facts?

Whereas truth commissions are a kind of proto-historian,³⁴ courts appear to be less competent chroniclers.³⁵ Instead, the courts themselves end up becoming historical events. Nevertheless, criminal tribunals are factories of historical evidence [sources]. Their trials are the workshops of detailed fact and the forum in which conflicting narratives [prosecution vs. defence vs. victims] are contested. The end products [decisions and judgements] of trials, however, are just condensed digests. Through the lens of law, they submit a narrative representation of individual transgression within its immediate circumstances. Nonetheless, when confronted with non-documentary societies, their groundwork is often uncertain. This ultimately results in simplistic and distorted images of African violence.³⁶

International judges are required to determine individual guilt or innocence ‘beyond any [a] reasonable doubt’. It is for prosecutors to meet that threshold and detect, collect, and record convincing evidence that supports the scenario of events listed in their charge sheet. Ideally, in a Western-style

[context, causes, and patterns] level; (2) personal and narrative truth [stories, myths, and experiences]; (3) social truth [through interaction, discussion, and debate]; and (4) healing and restorative [public acknowledgement, disclosure]. Truth and Reconciliation Commission of South Africa (TRCSA), *Truth and Reconciliation Commission of South Africa: Report*, Volume 1 (October 1998) 110–114.

34 See: “Truth Commissions as Protohistorians”, *V.V.N.-Berichten, Tijdschrift van de Vereniging voor de Verenigde Naties*, jg. 26, nr. 117, 2002, nr. 4, p. 3–19 [in Dutch].

35 See: William Schabas, ‘History, International Justice and the Right to Truth’, in *Unimaginable Atrocities. Justice, Politics, and Rights at the War Crimes Tribunals* (Oxford: Oxford University Press 2012) 153–172; Fergal Gaynor, ‘Uneasy Partners: Evidence, Truth and History in International Trials’, *Journal of International Criminal Justice*, 10 (5) (2012) 1257–1275; and Richard Ashby Wilson, *Writing History in International Criminal Trials* (Cambridge: Cambridge University Press, 2011).

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

criminal trial, investigators follow a paper trail: documents, forensics, and physical artefacts link the crime to a person. The Nazi archives, for example, proved to be of great assistance to the Nuremberg prosecution in presenting its cases.³⁷ However, torturers, genocidaires, or warlords share a survival technique of denial: they do not keep records and annihilate all possible traces. The consequence is that contemporary tribunals – especially when working in oral societies – are forced to rely heavily on witness testimony. It poses a complex fact-finding challenge: the data of atrocity crimes is embedded in the minds of those who were close to the events as victim, perpetrator, or bystander.³⁸

Recent studies demonstrate how this state of affairs impairs fact-finding processes and truth-ascertaining capacities. Eyewitness testimony at international tribunals proves to be of questionable reliability.³⁹ Nancy Combs showed that witnesses at the Rwanda and Sierra Leone tribunals had a hard time providing the kind of testimony that fact-finders need to determine, with any kind of certainty, basic facts like who did what to whom. Oral testimony at these tribunals is frequently vague, lacks detail, and is often inconsistent with earlier written statements. These deficiencies stem from multiple causes: witnesses' lack of education, investigator errors, language interpretation, cultural divergences between the witnesses and the courtroom, evasion, or perjury.⁴⁰ In addition, due to physical and psychological erosion of the brain, witnesses' memories tend to simply fade, distort, or become influenced over time.

In this scenario, judges face the near-impossible task of considering witness credibility and of ensuring that the content of what has been said has been accurately conveyed in the trial setting. International tribunals assert a fact-finding competence they do not possess. On the surface, they appear to be Western-style trials, but in practice they constitute a much less reliable fact-finding mechanism.⁴¹ Thus, the recollection of mass crimes in non-Western contexts is embedded in the memories of witnesses, and these recollections can be fractured, misinterpreted, or orchestrated. These

37 Nancy Amoury Combs, *Fact-Finding Without facts. The Uncertain Evidentiary Foundations of international Criminal Convictions* (Cambridge: Cambridge University Press, 2010) 11.

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

39 Combs, *Fact-Finding Without facts*, 4; Caroline Buisman, *Ascertainment of the Truth in International Criminal Justice* (Ph.D. dissertation; January 2012).

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

41 Romasevych, 'When facts are thin', 4 & Combs, *Fact-Finding Without facts*, 176.

risks pose epistemological questions as to how to evaluate testimonies, judgements, and facts and how to assess their implication for the historical record of mass crimes.

Mass Accountability: Rwanda

Between 1990 and 1994, Rwanda experienced insurgency, intra-state warfare, and genocide. The Rwandan Armed Forces (FAR), Interahamwe and Impuzamugambi militias, civilians, and the Rwandan Patriotic Army/Front (RPA/F) all committed human rights violations. The dust settled on 19 July 1994, and in the subsequent eighteen years, Rwanda used prosecutions, truth-finding, reconciliation initiatives, reintegration, re-education, and reparations to move towards internal peace.⁴²

During the war, an international non-governmental commission of inquiry documented government and rebel human rights violations and concluded that the Rwandan state committed acts of genocide against Tutsis.⁴³ Days into the massacres – on 13 April 1994 – the RPF envoy at the UN requested the UN Security Council to found a “war crimes tribunal and apprehend persons

42 Besides the mechanisms further discussed in this chapter, Rwanda established various post-genocide TJ initiatives: National Unity and Reconciliation Commission (NURC 1999); *ingando* solidarity camps (see the previous chapter by Hoeksema); 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, UCT Press, 2005) 86–95.

43 Human Rights Watch (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 Human Rights Watch, *Report of the International Commission of Investigation on Human Rights Violations in Rwanda since October 1, 1990 (January 7-21, 1993)* (New York: Human Rights Watch, 1993). At the request of the RPF, the commission planned a second trip that never took place since the genocide unfolded. Human Rights Watch (HRW) ‘Rwanda: Human Rights Developments.’ In: Human Rights Watch (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) 597–633: 629–632; Priscilla B. Hayner, *Unspeakable Truths: Transitional Justice and the Challenge of Truth Commissions* (New York: Routledge, 2011) 16; and Paul Christophe Bornkamm, *Rwanda's Gacaca Courts. Between Retribution and Reparation* (New York: Oxford University Press, 2012), 22.

responsible for the atrocities",⁴⁴ but no official request was endorsed as the Rwandan regime held a rotating seat.⁴⁵ The transitional government filed a new request,⁴⁶ and the ICTR was set up shortly thereafter. It was tasked with 'prosecut[ing] 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'.⁴⁷ The tribunal charged 92 Rwandans and one Belgian of whom 83 were tried (the other nine suspects remain at large).⁴⁸ Its residual work has been taken over by the Mechanism for International Criminal Tribunals (MICT) since July 2012.⁴⁹

On a national scale, the RPF arrested an estimated 120,000 people, intending to criminally prosecute everyone involved in the genocide.⁵⁰ Simultaneously, Rwanda convened an international conference to discuss its transitional justice strategy,⁵¹ resulting in the establishment of specialized

44 UNSC, *Report of the Independent Inquiry into the Actions of the United Nations During the 1994 Genocide in Rwanda* (UN.doc.: S1999/1257, 15 December 1999), 68.

45 Kingsley Moghalu, *Rwanda's Genocide: The Politics of Global Justice* (New York: Palgrave, 2005) 20.

46 UNSC, *Letter Dated 28 September 1994 from the Permanent Representative of Rwanda to the United Nations addressed to the president of the Security Council* (UN-doc. S/1994/1115, 29 September 1994) 4.

47 UNSC, *Resolution 955. Annex: Statute of the International Tribunal for Rwanda* (UN-doc. S/RES/955 (1994), 8 November 1994). The only country voting against its establishment was Rwanda.

48 As of 11 May 2012, the Tribunal had completed the work at the trial level with respect to 83 of 93 accused. This includes 52 first-instance judgements involving 72 accused, six referrals to national jurisdictions (three apprehended accused and three fugitive cases), two withdrawn indictments, and three indictees who died prior to or in the course of the trial. Appellate proceedings have been concluded in respect of 45 persons. See: Security Council, *Report on the completion strategy of the International Criminal Tribunal for Rwanda (as at 11 May 2012)*, (UN-doc. S/2012/349, 22 May 2012) para. 3. For a detailed and up-to-date list: UN/ICTR, *Status of Cases* (www-text: <http://www.UN/ICTR.org/Cases/tabid/204/Default.aspx>, accessed: 4 February 2013).

49 UN/ICTR, *Mechanism for International Criminal Tribunals (MICT) begins work in Arusha* (press release: ICTR/INFO-9-2-725.EN, 2 July 2012). The MICT carries out a number of essential functions of the UN/ICTY and UN/ICTR after the completion of their respective mandates. UNSC, 'Annex 1: Statute of the International Residual Mechanism for Criminal Tribunals,' *Resolution 1966* (UN-doc. S/RES/1966, 22 December 2010).

50 Paul Christophe Bornkamm, *Rwanda's Gacaca Courts. Between Retribution and Reparation* (New York: Oxford University Press, 2012) 22.

51 The conference stressed the need to bring perpetrators of genocide to justice, rejected any consideration of amnesty, and discussed two alternative proposals of specialized tribunals: a specialized court for genocide cases or a specialized 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 1st to November 5th, 1995* (Kigali, December 1995) 8-9 & 16-24.

chambers in the ordinary and military courts to try genocide and crimes against humanity committed since October 1990.⁵² Genocide offences were categorized,⁵³ and a confession procedure⁵⁴ 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.⁵⁵ Several hundred people were sentenced to death, but no public executions have been carried out since 24 April 1998.⁵⁶ Classic trials soon proved to be inadequate in criminally prosecuting all suspects in and outside the country. Rwanda therefore established *inkiko gacaca* – or lawn courts in Kinyarwanda – in 2001.⁵⁷ 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 (6) demonstrating that Rwandans can resolve their own problems’.⁵⁸ From 10 March 2005 until the closing of *gacaca* in June 2012, 12,103⁵⁹ grassroots courts throughout

52 *Organic Law No 08/96 of 30th 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) article 1.

53 Category 1: a) planners, organizers, 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 30th August 1996*, art. 2.

54 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.

55 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: Cambridge University Press, 2004) 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) 879–895; Nicholas A. Jones, *The Courts of Genocide. Politics and the Rule of Law in Rwanda and Arusha* (New York: Routledge, 2010) 88.

56 Des Forges, ‘Legal Responses to Genocide in Rwanda’, 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).

57 ‘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.

58 Republic of Rwanda, National Service of Gacaca Courts (NSGC), *Summary of the Report Presented at the Closing of Gacaca Courts Activities* (Kigali, June 2012) 34.

59 9,013 cell-level courts; 1,545 sector-level courts (plus 1,803 additional benches to complement these courts; 1,545 appeals courts (plus 412 additional benches). See: NSGC, *Summary Report*, 33.

the whole country had tried 1,003,227 people in 1,958,634 cases.⁶⁰ Although the *gacaca* process has met with both praise and criticism from inside and outside Rwanda,⁶¹ its process has microscopically documented its genocide to an unprecedented extent.⁶²

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,⁶³ while the UN and the Organisation of African Unity (now African Union: AU) investigated the 1994 bloodbath on their behalf.⁶⁴ In addition to these fact-finding exercises, a range of countries opted for criminal prosecutions. Judiciaries in Belgium, the Netherlands, Canada, Switzerland, France, Finland, Germany, the United Kingdom, the United States of America, Denmark, Sweden, Norway, and Spain have investigated, indicted, or tried dozens of Rwandans suspected of crimes committed in 1994 under the principle of universal jurisdiction.⁶⁵ Some of these countries

60 For a complete overview of cases, convictions, guilty pleas, as well as a timeline, see: NSGC, *Summary Report*, 34-39.

61 For instance: Human Rights Watch (HRW), *Rwanda. Justice Compromised. The Legacy of Rwanda's Community-Based Gacaca Courts* (New York 2011).

62 The Gacaca archive currently consists of some 20,000 boxes, which are kept in 1,000 square meters of a large building at the National Police Headquarters in Kigali.

63 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: 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).

64 UNSC: United Nations Security Council, *Report of the Independent Inquiry into the Actions of the United Nations During the 1994 Genocide in Rwanda* (UN.doc.: S1999/1257, 15 December 1999) & 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).

65 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 Defense 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, *Delivrance de Mandats D'Arrets 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

have sent criminal files to Arusha or vice versa, including transfers to a specialized chamber in Rwanda.⁶⁶

Hybrid Transition: Sierra Leone

While the genocide that killed up to one million Rwandans received unprecedented judicial attention, responses to the large-scale killings, amputations, and annihilation in Sierra Leone took place in the shadow of Rwanda. Between 1991 and 2002, Sierra Leone went through a violent period of insurgency and civil war. Human rights were violated by 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.⁶⁷ In 1999, there was a pause in the violence after the signing of a peace agreement in Lomé [the so-called Lomé Agreement], which, inter alia, provided for disarmament, amnesty,⁶⁸ and a truth and reconciliation commission (TRC).⁶⁹ 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

(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).

66 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 The Hague, *Interlocutory decision*. LJN: BB8462 (Rechtbank ‘s-Gravenhage, 09/750009-06 + 09/750007-07 English translation; 24 July 2007); United Nations International Criminal Tribunal for Rwanda (UN/ICTR), ‘Tribunal Transfers Two Accused to France for Trial, *Press Release* (ICTR/INFO-9-2-538.EN; 20 November 2007); and United Nations International Criminal Tribunal for Rwanda (UN/ICTR), ‘Munyarugarama Case Transferred to Rwanda’, *Press Release* (ICTR/INFO-9-2-724.EN; 28 June 2012).

67 Truth and Reconciliation Commission for Sierra Leone (TRCSL), *Witness to Truth: Report of the Sierra Leone Truth and Reconciliation Commission*, Vol. II, ‘Executive Summary’ (Accra 2004) 3-22.

68 During the signing ceremony, the United Nations representative, Moses Okelo, added a last-minute handwritten disclaimer for international crimes to the broad amnesty provisions. It reads: “The United Nations 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) 145-169; 148 & 149; Priscilla Hayner, *Negotiating peace in Sierra Leone: Confronting the Justice Challenge* (Geneva: ICTJ, 2007) 17-18.

69 *Peace Agreement between the government of Sierra Leone and the Revolutionary United Front of Sierra Leone*, 7 July 1999 (UN-doc. S/1999/777; 12 July 1999).

of the Revolutionary United Front (RUF) and their accomplices [...]”.⁷⁰ He declared that the war was over during a symbolic ‘Arms Burning Ceremony’ on 18 January 2002.

Amnesty, prosecutions, truth-finding, reconciliation, reparations, and re-integration were used in Sierra Leone to move towards peace.⁷¹ The government and the UN jointly established the Special Court for Sierra Leone (SCSL).⁷² Based in Freetown and Leidschendam, this hybrid 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 1996.⁷³ Nine Sierra Leoneans (three RUF, two CDF, three AFRC) and the former Liberian president Charles Taylor have been tried and convicted, while other prime suspects died in detention, were murdered, or are still at large.⁷⁴ 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 a total of 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).⁷⁵

70 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* (UN-doc. S/2000/786; 10 August 2000).

71 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) 263–287.

72 *Agreement between the United Nations and the government of Sierra Leone on the establishment of a Special Court for Sierra Leone & Statute of the Special Court for Sierra Leone* (Freetown 16 January 2002), annexed to: UNSC, *Report of the Planning Mission on the establishment of the Special Court for Sierra Leone* (UN-doc. S/2002/246; 8 March 2002).

73 *Statute of the Special Court for Sierra Leone*.

74 RUF: Special Court for Sierra Leone (SCSL), Appeals Chamber, *The Prosecutor against Issa Hassan Sesay, Morris Kallon & Augustine Gbao: Judgement* (Case. No. SCSL-04-15-A; Freetown 26 October 2009); CDF: Special Court for Sierra Leone (SCSL) Appeals Chamber, *The Prosecutor against Moinina Fofana & Allieu Kondewa: Judgement* (Case No. SCSL-04-14-A; Freetown 28 May 2008); AFRC: Special Court for Sierra Leone (SCSL) Appeals Chamber, *The Prosecutor against Alex Tamba Brima, Brima Bazzy Kamara, Santigie Barbor Kanu: Judgement* (Case. No. SCSL-2004-16-A; Freetown 28 February 2008); and Special Court for Sierra Leone (SCSL), *Prosecutor versus Charles Ghankey Taylor: Judgement* (Case No. SCSL-03-01-T; The Hague 18 May 2012). The case is currently before the Appeals Chamber, with a verdict due in the first quarter of 2013. 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.

75 Sigall Horowitz, *Sierra Leone: Interaction between International and National Responses to the Mass Atrocities* (DOMAC, 2009) 26–30.

Next to international prosecutions, a truth and reconciliation commission carried out its work between 2002 until 2004.⁷⁶ The TRC was given the mandate 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.⁷⁷ Throughout its process, the TRC collected some 8,000 statements from Sierra Leone and the diaspora and held hearings [public, closed, thematic, event-specific] in Freetown and district capitals. The commission also carried out research, organized reconciliation workshops, and initiated a National Vision for Sierra Leone project. 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.⁷⁸

The formal processes of the SCSL and the TRC were driven by concepts of justice, truth, and reconciliation, which were alien to local communities.⁷⁹ Although customary justice systems existed among communities in Sierra Leone, they appeared to be insufficient to reckon with the scale of the atrocities.⁸⁰ 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, which facilitates unofficial community-based reconciliation

76 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.

77 'The Truth and Reconciliation Commission Act 2000', *Supplement to the Sierra Leone Gazette Vol. CXXXI* (Freetown, 10 February 2000).

78 Truth and Reconciliation Commission for Sierra Leone (TRCSL), *Witness to Truth: Report of the Sierra Leone Truth and Reconciliation Commission* (Accra 2004); Truth and Reconciliation Commission for Sierra Leone (TRCSL), *Truth and Reconciliation Commission Report for the Children of Sierra Leone. Child Friendly version* (Freetown 2004); Truth and Reconciliation Commission for Sierra Leone (TRCSL), *TRC Report: A Senior Secondary School Version* (Freetown 2005); Truth and Reconciliation Commission for Sierra Leone (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.sierraleonetr.org>.

79 Tim Kelsall, *Culture under Cross-Examination. International Justice and the Special Court for Sierra Leone* (Cambridge: Cambridge University Press, 2009); 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) 36-68; & 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* (Mortsel: Intersentia, 2012) 263-287.

80 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 Huyse and Mark Salter, eds., *Traditional Justice after Violent Conflict. Learning from African experiences* (Stockholm: IDEA, 2008) 123-146.

gatherings.⁸¹ By drawing on age-old traditions of confession, apology, and forgiveness, communities throughout the country have been organizing ceremonies that include truth-telling bonfires and cleansing ceremonies.⁸²

Liberia's conflicts [1989–2003] were closely intertwined with the Sierra Leonean war. The former Liberian president played a central role in West-African politics and transitional justice in the region.⁸³ He stepped down after the Special Court warranted his arrest, leading to a Liberian peace agreement that called for a truth and reconciliation commission.⁸⁴ Established in 2005, the TRC was to investigate Liberia's 'turbulent history' between 1979 and 2003 and recommend steps towards peace, justice, and reconciliation.⁸⁵ The first hearing began on 8 January 2008, one day after the first prosecution witness appeared in the trial against Taylor in The Hague.⁸⁶ The commission released its final report in June 2009.⁸⁷ The report docu-

81 Developed by the Sierra Leonean *Forum of Conscience* and *Catalyst for Peace* (USA), Fam-bul Tok was incorporated as an international non-governmental organization, *Fambul Tok International* (FTI), in late 2009. Fambul Talk International, 'About us' ([www-text: http://www.fambultok.org/about-us](http://www.fambultok.org/about-us), last visit: 4 February 2013).

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

83 Adekeye Adebajo, *Building Peace in West Africa. Liberia, Sierra Leone, and Guinea-Bissau* (London 2002); Adekeye Adebajo, *Liberia's civil war. Nigeria, ECOMOG, and Regional Security in West Africa* (Boulder & London 2002; Amnesty International (AI), *Liberia: Truth, Justice, Reparation for Liberia's victims* (AI Index: AFR 34/001/2007; 15 February 2007).

84 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) 205–233; Special Court for Sierra Leone (SCSL), *The Prosecutor against Charles Ghankay Taylor also known as Charles Ghankay Macarthur Dapkpana Taylor: indictment* (Case No. SCSL-03-I; Freetown 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).

85 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) article IV.

86 Gibson W. Jerue, 'Liberians exhume the catalogue of horrors', *International Justice Tribune*, 81 (21 January 2008) 3–4.

87 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 separate Diaspora report.

ments gross human rights violations and recommends the establishment of an Extraordinary Criminal Court.⁸⁸ In line with the historical and diaspora connections, the US judiciary tried and convicted Charles Taylor's son, Roy Belfast Jr., for torture committed by Taylor's Anti-Terrorist Unit (ATU).⁸⁹

A Machiavellian Plan

[...] justice demands that the accused be prosecuted, defended and judged, and that all the other questions of seemingly greater importance – of 'How could it happen?' and 'Why did it happen?' [...] be left in abeyance.⁹⁰

Despite the discussion on whether they ought to write history, tribunals often cannot avoid dealing with the past. Criminal intentions/behavior or elements of mass crime can be inferred from past political, social, or economic events or conditions. It is no surprise that historians have been called to testify about the Balkans, Rwanda, Sierra Leone, or Congo. They illuminate context, details, and explanations. At the ICTR, the prosecutor's office was in fact driven by socio-historical explanations of the genocide. Behind the scenes in Arusha, Alison Des Forges – a historian, human rights activist and Rwanda expert – worked as a key prosecution witness. In effect, all principal ICTR indictments and judgements bear her stamp.⁹¹ But Des Forges, flanked by expert witness colleagues Filip Reyntjens and Andre

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) 341-361.

88 See: 'Annex 2. Draft Statute: Extraordinary Criminal Court', in: Republic of Liberia Truth and Reconciliation Commission (TRCL), *Volume II: Consolidated Final Report* (Monrovia 30 June 2009) 426-459.

89 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 ROYM. 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* (Case No. 09-10461; 15 July 2010).

90 Hannah Arendt, *Eichmann in Jerusalem: A Report on the Banality of Evil* (New York 1963) 3.

91 Scott Strauss & Lars Waldorf, 'Preface', in: Scott Strauss & Lars Waldorf (eds.) *Remaking Rwanda. State Building and Human Rights after Mass Violence* (Madison: University of Wisconsin Press, 2011) XV.

Guichaoua, had hoped that the ICTR's investigative means would be used to lay bare the full scope of the genocide.

Reyntjens suspended his work for the prosecutor, as evidence on a number of massacres committed by the RPF in 1994 did not lead to criminal charges.⁹² Des Forges lamented the fact that OTP investigators had made no serious endeavor to gather documentary or forensic evidence.⁹³ Consequently, the court's first conviction – of Taba's bourgomastre Jean Paul Akayesu – was solely based on the witness testimony.⁹⁴ In the other early cases – versus Jean Kambanda [ex prime minister], Omar Serushago [Interahamwe leader], and Georges Ruggiu [RTLM journalist] – the evidence consisted of their guilty pleas to the facts they were accused of.⁹⁵ Altogether, the three confessors recognized and confirmed that there had been a genocide and that it had been organized and planned at the highest political and military levels – although as insider witnesses in other trials, their testimonies were riddled with lies, contradictions, and inconsistencies.⁹⁶ Throughout the lifespan (1994–2012) of the tribunal, the evidentiary basis

92 Like Alison Des Forges, Reyntjens is one of the leading experts on Rwandan law, politics, and history and has testified in Rwanda trials and before commissions of inquiry around the world. He has testified for the prosecution in the ICTR trials against Georges Rutaganda (1997) and Bagosora (2004) and later for the defense in the case against Joseph Kanyabashi (2007). In addition, he testified before parliamentary commissions in Switzerland, Belgium, and France as well as Rwanda trials in Canada, the USA, Switzerland, Belgium, Finland, Denmark, and the UK. Thijs Bouwknecht, 'Telephone Interview' *Filip Reyntjens*, 31 August 2012

93 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: Cambridge University Press 2004) 49–68: 53.

94 Twenty-two eyewitnesses, five experts [including Des Forges] and one prosecution investigator. United Nations International Criminal Tribunal for Rwanda (UN/ICTR), *Prosecutor versus Jean Paul Akayesu: Judgement* (Case No. ICTR-96-4-T; Arusha, 2 September 1998) paras. 9–28.

95 UN/ICTR, *Prosecutor v. Jean Kambanda: Joint Motion for Consideration of Plea Agreement Between Jean Kambanda and the Office of the Prosecutor, Annexure A Plea Agreement Between Jean Kambanda and the Office of the Prosecutor* (Case No. ICTR-97-23-1; Arusha, 29 April 1998); UN/ICTR, *Prosecutor versus Jean Kambanda: Judgement & Sentence* (Case No. ICTR-97-23-5; Arusha, 4 September 1998) & UN/ICTR, Appeals Chamber, *Jean Kambanda versus The Prosecutor: Judgement* (Case No. ICTR-97-23-A; Arusha, 19 October 2000). The former Prime Minister – during the genocide – was the first to plead guilty at the ICTR. His appeal was later dismissed. UN/ICTR, *Prosecutor v. Omar Serushago. Plea Agreement between Omar Serushago and the Office of the Prosecutor* (Case No. ICTR-98-37; Arusha, 4 December 1998); UN/ICTR, *Prosecutor v. George Ruggiu. Plea Agreement between Georges Ruggiu and the Office of the Prosecutor* (Case No. ICTR-97-32-DP; Arusha, 11 April 2000). See for details: Nancy Amoury Combs, *Guilty pleas in International Criminal Law. Constructing a Restorative Justice Approach* (Stanford 2007) 91–113.

96 Kambanda immediately stopped his cooperation when he found out that the OTP called for a life sentence and that Serushago's and Ruggiu's testimonies in the *Media trial* were riddled with lies, inconsistencies, and contradictions. UN/ICTR, *Prosecutor v. Ferdinand Nahimana*,

for prosecutions consisted of witness testimony from victims, survivors, perpetrators, observers, investigators, and a group of experts. The latter provided the blueprint for the trial narrative.

Des Forges was the OTP's 'personal guide to understanding the genocide and making sense of how to proceed against its authors'.⁹⁷ The prosecution's version of what happened in Rwanda was based on Des Forges's writings and testimony in eleven trials rather than on forensics. Judges in multiple decisions and judgements incorporated it. Moreover, except for the chapter on RPF crimes, her book – *Leave None to Tell the Story* – became the official version of Rwandan history at the tribunal.⁹⁸ It is the narrative of a "tropical Nazism"⁹⁹: conspiracy, ethnic division, preparation, organization, propaganda, and extermination.¹⁰⁰ Most of these elements were reviewed in every genocide trial up to 2006, when the tribunal finally accepted as a 'judicial notice' that (1) Hutu, Tutsi, and Twa are protected groups under the Genocide Convention; (2) between 6 April and 17 July 1994 there were widespread and systematic attacks against civilians based on ethnic identification; and (3) between 6 April and 17 July 1994 genocide was committed against the Tutsi ethnic group.¹⁰¹ After twelve years, the ICTR had thus established that the Rwandan genocide was a fact beyond legal dispute. The foundation of the prosecution's thesis on how it was planned, however, was seriously undermined in two major trials dealing with Rwanda's history.

In 2007, in the historic 'Media Trial',¹⁰² the appeals chamber found that the prosecutor failed to demonstrate the existence in 1994 of a conspiracy to commit genocide between Radio Television Libre de Mille Collines (RTLM),

Jean-Bosco Barayawiza, Hassan Ngeze: Judgement and Sentence (Case No. ICTR-99-52-T; Arusha, 3 December 2003) paras. 817-824 & 548-549.

97 Kenneth Roth, 'Alison Des Forges. Remembering a Human Rights Hero', in: Scott Strauss & Lars Waldorf (eds.) *Remaking Rwanda. State Building and Human Rights after Mass Violence* (Madison: Wisconsin University Press, 2011) xxiii-xxv: xxiv.

98 Wilson, *Writing history*, 172.

99 Borrowed from: Jean Pierre Chretien, 'Un "nazisme tropical" au Rwanda? Image ou Logique d'un genocide', *Vingtième Siècle. Revue d'histoire*, 48 (October-December 1995) 131-142.

100 Alison Des Forges, *Leave none to tell the story. Genocide in Rwanda* (Human Rights Watch & International Federation of Human Rights; New York & Paris 1999).

101 UN/ICTR, *Prosecutor v. Eduard Karemera, Mathieu Ngirumpatse, Joseph Nzirorera: Decision on the Interlocutory Appeal of Decision on Judicial Notice* (Case No. ICTR-98-44-AR73(C); Arusha, 16 June 2006).

102 RTLM and Kangura ventilated their messages in strong historical discourse. Besides, Ferdinand Nahimana himself was a historian alongside three prosecution witnesses: Alison Des Forges, Jean Pierre Chretien, and Marcel Kabanda. The latter two had authored a book on Rwandan media: J.P. Chretien, J.F. Dupaquier & M. Kabanda *Rwanda: les médias du genocide*

newspaper Kangura, and the Coalition pour la Défense de la République (CDR) party. They furthermore ruled out an analogous genocidal plot between their respective representatives Ferdinand Nahimana [historian], Hassan Ngeze [editor], and Jean-Bosco Barayagwiza [lawyer, politician], a finding made by the trial chamber four years earlier.¹⁰³ The trial judges had in 2003 accepted hate-filled radio broadcasts and publications from before 1994 – but outside its jurisdiction – as evidence for continuing crimes, which ultimately culminated in the achievement of the crimes' intended purpose: genocide. Since the massacre happened in 1994, the ICTR judges found they had jurisdiction to try these crimes. The appeals judges, however, strictly applying the tribunal's temporal jurisdiction, ruled that culpability could only be based on events in 1994. Moreover, they ruled that only RTLM broadcasts after 6 April 1994 contributed significantly to the perpetration of acts of genocide.¹⁰⁴

The appeals judgement in the Media Trial came six months after the closing arguments in the ICTR's most significant trial. The so-called "Military I" trial against Théoneste Bagosora and three others¹⁰⁵ also relied heavily on the theory of a longstanding conspiracy. Even though prosecutor Carla Del Ponte opened the trial with the proviso that "the tribunal can never write the whole history of the Rwandan tragedy of 1994, in particular the Rwandan genocide, its genesis and its realisation," the charges were formulated in strong historical terms.¹⁰⁶ While the initial indictment was quickly written up after Bagosora's arrest in 1996,¹⁰⁷ Louise Arbour, Del

(Paris 1995). For a more general study, see: Allan Thompson (ed.), *The Media and the Rwanda Genocide* (London 2007).

103 The trial chamber found them guilty of genocide, conspiracy to commit genocide, direct and public incitement to commit genocide, and persecution and extermination as crimes against humanity. UN/ICTR, *Prosecutor v. Ferdinand Nahimana, Jean-Bosco Barayagwiza, Hassan Ngeze: Judgement and Sentence* (Case No. ICTR-99-52-T; Arusha, 3 December 2003).

104 UN/ICTR, Appeals Chamber, *Ferdinand Nahimana, Jean-Bosco Barayagwiza, Hassan Ngeze (Appellants) v. The Prosecutor (Respondent): Judgement* (Case No. ICTR-99-52-A; Arusha, 28 November 2007).

105 The case also concerned General Gratien Kabiligi (head operations bureau of army general staff), Major Aloys Ntabakuze (Para Commando Battalion commander) and Colonel Anatole Nsengiyumva. UN/ICTR, *Prosecutor versus Théoneste Bagosora et al.: Amended Indictment* (Case No. ICTR-96-7-I; Arusha, 31 July 1998).

106 UN/ICTR, *Prosecutor versus Théoneste Bagosora et al.: Opening Statement* (Case No. ICTR-96-7-T; Arusha, 2 April 2002).

107 Bagosora was arrested in Cameroon following a Belgian arrest warrant in which he was charged with direct responsibility for the massacres that followed the attack against the plane of President Juvénal Habyarimana on 6 April 1994, and for the murder on 7 April 1994 of 10 UNAMIR soldiers from the Belgian contingent stationed in Kigali, Rwanda. See: Tribunal de Première

Ponte's predecessor, drafted a 'global charge sheet' against Bagosora in conjunction with 28 others, attempting to generate a historical record of the Rwandan genocide.¹⁰⁸ Indeed, the indictment's first twenty-nine pages deal exclusively with the history of Rwanda, starting with the 'revolution of 1959'.¹⁰⁹ The tribunal disallowed a Nuremberg-style trial,¹¹⁰ but a revised version of the charges – now alongside three others – includes the same historical discourse. Its first ten pages set out the 'historical context', after which it formulates the individual accusation: from late 1990 to July 1994, the former colonel conspired with other extremist Hutus to execute a "Machiavellian Plan" to exterminate all Tutsis and their Hutu 'accomplices'.¹¹¹ In harmony with post-genocide historiography, Bagosora – who was cabinet director in the Ministry of Defence at the time – was the alleged centerpiece in a carefully planned and organized Hutu plan to murder all Tutsis.

A historical indictment demanded a meticulous exhumation of the past, and it was no surprise that Des Forges, as the first witness in the trial, was cross-examined for nearly two months while her entire book was tendered as evidence.¹¹² Two years later, towards the end of the prosecution case, Reyntjens was also questioned on Rwandan history.¹¹³ Despite their testimonies, six years of trial proceedings did not answer beyond a reasonable doubt the question as to how the plan to exterminate all Tutsis and their 'accomplices' had unfolded. In 2008, Bagosora was found guilty of genocide,

Instance de l'arrondissement de Bruxelles, *Pro Justitia. Mandat d'Arret par Defaut*, dossier 57/95, notices no. 30983332/95 (Brussels, 29 May 1995). The first ICTR Prosecutor Richard Goldstone signed an indictment – very similar to the Belgian one – listing four counts of genocide, crimes against humanity, and war crimes. UN/ICTR, *The Prosecutor of the Tribunal Against Théoneste Bagosora: Indictment* (Case No. ICTR-96-7-I; Arusha, 5 August 1996).

108 Don Webster, 'The Uneasy Relationship between the ICTR and Gacaca', in: Scott Straus & Lars Waldorf (eds.) *Remaking Rwanda. State Building and Human Rights after Mass Violence* (Madison: Wisconsin University Press, 2011), 185-186.

109 UN/ICTR, *Prosecutor versus Théoneste Bagosora & 28 others: Indictment & Supporting Material* (Case No. ICTR-98-37; Arusha, 6 March 1998) pp. 2.

110 UN/ICTR, Appeals Chamber, *Prosecutor versus Théoneste Bagosora and 28 others: Decision on the admissibility of the prosecutor's appeal from the decision of a confirming judge dismissing an indictment against Théoneste Bagosora and 28 others* (Case No. ICTR-98-73-A; Arusha, 8 June 1998).

111 UN/ICTR, *Prosecutor versus Théoneste Bagosora et al.: Amended Indictment* (Case No. ICTR-96-7-I; Arusha, 31 July 1998) 2-11.

112 Des Forges, *Leave None To Tell The Story*. The book has been described as "the most important historical record there is of the genocide and a virtual guidebook for prosecutors". Kenneth Roth, 'Alison Des Forges. Remembering a Human Rights Hero', in: Scott Straus & Lars Waldorf (eds.) *Remaking Rwanda. State Building and Human Rights after Mass Violence* (Wisconsin 2011) XXIV.

113 To counter these prosecution witnesses, the defence also called in witnesses to testify on the country's history: Helmut Strizek (11-13 May 2005) and Bernard Lugan (13-16 November 2006).

crimes against humanity, and war crimes for ordering and authorizing various killings and rapes between 6 and 9 April 1994. But, according to the judges, several elements commonly considered to be crucial in the planning of the 1994 massacres were “not supported by sufficiently reliable evidence” or did “not necessarily demonstrate criminal intent”.¹¹⁴ “Confronted with circumstantial evidence,” the judges wrote, “the tribunal may only convict where conspiracy is the only reasonable inference from the evidence.”¹¹⁵

Applying that test, the chamber concluded that the prosecution did not prove beyond a reasonable doubt that the only reasonable inference to be drawn from the evidence is that the four accused conspired amongst themselves – or with others – to commit genocide before it unfolded from 7 April 1994. All elements of the conspiracy alleged by the prosecution were dismissed or found unconvincing. The creation and work of a military commission to define “the enemy” chaired by Bagosora in 1991 were not considered as criminal. Bagosora and others had played a role in the creation, arming, and training of civil militias and maintaining lists of “RPF accomplices”, but the judges could not conclude that “these efforts were directed at killing Tutsi civilians with the intention to commit genocide”. Bagosora’s reported warning in 1992 that he was going to “prepare the apocalypse” proved to come from two dubious witnesses who contradicted themselves. His alleged role in clandestine organizations such as the AMASASU, the Zero Network, or death squads was supported by considerable evidence, yet it was indirect, second-hand, and did not mean they were preparing genocide. Testimony about a meeting in Butare in February 1994, where Bagosora allegedly drew up a list of Tutsis to be killed, was not considered credible. Moreover, there were concerns over the reliability of the information provided by Jean-Pierre – who had famously informed UNAMIR peacekeepers in January 1994 about secret militia training plans intended to exterminate Tutsis and their accomplices – and an anonymous letter outlining a “Machiavellian Plan”. “In reaching its finding on conspiracy, the Chamber has considered the totality of the evidence, but a firm foundation cannot be constructed from fractured bricks,” concluded the judges.¹¹⁶

The judgement was received as iconoclastic. The alleged masterminding role of Bagosora in the genocide was reduced to that of a temporary project

114 UN/ICTR, *Prosecutor versus Théoneste Bagosora et al.: Judgement & Sentence* (Case No. ICTR-98-41-T; Arusha, 18 December 2008) para. 12.

115 UN/ICTR, *Prosecutor versus Bagosora: Judgement & Sentence* (Case No. ICTR-98-41-T; Arusha, 18 December 2008) para. 9.

116 UN/ICTR, *Prosecutor versus Bagosora: Judgement & Sentence* (Case No. ICTR-98-41-T; Arusha, 18 December 2008) para. 1221.

manager for 65 hours (between 6 and 9 April 1994).¹¹⁷ On appeal, Bagosora's factual responsibility was trimmed down even more and his life sentence was reduced to 35 years.¹¹⁸ The appeals chamber concluded that 'there is no finding or sufficient evidence that Bagosora ordered or authorised any of the killings for which he was found to bear superior responsibility', but that he 'failed to take the necessary and reasonable measures to prevent these crimes' while he was in a position to do so.¹¹⁹ Thus, while the historical lead-up to events in 1994 were crucial to the ICTR's understanding of the genocide, it appears that on the basis of testimony from 242 witnesses, nearly 1,600 exhibits and around 4,500 pages of submissions from the prosecution and defence, the ICTR judges were not able to corroborate – beyond any reasonable doubt – historiography on the architecture of the Rwandan genocide. On the surface, the trial appears to be the sobering illustration of justice's powerlessness to punish history.¹²⁰

In fact, however, the trial judges had already outlined that 'the process of a criminal trial cannot depict the entire picture of what happened in Rwanda', emphasizing that their task is narrowed by exacting standards of proof and procedure as well as its focus on the accused and the specific evidence placed before it.¹²¹ It did accept that the evidence may indicate a plan to commit genocide – in particular when viewed in the light of the subsequent targeted and speedy killings immediately after the shooting

117 Tribunal expert witness, Andre Guichaoua, quoted in: Thierry Cruvellier, 'ICTR: Rwandan genocide – No Masterplan', *Radio Netherlands Worldwide International Justice*, 19 December 2011 ([www-text: http://www.rnw.nl/international-justice/article/brainless-genocide](http://www.rnw.nl/international-justice/article/brainless-genocide), last visit, 27 August 2012).

118 Bagosora's convictions for genocide, crimes against humanity, and war crimes were upheld. However, it reversed Bagosora's convictions for the killings of Augustin Maharangari, Alphonse Kabiligi, and the peacekeepers murdered before his visit to Camp Kigali, as well as for the killings in Gisenyi town, at Mudende University, and at Nyundo Parish. The appeals chamber also set aside the finding that Bagosora was responsible for ordering crimes committed at Kigali area roadblocks, but found him liable as a superior instead. In addition, the appeals chamber reversed a number of Bagosora's convictions for murder as a crime against humanity and for other inhumane acts as a crime against humanity for the defilement of Rwandan Prime Minister Uwilingiyimana's corpse. UN/ICTR, 'Appeals Chamber Delivers Judgement in the Bagosora and Nsengiyumva Case,' *Press Release* (ICTR/INFO-9-2-695.EN; 14 December 2011).

119 UN/ICTR, Appeals Chamber, *Théoneste Bagosora & Anatole Nsengiyumva v. The Prosecutor* (Case No. ICTR-98-41-A; Arusha, 14 December 2011) paras. 670-671.

120 Thierry Cruvellier, 'Brainless Genocide', in: Gargot, Christophe, Sylvie Lineperg & Thierry Cruvellier (eds), *Arusha to Arusha* (DVD/Book: Paris 2011) 58-74: 73.

121 UN/ICTR, *Prosecutor versus Théoneste Bagosora et al.: Judgement & Sentence* (Case No. ICTR-98-41-T; Arusha, 18 December 2008) para. 5.

down of Juvenal Habyarimana's aircraft,¹²² but that was also consistent with preparations for a political or military power struggle in the context of an on-going war with the RPF. They concluded that other or newly discovered information, subsequent trials, or history may very well demonstrate a conspiracy involving the accused – prior to 6 April 1994 – to commit genocide.¹²³

Indeed, historians are not similarly constrained. Analyzing the same evidence, they might well conclude that there had been a high-level conspiracy to commit genocide in Rwanda before it unfolded. It is not justice's powerlessness to judge history. It is rather the illustration of the problem that arises when relying on a trial judgement as an objective account of history: the standard of proof of 'beyond a reasonable doubt' that criminal judges must apply. The test applied by historians appears to be closer to the standard of proof of balance of probabilities or convergence of the evidence, which is that adopted by many truth commissions.¹²⁴

"Godfather" of Terror in Sierra Leone¹²⁵

Your Honours, it's important, I believe, to make a review of the history, not all of the history but the relevant portions, of the execution of this plan, and it really begins, as we indicated, before 1991, before 1996, in 1988 or 1989, with the military training in North Africa of Charles Taylor and Foday Sankoh and other people who later became leaders of the RUF and NPFL.

*Stephen J. Rapp*¹²⁶

122 An event that has not been investigated at all at the ICTR, as it was not included in any of the charges against ICTR suspects.

123 UN/ICTR, *Prosecutor versus Théoneste Bagosora et al.: Judgement & Sentence* (Case No. ICTR-98-41-T; Arusha, 18 December 2008) para. 1221.

124 Fergal Gaynor, 'Uneasy Partners: Evidence, Truth and History in International Trials', *Journal of International Criminal Justice*, 10 (5) 1257-1275: 1273.

125 Portions of this text appeared in: Thijs Bouwknecht, 'International Justice and History: an imperfect balance', *Newsletter Criminology and International Crimes*, 7 (1) (July 2012) 5-7; and Thijs Bouwknecht, 'An ill-fitting Taylor-made trial', *International Justice Tribune*, No. 150 (25 April 2012) 1-2.

126 Special Court for Sierra Leone (SCSL), 'Opening Statement', *Transcript* (Case No. SCSL-2003-01-T; The Hague; 4 June 2007) 282. Stephen Rapp – currently Ambassador-at-Large, heading the Office of Global Criminal Justice in the US Department of State – also led the ICTR's 'Media' case discussed above. Rapp, who is married to a historian, left the ICTR, where he worked as Chief of Prosecutions, in 2006 to become the SCSL Chief Prosecutor. See: Stephen J. Rapp, 'Achieving Justice for Victims of Genocide, War Crimes and Crimes Against Humanity', *Joan*

When Bagosora was on trial in Arusha in the summer of 2002, prosecutors in Freetown commenced investigations into atrocities committed during Sierra Leone's civil war.¹²⁷ Seven months later, the 'Special' court prosecutor presented eight indictments, and by June 2003, another four charge sheets were completed. Three Sierra Leonean parties were represented in the charge sheets. The SCSL's prime suspect, however, was a foreigner. Dubbed 'case SCSL-03-01', the first case file concerned Charles Taylor, then President of Liberia.¹²⁸ The eleven-count indictment on war crimes and crimes against humanity was unveiled in June 2003, while he was in Accra for Liberian peace talks. The Ghanaian government flew Taylor back to Monrovia in a presidential plane. But it was only after three years of refuge in a luxurious villa at the invitation of former Nigerian president Olusegun Obasanjo that he arrived at the fortified SCSL compound in Freetown.¹²⁹

"Most definitely, Your Honour, I did not and could not have committed these acts against the sister Republic of Sierra Leone," Taylor told the judges during his first appearance in April 2006, "[...] so most definitely I am not guilty."¹³⁰ Taylor was the first former African head of state to be judged, convicted, and sentenced before an international criminal tribunal. He has been described as the jewel in the crown of the SCSL, but his criminal case is in no way crystal clear.¹³¹ It is rather characteristic of the precarious balance between history and the law. In the end, the file left a legacy of unaddressed bloodshed, as most of Taylor's alleged crimes fell outside the

B. Kroc Institute For Peace & Justice: Distinguished Lecture Series (Joan B. Kroc School of Peace Studies, University of San Diego California, 17 February 2011).

127 SCSL, *First Annual Report of the President of the Special Court for Sierra Leone* (Freetown 2003) 14-15.

128 For a detailed study on Taylor, see: Colin M. Waugh, *Charles Taylor and Liberia. Ambition and Atrocity in Africa's Lone Star State* (New York, 2011).

129 For a detailed analysis and trial reports of the Taylor trial, see: 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) 205-233; Open Society Justice Initiative, *The Trial of Charles Taylor* (website: <http://www.charlestaylortrial.org/>); International Center for Transitional Justice, *The Special Court for Sierra Leone: the first eighteen months* (March 2004) 4-5.

130 SCSL, *The Prosecutor of the Special Court v. Charles Ghankay Taylor: Transcript* (Case No. SCSL-2003-01-PT; Freetown, 3 April 2006) 15.

131 Thierry Cruvellier, *From the Taylor Trial to a Lasting Legacy: Putting the Special Court Model to the Test* (International Center for Transitional Justice and Sierra Leone Court Monitoring Programme 2009) 5.

straitjacket of his prosecution. Still, the trial narrative¹³² against Taylor reads like a classic script on the rise and fall of a dictator.¹³³ Taylor rose from being a dishwasher and mathematics and science teacher to elected president of Liberia. In between, he studied economics, purportedly escaped from a US prison, and became a notorious warlord. His career ended in the dock in the Netherlands, far from his home in West Africa. He may spend the remainder of his life in a prison in the UK.¹³⁴

The trial chamber sentenced Taylor to 50 years' imprisonment on 30 May 2012.¹³⁵ A month earlier, he was found guilty of planning, aiding, and abetting a long list of crimes committed by merciless RUF and AFRC fighters. These included acts of terrorism, murder, rape, sexual slavery, enslavement, pillage, and the conscription and enlistment of child soldiers.¹³⁶ In their verdict, numbering almost 2500 pages, the three judges detailed how Taylor took part in planning attacks on Kono, Makeni, and Freetown between December 1998 and February 1999, and instructed rebels to 'make the operation [s] fearful'. They further outlined how Taylor had aided and abetted the fighters in committing atrocities by providing arms and ammunition, military personnel, and operational and moral support.¹³⁷

'If the roots of a mango tree are cut, the tree will die', prosecutor Brenda Hollis said, quoting a Sierra Leonean chief. 'Mr. Taylor was the root which fed and maintained the RUF and kept the AFRC/RUF alliance alive; without him the rebel movement, with its attendant crimes, would have suffered

132 For a comprehensive study on prosecution and defence discourses, see: Marlies Glasius & Tim Meijers, 'Constructions of Legitimacy', *International Journal of Transitional Justice*, 6 (2) (July 2012) 229-252.

133 The Taylor trial opened on 4 June 2007. It was adjourned immediately after the prosecution's opening statement when Taylor dismissed his lawyer Karim Kahn and requested new representation. Witness testimony commenced on 7 January 2008 and ended on 12 November 2010. Closing arguments took place in February and March 2011. The court heard live testimony from 94 prosecution witnesses and received written statements from four additional witnesses. The defence presented 21 witnesses, with Taylor testifying in his defence.

134 *Agreement between the Special Court for Sierra Leone and the Government of the United Kingdom of Great Britain and Northern Ireland on the Enforcement of Sentences of the Special Court for Sierra Leone* (London, 10 July 2007).

135 SCSL, *The Prosecutor of the Special Court v. Charles Ghankay Taylor: Sentencing Judgement* (Case No. SCSL-2003-01-T; The Hague; 30 May 2012).

136 SCSL, *Prosecutor versus Charles Ghankay Taylor: Judgement* (Case No. SCSL-03-01-T; The Hague 18 May 2012).

137 SCSL, *Prosecutor versus Charles Ghankay Taylor: Judgement* (Case No. SCSL-03-01-T; The Hague 18 May 2012).

an earlier death,' she continued.¹³⁸ However, Taylor's judgement suggests he played a more limited role in Sierra Leone than the prosecution had claimed. The judges did not find that he had superior responsibility over members of the rebel groups, or that he had led a joint criminal enterprise (JCE). Count one of the charge sheet listed Taylor's ultimate crime: acts of terror.¹³⁹ It burdened the prosecution with a complex challenge in trying the former Liberian leader. The golden thread in the case: Taylor forged an illicit conspiracy with RUF leader Foday Sankoh in Libya – under the auspices of Muammar Gaddafi¹⁴⁰ – in the late 1980s to conquer West Africa. Their motive: enriching themselves with rough diamonds from Sierra Leone. Their modus operandi: a menacing campaign of terror. The prosecution advocated it proved 'beyond a reasonable doubt' that Taylor was personally responsible for this surreal theater of atrocity. 'The evidence in this case shows that the RUF was a terrorist army created and supported and directed by Charles Taylor who, in truth, is the person most responsible for the crimes charged,' concluded Brenda Hollis in her final brief.¹⁴¹

But, armed with a limited mandate – they could only prosecute crimes committed from November 1996¹⁴² – prosecutors had an exceptionally demanding job to criminally tie Taylor to the bloodshed. Like the ICTR, the Special Court was confronted with a complex oral society and an absence of a clear paper trail or forensics. The tribunal therefore heavily relied on testimonial evidence.¹⁴³ The prosecution called on some 94 witnesses includ-

138 SCSL, *The Prosecutor of the Special Court v. Charles Ghankay Taylor: Sentencing Judgement* (Case No. SCSL-2003-01-T; The Hague; 16 May 2012) 49691.

139 SCSL, *The Prosecutor of the Special Court v. Charles Ghankay Taylor: Prosecution's Second Amended Indictment* (Case No. SCSL-2003-01-PT; Freetown, 29 July 2007) para. 4.

140 In fact, Gaddafi was named as an indirect co-perpetrator in the initial indictment, but he was never charged by the SCSL. SCSL, *The Prosecutor against Charles Ghankay Taylor also known as Charles Ghankay Macarthur Dapkpana Taylor: indictment* (Case No. SCSL-03-I; Freetown 3 March 2003) para. 17. According to the court's first prosecutor, David Crane, Britain put pressure not to indict Gaddafi for war crimes, despite the evidence. Soraya Kishtwari, 'Prosecutor reveals how Britain let Gaddafi off', *The Times*, 25 February 2011.

141 SCSL, *The Prosecutor of the Special Court v. Charles Ghankay Taylor: Prosecution Final Brief* (Case No. SCSL-2003-01-T; The Hague; 8 April 2011) 531.

142 *Agreement between the United Nations and the government of Sierra Leone on the establishment of a Special Court for Sierra Leone & Statute of the Special Court for Sierra Leone* (Freetown 16 January 2002), annexed to: United Nations Security Council (UNSC), *Report of the Planning Mission on the establishment of the Special Court for Sierra Leone* (UN-doc. S/2002/246; 8 March 2002).

143 Chief Prosecutor Brenda Hollis reiterated this fact in her address to the United Nations Security Council: 'Without witnesses, no trials would be possible. Our main challenges were to communicate and meet with some 800 potential witnesses in a safe environment, and, in

ing experts, crime victims, and perpetrators. Since 2008, testimony on the forgotten cruelties of the Sierra Leonean civil war echoed in the courtrooms in The Hague and later in Leidschendam, where the trial subsequently took place.¹⁴⁴ The judges heard how RUF rebels sowed death and destruction, hacking off limbs, raping women, and pillaging diamond mines. 'All this suffering, all these atrocities to feed the greed and lust for power of Charles Taylor,' proclaimed Brenda Hollis.¹⁴⁵ Taylor does not deny these offences took place but refutes the charge that he was at the very center of the web of these crimes.

'Throw it in the bin. That is what we submit the court should do with this body of evidence: Get rid of it.'¹⁴⁶ That was the message from Taylor's lawyers during closing arguments in March 2011. The only direct evidence that connected a campaign of murder, mutilation, and rape in Sierra Leone to Charles Taylor came from his own former aides and enemies. But the use of this insider witness testimony had to stand the test of credibility on the grounds of their ethnic/regional/national loyalties, or because of their own implication in crimes. Some of them had strong reasons to testify against their political rival. Others were self-confessed criminals, like Joseph Marzah. Nicknamed 'zigzag', the former secret service agent confessed to mass murder, killing babies, cutting open pregnant women, and eating 'Nigerians and white people as pork,' during a chaotic and sketchy three-day testimony.¹⁴⁷ The defence did not need too much energy in discrediting these kinds of witnesses.

With this evidence in hand, the prosecution faced additional hurdles: time and space. The SCSL could only deal with crimes committed in Sierra Leone from November 1996 onwards. But at this time, Taylor was not at this crime scene and is rather infamous for spearheading bloodshed in his own country. The SCSL's main shortcoming in this trial is that it could not deal with Taylor's full role in West Africa's atrocious history. Taylor's crimes in Liberia have been well documented by historians and the truth and

cooperation with the Registry's Witness and Victim Section, to ensure the security before, during and after the trial, of the more than 300 Prosecution witnesses who testified." SCSL, Office of The Prosecutor, *Statement by Prosecutor Brenda J. Hollis, Special Court for Sierra Leone to the United Nations Security Council* (New York, 9 October 2012) 5.

144 The trial was moved to the Netherlands because of security concerns in West Africa. It was held at the ICC in The Hague and later at the Special Court for Lebanon in Leidschendam.

145 SCSL, *The Prosecutor of the Special Court for Sierra Leone v. Charles Ghankay Taylor: Transcript* (Case No. SCSL-2003-01-T; Leidschendam, 8 February 2011) 49150.

146 SCSL, *The Prosecutor of the Special Court for Sierra Leone v. Charles Ghankay Taylor: Transcript* (Case No. SCSL-2003-01-T; Leidschendam; 9 March 2011) 49454.

147 SCSL, *The Prosecutor of the Special Court for Sierra Leone v. Charles Ghankay Taylor: Transcript* (Case No. SCSL-2003-01-T; The Hague, 13 March 2008) 5998. Marzah testified from 12 to 14 March 2008.

reconciliation commissions in Liberia and Sierra Leone.¹⁴⁸ The reality is that they remain outside the reach of the SCSL, and this has caused problems in establishing Taylor's alleged crimes in Sierra Leone. But it did not prevent prosecutors from delving into history.

'The indictment crimes did not happen overnight,' reads the prosecution's case summary.¹⁴⁹ Their case has therefore focused on highlighting a long-standing relationship between Taylor and the RUF. The prosecution claims that this bond lasted throughout the 1990s, and when Taylor became president in 1997, Taylor continued to be the 'chief', 'father', and 'godfather' of 'his proxy forces the RUF and later the RUF/AFRC'.¹⁵⁰ Several of Taylor's former aides indeed testified to regular communications taking place between Taylor and other RUF commanders such as Sam Bockarie and the convicted Issa Sesay. Still, while the bench was sympathetic towards the prosecution in allowing evidence falling outside the scope of the indictment, no 'smoking guns' were presented. There is a lack of precision and proof at the heart of the testimony heard in court. The relationship between Sankoh and Taylor in Libya – the very basis of criminal charges – remains shrouded in mist. No documentary evidence has shown that the two met each other between 1991 and 1999. Historian and expert witness Stephen Ellis could only say that the two met 'sometime between 1987 and 1989'.¹⁵¹

Depicting him as 'a master of manipulation' and a 'liar', the prosecution claimed that Taylor controlled the RUF from behind the façade of a regional peace broker. But at best, the prosecution has shown that Taylor – because of his position – 'should have known' about the crimes and that he 'did nothing to prevent them' while he may have been in a position to do so. They claim he did everything to conceal his crimes and destroy evidence of links with the RUF rebels, accusing Taylor of killing his 'favourite' RUF general Sam Bockarie and AFRC junta leader Johnny Paul Koroma after they were charged

148 See: Truth and Reconciliation Commission for Sierra Leone (TRCSL), *Witness to Truth: Report of Sierra Leonean Truth and Reconciliation Commission* (Accra 2004) & Truth and Reconciliation Commission for Liberia (TRCL), *Consolidated Final Report* (Monrovia, 30 June 2009).

149 SCSL, *The Prosecutor of the Special Court v. Charles Ghankay Taylor: Prosecution Final Brief* (Case No. SCSL-2003-01-T; The Hague; 8 April 2011) 31.

150 SCSL, *The Prosecutor of the Special Court v. Charles Ghankay Taylor: Prosecution Final Brief* (Case No. SCSL-2003-01-T; The Hague; 8 April 2011) 34.

151 SCSL, *The Prosecutor of the Special Court for Sierra Leone v. Charles Ghankay Taylor: Transcript* (Case No. SCSL-2003-01-T; The Hague; 16 January 2008) 1426-7 & Special Court for Sierra Leone (SCSL), *The Prosecutor of the Special Court for Sierra Leone v. Charles Ghankay Taylor: Transcript* (Case No. SCSL-2003-01-T; The Hague; 18 January 2008) 1530. Also see: Stephen Ellis, *Report for the Special Court for Sierra Leone: Charles Taylor and the war in Sierra Leone* (5 December 2006) 3.

by the SCSL.¹⁵² A court trying a president cannot escape debating politics and history. And indeed, two diametrically opposed narratives about Taylor's role in west Africa were put before the judges. Producing almost 50,000 pages of transcript and over 1,000 exhibits, the Taylor trial offers a unique insight into Liberian and Sierra Leonean history. In the prosecution's version, it is the darkest corner of the world. Moreover, no other international court has heard a former president testify in so much detail as in this trial. The Special Court judges gave Taylor an unprecedented seven months in the witness stand. And the former president took his time to take the court through his concise version of the history of 20th-century West African politics.

In his own version, Taylor is not a war criminal but a peacemaker who was left carrying the can for the international community. He does not deny that crimes were committed in Sierra Leone but argues that he would have had to be a "superman" to run his own war-torn country while also planning and ordering the commission of crimes on the other side of the border. The defence accused the prosecution – which is largely composed of US citizens – of being part of an 'American conspiracy' to get rid of Taylor and the SCSL of being an instrument of regime change in the US's former 'Lone Star' colony. At the end of the trial, Griffiths eagerly referred to two leaked US code cables from the embassies in Monrovia and The Hague suggesting that Washington wanted Taylor to disappear behind bars forever. Brandishing the prosecution as racist, he sneered that the prosecutors had 'besmirched the lofty ideals of international criminal law by turning this case into a 21st century form of neo-colonialism'.¹⁵³

The four-year trial against Charles Taylor ended with an unprecedented and dramatic twist: a judge who had attended all hearings and deliberations posed questions as to whether the facts have actually been proven. After his three colleagues had summarized their guilty verdict against Taylor, alternate Judge El Hadji Malik Sow outlined his belief that guilt had not been proven beyond a reasonable doubt and that no deliberations on fact had taken place.¹⁵⁴ But after about a minute, his microphone was cut off and a metal grate was lowered over the glass that separates the courtroom

¹⁵² SCSL, *The Prosecutor of the Special Court v. Charles Ghankay Taylor: Prosecution Final Brief* (Case No. SCSL-2003-01-T; The Hague; 8 April 2011) 491-509.

¹⁵³ SCSL, *The Prosecutor of the Special Court for Sierra Leone v. Charles Ghankay Taylor: Transcript* (Case No. SCSL-2003-01-T; Leidschendam; 9 March 2011) 49389.

¹⁵⁴ '[...] I disagree with the findings and conclusions of the other Judges, standard of proof the guilt of the accused from the evidence provided in this trial is not proved beyond reasonable doubt by the Prosecution [...]' El Hadj Malik Sow, 'Oral Statement' (Leidschendam, 26 April 2012) on file with author.

from the public gallery. Only a few days later, the plenary of judges met and recommended his suspension.¹⁵⁵ Meanwhile, both the defence¹⁵⁶ and prosecution¹⁵⁷ appealed the verdict. On appeal, Taylor's defence wanted to call the judge as a defence witness,¹⁵⁸ but their request was turned down. On appeal, after a year of closed-door deliberations, the judgement was rubber-stamped and Taylor was sent to the UK to serve his 50-year sentence." Bijbehorende voetnoot: "Only a part of one out of four grounds of appeal by the Prosecutor and one out of 45 grounds of appeal by Taylor were allowed, thus altering minor details but confirming the substantial findings of the first instance judgment."¹⁵⁹

Distortion The Prosecutor shall – in order to establish the truth – extend the investigation to cover all facts and evidence relevant to an assessment of whether there is criminal responsibility under this Statute, and, in doing so, investigate incriminating and exonerating circumstances equally.¹⁶⁰

International criminal tribunals are ascribed – or ascribe to themselves – a historical competence they do not really possess.¹⁶¹ By pursuing a historical mission – beyond their mandate – protagonists as well as agents of international criminal justice experiments distort the public image of the purpose of the trial and thereby raise false expectations. The fact that these courts judge crimes of historical significance and deliver rulings that may influence historical narratives does not automatically make them appropriate arenas for historical elucidation or fact-finding. Truth is a vehicle rather

155 SCSL, *The Prosecutor of the Special Court v. Charles Ghankay Taylor: Transcript* (Case No. SCSL-2003-01-PT; Freetown, 16 May 2012) 49681-49683.

156 SCSL, *The Prosecutor v. Charles Ghankay Taylor: Notice of Appeal of Charles Ghankay Taylor* (Case No. SCSL-03-01-A; The Hague, 19 July 2012).

157 SCSL, *The Prosecutor against Charles Ghankay Taylor: Prosecution's Notice of Appeal* (Case No. SCSL-03-01-A; The Hague, 19 July 2012).

158 SCSL, Appeals Chamber, *The Prosecutor v. Charles Ghankay Taylor: Submission in Response to the Order for Clarification of 15 August 2012* (Case No. SCSL-2003-01-A; The Hague, 17 August 2012).

159 Special Court for Sierra Leone, Appeals Chamber, *The Prosecutor Against Charles Ghankay Taylor: Judgment* (Case No. SCSL-03-01-A; 23 September 2013).

160 *Rome Statute*, art. 54 (1a).

161 For a discussion, see: William Schabas, 'History, International Justice and the Right to Truth', in *Unimaginable Atrocities. Justice, Politics, and Rights at the War Crimes Tribunals* (Oxford 2012) 153-172; Gaynor, 'Uneasy Partners: Evidence, Truth and History in International Trials', *Journal of International Criminal Justice*, 10 (5) 1257-1275; and Richard Ashby Wilson, *Writing History in International Criminal Trials* (Cambridge 2011).

than an objective in the trial. Prosecutors employ evidence to secure convictions, lawyers serve their clients, and judges apply the law to the evidence put in front of them. "The purpose of a trial is to render justice, and nothing else," observed Hannah Arendt forty years ago.¹⁶² This equally applies to the contemporary tribunals, which are only and unambiguously tasked with prosecutions.¹⁶³ At the nucleus of international trials is the liability of a defendant in past crimes, not history itself. Juan Mendez claims that trials cannot settle conflicting interpretations of history, they can only limit the scope of impermissible lies about those events. Moreover, he underlines that they should not be expected to write history.¹⁶⁴

The ICC prosecutor is required to establish the truth. Witnesses are to tell the truth and nothing but the truth, while deliberate lying is punishable.¹⁶⁵ The agent of the global antidote to impunity was not given a historical mandate, and its prosecutor has reiterated, "his mandate does not include production of comprehensive historical records for a given conflict." Instead, the prosecutor opted to select a limited number of incidents to provide a sample that is reflective of the gravest incidents and the main types of victimization.¹⁶⁶ In contrast to the ICTR and SCSL, the ICC prosecutor has adopted an a-historical strategy and has not made any promises that it will contribute to the writing of history. As a result, its judgements do not delve into historical details and contexts. They have rather dealt with the quality of fact-finding and the reliability of witness evidence.¹⁶⁷ Implicitly, ICC judges have shown that international tribunals are less capable of at least unearthing and corroborating basic facts and presenting an accurate representation of the political, social, and historical contexts of violent conflicts.

The ICC's forerunners in Arusha and Freetown, whose prosecutors embraced a larger historical ambition, created a vast archive but left a rather

162 Hannah Arendt, *Eichmann in Jerusalem: A Report on the Banality of Evil* (revised edn; Penguin Books 1994) 232.

163 The respective statutes of the Special Tribunal for Lebanon, the Extraordinary Chambers in the Courts of Cambodia, the International Criminal Court, the Special Court for Sierra Leone, the ICTR and the ICTY do mention establishing a historical record of what happened.

164 Juan E. Mendez, 'Backflip', Richard Ashby Wilson, *Writing History in International Criminal Trials* (Cambridge 2011).

165 *Rome Statute*, art. 69 (1) & 70 (1a).

166 ICC, *Prosecutorial Strategy 2009-2012* (The Hague, 1 February 2010) para. 20.

167 Nine out of 593 pages of the Lubanga verdict deal with the background of the conflict in Ituri, while no specific chapter has been devoted to the background in the Ngudjolo verdict. ICC, *Prosecutor vs. Lubanga: Judgment*, paras. 67-91 & ICC, *Situation en République Démocratique du Congo. Affaire le Procureur c. Mathieu Ngudjolo: Jugement rendu en application de l'article 74 du Statut* (Case No. ICC-01/04-02/12; The Hague, 18 December 2012).

scattered narrative of events in the Great Lakes Region of West Africa. The ICTR only looked into genocide crimes committed by Hutu extremists, while the SCSL prosecuted former Liberian president Charles Taylor for crimes committed in Sierra Leone and not in Liberia. More importantly, after years of investigations and trials, judges ruled out evidence supporting grand narratives of the Rwandan genocide or interrelated wars in West Africa. Besides the challenging non-documentary environments and cultural settings they investigate, there are fundamental limitations in international criminal justice on writing history. First, tribunals are bound by their temporal [when], territorial [where], personal [who], and subject-matter jurisdiction [what]. Second, prosecutorial discretion determines the line of investigations [who, what, and if]. The scope is further limited in the indictment [which crime, where, and when]. Three other factors straitjacket the tribunal's exposure of historical fact: confidentially [protected witnesses and documents]; plea agreements [limited crimes and evidence]; and relevance [historical significance is not equal to legal weight].¹⁶⁸

International trials concerning non-documentary conflict zones only uncover fractions of the past. The prism of law and investigative challenges restricts their narrative. Yet they do establish micro-histories. Rwanda and Sierra Leone both went through a more all-embracing transition and launched parallel ventures to unearth or configure narratives of the violent past. Rwanda's post-genocide government has exhausted the 'transitional justice toolbox' in its mission to construct a new nation, leaving the ICTR on the outside. The *gacaca* process was perhaps its most ambitious project: unveiling the local realm of genocide while pursuing its perpetrators in communal settings. In Sierra Leone, the Truth and Reconciliation Commission (TRCSL) was the first genuine endeavor to unveil, explore, and explain the architecture of the violent past. More than trials, these truth ventures equal the work of historians and are part of the historiography on mass violence.

168 Gaynor, 'Uneasy Partners', 1257-1275.