



A University of Sussex PhD thesis

Available online via Sussex Research Online:

<http://sro.sussex.ac.uk/>

This thesis is protected by copyright which belongs to the author.

This thesis cannot be reproduced or quoted extensively from without first obtaining permission in writing from the Author

The content must not be changed in any way or sold commercially in any format or medium without the formal permission of the Author

When referring to this work, full bibliographic details including the author, title, awarding institution and date of the thesis must be given

Please visit Sussex Research Online for more information and further details

Thesis Title

Legal Witnessing and Mass Human Rights Violations: Remembering Atrocities

By

Benjamin Thorne

University of Sussex

Law

Supervisors

Dr Matthew Evans, Dr Tom Frost and Dr Tarik Kochi

Submitted for the Award of Doctor of Philosophy

February 2020

Abstract

Legal witnesses are perceived to be a crucial part of international criminal tribunals' and courts' responses to mass human rights violations, not only in contributing to a legal determination of guilty or not guilty being reached but also to produce a collective memory of the atrocities. However, this common claim in the transitional justice legal scholarship fails to fully understand the nature of memory. Memory construction entails fragments of individual and collective memories combining into contingent and contestable narratives of the past, and it is for this reason that the thesis challenges the claim that international criminal tribunals and courts are able to produce a collective memory of atrocities.

Taking the International Criminal Tribunal for Rwanda (ICTR) as its case study, this thesis differs from the majority of legal transitional justice studies researching courts and tribunals, which have worked within traditional legal frameworks. The originality of this thesis is that it offers a conceptually driven and empirically grounded analysis of archived ICTR documents, and interview transcripts of ICTR staff from the University of Washington (UoW) archive, relating to the selection of witnesses. In order to show the limitations of legal memory the thesis constructs an original conceptual framework using Giorgio Agamben's concept of 'witness' and Paul Ricoeur's philosophical insights on 'memory'. Accordingly, the research argues for the need to understand witnessing as non-instrumental: a contingent and multi-layered discursive process. It is the discursive formations within a discourse of witnessing that constitutes the conditions determining the subject position of witness. Therefore, what the witness subject remembers is a constellation of fragments of the past, which are formed within the contingent conditions of discourse.

The arguments advanced by the thesis contribute towards discussions on the role of witnesses and how the past is remembered during transitional periods, by highlighting the need for the study and practice of transitional justice to fully understand how theoretical insights can make visible the complexities and contours of the legal construction of the past. The thesis thus contributes to specific analysis of witnessing and memory, but also the broader transitional justice scholarship.

Table of Content

Abstract (2)

Acknowledgments (6)

Abbreviations (7)

Introduction Chapter (8)

- Introduction (9)
- Defining Transitional Justice (12)
- Context (16)
- Research Data and Method (19)
- Structuring the Argument (22)

Chapter One: Memory, Witnesses and International Criminal Institutions

- Introduction (25)
- Origins of the Practice of Transitional Justice: Nuremberg and the Exceptional use of International Law (26)
 - i. *The symbolic representation of Nuremberg and Human Rights* (30)
 - ii. *Eichmann: Law and the Need for Witnesses to Remember* (35)
- A Discourse of Transitional Justice Scholarship: From International Justice to Local Justice Via International Norms (41)
- International Criminal Tribunals and Courts: Witnesses and Testimonial Evidence (48)
 - i. *International Criminal Tribunal for Rwanda and Defining Legal Witnesses* (54)
- Conclusion - International Legal Institutions: Spaces of Memory Construction (58)

Chapter Two: Conceptualising the way Legal Witnesses Remember Mass Human Rights Violations

- Introduction (61)
- Law and the 'Grey Zone' of Witnessing (62)
 - i. *Bearing Witness* (65)
- The Grey Zone: Law, Ethics and Legal Witnesses (68)
- The 'Muselmann': the lacuna of law and justice or legal witnessing as 'Judgment' (71)
 - i. *Theoretical lens: conceptualising legal witnessing* (75)
- Memory: Individual and Collective Components (77)

i. *Manipulated Memory* (80)

- From Agamben and Ricoeur to an original conceptual framework: analysing the way legal witnesses remember at the ICTR (82)
- Conclusion (85)

Chapter Three: Discourse and Legal Archives

- Introduction (86)
- The Data (87)
 - i. *The ICTR archives: selecting the ‘corpus’ for a Foucauldian discourse analysis* (89)
- Methodology and Research design (95)
 - i. *Statements* (97)
- Method: Foucauldian framework for a discourse analysis (101)
- Conclusion (109)

Chapter Four: The Discursive Battleground of Legal Witnessing, Or, The Active Witness and Their ‘Right to Truth’

- Introduction (110)
- Nowhere and Everywhere: The Discursive Reach of the Witness at the ICTR (113)
- Right to Truth (126)
 - i. *Mass Atrocities and the Right to Truth* (127)
 - ii. *Victims-Witnesses* (129)
 - iii. *The discursivity of the ‘witness’ vs the right to truth: universality, agency and collective legal stories* (131)
- Conclusion (134)

Chapter Five: Memories of Violence and the Limitations of Law

- Introduction (136)
- Law, Genocide and Legal Memories of Mass Violence (137)
 - i. *The ICTR and the crime of Genocide* (138)
 - ii. *Genocidal violence: Layers and fluidity of events, actions and agents* (141)
- Beyond Law: The Plurality of Violent Memories (145)
 - i. *Discursive restrictions of witness memories* (145)
 - ii. *The ‘Grey Zone’ of Legal Witnessing* (153)
 - iii. *The plurality of memory* (155)
- Conclusion (158)

Chapter Six: Critiquing Law and Collective Memory

- Introduction (160)
- Legal Actors as Memory Producers (161)
 - i. *Testifying in the ‘Interest of Justice’* (161)
 - ii. *The discursive practices of Disclosure* (165)

- iii. *Producing a Legal Memory of Rape and Sexual Violence* (166)
 - Liberal Legality and Collective Memory: A Critique
 - i. *A critique of advocacy for a legal collective memory of atrocities* (172)
 - ii. *Plural vs Collective memory* (174)
 - iii. *A Conception Alternative* (177)

Chapter Seven: Fragments of Legal Memories

- Introduction (183)
- Legal Archives: Plurality, Self and ‘Others’ (185)
 - i. *Plural Fragments of Memory* (187)
 - ii. *Intergenerational Transmission of Legal Memories: Words and Images* (191)
- Legal Memory: The Empirical Potential and Challenges of the ICTR Archive (196)
- Conclusion (202)

Conclusion

- Introduction (204)
- Key Findings and Significance of Findings (205)
- Contribution to Knowledge (208)
- Limitations (210)
- Possible future Research Directions (212)

Bibliography (214)

Appendix

- Appendix One: Case Studies (234)
- Appendix Two: List of Data (235)

Acknowledgments

Firstly, I would like to thank my parents, brother, sister and brother-in-law for their unconditional love, support and understanding during the many years of undergraduate and postgraduate study. I would also like to say an enormous thank you to my PhD supervision team of Dr Matthew Evans, Dr Tom Frost and Dr Tarik Kochi. My PhD journey at Sussex would have not even begun if it was not for Tom's belief and enthusiasm in the project, and in me, at a time when self-doubt was making the prospect of even starting the PhD a far-off reality. His expertise, guidance and friendship during the last 4 years have undoubtedly shaped this thesis for the better. Tarik has provided the thesis with essential levelheadedness and a calm sense of authority that has been warmly welcomed. Since joining the supervision team at the start of the second year Matthew has brought additional expertise and insights that have without doubt enhanced the final version of the thesis. It is needless to say that without Tom's, Matthew's and Tarik's intellectual guidance and emotional support this thesis would not have been possible (whilst any errors are of my own doing).

I would also like to say a big thank you to all the staff and doctoral students at Oxford University Centre for Socio-Legal Studies where I spent a very happy 8 months of my PhD journey as a visiting researcher. My time at the centre provided additional intellectual insight and an opportunity to be part of a truly interdisciplinary group of scholars. In particular, I would like to thank Samuel, Lisa and Mark for making me feel so welcomed and part of the community at Oxford. I have been very fortunate to have had the opportunity to collaborate on more than one occasion with Dr Julia Viebach. These experiences have had a significant impact on my research outlook and writing. Dr Craig Johnson has provided all manner of insightful and pragmatic advice (and bad jokes) on the PhD journey and navigating the complexities of life in general, and for these reasons I am particularly thankful to him. The PhD journey was also shaped by a two-month institutional visit to the Aegis Trust in Rwanda, which provided me with important context and a sense of reality for the themes the thesis engages with. Thank you to all the staff at the Aegis Trust, in particular, Aude, Claver and Paul, for making the visit possible and enjoyable. My stay in Rwanda was made even more special because of my time staying with JMV at Ivuka Arts Centre: thank you my friend for the many conversations and numerous moments of happiness and laughter.

I would like to thank all of the administration staff at the school of LPS who work tirelessly to make sure the practical components of the PhD journey run as smoothly as possible. In this regard, Linsey Cavell requires particular thanks. Another huge thank you needs to go to my dyslexic support advisor Judith Shaw who has not only aided the clarity of my writing in the thesis but also provided a much-welcomed sense of kind pragmatism. The PhD journey has also been made more emotionally manageable and enjoyable through friends' willingness to let me walk their dogs. These canine companions' true sense of unconditional love has provided many moments of pure happiness and warmth.

Finally, thank you to my wife Dani, words cannot fully express the love and gratitude that I feel for you. Your love, friendship and belief in me has made the emotional rollercoaster that is the PhD journey a more warm, kind and happy place. Thank you.

Abbreviations

ICTR: International Criminal Tribunal for Rwanda

ICTY: International Criminal Tribunal for the Former Yugoslavia

ICC: International Criminal Court

ECCC: Extraordinary Chambers in the Courts of Cambodia

RPE: Rules of Procedure and Evidence

RPF: Rwandan Patriotic Front

MICT: Residual Mechanism for the International Criminal Tribunals

IRMCT: International Residual Mechanisms for Criminal Tribunals (formally MICT)

RA: Remnants of Auschwitz

HS: Homo Sacer

UoW: University of Washington

Introduction Chapter

This thesis investigates the way the past of societies undergoing political transition is remembered, and how processes of witness testimony at the International Criminal Tribunal for Rwanda (ICTR) set up conditions for individual memories of human rights violations to be collectively understood. The central question this thesis asks is: How do legal witnesses of human rights violations contribute to memory production in transitional post-conflict societies? Witnessing at tribunals entails individuals externalising memories of violations. This is commonly construed within the transitional justice legal scholarship as an opportunity for individuals to ensure their memories are entered into an historical record (Byron 2008; Groome 2011; Keydar 2019; Klinkner and Smith 2015; Osiel 2000). Yet this predominant understanding of witness testimony fails to comprehend the nature of memory. Memory construction entails fragments of individual and collective memories within a contestable and contingent framing of the past (Assmann 2012), and it is for this reason the thesis challenges the claim that international criminal courts and tribunals are able to produce a collective memory of atrocities. Scholars who make this claim include Osiel (2000), Keydar (2015, 2019), (Douglas 2001). Even though the scholarship indicates the need for alternatives to trials to understand a society's past during transitional periods (Clark 2012; McEvoy 2007; Murphey 2018; Waldorf 2010), international legal frameworks continue to dominate debates on how transition 'should be' (Dixon and Tenove 2013; Klinkner and Smith 2015; Sikkink 2011). This thesis agrees with Turner (2016) and Zunino (2018) in calling for a more nuanced and critical understanding of legal and human right norms during transitional periods, and takes a cautionary position in understanding law's ability, or possible inability, to mediate social change following mass atrocities.

This project differs from the majority of legal transitional justice studies researching tribunals/courts, which have worked within traditional legal frameworks (Combs 2010; Gahima 2013; Groome 2011; Keydar 2019; Sikkink 2011). Specifically the thesis's critiques are located within the legal scholarship advocating the restorative justice turn in international criminal law. Advocates of this 'turn' seek new meaning and scope as to what international criminal law is and for (Kendall 2015, 357-359). Throughout this thesis when reference is made to the legal transitional justice scholarship it is specifically those advocating the restorative justice 'turn'. The originality of this thesis is that it offers a conceptually driven and empirically grounded analysis of archived

ICTR documents, and interview transcripts of ICTR staff from the University of Washington (UoW) archive, relating to the selection of witnesses. These archived materials have been analysed in order to better understand the condition and possibility of the ‘witness’(es). This project argues that the public construction of individual internal memories into an authoritative legal memory should have limited application in how transitional justice discourses shape the future of transitioning communities. Crucially, it contributes to the discussion on the role of witnesses and how the past is remembered during political transition, by highlighting the need for the study and practice of transitional justice to fully understand how theoretical insights can make visible the complexities and contours of the legal construction of the past. The thesis thus contributes to specific analysis of witnessing and memory, but also the broader transitional justice scholarship. A conceptual framework is offered by this research, which could be used in future research to look at other international legal processes of witnessing such as the International Criminal Tribunal for Yugoslavia (ICTY) and the International Criminal Court (ICC) deployed during periods of transition.

Taking the ICTR as its case study, this conceptually led thesis analyses the construction of legal memory and the discursive conditions of the ‘witness’, through developing an original conceptual framework. Discursive conditions are understood here to mean the way social power abuse, dominance, and inequality are enacted, reproduced, and resisted by writing and speaking (Foucault 1972). Accordingly, the thesis’s framework uses Giorgio Agamben’s understanding of the ‘witness’ and Paul Ricoeur’s concept of ‘memory’ (Agamben 1999; Ricoeur 2004). Agamben’s (1997) understanding of witnessing is concerned with the ethical implications of positioning the survivor of mass violence as the witness, accounting for the trauma suffered by others. Agamben’s concept of ‘witness’ focuses on the concentration camps at Auschwitz. This thesis takes Agamben’s conceptual insights and applies them to a new context, the ICTR. For Agamben, witnessing entails speaking in proxy for those who are the true witnesses, the individuals who experienced the trauma but did not survive. Thus, the speaking witness cannot be the true complete witness; rather the witness who survived is the witness of the witness (Agamben 1997, 33). Agamben posits the witness in a lacuna between legal judgment that is absent of truth and the ethical category of truth and justice, often naturalised as being bestowed upon the witness (Agamben 1997, 23-27). According to Agamben’s understanding, the essential structures that are the conditions for the subjectification of the individual human ‘being’ are constituted as the subject of witness.

This allows for an understanding of what witnesses are. However, Agamben's concept of 'witness' does not include a substantive theory of memory. Therefore, the thesis will turn for this to Paul Ricoeur's concept of 'memory'.

Ricoeur (2004) understands memory to be fragmented, unable to render the temporality of historical knowledge. He insists that memory is not capable of revealing unequivocal or uncontaminated facts about the past. As such, Ricoeur perceived remembering to be comprised of two parts: embodied and external. Embodied or 'inwardness' refers to individual memories, what individuals have encountered and done (Ricoeur 2004, 40-45). Remembering is also external, entailing 'community', in that communal memories are what derives a sense of 'we' – plural – that offers a sense of shared experience. It is through remembering in and with 'community' that individuals gain a sense of a shared experience, which forms a 'life in common with-others' (Ricoeur 2004, 54). This thesis's conceptual framing of witness memories expands existing transitional justice paradigms, which remain under-theorised since the emergence of the transitional justice scholarship in the late 1980s (Clark 2012). This is particularly the case for the entwined relation of memory and transitional justice. Thus, the thesis's conceptual framework enables a more nuanced understanding of the scope, and limitations, in which historical accounts of the past, produced through legal determinations of 'the truth', can make a contribution to the wide-reaching transitional justice aspirations of facilitating 'justice' and 'peace' (Dixon and Tenove 2013; Klinkner and Smith 2015). To do this, the thesis employs a Foucauldian framework for a discourse analysis which focuses on how forms of representation and convention in writing and speaking produce specific historically located meaning and knowledge. To show the contingent nature of legal memory, the thesis analyses ICTR archived court documents relating to the selection of witnesses and interview transcripts of ICTR personnel taken from the UoW online archive. The documents the thesis analysed were taken from the online ICTR archive include statutes and rules of procedure and evidence, indictments, witness statements and summaries of witness statements, pre-trial briefs, motion and motion decisions and judgments. It is from a Foucauldian poststructuralist position that this thesis engages with the data and original conceptual framework. This project will inform contemporary and future debates on the role of witnessing in the context of legal constructions of memory and historical truth-telling during political transition.

In summary, this thesis's original contribution is that it offers an original conceptual framework for understanding the construction of witness memories at the

ICTR. The conceptual offerings of the thesis extend current understandings of legal witnessing and memory in the legal scholarship which has remained under theorised. Moreover, the limited existing theoretical approaches have largely been saturated within traditional legal frameworks. Alongside the original conceptual framework, the thesis also engaged with an analysis of empirical data, namely archive material relating to the selection of witnesses at the ICTR. The decision for this conceptual led thesis to engage with empirical material is to acknowledge that conceptually led transitional justice research should be in dialogue, and engaged, with empirically grounded analysis (Sharp 2019, 21)

The transitional justice legal scholarship is central to this thesis and the arguments it advances. Therefore before the significance of the project and its contributions are outlined it is necessary to define and explain the thesis's understanding of transitional justice.

Defining Transitional Justice

Transitional justice is a multifaceted 'field', however there is a dominant framing of what transitional justice is, what it aims to achieve and how it 'should' achieve its aims (Turner 2016; Zunino 2018, 3). This norm or dominant discourse of transitional justice has created a paradigm of the context transitional justice operates in and what counts as legitimate approaches (Zunino 2018). This dominant discourse of transitional justice can be described as follows. It is in the end of the cold war period, from the late 1980s Argentina, Chile, Uruguay into the 1990s Sierra Leone, Rwanda, South Africa, that the term transitional justice as a field of academic scholarship first emerged (Teitel 2003). According to Teitel the academic field of transitional justice emerged during the late 1980s, which was explicitly related to a seismic shift in international politics during this period. Specifically, the breakdown of the Soviet Union, and capitalist (west) versus communist (east) proxy wars, posed important questions for the succeeding regimes – Latin America, Eastern Europe, Central Africa (Kritz 1995; Teitel 2003, 71). In particular, how would those new to power bring-about accountability and foster peace and democracy in the countries where the proxy east versus west wars had occurred (Teitel 2003)? The seismic shift in international politics culminated in 1989 with the end of the Cold War. Many of the 'proxy wars' had been 'supported by international power politics' (capitalism versus communism) and thus were directly affected by the Soviet collapse

(Teitel 2003, 71). The collapse of the Soviet Union and subsequent demise of authoritarian regimes in Latin America and Eastern Europe was perceived by many to be the beginnings of a global ‘liberal’ movement (Fukuyama 1989).¹ Importantly, the newly liberated states were tasked with the challenge of conceiving how to administer justice and build democracy. That being, the core principles of the existing model of transitional justice, ‘accountability through international law’, and its relevance to the post-Cold War period were increasingly being questioned (McEvoy 2007). This is what Teitel is referring to in suggesting within ‘phase II’ of transitional justice ‘the rule of law [was] equated with trials by the nation-state to legitimate the successor regime and advance nation-building’ (Teitel 2014, 54). According to Teitel, the orientation towards nation-building projects was a shift from transitional justice solely holding previous regimes accountable for mass atrocities to incorporating rule-of-law values, such as ‘peace’ and ‘reconciliation’ (Teitel 2014, 54). This shift to include aspirations for healing an entire society, through ‘rule-of-law values’, was the inclusion of diverse post-conflict processes, which had ‘previously been treated as largely external to the transitional justice project’ (Teitel 2014, 55). In short, the end of the Cold War, and collapse of the Soviet Empire, presented new questions for the transitional justice project (Kritz 1995; Teitel 2003). In particular, how could transitional justice mechanisms achieve justice and peace-reconciliation, whilst still upholding the rule-of-law? In other words, there was a growing call for transitional justice through the rule-of law to bring about accountability for past atrocities, whilst taking into consideration the context-specific needs of transitioning states, in order to move from ‘illiberal rule to liberal democracy’ (Teitel 2014, 76).

The focus for transitional justice scholars to understand the context-specific needs of transitioning societies was a central debate within the transitional justice scholarship during the post-cold war period (Hayner 2011, Roht-Arriaza 2006, Teitel 2003). The scholarship orientated towards consideration of how a template – ‘tool kit’ – of transitional justice legal and non-legal mechanisms could facilitate reconciliation and peace (Clark 2012). This ‘tool kit’ approach comprised diverse legal and non-legal mechanisms: national trials, truth and reconciliation commissions, reparation, ‘traditional’ justice mechanisms, forgiveness and healing rituals (Hayner 2011; Roht-

¹ In his provocative 1989 conceptual essay ‘The End of History’ Francis Fukuyama argued the end of the cold-war and fall of the Soviet Empire was the beginning of a global liberal democracy. Influenced by Hegelian understanding of history Fukuyama’s central thesis was ‘that liberal democracy may constitute the “end point of mankind’s ideological evolution” and the “final form of human government,” and as such constituted the “end of history”’. See Fukuyama (1989); also see: Fukuyama (1992).

Arriaza 2006). The crux of a ‘tool kit’ approach to periods of transition was the perception that for newly liberated states to transition to ‘democracy’ required the inclusion of restorative justice component(s) (Roht-Arriaza 2006, Teitel 2003). Inasmuch as, the common advocacy for the future of newly liberated states entailed understanding, constructing, the ‘truth’ of past atrocities. This can be seen in Teitel pointing out that in the aftermath of the Cold War ‘the main purpose of transitional justice was to construct an alternative history of past abuses’ (Teitel 2014, 56).²

For example, following the end of apartheid rule in South Africa, the South African government chose to create a ‘Truth and Reconciliation Commission’ (TRC) (Verdoolaege 2008). This included perpetrators being given amnesty for crimes they committed in exchange for telling the truth of past abuses.³ A further example of the transitional justice discourse shifting from the exclusivity of accountability through international law to understanding the context-specific needs of transitioning societies is illustrated in the Rwandan gacaca courts (Clark 2010, 2014). The gacaca courts, based upon a ‘traditional’ Rwandan reconciliation process, facilitated accountability through gacaca being legislated in Rwandan law as a legal institution, whilst concurrently giving victims/survivors of the genocide the opportunity to tell the community of their experience of violations (Clark 2010; Doughty 2015; Palmer 2015). Slogans such as ‘The Truth Will Heal’ were a common sight during the existence of the gacaca courts – 2002-2012 – (Clark 2014). In short, the need to understand the context-specific needs of transitioning societies questioned the extent to which accountability in isolation was appropriate in order to transition newly liberated states to a ‘liberal democracy’ (Teitel 2003). Thus a position emerged within the transitional justice scholarship advocating the use of multiple mechanisms (the ‘tool kit’) in order to facilitate accountability and help reconcile an entire society. However, legal and human rights norms continue to significantly orientate and shape how transitional justice processes ‘should be’ (Sikkink 2011; Dixon and Tenove 2013). These norms define the paradigm in which transitional justice mechanisms determine the ‘correct’ approaches and the perceived success or failure of these approaches (Turner 2013, 198). The significance of legal and human rights

² For discussion on transitional justice mechanisms in Latin America, see Anita Ferrara (2014), Elin Skaar, Siri Gloppen and Astri Suhrke (2005).

³ Verdoolaege argues that the South African TRC constructed a ‘reconciliation discourse’ which had long lasting implications on the recovery of South African society. See: Verdoolaege (2008). Also see Moon (2006). For a more general discussion on Truth Commissions and Amnesty see Jeremy Sarkin, who suggests caution should be taken when considering the South African TRC as a template for other transitioning societies. See: Sarkin (2004, 2015). Also see: Hayner (2011).

norms, particularly in shaping the perceived importance of legal witnesses will be unpacked in Chapter 1 and is a theme running throughout this thesis.

This dominant framing of transitional justice, summarised above, has been convincingly argued by Zunino as a discourse of transitional justice (Zunino 2018). Zunino defines a discourse of transitional justice as entailing ‘characteristics at its core which have framed existing accounts of the history of transitional justice determining which responses are recognised as relevant and which are ignored’ (Zunino 2018, 231). A discourse of transitional justice is a ‘distinct discursive space’ with six core characteristics: comparative, technical, teleological, liberal, multilevel and state-centric (Zunino 2018, 22-23). The comparative characteristic is transitional justice’s reliance on comparative method to contrast a range of responses to different contexts that have experienced past systematic periods of violence. Technical refers to transitional justice’s strong legal and apolitical orientation. This orientation has ‘developed a community of legal experts in international criminal law that regard it as a self-contained system with its own logic’ (Zunino 2018, 109). Transitional justice is teleological in the sense it is directed at achieving a specific set of goals. International criminal court and tribunals founding documents set varying goals for them, such as the ICTR will contribute to reconciliation and peace in Rwanda (Zunino 2018, 109). Liberal is the liberal imprint embedded in international criminal justice, ‘especially in the dimension of foregrounding violations of civil and political rights and instances of physical violence’ (Zunino 2018, 110). Multilevel is the way in which different transitional justice mechanisms operate and are influenced by the international. Notwithstanding the strong influence of the international, state-centric characteristic is the ‘heavy involvement of states, while less so than national prosecutions, international criminal justice is state-centric (Zunino 2018, 111).

According to Zunino, it is these six characteristics that have established the parameters for most discussions on transitional justice and in doing so has resulted in certain mechanisms and processes being given preference (Zunino 2018, 58). It is Zunino’s understanding of transitional justice as discourse that this thesis adopts. As a discourse, transitional justice entails two components, the practices of transitional justice with its origins in the aftermath of the Second World War and a discourse in scholarship (Zunino 2018, 3). Zunino argues that a discourse of scholarship on transitional justice significantly shaped the origins of the practice of transitional justice being located within the Nuremberg trials (Zunino 2018, 171-172). Nuremberg was chosen as the origins of

the practice of transitional justice because it reflected many of the core characteristics during the emergence of a discourse in scholarship, particularly the scholarship's legalistic orientation (Zunino 2018, 172). Understanding transitional justice as a discourse is suitable for the purposes of this thesis in two particular ways. Firstly, it helps identify how legal and human rights norms have become a dominant position within the scholarship on transitional justice, and as a core feature within transitional justice practices, such as international criminal tribunals and courts. Secondly, it foregrounds the 'importance that language, concepts and tropes have in [the transitional justice] phenomenon' (Zunino 2018, 9). In short, it puts front and centre the importance of analysing discursivity in our research into transitional justice processes. This thesis being interested in a discourse of witnessing at the ICTR is, like Zunino's discourse of transitional justice, focused on understanding the discursive conditions and practices that shape our understanding of post-conflict phenomena. Therefore, transitional justice understood as discourse provides a useful frame of reference for this thesis to unpack the 'language, concepts and tropes' which determined at the ICTR the individuals who can be a witness subject and what knowledge of past rights violations they can talk about.

Subsidiary Research Questions

To enable the project's research question to be answered - 'How do witnesses of human rights violations contribute to memory production in transitional post-conflict societies?' - the project will ask the following subsidiary research questions:

- (i) How is the subject position of 'witness' discursively created? (The way social power relations produce identities and specific historically located meaning).
- (ii) In cases of mass human rights violations, how does the construction of memory at the ICTR frame the manner in which violence is remembered?
- (iii) Does positioning memory within the discursive construction of witness mean memory becomes fixed and rigid?

Context

In answering these subsidiary questions, the project's original conceptual framework of witness memories will add to existing legal transitional justice frameworks of witnessing (Combs 2010; Osiel 2000, Klinkner and Smith 2015; Klinkner and Howard 2019), which lack consideration of the discursive and contingent nature of memory.

During transition, witness testimony given in court is often perceived to contribute on an individual level by enabling witnesses to come to terms with the past (Kim 2013, 40; Klinkner and Smith 2015) and at a collective level through the compilation of witness testimonies facilitating a collective memory of mass violations (Groom 2011; Keynar 2019; Osiel 2000). Groome argues that, on an individual level, there is a need to position individual victims of mass human rights violations at the centre of legal responses to atrocities, transitioning victims from passive sufferers of violence to active participants in processes of redress (Groome 2011). Moreover, Combs (2010) argues that witness evidence provided at tribunals differs substantially to evidence provided in non-transitional contexts, suggesting the legal ‘rules of procedure’ should provide judges with more discretionary power when interpreting witness evidence. Combs claims, in the context of the ICTR, witness evidence given by Rwandans was often untrustworthy (Combs 2010).⁴ Osiel (2000), emphasising the collective benefits of witnessing, points to a more far reaching paradigm for witness memories, stating that witness testimonies can construct a coherent collective memory of atrocities, providing victims and societies affected with a collective narrative of past events (Osiel 2000). However, Combs and Groome’s framing of witnessing does not account for how legal constructions of the witness(es) perpetuate into the wider transitional justice discourse. Moreover, Osiel’s advocacy for a collective legal explanation of the past negates the discursive contingency of legal memory.

A recurrent understanding of witnessing is provided from a human rights perspective. Dixon and Tenove (2013), Klinkner and Smith (2015), and Kim (2013) frame witnessing within a wider human rights project. Central to this perspective is an assumed normative process of advocacy for universal human rights (Dixon and Tenove 2013, 3-4; Klinkner and Smith 2015). This places a strong emphasis on human rights violations not being forgotten but remembered, and victims having the ‘right to [tell] the truth’ of their experience (Klinkner and Smith 2015, 11-12). With its objectives informed by ‘human rights discourse’, this perspective perceives victims as being given a voice to remember the violations they suffered as a human right in itself (Klinkner and Smith 2015, 11). However, this human rights discourse on witness memories fails to comprehend the discursive and contingent nature of memory. This is because there exists

⁴ Eltringham has challenged Combs’s claim that Rwandan witnesses at the ICTR were untrustworthy, arguing that Combs fails to fully understand how ‘legal culture’ was a significant impact on witness testimonies (Eltringham 2019).

a fundamental principle within normative human rights discourse that individual victims of rights abuses have a universal right to agency in legal proceedings (Klinkner and Smith 2015, 11-12).⁵ This normative human rights discourse often leads to ‘faith-based’ rather than ‘fact-based’ prescriptions (Clark 2012, 12). As such, this suggests that expectations of human rights advocacy are often too high, which exemplifies the need to examine the discursive conditions of legal witnessing in which the subject of ‘witness’ is constituted and the manner in which legal memory becomes fixed and rigid.

There is a smaller, although persuasive, body of work that has looked more critically at witnessing in international criminal tribunals and courts (Dembour and Haslam 2004; Viebach 2017; Wilson 2011). It is these scholars that the thesis works with and contributes towards discussions on how international criminal tribunals and courts shape understandings of atrocities. For example, Viebach’s critical work has shown, through testimonies of witnesses in the Seromba trial at the ICTR, the way narratives of trauma are told are much more restrictive than how survivor testimonies were told at the Rwandan Nyange memorial site (Viebach 2017). Viebach argues there is a perpetual strain between what survivors say on the witness stand and whose stories are silenced (Viebach 2017, 68). Dembour and Haslam (2004) argue, in the context of the ICTY, that these trials are not equipped nor is it their purpose to produce a collective memory via the testimonies of witnesses (Dembour and Haslam 2004). The Krstic trial had the effect of silencing rather than hearing the stories of witnesses (Dembour and Haslam 2004, 175). While these works provide useful insights into how the courtroom and its actors shape what witnesses can say on the witness stand, what is also very important, and has received less scholarly attention, is the extent to which the processes before witnesses give their testimony in court contribute to who can be a witness and what stories they can tell. This thesis focuses specifically on the legal processes before witnesses testify in court, and the important role these processes have in shaping and restricting who can speak at the ICTR and what they can speak about. Specifically, minimal scholarly attention has been given to the role conceptual insights could have on casting light upon how international criminal institutions construct witness identities and memories of past horrors, and it is this context that is the central focus of the thesis.

Therefore, notwithstanding the benefit of international criminal proceedings, this research argues legal institutional (re)production of memory needs to be understood

⁵ See Mutua 2013.

within the scholarship on transitional justice not as a ‘product’ or ‘thing’ (Osiel 2000; Groome 2011; Keydar 2019). Instead, memory needs to be viewed as process, which is multidimensional and transient. Significantly, to specify agency is vital (Winter 2006, 3) as it prioritises answering the central questions on the legal construction of memory, that being: who remembers, when, why and how? Accordingly, the research proposes a need to depart from an instrumental understanding of witnessing: the witness conceived as a pre-existing self-evident subject, through which previously ‘hidden’ or ‘suppressed’ memories can to a greater or lesser extent be recovered (Combs 2010). Accordingly, the research argues for the need to understand witnessing as non-instrumental: a contingent and multi-layered discursive process. It is the discursive formations within a discourse of witnessing that constitutes the conditions determining the subject position of witness. Therefore, what the witness subject remembers is a constellation of fragments of the past, which are formed within the contingent discursive conditions of discourse.

Thus, this thesis makes a conceptual contribution, showing that it is only by understanding the discursive conditions that constitute the witness and the manner in which constructions of memory become fixed and rigid that we can understand what is at stake during processes of witnessing. Specifically, remembering events such as mass violations of human rights requires understanding such events as comprising a shared experience. It is through ‘community’ and ‘with-others’ (Ricoeur 1984, 2004) that individuals construct meaning of experiences of the past, in which networks of social relations are enacted and re-enacted amongst individuals and groups. Accordingly, legal witnessing as a modality for legal memory is absent modes of remembering which are able to encompass ‘community’ and ‘with-others’ (Ricoeur 1984, 2004), as is argued in Chapter 5. This brings into question the way in which international legal proceedings shape transitional justice discourse, which informs the diverse processes of societal transition. The latter part of the thesis explores what else is produced through the discursive conditions and practices at the ICTR. This exploration is made in Chapter 7 by considering the fragments of memories within the archive material and the potential for this material to aid memory production in Rwanda. Here, it is necessary to acknowledge that whilst the thesis’ understanding of memory as something constructed and plural is very useful for the discussions in Chapter 7 and the central thrust of the thesis’ arguments, however this frame of memory does not advocate that all uses of the past should be permitted, specifically in the context of genocide denial and revisionism (see Chapter 7). Genocide denial in Rwanda, and many other post genocide contexts, by the architects of

the genocide and their supporters continue to present significant challenges and brings distress to survivors and the families of victims (Melvern 2020). Genocide denialists attempt to intentionally distort and/or manipulate past events in order to fit their warped and abhorrent narrative (Melvern 2020, 5). However notwithstanding this, experiences of the past will always entail plural understandings, and crucially the thesis's conceptual framework extends our understandings of how plural fragments of the past are constructed. In summary, by showing what is at stake during legal witnessing and the manner in which legal memory is constructed, it is only then are we able to gain a fuller understanding of the scope, and limitations, in which historical accounts of the past, produced through legal determinations of 'the truth', can make a contribution to the wider transitional justice aspirations of facilitating 'justice' and 'peace' (Dixon and Tenove 2013; Klinkner 2015): transitional justice discourse engages in shaping the future of a given community, in which legal outcomes influence the framing of articulations of the past.

Research Data and Method

The recent completion of the ICTR mandate (2015) and its perceived success is significant to how we understand future processes of transitional justice, as there is a very real possibility that witness memories, through testimony, will be seen to have been central to the ICTR model (Byron 2008; Gahima 2013; Kendall and Nouwen 2016). Furthermore, the 'legacy debate' surrounding the contribution the tribunal archives should have to transitional periods are often construed as providing a historical legal record of the 'facts' of the atrocities committed (Ketelaar 2012). Such historical records of the legal 'facts' often orientate around a linear constructed narrative of mass violations (Ketelaar 2012; Redwood 2017) which can condense the complexities of past violations into an overly simplified account of the past and present. As such, through a Foucauldian discourse analysis of archived legal documents and interview transcripts, this project foregrounds the fragmentation of individual and collective memory whilst concurrently pointing out the contingent nature of constructions of the past and present. The data to be analysed is taken from the publicly accessible online archived judicial documents from the ICTR and UoW archived interview transcripts with ICTR personnel including Judges, prosecution and defence counsels, investigators and registrar. All ICTR material is

written/transcribed in English and French.⁶ The documents from which a close discursive reading was conducted have been taken from two ICTR cases, Emmanuel Rukundo and Ildephonse Nizeyimana. These two cases were selected for two primary reasons: the Nizeyimana case relates to the Butare area in Rwanda which was where some of the most extensive and prolonged violence occurred, and the length of the two cases accounts for a significant time period of the ICTR's lifespan and has resulted in an extensive collection of legal documents (see Chapter 3 and Appendix 1 for case details). The analysis focused primarily on these cases in order to identify the patterns and themes within the data, although the analysis also engaged with documents relating to other ICTR trials to identify if a similar pattern of discursivity is evident. All data was uploaded to NVivo, which was used to manage the data and as a platform for the analysis.

The method used for analysing the data was Foucauldian framework for a discourse analysis (Foucault 1972). The method aimed to identify the discursive conditions within a discourse of witnessing. Discursive conditions are the way social power abuse, dominance, and inequality are enacted, reproduced, and resisted by writing and speaking. This method analyses language and the way in which text and talk produces specific historically located meaning and identity (Foucault 1972). Accordingly, the main things the analysis aims to identify in examining language – statements – are:

- I. Repeatability of statements;
- II. Conditions which constitutes the subject position of witness;
- III. Positions and authority from which subjects can speak;
- IV. Formation of objects of knowledge.

Throughout the analysis chapters (4-7) the discussions and arguments developed are centred around Foucauldian discursive conditions and practices. This continual use of these terms should not be read as a repetition in the discussions, rather they are central to this thesis investigating how witness memories are constructed at the ICTR. Specifically, the way in which the subject position of witness and objects of knowledge they describe are constituted is directly related to the interconnected relationship of statements (series

⁶ During some of the ICTR cases legal counsels brought motions arguing that the opposing counsel had not translated witness statements into both of the tribunal's working languages. It was common that when investigators gathered witness statements from Rwandans they would be written and/or recorded in Kinyarwanda, the most commonly spoken language in Rwanda.

of signs). Therefore it is necessary for the analysis to explore the variety, or layers, of discursive conditions within the legal documents relating to the selection of witnesses.

Whilst archival data provides a very useful source for this thesis investigating processes of memory construction at the ICTR, it is necessary to acknowledge that the archival data, like all data, has limitations. Archival data is not capable of revealing a complete account of past events or able to reveal a ‘complete truth’ of historical suffering. However, as is argued throughout this thesis, accounts of the past are always contingent and contestable and thus inevitably contain gaps (see Chapter 3, 7). Archival material offers a particularly useful source of data for the thesis investigating the processes at the ICTR in which knowledge of the past is constructed. Accordingly, this data and method of analysis shows within processes of testimony how forms of representation and conventions in text and talk produce historically located identities and knowledge. Therefore, the intention of selecting the documents housed in the archives of the ICTR and UoW is to show that this data highlights how the discursive conditions of legal witnessing constructs the subjects (witnesses) and knowledge of transitional justice into a rigid and authoritative account of past atrocities.

This thesis, positioning its argument within the legal transitional justice scholarship, acknowledges international legal processes of witnessing are only one of numerous modes of witnessing during transitional periods. Witnessing during transition is multidimensional which can include: Truth Commissions, regional and local trials, traditional justice and healing processes. Each of these different modes of witnessing provides potential insight for how societies attempt to make sense of and recover after mass atrocities. However, the legal scholarship as a dominant presence in post-conflict debates has produced a set of norms that purport the benefit, indeed the necessity, of legal witnessing as a key component for successful transition (Groome 2011; Keydar 2019; Osiel 2000; Skikink 2011). Thus, this thesis is an enquiry that questions labels and assumptions in arguing there is a need for alternative conceptual understandings of what it is witnesses are and what they can do in international tribunals and courts.

This thesis is one interpretation of witnessing and the legal construction of memory at the ICTR. There will be other understandings of witnessing at international tribunals and courts and this thesis makes no claim to offer a normative prescription of how legal witnessing ‘should be’. Therefore, it is not the purpose of this thesis to reach a more ‘true’ or complete understanding of legal witnessing during transitional periods. However, this thesis does offer one alternative understanding, which casts the

phenomenon of legal witnessing in a new a light and offers one alternative understanding of the way in which witnesses remember.

Structuring the Argument

The thesis's argument is developed across seven chapters. Chapter 1 locates memory and witnessing within the broader literature on transitional justice and specifically the scholarship on international criminal trials. It discusses the origins of the legal scholarship on transitional justice, and importantly, how these origins have been influential in the way in which the contemporary legal transitional justice scholarship perceives legal and human rights norms as fundamental to successful transition (Turner 2016; Zunino 2018). Beginning with the Nuremberg and Eichmann trials the chapter highlights the existence within these two trials of the inherent relation between universal human rights and memory work. Particularly the need to remember mass violations of human rights through legal processes since the end of World War II became common practice in how the international community responds to mass atrocities. From this, the chapter traces the discourse of transitional justice scholarship, particularly the legal scholarship, foregrounding that witnessing and remembering violations have become an embedded and fundamental component for the way in which transitional justice perceives the successful transition of a given society. The chapter concludes by arguing that while it is common within the legal scholarship for advocacy for trials to contribute to a collective story of past atrocities, this advocacy fails to comprehend the contingent nature of memory and the crucial role international criminal institutions, and legal actors, have in the construction of witness memories.

Chapter 2 constructs an original theoretical framework using the concepts of 'memory', (Ricoeur) and 'witness' (Agamben). The thesis's framework uses a 'toolkit' approach to theoretical insights, in which particular conceptual components are brought together as a conceptual lens to cast new light on a given research problematic (Foucault 1977). Unpacking the nexus of the concept of 'witness' foregrounds Agamben's central contention: the paradox between what he defines as the true complete witness, the victim who experience the full horror of trauma and did not survive, and the survivor who is bestowed with the ethical obligation of bearing witness, speaking in proxy for the 'true witness' (Agamben 1999, 25-37). Agamben's concept of 'witness' contributes to the philosophical foundation of the thesis's framework in arguing that witnessing is a non-instrumental, contingent and multi-layered practice (Agamben 1997). The remainder of

the chapter discusses the thesis's engagement with Paul Ricoeur's concept of 'memory'. The insights offered by Agamben and Ricoeur provide a philosophical framework for an investigation which attempts to better understand the extent to which memory constructed through legal witnessing at the ICTR is able to contribute to the wide-reaching aspirations of transitional justice.

In Chapter 3 the thesis's poststructuralist methodology and engagement with data is unpacked. The chapter begins by summarising the data to be analysed, including: rules of procedure and evidence, indictments, motion and motion decisions, pre-trial briefs and judgments and interview transcripts of ICTR staff. Importantly for the research in analysing interview transcripts and ICTR legal documents is discursivity. Discursivity is understood here to mean the way in which language constitutes meaning and knowledge that then become accepted social practices, on which serious claims to truth and falsity are made (Foucault 1991). The concluding part of the chapter outlines how a Foucauldian understanding of discourse will be used to analysis the discursive conditions of witnessing within the archived ICTR legal documents relating to the selecting of witnesses.

Chapter 4 starts discussing the analysis of the data. The chapter explores the discursive conditions that constitute the witness as the subject position of discourse. Particular consideration is given to the relation between the discursive construction of the 'witness' and the right to truth, which is legislated in human rights law and purported by advocates as being a key component during legal redress for mass atrocities (Funk 2015; Groome 2011; Klinkner and Smith 2015).

Developing on from the previous chapter's focus on what witnesses are, Chapter 5 focuses on what memories witnesses can talk about. The chapter considers the way in which memories of genocidal violence are constructed at the ICTR. In particular how the diverse individual experiences of violence during the genocide against the Tutsi is constructed and shaped by law during the legal processes (pre-trial and trial) at the ICTR. The chapter concludes by arguing that the discursivity of legal practices at the ICTR acts to camouflage the absence of memories relating to the wider complexities of genocidal violence.

Chapter 6 advances two related points, firstly that analysing the discursivity of motions and motion decisions shows the crucial role ICTR legal actors, legal counsels and judges, have in the construction of legal memory. Secondly, drawing upon the thesis's conceptual framework and the analysis from Chapters 4-5, a critique of and challenge to

Mark Osiel's advocacy for legal collective memory is made, and an alternative conceptual frame is offered.

Extending the arguments made in Chapters 4-6, Chapter 7 explores a potential way legal witnesses could contribute to the plurality of memory in post-conflict societies, which crucially is not rigid and fixed within the tightly controlled discursive conditions of legal proceedings. It is proposed that fragments of witness memories contained in the ICTR archive have the potential to contribute to the post-genocide memory ecology in Rwanda. It is argued that proposing that fragments of witness memories contained in the archive can aid memory production in Rwanda requires a conceptual reorientation in how we think about legal memory. Specifically, we need to re-orientate our understanding of legal memory away from court proceedings and instead zoom-in on the legal archive, and material it houses. Therefore this final analysis chapter offers an alternative way of thinking about transitioning societies' relationship with legal memory. The chapter is one way not to be limited by law's need for singularity and progress, and therefore puts front and centre the plural and multidirectional nature of remembering atrocities.

Chapter 1 – Memory, Witnesses and International Criminal Institutions

Introduction

This chapter situates memory and witnessing in relation to post-conflict transition, discussing how remembering trauma is understood within both the broader literature on transitional justice, and specifically the scholarship on international trials. This includes outlining the perceived role memory has in international criminal trials – Nuremberg/Eichmann, ICTR, ICC – mandated with human rights objectives (Klinkner and Smith 2015; Osiel 1997). The chapter argues that while it is common within the legal scholarship for advocacy for trials to contribute to a collective story of past atrocities, this advocacy fails to comprehend the contingent nature of memory and the crucial role international criminal institutions, and legal actors, have in the construction of witness memories.

The chapter begins by discussing how memory, particularly the recalling of mass violations of human rights since the end of World War II became common practice in how the international community responds to mass atrocities. Specifically, this chapter details the Nuremberg trials and the trial of Eichmann as the origins of transitional justice discourse and, importantly, pointing out within these two trials the inherent relation of universal human rights and memory work. From this, the chapter unpicks the emergence of a discourse of transitional justice scholarship (1980s) and the embedded human rights-memory relation (Teitel 2003). Accordingly, tracing the legal scholarship on transitional justice shows witnessing and remembering violations, specifically within international trials, have become an embedded and fundamental component for the way in which transitional justice perceives the successful transition of a given society.

Yet, within the legal scholarship, memory is commonly perceived to be a thing which can be recovered through witness testimony in trials, in order to reveal previously hidden accounts of the past, thus contributing to a collective understanding of mass human rights violations. This legal construction of the past commonly informs the manner in which the transitional justice discourse shapes the future of a transitioning community. However, this predominant understanding of witness testimony fails to comprehend the nature of memory. Legal memory entails the construction of fragments of individual and collective memories within a contestable and contingent framing of the past (Assmann 2012). Furthermore, in the transitional justice literature the focus has been on affording agency to victims, giving them a voice to remember their experiences, and through the

act of witnessing a collective narrative detailing the complex reasons for the violations can be constructed (Blants 2013, 41). As such, this thesis analyses the subjectivity of witnessing in international tribunals (ICTR) and the manner in which individuals are constituted as the subject of witness(es) (Agamben 1997).

Origins of the Practice of Transitional Justice: Nuremberg and the Exceptional Use of International Law

This section locates the origins of transitional justice within the Nuremberg trials, highlighting the ‘exceptional’ use of international law by the international community to address the atrocities of the Second World War (Zunino 2018). The section details the origins of the practice of transitional justice which emerged as a term to explain the exceptional use of the law during periods of political change (Teitel 2003). The Nuremberg trials, then, act as a recognisable symbol of the post War origins of transitional justice which, according to Teitel, reflects the accomplishment of international law (Teitel 2003, 70). However, this section notes a criticism of the practice of transitional justice in the context of Nuremberg, particularly in starting to position the thesis’s argument within the literature and debates. This criticism relates to the establishment of the Universal Declaration of Human Rights and an obligation to remember. The Declaration, the agreement to establish a minimum standard of rights for all human beings, was not only the beginning of international law to address mass violence and conflict but also a commitment to a moral obligation by the signatory nations to the Declaration to remember the human rights atrocities that preceded it. Following Teitel, the origins of transitional justice are the ‘exceptional’ and ‘international’ use of law in the post-World War II period. It can also be seen to directly encompass memory work. In that, memory, the need to remember the failures of societies in order to ensure the suffering of the world wars were not repeated, becomes a legally embedded obligation of the international community, and, a criticism of the Nuremberg trials not providing victims with the opportunity to recall the experiences of the atrocities.⁷

According to Teitel the origin of transitional justice is the creation of the international Criminal Tribunal at Nuremberg (IMT), in the immediate aftermath of the Second World War (Teitel 2003). The Nuremberg tribunal included the trials of 24 leading members of the Nazis (Teitel 2014). Following Teitel, the Nuremberg Trials are

⁷ Witnesses were called at Nuremberg although witness evidence was used as supplementary to the vast amount of documentary evidence presented by the prosecutor (Jackson 1993, Douglas 2001)

marked by a seminal moment in international law. That being, the Allied powers creating an international tribunal to try the ‘main’ perpetrators of the Nazi atrocities established, for the first time, international law which had a legal mandate to prosecute individuals for crimes committed by a state against its own citizens (Teitel 2003, 70). Prior to the creation of the Nuremberg Tribunal international law had been unable to penetrate the sovereignty of states. States were perceived as being responsible for administering the rule of law for violations of international justice committed within its territory. Accordingly, the creation of international law for the Nuremberg Trials marked a ‘critical turn away from prior nationalist transitional response’ towards international policy thought to be guaranteed by a universal application of international law (O’ Sullivan 2017; Teitel 2003 73). In short, the creation by the Allied powers of a set of international law for the Nuremberg Trials had legal primacy over national justice, which marked an important turn to the international. The post Second World War move to international law ‘created the sense that the relevant subject of transitional justice was an international legal response governed by the law of conflict’ (Teitel 2003, 73-74).

The creation of international law at Nuremberg was indeed a seminal moment within the origins of transitional justice, although Allied powers had been in dialogue regarding the potential of international law following the conclusion of World War One. The justice discourse during this interwar period entailed defining ‘unjust war’ and a paradigm of ‘justifiable punishment by the international community’ (Teitel 2003, 72). This initial consideration of an international legal paradigm for ‘unjust war’ is most evident in relation to the Paris Peace Conference 1919 and the Treaty of Versailles (Taylor 1993, 14-15). The Allied powers agreed that the war crimes committed by the German Empire should be held accountable to the rule of law. In March 1919 a commissioned report, stemming from the Paris Peace Conference, charged ‘Germany and her allies with extensive violations of the laws of war’ (Taylor 1993, 15). Although, conflicting political objectives of the Allied powers curtailed the implementation by the international community of international law. However, whilst the Versailles Treaty did not lead to the creation of international law to try Germany and her allies, Mettraux points out, ‘the decision to punish [Nazi] crimes... was born of the failure to do so after the First World War, a bitter lesson not lost on the Allied Powers.’ (Mettraux 2013, 6).

On the 8th August 1945 the Allied powers⁸ signed the London Agreement,

⁸ United States of America, France, United Kingdom, and Soviet Union: see Taylor (1993), also see: Mettraux (2008).

bringing into existence the International Criminal Tribunal at Nuremberg (Heller 2011, 123; Mettraux 2013, 6). In signing the London Agreement the Allied powers had established an international criminal tribunal which was prescribed with ‘mostly a new set of rules and principles’, which were to be applied to ‘exceptional events’ (Mettraux 2013, 6). The crimes under the jurisdiction of the Nuremberg Tribunal included: Crimes Against Humanity, Crimes Against Peace, and War Crimes. Here a point of note, the jurisdiction of the Tribunal to include ‘Crimes Against Humanity’ encompassed inhumane acts committed ‘against civilians, whether or not in the context of the war’ (Taylor 1993; Teitel 2014, 41).⁹ The embryonic reach of international law, stemming from the London Agreement, to include inhuman acts against civilians serves as a central legacy of Nuremberg (Mettraux 2008; Teitel 2014, 42). Importantly, the significance of the London Agreement is stated by Mettraux, that this achievement ‘was the creation of a genuinely international body of criminal law capable of universal application’ (Mettraux 2008, 7). In one regard, the London Agreement was motivated by what was perceived by many in the international community to be the irrelevance to which ‘international law had been reduced by the war’ (Mettraux 2013, 7). The perceived irrelevance of existing international law led to a ‘rare legislative moment’ (Mettraux 2013, 7). The overriding view of the international community was that as there was no adequate law to punish the crimes of the Nazis an international body of criminal law needed to be made (Mettraux 2013, 7, Taylor 1993, 33-38).

Here a noteworthy point: international law created for Nuremberg was, at the time, not universally advocated, particularly evident in Karl Jaspers’s (1947) concerns for the retroactive creation of international law by the victors of war.¹⁰ Specifically, Jaspers was troubled by the creation and employment of international law to be applied retroactively to Nazi crimes. A central problematic for Jaspers was the way in which the ‘victors’ of the Second World War – Allied powers – were permitted to decide the legal paradigm in which their enemy – the Nazis – would be held legally accountable (Jaspers 1947, 151-160). For Jaspers, judgment for the crimes committed by the Nazis should be ‘passed only in accordance with a law which was already in existence prior to the commission of the

⁹ Crimes Against Humanity included: ‘murder, extermination, enslavement, deportation and other inhumane acts committed against any civilian population’ or persecutions on political, racial or religious grounds ‘whether or not in violation of the domestic law of the country where perpetrated.’ (Nuremberg Charter in Teitel 2014).

¹⁰ Karl Jaspers was a German Philosopher whose seminal work attempted to understand to what extent the German people should feel guilt and responsibility for the atrocities carried out by the Nazis: see Jaspers (2000); for a general discussion the philosophical works of Jaspers: see Thornehill (2002).

act' (Jaspers 1947, 155). In other words, the Nazis should be held legally accountable, though, specifically for crimes that came under the law prior to the act(s) being committed (Jaspers 1947, 155). Yet for Jaspers, at Nuremberg it was the 'victors' who 'now pronounce the judgment (with retroactive force) in accordance with laws which the victors themselves have drawn up' (Jaspers 1947, 155). In short the 'victors' of the Nazi war created a set of new rules, which for Jaspers, had the potential to establish a perturbing precedent whereby 'victors' of conflict would be permitted to define the legal accountability of their enemy. Nonetheless, in the aftermath of World War II the international community overwhelmingly supported the creation of 'new' international law to be established as a universal response to mass violations (O' Sullivan 2017, 59; Teitel 2014).

One important implication of this body of criminal law and its 'universal application' was its jurisdiction to prosecute individuals (O'Sullivan 2017, 61). The Tribunal's Charter set an inaugural legal precedent; law that allowed for the legal determination of individual responsibility for crimes committed against the citizens of a state. This can be seen in the IMT judgment stating that 'crimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced' (Nuremberg Judgment 1946). Accordingly, the Tribunal's Charter explicitly granted power to international law to supersede state sovereignty, in that, no longer was it possible for persons who violated international law to gain impunity in the name of sovereignty (Taylor 1993, 612-618). Having legal jurisdiction to bring individual accountability for Nazi crimes allowed Nuremberg prosecutors to refute defense claims that international law permitted liability for states, not individuals (Taylor 1993, 612-618). The legal substance supporting individual accountability is directly related to the tribunal's jurisdiction, founded on 'mostly new' international law (Drumbl 2007).

In summary, what becomes evident from the Tribunal's marked turn away from state responsibility to individual responsibility for mass violations is the ability of international law, by relation the international community, to surpass the sovereignty of states. In other words, the Nuremberg trials are a seminal moment, a shift from the national to international through the creation of international law. International law from the Nuremberg trials onwards is not only the creation of an international ad hoc tribunal, but also importantly, a paradigmatic shift to the exceptional and international use of law by the international community.

The symbolic representation of Nuremberg and Human Rights

A shift to an international legal response for violations of international law is an important component in understanding the origins of the practice of transitional justice Discourse (Zunino 2018, 138).¹¹ However, the Nuremberg trials also serve as a powerful symbolic and moral representation of international justice which are fundamental to both the origins of transitional justice and many of the epistemological assumptions evident in the discourse of transitional justice scholarship. Symbolically, the Nuremberg trials are not only testament to the international community's ability to create a body of new criminal law to bring individual accountability, importantly, it also acts as a 'symbol of justice' (Drumbl 2011, 23; Mettraux 2013, 11-12). That being, the philosophical underpinnings of Nuremberg, the universality of international rule of law, was 'a symbol of man's resistance to its own inhumanity' (Mattraux 2013, 13). The international community's paradigmatic shift to international tribunals and international law as the primacy of international justice, can be read as an attempt to mark international law's 'monopoly on violence' (Felman 2002, 2). In doing so, international justice was not just punishment for violations of international law committed by the Nazis, but acted 'as a marked symbolic exit from the injuries of a traumatic history: as a liberation from violence itself' (Felman 2002, 1).

Understanding transitional justice as discourse (Zunino 2018), as this thesis does, it is worth noting here that Nuremberg being located as the origins of the practice of transitional justice and the primary response to the violence of the Second World War is a restrictive understanding. As Zunino argues, a discourse of transitional justice locating Nuremberg as its origins has acted as a process that includes and excludes, through which the transitional justice scholarship emphasis elements of Nuremberg that fit within the positive narrative of international criminal justice and marginalise elements which do not align or possibly contradict this narrative (Zunino 2018, 151). As Zunino insightfully foregrounds, while a few transitional justice scholars have critiqued Nuremberg, such as Teitel (2014), they still emphasis Nuremberg as a positive contribution to transitional

¹¹ Zunino argues that as a discourse of the origins of the practice of transitional justice being located at Nuremberg was created by the scholarship of transitional justice during its emerging in the 1980's in order to give the scholarship a 'historical foundation' (Zunino 2018, 131). In particular, '[a]dvocates of international criminal justice used the example of Nuremberg to generate support for international courts' (Zunino 2018, 141). Transitional Justice having its 'historical foundations' within international criminal justice helped justify the primacy of international criminal courts within the transitional justice scholarship (Zunino 2018, 140-141).

justice's legal foundations. Thus, 'for the discourse [of transitional justice], [Nuremberg] is primarily a symbol of legalistic transitional justice' (Zunino 2018, 151), which has resulted in transitional justice phenomena that are not strongly legalistic being dismissed. For example 'the fact that the [Tokyo trials] IMTFE was more openly political and less legalistic than [Nuremberg] can explain why the Tokyo trial lags far behind in terms of being considered the origin of transitional justice' (Zunino 2018, 151-152). Nuremberg as the origins of transitional justice created a dominant narrative that the most suitable transitional justice response to violence was international criminal trials. This dominant narrative in the transitional justice discourse has marginalised other responses to the violence of World War Two being widely discussed, such as the trials conducted by the Soviet Union and Germany's reparation 'scheme' (Zunino 2018, 156). Nevertheless, Nuremberg continues to be understood as the origins of transitional justice and as the 'historical foundations' of the scholarship's legalistic orientation.

Thus Nuremberg's significance extends beyond its contribution to a body of international law, it constitutes a historically symbolic moment, a universal symbol of justice itself (Drumbl 2011, Teitel 2014).¹² That being, Nuremberg actualised, through the successful prosecution of the 'main' perpetrators, a much 'needed sense of justice and comfort to the millions who had suffered from the crimes of the Nazi regime' (Minow 1998). As such, the symbolic representation of Nuremberg set a precedent, whereby international law serves as the primary and dominant measure, for justice, as well as accountability, following periods of mass violence (Drumbl 2011, 24). From Nuremberg onwards, the symbolic importance of the tribunal has formed the foundations for how the legal approach to transitional justice understands and responds to mass atrocities (Drumbl 2011, 24-26; Teitel 2003).

Nuremberg as a seminal moment in international law and the origins of transitional justice relates explicitly to another historical rupture in the aftermath of World War Two, namely the Universal Declaration on Human Rights. The Declaration, the agreement amongst the 50 signatory nations for a universal standard of rights for all human beings,¹³ is directly attributable to the creation and perceived success of the Nuremberg Tribunal (Taylor 1993). The Declaration was signed in Paris on 10th December 1948. In signing the declaration:

¹² For a critical discussion on Nuremberg as the origins of transitional justice see Zunino (Zunino 2018, 150-158).

¹³ The declaration was unanimously passed although 6 out of 56 members abstained

the peoples of the United Nations have in the Charter reaffirmed their faith in fundamental human rights, in the dignity and worth of the human person and in the equal rights of men and women and have determined to promote social progress and better standards of life in larger freedom (Universal Declaration on Human Rights 1948, Preamble).

Here, it is worth noting that a chief architect and draftsman of the Declaration on Human Rights and a key figure in actualising the Nuremberg Tribunal was French jurist Rene Cassin (Winter 2006, 2013).¹⁴ Cassin's work in preparing Nuremberg 'further deepened his commitment to the principle of transnational jurisdiction in cases of gross violations of human right' (Winter 2006, 116). Cassin's commitment to creating the Declaration and protecting human rights for all 'humanity' is evident in his own words spoken in Paris in December 1948, 'our declaration is the most vigorous, the most essential of protests of humanity against the atrocities and oppression which millions of human beings suffered throughout the centuries and more particularly during and between the two last world wars' (Cassin in Winter 2006, 116). Cassin continued, the Declaration is essential 'in order to proclaim that the practical consecration of the essential liberties of all men is indispensable to the establishment of a real international peace' (Cassin in Winter 2006, 116-117).

The creation of a universal standard of human rights, and the Genocide Convention of 1948, was an acknowledgement by the international community of its failure to protect the rights of millions of individuals during the Holocaust (Ehrenfreund 2007). According to Ehrenfreund (2007) there 'can be no question that these declarations and conventions flowed from the Nuremberg experience'. Indeed, through the London Charter establishing the concept of 'crimes against humanity' a 'new law was born protecting human rights for all' (Ehrenfreund 2007, 123-125). In the context of the origins of transitional justice, the direct lineage of the Universal Declaration of Human Rights and Nuremberg was not just the creation of a legislative document, but also perceived by many – survivors, human rights activists – as the begin of a new world order for the protection of human rights (Ehrenfreund 2007, 123-125). As such, the commonly held optimism in the aftermath of the Second World War assumed 'Nuremberg and its progeny would surely improve the human condition' (Ehrenfreund 2007, 125). This is what Jay

¹⁴ Cassin's influence in creating Nuremberg Tribunal and the Universal Declaration on Human Rights – see Jay Winter 2006. Whilst Cassin was a leading force in the drafting of the declaration, there were a number of individuals who contributed to its creation – see Winter 2006, Huyseen 2011, Jackson 1993.

Winter (2006, 116) is referring to in stating, that in establishing a new international order founded upon the acknowledgement that ‘traditional’ understandings of absolute sovereignty needed to be ‘revised in those areas where domestic injustice and international order overlapped’. Chief among them was the domain of human rights’ (Winter 2010, viii). However, Winter points out that, rather than to improve the ‘human condition’, the notion of an international order of human rights is instead best understood as a ‘normative statement of a standard against which to measure the behaviour of the states in which we live’ (Winter 2010, viii). The Declaration understood as a ‘normative statement’ is helpful here, inasmuch as it positions human rights not as a new order founded on a notion of protecting ‘human rights for all’. Rather, as a vision emerging at terrible time that ‘offered survivors of war a glimpse of a better world’ (Winter 2010). Yet, as noted by Winter: ‘we live in an age in which human rights claims provide a grammar of transformation, but no assurance whatsoever that transformation will actually occur or endure’ (Winter 2010, viii). Nonetheless, a discourse of a new international order of human rights dominated the aftermath of the Second World War and beyond. In short, the Declaration on Human Rights emerged at a dark moment for humanity, which had ‘tragedy and failure written all over it’ (Winter 2010, 102). And yet, this ‘dark utopia’, born out of the horrors of Nazi occupation was able to transcend it (Winter 2006, 101-105).

The Declaration on Human Rights was founded upon a notion that the injustices of the Holocaust needed to be addressed, and was also an acknowledgement by the international community not to forget but remember the atrocities committed (Winter 2006). Memory work (remembering) is inseparable from the international institutions (Nuremberg) and declarations (Human Rights) created in response to the atrocities of the Second World War (Winter 1999, 26-30). Remembering and creating a record of the atrocities of the Second World War attempted to encapsulate the drama and suffering narrated through the Nuremberg Tribunal (Winter 1999, 6). In that, the suffering of the victims of the Nazi crimes needed to be remembered and recorded, and to be told to future generations to deter future atrocities and conflict (Huyseen 2011). Whilst the Declaration did not include remembering as a right, yet, ‘that right is everywhere in it’ (Winter 2010, viii). As Winter points out, the Declaration was a ‘memory document, a set of principles framed because of a historical catastrophe which pre-ceded it’ (Winter 2010, vii). The Declaration as a ‘memory document’ was intentionally victim-orientated, and specifically a moral obligation for the international community to remember the horrors and struggles

endured by victims (Winter 2006). This is what Huyseen (2011, 611) is referring to in stating the dignity and fate of victims ‘must be preserved in memory, all the more so since it was the express aim of the masters of the genocide to obliterate all memory of their victims’. Here, it can be suggested that remembering (memory work) and the creation of a minimum standard of human rights (Declaration) are twinned (Huyseen 2011, 607). They both are occupied with the violations and protection of basic human rights. Both remembering and human rights must engage with the past in order to address violations and protect rights. Remembering and human rights in pursuing the public recognition of past wrongs are also future orientated, as they ‘imagine a better future for the world’ (Huyseen 2011, 607). In this sense, the inherent relation of remembering and the Human Rights Declaration can be understood as a moral commitment by the international community to establish a historical record of Nazi atrocities.

The importance of establishing a record of the Nazi atrocities was posited by Nuremberg Chief Counsel to the Prosecutor Robert H. Jackson. For Jackson, a central function of the Nuremberg Tribunal was to provide humanity with an unassailable record that the Nazi atrocities did happen and that its orchestrators had been held accountable. As noted by Jackson in his opening address at Nuremberg, ‘if we can cultivate in the world the idea that aggressive war-making is the way to the prisoner's dock rather than the way to honours, we will have accomplished something toward making the peace more secure’ (Jackson 1945, 227). Though, concerned that a record which relied on the testimonial accounts of victims-witnesses might be seen by the accused as equivocal, Jackson insisted that the record which was to establish the crimes committed by the Nazis would primarily consist of documents that had largely come from the Nazis’ own archives’ (Mettraux 2013, 9).¹⁵ According to Mettraux ‘[t]he most important thing about Nuremberg is that it created the record of Nazi aggression and inhumanity, and set precedents that changed the world’ (Mettraux 2013, 139). Here an important point of note, particularly in relation to the origins of the practice of transitional justice and a criticism of Nuremberg. The record established at Nuremberg being based mostly on documentation, intentionally so, rather than the testimonials of victims, gave rise to the concern that this legal record was absent of the voices of victims. Whereby, a record of the crimes committed by the Nazis that lacked the individuality of the voices of its victims, was perceived to continue the silencing of victims enacted by the Nazis during

¹⁵ For discussions on Robert Jackson as chief counsel to the prosecution see: Raful 2006, Mettraux 2008.

the war (Felman 2002). Thus, the ‘witnesses at Nuremberg played a largely supplemental role to the evidence supplied by documentary evidence, [however,] the opposite was the case’ in the Eichmann trial (Douglas 2001, 105).

This criticism of Nuremberg lacking the memories of the victims was supported by the prosecutor at the Eichmann trial Gideon Hausner.¹⁶ For Hausner, whilst Nuremberg’s approach of a ‘few witnesses and films of concentration camps horrors, interspersed with piles of documents’ was ‘efficient and simple’. It ‘failed to reach the hearts of men’ (Hausner in Douglas 2001, 105). Hausner insisted, if the sole purpose of the Eichmann trial was a conviction:

it was obvious enough to let the archives speak; a fraction of them would have sufficed to get Eichmann sentenced ten times over. ... I knew we needed more than a conviction; we needed a living record of a gigantic human and national disaster (Hausner in Douglas 2001, 104-106).

Therefore, the origins of the practice of transitional justice Nuremberg was indeed a seminal moment which established a body of international law to respond to exceptional events which set a precedent which reached far beyond the Nuremberg Trials (Drumbl 2011, 24). However, in the aftermath of the trials at Nuremberg a growing criticism was that the tribunal had failed to establish a platform on which victims’ memories of the Holocaust could be entered into a historical record. In short, the origins of the practice of transitional justice are the ‘exceptional’ and ‘international’ use of law, discussed above, in the post-World War II period. It can also be seen to directly encompass memory work. In that, memory, the need to remember the failures of societies in order to ensure the suffering of the world wars were not repeated, becomes an embedded obligation of the international community and a criticism of the Nuremberg Trials not providing victims with the opportunity to recall the experiences of the atrocities.

Eichmann: Law and the need for witnesses to remember

This section, drawing directly on the work of Shoshana Felman (2002), will foreground the trial of Otto Adolf Eichmann was a site of the interwoven relation of international law and remembrance. It is at the Eichmann trial in 1961 that the inherent nature of law and

¹⁶ Otto Adolf Eichmann, who served as a Colonel in the Gestapo (Secret Police) during the Second World War, was successfully prosecuted by the Supreme Court in Jerusalem for being directly involved in the genocide and was sentenced to death in December 1961. For a critical discussion of the Eichmann trial and its influence on universal jurisdiction see O’ Sullivan (2017)

memory in transitional justice is evident in practice. The Eichmann trial, unlike Nuremberg, facilitated the testimony of dozens of victims of the Nazi violations as part of the prosecutor's evidence. The trial of Eichmann was the deliberate employment of both exceptional use of international law and remembrance, which were thus both challenged to address the causes and consequences of the historical traumas of the Holocaust. This interwoven emergence of law and memory work from the Eichmann trial onwards established a precedent; a new paradigm for how the international community responded to mass atrocities. In short, the Nuremberg and Eichmann trials mark the origins of transitional justice (Zunino 2018), within which emerged the exceptional use of law by the international community, and a moral precedent to remember.

The trial of Otto Adolf Eichmann took place in 1961 at the Supreme Court in Jerusalem. Eichmann was successfully prosecuted for directly participating in the genocide carried out by the Nazis and was sentenced on the 15th December 1961 to death (Arendt 2006). Eichmann, during the Second World War, had served as Lieutenant-Colonel in the Gestapo (Secret Police) of the Third Reich (Powderly 2013, 34). The Gestapo formed part of the Reich Main Security Office, 'which was primarily concerned with the realization of the Final Solution' (Powderly 2013, 34). The 'Final Solution' was the term used by the Nazis to refer to their plan to exterminate the Jews (Arendt 2006, 84). Eichmann specifically had directed (1942-1945) Section IV B(4) which was the division responsible for the infrastructure facilitating the transportation of millions of Jews to concentration/death camps in Eastern Europe. Though, despite Eichmann functioning as an important component within this mechanism of the Nazi operations he was deemed by the Nuremberg Tribunal not to have held a significantly senior role to merit being prosecuted at Nuremberg (Arendt 2006, 35). However, whilst Eichmann was not indicted by Nuremberg, transcripts and the final judgment during the Nuremberg trials did make explicit reference to the important role he played in the genocide plans of the Nazis (Arendt 2006, 35):

A special section of the Gestapo office of the RSHA under Standartenfuehrer Eichmann was set up with responsibility for Jewish matters which employed its own agents to investigate the Jewish problem in occupied territory.... A special detachment from Gestapo headquarters in the RSHA was used to arrange for the deportation of Jews from Axis satellites to Germany for the 'final solution. (Nuremberg Judgment 1946).

Following his arrest Eichmann was charged with 15 counts that were drafted upon

‘offences under the law [which] were broadly derived from existing instruments relevant to international law’ (Powderly 2013, 35). In contrast to Nuremberg, the trial of Eichmann included testimonies of dozens of victims of the Nazi atrocities (Arendt 2006, 223-225). Here in relation to the origins of the practice of transitional justice, it will be suggested that it is within the trial of Eichmann that the interwoven relationship of the exceptional use of international law and remembering (memory work) are evident in practice. As will be discussed below, the trial of Eichmann set a precedent whereby the international community’s response to mass atrocities was the employment of international law and remembering (memory work), which endured into the second half of the twentieth century and beyond.

It is the inclusion of victims of the Nazi atrocities as witnesses during the Eichmann trial where international law and by relation international trials establishes for the first time a legal space for individual memories of trauma to be publicly externalised (Felman 2002). Necessary to foreground here, whilst international law significantly influenced the legal process of the Eichmann trial, in particular the universal jurisdiction of international law, the trial was however based upon Israeli national law: the Nazis and Nazi Collaborator Punishment Law (NNCPL) (1950) (O’Sullivan 2017). As Wieng (2007) points out, the decision by the State of Israel to try the crimes committed by the Nazis was in part resulting from the Jewish people being the explicit target of the Nazi regime. Whilst the trial of Eichmann was entrenched in international law couched in the internationally accepted terms of the Genocide Convention, and though applied under universally recognized principles of jurisdiction, ‘it is deeply personal and has been coloured by the State’s history and pre-history’ (Wieng 2007, 103). Considering the State of Israel did not exist during the Holocaust,¹⁷ the Israeli law of 1950 provided an important linking point for the Jewish people between the crimes committed and the State of Israel, specifically in the absence of a territorial connection (Wieng 2007, 103).

It was the creation of the 1950 NNCPL, which was the legal basis upon which the Eichmann trial was founded. The NNCPL, though created by the State of Israel, had direct correlations with the Nuremberg Charter, specifically the crime of ‘Crimes Against Humanity’ and the definition of genocide as stated in the 1948 Genocide Convention (Wieng 2007, 104).¹⁸ The crime of genocide as defined in the Genocide Convention

¹⁷ The state of Israel was created in 1948.

¹⁸ Article 1 (7) of the Nazis and Nazi Collaborators Punishment Law states the Crime Against Humanity ‘means any of the following acts: murder, extermination, enslavement, starvation or deportation and

significantly informed the creation of ‘crimes against Jewish people’. Article 2 of the Convention defines Genocide as ‘any of the following acts [committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group]’ (Article 6 1948).¹⁹ One important distinction from the crime of genocide was its counterpart in NNCPL explicitly states Jewish people as the victims, whereas the Genocide Convention does not. Notwithstanding the Eichmann trial being constituted within national Israeli law, international law at the time was highly influential, as has been the Eichmann trial on international law in particular its response to mass atrocities (O’ Sullivan 2017).

The contribution of the Nuremberg Charter and Genocide Convention to the drafting of the NNCPL was perceived at the time, and still is by some scholars, as a positive example of the universal jurisdiction of international law.²⁰ According to the District Court of Jerusalem the NNCPL definition of crimes represented a violation of international, as well as Israeli national law (Inazumi 2005, 64). For Inazumi the universal jurisdiction of international law at the Eichmann trial specifically stemmed from absence of an international criminal court (Inazumi 2005, 64). Accordingly, universal jurisdiction does not restrict states’ authority to try these crimes, rather ‘it requires the organs of each State to try suspects because the jurisdiction to adjudicate crimes against international law is universal’ (Inazumi 2005, 64).

The Eichmann trial and the NNCPL (1950), which was founded in principles of international law, created a space for internal individual memories to be publicly externalised. More specifically, this legal space is where the private sphere interacts and becomes inseparable from the public sphere. As Felman points out, within the Eichmann trial the ‘stereotypical division between the public and the private requires a rethinking, [in] particular, of the relationship between what is presumed to be private trauma and

other inhumane acts committed against any civilian population, and persecution on national, racial, religious or political grounds’ (Nazis and Nazi Collaborators Punishment Law 1950). Article 6 (C) defines the ‘Crime Against Humanity’ as: ‘namely, murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war; or persecutions on political, racial or religious grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated. Leaders, organizers, instigators and accomplices participating in the formulation or execution of a common plan or conspiracy to commit any of the foregoing crimes are responsible for all acts performed by any persons in execution of such plan.’ (Nuremberg Charter 1945).

¹⁹ As such :(a) Killing members of the group; (b) Causing serious bodily or mental harm to members of the group; (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part; (d) Imposing measures intended to prevent births within the group; (e) Forcibly transferring children of the group to another group.

²⁰ O’ Sullivan has argued that debates on Universal Jurisdiction are centred on a binary with each side of the binary reinforcing a dominant narrative of universal jurisdiction leaving little room for alternative understandings (2017).

what is presumed to be collective, public trauma' (Felman 2002, 5). Accordingly, the employment of NNCPL for the Eichmann trial was the inaugural endeavour by law to translate into 'legal-conscious terminology' the masses of incoherent private memories inflicted during the Holocaust into a coherent collective memory (Felman 2002, 5). In short, the Eichmann trial, by project and design, sets out to articulate and establish a collective memory of the traumas suffered by the victims of the Holocaust, which up until then had largely remained private (Felman 2002, 5-7).

The legal space created by the trial of Eichmann was the deliberate attempt through law (NNCPL) to transform a mass of incoherent private memories into one collective memory (Felman 2002, 7). Whereby, giving a public legal stage to render previously 'silenced individual traumas of the survivors' into the public and legal consciousness (Felman 2002, 7). The previously suppressed, hidden traumatic memories of 'the bearers of the silence', through law, were given a space to externalise and uncover 'secrets and taboos' of the Holocaust (Felman 2002, 7). In doing so the trial of Eichmann was also a 'legal process of translation of thousands of private, secret traumas into one collective, public and communally acknowledge one' (Felman 2002, 124). Law facilitating the construction of a collective story of the Holocaust created consciously and meticulously an 'unprecedented public and collective legal record' (Felman 2002, 7). This legal record of 'mass trauma formerly existed only in the repressed form of a series of untold, fragmented private stories and traumatic memories' (Felman 2002, 7).

According to Felman, memory through the testimony of victims at the Eichmann trial is an inaugural narrative event, which is itself 'historically and legally unprecedented' (Felman 2002, 123).²¹ For Felman, this narrative event is not the rehearsal of pre-existing stories of victims. Rather, the legal space and language of the Eichmann trial produces the victim's story for the first time, and, produces it as a legal act of authorship of history (Felman 2002, 126). Helpful here in understanding Felman's argument is her repositioning of Hannah Arendt's influential understanding of the 'banality of evil' (Arendt 2006), specifically, in the context of foregrounding the Eichmann trial as the origins of the interwoven relation of law and memory work. In short, Arendt, who wrote substantially on the Eichmann trial, wanted to understand how Eichmann could be so banal in carrying out his deplorable acts (Felman 2002). Felman suggests, rather than seeing the Eichmann question as a question of psychology, as Arendt

²¹ Also see Caruth (2017)

did, instead the Eichmann question should be understood as legal and political. In that, '[h]ow can the banality of evil be addressed in legal terms and by legal means?' (Felman 2002). For Arendt (2006), the Eichmann trial serves as an illustration of law's inability to tell the story of the traumatic memories of the Holocaust. Conversely, and importantly here, Felman highlights that the inability of law to tell the story of the Holocaust is 'not external to this story: it is the story's heart' (Felman 2002, 159). That being, the Eichmann trial foregrounds how the innate impossibility to 'tell the story' of the sufferings of the Holocaust is itself an 'integral part of the history and of the story of the Holocaust' (Felman 2002, 159). In other words, the legal process is incapable of telling the horrors of the Nazi atrocities, and yet, this is precisely what the law must produce: a historical legal account of the Holocaust (Felman 2002, 158-159). The function of the trial, in essence, 'becomes precisely to articulate the impossibility of telling through the legal process and to convert this narrative impossibility into legal meaning' (Felman 2002, 159). Felman's argument is insightful, inasmuch as it foregrounds how international law (trials) provides the legal space to give a public voice to victims in which law constructs the fragmented mass of private memories into a temporal authoritative legal narrative of past atrocities.

Memory work at the Eichmann trial also served another important function: memory as change. For Felman, it is law changing the victim's status to that of prosecution witnesses which authenticates their, witnesses', story as a legitimate authorship of history (Felman 2002, 127). 'Victims, through law constructing their status as a "witness", are empowered by their new role not as victims but as prosecution witnesses within the trial' (Felman 2002, 127). Thus, as Felman astutely argues, it is the act of externalising memories, constituted by the status of prosecution witness, which transforms the 'silent' victim into an active agent within the process of legal redress (Felman 2002, 125). Therefore, importantly, 'victims' were bestowed with agency within the legal space of the Eichmann trial to externalise their memories, which is legitimised by their status as prosecution witnesses (see Chapter 4). It is the transformation to the legal status of witnesses where '[v]ictims were thus for the first time gaining what as victims they precisely could not have: authority-historical authority, that is to say, semantic authority over themselves and over others' (Felman 2002, 125). In short, memory at the Eichmann trials serves as a symbolic marker. Whereby, those who externalise their traumatic memories are no longer the hidden and suppressed 'bearers of silence', rather active participants in the legal authorship of a traumatic history (Felman

2002, 125).

As has been outlined in the above discussion, the interconnectedness of international law and memory are central to the origins of the practice of transitional justice. However, as the following sections show, within the scholarship on transitional justice there has been a significant lack of critical engagement with memory work, particularly within the milieu of international legal institutions. In the context of Nuremberg and Eichmann as the origins of the practice transitional justice, there has been cautionary dialogue, albeit marginal, on the limitations of international trials to produce a collective account of mass atrocities. It was German philosopher Karl Jaspers who questioned the way in which the Nuremberg trials were at risk of collectivising German guilt (Jaspers 2000). Importantly for Jaspers was the concern of the potential reach of the Tribunal to produce indiscriminate condemnations of the German people for the crimes committed by the Nazis (Jaspers 2000, 11-19). Moreover, in the context of the Eichmann trial Hannah Arendt (2006) warned of the impossibility of the trial to adequately tell the story of horrors of the Holocaust. Indeed, Felman (2002) in repositioning Arendt's question on the 'banality of evil' insightfully adds to Arendt's work in arguing the impossibility of law to tell the traumas of the victims is a fundamental part of the story of the Holocaust.

A Discourse of Transitional Justice Scholarship: From International Justice to Local Justice Via International Norms

The dominant framing of the transitional justice literature frames the emergence of the field at the end of the Cold War period where countries emerging from authoritarian rule and conflict were tasked to address past wrongs, and promote liberal democratic principles like the rule of law (Zunino 2018, McAuliffe 2013). Questions about individual and societal healing, forgiveness and reconciliation were added to transitional justice debates that had until then largely centred on legal priorities of accountability through criminal trials and addressing impunity. A 'tool kit' approach to transitional justice developed, advocating a mix of legal and non-legal mechanisms (truth commissions, customary justice, memorialisation and commemoration, traditional healing rituals) with particular emphasis on understanding the needs and priorities of the societies effected by conflict/authoritarian rule (Murphey 2018, 576; Zunino 2018, 27). This can be seen in Shaw and Waldorf arguing for transitional justice to re-orientate the 'local'; the local

becomes the ‘shifted center from which the rest of the world is viewed’ (Shaw and Waldorf 2010, 6). In turn, the ‘local’ moves from the margins to front and centre of approaches to transitional justice (Shaw and Waldorf 2010). According to Shaw and Waldorf, transitional justice is frequently marked by ‘disconnections between international legal norms and local priorities and practices’ (Shaw and Waldorf 2010, 3). Shifting the ‘local’ to the centre, for Shaw and Waldorf, provides transitional justice with a more informed approach to the specific needs of affected societies, through ‘adapting customary law processes and by involving local NGO’s and local elites’ (Shaw and Waldorf 2010, 5).²² Thus, by understanding the priorities of individual societies during transitional periods it increases the likelihood of transitional justice mechanisms being effective (Shaw and Waldorf 2010, 3-18).²³

Following a similar line of thought to Shaw and Waldorf, McEvoy highlights that international law is a powerful ‘practical and symbolic break with the past’ that attempts to facilitate legitimacy and accountability during transition (McEvoy 2007, 417). Though, importantly, McEvoy stresses the way in which ‘law as a dominant symbol for successful transition ‘thins out’ the complexities of life in conflicted societies’ (McEvoy 2007, 417-418). That being said, law’s predominance sets normative objective priorities that underpin processes of tribunals, national courts, and local justice mechanisms. Thus, McEvoy argues that transitional justice risks decoupling itself from the complexities and needs of a given society in which it attempts to engage (McEvoy 2007, 417-418). Thus, emphasising the need for transitional justice to better understand what ‘justice’ means to individuals and communities who have been directly affected by mass atrocity.

McEvoy, Shaw, and Waldorf have highlighted the importance in considering how ‘local’ and non-legal processes can help societies confront past violations. However, a discourse of transitional justice continues to be orientated towards the ‘international’ (K Clarke 2009, Zunino 2018). In that, the transitional justice scholarship is both explicitly interconnected with international politics (Bell 2009; Simpson 2007) and often orientates towards international legal mechanisms and international human rights law as the primacy of transitional justice (Dixon and Tenove 2013, Turner 2016).²⁴

²² See Sage and Woolcock, in Tamanaha 2013, 3-21; Nagy 2008. For a discussion on legal Pluralism: also see Merry 1988.

²³ For discussion on evaluating transitional justice: see Ainley 2015.

²⁴ International politics influencing transitional justice being orientated towards the ‘international’ can be understood, in part, by a rupture in international politics, namely the September 11th terrorist attacks in New York in 2001 (Hazan 2010; Keen 2006). According to Hazan, the terrorist attacks in New York were a break in transitional justice mechanisms, whereby the so-called ‘war on terror’ (WoT) used locally

The scholarship's understanding of the 'local' is shaped by the 'international' in a particularly important way, namely international legal norms. In short, legal norms are a set of 'western' legal values that espouse the existence of a standardised framework of criminal law which functions as a universal paradigm for the international community (Teitel 2014, 56). That being, a standardised framework has the capability to be universally applied to a given transitioning society as a means to measure the success/failure of a 'local' transitional justice mechanism. It is often assumed by legally orientated scholars that the employment of legal norms is a crucial component for societies affected by mass human rights violations in transitioning to 'democracy'. Legal norms 'uphold the rule of law' which is essential in building democracy where the rule of law has previously been used for illegal ends by the ousted regime (Teitel 2014, 96; Stover and Weinstein 2004). Yet, it can be suggested there is an important contradiction within the legal transitional justice scholarship in the context of the 'local'. Scholars who advocate transitional justice to focus on the context specific – 'local' – needs of a transitioning society – Shaw and Waldorf – measure the success of a given 'local' mechanism through the lens of international legal norms.

To illustrate, the contradiction between advocacy for the 'local' and international legal norms is evident in the work of Waldorf on the Rwandan gacaca courts (Waldorf 2009, 2011). Waldorf, as discussed earlier, argues for transitional justice to move away from international norms and position the 'local' at the centre of approaches to transitional justice (Waldorf 2010, 3). However Waldorf, in reaching his conclusion that gacaca is a 'failed' legal mechanism, assesses the gacaca process in the context of whether it has complied with international legal norms (Waldorf 2010).²⁵ For Waldorf:

[f]rom the beginning, it was clear that gacaca would depart radically from international norms for fair trials, most notably the right against self-incrimination and the right to defence counsel. Gacaca courts were not excused from those standards by virtue of their supposedly 'traditional' nature. (Waldorf 2010, 195).

In contrast to Waldorf's assessment of gacaca is Clark. Clark contends that orthodox legal interpretations of gacaca as a failed institution, such as Waldorf's, do not fully engage with gacaca's legal status:

orientated approaches to transitional justice, specifically, when it fitted the strategic goals in countering the WoT. See Keen 2006; Hazan 2010.

²⁵ For alternative arguments on gacaca: see Clark 2010, 2014; Doughty 2015; Karbo and Mutisi 2008; Palmer 2015; Thorne and Viebach 2019.

The Gacaca Law states that gacaca has been established to ‘achieve justice and reconciliation in Rwanda’ and is designed ‘not only with the aim of providing punishment, but also reconstituting the Rwandan Society that had been destroyed by bad leaders’. The Gacaca Law thus enshrines reconciliation and restorative justice as key objectives of gacaca (Clark 2010, 348-349).

Aligning with the vein of Clark’s argument, Allen and Macdonald highlight international legal norms during periods of transition, ‘even when the focus is on local realities, [are] imbued with normative agendas about what law and justice should look like’ (Allen and Macdonald 2015, 280). Here, insightfully, Allen and Macdonald argue, it is specifically because of normative agendas on how law ‘should be’ during periods of transition that ‘highlights a disconnect between international legal norms... and locally legitimate processes of justice, [and] accountability’ (Allen and Macdonald 2015, 285). Thus, transitional justice advocacy for the ‘local’, such as Waldorf’s, often assesses the success of a ‘local’ mechanism through the lens of international legal norms. As such, it is these normative legal agendas that shape the practices and discourse during periods of political transition (B Jones 2015, 293).

In the context of the contemporary scholarship on transitional justice human rights advocacy is the unequivocal belief in the necessity for ‘international judicial responses to human rights violations’ (Clark 2012, 7).²⁶ Indeed, unequivocal support for judicial responses to mass human rights violations is reflected in the claim of Sikkink, that ‘transitional countries in which human rights prosecutions have taken place are less repressive than countries without prosecutions’ (Sikkink 2011, 26). Thus, as Turner’s critical appraisal of transitional justice highlights, ‘the promotion of the rule of law through international human rights norms underpins the entire discourse of transitional justice’ (Turner 2013, 199). Here, turning to the literature on critical human rights helps to identify the core assumptions, such as those of Sikkink, which are central to human rights advocacy within the legal transitional justice scholarship.

Kennedy, in his critical assessment of human rights, notes that human rights advocacy has grown into a system of engrained norms, which support the endeavours of the international human rights movement (Kennedy in Dickinson and Murray 2012).

²⁶ International human rights law as a dominant discourse within the transitional justice legal scholarship is explicitly related to the international human rights movement (IHRM), which emerged during the Cold War period (Moyn 2018; Zunino 2018). As Neier points out, rather than one seismic event as the origins of IHRM, instead, many events ‘led to the emergence of the human rights movement’ principally because of their correlation to the politics of the Cold War (Neier 2012, 4).

Related to Kennedy's point on human rights as a system of engrained norms, Ignatieff argues that for human rights advocates the functioning of 'human rights are to define a higher realm of shared moral values that will assist contending parties to find common ground' (Ignatieff 2003, 21). Ignatieff's argument highlights that when a human rights claim is made, it is understood by human rights advocates to be non-negotiable: '[c]ompromise is not facilitated by the use of rights claim language' (Ignatieff 2003, 20). Human rights are a binary value, either supported by those who value humanity or opposed by those who do not (Mutua, 2001). Accordingly, when a human rights claim is 'introduced into a political discussion' it acts to conclude the discussion, specifically in favour of whom ever has made the rights claim (Ignatieff 2003, 20). As summarised by Ignatieff, 'Human rights has become [a] major article of faith... It is has become the *lingua franca* of global moral thought' (Ignatieff 2003, 53). The importance of highlighting human rights claims as being perceived by advocates as being of the highest moral value is that many scholars of transitional justice are also human rights advocates. Crucially, transitional justice legal scholarship straddles awkwardly between 'analysis and advocacy as many academics and practitioners engage in both processes' (Clark 2012, 7). This bestriding of analysis and advocacy has often led to 'faith based' rather than 'fact-based prescriptions' (Clark 2012, 7).

The reverence of human rights advocacy has influenced the perceived importance of international human rights law in the transitional justice scholarship (McEvoy 2007). International human rights law acts as a universal standard which can 'provide guidance on the necessary course of action', which is external to the parties involved in transition (Turner 2013, 200). Importantly, it is the framing of international human rights law, by legal scholars and human rights advocates, as being capable of transcending political and social conditions that provides its legitimacy as 'neutral' (Turner 2013, 201). That being, for advocates of human rights the domestic rule of law, before and after mass human rights violations, succumbs to political conditions whereby those in power use the rule of law for their own political ends. It is the conception of international human rights law as not being constrained by political conditions which is key to legal approaches in the transitional justice scholarship (M. Clarke 2009). The perception of international human rights law as 'neutral' is succinctly captured by Clarke:

[The] growth of international law movements, have tended to argue that human rights and rule of law activism are paramount because their calling is derived from

a transcendent truth, that they carry with them an ultimate set of principles for humanity, or that the justice they derive from international adjudication is founded on fairness and judicial diversity (M. Clarke 2009, 8).²⁷

Accordingly, by transcending domestic law and its inherent entanglement with politics, international human rights law is regarded ‘as a key source of democratic legitimacy’ (Turner 2013, 201). In other words, legal approaches to transition have sought to re-orientate the root of ‘legal legitimacy from the domestic order to the international’ (Turner 2013, 200). However, the peculiarity of transitional legal approaches – human rights law – particularly its perceived capability to surpass political and social conditions is best understood as a figment. As Turner insightfully argues, ‘[f]ar from existing independently from history, politics and morality, transitional justice bears within it traces of all of these influences’ (Turner 2013, 203). Nonetheless, international human rights law continues to be positioned by legal approaches to transitional justice as external to political and social conditions, thus constituting itself as universally mandatory for successful transition to democracy (Turner 2016; Zunino 2018). The understanding of international human rights as providing transitional justice with a ‘neutral’, and standardised law is the ‘application of human rights law to respond to past human rights abuses’ (Turner 2013, 204). In other words, within the legal transitional justice scholarship it is the perception that the only way to respond to mass atrocities is human rights law, which is universally applicable to all situation where human rights have been violated (Turner 2016, 198-204). Thus, during periods of transition law and the employment of international human rights law is understood as the means, possibly the only means, for achieving justice (Turner 2013, 199). In one sense, transitional justice scholarship aiming to ‘address past failings of law by replacing it with law’, is situated on a paradox (Turner 2016, 199) whereby it is the assumed primacy of international human rights law, and its universality, to have the capacity to make sense and respond to mass violations of international human rights law (Turner 2016, 199). Crudely put, during periods of transition international human rights law perceives itself as the unequivocal remedy to its own demise.

Important here is the argument of McEvoy, who succinctly summaries the perceived authority human rights norms have during transition:

contemporary transitional justice discourses would suggest that human rights talk lends itself to a 'Western-centric' and top-down focus; it self-presents (at least) as

²⁷ Also see: Ignatieff 2003.

apolitical; it includes a capacity to disconnect from the real political and social world of transition through a process of ‘magical’ legalism. (McEvoy 2007, 421)

One important effect of this is human rights defines how transitional justice makes sense and legitimises processes which engage with addressing mass atrocities. More specifically, it is international legal and human rights norms by which transitional justice mechanisms are evaluated and gain their legitimacy (O’ Sullivan 2017, 125). As Turner points out, the effectiveness in which all transitional justice initiatives deliver ‘justice is defined in international law and action in transitional contexts came to be legitimated by the label of transitional justice’ (Turner 2013, 198). Thus, legal and human rights norms set the paradigm for what constitutes successful transitional mechanisms. Crucially, this paradigm concurrently acts to include and exclude legitimate knowledge of transitional periods, whereby, legal and human rights norms are the means, indeed the only means, to understand periods of transition. This is what Turner is referring to in stating, ‘[w]here one concept or one way of seeing the world is placed at the centre of meaning and prioritised over all other ways of thinking, the effect is to marginalise or exclude all other ways of interpreting meaning’ (Turner 2013, 198). As such, transitional justice, defined by legal and human rights norms, homogenises the way in which periods of transition are comprehended. This homogenising perceives that there is one, indisputable, understanding of justice through which past atrocities can be understood and addressed. Thus, this singular understanding of justice acts to carve a paradigm of legitimacy for transitional justice mechanisms, which importantly, comes at the cost of withdrawing heterogeneous meaning during periods of transition. This is reflected in Turner arguing, it is ‘[p]recisely because of the inevitable disagreement over the meaning of justice in transitional societies, law steps in to replace politics as the basis for authoritative decisions’ (Turner 2013, 205). As a result of law colonising what constitutes legitimate meaning, alternative understandings of justice are marginalised from the debate (Turner 2013, 199-201). For example, the Rwandan gacaca courts, discussed earlier, have been labelled as a ‘failed’ process by much of the legal scholarship, precisely for not falling within the legal paradigm of legitimate approaches, even though many Rwandans interpret gacaca in different ways (Thorne and Viebach 2019).²⁸ Moreover, the recently

²⁸ See Clark (2010). Thorne and Viebach have argued that reports on gacaca produced by human rights organisations, such as Human Rights Watch (HRW), constructed knowledge of gacaca as a failure because it didn’t adhere to the universality of legal and human rights norms. See Thorne and Viebach (2019).

proposed peace agreement for the Colombian civil war – spring 2016 – between FARC²⁹ and the Colombian government was harangued by Human Rights Watch for the inclusion of amnesty over universal judicial accountability as part of the transitional process.³⁰ Thus, the transitional justice scholarship in dealing with the past and as a legitimating source for a democratic domestic future is founded upon the ‘assumption of the capacity of law to mediate social change’ (Turner 2013, 198-199; Bell 2009, 15-16).

International Criminal Tribunals and Courts: Witnesses and Testimonial Evidence

This section discusses the role of witnesses and rules of procedure of testimonial evidence in international criminal trials in general – ICTY, Extraordinary Chambers for the Courts in Cambodia (ECCC), and ICC – and at the ICTR in particular. The section begins by summarising current debates within the literature on transitional justice and international trials, which primarily have focused on the role of witnesses in relation to procedural legitimacy: whether the use and role of witness(es) during trials works within the rules of procedure and evidence as detailed in the statute(s). To illustrate, a discussion will be had on witness proofing and testimonial evidence given in court, which are central debates within the transitional justice scholarship on legal processes of witnessing (Combs 2010; Jordash 2010). Furthermore, a recurrent human rights framing of witnesses in international tribunals and courts will also be highlighted. To be sure, the purpose of summarising these debates on witnessing is not as a means to provide an alternative offering for judicial reform. Rather, highlighting these debates is used here specifically to show that dominant discussions within the scholarship on witnessing are saturated within the efficiency of legal procedures. Crucially, in doing so foregrounds a lack of understanding of how discursive conditions are central to understanding what witnesses are and can do, which is the aim of Chapters 4-7. Furthermore, it will be pointed out that the ICTR statute does not provide any legal definition of ‘witness(es)’. The section will go on to propose a need to depart from an instrumental understanding of witnessing: the witness conceived as a pre-existing self-evident subject, through which previously

²⁹ The Revolutionary Armed Forces of Colombia (FARC) are the largest rebel group in the country.

³⁰ Legal approaches to the scholarship positioning legal processes as unequivocal is mirrored by the United Nations:

[t]here is a need to ensure that reconciliation is not the ideological mantle of injustice, the cement used to cover the cracks that have developed within society. Considering that the law, rights and justice are closely connected, reconciliation cannot be achieved by deliberately forgetting the acts committed, but rather by punishing such violations (United Nations 2002).

‘hidden’ or ‘suppressed’ memories can to a greater or lesser extent be recovered. Accordingly, arguing for the need to understand witnessing as non-instrumental: a contingent and multi-layered discursive process.

One frequent debate on witnessing within the legal scholarship on transitional justice is commonly framed within discussion on the legitimacy of judicial procedures, centring around the Rules of Procedure and Evidence (RPE). More specifically, the RPE provide legal counsel and judge’s chambers with regulations on the use of witness evidence in the lead up to (pre-trial), during trials, and the appeal process at international criminal tribunals/courts. The origins of RPE in contemporary tribunals and courts – ICTR, ICTY, ECCC, ICC,³¹ can be traced back to the Nuremberg Tribunal, albeit at Nuremberg there was not an official RPE.³² As May and Wierda note, the ICTR adopted a broadly similar approach to procedure and evidence to Nuremberg, though the RPE at the ICTR was legislated within the statute (May and Wierda 1999). That being the Nuremberg statute stated that the court is not bound ‘by technical rules of evidence. It shall adopt and apply to the greatest possible extent expeditious and non-technical procedure, and shall admit any evidence which it deems to have probative value’ (Nuremberg statute in Cassese 2013, 380). According to Cassese it was the Nuremberg statute’s advocacy for not being insurmountably bound by ‘technical rules’ which, in part, informed the drafting of the ICTR RPE,³³ which was adopted somewhat uncritically (Cassese 2013). In other words, unlike Nuremberg, the RPE for witnesses in contemporary tribunals are legally legislated within the statute(s).

Statutes and RPE provide the context for much of the legal scholarship debates on witnessing at international tribunals, with sustained discussions particularly on witness proofing.³⁴ This is relevant to understanding the transitional justice scholarship on

³¹ For discussion on the use of civil and common law in international tribunals and courts see Carter and Pocar 2013, Doria, Gasser, Cherif 2009. Also see: Langbein 2012.

³² Cassese points to a number of contributing factors to why the Nuremberg Tribunal did not implement RPE as part of its statute. These included the void of international human rights norms protecting the right to cross-examination, a mandate of the Nuremberg statute stating the need for expeditious proceedings, and the adoption of ‘civil law’ use of judges instead of a jury, meaning there was not a need to shield a jury from irrelevant/unreliable evidence (Cassese 2009, 314). The favouring of judges (‘civil law’) over a sitting jury, as noted by May and Wierda had a positive impact for the Nuremberg tribunal, whereby discarding the concern of protecting a jury from hearing prejudicial evidence ‘presented a liberal approach akin to that of the civil law systems. The result was an expeditious trial of the accused – required by the Charter – which was completed in ten months and in which issues such as the admissibility of evidence did not take up much time’ (May and Wierda 1999, 729-730).

³³ See May and Wierda (1999) for discussion on Law of Evidence at international tribunals and courts.

³⁴ For a general discussion on the influence of national legal systems – common and civil – on witness proofing/familiarisation see: Hannah Garry (2013, 66-99) in Carter and Pocar (2013).

witnessing particularly as it relates to notions of truth seeking and legitimacy. According to Garry, in a general sense witness proofing or familiarisation (also known as witness preparation) is the preparation by parties to a case to prepare witnesses for giving testimony during a trial (Garry in Carter and Pocar 2013, 66-67). Though, Garry is keen to note that witness proofing has been one of the ‘more polarising procedural issues litigated before international criminal tribunals’ (Garry in Carter and Pocar 2013, 66). The contention that witness proofing has been polarising is partly explained by the fact none of the ad hoc tribunals nor the permanent International Criminal Court clearly define the term witness proofing or familiarisation. As Jordash argues, neither the statutes nor rules of procedure and evidence of these tribunals and courts define the term.³⁵ At the ICTR, the definition of the term is usually determined on a case by case basis (Jordash 2009). Here a noteworthy point: during the first decade of the ad hoc tribunals witness proofing was not perceived as a major issue of contention. It was specifically during the *Fatmir Limaj*³⁶ case (IT-03-66) at the ICTY (2004) that the defence counsel raised issue with the use of witness proofing in relation to breaches of fair trial rights (Garry in Carter and Pocar 2013, 67). It is with this backdrop that transitional justice scholarship debates on the role and legitimacy of witnessing are commonly positioned.

For example, Jordash, who understands international tribunals as having an important role in contributing to ‘truth- telling’, raises specific concern with the re-articulation of witness statements by legal counsels during witness proofing, which ‘at the ad hoc tribunal has for too long been allowed to undermine the truth-finding process’ (Jordash 2009, 503). For Jordash there is a clear distinction between providing witnesses with adequate information and misuse of proofing. The former allows for the witness to be informed of the process of giving evidence whereas the latter is when witnesses are informed of the exact question they will be asked and in what order (Jordash 2009). Jordash argues that through witness proofing legal practitioners are in a difficult position, trying to serve the interests of their client whilst maintaining a duty to ‘present only that which is believed to be the truth’ (Jordash 2009, 512). This leads Jordash to state that in spite of the ICTR stating they have prohibited, rehearsed or coached witness testimonies, they have in fact either sanctioned or ‘turned a blind eye to – activities which are

³⁵ While the ECCC can be encompassed within generalisation on ad hoc tribunals, the ECCC adopted national Cambodian law which does not provide provisions for witness proofing.

³⁶ Lamja was judged by the trial chamber in November 2005 to be Not Guilty. The case went to appeal, in September 2007 the appeals chamber found him Not Guilty.

indistinguishable in practice’ (Jordash 2009, 513). Thus, Jordash’s argument points towards the important role trials have in establishing the truth. The potential risk is not with the pre-trial interaction between witness and lawyers per se. Rather the issue is specifically with the judicial process of proofing lacking universal clarity by the ICTR and other ad hoc tribunals that gives rise to claims of manipulation of evidence and impedes the potential for uncovering the truth (Jordash 2009, 503-519).

Relating to Jordash’s concern of witness proofing and ‘truth recovery’, Shoen (2010), Karemaker (2008), and Sliedregt (2008) question the ICC’s use of witness familiarisation. Interestingly not defined in the Rome Statute, witness familiarisation was introduced as a legitimate procedural practice in the first case at the ICC (Thomas Lubanga), whilst the trial chamber rejected the use of ‘witness proofing’ (Shoen 2010).³⁷ For Karemaker, the procedural measures for witness proofing employed and developed by the ad hoc tribunals have overall had a positive impact. International Criminal law’s contribution to ‘truth recovery’ at the ICC is more likely to be enhanced by the continuation of witness proofing rather than by a wholesale rejection of it (Karemaker 2008, 695-697). Contradicting Karemaker, Ambos argues that the continuations of the provision for witness proofing at the ICC is incompatible with the legal procedures of the court. Ambos positions his argument specifically within the ICC’s adoption of mixed adversarial-inquisitorial procedures,³⁸ which is converse to the ad hoc tribunals which primarily employed adversarial procedures (Ambos 2008, 915-916). Thus for Ambos, the procedural model of the ICC is incompatible with the ad hoc tribunals’ witness proofing adversarial orientation. Consequently Ambos argues, that at the ICC proofing is ‘neither legally admissible nor a necessary and useful practice’ (Ambos 2008, 916).³⁹ Here, importantly, these debates on the legitimacy of witness evidence and its contribution to the ‘truth recovery’ process encapsulate a recurring dialogue in the transitional justice scholarship on witnessing. Whereby, what it is witnesses are is self-evident and a fundamental feature of international tribunals and courts’ contribution to the ‘truth finding’ process: the catharsis of witnesses giving testimony of a violent past. As such, framed in the context of procedural legitimacy and legal systems, these dialogues focus

³⁷ See pre-trial chamber hearing for the Lubanga case (*ICC-01/04-01/06-679*) (ICC 2006).

³⁸ For discussion on adversarial and inquisitorial legal systems in international tribunals and courts see: Ambos 2003.

³⁹ Ambos (2008) and Jordash (2009) state that the ICC’s use of ‘witness familiarisation’, administered by the court’s Victim and Witness Protection Unit (VWU), provides witnesses with appropriate means of preparation for giving testimonial evidence.

on the way witnessing should function in international tribunals and courts. It is the scholarship's concentration within normative debates on what the 'correct' way witnessing should be that has contributed to the transitional justice legal scholarship neglecting to question the normalisation of witnessing.

Following a similar normative approach to witnessing, Combs questions the extent to which testimonial evidence of witnesses can contribute towards reliable judgments at international tribunals (Combs 2010, 2015). According to Combs, despite ad hoc tribunals' common perception that testimonial evidence given in trials will contribute to fact-finding and informed judgments, witness testimonial evidence is often confusing, contradictory, or unreliable and thus ill-equipped to provide information which judges can understand and critically evaluate (Combs 2015, 21). As Combs argues:

International criminal trials employ Western-style criminal procedures that presuppose a smooth flow of questions and answers between counsel and witnesses... International witnesses frequently are unable or unwilling to relate whole categories of information that are crucial to accurate fact-finding (Combs 2010, 22).⁴⁰

While Combs does acknowledge that other procedures and functioning's of ad hoc tribunals does impact on judgments, however a considerable part of Combs's argument focuses specifically on witness reliability. Combs attributes substantive weight to the failings of witnesses whom 'claim not to understand counsel's questions', in addition some 'respond evasively or otherwise unresponsively' (Combs 2015, 22). In the context of the ICTR, Combs purports that witnesses were often inconsistent with their stories or at times deliberately testified to information which was untrue (Combs 2010). The reliability of witnesses is something international and domestic courts are aware of and need to manage. Yet, Combs's framing of witnessing, including the ICTR, can be

⁴⁰ Within the witness box, techniques deployed by legal counsels during 'witnesses examination are divorced from discourse in ordinary life which revolves around "turn-taking"' (Uglow 1997, 325). The term turn-taking refers to the order and a sequence of questions and answers during witnesses' testimony. The way an individual would testify in a social context is very different from the way testimony is delivered in court (Uglow 1997, 327). In a social context giving an account of something for example, 'to a doctor the individual has the opportunity to tell their story in full' (Uglow 1997, 327) in their own time and without interruption. Usually it is legal counsels who prepare questions in advance that are put to the witness. Accordingly, witnesses produce accounts that are in the 'sequential position of post-question, and should therefore be answers; this means that persons who are being examined may not exercise the option of selecting by, for instance, themselves asking the other party (i.e the examiner) a question' (Atkinson 325-326). The rigid sequences of turn-taking for some witnesses can come as a surprise as they assumed being called to give evidence would be their opportunity to tell in full what they have experienced (Schabas 2006).

understood as diagnosing witnesses themselves as a key symptom of the weakness of judgments at ad hoc tribunals. Importantly, Combs's claims that the unreliability and dishonesty of witnesses was a core issue at the ICTR and other tribunals appears largely unsubstantiated. Combs focuses exclusively on 'culture', how Rwandan culture shapes how witnesses engage with the ICTR. Combs fails to acknowledge the important role the legal culture and practices of the ICTR had in shaping what the testimonies of witnesses (Eltringham 2019, 137).⁴¹ The limitation of witnesses' ability to contribute to the truth recovery process stated by Combs lacks consideration of how the discursive conditions within a discourse of witnessing produce the subject of 'witness(es)' and produce 'legitimate' knowledge about the past.

A recurrent understanding of witnessing at international tribunals and courts is provided from a human rights perspective. Sikkink (2011), Groome (2011), and Klinkner and Smith (2015) frame witnessing within a wider human rights project. Central to this perspective is an assumed normative process of advocacy for universal human rights within international criminal trials (Dixon and Tenove 2013, 3-4; Klinkner and Smith 2015). This places a strong emphasis on human rights violations not being forgotten but remembered, and victims having the 'right to [tell] the truth' of their experience (Klinkner and Smith 2015, 11-12). With its objectives informed by 'human rights discourse', this perspective perceives victims being given a voice to remember the violations they suffered as a human right in itself (Klinkner 2015, 11). As Klinkner and Smith (2015) argues, the 'right to truth' is becoming a prominent and important component of legal approaches to transitional justice. Proponents of the right to truth, such as Klinkner, advocate the institutionalisation of this right 'as a legal obligation, which in turn is enforceable through the procedures of appropriate courts' (Klinkner and Smith 2015, 4). The right to truth entails the right to seek and obtain information 'relating to the reasons and causes which lead to the victimisation of the individual(s) concerned, together with

⁴¹ The evidence provided through witness testimonials is weighed by trial judges in determining what the truth is (Jones 2009). The judgments made at international criminal tribunals including the ICTR differ from many municipal courts (Combs 2012). Judgments made in municipal courts are usually made by a panel of jurors whereas in tribunals a panel of judges are tasked with determining 'beyond reasonable doubt' what the truth is (Schabas 2006). According to the ICTR statute rule 87 on deliberation 'A finding of guilt may be reached only when a majority of the Trial Chamber is satisfied that guilt has been proved beyond reasonable doubt' (ICTR 1995, 36). In his assessment of ICTR judicial processes Schabas states the legal mechanism of 'beyond reasonable doubt' means:

a doubt that is founded in reason. It does not mean "any doubt", "beyond a shadow of a doubt", "absolute certainty" or "moral certainty". Nor, at the other end of the scale, does it imply "an actual substantive doubt" or "such doubt as would give rise to a grave uncertainty" (Schabas 2006, 464).

the prevailing conditions, circumstances and reasons which led to or otherwise facilitated the gross violation of human rights more generally’ (Klinkner and Smith 2015, 4). Important to note here, the right to truth encompasses individual as well as collective components.⁴² In principle, the ‘right to truth’ allows individuals to know why and how they or their loved ones were abused, whilst on a collective level, through testimonial evidence of victims, communities can understand the political and social conditions which led to the violations occurring. Individual and collective components of the right to truth are increasingly being advocated by human rights scholars as an important contributor to ‘truth-telling’ (Groome 2011; Klinkner and Smith 2015). In particular, the right to truth does not only include the right to hear the truth but also the right to impart the truth, which is often framed by advocates of the right within the judicial process of witness testimony (Klinkner and Smith 2015). The purported capacity of the ‘right to truth’ to contribute to the ‘truth telling’ is reflected in Klinkner stating:

the inclusion of truth-telling within the ambit of the right would not only place survivors in a more proactive role in the achievement of a broad, societal truth, but would also provide society, which may have diminished trust in the ability of the State to provide accurate and reliable information about human rights abuses, with an alternative source of information. (Klinkner and Smith 2015, 11-12)

For proponents of the right to truth such as Klinkner and Smith the ICC offers the potential to further establish the right as a key judicial response to mass violations. In particular, it is the ICC’s victim centric approach which for advocates (Groome 2011, Klinkner and Smith 2015) of the right represents an important function for promoting ‘truth telling’ in legal proceedings (Klinkner and Smith 2015, 12). In other words, those who purport the beneficial relation of legal approaches to ‘truth telling’ and the right to truth argue it aids individuals and ‘satisfies society’s interest in the truth about gross violations of human rights’ (Groome 2011, 198).

However, this human rights discourse on witness memories fails to comprehend the discursive and contingent nature of memory. This is because there exists a fundamental principle within normative human rights discourse (Clark 2012) that

⁴² UN resolution 9/11 ‘right to the truth’ states the need through judicial trials for the ‘right of the victims of gross violations of human rights and the right of their relatives to the truth about the events that have taken place, including the identification of the perpetrators of the facts that gave rise to such violations’ (UN Resolution 2012).

individual victims of rights abuses have a universal right to agency in legal proceedings (Klinkner and Smith 2015, 11-12).

International Criminal Tribunal for Rwanda and Defining Legal Witnesses

The International Criminal Tribunal for Rwanda (ICTR) was created (UN Resolution 955) following the request led by the Rwandan government (Rwandan Patriotic Front) and a United Nations investigation that concluded the violence in Rwanda between April and July 1994 was genocide. The preamble in the ICTR statute states the establishment of the tribunal will bring a new era to international criminal justice and individual accountability for violations of international law including genocide (ICTR Statute 2007). The United Nations Resolution (955) states the court is established to try perpetrators of crimes of genocide and human rights violations that occurred between 1 January 1994 and December 31, 1994 (ICTR Statute 2007, Article 1). The statute also states that the tribunal will contribute to reconciliation and peace in Rwanda:

[c]onvinced that in the particular circumstances of Rwanda, the prosecution of persons responsible for serious violations of international humanitarian law would enable this aim to be achieved and would contribute to the process of national reconciliation and to the restoration and maintenance of peace.
(ICTR Statute 2010, 2)

At the ICTR's core are investigations carried out by prosecution and defence counsels where tens of thousands of witness statements from individuals who had survived the violence were gathered (ICTR 2014). The tribunal comprises three organs: the chambers, the prosecutor and the registry.⁴³ The ICTR RPE are an established set of processes that define the conditions for the use of testimonial evidence, enforced by the ICTR Statute. The Statute's authority is enshrined by constitutional agreement amongst United Nations member states on international law (Statute of International Law Commission Article 1

⁴³ Trial judges that preside over Chambers are elected by a nomination process (ICTR 2007). Judges serve out a period of four years at which point they can be nominated to serve a second term (Schabas 2006). For a discussion of a need for changes in the process of judge selection at the International Criminal Court see Al- Khudayri and De Vos (2019) - <https://www.justiceinitiative.org/voices/excellence-not-politics-should-choose-the-judges-at-the-icc>. The registry organ is responsible for administration and servicing of the ICTR (Article 16 2010). This includes managing the tribunals' finances, managing external communications and managing victims and witnesses (Jones 2009, 116). The registry is also responsible for engaging the workings of the tribunal with Rwandan society. Such activities included the setting up of an information centre in the Rwandan capital Kigali to inform citizens of the activities of the ICTR (Jones 2009, 117).

2005, 2), and political authenticity by the State of Rwanda requesting the creation of an international criminal tribunal (Resolution 955).

However, despite the central importance of witnesses to the tribunal the ICTR statute does not define the term witness. The statute and RPE do outline the technical process for witnesses in the pre-trial stage and in court. Schabas points out that in practice at international tribunals and courts individuals who provide witness testimony are usually categorised as ‘ordinary witness’ and ‘expert witness’ (Schabas 2006). Though, the ICTR statute and rules of evidence do not define the term witness. Generally, an expert witness is someone who is perceived to have specific knowledge and expertise that can contribute to trial proceedings. Whereas, an ‘ordinary witness’ is somebody who gives a ‘factual account’ of events based upon ‘personal knowledge’ (Rule 90 2007). In principle, the giving of testimony at the ICTR is structured first by a witness taking an oath declaring the account they will give is the whole truth. This is followed by the witness testifying during evidence-in-chief led by the prosecution counsel then the defence counsel are allowed to ask questions during the cross examination of the witness (Rule 90 2007). In International Criminal Tribunals a distinction is made between testimonial evidence and hearsay evidence. Testimonial evidence is based upon a ‘true’ account of what someone saw whereas hearsay evidence is what they have been told happened by somebody else. However, Schabas points out that at the ICTR during evidence-in-chief witnesses are afforded an element of admissible hearsay evidence as a way of ‘narrating background information for the court’ (Schabas 2006, 473).

Regulation 79 of the Regulations of the Registry makes it clear that preparation of witnesses for the experience of testifying is an important consideration:

Pursuant to article 43, paragraph 6, and rules 16, 17 and 18, the Registrar shall develop and, to the extent possible, implement policies and procedures to enable witnesses to testify in safety, so that the experience of testifying does not result in further harm, suffering or trauma for the witnesses. (ICTR Statute 2010)

In relation to the registrar’s regulations for witnesses, the Victim and Witness Support Unit (VWSU) is responsible for both victims/witnesses and perpetrators (RPE 69 2007).⁴⁴

⁴⁴ In assessing functions of the VWSU Clark and Palmer state that the unit had a narrow focus that emphasises giving practical assistance to victims and witnesses. Rather than also considering how the Rwandan government through the VWSU could develop a set of laws protecting the future rights of witnesses. This would appear to be significant in considering that a number of ICTR and all remaining Gacaca cases have been transferred to the Rwandan judicial system (Ministry of Justice 2013).

They provide guidance regarding trial proceedings to prepare witnesses for the giving of testimonial evidence (ICTR Statute 2010, Article 21). Witnesses who give testimonial evidence at tribunals and courts may be concerned that by giving accounts of acts of violence they may be accused of participating in the criminal act they are giving testimony about. In such cases testimony can be used as a bargaining chip allowing lower-level participants in the genocide to testify and in return are given amnesty against prosecution. This concern is detailed in the United Nations rules of evidence for genocide judicial proceedings that witnesses are encouraged to testify without the concern of the possibility of future indictments against them: ‘A witness may object to making any statement which might tend to incriminate him. The Chamber may, however, compel the witness to answer the question. Testimony compelled in this way shall not be used as evidence in a subsequent prosecution against the witness for any offence other than perjury’ (Rule 90 1995). Many of the prosecution witnesses who were incarcerated were lower level suspects and were not on trial at the ICTR but were being held often without charge until the national judicial system or gacaca courts could process them (Jones 2009).⁴⁵ However, what it is witnesses are, the discursive conditions which constitute the subject-position of the witness, are largely absent from the legal scholarship. Furthermore the ICTR rules of evidence and procedure do not define the term witness. Within the Statute and Rules of Evidence the term witness is positioned in a very technical legal sense. These technical descriptions of witnessing in the literature and in the ICTR documents leads to a void in understanding of how the discursive conditions constitute the subject position of the witness.

Conclusion - International legal institutions: spaces of memory construction

Despite the parallel emergence of transitional justice and memory work after the Second World War, within the transitional justice legal scholarship there has been surprisingly little direct critical engagement with memory. The limited work that has been done on memory within transitional justice research has primarily been on the use of remembrance and commemoration as a modality for state building by new governments during transitional periods: an official narrative of a nation’s history. Moreover, there has been

⁴⁵ Palmer highlights that for many Rwandans they gave testimonial evidence in at least two, if not all three of the legal processes established in response to the genocide against the Tutsi: ICTR, National Rwandan Courts, and the Gacaca community courts. Palmer coins the term ‘concurrent justice’ for multiple legal institutions responding to the same mass atrocity. See Palmer (2015).

sparse analyse of memory production at international legal institutions. What research there has been comes from a liberal institutional epistemology. For example, Osiel (2000) points to a far-reaching paradigm for witness memories, stating that witness testimonies can and should construct a coherent collective memory of atrocities, providing victims and societies affected with a collective narrative of past events. Yet Osiel's advocacy for a collective legal explanation of the past, this thesis argues, negates the discursive contingency of collective memory. Understanding memory as pluralistic, multi-layered and transient, as this thesis does, necessitates the need to 'explore [the] various non-territorial spaces of memory' (Resende and Budryte 2013, 10). These spaces are constructed by various forces including international norms (Human Rights, Rule of Law). Accordingly, analysing the intersection between memory and political change should take international actors and organisations into account, highlighting the international dimension of memory and the wide variety of actors involved (Resende and Budryte 2013).

From the origins of the practice of transitional justice (Zunino 2018), memory and the exceptional use of international law have been a central response by the international community to mass atrocities. It was at the Nuremberg Tribunal that international law, and advocacy for remembering the human rights atrocities committed, were evident. Indeed, it was a criticism of Nuremberg not putting front and centre the memories of victims which directly contributed to witness testimony having a pivotal role at the Eichmann trial (Felman 2002).

The emergence of a discourse transitional justice scholarship in the late 1980s continued to frame international law and remembering past rights violations as central to this embryonic field of study (Teitel 2003). The perceived capacity for law to uncover the truth of past rights violations was, and is, perceived as a mandatory prerequisite for societies to successfully transition to a peaceful democratic future. As Teitel reminds us, 'transitional law is both backward- and forward-looking, as it disclaims past illiberal values and reclaims liberal norms' (Teitel 2014, 96).⁴⁶

Yet, the transitional justice legal scholarship has neglected to address the way that international legal institutions and international actors can play a fundamental role in the

⁴⁶ For a discussion on the role of memory in nation building projects see De Brito (2001), Lessa (2013). For example, De Brito has investigated the way national level justice and reconciliation initiatives in the Southern Cone – Argentina and Uruguay – have been used to construct particular narratives of the nations' pasts, which supported the new regime's own political agendas and highlights the importance for state constructed narratives of past atrocities to be subject to critical scrutiny (De Brito 2001).

construction of the past in the present. The limited research on memory work in post-conflict international legal institutions that has been conducted is framed within a liberal epistemology. For Osiel (2000, 2009), the criminal law correctly encapsulates assumptions about ‘human nature and society that are primarily liberal’ (Osiel 2000, 9). In the aftermath of mass atrocities, criminal trials can provide a productive response to the affected societies’ need for a collective understanding of the causes that led to the violations occurring (Osiel 2000, 2). According to Osiel, atrocity trials are processes that can and should construct a collective memory for societies affected by mass violations, and, ‘such trials should be unabashedly designed as monumental spectacles’ (Osiel 2000, 5-6). However, as argued in the theoretical framework in Chapter 2, the conceptual liberal assumptions that allow Osiel to argue that international legal institutions can have an important role in constructing a collective societal understanding of atrocities ultimately unconvincing. The framework proposed in Chapter Two of the thesis suggests a post-structuralist epistemology provides a useful alternative, and more nuanced, understanding of the discursive construction of memory in international tribunals and courts.

This thesis therefore critically engages with the ICTR as a space of legal memory construction, specifically analysing the universal application of human rights and rule of law norms to produce a singular ‘narrative’ of history.⁴⁷ International tribunals and courts are a crucial, albeit neglected, part of any given post-conflict memory-scape. These international institutions and the international actors – judges, legal counsel, registrar, investigators – who inhabit these spaces of memory production, shape in important ways the discursive conditions of a discourse of witnessing, in which legitimate meaning and knowledge of past violations are constituted. The construction of memory is understood here as something that is plural, multidimensional and transient. As Rothberg points out, collective memory is best understood as multidirectional. This concept:

draws attention to the dynamic transfers that take place between diverse places and times during the act of remembrance. Thinking in terms of multidirectional memory helps explain the spiralling interactions that characterize the politics of memory (Rothberg 2008, 29).

Collective memory is not able to exist autonomously from other spaces of memory construction and production. Collective remembering is fluid and pliable, which means it

⁴⁷ For critical discussion on witness testimonies at international criminal tribunals and courts see Dembour and Haslam (2004); Viebach (2017); Wilson (2011).

can be shaped and reshaped across and between spaces of memory (Rothberg 2008, 5). Notwithstanding the plurality and fragility of memory, in the context of transitional justice, truth recovery in legal trials can become a dominant discursive practice. The perceived authority of the legal judgments, substantiated by the universal nature of human rights and rule of law norms, acts to legitimise knowledge produced in trials as an authoritative true account of the past (Blants 2013). Thus a legal collective memory produced from the discursive legitimacy of law, whilst not static, can become a dominant objective account of a violent past. Any challenges to legal collective memory resulting from the nature of the universal principles of international law, which legal collective memory is founded upon, are accused of bringing into question the principles of law itself. Therefore, it is the way in which the universality of human rights and rule of law norms as an unequivocal response for making sense of mass human rights violation can become a dominant discursive practice. The discursive conditions of the language of law and human rights act to stabilise the collective memory produced within a discourse of witnessing. It is therefore the purpose of the chapters which follow to present Foucauldian discourse analysis as a suitable method for analysing archived ICTR legal documents and positioning the original conceptual framework. This framework combines the concept of ‘witnessing’ (Giorgio Agamben) and ‘memory’ (Paul Ricoeur) as an informative mode of enquiry. This enables Chapters 4-7 to argue that the public construction of individual internal memories into an authoritative legal collective memory should have limited application in how transitional justice discourses shape the future of transitioning communities.

Chapter 2 - Conceptualising the way Legal Witnesses Remember Mass Human Rights Violations

This chapter constructs a theoretical framework using the concepts of ‘memory’ (see Ricoeur 2004) and ‘witness’ (see Agamben 1997). Agamben’s concept of ‘witness’ contributes to the philosophical foundation of the thesis’s framework. Agamben argues that witnessing is a non-instrumental, contingent and multi-layered practice (Agamben 1997). Unpacking the nexus of the concept foregrounds Agamben’s central contention, that being the paradox between what he defines as the ‘true complete witness’, the victim who experienced the full horror of trauma and did not survive, and the survivor who is bestowed with the ethical obligation of bearing witness, speaking in proxy for the ‘true witness’ (Agamben 1997, 25-37). However, Agamben’s concept of the ‘witness’ does not provide a full philosophical theory of memory. Therefore, the remainder of the chapter discusses the thesis’s engagement with Paul Ricoeur’s concept of ‘memory’ and his understanding of this concept (Ricoeur 2004). The chapter then discusses how the thesis uses Ricoeur’s and Agamben’s concepts as a theoretical lens through which to analyse the role of witnesses and memory construction in courts.

Ricoeur perceives remembering to be comprised of two parts: embodied and external. Embodied or ‘inwardness’ refers to individual memories, what individuals have encountered and done (Ricoeur 2004, 40-45). Remembering is also external, entailing ‘community’, in that communal memories are what derives a sense of ‘we’ – plural – that offers a sense of shared experience. It is through remembering in and with ‘community’ that individuals gain a sense of a shared experience, which forms a ‘life in common with others’ (Ricoeur 2004, 132).

The chapter concludes by proposing that the philosophical insights offered by Agamben and Ricoeur account for the manner in which legal witnessing would be constitutive of the discursive conditions of the subjects (witnesses) engaged in collective remembering which entails plural, shared experiences. This explanation is necessary if the thesis’s contention that legal memory in courts is a tightly controlled discursive process is to be given substance. The insights offered by Agamben and Ricoeur provide a philosophical framework for this thesis’s investigation, attempting to better understand the extent to which memory constructed through legal witnessing at the ICTR is able to contribute to the wide-reaching aspirations of transitional justice.

Law and the 'grey zone' of witnessing

According to Agamben, the survivor who bears witness to the horrors of Auschwitz is not the true witness, rather the survivor is the witness of the 'witness' (Agamben 1999, 34). For Agamben, those at Auschwitz who reached the bottom, saw the 'gorgon' (gas chamber),⁴⁸ but did not return to bear witness to the full horrors of Auschwitz are the complete witness (Agamben 1999, 16). Thus the burden to bear witness is bestowed upon those who did not experience the full trauma of what happened. Rather the survivor is burdened to speak of what they have not fully experienced (Agamben 1999, 19). Agamben's engagement with the concentration camps at Auschwitz in his book *Remnants of Auschwitz* (RA), where he constructs his concept of witnessing, is employed as a mode to advance his philosophical thinking on ethics (Durantaye 2009, 252). In RA Agamben's central question is on testimony, specifically the theory and practice of testimony (Agamben 1999, 13; Durantaye 2009). In relation to the thesis's theoretical framework, as a lens through which to explore legal witnessing at the ICTR Agamben's philosophical thinking on ethics offers a conceptual way to cast the phenomenon of legal witnessing in a new light. Specifically, what the thesis draws out of Agamben's philosophical work on ethics is subjectivity and the separation of law from ethical categories. To be clear, the oeuvre of Agamben's work covers vast ontological ground, and it is not the stated purpose of this thesis to provide full coverage of Agamben's philosophical arguments.⁴⁹ Instead, it is the purpose of this chapter to engage and draw out specifics from Agamben's conceptual insight on witnessing, which along with Ricoeur's concept of 'memory' discussed in the latter part of this chapter, provides the thesis with the conceptual tools in which to offer an alternative understanding of the way in which witnesses remember during political transition.

⁴⁸ Also, Agamben engages with the use of the term 'gorgon' from ancient Greece (that which must not be looked at).

⁴⁹ Agamben's philosophical thought stretches across disciplines and often individual pieces of work can be interpreted by some, and on occasions stated by Agamben himself, as being a singular philosophical offering and unconnected to other works. Moreover, Agamben's work can be perceived as being in two distinct categories, his early writings on language, and his later political writings. However, both the perceptions, that individual works are singular and can be separated to two distinct categories, is to not fully appreciate the continuity of thematic interest that run across Agamben's body of work, namely, the relationship between literature, ontology and politics (Durantaye 2009, 11; Murray 2010; Frost 2015). While it is the case that 'Homo Sacer is indeed more directly concerned with political questions, than any of Agamben's earlier books ... this is a change that is all too easy to overestimate' (Durantaye 2009, 11). For discussions on Agamben's philosophical arguments, see: Frost 2011, 2014, 2015; Zartaloudis 2010, 2018; Durantaye 2009; Mills 2008; Murray 2010; Clemens, Heron, and Murray 2012.

This section begins by acknowledging that Agamben's work on ethics in RA forms part of his *Homo Sacer* project.⁵⁰ This acknowledgement is necessary given that RA has received sustained criticism. In particular, critics have challenged the lack of historical coverage of Auschwitz by Agamben in his philosophical discussion on ethics (Bernstein 2004; Marion 2006; Norris 2005). A summary of these criticisms will be given and, importantly, how some of these criticisms have missed the essence of what Agamben is attempting in RA – not a historical account of Auschwitz, rather 'a kind of perpetual commentary on testimony' (Agamben 1999, 13). This summary is needed as it allows the section to justify and locate the use of Agamben's concept of 'witness' as part of the thesis's theoretical framework. The chapter then goes on to unpack and outline the concept of 'witness'. Agamben, throughout his conceptualisation of the 'witness' draws directly upon *The Drowned and the Saved*, an account of life in Auschwitz and the responsibility to bear witness to it written by camp survivor Primo Levi (Levi 1988). As such, a brief summary of Levi's account of Auschwitz, and a discussion on Agamben's philosophical use of it will be put forward. In particular, this is relevant to the thesis suggesting that the witness testifying in trials is positioned in a 'grey zone'. The latter part of the section discusses Agamben's theoretical insights on what he sees as the conflation of judicial categories with ethical categories, such as responsibility and justice, which Agamben argues places upon law categories that are only judicial, not ethical (Agamben 1999, 20-21). The thesis's framework interprets this in order to advance the conceptual claim that the legal testimony of witnesses can be understood as a purely judicial category which is absent of ethical categories.

RA forms the third instalment of Agamben's *Homo Sacer* project, though it is this third instalment in particular that received heavy criticism for its apparent deemphases of historical singularity (Marion 2006). Although, as will be foregrounded below, such criticism overlooks the nuances of the philosophical method Agamben employs. This criticism stemmed from Agamben's use of Auschwitz and figures and events from the camp as much as it did for the content and insights it offers (Durantaye 2009, 248-249). For example, Marion argues that the method deployed by Agamben in RA creates a 'lacuna of the horror of Auschwitz' and dehumanises the Holocaust (Marion 2006, 1018-1023). Following a similar trajectory to that of Marion, Bernstein has stated that RA is an extreme aestheticization of figures in the camp, particularly that of the Muselmann

⁵⁰ See, *The Omnibus: Homo Sacer* (Agamben 2017).

(Bernstein 2004). Muselmann was the term camp detainees used referring to an individual that had reached a state of psychological despair. Someone who was not dead though was not fully alive either (Levi 1988, 63). Agamben also employs the term *Muselmann* in explaining his philosophical framing of testimony (Agamben 1999, 41-86). Moreover, criticism aimed more generally at Agamben's work on *Homo Sacer*, similarly to the historical issues raised against RA, has focused on Agamben's use of examples. This criticism can be seen in Laclau stating:

by unifying the whole process of modern political construction around the extreme and absurd paradigms of the concentration camp, Agamben does more than present a distorted history: it blocks any possible exploration of the emancipatory possibilities opened by a modern heritage (Laclau 2007, 22).

For Laclau and others,⁵¹ Agamben's use of the concentration camp at Auschwitz as an 'example' to frame what he sees as shortfalls in contemporary politics all too easily jumps from establishing the historical specificities of Auschwitz to the relevance and workings in a contemporary context (Laclau 2007, 22). What critics including Laclau, Marion and Bernstein appear to be challenging most of all, albeit Marion and Bernstein from a slightly different position to Laclau, is the paradigmatic method Agamben uses to make his philosophical offerings. That being, Agamben approaches his argument on ethics specifically, and the *Homo Sacer* generally, with a distinct understanding of 'paradigm'. Agamben, explaining 'paradigm' states:

The figures of the 'homo sacer' and the camp serve as examples inasmuch as they are concrete historical phenomena. I do not reduce or cancel this historical aspect – on the contrary, I try first to contextualize them. And only then do I try to see them as a paradigm through which to understand our present situation. This is simply another way of working historically, another methodological approach (Agamben in Durantaye 2009, 223).

Thus, the above framing of 'paradigm' by Agamben highlights that common criticism of its use, such as that made by Laclau, seems to miss or avoid taking seriously the paradigmatic methodology Agamben uses to advance his philosophical argumentation (Agamben 2002, 4).⁵² In other words, the 'paradigm' as understood by Agamben is

⁵¹ See: Norris 2005.

⁵² Agamben's understanding and use of 'paradigm' is closely connected to Foucault's understanding, so much so, Agamben in his early work did not feel the need to explain his use of 'paradigm' as he thought

dualistic. Whereby it provides exemplarity in contemporary context and singularity of historical context. However, importantly, exemplarity and singularity are never fully separated. Thus, the ‘paradigm’ functions more than just a lens through which to show what is already there. The ‘paradigm’ not only ‘renders intelligible a series of phenomena’ that may have ‘escape[d] the historians’ gaze’ but is constitutive of a given phenomenon (Agamben 2002, 4-5, Durantaye 2009, 223-224).⁵³ As Durantaye points out the ‘idea of the paradigm as that which casts light through which things first come to be known, but that does not, for as much, diminish the integrity of that source of light’ (Durantaye 2009, 226). In short, the ‘paradigm’ engages with historical materials and methods (importantly, structures as well as events), not in order to understand the past; rather, as an attempt at understanding present situations.⁵⁴

The above discussion on criticism of Agamben’s use of Auschwitz to advance his philosophical insights has been a necessary prelude to unpacking his concept of ‘witness’ and beginning to construct the theoretical framework of the thesis. In summary, explaining Agamben’s engagement with Auschwitz and his philosophical frame legitimates this chapter to propose a conceptual framework of witnessing at the ICTR. In order to construct this framework, the discussion which follows will unpack and outline Agamben’s understanding of the ‘witness’ including a discussion of Agamben’s engagement with the concentration camp at Auschwitz.

Bearing Witness

According to Agamben, there are two types of witnesses at Auschwitz. The witness who was killed at Auschwitz and the witness who survived and left to tell the story of Auschwitz to others (Agamben 1999, 16). For Agamben, these two types of witnesses are an instructive ‘paradigm’ for thinking through, ontologically, how experience (knowledge) is understood (Agamben 1999). That being, interrogating the lacuna in which ‘survivors bore witness to something it is impossible to bear witness to’ (Agamben 1999, 13). This is why Agamben insists RA’s central concern is testimony (Agamben

it was obvious (see: Durantaye 2009, 214-217). For an example of Foucault’s use of ‘paradigm’, see: *Discipline and Punish* (Foucault 1979).

⁵³ As Agamben himself points out his understanding of ‘paradigm’ is similar to that of Foucault. Although, it is important to note that Agamben’s philosophical oeuvre should not be mistaken as explicitly following Foucauldian coordinates: not as a successor to Foucault philosophically, as Frost argues, ‘it would be more accurate to view Agamben as complementing his wider philosophical project with a re-imagination of Foucault’s ideas’ (Frost 2011, 58; also see: Frost 2017).

⁵⁴ See: Agamben 2002.

1999, 13). According to Agamben this lacuna of the impossibility for the survivor to bear witness is clearly evident in Primo Levi's account of his own experience of surviving Auschwitz (Agamben 1999, 16-17). Specifically, Agamben uses Levi's account in *The Drowned and the Saved* as the ontological foundation for thinking through how the experience, and more specifically knowledge, of Auschwitz can be known if it is impossible for the survivor to bear witness to it (Agamben 1999). Therefore it is necessary for the discussion that follows to briefly summarise Levi's *The Drowned and the Saved* then to go on to unpack how Agamben uses it to develop his philosophical understanding of witnessing and how the thesis will use it.

A central theme of Levi's *The Drowned and the Saved* is the survivors' responsibility to speak, ensuring the atrocities of Auschwitz were not forgotten, and simultaneously coping with the guilt of having survived the camps when so many did not. Levi's account of life in the camp depicts the relentless violence and suffering of the camp's inhabitants (Levi 1988). The everyday routine-ness of the brutality of the beatings and deprivation imposed upon prisoners was experienced first-hand by Levi.⁵⁵ For Levi, those who lived through and survived the camps bestowed upon themselves the moral obligation to bear witness to Auschwitz. To speak for those who did not return from the camps and to make sure the memory of the Nazis' plan to exterminate the Jews was not forgotten. On bearing witness to the memory of Auschwitz and a moral obligation to do so, Levi is clear on one thing: as a survivor of the camps Levi accepts the moral obligation to testify to what he witnessed.⁵⁶ However, Levi is unequivocal that the true witness to the horrors of the Nazi concentration camps were those killed in the gas chambers (Levi 1988). Here it is worth stating at length Levi's conviction on his understanding of the true witnesses:

I must repeat – we, the survivors, are not the true witnesses. This is an unfortunate notion, of which I have become conscious little by little, reading the memories of

⁵⁵ Levi himself acknowledges that having been a chemist prior to arriving at the camps had afforded him certain 'privileges' which the vast majority prisoners were not afforded (Levi 1988). However Levi insists that life in the camp, for those with 'privileges' or not, was extremely tough. In addition to having the 'luck' of having a profession prior to Auschwitz, which afforded him moments of respite from the continuous beatings (Levi 1988), Levi also regards his survival as down to another element of 'luck', that being the decision by the Nazis shortly before he was moved to Auschwitz to extend the life expectancy of camp inhabitants (Levi 1991, 4).

⁵⁶ Levi is 'stereotypical' of those who have witnessed atrocities. Upon returning home from Auschwitz Levi continuously recounts his experience, which included writing down what took place in the camps (Agamben 1999, 16). Although, as Levi himself states, responding to the question of whether he sees himself as a writer or a chemist: 'A chemist, of course, let there be no mistake' (Levi 1988, 102). For Levi, writing afforded him the opportunity to bear witness.

others and reading mine at the distance of years. We survivors are not only an exiguous but also an anomalous minority: we are those who by the prevarications or abilities or good luck did not touch the bottom. Those who did so, those who saw the gorgon, have not returned to tell about it or have returned mute, but they are ‘Muslims’, the submerged, the complete witnesses, the ones whose the position would have a general significance. They are the rule, we are the exception ... we who were favoured by fate tried, with more or less wisdom, to account not only our fate, but also that of the others, the submerged; but this was discourse on ‘behalf of third parties’, the story of things seen from close by, not experienced personally (Levi 1988, 63-64).

It is this ‘speaking in proxy’ Levi foregrounds that Agamben interprets in advancing his philosophical explanation of testimony. In that for Agamben, Levi’s claim that the survivor speaks in proxy for those who cannot is analogous to how experience is understood (Agamben 1999). In other words, Agamben, conceptualising his understanding of witnessing takes as its starting point Levi’s account of the ‘true witnesses’ of Auschwitz. In the context of the thesis developing a theoretical framework it is in particular Agamben’s engagement with Levi’s discussion on the ‘grey zone’ of the camps and the *Muselmann* that is relevant (Agamben 1999, 41-86). As such, the following discussion will detail Agamben’s concept of ‘witness’.

Agamben uses the term subjectivity, in part, as the potential for an individual to ‘become’ something. This thesis acknowledges that both ‘becoming’ and ‘to have language’ are important parts of Agamben’s ontological oeuvre and political thought.⁵⁷ However, for the purpose of constructing a conceptual framework of legal witnessing at the ICTR it is particularly the potential to ‘become’ something that is of primary interest here.

Subjectivity, similar to much of Agamben’s philosophical thought, is framed within his understanding of potentiality.⁵⁸ For Agamben, potentiality is the ontological

⁵⁷ Language, or the philosophy of language, is a central concern throughout Agamben’s philosophical oeuvre. For Agamben language is where the human is defined and redefined through the human’s ‘faculty for language’ (Agamben 1999b). Humans having language is fundamental to understanding who we are (Murray 2010, 5). According to Agamben language directly relates the philosophical concern about how the essence of language constitutes our ‘being in this world’. Agamben’s enquiry on the interconnectedness of language and existence (being) is directly influenced by the thought of Martin Heidegger [see ‘*Being and Time*’ (Heidegger 1962)]. Thus for Agamben, literature, ontology and politics and their relationship between each other are central themes of enquiry. For Agamben this philosophical frame allows him to examine ‘how government and the law use and manipulate language to create and reinforce their power, but also how representations and the use of language can be the means of challenging that power’ (Murray 2010, 5). See *Homo Sacer* (Agamben 1995); *State of Exception* (Agamben 1999); *The Coming Community* (Agamben 2007).

⁵⁸ Regarding the fundamental importance of potentiality to his philosophical enquires, Agamben himself states:

principle of the possibility that there is always the potential to do something, although whether an individual does that thing or not is never predetermined (Agamben 1995, 39-49). Potentiality is not the potential of something waiting to be actualised, rather potentiality, or 'impotentiality', is the opposite to understanding events as totalising. It is the potential for an individual to 'become', but also not to become something, the eschewing of single unity of subjects. Following Agamben, an individual subject's relation to the totality of a group, such as witnesses, is the potential to only be part of that totality, which is referred to by Agamben as a 'remnant' (Agamben 1999, 87-135). Importantly, 'remnant' is the subjectivity of the subject not becoming encapsulated within the singular identity of a collective (Agamben 2005, 54). A subject understood as a 'remnant', which is the interpretation taken by the thesis, is a conceptual tool to see 'how a totality conceives of itself and of its component parts' (Durantaye 2009, 299). In short, the subject, the individual who saw the horrors of rights violations, is a kind of 'remnant'. The subject as a 'remnant' is 'neither the all, nor a part of the all, but the impossibility for the part and the all to coincide with themselves or with each other' (Agamben 2005, 55).⁵⁹ In other words, the subject framed as a 'remnant' challenges the notion that a community completely encapsulates the singularity of its members (Durantaye 2009, 300). From the thesis's perspective, it is instead the discursive conditions and thus discursive practices that constitute who can speak as the subject witness and what they can speak about.

The Grey Zone: Law, Ethics and Legal Witnesses

The 'grey zone', a term Agamben takes from Levi, is where the intersection, or more specifically the conflation, of law and ethical categories exist (Agamben 1999, 22). According to Agamben, philosophical understandings of ethics encompass categories such as guilt, responsibility, and judgment as judicial as well as ethical categories.

I think that the concept of potentiality has never ceased to function in the life and history of humanity, most notably in that part of humanity that has grown and developed its potency [Potenza] to the point of imposing its power over the whole planet ... I could state the subject of my work as an attempt to understand the meaning of the verb "can" [potere]. What do I mean when I say: "I can, I cannot"? (Agamben 1999, 177).

See: *Potentialities: Collected essays in philosophy* (Agamben 1999). The centrality of potentiality to Agamben's philosophical oeuvre is evident in his work on 'Homo Sacer'. Potentiality 'enters Homo Sacer through an analysis of the relation between the constituting power "that founds a sovereign state" and the "constituted power" that maintains it once it has been established' (Durantaye 2009, 230). See Homer Sacer (Agamben 1995).

⁵⁹ Agamben engages with St Paul's text and Jewish Messianism in his discussion on 'remnants'. See: *The Time That Remains: A commentary on the letter to the Romans* (Agamben 2005). Also see Agamben (1993).

Agamben's main contention is that what he sees as legal categories are being misused as if they are ethical categories. In other words, according to Agamben, law and ethics are separate areas, and ethics should not borrow concepts from law, but instead develop its own categories (Agamben 1999, 22).⁶⁰ Agamben appears to suggest that there is something problematic about weakly developed ethical categories, rather than something fundamentally dangerous about law (Durantaye 2009, 254). Agamben locates this problematic borrowing by ethics of legal concepts in the 'grey zone' (Agamben 1999, 21-22). Here, it is worth summarising what it is Agamben takes from Levi's concept of the 'grey zone'. This is important as the thesis framework uses an interpretation of Agamben's understanding when suggesting that witnesses at the ICTR are located in a 'grey zone'.

Levi's term, the 'grey zone', relates to camp detainees and the blurring of distinctions between prisoner and 'executioner' at Auschwitz; some detainees 'volunteered' for 'work' roles within the camp. One such collaborative role was the Sonderkommando (Special Squad) who were 'entrusted with running the crematoria': disposing of the bodies from the gas chambers (Levi 1989, 32). Levi discusses an unusual event, a soccer match, that took place at Auschwitz between the 'Special Squad' and SS camp guards. It is Levi's depiction of the soccer match, which Agamben uses as an example of the 'grey zone' in framing his philosophical argument on law and ethics.⁶¹ Levi notes how surreal the event of the soccer match was:

Men of the SS and the rest of the squad are present at the game; they take sides, bet, applaud, urge the players on as if, rather than at the gates of hell, the game were taking place on the village green (Levi 1989, 38).⁶²

For Agamben, the soccer match at Auschwitz may be incorrectly understood by some as an example of a 'brief pause of humanity' in the despairs of the horrors and atrocities taking place at Auschwitz (Agamben 1999, 26). However, Agamben argues that this 'game' is not a sign of hope. It is for Agamben the normalcy of the soccer match, which

⁶⁰ For a discussion on Agamben's thought on ethics and his engagement with Levinas see: Frost 2015.

⁶¹ Levi's discussion on the soccer match is based upon the account of Miklos Nyszli, one of the very few individuals who survived the last 'special squads' at Auschwitz (Levi 1988, 63-68).

⁶² According to Levi, it was the specific nature of the 'work' carried out by the 'special squad', and no other category of prisoners that made it possible for the SS to take part in the match:

we have embraced you, corrupted you, drag you to the bottom with us. You are like us, you proud people, dirtied with your own blood, as we are. You too, like us and like Cain, have killed the brother. Come we can play together (Levi 1989, 38).

is the true horror of the Nazis' concentration camps. As Agamben states, 'that match is never over; it continues as if uninterrupted. It is the perfect and eternal cipher of the "grey zone" which knows no time and is in every place' (Agamben 1999, 26). What Agamben appears to be pointing towards here in explaining his philosophical framing of the 'grey zone' is that what can appear as a break in the cycle of repression or violence is not in fact a rupture that signals change. Instead it is the illusion of change. Agamben's philosophical framing of the 'grey zone' encapsulates the fallacy of security and distance from repression and/or violence. This fallacy is but a 'brief respite, and at any moment the suffering and cruelty can come screaming back' (Durantaye 2009, 257). In other words, for Agamben the 'grey zone' is, ontologically, a dangerous projection of hope and progression towards change. The 'grey zone's' projection of hope and progression towards a better horizon is a sinister fable marking the closure of an unpleasant past and the beginning of a 'better' future (Agamben 1999, 26). Agamben argues it is the 'grey zone's' fallacy of a rupture to the status quo that needs to be shattered. Like the soccer match at Auschwitz, it is essential the 'grey zone's' illusion of actual positive change be exposed: 'if we do not succeed in understanding that match, stopping it, there will never be hope' (Agamben 1999, 26).⁶³ In short, the 'grey zone' projects an interruption to unpleasant and repressive action. This interruption to the status quo has the false appearance of bringing back normalcy as the foundations for progressive change. However, the apparent appearance of normalcy is no guarantee of breaking the status quo.

Agamben's 'grey zone' is interpreted by the thesis as a conceptual tool, which will be used to shed light on how legal witnessing has the illusion of movement from a violent past to a more peaceful future. More specifically, the thesis's framework interpreting Agamben's 'grey zone' suggests that dominant perspectives in the legal transitional justice scholarship purporting that transformative benefits of legal witnessing facilitated by law and human rights norms, is a 'grey zone'. That being, these dominant perspectives perceive that law facilitated through international tribunals acts as the distinct marker between a violent past and a more peaceful future (Klinkner and Smith 2015; Sikkink 2011). In other words, from such perspectives international law and its

⁶³ Agamben's engagement with literature is a central mode he uses to make his philosophical offerings. Agamben engages with a range of literary characters and figures, these include creatures that transcend particular divisions: man/animal; human/divine, that Agamben employs as 'thresholds' that are key to his philosophical argumentation. One source of literary work Agamben engages with on multiple occasions is that of Franz Kafka. The figures (characters) from Kafka, as with figures from other literary works, are for Agamben illustrative of 'desubjectivised' entities, 'an image of the undoing of our structured and imposed forms of

universality steps in where law has previously failed resulting in the violations occurring (Turner 2016). It is the perceived primacy of international trials and the testimonial evidence of witnesses they facilitate, that acts as linear progression. That being, law affords the violations of a violent past to be known, which facilitates a collective understanding and provides individual catharsis of past trauma (Keydar 2019; Osiel 2000). It is the externalising and understanding of the past, made possible by the purported universality of law that makes transition to a peaceful and democratic future most likely to succeed. In other words, from such perspectives, in order for society to transition to a positive future there first needs to be understanding and acceptance of past violations. It is the perceived universality and ‘neutrality’ of law and human rights norms which makes comprehensible knowledge of a violent past, and through the historical record trials produce, contributes to transition to a progressive future. The thesis pushes back against witness testimony being the bridge between the past and movement forward. The framework of the thesis looking at witness testimony at the ICTR through the lens of the ‘grey zone’ will foreground that legal testimony is not the completion of understanding a traumatic past, it is not the bridge between the past and present.

The ‘*Muselmann*’: the lacuna of law and justice or legal witnessing as ‘Judgment’

The *Muselmann*, alongside the ‘grey zone’, is for Agamben an ontological concept that he uses to argue that law and ethics are separate categories (Agamben 1999). By decoupling law from justice Agamben states that, ontologically, law is solely about ‘judgment’ absent of justice and truth. For the purpose of the thesis’s conceptual framework, it is Agamben’s insights on the need for distance to be drawn in law-justice understood as one as the same thing.⁶⁴ To be clear, the thesis is specifically interested in Agamben’s insights on the relationship, or lacuna, between law and justice, rather than directly engaging with his thinking on law.⁶⁵ Here it is also worth acknowledging that the thesis interprets this insight of Agamben. Specifically, the thesis does not follow Agamben all the way in seeking the deactivation, or removal of law, in order for justice

⁶⁴ In the context of philosophy’s engagement with questions of ethics Agamben’s approach needs to be understood as somewhat unconventional. That being, ‘there is no essence, no historical or spiritual vocation ... that humans must enact or realise’ (Agamben 2007, 43). ‘Since there is no telos, origin or vocation, there is only the intrinsic potentiality of the human being, and uncovering that potential is the primary ethical task’ (Murray 2010, 117). This is why Agamben insists that ethics is a question of history and language, and thus ethics is not in the realm of law, but elsewhere, in language’ (Murray 2010, 120).

⁶⁵ For discussion on Agamben’s understanding of law see Zartaloudis (2010); Frost (2015); Agamben (1995).

to be reached (Agamben 1999). Although, the thesis does agree with Agamben that law and justice are distinct. In short, using Agamben's insights on the lacuna of law and justice is not to argue that transitional justice should seek the removal of law for justice to be possible for transitioning societies. Rather, his insights are interpreted as a conceptual tool to argue (Chapters 5, 6) the need to unshackle the fallacy of a transcendent synthesis at international tribunals (ICTR). This fallacy is the conflation of legal determination and the capacity of law to contribute to making sense of the past in deeply divided societies: the law's (in)ability to facilitate social change.

Agamben's ontological writing on law-justice is very complex and dense, and therefore for the purpose of accessibility and clarity the following discussion will primarily engage with Zartaloudis's (2010) work that discusses Agamben's insights on law and justice. The following discussion will briefly summarise Agamben's understanding of the *Muselmann*, and then outline his ontological argument that law and justice are separate and then go on to explain how the thesis will use this.

For Agamben, the *Muselmann*⁶⁶ is the 'true witness' and it is in the *Muselmann*'s name the survivors of Auschwitz speak in proxy for.⁶⁷ Agamben, developing his philosophical understanding of the *Muselmann*, continues to engage with Levi's account of Auschwitz (Agamben 1999, 15-39). Levi explains that there were individuals in the camp that were like 'Mummies'. These corpse-like figures were referred to by the rest of the camp detainees as *Muselmann*.⁶⁸ Agamben, like Levi, does not understand the *Muselmann* as no longer human, rather than the zone of indistinction between human and inhuman (Agamben 1999). That being, the *Muselmann* is no longer able to communicate or respond to abuse and is unrecognisable as human. However, the *Muselmann* has not yet ceased living, the death that awaited all the *Muselmann* had not yet occurred, and therefore has not passed across to being inhuman (Agamben 1999, 61). In other words, for Agamben the '*Muselmann* is not so much the limit of life and death; rather he marks the threshold between the human and the inhuman' (Agamben 1999, 55). For Agamben, 'threshold', or lacuna, is a key conceptual device that he uses throughout his ontological

⁶⁶ The origins of the term *Muselmann* is contested, though Agamben suggests the likely origin of the term can 'be found in the literal meaning of the Arabic word Muslim: the one who submits unconditionally to the will of God' (Agamben 1999, 45).

⁶⁷ Agamben also uses the *Muselmann* in discussing his understanding of biopolitics. See: Agamben 1995, 1999.

⁶⁸ Prisoners did not attempt to help the *Muselmann* or offer them sympathy as this would be a futile exercise because the *Muselmann* would not acknowledge their existence. Though, there was another reason why prisoners avoided the *Muselmann*. By looking at them, acknowledge their existence was an all too painful reminder that the *Muselmann* was the fate that awaited all prisoners (Levi 1988).

oeuvre, including the separation of law-justice, to foreground ‘the undoing of our structured and imposed forms of subjectivity’ (Murray 2010, 100). It is this threshold between the human and inhuman that Agamben suggests foregrounds the problem of weakly developed ethical categories.⁶⁹ Crucial to Agamben’s ontological understanding of the lacuna is the relationship between law and justice, or more directly put, the need to draw distance within the notion that law and justice are one and the same thing. Law is only about ‘Judgment’ (Agamben 1999). To explain why Agamben understands law as only about Judgment, and the relevance of this understanding to the thesis, there first needs to be a discussion on the conceptual relation of law and justice. For Agamben, law-justice as inseparable is a fallacy that entrenches the idea that through the applications of law, justice is unequivocally attainable. To be clear, Agamben’s conceptual framing of justice and law is not a dismissal or challenge to the work of legal theorists, such as Dworkin or Raz, rather Agamben approaches the question from a slightly different position and offers different insights.⁷⁰ In short, Agamben’s critical approach to law is less concerned with developing judicial instruments such as human rights or answering common legal scholarly questions around resistances to politico-legal power (Parsley 2010, 121-122). Instead, his focus is on understanding the ‘limits’ of law.

According to Agamben, there is no origin or foundation of law that it is possible to return to, that would allow for the fulfilment of justice (Agamben 1995). Law in the Western tradition has from the outset always been conceived as law and justice (Zartaloudis 2010, 279). As Zartaloudis argues, ‘Justice is neither the justice that gives a reward to those that may will it or deserve it, nor a perpetual punishment to what is (and could not be otherwise), but is instead a turn to potentiality, to pure existence’ (Zartaloudis 2010, 285). Justice understood as ‘potentiality’ (Agamben 1995, 39-49) is a conceptual understanding where justice is not a right or a ‘predicate of human beings that can be demanded or possessed, but their condition of being without essential predicates, their whatever being’ (Zartaloudis 2010, 285). Following Agamben, Frost has highlighted that justice understood as ‘potentiality’ requires the ‘messianic’ deactivation of the law (Frost 2015). To deactivate the law is not the destruction of law or to move beyond the law. Rather to ‘deactivate’ the law, or the messianic deactivation of the law, is the ‘gate’

⁶⁹ Frost (2015) argues that Levinas’s ethics is more closely related to Agamben’s conceptual thought, more so than Agamben himself recognises.

⁷⁰ For key work of Dworkin’s see, *Law Empire* (Dworkin 1998). For a discussion on Dworkin’s influence in the Philosophy of Law see, (Herskovitz 2006; Ripstein 2007) For Raz see, *The Authority of Law* (Raz 2009); *Practical Reasons and Norms* (Raz 1999).

that can lead to justice (Frost 2015, 219; Agamben 1995). The ‘messianic’, a key concept for Agamben, above all signifies a crisis and radical transformation of the entire order of the law (Frost 2015). The messianic deactivation does not mark the completion of law where justice is achieved. Rather law is what must be “‘fulfilled” in the passage to justice’ (Whyte 2010, 111). As Agamben argues, ‘law is not directed toward the establishment of justice. Nor is it directed toward the verification of truth. Law is solely directed toward judgement, independent of truth and justice’ (Agamben 1999, 18). In short, the thesis interprets Agamben’s understanding of the ‘witness’, discussed above, and the distancing of law-justice discussed here, in order to argue that legal witnessing at the ICTR should be understood as located in a lacuna between legal determination and justice-truth, ‘judgement’.

This challenges the common perception within the legal transitional justice scholarship of a transcendent synthesis of legal determination and the capacity of law to make sense of a violent past. For example, according to Sikkink (2011), human rights trials necessarily address mass rights violations through judicial accountability. Simultaneously the judicial accountability through the application of international human rights law allow for those violations to be understood (Sikkink 2011). In other words, for scholars such as Sikkink (2011) a tribunal reaching a legal determination of guilt or innocence and related judgment is inherently tied with being able to make sense of past violations. Legal determination and law’s ability to make sense of past horrors are one and the same thing. For the thesis, understanding law-justice as independent from each other is an important conceptual tool to argue that the ontological distancing of law-justice produces a lacuna in which the myth that legal and human rights norms facilitates a transcendent synthesis from legal determination to understanding a traumatic past can be exposed.

In further explaining the thesis’s understanding of the lacuna between legal determination and justice-truth, it is helpful to engage with Agamben’s understanding of ‘*superstes*’ and ‘*testis*’. In framing his philosophical understanding of ‘witness’ Agamben engages with Roman Law and the Latin words for witness, those being ‘*superstes*’ and ‘*testis*’. The word ‘*testis*’ refers to a person in a trial between two parties and who speaks as a third party.⁷¹ ‘*Superstes*’ relates to the specific events experienced personally, something an individual has lived through, and thus has intimate details of the event and

⁷¹ Testis is the origins of the word testimony (Agamben 1999, 17).

can bear witness to it (Agamben 1999, 17). Empirically, it seems improbable to be able distinguish between these forms of witness, for example witnesses at the ICTR were commonly both a ‘third party’ and had personally ‘experienced’ violations. However, the point to be made is not an empirical one. It is rather a conceptual one. Attempting to avoid a conflation of ‘*superstes*’ and ‘*testis*’ is an endeavour to navigate the nexus of the transitional justice project, law-truth and justice-peace. For Agamben it is important that ‘*superstes*’ and ‘*testis*’ are not blurred and remain separate. In short, it is law’s need for closure, and to bear witness to human action that is beyond the capability of law (Agamben 1999, 18). It is in this lacuna of law’s need for closure and the perpetual need to bear witness to the past being beyond the reach of law, which is the nexus of law and justice-truth.⁷² It is law’s need for closure which leads to law’s inability to facilitate what is so important to survivors; trials do not connote that a troubled past has been overcome. ‘Judgement’ aims to ‘neither establish justice nor to prove the truth. Judgement is in itself the end’ (Agamben 1999, 19).

In short, it is the law’s messianic fulfilment that leads to justice (Agamben 2017). This fulfilment is located in the lacuna of ‘Judgement’. This Lacuna is where the messianic fulfilment of the law occurs. It is the ‘deactivation’ of the law that allows the ‘fulfilment’ of the law. When law is ‘fulfilled’ it is returned to ‘pure potentiality’. Crucially in being returned to potentiality law is understood in terms of what it ‘can be’ rather than what ‘it is’ (Agamben 1995, 39-49). Importantly for the thesis, it is the ‘potentiality’ of the lacuna between law and justice where legal witnessing needs to be located.

Theoretical lens: conceptualising legal witnessing

This section has discussed specific components of Agamben’s concept of the ‘witness’ through engaging with his ontological understanding of subjectivity (witness), the ‘grey zone’, and legal and ethical categories (*Muselmann*). Specifically, the above discussion has outlined the three conceptual components from Agamben’s philosophical thought on

⁷² Agamben, framing his understanding of Law as separate from truth and justice (ethical categories) engages with Franz Kafka’s story *The Trial*. Reading Kafka’s *The Trial* Agamben suggests:

law appear[ing] solely in the form of the trial, contains a profound insights into the nature of law, which, contrary to common belief is not so much rule as it is judgement and therefore, trial. But if the essence of the law – of every law – is the trial, if all right (and morality that is contaminated by it) is only a tribunal right, then execution and transgression, innocence and guilt, obedience and disobedience all become indistinct and lose their importance. ‘The court wants nothing from you. It welcomes you when you come; it releases you when you go’ (Agamben 1999, 18-19).

witnessing, which forms part of the theoretical lens of the thesis. These conceptual components will support the thesis's contention that there is a need to depart from an instrumental understanding of witnessing: the witness conceived as a pre-existing self-evident subject, through which previously 'hidden' or 'suppressed' memories can to a greater or lesser extent be recovered (Combs 2010; Sikkink 2011). It is through the conceptual offerings of subjectivity, the 'grey zone' and the lacuna of law and justice, that will enable the thesis to better understand what witnesses are and can do in international criminal tribunals.

In summary, the thesis's conceptualisation of legal witnessing at the ICTR is formed around three philosophical insights. Firstly, the way in which the past is understood is always partial and told by individuals who did not experience the full trauma of the atrocities (Agamben 1999). Moreover, the way in which individuals become subjects always entails the potential not to become a given subject. That is, the identity of an individual is never predetermined, and the identity of a group, such as witnesses, is not singular and therefore never self-evident. This relates to the thesis suggesting that legal witnesses are constituted by the discursive conditions and practices of the ICTR. This highlights what it is witnesses are, and can do, is formed within a tightly controlled discursive field. Secondly, the thesis pushes up against the dominant perception in the legal scholarship, of a linear flow from past, present, and future, facilitated by and through legal and human rights norms. In short, legal witnessing facilitated through and by law and human rights norms should not be understood as contributing to a linear progression from a violent past to a more peaceful future. It argues instead for the need to understand the limitations of a singular legal narrative, constructed through the testimony of witnesses, and asks whether this narrative is able to aid understandings of the multi-layered social-political conditions that led to the violations occurring. Thirdly, the thesis makes an important distinction between the ICTR reaching a legal determination which contributes to bringing those responsible for atrocities to account, and, constructions of the truth relating to the reasons and causes that facilitated the atrocities.

The three philosophical insights taken from Agamben's ontological thought, will contribute to the thesis investigation aiming to better understand the ways in which legal witnesses remember. However, the philosophical insights of Agamben do not allow the thesis to fully address the research question: 'How do legal witnesses of human rights violations contribute to memory in transitional post-conflict societies?' The thesis understands memory as something which is multidirectional and transient. This entails an

exploration of the central questions on the legal construction of memory: who remembers when, why and how? Therefore, the following discussion will engage with Paul Ricoeur's (2004) concept of 'memory' and will then explain how the thesis interprets his concept.

Memory

This section begins by discussing how Ricoeur's philosophical understanding of memory consists of both internal and external memory. Specifically, Ricoeur eschews philosophical understandings of memory being reduced to a binary of individual (internal) or collective (external). From these polemical perspectives, memory is understood as either belonging to an individual (Augustine 2009, Locke 1996, Husserl 2006) or as collective and attributed only to 'groups' or 'society' (Ricoeur 2004; Halbswach 1950). Ricoeur frames his concept of 'memory' as entailing both individual and collective components, which is the understanding of memory used by this thesis. This is the framework used to understand memory construction at the ICTR. Specifically, understanding memory as being comprised of individual and collective components contributes to the thesis which argues, in Chapters 4-5, that the tightly controlled legal discursive conditions are absent of plural understandings of a violent past. Ricoeur's concept of memory forms part of his phenomenological oeuvre, but it is not the stated purpose of this framework to directly engage with the wide body of his philosophical thought. Rather, the purpose of this section is to unpack and outline Ricoeur's understanding of memory, and how this understanding contributes to the thesis's theoretical lens that analyses the way in which legal witnesses remember. In particular, what the thesis draws upon from Ricoeur's concept of memory is the individual-collective nexus, plurality, and manipulated memory (Ricoeur 2004). The section then goes on to discuss how Ricoeur's conceptual understanding of memory entails shared experiences and 'being with others' (Ricoeur 2004, 132). This relates to the thesis's conceptual claim that the legal construction of memory lacks plural shared experiences. The final part of this section concludes the chapter by drawing together the thesis's understanding of 'witness' and 'memory'.

Memory: Individual and Collective Components

Ricoeur understands memory to be both individual and collective, rejecting the polemical positing that memory is either individual or collective. Underwriting Ricoeur's rejection of a binary understanding of memory is the idea that if memory belongs purely to the

individual it does not seem possible to have a genuine sense of communal memory. Conversely if memory is only collective, our understanding of memory is separated from the memories of individual subjects (Ricoeur 2004, 45-50).⁷³ According to Ricoeur, individual memory or 'inwardness', is phenomenologically what an individual has remembered. Ricoeur, directly engaging with Augustine's thought on 'inwardness', notes that memory from an Augustinian position is private.⁷⁴ Memories are singular. The memories of an individual are theirs and not someone else's (Ricoeur 2004, 96). It is the internal existence of memory, belonging to the individual, that phenomenology ties 'inwardness' to memory, where the origins of 'consciousness to the past resides' (Ricoeur 2004, 96). Following Ricoeur, the foundations of memory, 'inwardness', are insurmountably of the past which belongs to the individual. Memory located purely in the past is the perpetual temporality of the individual and is a linear movement from the present to the past and back again without being fragmented. For example, this temporal continuity facilitates the individual to remember far off events from their childhood without interruption (Ricoeur 2004, 97). As noted by Ricoeur, memory as belonging to the individual is the capacity 'to move back through time, without anything, in principle, preventing the pursuit of this movement, without any end to its continuity' (Ricoeur 2004, 97). In short, memory understood as 'inwardness' perceives the individual as the origin of memory, and it is memory that allows individuals to traverse from the present to the past.⁷⁵

In summary, memory understood as being individual draws directly upon phenomenological thought on 'inwardness' (Augustine; Husserl) which understands memory as interconnected, and inseparable from interiority and time: 'consciousness and memory are one and the same thing' (Ricoeur 2004, 105). The interiority of memory is directly related to temporal orientation in two connected ways. The passage of time from the past to the future following linear progression, and the inverse from the future to the past (Ricoeur 2004, 105). It is the temporal movement of the individual between past-present-future that the origins of 'inwardness' was founded upon. Ricoeur, in outlining

⁷³ Jeffery Olick takes a similar position that '[t]here is no individual memory without social experience, nor is there any collective memory without individuals participating in communal life' (Olick 2007, 34).

⁷⁴ 'Augustine is at once the expression of this tradition and its initiator. He can be said to have invented inwardness against the background of the Christian experience of conversion' (Ricoeur 2004, 97).

⁷⁵ Ricoeur's exploration of the 'inwardness' (individual memory) side of the binary understandings of memory also engages with Husserl's thought on 'inwardness': that memory as understood as belonging to the individual is intertwined with interiority and temporality (Ricoeur 2004).

his understanding of memory, also engages with the sociological understanding of memory as collective (external).

Ricoeur's understanding of the collective component of memory directly engages with Maurice Halbwachs's sociological framing of memory as communal: memory requires 'others' (Ricoeur 2004, 121). According to Ricoeur, memory understood as collective perceives that the origins of memory are not capable of starting with interiority and then filtering down to 'others'. Rather, memories derive from individuals externalising experiences which then form individual understandings of past events. For example, testimony about the past given by an individual is conceived here in a specific way. Events are not understood by the utterance of testimony coming from an individual. Instead, testimony is something received by an individual 'from someone else as information about the past' (Ricoeur 2004, 121). In short, testimony is something external to the individual. Testimony positioned as something received rather than uttered is the derivation of memory, which is shared or communal (Ricoeur 2004, 121). In other words, the origins of memory understood as communal begins with other people's testimonies about the past, and then working through memories that 'we have as members of the group' (Ricoeur 2004, 121). Therefore, access to information about the past is assembled for us by the memories of 'others'. The essence of the argument claiming memory is collective can be summarised thusly. When an individual is no longer part of the group in which a given event from the past is preserved the individual's internal memory becomes fragile because of the lack of external support. '[O]ne does not remember alone', rather individuals remember by putting themselves in the vantage point of a group or often multiple groups (Ricoeur 2004, 121). Here, importantly, Ricoeur rejects the polemical terrain upon which phenomenological and sociological understandings of memory exist. For Ricoeur, it is necessary to denounce the 'inwardness' position that the origins of memory can only reside within the individual. However, he also challenges the claim that memory is unequivocally 'communal'. Specifically:

[d]oes not the very act of 'placing oneself' in a group and of 'displacing' oneself or shifting from group to group presuppose a spontaneity capable of establishing a continuation with itself? If not, society would be without any social actors. (Ricoeur 2004, 122)

For Ricoeur, conceptualising 'memory' requires a middle ground, 'between the self and they' (Ricoeur 2004, 132); a framing of memory that is inclusive of the 'inwardness'

perspective of agency whilst also allowing for the ‘collective’ sharing of memories with ‘others’. This middle ground proposed by Ricoeur entails being in close proximity with ‘others’. That is, being close with ‘others’ (groups) whilst at the same time maintaining a relation to the self; between the private solitary individual and public communal life (Ricoeur 2004, 132). ‘[C]lose relations’ are individuals who ‘approve of my existence and whose existence I approve of in the reciprocity and equality of esteem’ (Ricoeur 2004, 132). It is with ‘close relations’ that an individual can speak and remember, and importantly, includes those who may not approve of an individual’s actions though do not dismiss the individual’s experience.⁷⁶ In other words, being close with ‘others’ is the capacity to share stories of the past with ‘others’ and have a collective understanding of events without individuals being reduced to the collective identity of a group. Sharing stories ‘with others’, Ricoeur suggests, is what forms a ‘life in common’ (Ricoeur 2004, 131-132). Specifically, a shared understanding of a traumatic past is not located in what a given community (group) remembers about itself. Rather it is the stories of individuals which they tell each other about the origins of their shared experience of past events (Leichter 2012). It is the plural stories of individuals and heterogeneous experiences communally shared that forms a ‘life in common’ with ‘others’ (Ricoeur 2004, 131-132). Whilst the sharing of heterogeneous memories of the past with groups is for Ricoeur an important component of ‘memory’, Ricoeur does acknowledge that collective understanding of the past produced through individual experiences can potentially be problematic, particularly the institutional production of memory.

Manipulated Memory

Ricoeur uses the term ‘manipulated memory’ in relation to institutionalised production of memory (Ricoeur 2004, 80). Specifically, the institutionalised production of memory entails strategies including the intentional omission of certain facts and the promotion of others, and a contextual narrative emphasising a casual relationship between events. For Ricoeur it is within ‘manipulated memory’ that ideology functions, justifying power ‘that the resources of manipulation provided by narrative are mobilised’ (Ricoeur 2004, 85). Here, an important point of note in framing the thesis’s conceptual understanding of

⁷⁶ Ricoeur’s understanding of ‘close relations’ engages with Augustine’s thought: ‘my true brothers are those who rejoice for me in their hearts when they find good in me [*qui cum approbat me*], and grieve for me when they find sin. They are my true brothers, because whether they see good in me or evil, they love me still. To such as these, I shall reveal myself [*indicabo me*]’ (*Confessions*, 10.4, 209).

memory. The framework takes an interpretation of Ricoeur's thought on 'manipulated memory', not using the idea of ideology but, rather, discursive conditions. Discursivity is understood here to mean the way in which language constitutes meaning and knowledge that then becomes accepted social practices, on which serious claims to truth and falsity are made (Foucault 1991). Whilst the framework acknowledges there are conceptual contours in reading 'manipulated memory' through the discursive lens (Foucault 1972), that said, there are key overlaps between discursive conditions and ideology in understanding 'manipulated memory'.⁷⁷ In particular, they are both conceptual tools concerned with showing how institutional structures and forms of power construct identity and knowledge about the past.

According to Ricoeur, the institutional construction of the past, manipulated memory, centres around the legal demand for the public expression of memory (Ricoeur 2004, 220). For the thesis, it is the institutional actors and discursive practices of institutions, such as the ICTR, which mould and structure the 'manipulation' of memory. Institutional discursive conditions and practices act to legitimate certain constructions of knowledge of past events. Crucially, manipulated memory in international institutions is centred around hierarchal systems of power and order that legitimise certain courses of action (Ricoeur 2004, 83). For Ricoeur, the production of institutional knowledge of past events is legitimised through a hierarchal relation between the agency of certain actors being enacted over actors with less or no agency (Ricoeur 2004, 83). In the context of this thesis the ICTR is understood as an institution that entails discursive conditions and practices, which are systems of power that structure and legitimise certain knowledge whilst simultaneously constraining other forms of knowledge (see Chapter 3 for discussion on discursivity). Importantly, understanding the ICTR as a site of 'manipulated memory' will contribute to the thesis arguing that the discursive conditions at the ICTR construct a narrow, rigid and fixed memory of the mass human rights violations in Rwanda.

Directly related to Ricoeur's understanding of institutional production of knowledge of past events ('manipulated memory') is the problem of dominant 'norms'. More specifically, in the context of knowledge construction dominant 'norms' and institutions should be considered jointly (Ricoeur 2004, 220). Ricoeur argues that

⁷⁷ Using discursive conditions rather than ideology is also intended as acknowledgement to Foucault's dislike of the term ideology, which Foucault argued would result in understanding reality as a singular and which he refuted (Foucault 1979).

institutions tie together models of social relations and behaviors including dominant ‘norms’, which leads to the notion of regularity (Ricoeur 2004, 220). In the context of the thesis we can think of legal and human rights norms at the ICTR as a dominant ‘norm’. Specifically legal and human rights norms form a paradigm of how legal witnessing ‘should be’ (see Chapter 1). It is in this regularity of institutions and the role of ‘norms’ in the representation of past phenomena that they produce collective knowledge, and constraints to the way that knowledge is constructed and framed. Ricoeur argues that a dominant ‘norm’ is one of the key components for the construction of knowledge of past events (Ricoeur 2004). This epistemological frame acts as a powerful representation that classifies and constrains.

From Agamben and Ricoeur to an original conceptual framework: analysing the way legal witnesses remember at the ICTR

The discussion so far has explained the conceptual ideas, ‘tool kit’, the thesis takes from the philosophical thought of Giorgio Agamben and Paul Ricoeur. It is now necessary to draw together these conceptual insights into an original conceptual framework for understanding legal witnessing at the ICTR. It is this conceptual framework that the thesis proposes will expand existing transitional justice legal scholarship’s understanding of what it is witnesses are, and the way in which witnesses remember in international criminal tribunals and courts. It is suggested here that using these concepts and drawing them together provides a framework to question the labels and assumptions in the existing legal transitional justice scholarship on legal witnessing, and, offers a novel insight which moves beyond the current saturated debates within traditional legal frameworks for understanding legal witnesses (Combs 2010). Specifically, the thesis’s conceptual framework is directed at challenging and offering an alternative to the narrow procedure lens of traditional legal frameworks, human rights norms as a framework for legal witnessing, and the need to understand legal memory construction as process.

Traditional legal frameworks often focus on whether the Rules of Procedure and Evidence relating to witness testimony have been adhered to. For example, as argued in Chapter 1 legal analysis of witnessing at international tribunals and courts often centres around debates of procedural legitimacy, for example, the process of ‘witness proofing’ (Ambos 2008; Jordash 2009; Karemaker 2008; Shoen 2010).⁷⁸ Framed in the context of

⁷⁸ Also see Chapter 1 for a critique of Combs’s approach to legal witnesses.

procedural legitimacy and legal systems these debates focus on the ‘correct’ functioning of witnessing in international tribunals and courts. Whilst discussions of procedural rigour are necessary, what these approaches miss, or are conceptually unable to comprehend, is the question of ‘how’ legal witnessing is.⁷⁹ This has led to the transitional justice legal scholarship neglecting to question the normalisation of witnessing. In other words, traditional legal frameworks as a lens to analyse legal witnessing begins with the assumption that what it is witnesses are is self-evident. What is missed by this legal analysis is understanding witnessing as non-instrumental, a contingent and multi-layered discursive process. This is where the framework’s conceptual component, subjectivity (witness), will be used to show the way in which individuals become subjects always entails the potential not to become a given subject. That is, the identity of an individual is never predetermined, and the identity of a group, such as witnesses, is not singular and therefore never self-evident.

The thesis’s conceptual framework also pushes up against the recurrent understanding of legal witnessing in the scholarship, which is framed within the human rights project. In particular, right to truth and the perceived crucial role it has in international tribunals and courts to aid victims to come to terms with the past (see Chapter 1). However, this human rights discourse on witness memories fails to comprehend the discursive and contingent nature of memory. This is because there exists a fundamental principle within normative human rights discourse that individual victims of rights abuses have a universal right to agency in legal proceedings (Klinkner and Smith 2015, 11-12). It is the conceptual components of the ‘grey zone’ and ‘*Muselmann*’ (lacuna of law-justice) that the thesis uses to suggest the legal witnessing at the ICTR is located in a ‘grey zone’, which challenges the notion that legal and human rights norms are the ‘bridge’ to move from a violent past to a more peaceful future. It is this normative human rights discourse that often leads to ‘faith-based’ rather than ‘fact-based’ prescriptions (Clark 2012, 12). This exemplifies the need for the transitional justice legal scholarship to examine the discursive conditions of legal witnessing in which the subject of ‘witness’ is constituted and the manner in which memory becomes fixed and rigid.

Within the limited work that has been done on the legal production of memory, Mark Osiel’s conceptual insights directly engage with questions on the legal construction

⁷⁹ For discussion critiquing witness testimonies and their contribution to historical ‘truth’ in international criminal trials, see Wilson 2011; Gaynor 2012; Viebach 2017; Dembour and Hasham 2004.

of memory after mass atrocities (see Chapter 6).⁸⁰ Crucially, however, the thesis positions itself against Osiel's conceptual offering that proposes the legal construction of memory can, and should, construct a collective societal understanding of past atrocities. For Osiel, trials established in response to mass atrocities successfully 'stimulate reflection [and] such proceedings indelibly influence collective memory of the events they judge' (Osiel 2000, 2). Osiel argues that, seen through a lens of liberal legalism, collective memory constructed at trials and established in response to administrative massacres can provide individuals affected by mass violence with a shared understanding of the reason that led to the atrocities occurring. Osiel notes, 'liberal show trials are ones that are self-consciously designed to show the merits of liberal morality and to do so in ways consistent with its very requirements' (Osiel 2000, 65). In short, memories belonging to individuals can be 'recovered' through trials. Here, individuals are perceived as self-evident beings capable of thought autonomously to the material world. However, the thesis argues that, seen through the framework's theoretical lens, what it is witnesses are, and the way in which they remember, are formed within a tightly controlled discursive field.

To recap, memory is understood by this thesis as something that is plural, multi-directional and pliable (Rothberg 2008, 5), which means it can be shaped and reshaped across and between spaces of memory (see Chapter 1, Section 5). Notwithstanding the plurality and fragility of memory, in the context of transitional justice, truth recovery in legal trials at the ICTR can become a dominant discursive practice (see Chapters 3-4). International legal institutions, such as the ICTR, and the international actors – judges, legal counsel, registrars, investigators – who inhabit these spaces of memory production, shape in important ways the discursive conditions of a discourse of witnessing, in which legitimate meaning and knowledge of past violations are constituted (Ricoeur 2004, 80). Crucially, the thesis's conceptual framework will contribute to the discussion on the role of witnesses and how the past is remembered during political transition, by highlighting the need for the study and practice of transitional justice to fully understand how theoretical insights can make visible the complexities and contours of the legal construction of the past.

⁸⁰ See: 'Mass Atrocity, Collective Memory, and the Law' (Osiel 2000).

Conclusion

This chapter has discussed and outlined the conceptual insights from Agamben ('witness') and Ricoeur ('memory'), which have been drawn together to construct the original conceptual framework for the thesis. It is these conceptual insights which the chapter has argued will provide the conceptual framework for this thesis's investigation attempting to better understand the extent to which memory constructed through legal witnessing is able to contribute to the wide-reaching aspirations of transitional justice. The transitional justice legal scholarship has largely neglected to analyse the way in which international legal institutions are important sites of legal memory construction and production, which is where the thesis's conceptual framework will contribute. The theoretical framework of the thesis, discussed above, understands the legal production of memory as constructed within a field of tightly controlled discursive conditions (see discussion on Foucault and discursivity: Chapter 3). The discursivity of legal memory construction will be argued by the thesis (Chapters 4-6) that the ICTR produces a narrow, singular and rigid memory of past human rights violations. It is a singular authoritative legal narrative of a violent past that directs the thesis to argue that the public construction of individual internal memories into an authoritative legal collective story should have limited application in how transitional justice discourses shape the future of transitioning communities. Therefore, it is through the conceptual lens of the thesis, that it will be shown what is at stake during legal witnessing and the manner in which collective remembering is constructed. Therefore the conceptual offering of the thesis provides a lens through which we are able to gain a better understanding of the scope, and limitations, in which historical accounts of the past, produced through legal determinations of 'the truth', can make a contribution to the wider transitional justice aspirations of facilitating 'justice' and 'peace' (Dixon and Tenove and Tenovor 2013; Klinkner 2015).

Chapter 3 - Discourse and Legal Archives

Introduction

In order for the thesis to be able to show how the original conceptual framework can be applied to the empirical context of legal witnessing at the ICTR, it is the purpose of this chapter to present a Foucauldian framework for a discourse analysis as a suitable method for analysing archived ICTR legal documents and UoW interview transcripts. Therefore, Chapter 3 aims to outline the ICTR and UoW archives as the data to be analysed and explain poststructuralism as the methodological approach of the research. The thesis engages with the original conceptual framework and the data from a Foucauldian poststructuralist position. The latter part of the chapter draws upon Michel Foucault's thought on discourse theory which the chapter uses to construct an analytical framework that will be employed to conduct a close discursive reading of ICTR archived legal documents and interview transcripts (Chapters 4-7).

The chapter begins by outlining as the data to be analysed the ICTR archives and interview transcripts of ICTR personnel from an online archive created by the UoW. The material analysed from the ICTR archive includes written and transcribed communications between legal counsels and judges, witness statements, statutes and rules of procedure and evidence, motion and motion decisions, indictments, and pre-trial briefs. Importantly for the research, analysing ICTR court documents and interview transcripts is discursivity. Discursivity is understood here to mean the way in which language constitutes meaning and knowledge that then become accepted social practice, on which serious claims to truth and falsity are made (Foucault 1991). More specifically, it is the discursive conditions constituting particular political subjects and objects of knowledge that entail processes of inclusion/exclusion that are of interest (Foucault 1972). Thus, this research understands discursive conditions to involve a set of rules or 'discursive formations' that are 'specific to a particular time, space and cultural setting', determining under what conditions meaning emerges within discourse. In other words, it is not a case of 'external determinations being imposed on people's thought', instead it is a case of rules allowing certain statements – language – to be made (O'Farrell 2005, 79).

The chapter then goes on to discuss a Foucauldian understanding of discourse and the epistemological implications for this research of taking this methodological position. This includes outlining how Foucault's understanding of discourse is distinct from linguistic understandings of discourse such as those conceived by Saussure, Levi-Strauss,

Benveniste and others, and why a Foucauldian understanding of discourse analysis is a suitable mode for analysing the discursive conditions of witnessing within the archived ICTR court documents and interview transcripts. In short, it is understanding discourse not as a ‘language system’ in which utterances and statements relate to syntactically well-formed grammatical sentences. Rather, this research understands discourse to entail a set of contingent rules in which the objects and subjects who describe them are constituted (Foucault 1972).

The Data

The transcripts of communications between legal counsels from which the data were collected and analysed included prosecution indictments, detailing the witnesses to be called during trials and summaries of what will be included in their testimonies. It also includes legal counsels’ motions and motion decisions documents relating to the admissibility of witnesses, commonly including a detailed exposition of the authentic or inauthentic knowledge correlating to rights violations. Transcripts of pre-trial briefs were also analysed.

The material from the ICTR online archives formed the majority of data that was analysed. However the ICTR archive, like all archives, are partial and thus contain gaps (Keetlaar 2012). In order to address some of these gaps, archived transcripts of interviews with ICTR staff were also analysed. These interviews were conducted by the UoW Faculty of Law (2008-2009) for their project *‘Voices from the Rwanda Tribunal’*, and include the full transcripts, audio and video recordings of the interviews along with all of the questions the interviewees were asked. The online archive contains 49 interviews with ICTR personnel including Judges, Acting Chief of Investigations, Legal Officers, Prosecution and Defence Counsel, Investigators, and the Chief of Information. The University of Washington’s project was created for the purpose of establishing an online archive of information with the intention that it be reused and repurposed by others including Rwandans, researchers, artists and educators (Nathan 2011, 593). The interview transcripts provide very useful information about first hand experiences of the functioning of the tribunal relating to witnesses and therefore offers the thesis an additional complement of data in analysing the discursive conditions of witnessing at the ICTR. The data quoted in Chapters 4-7 is drawn from a larger quantity of analysed data. The data analysed included 512 documents across the two primary ICTR case studies. The data analysed also included 43 archived ICTR documents from other ICTR cases.

Furthermore, 23 interview transcripts of ICTR personnel taken from the UoW online archive were also analysed.

Identifying the discursive conditions within the court documents and interview transcripts entails the analysis identifying the repeatability of statements. In a Foucauldian understanding of discourse, statements are ‘series of signs’ (Foucault 1972), in which, certain subjects and objects are constituted whilst other ‘just as feasible’ subjects and objects are not (Foucault 1972). For example, the way in which legal counsels and judges deploy certain statements, i.e. in the ‘interest of justice’, instead of other ‘feasible’ statements. Importantly, it is also the discursive conditions within relational groups of statements that constitute the subject of witness that the analysis will attempt to understand. Following the idea that the identity of witness is not a pre-existing thing, identity is not a pre-determined condition which defines human beings (Foucault 1972). It is the aim of the analysis to identify the discursive conditions that constitute the subject of witness, what it is witnesses are and can do; the way relations of statements produce witness subjects, and the authority by which the language of witnesses produces legitimate knowledge about the past. As such, the analysis focuses on the discursive conditions that determine who is rendered with the right to speak, subject of witness, and how language constitutes meaning which defines the conditions in which individual memories of the past can be externalised.

The archives of international tribunals and courts, specifically the ICTR, are commonly perceived by these institutions and the legal scholarship on transitional justice as providing a historical legal record of the facts of mass human rights violations (Adami and Hunt 2005; Adami 2007). However, whilst the legal scholarship commonly advocates the importance of legal archives during transitional periods, there has been minimal direct engagement with legal archives by the transitional justice scholarship.⁸¹ This thesis provides a conceptual enquiry into witnessing and legal memory and thus challenges the perception of transitional justice archives as passive repositories of history (Adami and Hunt 2005). Importantly this research understands legal archives as a site where the discursive formation and conditions that constitute a discourse of witnessing can be explored. In considering the research’s epistemological position, whereby the meaning and knowledge of past violations is part of a contingent discursive construction, the ICTR archive material is an important, and underexplored, discursive space. This research

⁸¹ For existing discussions on transitional justice archives, which predominantly exists within the field of Archival Studies see: Adami and Hunt 2005; Campbell 2013; Ketlaar 2012; Peterson 2008; Redwood 2017; Syrri 2008; Sachs 2006.

suggests the archive documents at the ICTR need to be understood as entailing the discursive conditions upon which law produces an authoritative singular account of a violent past. The ICTR archives are not analysed here in order to determine whether the legal process has allowed witnesses to remember. Rather, understanding the restricted space of the discursive field and the set of conditions that forms it, allows both memory and witness subject(s) to be understood as being discursively constituted. By applying a Foucauldian framework for a discourse analysis, the discursive conditions that constitute the witness and the meaning of the past, this thesis argues that the ICTR archives are a crucial site which can offer an alternative understanding on the scope, and limitations, through which international tribunals and courts can contribute to historical truth telling during transition.

The ICTR archives provide a suitable data-set for analysing a discourse of witnessing in the context of transitional justice and legal tribunals' contribution to understanding the traumatic past. Furthermore, the ICTR and ICTY as ad-hoc tribunals were pre-cursors to the creation of the permanent International Criminal Court (ICC) established in 2002.⁸² In particular, the ICC's legal rules (Rome Statute) governing the use of witnesses and testimonial evidence given in court has a direct correlation to the ICTR's 'rules of procedure and evidence'. As such, the discursive conditions of witnessing identified at the ICTR, using a Foucauldian framework for a discourse analysis could be applied in future research to archived documents at the ICC to see if a similar set of discursive conditions are evident. However, it is important to note here, that in suggesting a Foucauldian framework for a discourse analysis could be applied to other international tribunals and courts; the epistemological limits of a poststructuralist methodology means it is not the intention of this analysis to provide a template of witnessing which can be applied unconditionally to any given phenomena. However, what is offered is one alternative conceptual understanding of the legal discursive conditions of witnessing.

The choice of archival data, instead of other sources of data collection such as fieldwork, analysed using Foucauldian discourse analysis is suitable for this thesis's critique of international criminal institutions, using the context of the ICTR. The analysis of archival data using textual analysis is a well-established and productive method within numerous disciplines for investigating processes of knowledge production (Ahl 2007,

⁸² For a discussion on the ad-hoc tribunals in relation to the creation of the ICC. See: Schabas 2014.

247). This well-established use of archival data and textual analysis supports this thesis' decision to engage with archival sources from the ICTR and UoW. Moreover, a fieldtrip to the ICTR archival facility in Arusha was planned, however this had to be cancelled due to practical ICTR issues relating to accessibility of the physical archive (see Chapter 7). Related, applying a Foucauldian discourse analysis to the archival data allowed the thesis to investigate how institutional process, and its actors, construct knowledge about the past. Furthermore, the central focus of the thesis is the ICTR rather than explicitly Rwanda. Understanding post-genocide Rwanda and memory construction in the country is an important site of research and has indeed been a site of investigation by numerous scholars (Viebach 2019; Longman 2017; Burnet 2012; Cieplak 2017). However, memory construction in Rwanda is not the stated central focus of this thesis, rather the thesis' choice of the case study of the ICTR, and archival data, fits the main thrust of the thesis which is a critique of liberal international law as a response to mass atrocities. Notwithstanding this, the context of the thesis's investigation has relation to Rwanda, which is a theme taken up in Chapter 7's discussion on the potential role ICTR archival material could have in aiding the post genocide memory ecology in Rwanda. In short, the choice of the thesis to engage with archival data and to use a Foucauldian discourse analysis, is suitable methodologic approach for this thesis' focus on how the ICTR as a legal institution constructs witness memories.

As this thesis is using Foucault's insights on discourse, it is worth briefly summarising the similarities between Foucault and Agamben, particularly in how they understand the philosophy of language and methodology (Snoek 2010, 48-56). Agamben himself has acknowledged the influence of Foucault on his own philosophical writings (Agamben 2008). Agamben was criticised for not fully explaining his paradigm concept. He stated that he did not feel an explanation was necessary as this concept was so closely related to Foucault's historical methodology, he thought it was obvious (Agamben 2002, 2-3). Moreover Agamben and Foucault share a similar understanding of subjectivity and knowledge (Frost 2017). Agamben and Foucault agree that identity and knowledge are constituted within language, and both theorists refute the notion of the existence of origins or foundations (Snoek 2010, 56). These conceptual similarities between Foucault and Agamben support the decision to apply a Foucauldian poststructuralist lens to the data and conceptual framework.

The ICTR archives: selecting the ‘corpus’ for a Foucauldian discourse analysis

Conducting a Foucauldian framework for a discourse analysis of ICTR archived documents and interview transcripts requires what Foucault referred to as identifying the ‘archive’ (Foucault 1972, 146). Foucault understood the ‘archive’ not as a mass of records documenting social practices, although the ‘archive’ for this thesis happens to be taken from an archive in this sense. Rather, an ‘archive’ is ‘the general system of the formation and transformation of statements’ (Foucault 1972, 146), which for the thesis is the relation of statements within the ICTR documents that constitutes the witness subject. Identifying an ‘archive’ requires acknowledging that Foucault’s thought on discursivity did not provide a complete method for conducting discourse analysis. As Kendall and Wickham state, ‘they do not add up to a coherent statement of his methodology and they hardly constitute a user-friendly “how to” guide to Foucauldian scholarship’ (Kendall and Wickham 2011, 2). This lack of a coherent method within Foucault’s work on discourse points towards that there is not one singular mode of Foucauldian discourse analysis. As Diaz-Bone (2007) notes, Foucauldian concepts of discourse analysis have developed into numerous national and international domains. As such, the term Foucauldian discourse analysis does not define a singular field of study.⁸³ Rather:

one can speak of a fragmented international field containing national ‘subfields’, which are more or less self-oriented. Some of these have a rich tradition of their own and focus mainly on this tradition (as, for example, does French discourse research); some are more internationally oriented (Diaz-Bone 2007, 7).

Whilst there are numerous national subfields and internationally orientated perspectives on Foucauldian discourse analysis, this thesis takes a poststructuralist methodology and draws directly upon Foucault’s thinking on ‘discursive formations’ understood as being

⁸³ Diaz-Bones identifies Foucauldian discourse analysis developing in national subfields including: French – Annales School (Pecheux 1975; Althusser 1970; Bachelard 2016), German (Zimmerman 2007), Great Britain (Fairclough 2010), and the Netherlands (Wodak 1995). For a summary discussion on national subfields of Foucauldian discourse analysis see Diaz-Bones (2007). Foucauldian understanding of discourse in the Great British field led to a strand of discourse analysis being developed: Critical Discourse Analysis (CDA). CDA methodology, whose development was highly influenced by the work of Ruth Wodak, combines Foucault’s thinking with linguistics and sociolinguistics. In particular, Foucauldian understanding of discourse analysis was influential in Norman Fairclough’s thinking, specifically his ‘Three Dimensional Approach’ to CDA. See Fairclough (2010). Also see; Muleffu 2019; Wodak 2009; Dijk 2006; Richardson 2007; Kelsey 2015.

related to French Discourse Analysis (FDA).⁸⁴ That being, it is specifically the influence of French structuralist Ferdinand de Saussure on Foucault's thinking of statements and discursive rules of formation and FDA's primary concern with poststructuralist methodology (Diaz-Bone 2007, 8-9; Williams 1999).⁸⁵

The thesis conducting a Foucauldian discourse analysis informed by the FDA 'field' means the selection of the 'text' ('corpus') to be analysed is explicitly related to identifying the research problem. As Williams points out:

[o]nce the definition of the problem has been achieved, the problem of collecting a large corpus of text for the objective in hand can be confronted. That is, the problem must be defined before the nature of the corpus unit (Williams 1999, 258-259).

In other words, identifying the 'problem at hand' then allows the researcher to select the 'corpus', which will facilitate an investigation into the chosen research problem.⁸⁶ The problem this thesis has identified is remembering the past and the discursive creation of the witness.

Therefore this requires a 'corpus' (ICTR documents and interview transcripts) in which the legal discursive conditions which constitute memory and the witness subject can be analysed, which is selected by the researcher. The researcher identifying suitable 'corpus' for a Foucauldian framework for a discourse analysis can be seen in Helen Ahl's research on representations of women in academic papers. Ahl used a Foucauldian framework to conduct a discourse analysis of academic research papers on women's entrepreneurship, in order to understand how the female entrepreneur was discursively constructed.⁸⁷ Ahl selected 81 research articles on woman's entrepreneurship published

⁸⁴ Undoubtedly Foucault as a French Philosopher, Historian, and Epistemologist was highly influential in the thinking of FDA, though it was also the case that 'the groups in the Parisian region which promoted a Foucauldian form of discourse analysis as an empirical method were interdisciplinary from the beginning' (Diaz-Bone 2007, 9). Similarly, Williams notes that French discourse analysts were 'embedded in the wider context of post-structuralism and therefore not narrowly oriented only to the works of one author' (Williams 1999, 251). See 'French Discourse Analysis: The Method of Post-Structuralism' (Williams 1999).

⁸⁵ Whilst Foucault was influenced by structuralist thought he never perceived himself as a 'structuralist' (Foucault 1983). For discussions on structuralism's impact on Foucault's thought: See Dreyfus and Rabinow 1982, 16-43. Also see Glyn Williams 1999, 33-62. For discussion on Louis Althusser's influence on poststructuralism in FDA see Williams 1999, 67-76.

⁸⁶ For a discussion on poststructuralist methodologies in legal research see Sohki-Bulley 2013, 2019.

⁸⁷ A further example of research using Foucauldian discourse analysis is Bonnafous's (1991) research on racism in the French press (Bonnafous 1991). It was the press, that Bonnafous argued, stood between 'oral discourse which was' not meant to be preserved and the 'reflection that exists in the discourse of politicians'. Bonnafous selected 10 newspapers which represented the spectrum of French political

between 1982-2000. In justifying her ‘text’ selection Ahl argued ‘[t]he discourse in research texts are particularly important study objects since researchers enjoy an expert status in society. They are seen as those who are supposed to know and are often asked for opinions by the popular media’ (Ahl 2007, 219). The above definition of ‘corpus’ selecting is interpreted by this thesis for the identified problem as archived ICTR documents. Investigating the discursive conditions of legal witnessing during periods of transition (ICTR) requires investigating the manner in which written and transcribed communications between legal counsels and judges; the tribunals Statutes and Rules of Procedure; witnesses and the recalling of violations (witness statements, indictments, witness lists) are edited, changed, discarded, and transformed by the discursive conditions at the ICTR. The documents from which a close discursive reading was conducted have been taken from two ICTR cases, Ildephonse Nizeyimana and Emmanuel Rukundo and (see Appendix 1 for case details). These two cases were selected primarily because of the location in Rwandan where their crimes occurred and the length of the cases. The Nizeyimana case relates to the Butare area in Rwanda which was where some of the most extensive and prolonged violence occurred, and the total length of the two cases, particularly Nizeyimana, accounts for a significant time period of the ICTR’s lifespan and has resulted in an extensive collection of legal documents. The large collection of legal documents for these two cases offers the thesis a useful data across a range of legal processes before witnesses testified in court. There is also the practical implication of working with the ICTR online archival material that has influenced the thesis’s choice of case studies. Specifically, some of the ICTR ‘landmark’ cases that would have been relevant and suitable case studies currently have limited publicly available documents from the archive. This is partly because the digitisation process is still ongoing and many documents relating to these ‘landmark’ cases, such as Akayesu, are currently going through the process of legal review. This is particularly prevalent for early ICTR cases such as Akayesu and Kambanda (former head of state) (see Chapter 7).⁸⁸

To be sure, the thesis does not analyse the discursive conditions of witnessing of the selected ‘corpus’ in order to uncover previously hidden truths of past rights violations or to offer a conceptual template of testimony in which the witness is able to become an

opinion published between 1974-1984 (Bonnafoous 1991 in Williams 1999, 231). Also See; ‘A Foucauldian framework for discourse analysis’ (Ahl 2007, 216-250).

⁸⁸ The ICTR have indicted 93 individuals in which 62 have received sentences. A further 14 have been acquitted, 10 cases referred to national judication for trial, three indicted individuals are currently still at large, two were deceased before judgment, and two cases were dropped before trial (ICTR 2015).

emancipated subject. As such, the selected research ‘corpus’ from a poststructuralist position is not an unproblematic collection of ‘texts’, which can provide objective reflection of an existing reality. Rather, ‘texts’ are ‘part of the reality producing process’ (Ahl 2007, 219). However, it is the aim of the research to offer an understanding of the data (‘corpus’) that will recast the phenomenon of witnessing, offering an alternative understanding of the role of memory during legal redress of violations of human rights. Importantly, understanding discourse as a series of representations involves understanding the conclusion the research reaches as one interpretation of the data. Thus, this research does not claim to offer a more truthful understanding of witness memories at the ICTR, but rather an alternative understanding of how law constructs meaning and knowledge during periods of transition. Claims this research makes should always be subject to the same tenet of investigation that gave rise to it. In short, the intention of selecting the documents detailed above housed in the ICTR archives and the archived interview transcripts is an attempt to show that discursively we can take this data as a wider discursive creation of the condition and possibility of the witness, what is it witnesses are and the way in which witnesses remember.

Framing the data and methodology

A general orientation of research focusing on periods of political transition, particularly within transitional justice, is an investigation of empirical evidence (Gahima 2013; Jones 2009; Schabas 2006; Waldorf 2009). These investigations (Combs 2010; Gahima 2013; Klinkner and Smith 2015) typically attempt to work with data to find new evidence that can uncover previously unknown facts. Scholars such as Sharp (2019) and K. Clark 2011 have noted that empirical research into mass violations of human rights can have a tendency to privilege new facts over theoretical constellations (Sharp 2019, 13). Accordingly, this privileging perceives working with empirical data will lead to undocumented evidence, which can unveil new facts about an existing reality (K. Clarke 2011). However, Sharp suggests that an emphasis on empirical evidence can leave theoretically focused engagements with data open to criticism regarding their contribution to research (Sharp 2019, 5). Sharp’s note relates to Mamdani who has emphasised the importance of methodological rigor: ‘facts need to be put in context and interpreted, neither of which is possible without theoretical illumination’ (Mamdani 2002, xiii). Both Mamdani’s and Sharp’s points are insightful, inasmuch as to distinguish between empirical facts and theoretical engagements in such a way suggests subverting the

importance of theory when working with empirical evidence (Coward 2009, xii). The reason for highlighting this point is to position the thesis's engagement with the data. To understand the non-instrumental role of the witness requires not just empirical evidence but a new interpretation of existing evidence through a conceptual re-working of the evidence (Coward 2009, xii).⁸⁹

The empirical evidence this thesis analyses and interprets is neither new nor are the facts the data pertains to undocumented. It is not the purpose of this research to analyse a discourse on witnessing in order to uncover previously undiscovered facts attaining to the indictments and successful prosecution of perpetrators. Indeed, from the thesis's perspective it is likely that the facts discussed are relatively well known and are publicly available. However, what is being argued here is that by problematising memory and witnessing, an attempt can be made to reinterpret existing facts and to better understand the manner in which truth-claims emerge, which occurs in discourse (Coward 2009, xii).

It is within discourse that identity is constituted; that is to say, the identity of human beings is not a pre-existing thing that has remained the unchanged condition of the human subject throughout history (Foucault 1982, 331). From this, the thesis does not take the human subject to be an individual self-evident being, as human rights advocates and liberal perspectives within the transitional justice literature and practice often understand it to be, either explicitly or implicitly (Combs 2010; Klinkner and Smith 2015; Osiel 2000). Here we can see the similarities between Foucault and Agamben's understanding of identity, Agamben, like Foucault, rejects the notion that identity is self-evident. From the perspectives such as Combs 2010; Klinkner and Smith 2015, individuals are perceived as existentially pre-existing other 'subjects' and 'things', in that, individuals are interiority beings capable of thought autonomously to the material world and society (Foucault 1977). However, this research understands the subject as 'continuously dissolved and recreated in different configurations, along with other forms of knowledge and social practices' (Foucault 1977, 118). Thus, the empirical data this research analyses is constitutive of a discursive formation of a discourse of witnessing, in which it is the discursive conditions that constitute the subject position of witness.

⁸⁹ This is an approach used by Martin Coward, arguing the anthropocentric understanding of political violence evident in the literature failed to understand urbicide – the destruction of the built environment – as a form of political violence. Accordingly, Coward was able to show, developing a conceptual framework, the role urbicide has in 'negating plural communities and constituting homogenous, exclusionary political programs' (Coward 2009, xiii).

Methodology and Research design

To be able to understand the thesis's use of 'rule of formation' as the analytical tool for analysing the ICTR archived documents there firstly needs to be a discussion of what discourse is. As Howarth indicates, the multi-disciplinary use of discourse has created widening interpretations and understandings of the term discourse (Howarth 2000, 1). Within the social sciences 'discourse is often perceived as tantamount to the social system, within which, discourses literally constitute the social and political world' (Howarth 2000, 2). One such approach to discourse, and which is the understanding of discourse taken by this research, is that of Michel Foucault.

Foucault understood discourse to be 'historically specific systems of meaning' in which the identities of subjects and objects are formed (Foucault 1972, 49). Moreover, for Foucault it is through specific historical rules that consideration can be given to the manner in which discourses are both shaped by social practices and how they shape 'social relationships and institutions' (Foucault 1972, 55). Importantly, the historical tracing of discourse is not centred on binary practices of foregrounding a falsehood or uncovering a hidden truth per se, but rather focuses on identifying the historical effects of truth within discourse (Foucault 1972, 50). The historical effects of truth, constituted within discourse, involve the discursive formations and representation of knowledge. Here, the production of knowledge is part of a contingent system of discursive formations, a representation allowing for the making of truth and false claims that become over time normalised accepted social practices (Foucault 1972, 98-101). All social practices have meaning and it is those meanings that construct and influence our actions, so all social practices have discursive elements. It is discourse that forms topics, and Foucault points out that our knowledge is not only defined by it but also produced by it (Foucault 1972, 50-68).

Foucault's understanding of discourse carries with it distinct epistemological assumptions about the social and political world. Firstly, Foucault's positioning of discourse as the constitutive 'conditions for [objects'] historical appearance', dispenses with the objectivist accounts that reduce discourse to a 'pre-existing reality' (Foucault 1972, 48; Howarth 2000, 52-53). Accordingly, objects are created within discourse and made possible by discursive rules of formation, which relate objects 'to the body of rules that enable them to form as objects', constituting the conditions of their historical appearance (Howarth 2000, 50). So, from a Foucauldian perspective, discourse is not a

linguistic mechanism that describes objects. Rather discourse is what constitutes both objects and subjects.

To understand discourse being the constitutive foundation of objects as well as subjects is an understanding of the human being not as a universal person that has remained the unchanged basis of the human subject ‘for all of history’ (Foucault 1972). Instead, it is the historical modes in which it has become possible for human beings to be made particular subjects (Foucault 1982, 207-208). As Foucault states, ‘[n]othing in man – not even his body – is sufficiently stable to serve as the basis for self-recognition or for understanding other men’ (Foucault 1987, 87-88). Thus, the important point Foucault foregrounds is to understand the human subject not to be a pre-existing thing. Rather it requires investigations into the manner in which the identity of subjects are rendered possible (Foucault 1987, 88). For example, to understand how identity, woman/man, mad/sane or victim/survivor, have been constituted over ‘time and in different places’ requires a binary association of inclusion/exclusion. From this perspective, it is not possible for identity, individual or collective, to be taken as natural or unproblematic.

To comprehend the way in which certain subjects are bestowed the right to speak involves consideration of subjects that are not rendered with the right to speak. A subject is afforded the right to speak by the manner in which they and the objects they described are deemed to be on one side of a dualistic structure. This structure centres on the idea of ‘the limit attitude’, the limits or boundaries that give meaning to thought and practice (Foucault 1979, 198). Of concern here, is the inside/outside binary association. For example, in *Discipline and Punish* (1979) Foucault, using the example of a prison, demonstrates what the prison confines of is as much about the identity of society outside the prison walls as it is about the prisoners on the inside (Foucault 1979, 205). Outside the prison walls the good, civilized society is constituted by the bad, uncivilized, violent prisoners contained inside. The pathological effect of criminalising prostitution or drug taking is to ‘normalise the moral order’ in which particular behaviours are excluded (Foucault 1979, 205-208). As such, the inclusion/exclusion binary of identity involves power, although, power in a Foucauldian context needs to be understood as productive and not repressive. Here, power is productive in that, it does not contain the possibility of limits or constraints. Rather, relations of power establish the limitations of inside in relation to outside. Without the limitations of the notion of inside, the outside would not exist; ‘we know what this thing is by knowing what it is not’ (Campbell 2014, 232-236). Therefore, limitations are productive, a productive form of power – ‘disciplinary power’

– that ‘disciplines’ to be able to produce a particular political subject. As such, the particular phenomena that are recognized in history are therefore to be ‘understood as constituted by an order always dependent upon the marginalization and exclusion of other identities and histories’ (Campbell 2014, 234; Foucault 1979).

Therefore, this research understands discourse as a series of representations and practices. This involves ‘a multiplicity of discursive elements which come into play in various strategies’ in which meanings are produced, identities constituted and political outcomes made more or less possible (Foucault 1979, 101). Understanding discourse from this perspective means the analysis of the data is not intended to show a discourse of witnessing is an ‘accepted discourse’ whilst simultaneously excluding other discourses (Foucault 1979, 101). Rather, it is the non-uniform and unstable discursive formations within the data that are the focus of the analysis.

Statements

In clarifying the modes of the ‘statement’, as understood by Foucault, and its centrality to the thesis’s analysis, it is useful to restate here the distinctive functioning of the statement in a Foucauldian framework for a discourse analysis. As Foucault acknowledged, it is difficult to define the statement easily as it covers a lot of ground within the formation of discourse (Foucault 1972, 110-116). However, a statement as defined within Foucault’s conception of discourse is not language in the sense that would centre on proposition and unified meaning. The statement has no inherent correlation with the propositional content of spoken words or written sentences. Nor is the statement concerned with the human subject as cogitative creator of statements (Foucault 1972, 55-56; Foucault 1972, 57-67). Rather, the speaking or writing subject is replaced by the authorial function, which indicates from where and what authority statements arrive but does not deduce anything about the human author of the statement.

Statements are made possible by their relation with other groups of statements, in which language is constituted. Again, language here is not understood as linguistic units, but rather as relations of statements which involve an analysis of signs, which are not reduced to linguistic units, referred to by Foucault as the ‘enunciating function’ (Foucault 1972, 99). In relation to the research analysing court documents, the enunciating function is analysing language – statements – to foreground the discursive conditions under which something about the past could be said. Thus, the enunciating function is a way of

understanding where in the data meaning is constituted, which is always within related groups of statements.

Understanding statements and related groups of statements as where meaning is constituted, requires the thesis to analysis series of signs, specifically the concept of ‘sign’ as understood by sociolinguist Ferdinand de Saussure (Saussure 1972).⁹⁰ It is therefore necessary for the discussion which follows to briefly summarise Saussure’s understanding of ‘Sign’, which was fundamental to Foucault’s thinking on statements.⁹¹ Though Foucault’s understanding of ‘*langue*’ is distinct from that of Saussure’s whose semiology focused on a science of signs within society (Saussure 1972). From this the discussion will point out it is a Foucauldian poststructuralist understanding of ‘Signs’, which this thesis employs in analysing statements within the selected ‘corpus’ of ICTR archived documents.

Saussure’s thinking on ‘Signs’ entailed understanding the fundamental relation between the signifier and signified.⁹² Signifier is the ‘sound image’, not explicitly an actual sound, rather something material: i.e. visual, touch, taste etc.... Signified is the concept in the mind, not of an actual thing but a notion of a thing (Saussure 1972). In a Saussurian context Sign(s) can be anything and are all around us, that is to say a sign can be anything that interprets meaning, which always must have a ‘sound image’ and ‘concepts’ (signifier and signified). Saussure’s understanding of ‘sign’ therefore positioned the signifier and signified as distinct yet unequivocally connected; it is not possible to have one without the other for there to be meaning. Saussure used the analogy of a piece of paper to explain his understanding of language and the inseparability of signifier and signified.⁹³ Language consists of signs, each sign consists of two interconnected parts – signifier and signified – a piece of paper, like a sign, has two sides. In this analogy signified is the front of the piece of paper and signifier is the back: ‘one cannot cut the front without cutting the back at the same time; likewise in language, one can neither divide sound from thought nor thought from sound’ (Saussure 1972, 65). Saussure’s thought on signs was a radical departure from the existing philosophy of

⁹⁰ There are numerous strands of linguistics and the use of signs. See; Pierce 1989; Levi-Strauss, Searl 1979; Halliday 1978; Pecheux 1975; Benveniste 1971.

⁹¹ For discussion of Saussure’s work on ‘Signs’, see ‘Course in General Linguistics’ (Saussure 1972). For general discussions on language and signs, see; Levi-Strauss. For a reworking of Saussurian understanding of signs see Benveniste 1971. Also see ‘Mythologies’ (Barthes 1970).

⁹² For discussion on Cartesian linguistics see Chomsky (2009). Also see Gadet (1987).

⁹³ For a discussion on Emile Benveniste’s reconfiguration of Saussure’s concept of ‘Signs’ and its influence in the field of Structuralism see ‘Problems with General Linguistics’ (Benveniste 1971). Also see; (Attridge 2004, 58-84).

language. A Cartesian philosophy of language, converse to Saussure's, argued that meaning of the world is outside of language, that the mind mediates between the world external to language and spoken words. Signs which conceive language entails their relation to 'things' external to language. Accordingly, from a Cartesian position, the human subject is a rational sovereign being who assigns meaning to words. Thus 'the subject is allocated primacy in that orders of thought and of the world are constructed by the subject' (Williams 1999, 35). What this meant was language as described by Saussure rejected the Cartesian philosophy of language, and foregrounded that it is not possible for things and ideas to exist prior to language. Saussure rejected the idea of a real world being out-there which could be defined and fixed by language. This can be seen in Williams stating that from Saussurian position '[l]anguage was no longer a stock of things waiting for stock of labels to give them their designation' (Williams 1999, 36). Thus as Saussure reminds us if there is not language (*langue*) 'thought is a vague, uncharted nebula. There are no pre-existing ideas, and nothing is distinct before the appearance of language (*langue*)' (Saussure 1972, 111).

Saussure's thought on '*langue*', converse to Foucault, understood series of signs as encapsulating a universal language for society. Saussure thus conceived '*langue*' and '*parole*' as being more than language and speech. For Saussure, '*langue*' is an entire semiological system which makes language possible, whose base unit is the 'sign'. '*Parole*' is the actual use of the system such as an utterance, though it is not the system (Saussure 1972). Accordingly for Saussure, '*langue*' consisting of series of signs acted as a collective or universal system of language, it ('*langue*') 'is treated as a social fact in being the faculty of language that is peculiar to humans' (Williams 1999, 41). Importantly here for the thesis using Foucauldian framework for a discourse analysis is Foucault's departure from a Saussurian understanding of '*langue*' as a universal system.⁹⁴ Specifically, Foucault (1972) challenged the idea of social knowledge having a commonality that sought to explain human actions in terms of universally applicable conditions.

⁹⁴ Foucault's understanding of language being where human subjects are constituted was influenced by Emile Benveniste. It was in particular the similarity of Foucault's and Benveniste's thought on subjectivity as being premised within language. Although, Benveniste confines the constitution of the subject to grammatical structures, which he understands as being distinct from discourse (Williams 1999). For a discussion on Benveniste's work on subjectivity see 'Problems with General Linguistics' (Benveniste 1971). For general discussions on Benveniste's work and impact on linguistics see Dosse (1997).

Whilst Foucault did follow Saussure in understanding that meaning entailed series of signs, Foucault rejected the notion of the existence of a universal system of meaning. Crucially, Foucault focused on series of signs, not as part of a universal system of knowledge, instead the manner in which signs and the statements they comprised emerged, that being, the rules which allow certain statements to exist (Foucault 1972, 121; Williams 1999, 76). As Foucault states, analysing the discursive rules of statements is:

not to show that the mechanisms or processes of the language (*langue*) were entirely preserved in it; but rather to reveal, in the density of verbal performances, the diversity of the possible levels of analysis; to show that in addition to methods of linguistic structuration (or interpretation), one could draw upon a specific description of statements, of their regularities proper to discourse (Foucault 1972, 220).

In summary, for Foucault '*langue*' defines the conditions that give function to 'series of signs' to exist and enables the existence of 'series of signs' to operate, although 'series of signs' are not 'grammatically' or 'logically' structured (Foucault 1972, 122). Instead, the structure of 'series of signs' operate as a set of possible discursive positions. These positions being of the subject, not as being 'capable of forming meaning of its own accord', rather an element in the 'field of coexistence' within a discursive formation. Therefore, the thesis analysis describing statements is concerned with the 'conditions of existence of different groups of signifiers' (Foucault 1972, 122).

Identifying statements, as has been described, entails departing from understanding language as a pre-existing proposition of meaning or as something that comes from the psychology of a speaking individual. In this sense, identifying statements is not focused on the individual content of a statement. It is not interested in uncovering hidden meanings of words, or the encrypted objectives of the author (Foucault 1996, 57-67). It is instead identifying the discursive rules that govern the relation of statements, therein describing the discursive field that connects the statements.

Statements as relational groups, is important as it refers to the contingent nature of the constituting of meaning and language, which entails related dispersed groups of statements. These groups are concurrently related to the material world but are not fixed to it. Statements made about subjects and objects cannot be repeatedly made producing the same meaning every time (Foucault 1972, 230). Significantly, this understanding of statements does not assume the inherent repeatability of meaning. Indeed, positioning the

analysis within discourse where meaning and language is not tied down insurmountably by the material world. Accordingly, understanding statements as relational groups of contingent meaning, allows the data to be read as a discursive field where groups of statements indicate discursive formations (Dreyfus and Rabinow 1982, 59). As such, this affords an analysis into the language that describes the past not as correlation to a pre-existing linguistic unit or a physical material object. Rather, understanding the basic elements of accounts remembering the past, are statements. As such, the statement:

Circulates, is used, disappears, allows or prevents the realization of a desire, serves or resists various interests, participates in challenge and struggle, and becomes a theme of appropriation or rivalry. (Foucault 1972, 126)

Thus, the manner in which remembering the past and the temporal accounts of rights violations are made in international tribunals, can through analysing the data offer a comprehensive understanding of the way in which the subject positions of the witness and the objects they describe become meaningful authoritative accounts of the past.⁹⁵

Method

Foucauldian framework for a discourse analysis: the analytical tools for analysing the data

In order for the thesis to use Foucault's theoretical insights on discourse as a practical method for conducting discourse analysis of ICTR archived documents, the discussion which follows outlines three steps the thesis uses to develop a Foucauldian framework in order to undertake a discourse analysis (Ahl 2007, 216-251). Step one is 'reading Foucault', step two is translating Foucault into an analytical framework, and step three is the analysis (Ahl 216-220). To be sure, developing a Foucauldian framework and the three steps involved is specific to the research problem and research questions this thesis will address. While it is the case that the three steps are specific to this thesis, and as such would not necessarily be appropriate to duplicate and apply to other research projects, using a three-step process and engaging with the particularities of Foucault that are relevant to a given project, can be applied to other research 'text' in conducting a discourse analysis (Ahl 2007). The discussion which follows begins by summarising the

⁹⁵ For discussions on legal language systems in the context of debates on Universal Jurisdiction see, (O'Sullivan 2017). Furthermore, Muleefu (2019) used critical discourse analysis to investigate different narratives that criticise and defend the functioning of the ICC, particularly its work in Africa.

selection of ‘text’ (coding) for this analysis. Then the chapter will describe a three-step process to construct a Foucauldian framework for analysis of ICTR archived documents relating to the selection of witnesses. Outlining the first step includes identifying components of Foucault’s thought on discourse and relevance to the thesis analysis. Describing step two, building on from identifying components in step one, will detail the analytical framework to be used for the analysis.

Part 1 (coding)

The two ICTR cases are used as case studies, discussed above and detailed in Appendix 1, frame the trajectory of documents to be collected and analysed. For each of the two cases documents will be taken from:

- Indictments, including samples and/or summaries of witness statements
- Pre-trial briefs
- Motions and motion decisions (before and during trials)
- Statute
- Rules of Procedure and Evidence
- Judgments
- Interview transcripts

The above documents were collected from the UoW and ICTR online archives. Documents gathered from the ICTR online archive and the UoW archive, searching the sections, stated above, working on one case at a time. For example: starting with the Nizeyimana case, searching the sections relating to this case, then searches in sections relating to the next case, and so on and so forth.

In order to be able to work with the vast amount of documents relating to the two case studies, it is necessary for the analysis to narrow down the documents to be worked with through doing a keyword search. The keywords selected by the researcher, which relate to the research questions and the thesis argument, include:

- witnesses
- witness statements
- testimonial evidence
- hearsay evidence
- witness

- victims

The keyword search takes place during the process of gathering the documents; for example, a section (plenary meeting transcripts) is searched on the online archives; once retrieved these documents will be listed above. The documents that are retrieved from this keyword search were uploaded to NVivo software as a platform for analysis.

Part two

Step 1

The discussion which follows outlines the theoretical insights from Foucault which will be developed into an analytical framework (step two). The discussion here will include a summary of the theoretical insights from Foucault the thesis has chosen.

The speaking subject, out of the totality of speaking individuals who are the individuals which are constituted to speak as a given subject. There are specific conditions, such as faith, law, tradition, of the individuals, and those individuals alone, who have the status to speak. Discourse does not permit anyone to occupy ‘a specific subject unless he has satisfied certain conditions’ (Foucault 1972). For example, the status of doctor entails some criteria of knowledge, legal conditions, competence, institutions (Foucault 1972, 55-56). ‘Statements’ on medicine cannot come from anywhere, it is the doctor as speaking subject whereby the medical statements gains its value and efficiency and exist as medical ‘statements’. The doctor as speaking subject has the right to make ‘statements’ ‘and to claim for them the power to overcome suffering and death’ (Foucault 1972, 56). The thesis translates this to mean the discursive conditions of a discourse of witnessing, which constitutes the speaking ‘witness’. That being, out of all the individuals who experienced the horrors of the Rwandan genocide, identifying the discursive processes at the ICTR that constitute some individuals, as opposed to other individuals, as the legal ‘witness’.

Institutional Sites are the places from which subjects speak, where discourse ‘derives its legitimate source’ and ‘its specific objects’ (Foucault 1972, 56). In keeping with the medical example used above, the institutional sites from which the doctor makes their discourse can include: the hospital – a site of ‘systematic observation, run by hierarchized medical staff’; and the laboratory – distinct from the hospital where certain truths concerning the human body, life, diseases, which provide certain criteria for diagnosis,

cure etc (Foucault 1972, 56-57). This analysis takes Institutional Sites to mean the places from which the ‘witness’ can speak about past violations. Specifically, these legislated sites where the ‘witness’ subject can speak from form part of the discursive conditions and practices in which the discursive field controls the places from which the witness subject can speak of objects of knowledge of past rights violations.

The positions of the subject: From which legitimate and authorised statements can be made. Certain ‘statements’ can only be made from certain positions that a given subject occupies. For example, the positions from which the subject of doctor can make legitimate and authorised statements can include: the listening subject and the questioning subject. These positions enable the subject of doctor to be ‘emitter and receiver of observations, case histories, statistical data, general theoretical propositions projects and decisions’ (Foucault 1972, 58). This thesis takes this to mean the position from which the witness can speak about the past at the ICTRs entails conditions which ‘limit’ what the ‘witness’ can do and talk about.

Surface of emergence is the field in which objects first arise, allowing discourse to define what it is talking about. The continuities and discontinuities that define the ‘limitations’ in which objects become normative functions for understanding social practices. In a given discourse, such as psychiatric discourse (Foucault 1968), discourse ‘finds a way of limiting its domain, of defining what it is talking about, given it the status of an object – and therefore making it manifest, nameable, and describable’ (Foucault 1972, 46). Therefore this research needs to pay attention to the emergence of objects within a discourse of witnessing and how these objects restrict and ‘limit’ the discursive space, producing normative practices. For example, in the context of ICTR documents the term in the ‘interest of justice’ emerges in multiple fields including: the trial, investigations, formal correspondence, and meetings between legal counsels. It is within these fields in part because they are a normative function of legal tribunals that would determine the paradigms that make admissible or inadmissible witness subjects: a given witness is admissible instead of three other witnesses because it is in the ‘interest of justice’.⁹⁶ Worth noting here, the term ‘interest of justice’ at the ICTR is not defined in the statute or RPEs.

⁹⁶ In the case Michel Bagaragar (ICTR-2005-86-T) the judge motioned to remove six witnesses from the trial being replaced by one witness. The judge stating that the prompt exposition of the testimony of only one witness would be in the ‘interest of justice’.

Authorities of delimitation are the authorities empowered to determine which objects belong to which discursive formation. The authority of delimitation could be: judge's chambers, witness protection unit, and the office of the registrar that all have the judicial authority in relation to the witness subject to 'delimit, designate, name, and define' (Foucault 1972) a given object, such as in the 'interest of justice'.

Grids of specification are the systems according to which different understandings of an object are 'divided, contrasted, related, regrouped, classified, derived from one another' (Foucault 1972, 47). The medical profession would define different kinds of madness, in which objects will be constituted and derived from one another in psychiatric discourse (Foucault 1972, 46). The analysis translates this to mean the way in which a given object, for example in the 'interest of justice', is understood, reshaped, categorised.

Importantly, it would be the three planes – emergence, authority and specification – triangulating the term in the 'interest of justice', which could only form as an object in the discursive relation of the three planes. Here, it is worth pointing out, the research is aiming to identify the three planes and would analyse statements, and relations between groups of statements. For example, a statement containing the term in the 'interests of justice' would not only need to identify the three triangulating planes, but also the relation of this statement to other groups of statement would need to be shown. Accordingly, in the 'interests of justice' as an object of knowledge could only form within the discursive formation by the analysis indicating the ordering of statements. The ordering of statements could be for example: information from the president(s) of the tribunal to senior judges and communications from senior judges to the judges' chambers and legal counsels, which provide a framework regarding protection of witnesses, investigation process, witness list, procedures for witnesses giving testimonial evidence, and so forth.

Commentary forms part of the internal system of rules of discourse, which 'regulates' the discursive field. Each discourse has a set of foundational or primary 'texts' that are framed as highly important and are continuously commented upon (Foucault 1972). This 'commentary' ranges from complementary appraisal of the 'text', attempts at explaining the 'text', or critical arguments challenging its content, though importantly, the continuous 'commentary' on the 'text' enables repeatability and exclusion (Foucault 1969). The thesis translates this to mean that there are ICTR legislated documents, the

statute and RPEs, that are continuously referred to. Also important for the analysis are documents from other cases at the ICTR that become objects of exclusion: for example hearsay evidence explaining the background social conditions in Rwanda, might be excluded from one case, rationalised by a judge that the previous cases at the ICTR has extensively established these background social conditions. In short, it is the statute and RPEs, and transcripts from ICTR cases, which form part of discursive conditions which 'regulate' which individuals can speak and which objects they can speak about.

Statements (series of signs) are not linguistic units, that is, they are not the same as the sentence or utterance. The sentence and utterance comprises grammatical rules that are reducible to the 'syntactical structures of grammatically well-formed sentences' (Foucault 1972, 98). Rather, statements as understood by Foucault are relational entities that 'must be related to a whole adjacent field' of other statements (Foucault 1972, 98). In other words, the same statement can be uttered in different ways without being conflated to the 'syntactical structures' of sentences. Accordingly, statements are functions in which sentences and utterances are made. There can be statements without there being a sentence or utterance but not the converse (Howarth 2000, 55).

Here, to point out the important relations between describing groups of statements – series of signs – and enunciation. Not all groups of statements or relations of statements are enunciated, only certain – constituted – statements. The analysis therefore aims to identify what the conditions are in which the 'signifying groups that were enunciated can appear' (Foucault 1972, 134). The discursive conditions that establish the signifying groups which are enunciated amongst other possible groups is referred to by Foucault as establishing a 'law of rarity' (Foucault 1972, 134). Importantly for the research, the analysis determining the 'law of rarity' of a discourse of witnessing is to identify the conditions that allowed only the enunciated groups of statements, in which, witness subjects and objects could emerge.

Step Two: Analytical Framework

The analytical framework takes Foucault's theoretical insights, discussed above, and uses them as analytical tools to identify discursive conditions and practices. The analytical framework outlined below relates explicitly to answering the thesis research question and subsidiary questions. The framework comprises four tools, each of which

contribute to the research questions being explored and answered. For the purpose of clarity, the tools in the analytical framework have been ordered here in chronological order, though the order in which the tools are used in the actual analysis may vary:

- Deconstructing the ICTR foundational texts
- The individuals who get to speak about their experience of violations at the ICTR
- The knowledge about past rights violations witnesses are allowed to speak about
- The repeatability of certain ‘statements’

The discussion which follows outlines each of the analytical tools and explains their relation to answering the research questions. To restate, the thesis research questions are:

Primary research question

How should witnesses of human rights violations contribute to memory production in transitional post-conflict societies?

Subsidiary research questions

- (i) How is the subject position of ‘witness’ discursively created? (The way social power relations produce identities and specific historically located meaning)
- (ii) In cases of mass human rights violations, how does the construction of memory at the ICTR frame the manner in which violence is remembered?
- (iii) Does positioning memory within the discursive construction of witness mean memory becomes fixed and rigid?

Deconstructing the foundational texts of the ICTR, as an international legal institution, operates under legislated rules and regulations, specifically, the statute and rules of procedure and evidence (RPE), which define the legal processes at the ICTR. In particular, for this research, the statute and RPE defined the paradigms in which witnesses engaged and participated in legal processes at the ICTR. The statute and RPE, during the tribunal’s existence, have gone through numerous processes of amendments. As such, the research will analyse the original and amended versions of the statutes and RPE. Deconstructing the ICTR statutes and RPE (foundational documents) will analyse these texts to identify the legislative processes by which ‘witnesses’ engage with trials and the authority from which such regulations are upheld and managed. In other words, to identify

the discursive practices in the ‘foundational texts’, which form part of the discursive regularities of a discourse of witnessing. To analyse the way in which dominant ‘texts’ at the ICTR form part of discursive conditions, the analysis will also need to explore ‘foundational texts’, which are produced through the ICTR’s legal process. That being, outcomes from cases contribute to discursive regularity of other cases: information relating to the background social and political conditions in Rwanda gathered through hearsay evidence in the earlier cases at the ICTR results in the later cases not requiring substantial hearsay evidence. This is important as one of the claims of the ICTR’s output is that it will contribute to the truth in understanding the social and political reasons that led to the violations occurring (Byron 2008).

The individuals who get to speak about their experience at the ICTR: To determine what conditions constitute the witness as speaking subject amongst the totality of ‘speaking individuals’. These discursive conditions could be: the tribunal’s mandate stating specific crimes within the court’s jurisdiction, i.e. the main perpetrators of the genocide, indictments that state the specific violations purportedly committed by the accused, in which the testimony of witnesses will contribute to the legal determination of guilt, investigators determining which knowledge of individuals are most appropriate as evidence in relation to the specific crimes detailed in the indictment, investigators’ contextual knowledge, geographical location of potential witnesses. This relates to answering the thesis question in understanding the discursive conditions that constitute the ‘witness’ subject at the ICTR. In other words, this analytical tool helps to show how the identity of the legal witness is constructed.

Conclusion

The thesis, using a Foucauldian framework for a discourse analysis, will identify the discursive conditions of a discourse of witnessing. The analysis does not intend to highlight a discursive field in which individual subjectivity has been suppressed by a set of dominant discursive conditions, in which identifying sets of discursive conditions the sovereign subjectivity of the individual can be freed and can externalise their memories. Nor does the analysis understand identifying the formation of a discursive field to be able to offer a transcendent and uniform structure of discourse. However, in relation to the research questions and argument, what a Foucauldian framework for a discourse analysis does allow for is to understand what it is within the court documents that constituted

enunciations of objects to be made and the authority in which the witness subjects can speak. That being the constituted meaning of knowledge about the past emerges only from within the relation of statements which are enunciated. There are numerous alternative formations of dispersed groups of statements in which ‘things’ could have been given meaning and emerged as objects of knowledge but did not within the discursive field. Similarly, the way in which the witness subject is discursively constituted is dependent on a contingent set of statements that determine out of all the individuals who experienced the horrors of 1994 which ones can occupy subject position of the witness. Thus, the discursive field to be analysed is not intended to free objects of knowledge about the past and subjects of witness from the discursive conditions, in which they could (re)gain their autonomy. Rather, it is the discursive conditions, constituting the subjects of witnesses who are constituted to speak out of all the speaking individuals, the authority and places from which witness subject can speak, and the objects of knowledge about the past described by witness subjects through their perceived authoritative position. Thus, the analysis describing the formation of a discourse of witnessing is to identify the rules which constituted the existence of knowledge about the past and the subjects who describe it.

Therefore, the thesis through identifying the discursive conditions in which the enunciated subjects and objects emerged, it can be shown the manner in which the construction of legal memory at the ICTR operates and meaning about the past is produced. Thus applying a Foucauldian discourse analysis to ICTR archived documents, allows both memory and witness subject(s) to be understood as being discursively constituted. This thesis offers a perspective of legal memory not revealed through individual sovereignty but constructed as a part of a discursive formation.

Chapter 4 - The Discursive Battleground of Legal Witnessing, Or, The Active Witness and Their ‘Right to Truth’

This chapter discusses the analysis including the ICTR rules of procedure and evidence – Rule 26, Rule 31, Rule 48, Rule 69, Rule 71-82, and Rule 106-111.⁹⁷ Specifically, the chapter explores the discursive conditions that constitute the witness as the subject position of discourse. Particular consideration is given to the relation between the discursive construction of the ‘witness’ and the right to truth,⁹⁸ which is legislated for in international human rights law and purported by advocates as being a key component during legal redress for mass atrocities (Groome 2011; Klinkner and Smith 2015). Beginning with discussing the legal rules of evidence surrounding the admissibility of witness evidence at the ICTR, the chapter lays out its main contention. That being, renderings of the witness as a catchall identity fail to comprehend the limits and restrictions of the discursive field. The assumed identity of the subject position of witnesses enables the conflation of the legal category of judgment with the ethical category of truth that discursively produces a language that constitutes witnesses as active participants in uncovering knowledge about the past. The second part of the chapter highlights a disjuncture between redress for victims-witnesses as sufferers of violations and witnesses as discursive objects of legal knowledge. Specifically, the common advocacy within the transitional justice legal scholarship (Klinkner and Smith 2015; Pindell 2002; Sikkink 2011) promotes victim-witnesses as active participants in legal redress, particularly in relation to the ‘right to truth’ as an emerging free-standing right (Klinkner 2015, 6), perceives the right to hear the truth, and importantly, to impart the truth, as a positive and inalienable process of legal redress during periods of political transition (Groome 2011). From such perspectives, the right to truth is a fundamental component for victim-witnesses’ redress, facilitating individual participation (agency) within the judicial process, and contributing to the construction of a wider societal truth of the atrocities (Klinkner 2015, 10-11; Osiel 2012). However, transitional justice is a project with aspirations of contributing to ‘democratisation’ and ‘peace’, a core part of

⁹⁷ Rule 26: Plenaries, Rule 31: Functions of the Registrar, Rule 48: Submission of Indictment by the Prosecutor, Rule 69: Status Conferences, Rule 71-82: (pre-Trial Proceedings), Rule 106-111: (Proceedings Before Trial Chambers).

⁹⁸ The ‘right to truth’ encompasses ‘the right to seek and obtain information’ relating to reasons and causes of individual victimisation, and ‘circumstances and reasons which led to or otherwise facilitated the gross violation of human rights more generally’: see Klinkner and Smith 2015, 6; also see Pindell 2002.

which is the uncovering of the past atrocities. In other words, for a society to be able to rebuild after mass violations there first needs to be a shared understanding of why and how the atrocities occurred, in which international tribunals are perceived to be a key modality (Klinkner and Smith 2015) (see Chapter 1). This advocacy for legal responses to understanding the past commonly emphasises the centrality of victim-witnesses during transition from ‘illiberal’ rule to liberal democracy (Teitel 2003): ‘victim-focused prosecution norms comport and provide more effective means of promoting respect for human rights... in democratic transition from mass atrocities’ (Pindell 2002, 1399). Challenging this claim, it will be suggested the transitional justice wide paradigm of victims-witnesses conflates individual victims with the legal subject position of witnesses, which are two different identities entailing nuanced distinctions.

Witnesses at the ICTR, both directly and indirectly, interact with almost every facet of the tribunal. A very common association of witnessing at international criminal tribunals and courts is the testimonial evidence witnesses give in court. This important function was certainly a reality at the ICTR (Palmer 2015). However, this chapter suggests that witnesses’ engagement with the ICTR, and importantly the ICTR’s engagement with witnesses are part of the discursive construction of the witness subject. Specifically, from a discursive frame all the legal processes at the ICTR, including documents that created the tribunal, investigations and prosecutor’s investigation strategy, indictments, pre-trial briefs, witness lists, and motions, are all discursively important. Therefore, these processes need to be considered both individually and in their numerous interactions with each other. Thus witness testimony given in court is just one part, arguably a moderate part, of the discursive restrictions and conditions of legal witnessing at the ICTR. Put more crudely, the witnesses who get to testify in court at the ICTR are only the tip of a giant ‘discursive iceberg’. This discursive ‘giant’ needs to be analysed beyond what is initially ‘visible’ from the surface.

In relation to the thesis arguing that the subject position of the ‘witness’ is constituted within the tightly controlled discursive conditions of a discourse of witnessing, it is crucial for the analysis to focus on the diverse functions of witnessing at the ICTR (Foucault 1991). In short, this section argues that showing how the subject position of witness is discursively created supports the thesis’s contention that renderings of the witness as a catchall identity fails to comprehend the limits and restrictions of the discursive field (Foucault 1972, 52). This failing allows for the conflation of legal

determination and truth that discursively produces a language that constitutes legal witnesses as active participants in ‘uncovering’ the ‘truth’ about past atrocities.

Nowhere and Everywhere: The Discursive Reach of the Witness at the ICTR

Neither the ICTR statute nor the RPE define the term ‘witness’. This lack of definition is surprising given, as mentioned above, the extent to which witnesses reach into all legal and administrative functions of the ICTR. Within the discursive space of the ICTR the witness is everywhere, and simultaneously strikingly absent. In order for the chapter to argue that there is a need to radically rethink the common understanding in the legal scholarship of witnesses as self-evident, the following discussion will firstly focus on the ‘foundational documents’ as part of the discursive conditions which ‘filter’ who can be a witness subject. Foucault refers to ‘foundational documents’ as texts which are crucial to the creation and functioning of institutional discursive practices (Foucault 1979). The discussion will then focus on investigations and indictments as another layer of discursivity.

The ICTR consists of three organs, the Office of the Prosecutor (OTP), the Chambers and the Registry.⁹⁹ The defence counsel at the ICTR are not included as an organ. Each of the organs consists of numerous sections/departments. The ICTR ‘foundational documents’ include legislated rules and regulations under which the tribunal operates. Specifically, the statute and RPE which define the legal processes at the ICTR, contain discursive statements. In particular for this thesis, the statutes and RPE containing statements, are part of the discursive conditions that act to include/exclude which individuals can be the witness subject at the ICTR. For example, regulations

⁹⁹ The Registry is led by the Registrar and Deputy Registrar and is ‘responsible for the administration and servicing of the International Tribunal for Rwanda’ (ICTR Statute Article 16, 2010). The first Registrar Mr. Andronico O. Adede was appointed around 10 months after the adoption of UN Resolution 955 on the 8th September 1995 (ICTR Annual Report 1995). For more detail on the role of the Registrar see Rules of Procedure and Evidence Rule 33, 1995. The ICTR, like all international criminal courts is ‘political’ (Clark 2018; M. Clark 2009; Simpson 2007). For example, former Deputy Registrar Everard O’Donnell describes internal conflict between the President of the ICTR and the Registrar:

[A]t that time, there was a considerable conflict between the President and the Registrar, the then Registrar, and there was a considerable lack of communication between the two poles of the tribunal... the judges in effect made it perfectly clear that as far as they were concerned, and no matter what the statute said, they were going to be exercising the governance of the tribunal. And it caused conflicts in the early days of the, certainly this tribunal. Because the Registrar felt that there were certain responsibilities that he had as the senior staff member responsible to the New York, to the General Assembly, to the Secretary General, that he could not just do whatever it was that the President wanted him to do. Whereas the President felt that she had a right to say, ‘I want this, I want, you know, this, and I want this person recruited,’ and so on. ‘And I want it done now.’ And the UN rules, you know, don’t work like that. (Horowitz 2008)

regarding investigations and interactions with witnesses are stated in the ICTR statute and RPE.

The Prosecutor shall initiate investigations ex-officio or on the basis of information obtained from any source, particularly from governments, United Nations intergovernmental and non-governmental organizations. The Prosecutor shall assess the information received or obtained and decide whether there is sufficient basis to proceed (ICTR Statute 2010, Article 17).

While the statute states that it is the Prosecutor who decides to begin an investigation, from a discursive frame, however, the discursive conditions that shape the orientation of investigations, and by relation the selection of potential witnesses, begins with United Nations Resolution 955 defining what crimes are within the ICTR jurisdiction and that the Tribunal will prosecute those most responsible for the genocide. For example, two statements within the ICTR statute are, that the tribunal will prosecute those most responsible, and the specific crimes within the ICTR's Jurisdiction (ICTR Statute 2010). The ICTR's mandate stating it will prosecute the most responsible means, in practice, the evidence of witnesses required by prosecutors relates to the relatively small number of individual suspects. Individuals who experienced the horrors of 1994 but whose experiences were not perpetrated by those indicted by the ICTR are not relevant as evidence to prosecutors. As Foucault reminds, dominant *statements*, such as the suspects the ICTR has jurisdiction to prosecute, shape which individuals can and which individuals cannot, occupy a given subject position. As Foucault argues, the statement '[c]irculates, is used, disappears, allows or prevents the realization of a desire, serves or resists various interests, participates in challenge and struggle, and becomes a theme of appropriation or rivalry' (Foucault 1972, 126). What is being suggested here is that the statute contains discursive *statements* that from the creation of the ICTR has already begun the process of restricting which individuals can occupy the subject position of the witness. Understood as such, before the OTP begins an investigation, Resolution 955 along with the Statute is part of the discursive restriction of who can be a witness subject. It is therefore important to understand these 'foundational documents' beyond legislation that brings international criminal institutions into being. They are part of the discursive conditions determining who can occupy the subject position of the 'witness'.

United Nations Resolution 955, which brought the ICTR into existence, explicitly states that the tribunal will contribute to reconciliation and peace.

Convinced that in the particular circumstances of Rwanda, the prosecution of persons responsible for serious violations of international humanitarian law would enable this aim to be achieved and would contribute to the process of national reconciliation and to the restoration and maintenance of peace.

Whilst this statement on contributing to reconciliation and peace may have been intentionally abstract, in one sense it also served as rationale and motivation for those who understood the ICTR to have a dual role. This dual role entailed bringing judicial accountability, and understanding the historical truth of why and how the genocide occurred, through the testimonial evidence of witnesses. For example, former ICTR President and Judge Denis Byron was one advocate of this dual role of the tribunal. According to Byron, based on discussions he was involved in there was a general view at the ICTR that contributing to reconciliation, as stated in the mandate, required the tribunal to establish a factual historical record of what happened (Byron 2008). Byron states that the tribunal was conscious that having this dual role was costly in terms of the overrunning of the tribunal's Mandate, however for Byron it was a cost worth paying. In interview with Utter, Byron points out:

they addressed matters that were far wider and broader than were necessary to establish guilt or innocence in particular cases. They undertook the task of developing pretty comprehensive factual record of what transpired during that period [the genocide] and the period building up to it ... we had adopted two roles – the role of fact finder and the role of historical chronicler (Utter 2008).

According to Byron, it was because the ICTR went beyond its legislated mandate, the statute, that it was able to produce a collective understanding of the reasons and causes that led to the genocide against the Tutsi occurring. However, what Byron's position misses, and is argued throughout this thesis, is that the ICTR 'foundational documents', including the statute, are part of the discursive conditions that restrict what knowledge of past atrocities law is able to tell. Therefore, the common claim, such as Byron's, that law can produce a comprehensive understanding of past atrocities needs to be deconstructed. This deconstructing foregrounds that the tribunal's legal processes, including the 'foundational documents', are a crucial component that produces a narrow singular legal story of past atrocities.

The Discursivity of Investigations and Indictments

The OTP was comprised of the Prosecutor and ‘such other qualified staff as may be required’ who are recruited by the United Nations Secretary-General on the recommendation of the Prosecutor (ICTR Statute 2010, Article 15).¹⁰⁰ The organ of the Prosecutor includes at its core the ‘Investigation Section’.¹⁰¹ The Investigation Section is structured into a number of divisions/subsections (ICTR Statute 2010, Article 17).¹⁰² The Investigation Section was also geographically split between the tribunal in Arusha and the investigation office in the Rwandan capital, Kigali. Although in practice, the allocation of staff to the sites varied across the lifespan of the ICTR, during the first few years of the tribunal (1994-1999/2000) most of the investigation personnel were based in Kigali (ICTR Expert Report 1999). As will be suggested in the discussion to follow, that the organ of the OTP is fundamentally reliant on witnesses and thus is an important site of discursivity in relation to the construction of the ‘witness’. The following discussion will highlight how the complexities of investigations, such as lack of professional investigators, finding witnesses with evidence relating to crimes within the ICTR jurisdiction, lack of local expertise and knowledge, do more than just mirror the difficulties of the tribunal’s operations, they are part of the discursive conditions that restrict who can be a witness subject.

To give a taster here, according to the ICTR’s statute the Office of the Prosecutor (OTP), in addition to the Prosecutor, shall consist of ‘such other qualified staff’ including investigators (ICTR Statute 2010, Article 15). However, the investigation section, particularly in the early years of the tribunal, suffered from a lack of professional investigators.¹⁰³ In an interview with Nathan, former Acting Chief of Investigations Alfred Kwende notes:

¹⁰⁰ ‘The Prosecutor shall serve for a four-year term and be eligible for reappointment. The terms and conditions of service of the Prosecutor shall be those of an Under-Secretary-General of the United Nations’ (ICTR Statute 2010, Article 15). Until 2003 the Prosecutor served both the ICTR and ICTY, from 2003 each of the tribunals had their own prosecutor. During the lifespan of the ICTR there has been four Chief prosecutors, Richard Goldstone (1994-1996), Louise Arbour (1996-1999), Carla del Ponte (1999-2003), Hassan B. Jallow (2003-2015).

¹⁰¹ The Prosecutor was tasked with investigating and prosecuting individuals within the mandate of the ICTR (ICTR Statute 2010). The Prosecutor acts ‘independently as a separate organ of the International Tribunal for Rwanda. He or she shall not seek or receive instructions from any government or from any other source’ (ICTR Statute 2010, Article 15).

¹⁰² According to the ICTR Annual Report (1996) the Investigation Sections includes, ‘experienced senior and junior investigators, lawyers, intelligence analysts, advisers, a scientific director, experts in forensic medicine, statisticians, demographers, interpreters and translators, and support staff’ (ICTR Annual Report 1996).

¹⁰³ The Office of the Prosecutor in November 1995 consisted of 52 members of staff from 15 different countries. Half of which were on secondment. The majority of these the seconded staff were from the Netherlands, which included 21 investigators (ICTR Annual Report 1996).

the tribunal didn't start with professional investigators. It started with just picking anybody. They asked most countries to send staff, they sen[t] volunteers. Most of the volunteers were school-leavers or people in fields which did not actually master the science of investigations [...] in fact, within the first years a few professional investigators were picked up but the most of them were volunteers or secondees, secondees sent by states... In some case there were no follow ups [to investigations] because they had to go back to their countries, the secondees [were here] for three months, six months. They didn't have a full-time job so by the time they started recruiting people full-time as investigators, this was in fact getting late into '97, '98 (Nathan 2008).

This issue of lack of professional investigators and the somewhat chaotic approach to investigations in the first few years of the ICTR was also problematic for the defence. There were two instances where the defence counsel had employed investigators who, after a period working on investigations, turned out to be implicated in the genocide and were later prosecuted by the ICTR.¹⁰⁴ One of these individuals, Joseph Nzabirinda, was only identified as being implicated in the genocide when a person testifying in court remarked that this man on the defence counsel was actually involved in the genocide (Nathan 2008). The ICTR RPE details a linear process for OTP investigations including the collecting of witness statements, which in principle regulates the manner in which legal counsel conduct their investigations. However, as will be highlighted in the coming paragraphs, investigations are not a linear process. Instead the complexities of investigations are an important component in understanding how the subject position of the witness is discursively constituted. Rule 39, Conduct of Investigations, states:

[i]n the conduct of an investigation, the Prosecutor may: (i) summon and question suspects, victims and witnesses and record their statements, collect evidence and conduct on-site investigations (Rules of Procedure and Evidence 1996, Rule 39).

Prosecution counsels are also provided, in addition to RPE, with 'Prosecution Regulations'. Regulation No. 2 (1999) states that during the process of investigations:

¹⁰⁴ Joseph Nzabirinda was indicted by the ICTR on charges including genocide and crimes against humanity (Rape). Initially pleading not guilty, Nzabirinda after reaching a plea agreement with the prosecution pleaded guilty on 14 December 2006 to the crime of aiding and abetting the perpetration of crimes of murder and was sentenced to seven years (Sentencing judgment 23rd February 2007). The other individual, Simeon Nchamihigo, was arrested by Tanzanian authorities in May 2001, charges included genocide and crimes against humanity. He was sentenced to life imprisonment which later was reduced to 40 years upon appeal (Appeal Judgment 18 March 2010).

Prosecution counsel will adopt the highest standards of professional conduct. The Prosecutor expects them to behave in a manner, consistent always with the letter and the spirit of the relevant Statute and Rules of Procedures and Evidence (Prosecutor Regulations 1999).

However, in relation to investigations being part of the discursive condition of how the witness subject is constituted, it is argued here that the complexities of investigation, and prosecutors following a dominant narrative of the genocide, shaped in important ways who can be a witness and what they can speak about. Developing the discussion above on practical issues, such as lack of professional investigators, the following discussion will foreground that these practical challenges to investigations, along with internal power struggles within the prosecution,¹⁰⁵ are part of the tightly controlled discursive field of a discourse of witnessing.

During the ICTR reporting year of 1997-1998 a total 546 witness statements were gathered by prosecutor investigations, this was in addition to 1500 statements gathered before 1997-1998 (Annual Report 1998). In a characteristically optimistic tone, the ICTR 1998 Annual Report uses these statistics to convey the positive accomplishments of the prosecution investigations, including the robustness of evidence gathering. As the report states:

This numerical result of the investigations also attests to the quality of the information and evidence collected. Consolidation of the evidence has made it possible to formalize 12 indictments and take the initiative of consolidating certain procedures already pending before the Tribunal (ICTR Annual Report 1998).

Reading this text through a discursive lens, however, foregrounds important questions that need to be asked of this text beyond statistical values. Reading a text discursively entails consideration of what is absent as well as what is there (Foucault 1972). The subject position of the 'witness' is, like any subject position, restrictive. These restrictions need to be interrogated including understanding what knowledge of past rights violations the subject of 'witness' can talk about, and the places from which a 'witness' subject can speak (see Chapter 3). Therefore, this text needs to be interrogated and to be asked questions including, how were these witness statements gathered? Where were they gathered and by whom? Out of all the statements collected, how many were not submitted

¹⁰⁵ The Office's organization chart for the 1997 budget period makes provision for 137 posts, whereas at 1 May 1998 only 80 of the posts in question were filled and recruitment action was being taken in respect of 50 other posts (Annual Report 1998, 8).

as evidence, how many witnesses interviewed during investigations actually testified in court? In the following discussion, how witness statements were gathered, and how many witnesses actually testified will be explored further. Foucault reminds us that the discursive conditions of legal institutions include a range of processes and actors, and it is in the dispersed and often subtle interactions of these processes and actors that are a key component to understand how law produces knowledge and identity (Foucault 1991, 11). In his writings on the discursive conditions of law and legal institutions, Foucault focused on the French civil law legal system. While the ICTR is primarily based on common law it does include aspects of civil law, which thus has relevance to this discussion.¹⁰⁶

An example of what is absent from the above annual report (text), and thus plays a role in the discursive construction of the ‘witness’, is the complexities of investigations: the lack of professional investigators and absence of local expertise. For example, the ICTR Expert Report (1998) states:

Dislike and distrust of the Tribunal by many victims, potential witnesses and others involved in investigations often make it difficult to overcome obstruction or to obtain cooperation and needed information. (ICTR Expert Report 1998)

Furthermore, as former ICTR investigator David Wagala explains, investigators were only interested in witnesses who could provide relevant evidence to support the Prosecutor’s case (McKay and Friedman 2008). Finding the relevant witness evidence required a process of filtering out the ‘irrelevant’ witnesses. The filtering out of witnesses that did not have evidence relevant to ICTR investigations was a theme discussed in several of interview transcripts of ICTR investigators and prosecutors. For example, as Wagala explicitly states in interview with McKay and Friedman,

so first we just ask [the person] general questions to ascertain that they have knowledge of what happened, because we want very good witnesses, not just people, fancy people coming here telling stories. So the first interview is meant to identify the good potential witnesses (McKay and Friedman 2008).

Moreover, as former investigator Roger Pionana notes in an interview with McKay and Friedman:

¹⁰⁶ For a discussion on the importance of Foucault’s writings on Law see Golder 2010.

When we started investigating, talking about Butare – because I was assigned to work there – we started by interviewing many people at random, because we had to get information on what happened (McKay and Friedman 2008).

The interviewing people at ‘random’ and identifying only the ‘very good witnesses’, suggests that some of the witness statements gathered were likely not used by the Prosecutor. The investigators’ process of selecting only the best witnesses discursively restricts certain witnesses from becoming a witness subject. Discourse does not permit anyone to occupy ‘a specific subject unless he has satisfied certain conditions’ (Foucault 1972). In the investigations mentioned by Pionana, the numerous witnesses approached were not selected because investigators knew they had relevant information relating to specific ICTR crimes. Rather they would speak to people and hope that some of what they were told had some relevance as potential evidence (McKay and Friedman 2008).

Another part the discursive conditions of investigations is the Investigation Section lacked context specific knowledge and local expertise. The ICTR was reluctant, albeit implicitly, to allow Rwandans to be part of the OTP investigation teams, and allow judges and legal staff to visit Rwanda. The reluctance to use local expertise was based upon the concern that individuals sympathetic to the genocide as well as the Rwandan Patriotic Front (RPF) could manipulate or destroy evidence (Nathan and Utter 2008).¹⁰⁷ Whilst it is understandable that the ICTR wanted to preserve the objectivity of investigations, the distancing of local expertise, particularly in the first decade of the tribunal, resulted in investigations being somewhat haphazard (P Nathan and R Utter 2008). The lack of local expertise negatively impacting on investigations and the gathering of witness evidence was a common theme discussed within the archived interview transcripts. For example, in an interview with Nathan and Horowitz, former ICTR Legal Officer Suzanne Chenualt states that was a need for:

greater knowledge of the anthropological dimensions of this community. And I think that we’ve gone in almost like bears in a china closet without understanding Rwanda extremely well [including the] ways of approaching those who have survived and those people who witness the events (Nathan and Horowitz 2008).

¹⁰⁷ Interview with ICTR Prosecutor Charles Adeogun-Phillips. Interviewed by Lisa. P. Nathan and Robert Utter for the University of Washington project ‘Voices from the Rwanda Tribunal’.

The impact of lack of local knowledge on investigations and gathering witness evidence is also highlighted by my former ICTR prosecutor Charles Adeogun-Phillips. In interview with Nathan and Utter Adeogun-Phillips states,

[We] lacked the involvement of national staff in the investigative process. We didn't have any Rwandan help. What is the essential drawback of not having a Rwandan on your investigative team? Well, we're foreigners. We're, we're not native to the locality and there were so many diverse issues and intricacies about the whole genocide in itself that you, you are unable to understand or grasp at a very early stage if you don't have that local context [...] And you can imagine what the practical effect of that is, in the sense that we may have, based many of our trials on erroneous theories and strategies, not out of negligence, but out of ignorance. (Nathan and Utter 2008)

To identify what conditions constitute the witness as speaking subject amongst all the individuals who experienced the genocide against the Tutsi, is suggested here to include investigators' contextual knowledge, and geographical location of potential witnesses. The resistance by the ICTR to engage with local knowledge and expertise, mentioned above, is a mentality engrained within international criminal justice, more generally (Horowitz and Nathan 2008). This mentality insists legal actors adjudicating these trials need to keep a distance from the society affected in case they become influenced by what they see and/or hear. However, particularly in relation to the investigation process, the sense of duty felt by legal actors to keep themselves 'sterile' from events had a detrimental impact on the Prosecutor's ability to conduct robust investigations. As argued by Clark, international criminal institutions' insistence on legal actors being distant from a given society underestimates how essential it is for judges and investigators to spend a sustained period in these locations to understand the context in which they will be passing judgment (Clark 2018, 43).¹⁰⁸ The uncompromising stance for legal actors to be distant from the society is evident in one senior ICTR judge's response to Clark's question, *whether or not he had travelled to Rwanda?*

I have never been to Rwanda and I have no desire to visit. Going there and seeing the effect we are having would only make my work more difficult. How can I do my job – judging these cases fairly – with pictures in my mind of what

¹⁰⁸ Judge Eric Mose was a minority voice amongst ICTR judges advocating the usefulness of the trial chamber visiting the site where alleged crimes took place. Indeed, as one of the judges on the Ignace Bagilishema case Mose's advocacy led to the entire chamber 'judges, prosecutors, lawyers, clerks, registry staff, legal assistants' going to Rwanda (Cruvellier 2010, 134). However, Mose's advocacy for site visits was not something the tribunal embraced in the long term. See interview with Judge Mose (Voices from the Rwandan Tribunal 2008).

is happening over there? This task is already complicated enough (Clark 2018, 43).

It is crucial for courts to fully understand the historical and social complexities of the cases they are judging; however there is a continued failure by tribunals to properly engage with local knowledge. This failure has limited these courts' ability to achieve successful prosecutions, and also has more generally negatively impacted on their credibility as international legal institutions (Clark 2018, 36-37, 315).¹⁰⁹ Clark's persuasive analysis that ICC investigations lack local knowledge stems from issues evident within its predecessor, the ICTR, as the current discussion highlights. It is also an indication of lessons not learnt by the ICC and thus reflects the relevance of this thesis's argument to other international criminal institutions. In short, what is argued here as important discursive conditions to the construction of the witness at the ICTR is also relevant to the ICC.

The highlighting here of the complexities and in some instances incompetence of investigations is not done in order to propose procedural reform. Rather, the focus here, from a discursive frame, is to argue that these procedural complexities and shortfalls in investigations are an important component in understanding the discursive conditions and restrictions of how the subject position of the witness is constituted. In other words, the ICTR legal procedures, including investigations, are part of the 'filtering' process of the construction of the 'witness'. The way in which investigation teams gather evidence, respond to challenges/issues is more than just a reflection of procedural functioning of the ICTR; crucially, they are also part of the discursive process.

Indictments

The RPE states that following an investigation if there is substantial evidence an indictment can be submitted. As Rule 47 details:

If in the course of an investigation the Prosecutor is satisfied that there is sufficient evidence to provide reasonable grounds for believing that a suspect has committed a crime within the jurisdiction of the Tribunal, he shall prepare and forward to the Registrar an indictment for confirmation by a Judge, together with supporting material. The indictment shall set forth the name and particulars of the suspect, and a concise statement of the facts of the case and of the crime with which the suspect is charged. (Rules of Procedure and Evidence 1996, Rule 47)

¹⁰⁹ Also see Gready (2005).

Rule 47 implies there is a linear flow of procedural process from conducting investigations to the submission of an indictment. However, as already discussed, the complexities of investigations are part of the discursive field. It is also the preparation of indictments as well as indictments themselves that are part of the discursive restriction of witnessing. In the following paragraphs it will be argued that in some instances prosecutors mobilised a common narrative that all those who held government positions during the genocide were guilty. The mobilisation of this narrative allowed for successful submissions of indictments without the OTP, at the time of indictments, producing substantial witness evidence. Again, to be clear, the point to be made here is not to identify possible violations of ICTR regulations, but more specifically these procedural irregularities are part of the discursive restrictions of whom can be a witness subject. In other words, individuals who could have potentially been witnesses but were not approached by investigators because they followed a dominant narrative is discursively important. In short what the discussion in the paragraphs below argues is procedural irregularities, such as the way OTP produced indictments, acts a part of the discursive conditions of who can be a witness subject.

To provide an illustrated example, in the Nizeyimana (ICTR-00-55C) case a preliminary motion brought by the Defence stated:

The Defence contends that the March Amended Indictment, contrary to leading case law, contains many allegations which are fundamentally incomplete while others are entirely missing. Most references to ‘orders’ fail to provide the minimum information required by Appeals Chamber jurisprudence concerning the particular acts or particular course of conduct of the Accused making it impossible for him to defend against these allegations ... The Accused further notes that for many of the allegations included in the 1st March Amended Indictment, the Prosecutor seems to have no specific fact implicating the Accused. (Defence Preliminary motion on the defects in the indictment 2010, 6).

This example, like many of the motions relating to indictments that the thesis analysed, expresses concern that the amended indictment lacks specific facts, evidence relating to the allegations. It is not uncommon for defence counsel to raise objections to indictments, indeed it is often part of the defence strategy (Rohan and Zyberi 2017). However, discursively it can be read as indicating that the Prosecutor not providing specific facts, including evidence, as regulated in the RPE, acts as a condition of which individuals can be included as witnesses in indictments. This discursive process is present again in the defence motion requesting judgment for acquittal:

This Rule [rule 98] upholds paramount principles of criminal law: the presumption of innocence, and the corollary burden resting on the Prosecution to prove every element of the counts charged beyond a reasonable doubt. That burden is one of production of evidence before being one of persuasion ... The Prosecution at that stage is only required 'to establish a prima facie case against the Accused'. However, this standard 'is not met by any evidence; there must be some evidence which could properly lead to a conviction' and the 'Trial Chamber must assess whether the Prosecution evidence is actually probative of the elements of crimes charged in the indictment' (Defence Motion for Judgement of Acquittal Pursuant to Rule 98 Dis of the Rules 4 March 2011, 2-3).

Prosecutors using a dominant narrative in order to navigate the complexities of gathering witness evidence for indictments is discursively relevant as it restricts who can potentially be a witness. Associate Legal Officer for the trial chamber I M-L Lambert acknowledges the difficulty of assessing witness evidence in relation to being influenced by external factors such as a dominant narrative of who was guilty. In interview with Horowitz and McKay, Lambert points out the challenge of:

determining whether it is in true accordance with international legal principles, whether the accused, however famous or whichever position they may have held in Rwanda, can legally be held to account. And that's the challenge. (Horowitz and McKay 2008)

ICTR defence lawyer Phillippe Larochelle has argued that in practice ICTR prosecutors have followed a narrative of collective guilt in the manner in which they conducted their investigations.¹¹⁰ Larochelle locates this specifically within what he sees as failure of the prosecution to abide by the rules of procedure for investigations including the gathering of witness statements. Larochelle is in favour of prosecuting the main perpetrators of the genocide. Although, according to Larochelle, investigations should be a linear process, which gather and evaluate the evidence, then if there is substantial evidence produce an indictment that relates to that evidence (Larochelle 2008). In interview with McKay and Nathan, Larochelle states that prosecutors:

are putting things in reverse order, they are saying there was a genocide, there was a government, the only possible rational conclusion is that all the government was responsible ... you are getting into the realms of holding people accountable by virtue of the fact they belonged to an organisation or collective or group which I

¹¹⁰ See Mark Drumbl (2010) 'Collective responsibility and Post-Conflict Justice'.

think is a mistake, and, it actually runs contrary to what the original resolution says which is if you want to find someone guilty, you have to demonstrate their own guilt, intent and guilty acts. You cannot hold someone guilty by the fact that they belong to a government, a political party or an organisation (McKay and Nathan 2008).

In one sense, Larochelle suggests that contrary to the RPE for conducting investigations and producing indictments, witness statements were gathered that fitted a narrative that every member of the government during the genocide was guilty. It is the view of this thesis, having read indictments and motions across a range of ICTR cases, and engaging with interviews with legal counsels, investigators and registrars (Voices from the Rwandan Tribunal), that in some instances prosecution counsel, particularly in the first decade of the tribunal, did subscribe to this narrative. Again it is important to state that the procedural irregularities identified here are part of the discursive conditions that ‘filter’ who can be a witness subject. Indictments being based upon a narrative of collective guilt and then prosecutors trying to find witnesses that fit that narrative was an issue argued by former ICTR defence counsel Avi Singh. In interview with Friedman and McKay, Singh states how the preparation of an indictment should work, however, Singh states that in many instances prosecutors were not doing any of this:

So [an] ideal case, and let’s not even talk about whether the case is good or not, but ideal management of the case. It’s a well pleaded indictment, which actually tells you what evidence is going to be brought. Not one which is written before any of the witnesses are interviewed. There’s timely disclosure of that evidence on which the indictment was based – this is stuff that’s basic right? But none of this has happened. I mean this is stuff you would think is 101, none of this has happened. There would be timely disclosure of the witnesses on which the indictment was based. Those witnesses would then be brought. There would be, actually be a coherence to the prosecution case where you won’t have their own witnesses contradicting each other. So they would think about that before they wrote the indictment.

What is particularly relevant in the above quote is indictments being written before any witnesses have been interviewed. In others, the charges against the accused are written without knowing if actual evidence, including witness evidence, exists to support the charges. This can be interpreted as suggesting that the prosecutors had written an indictment based upon the collective guilt narrative, discussed above by Larochelle, and then needed to try and find witnesses to support that narrative. Specifically, prosecutors only selecting witnesses that fitted this dominant narrative is part of the discursive

restrictions of who can occupy the witness subject position. Prosecutors using this narrative as a frame to inform which witnesses they will speak to and gather statements from means that from the beginning of investigations, possibly before, many individuals would not be relevant to the legal story prosecutors needed to tell.

Here it is worth considering how many witnesses in the Nizeyimana case testified in court. In the Nizeyimana case the prosecutor called 38 witnesses to testify in court and the defence called 39 witnesses (Nizeyimana Judgment and Sentencing 2011, 450-451). Although, the Prosecutor's pre-trial brief stated the names, and summaries of what they would testify to in court, of 50 witnesses, twelve less than actually testified on the witness stand (Nizeyimana Pre-trial brief 2010). One month prior to the submission of the pre-trial brief the Prosecute filed a memorandum title 'Compliance with the scheduling order' (2010). This document stated the names of 71 witnesses that the prosecution would call during the trial (Prosecution Memorandum 2010, 1-9). In short, in the Nizeyimana case the number of witnesses which were to testify in court was reduced from 71 to 38, a reduction of 33 fewer witnesses. This does not include witness statements that may have been gathered by investigators but not included in the scheduling order or pre-trial brief. One example of the witness list being reduced before trial can be seen with witnesses BJW and BYE. Shortly before trial the prosecutor stated these 'witnesses were removed because of difficulty securing their attendance' (Prosecution Memorandum 2010, 3). Witness BYE's statement given to investigators included information about them being victims of rape (Scheduling Order 2010). In short, the ICTR legal procedure, including investigations, are part of the 'filtering' process in the construction of the 'witness' subject.

This section has outlined the important role the ICTR organs and foundational documents have within the discursive process in how the subject of the witness is discursively constituted. Furthermore, it has highlighted the central role legal actors, such as investigators and legal counsels, play in this discursive process. Building on this, the section argued that through a discursive lens the 'foundational documents', investigations and indictments are part of the discursive conditions that significantly restricted which individuals could be a witness. Having now made this argument, the following section, engaging with the above analysis, will use the illustrated example of the right to truth in challenging the claim that the ICTR facilitates witness agency and contributes to a collective legal memory of atrocities.

Right to Truth

This section explores the implication of the tightly controlled discursive conditions of the ‘witness’, discussed above, in relation to the right to truth and its perceived important role in international tribunals and courts in aiding victims-witnesses to understand past atrocities (Klinkner and Smith 2015). Specifically, it is argued that advocacy for the right to truth at international criminal tribunals is a misguided concept because the witness subject is discursively constituted. The focus of the discussion to follow is specifically to critique and challenge the claim that the right to truth can facilitate victim-witness agency in trials and contribute to a collective understand of past atrocities. The common advocacy within the transitional justice legal scholarship for international tribunals to make an important contribution to historical truth conflates individual victims with the legal subject position of witnesses. These subject positions are two different identities entailing nuanced distinctions. To be clear, this section’s engagement with the right to truth should not be understood as making a broad claim within the oeuvre of the literature on human rights. Rather, this thesis challenges the claim in the legal transitional justice scholarship that international tribunals can produce a collective memory of atrocities (Osiel 2012). The right to truth is used to contextualise and illustrate this challenge.

The section begins by briefly summarising the right to truth in the context of mass atrocities. The discussion will then outline the important distinction between the victim subject and witness subject in relation to claims that the right to truth facilitates agency.

Mass Atrocities and the ‘Right to Truth’

The right to truth has gathered traction in recent years as an important part of the dialogue on how legal and human rights norms can aid societies’ recovery from mass atrocities.¹¹¹

The right to truth:

encompasses the right to seek and obtain information relating to the reasons and causes which led to the victimisation of the individuals concerned, together with the prevailing conditions, circumstances and reasons which led to or otherwise facilitated the gross violation of human rights more generally (Klinkner and Smith 2015, 6)

¹¹¹ International and national experiences have led to several diverse institutional and procedural mechanisms to implement the right to the truth. International criminal tribunals, such as the International Criminal Tribunal for the former Yugoslavia, the International Criminal Tribunal for Rwanda and the International Criminal Court constitute one way to establish the truth (United Nations Report 2006).

In the context of legal responses to mass atrocities Klinkner and Smith have argued that international criminal tribunals and courts are a suitable site to facilitate the individual and collective components of the right to truth, and the right 'is playing an increasingly important role in judicial approaches to transitional justice' (Klinkner and Smith 2015, 4) (see Chapter 1, Section 4). According to Groome, the right to truth in the context of the ICTY made important contributions including aiding victims and broader society's interest in the truth about the conflict (Groome 2010, 187). Sweeney has suggested that the right to truth as a freestanding right is complex and more ambiguous than advocates such as Klinkner and Smith acknowledge:

There is also a certain amount of legal elusiveness about the right to truth. The 2006 UN Human Rights Commission 'Study on the right to truth' claimed to have found that the right to truth was an, 'inalienable and autonomous right', but its analysis conflated the historical and the legal bases of the right and failed to engage with the recognized sources of public international law at all. (Sweeney 2018, 358)

Despite the ambiguities of the right noted by Sweeney, in the context of the transitional justice legal scholarship advocates of the right to truth commonly agree that it plays an important role in international criminal tribunals' and courts' contribution to understanding past atrocities (Funk 2011; Groome 2011; Klinkner and Smith 2015; Pindell 2002; Sweeney 2018). The important point to highlight here in relation to the thesis is that the right to truth is encapsulated within legal and human rights norms. To recap from Chapter 1, transitional justice legal scholarship commonly advocates legal and human rights norms, here the right to truth, as an unambiguous response to mass human rights violations. This advocacy perceives international criminal legal institutions as a key process for societal transition, whereby these norms facilitate understanding of the reasons and causes that led to violations occurring. As Groome argues, legal responses to gross human rights violations increasingly employ the 'concept of restorative justice which in part seeks to empower victims with an active role in criminal proceedings' (Groome 2011, 189). In other words, according to Groome witness testimonies given in court go beyond the core role of a court, that is to reach a verdict of guilty or not guilty. Witness testimony, facilitated through the court process, allows past rights violations to be understood in the present. Crucially, however, the thesis disagreeing with the claim that international criminal tribunals are able to produce a collective understanding of past atrocities: law should not be seen as a 'bridge' to move from a violent past to a more

peaceful future (see Chapter 2). The paragraphs to follow will outline that the subject position of witness and victims need to be understood as different identity constructs, which is then used to argue against the claim that the right to truth facilitates agency of victims-witnesses.

Victims-Witnesses

The term ‘victim’ at the ICTR, unlike ‘witness’, is defined. The RPE defines victims as, ‘[a] person against whom a crime over which the Tribunal has jurisdiction has allegedly been committed’ (Rule 2 2010, 1). In relation to the above Rule, in the context of international human rights legal victims has a clear definition. This definition is split into two, direct victims and indirect victims. The former refers to a person who has suffered directly from a serious violation of human rights, whilst the latter means the immediate family or dependents of direct victims (United Nations Basic Principles 2005). However, the subject of the victim, like the witness, is socially constructed, thus understanding the victim as a social construct requires moving beyond the strict legalistic definitions.¹¹² Being a social construct, the victim is plural. In the context of transitional justice, victims have numerous discursive conditions, which importantly vary across the numerous transitional justice institutions and actors victims come into contact with (Hearty 2018; McEvoy 2013).¹¹³ Thus, importantly, understanding the victim subject as being plural foregrounds the importance of understanding victims beyond static legal notions of ‘direct’ and ‘indirect’ victims.¹¹⁴

Here the conceptual framing of victim and witness as separate subject positions can be empirically illustrated in the context of post-genocide Rwanda. Some individuals who testified as witnesses at the ICTR also appeared as victims at Rwanda’s two other legal transitional justice mechanisms, the Rwandan national courts and gacaca community courts (Palmer 2015, 4). Also, ICTR witnesses in some instances had appeared as alleged perpetrators at the national courts and/or gacaca. More crucially in

¹¹² Hearty has argued that in transitional justice the construction of ‘victims’ entails processes of hierarchies which act as a process of exclusion for individuals and groups who do not fit within certain categories (Hearty 2018). Also see Killean (2018); Moffat (2014). For a general discussion on victimology see, ‘Revisiting the Ideal Victim: Developments in Critical Victimology’ (Duggan 2018).

¹¹³ The understanding of victim as socially constructed in the transitional justice scholarship is often referred to as victimhood (Hearty 2018; McEvoy 2012).

¹¹⁴ For example, in the ICC ‘victim orientated approach’ in Central African Republic (CAR) an individual could be a ‘victim’ who is eligible for reparations including financial compensation. Simultaneously an individual could be categorised as a victim in local justice processes in CAR, importantly both these categories of victim would entail inclusions and exclusions of who can be ‘categorised’ as a victim (Hearty 2018, 901; Moffett 2014, 2017).

relation to the chapter's argument is to highlight that the labels transitional justice assigns individuals are not static. In other words, who can be a victim and what they can do in a given transitional justice mechanism will be different to another mechanism responding to the same conflict/atrocity. Thus, importantly, the universality of the right to truth is problematic as it categorises victims as a singular entity as this singularity defines all victims as an unambiguous whole. Here, recapping briefly from Chapter 3's discussion on Foucault's understanding of how identity is constructed is helpful. Subject positions, such as the witness, are not fixed identities, rather subjects are constantly reconfigured and reshaped into new configurations. (Foucault 1979, 52). Subject position, identity, is never self-evident, instead consideration must be given to the central role institutions, and actors, have in producing these identities (Foucault 1972, 201). Framing the subject positions of victim and witness as not being self-evident is crucial because it allows for this chapter, and thesis, to challenge claims in the legal scholarship that international criminal tribunals facilitate witness agency (Groom 2011; Klinkner and Smith, 2015). Therefore, a discursive deconstruction of victim-witnesses highlights the importance of understanding them as distinct identity constructs. Understood as distinct and discursively restricted subject positions brings into question the extent to which the right to truth is able to facilitate agency at international criminal tribunals.

There are two main points to draw out from the discussion above in relation to the thesis. Firstly the victim subject and witness subject are different identities, which should not be conflated, and both subjects are plural, thus do not fit neatly within the singularity of the right to truth. Secondly, the conflation of victim and witness subjects in the right to truth lacks understanding of the 'witness' at the ICTR as being a discursive object of legal knowledge. The witness as a discursive object is a point that will be further developed in Chapter 6. For the purpose of this section, to be able to challenge the claim that the right to truth facilitates agency and collective understanding of atrocities it has been necessary to first foreground the important nuances between the witness and victim subject(s) and why the conflation of these subjects is problematic. This clarification now enables the following discussion to argue that understanding the 'witness' as being constituted within tightly controlled discursive conditions challenges the right to truth claim that international tribunals and courts facilitate witness agency.

The discursivity of the 'witness' vs the right to truth: universality, agency and collective legal stories

In the transitional justice legal scholarship advocates of the right to truth commonly use the conflation of victim and witness subjects in claiming the benefits of judicial mechanisms to aid agency. This can be seen in Klinkner and Smith stating:

one of the key reasons for victim participation [at the ICC] is that it ‘empowers them, recognises their suffering and enables them to contribute to the establishment of the historical record, the truth as it were of what occurred’ thus arguably enhancing the truth-finding process and the realisation of the right to truth. (Klinkner and Smith 2015, 23)

The common claim in the legal scholarship, such as that of Klinkner and Smith, suggests that international criminal courts and tribunals do two things in relation to facilitating the right to truth: upholding the core principle of universality and giving victims a site from which they can tell their story (agency). Firstly, according to advocates (Klinkner and Smith, Groome, Sweeney) international criminal institutions are embodied with the universality of legal and human rights norms (Turner 2016). The universality of human rights, here the right to truth, is seen as a positive and fundamental component to international criminal institutions facilitating the right to truth for all victims. As Sweeney states, the right to truth, when considered in the context of the underlying values of each human rights treaty, can make a positive contribution to the individual and collective components of the right to truth (Sweeney 2018, 356). According to Sweeney, when the right to truth is considered in relation to each specific context, including international criminal tribunals and courts, it supports the ‘vindication of victims’ and their next of kins’ [sic] rights to know about pre-transition human rights abuses’ (Sweeney 2018, 356). However, this universality central to the right to truth fails to understand the discursive restrictions that produce tightly controlled discursive conditions that determine who is able to talk about past rights violations at the ICTR, and what knowledge of the past they can talk about.

Disagreeing with claims by advocates that international criminal tribunals, through upholding the universality of legal and human rights norms, facilitate victim-witnesses to hear, as well as tell, stories of rights violation, it is argued here that this universality in the context of international criminal tribunals is highly problematic. In short, prosecutors select only a fraction of victims of violations to testify in court. The fact that only a small portion of victims testify is problematic for scholars who advocate the ICTR can facilitate victims telling their story of atrocities. Telling victims that they

will be able to tell their stories is an aspiration destined to remain unfilled and therefore leave many victims disappointed and abandoned because most victims will not be called to testify in court (Megret 2018a; Moffett 2014). Legal counsel selected only the individuals that contribute to the narrow legal narrative they needed to tell in order for a legal judgment to be reached (Dembour and Haslam 2004). This narrow selection of individuals emphasises that the core role of trials is to reach a legal judgment of guilty or not guilty, and crucially, not to produce a comprehensive understanding of the past. Furthermore, the ICTR and the ICC being located thousands of miles away from where victim-witnesses live means in practice many individuals feel isolated and disconnected from trials (Clark 2018). The ICTR was located in Arusha Tanzania, while the ICC is located in the Hague, Netherlands. More crucially, the universality of the right to truth fails to understand the discursive conditions and practices at the ICTR that substantially restrict who is able to be a 'witness'. As foregrounded in Section 1, the ICTR foundational documents, United Nations Resolution 955, ICTR Statute and RPE, are important discursive components that shape who can be a 'witness'. Relatedly, the messiness of investigations and motion/motion decisions also discursively 'filter' which individuals are constituted as witnesses. Thus, viewed through a discursive lens, these discursive processes contradict the claims made by advocates of the right to truth.

Secondly, there is a need to challenge the claim that the right to truth at international criminal tribunals and courts facilitates victim-witness agency. For Groome, agency allows individuals who had directly experienced violations and have been left marginalised by the violations to feel part of the legal process of accountability for those violations (Groome 2011, 187). Importantly for advocates, the right to truth at international criminal tribunals also provides agency in the sense that it provides a site for individuals who had previously been silenced or marginalised to tell their story of the suffering they have experienced (Groome 2011; Klinkner and Smith 2015). In other words, the common advocacy within the legal transitional justice scholarship for international criminal tribunals to contribute to uncovering the truth of past rights violations assumes victims-witnesses as self-evident. However, as argued in the first section of the chapter, the discursive conditions of a discourse of witnessing is highly restrictive. Thus, the claim that the right to truth provides agency is significantly misguided. Here, drawing upon the above discursive analysis of the data, the creation of the ICTR, Resolution 955, the Statute and RPE, shape and orientate which individuals may be able to testify at the ICTR. That being, the individuals according to the ICTR

mandate who can be indicted and the crimes the tribunal has jurisdiction over. In the context of the right to truth's claim of agency the ICTR 'foundational documents' restrict which individuals might be interviewed by investigators. Those individuals who experienced violations which are not defined as crimes within the ICTR jurisdiction will not be considered as potential 'victim-witnesses' by the ICTR. Put more crudely, the claim of agency in the right to truth fails to understand that the act of creating the ICTR has already begun the process of withdrawing agency from individuals that are not relevant to the core legal purpose of reaching a legal determination of guilt or innocence. Relatedly, agency is further restricted by the discursive conditions of investigations and indictments. The messiness of investigations, including lack of professional investigators, lack of local expertise and knowledge and prosecutors following a dominant narrative of who was guilty, discursively constituted the restrictions on who could potentially be a 'witness'. Klinkner and Smith, who conceptually do not recognise the discursive restrictions of investigations and indictments, put forward the positive aspect of investigations in relation to the right to truth:

[F]or the purpose of conducting its investigation into alleged offences, international criminal law mechanisms, unlike their human rights counterparts, operate within the territories of the abusing States, and as such, have first-hand access to evidential materials, including those which might assist in answering the many questions that victims and their families have in the aftermath of atrocities. (Klinkner and Smith 2015, 17)

Moreover, as evidenced in Section 1, indictment and motion/motion decisions are further discursive layers in how the 'witness' is constituted. Motions are a key site for the discursive battleground between prosecution and defence counsel, and judges in 'filtering' which witnesses can be removed or added to the indictment as well as restrictions on what they will testify about. To give a further example here of how motions are discursively restrictive in the Nizeyimana Case a prosecution motion in relation to 'witness review' states:

On 6 and 7 September 2010 the Prosecution conducted a review of its List of Witnesses and the statements of the various witnesses in comparison to the Second Amended Indictment filed Friday, 31 August 2010. One result of that witness review was that the evidence of 17 witnesses was identified as being excessive to prove the same facts as the evidence of other witnesses on the list. That overall assessment was based on the assumption that the evidence submitted pursuant to

Rule 92bis, in the form of written statements, will be received by the Trial Chamber.

Motions such as this are common throughout ICTR trials. Importantly here, read through a discursive lens, motions are part of the discursive conditions of who can be a witness at the ICTR. In short, motions restrict who can occupy the subject position of the witness. This is crucial in challenging assumptions of legal witnesses as self-evident (Groome 2011). All subject positions, including the witness, are restrictive and include processes of inclusion and exclusion (Foucault 1991). Understanding how some individuals who experienced the genocide against the Tutsi are bestowed the right to speak requires consideration of individuals that are not rendered with the right to speak: individuals not constituted as a witness subject. As Foucault reminds us, '[n]othing in man – not even his body – is sufficiently stable to serve as the basis for self-recognition or for understanding other men' (Foucault 1987, 87-88). When claims of agency are made, such as by advocates of the right to truth, it is assumed witnesses are self-evident. However as has been argued in this section, no identity, including legal witnesses, is ever self-evident. Rather they are formed with the discursive conditions of the ICTR and its legal actors. Specifically, to more fully understand what agency witness subjects have, or do not have, necessitates the need to understand the discursive conditions in which the witness subjected is constituted.

Conclusion

This chapter has explored how the subject position of the witness at the ICTR is discursively constructed, and has argued that the witness is formed within tightly controlled discursive conditions. Showing these discursive conditions allowed the chapter to go on to challenge claims of witness agency in the right to truth. The opening section outlined how the three organs of the ICTR: Registry, Chambers, and OTP, are all important sites in analysing how the witness subject is discursively constituted. Building on from this the discussion then, engaging with the analysis, Statute, RPE, and Indictments, argued that these 'foundational documents' are a crucial component of understanding how the witness is constituted. Specifically, read through a discursive lens the ICTR 'foundational documents', through the crimes the ICTR has jurisdiction over and the messiness of investigations, discursively restrict who can occupy the subject position of the witness. Section 2 then used the analysis of the data to challenge the claim

that the ICTR facilitates witness agency and is able to produce a collective memory of atrocities. This challenge was made using the illustrated example of the right to truth. This argument was developed across three interconnected points. Firstly, the witness subject and victim subject are different identity constructs, secondly the discursivity of legal witnesses is at odds with the claim of agency in the right to truth, and thirdly the legal story the ICTR produces lacks plurality. Therefore, this chapter's argument contributes to answering the thesis's subsidiary question, 'how is the witness discursively constituted?' Specifically, the discursive conditions of a discourse of witnessing at the ICTR significantly restricts which individuals can occupy the subject position of the witness. It has been shown that an important part of these conditions are the legal actors, such as judges, legal counsels, and investigators, who shape in important ways the conditions determining out of all the individuals who experiences the horrors of 1994 which ones can become the witness subject.

Chapter 5 – Memories of Violence and the Limitations of Law

This chapter considers the way in which violence is remembered during the legal construction of memory at the ICTR. This consideration is made in relation to parts of the legal transitional justice scholarship advocating legal proceedings as the primacy of transitional justice mechanisms (Dixon and Tenove 2013). Scholars who advocate this legalistic orientation of transitional justice argue that tribunals contribute towards a collective narrative of why and how violations occurred (Groome 2011; Klinkner and Smith 2015). This chapter critiques and challenges this position. The chapter argues that the multidimensional experiences of violence are incompatible with the legal scholarship's claim that legal mechanisms are able to account for individual diverse experiences of violence (ICTR 2013; Osiel 2012). In particular, it discusses the limitations of the way in which violence is constructed and shaped by law during the legal processes (pre-trial) at the ICTR (Felman 2002; Fujii 2009; Viebach 2017, 2019). Through engaging with the work of Lee Ann Fujii, the chapter begins by outlining the variety of the manifestations of violence during the Rwandan genocide against the Tutsi; the diverse individual and personal characteristics of violence; and individual perpetrators' rationale for participation during the genocide (Fujii 2009).¹¹⁵ For the purpose of this chapter what is useful about Fujii's research is her focus on the social dynamics of genocide, particularly the complexities in understanding experiences and behaviours.¹¹⁶ This engagement with Fujii is in order to contrast the varieties of forms of violence evidenced by Fujii's research, and the form of violence in indictments that witnesses are required to remember which contributed to legal determinations. The chapter concludes by discussing witnesses' accounts of violence given in court, arguing that the narrow depictions of violence such as these, camouflage the absence of memories relating to the wider manifestations and complexities of genocidal violence.

The primary focus of the previous chapter was to understand the discursive conditions of how the 'witness' is constituted. This chapter focuses on how discursive conditions shape what witnesses can talk about. Specifically, it shows how the discursive

¹¹⁵ See Elain Scarry *The Body in Pain* (1985); Jenny Edkins *Trauma and the Memory of Politics* (2003); Cathy Caruth *Unclaimed Experience: Trauma, Narrative and History* (2010). In the context of narratives of trauma in post genocide Rwanda see Julia Viebach *Of Other Times: Temporality, Memory and Trauma in Post-genocide Rwanda* (2019).

¹¹⁶ For further discussions on the Genocide against the Tutsi see Eltringham (2003); Strauss (2006); Mamdani (2002); Melvern (2004).

conditions of the ICTR shape and restrict the construction of knowledge of mass right violations. In particular, it shows how the crimes within the ICTR's jurisdiction act to discursively restrict the complexities of the multidimensional experiences of violence. The ICTR constructs legal memories of violence that contribute to the factual bases of decisions for a legal judgment being reached. Crucially, however, understanding memory as process, as this thesis does, means the construction of legal memory of violence at the ICTR is embedded within the tightly controlled discursive conditions of a discourse of witnessing (see Chapter 1 and Chapter 3). In short, the process of legal construction of memory at the ICTR is produced through and by the discursive conditions and practices of the tribunal. Thus it will be argued that the rigidity of crimes within the ICTR jurisdiction and the ICTR legal processes are unable to understand the complexities and fluidity of the violence. To be clear, it is not being argued here that the ICTR should have been more flexible in its interpretation of the crimes within its mandate or included additional crimes within its jurisdiction. Rather, it is the temporality and rigidity of legal categories of crimes that is incapable of comprehending the messiness and complexities of violence during mass atrocities. Therefore, it is the aim of this chapter to challenge the claim that through the testimonies of witnesses the ICTR is able to tell stories of the diverse individuals' experiences of genocidal violence.

The following two sections will outline the complexity of individual experiences of violence during the Rwandan genocide against the Tutsi and how these complexities are at odds with the legal codification of the crime of genocide. The chapter then argues that the discursivity of legal practices at the ICTR acts to camouflage the absence of memories relating to the wider complexities of the violence. For this the chapter engages with Ricoeur's (2004) concept of 'manipulated memory'. The arguments made in this chapter directly relate to answering the thesis's subsidiary research question: 'How do discursive conditions shape the way violence is remembered at the ICTR?' This section begins by briefly summarising the claim by advocates, such as Osiel, that legal institutions responding to mass atrocities can account for the individual experiences of violence (Osiel 2000). These claims will be contrasted with the legally codified and temporally bound categories of crimes within the ICTR jurisdiction, including the crime of genocide. The discussion will then outline the diverse individual experiences of genocidal violence in Rwanda engaging with the research of Fujii (2009). It is Fujii's foregrounding of genocidal violence in Rwanda as a dynamic process that is of specific relevance. This supports the section's claims that the crimes within the ICTR's mandate serve the specific

legal purpose of reaching a legal determination and should not be used as a tool to claim that law can make sense of past atrocities in the present.

Law, Genocide and Legal Memories of Mass Violence

In the legal transitional justice scholarship a common understanding is that through witness memories the testimonial evidence given in court can contribute to understanding the individual reasons for and experiences of the genocide (Keyner 2019; Klinkner and Smith 2015; Osiel 2000; Sikkink 2011). However, it is the aim of this chapter to challenge this claim that law can produce detailed knowledge of the diverse experiences of genocidal violence. For supporters of this claim such as Osiel, criminal tribunals addressing mass atrocities contribute to understanding the reasons and causes that led to the atrocities occurring, including individuals' experiences of violent events. For example, according to Osiel, atrocity 'show trials' position administrative massacres centre stage, shining a spotlight on individuals affected by mass violence to share their personal experiences of the reasons and causes that led to the atrocities occurring (Osiel 2012, 4) (see Chapters 2 and 6). The claim that atrocity trials can aid individual agency was challenged in the previous chapter in relation to the right to truth (see Chapter 4). Osiel's understanding is framed by a conceptual insight in liberal thought. The crux of Osiel's liberal framing of memory argues that memories belonging to individuals can be 'recovered' through trials (Osiel 2012, 4). However, in the context of this section arguing that law is incapable of understanding the complexities of genocidal violence, there is a need to contrast claims such as Osiel's against the discursive conditions of crimes in the ICTR jurisdiction. In short, crimes the ICTR prosecutes, including Genocide, are part of the ICTR discursivity which restricts what knowledge of violence is constituted at the tribunal.

The ICTR and the crime of Genocide

The ICTR Statute, article 2(2010) defines the crime of Genocide as:

any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:

- (a) Killing members of the group;
- (b) Causing serious bodily or mental harm to members of the group;
- (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
- (d) Imposing measures intended to prevent births within the group;

- (e) Forcibly transferring children of the group to another group.
- 3. The following acts shall be punishable:
 - (a) Genocide;
 - (b) Conspiracy to commit genocide;
 - (c) Direct and public incitement to commit genocide;
 - (d) Attempt to commit genocide;
 - (e) Complicity in genocide.

However, genocide can be defined in at least two ways, the legalistic conceptualisation of genocide, as defined in the ICTR statute, and the ‘social’ definition (Anderson 2017, 4). Genocide, as ‘socially defined, is necessarily broad, attempting to incorporate all aspects of genocide and genocidal behaviour... The legalistic conceptualization, or codification, of genocide is far more focused, individualized, and restrictive’ (Anderson 2017, 6-7).¹¹⁷ Read through a discursive lens, the legal definition of the crime of genocide at the ICTR can be seen as being part of the discursive conditions that ‘filter’ and shape knowledge about the genocide violence. To be able to legally prove an individual is guilty of Genocide, prosecutors have to demonstrate very specific criteria have been met (Schabas 2008), specifically, the requirement to demonstrate that an individual had specific genocidal intent to destroy a group in whole or in part (Schabas 2008). In meeting this criteria international criminal law requires fixed and temporally bound sets of events, actions and agents that directly relate to demonstrating ‘beyond a reasonable doubt’ that an individual intended to destroy the ethnic group, Tutsi. In other words, the purpose of the legal codification of the crime of genocide is not to understand the variety of genocide related violence (Anderson 2017; Drumbl 2011; Schabas 2006).¹¹⁸ However, crucially, this narrow legal framing of violence is in contrast to the diverse and changing nature of genocidal violence in Rwanda in 1994, as will be outlined in the following paragraphs engaging with the work of Fujii (2009). The crimes the ICTR is mandated to prosecute,

¹¹⁷ The recently released report (June 2019) by Canada’s National Inquiry into missing and murdered indigenous women and girls drew heated debated centring on the report’s conclusion that violence against indigenous women and girls constituted genocide. Oszu suggests in the context of the Canadian inquiry, that while the legal codification of genocide is clunky and historically contingent, however the crime of genocide can be central to ‘illuminating some of the structural forces underlying and animating a range of events that may otherwise appear unrelated’. Oszu argues that central to the debate around the report’s conclusion is the relation between law and society, particularly the way in which legal definitions are applied and made sense of within different social conditions (Oszu 2019).

¹¹⁸ Also see, Meiches 2019; Bachmann 2019; Akhavan 2012; Moses 2016. As one ICTR judge (see Eltringham 2019, 136-137) stated in relation to the very specific information they needed from witnesses to determine if an individual is legally guilty of genocide: What I need to know is whether someone committed acts with the intention ‘to destroy, in whole or in part, a national, ethnical, racial or religious group’. What I want to hear is that this member of the Interahamwe was called up by this specific person on 8th April who gave them car keys and guns and said ‘go to this place and this place and kill Tutsi.’

including Genocide and Crimes Against Humanity, are part of the discursive ‘foundational documents’ that form the discursive conditions that produce a singular and narrow knowledge about the past.¹¹⁹ It is the repeatability of certain ‘statements’, such as the crime of Genocide, that constitute a dominant form of knowledge about mass rights violations. As Foucault reminds us, it is the discursive practices of institutions and actors, here the ICTR: judges, registrars, legal counsels, investigators, that determine how certain ‘statements’ come into play in various strategies in which knowledge is produced (Foucault 1979, 101). Dominant ‘statements’ (series of signs) are fundamental to the ICTR’s production of knowledge about the horrors of the 1994 genocide against the Tutsi. A dominant series of signs is a representation allowing for the making of truth and false claims that become over time normalised accepted social practices (Foucault 1972, 98-101).

In the context of the claim that law is able to tell individual stories of past violence, this understanding of Foucault is relevant as it foregrounds that legal knowledge construction of past atrocities is highly restrictive. Crucially, it is the definition of crimes in the ICTR jurisdiction as well as witness statements in indictments that discursively contribute to the production of a narrow and singular knowledge of genocidal violence. Indictments, being a crucial site of the discursive restrictions for the production of knowledge, will be unpacked further in the latter part of this chapter. To give one example here, indictments detail crimes the prosecution aims to prove, which often include summaries of what witnesses will testify about in court. In the Amended Second Indictment in the Nizeyimana Case, under the subheading of ‘Training and distribution of weapons’, it summarises what some of the witnesses will testify about:

¹¹⁹ Schabas (2008) has suggested that considering that legally the Crimes of Crime Against Humanity and Genocide are very similar, particularly the inclusion in both of extermination and length of sentences that can be issued, globally it is likely that if prosecutors focused on the Crime Against Humanity rather than Genocide successful prosecution may be more likely because the Crime Against Humanity does not require prosecutors to demonstrate an individual had specific genocidal intent to destroy a group in whole or in part. In part Schabas locates the continued focus on prosecuting Genocide in its powerful symbolic representation in popular discourse, Genocide is known as the ‘crimes of all crimes’ (Schabas 2008, 17). Article 3 of the ICTR Statute states, the

Crimes against Humanity The International Tribunal for Rwanda shall have the power to prosecute persons responsible for the following crimes when committed as part of a widespread or systematic attack against any civilian population on national, political, ethnic, racial or religious grounds: (a) Murder; (b) Extermination; (c) Enslavement; (d) Deportation; (e) Imprisonment; (f) Torture; (g) Rape; (h) Persecutions on political, racial and religious grounds; (i) Other inhumane acts.

From 7 April 1994 until mid July 1994, Iidephonse Nizeyimana distributed weapons to Interahamwe, including Bourgmestres and civilians at ESQ who were members of the joint criminal enterprise referred to in paragraph 5 herein, and authorised, ordered or instigated ESQ soldiers to train civilians such as Burundian refugees and University students at various locations including in a valley below ESQ, at Butare Hospital and in a forest near the Butare University. In particular, in accordance with instructions of the Accused, Sous-Lieutenant Jean-Pierre Bizimana trained youths at Butare Hospital and Sous-Lieutenant Ezechiél Gakwerere, commander of the first company in Nouvelle Formule at ESQ, utilized a number of subordinate FAR soldiers and students from ESQ to facilitate the training and cooperation with Interahamwe. These acts of training and distributing weapons were done in furtherance of the purposes of such joint criminal enterprise. (Nizeyimana Second Annotated Indictment 2010)

It is the detail provided relating to the accused's involvement in genocide preparations why this part of witness accounts has been included. In short, from a discursive position this summary of witness statements is part of the legal evidence prosecutors use to show the legal threshold of the crime of genocide has been met. Prosecutors select parts of specific and often small amounts of witness statements to include in indictments directly related to crimes. The essence of including detail of witness statements in indictments is to contribute to a legal determination of guilt or innocence being reached. Discursively this is very important, as prosecutors only include in indictments parts of witness statements that directly contribute as evidence to prove the accused committed the alleged crimes. Other details given in statements that do not speak directly to the alleged crime are not included. In short, indictments are part of the discursive condition that contribute to law being incapable of understanding the complexities of genocidal violence.

In order to support the section's claim that the ICTR is unable to tell stories of individual experiences of violence, the following paragraphs will summarise Fujii's research that highlights the complexity and diversity of the violence during the 1994 genocide against the Tutsi. Building on this summary, the section engaging with the primary data will argue that the complex accounts of individuals' experiences of violence are incompatible with law's need to produce an authoritative singular account of atrocities.

Genocidal violence: Layers and fluidity of events, actions and agents

Experiences of violence during the genocide against the Tutsi, unlike the legal codification of the crime of genocide, were fluid and multifaceted (Fujii 2009). The crimes within the ICTR's jurisdiction needed clearly defined categories of events, actions

and agents. However, experiences of genocidal violence in Rwanda did not unfold within neatly defined legal categories. As Fujii highlights, attempts to understand genocidal violence in Rwanda by using systems of categorization rigidifies actions and people in ways that do not mirror the realities of genocide: ‘genocides are dynamic, while categories are static’ (Fujii 2009, 8). Fujii stresses the point that ‘If we were to base theories of agency on only one set of actions—the set that most easily fits an existing analytic category, our theories would be at best, partial, and at worst, wrong’ (Fujii 2009, 9). In the context of this section, challenging the claim that the ICTR can produce a collective memory of individual diverse experiences of violence, Fujii’s insights are instructive. Specifically, the ways in which violence was enacted, who perpetrated the violence and the reasons for their participation were dynamic processes. Understood as a dynamic process, ‘genocide ceases to be a clearly demarcated temporal period of mass slaughter, [unlike legal categories], and becomes instead a messy agglomeration of actions taken and not taken, decisions made and unmade, perceptions reinforced and transformed’ (Fujii 2009, 84). Thus individual experiences of violence cannot be reduced to the legally codified definitions of ICTR crimes. Crucially, framing the genocidal violence in Rwanda as a ‘dynamic process’ is here deliberately used to contrast with the rigid categories of crimes that law is reliant on in order to reach a legal judgment.

Following Fujii, the key actors in understanding genocidal violence in Rwanda as a ‘dynamic process’ are local leaders, their collaborators and a group Fujii calls ‘joiners’ (Fujii 2009, 15). In particular, ‘joiners’ are key to understanding the process of genocidal violence, as it was ‘joiners’ who carried out much of it (Fujii 2009, 15-16). Fujii defines ‘joiners’ as the ‘lowest-level participants in the genocide’, who had no ‘prior military or police training but went about their task in [an] organized fashion’ (Fujii 2009, 15-16). ‘Joiners’ had the most to lose and the least to gain through their actions, as they were the ones who would feel the direct impact of the annihilation of their communities (Fujii 2009, 15-16). In short, it is particularly ‘joiners’ representing the messiness of genocidal violence that are relevant to this section challenging the claim that the ICTR can produce a collective memory of violence.

For example, ‘joiners’ rationale for participating in violence was often complex and layered. As one ‘joiner’ Fujii interviewed noted, ‘some of us participated because we were forced to by local leaders; there were those who participated willingly, and some unwittingly’ (Fujii 2009, 155). According to interviewees, Fujii notes that many of those who said they were forced to participate did so because the alternative would have been

to be killed by those who were recruiting them (Fujii 2009, 155). Interestingly, Fujii also points out that ‘joiners’ who self-identify as ‘willing’ participants stated they did so with a large amount of external pressure:

All three categories bespeak situational exigencies, which others in the community emphasized as well. A war was waging. Soldiers were shooting. People were fleeing. Some were getting shot and raped. Authorities were calling on residents to protect their community. Then the awful news: the RPF-Inkotanyi shot the president’s plane down from the sky—testimony to the rebel army’s power and its ultimate goal of taking the country by force. Given these circumstances, even those who participated willingly did so under powerful external pressures (Fujii 2009, 156).

Importantly, Fujii emphasises the need to not reduce participants’ actions in the violence to situational exigencies. Situational explanations perceive participation as based only on circumstance, which Fujii argues against. Whilst circumstance played a role, understanding participation as only situational circumstance cannot get to the complexities of individuals’ participation in the violence. On this point of participant agency Fujii argues:

Joiners did make choices, even if they were not completely conscious of the calculus by which they were making them. By their own explanations, Joiners tend to straddle categories, rather than fitting neatly into one. For example, Eugène, the Tutsi Joiner who said he joined the Interahamwe to save himself, fits the category of ‘forced’ participant since as a Tutsi, he had no choice but to try to save himself. Yet, given his precise circumstances when he joined the Interahamwe (the fact that he had a stamped document stating he was Hutu, not Tutsi), he also fits the category of a ‘willing’ participant. With the stamped document he obtained from Paul, Eugène had another option. He could have tried to save himself by fleeing the area, as many other Tutsi did. But he did not take that option, which makes Eugène both a ‘forced’ and ‘willing’ participant. (Fujii 2009, 156).

Understanding genocidal violence as a ‘dynamic process’ is also useful as it casts light on the fact that acts of violence during the genocide against the Tutsi were not exclusively carried out by a homogenous group with a pre-defined agenda (Fujii 2009). Specifically, this contrasts with legal categories of genocide in which a group follows clearly defined orders and attacks specific targets based upon a pre-conceived plan. It is a fact that there were large groups who acted out orders to kill with the intent of destroying the ethnic group Tutsi based upon orders from political and military leaders (Fujii 2009). It is indeed

these neat categories that are central to prosecuting the crime of Genocide (Akhavan 2019). Notwithstanding this, there was also a significant amount of genocidal violence experienced by individuals who do not fit within the law's need for temporally fixed events, actions and agents. Importantly, it is the diverse justifications for participation, as discussed above, that support this section arguing that the law is unable to understand individuals' experiences of violence. As Fujii argues:

[E]thnic masses do not act as a single unit, but as a variety of groups and groupings that do not always follow ethnic lines ... [There is a need to] investigate how violence interacts with ethnicity and how ethnicity, in turn, interacts with violence, without assuming that each exists separately from the other in premade or stable form. We need to investigate how exactly the conflict or violence is, or becomes, ethnic, rather than assuming it to be such from the start (Fujii 2009, 5, 10)

Important here is Fujii's foregrounding that genocidal violence was ethnic, but ethnic violence was one amongst other acts of violence performed and experienced during the genocide against the Tutsi. The legal crime of genocide, as well as the Crime Against Humanity, is concerned with ethnic violence. Particularly, ethnic violence provides law with clearly defined and legal codification, such as events, actions and agents that are fundamental to legal processes. However, the claim that law can tell stories of diverse individual experiences of violence relies on, or is insurmountably tied up within, these static categories: stories of violence at the ICTR are those that fit within the static legal categories. Crucially, it is the 'dynamic process' of genocidal violence defying legal categorisation that cannot be part of the collective legal story.

In summary, what is particularly helpful in Fujii's work in relation to this section is understanding that experiences of violence, who enacted that violence and why they decided to participate was an extremely complex and fluid process. It is this fluidity that is in contrast to legally codified categories. Fujii refers to participants' complex reasons for enacting violence during the genocide against the Tutsi as a script. This 'script' consisted of a wide variety of diverse performances (Fujii 2009, 13). There were actors who followed the text precisely,

such as when killers [went] after Tutsi and only Tutsi. Some [strayed] from the text as when killers target Hutu as well as Tutsi for killing. Some may abandon the script altogether as when killers help Tutsi instead of hurting them (Fujii 2009, 13).

Local ties were key to these diverse performances. It was often existing ties that ‘shaped how people saw and reacted to their situation. In certain circumstances, they enabled Joiners to continue to see Tutsi as friends, not targets, and some Hutu as targets, not friends’ (Fujii 2009, 20). These localised dynamic relations do not fit within the legally codified categories of the crime of genocide. For the purpose of this chapter, understanding the violence as a ‘script’ is useful as it draws out and shows that within the legal story of events, agents and actions the ICTR needs to tell, there exists a multitude of events, agents and actions that are beyond the comprehension of law.

In short, the genocidal violence enacted and experienced during the genocide against the Tutsi was dynamic. This view is in contrast to the rigid and temporally fixed legal categories law is reliant on. Having highlighted the complexities and multi-layered nature of violence, the remainder of this chapter, engaging with the primary data, will argue that the ICTR is only capable of producing a single and narrow story of violence.

Beyond Law: The Plurality of Violent Memories

Discursive restrictions of witness memories

It is the crime of genocide as part of the ‘foundational documents’, discussed above, that discursively restricts how individual experiences of violence are understood at the ICTR. Indictments, including statements and summaries of what witnesses will testify about, are also important to understanding the discursive conditions in the construction of knowledge of past violence. The Rukundo amended indictment also includes a summary of evidence that each witness will testify to. These summaries were drawn directly from the statements witnesses gave to investigators. These summaries include footnotes that indicate which part of the witnesses statement the summary is discussing. Importantly, it is the technical legal criteria of the specific crime that discursively conditions which witness statements or summaries will be included in the indictment and the specific parts of the statements. In the Rukundo second amended indictment the prosecution explained the charges against the accused and included the names, or pseudonyms, of the witnesses who would give evidence related to each specific charge. Taken from the Emmanuel Rukundo Amended Indictment page 5 (28th September 2006):

Between 12 and 15 April 1994, Emmanuel Rukundo, dressed in military uniform, armed and accompanied by soldiers, stopped at a roadblock around Imprimerie de Kabgayi, near the S1. Leon Minor Seminary, to talk to and observe the activities

of soldiers who were checking the identity cards of persons who passed through the roadblock. Several Tutsis were arrested by soldiers and interahamwe at this roadblock and killed nearby. Emmanuel Rukundo presence at this roadblock provided encouragement to these soldiers and interahamwe to carry on with the killing of Tutsis at this location. Emmanuel Rukundo thus instigated or aided and abetted the killing of Tutsis at the Imprimerie de Kabgayi roadblock

It is these specific summaries of witness statements that relate to proving the accused committed the crimes mandated with the ICTR that the prosecution counsel select to include in the indictment. In the Nizeyimana Second Amended Indictment the prosecution includes within it which witnesses will speak in court and what they will talk about:

Butare University

14. From on or about 16 April 1994, Ildephonse NIZEYIMANA ordered and instigated soldiers from the FAR, ESO, Ngoma Camp and Butare Gendarmerie Camp, and Interahamwe who were members of the joint criminal enterprise referred to in paragraph 5 herein to kill many Tutsi civilians at Butare University, with words to the effect that no Tutsi should remain. In greater particular: (i) under the authorization of the Accused, Chief Warrant Officer Damien Ntamuhanga engaged a number of subordinate FAR soldiers from his platoon, including Sergeant Major Innocent Sibomana and others, and exercised his command to target the civilian victims, using lists and identity cards to assist with that purpose; Witness ZT Witness AZM Witness ZBH WitnessMCM Statement signed 0310712010 at page 4; K0514404, paras 2& 6 Witness AUR WitnessTQ Witness GFL Witness ZCB Witness ZCA

It is the listing here of witnesses in relation to the specific detail of the crimes of Genocide and Crimes Against Humanity that are discursively important. As discussed in Chapter 4, indictments are part of the discursive conditions that constitute who can be a witness. Importantly, indictments also discursively ‘filter’ what the subject of witness can talk about. In the extract above, prosecutors select from all the witnesses who gave statements to investigators only witnesses that relate to the legal categories witness memories must speak to. In interview with Nathan chief prosecutor Jallow states this explicitly:

We thought we needed to reduce the number of witnesses as well because they were running into hundreds, close to 100 in some cases. Pick the best witnesses, proof them, prepare, I mean confirm them, make sure they are ready for court even before we filed our indictment (Nathan 2008).

It is the discursive conditions of indictments that restrict what witnesses can talk about at the ICTR. The discursive conditions of indictments are central to law telling a story of atrocities. However, law can only tell a narrow and singular story, plurality is beyond the capability of law. The discursive conditions shaping what the witness subject can talk about are further evident in motions. It is motions and motion decisions where prosecutors, defence and judges debate which witnesses listed in indictments can testify in court, and what part of their statement they will talk about. That motions are an important part of the discursive conditions of what knowledge of past horrors are told at the ICTR is something that will be further discussed in Chapter 6.

In addition to the discursive conditions of indictments are pre-trial briefs. Pre-trial briefs are submitted before the commencement of a trial, outlining the evidence supporting the prosecution's case and list of witnesses including summaries of the evidence witnesses will speak about in court (ICTR Rule 73*bis*). These briefs are submitted by prosecutors after indictments and therefore have another layer of discursivity. Pre-trial briefs, like indictments, include summaries of what each witness will testify to, the content of each summary is drawn directly for the statement's witnesses gave to investigators. This can be seen in the summary of witness Marie Claire Mukamusoni:

The witness will testify that in the camp there was a group of soldiers who Nizeyimana used as a killing squad. The killing squad included cadet soldiers, Fulgence Niyibizi and Jerome who were ruthless killers and very close to Nizeyimana. They used two sites for killings: Cares and Rwasave. She saw Jerome taking the three persons away and when he came back he was covered in blood. She will testify that during the genocide a group of five or six Interahamwe came to the camp almost everyday to talk and eat with Nizeyimana. She was afraid of this group Towards the end of April 1994, she saw the cars of some bourgmestres in the camp and weapons were loaded into their cars. The weapons were mostly AK-47. She saw the bourgmestre of Shyanda come to ESO to collect guns in exchange for some sacks of beans. In relation to rapes, she was not out in the field, but most of her male colleagues who returned from killing often told them they raped women in Hotel Faulcon and Ibis. A traumatized soldier once told her that he had raped a woman old enough to be his mother in Hotel Faucon. (Prosecutor's Pre-trial Brief 2010)

The detail in the summary of what the witness will testify about is framed within the discursive legal categories of what kind of violence is needed to be heard in order to successfully prosecute the accused, that being violence that fits within the temporally

bound legal categories of events, agents and actions. This can be seen again in the summary of witness BYO:

BYO, a Tutsi, will testify that on or about 30 April 1994, a group of people comprising civilians and armed soldiers from Ngoma Camp, attacked Benebikira Convent in search of Inyenzi. The witness will testify that these people, who were under the supervision of Ildephonse Hategekimana, proceeded to separate the nuns from the civilians and separated Hutus from Tutsis. She will testify that the Karenzi children including Solange, Malik and a third young boy had sought refuge at the Convent after their mother and father were killed. She will [testify] that on or about 30 April 1994, the Karenzi children were forcibly removed along with the others identified as Tutsi and driven off from the convent to be killed. (Prosecutor's Pre-trial Brief 2010, 13-14)

Both of the witness summaries above are temporally bound events, agents and actions within the legal codification of ICTR crimes. In BYO's witness summary the event is the targeted killing of individuals based on the ethnic identity, Tutsi. This fits within the crime of Genocide, telling a story of ethnic violence. The agents are Hutus whose intentions are to kill Tutsi; that is Tutsi are seen as the enemy of Hutus because of their ethnic difference.¹²⁰ The action is the separating out and targeted killings of Tutsi, and only Tutsi. Viewed through a discursive lens this summary has been included in the pre-trial brief because the violence it describes fits within the legal codification of the crimes of Genocide and Crimes Against Humanity. It is precisely this neatly categorised violence, and only this violence, that law can comprehend.

To be sure, it is not being argued here that witnesses in court never spoke about things outside of the evidence legal counsels needed for a verdict of guilty or not guilty to be reached. However memories of witnesses about the 'fluidity' of violence were not commonly part of witness memories told in court (Eltringham 2019, 138-139). Legal counsels commonly focus on a small part of a witness's experience and this can come as a surprise to witnesses as to why legal counsels are focusing on such a tiny and for the witness unimportant part of their story (Eltringham 2019). Understanding the 'fluidity' of violence during the genocide is used here to foreground that legal counsels were primarily focused on witnesses whose memories aligned with the crimes as stated in the statute. This relates directly to the discursive restrictions of what memories the witness

¹²⁰ For discussions on how the ICTR constructed representations of ethnicity see: Wilson 2011, Eltringham 2019.

subject can tell because legal counsels select witnesses to include in indictments and pre-trial briefs that spoke to this. Witnesses who may have memories not directly related to the crimes were not commonly included.

Here it is worthwhile noting that the two witnesses quoted above in the pre-trial brief were not mentioned in the judgment transcript. Judgments usually include a summary of all of the testimonial evidence given by witnesses. After the submission of the brief neither witness was found in any of the online documents searched for in the research for this thesis. This included searches for the two witness in transcripts and exhibits for all ICTR cases. The ICTR archive online search facility has a specific function for identifying witnesses, allowing for searches of a specific witness(es) mentioned in transcripts and exhibits. The names of witnesses can also be searched for by conducting a general 'content' search of all documents in the online archive. While currently it is not possible to be sure of the reason why these two witnesses do not appear in the judgment, there are a few possibilities that are worth speculating on. One possibility is that given the ICTR archive is still in a process of digitising documents, it is possible that documents that mentioned these witnesses exist in the physical archive but have not yet been digitised. Another possibility is that the Prosecutor decided that they already had similar evidence from other witnesses and thus these two witnesses were not necessary. The defence team might have brought a successful motion stating the inadmissibility of these two witnesses. Again, if such motions exist, they are not currently available on the online archive. Moreover, it is possible that the witnesses themselves decided they no longer wanted to testify. What is known is that current searches of the online archive show that these two witnesses gave statements to investigators and summaries of these statements were included in the pre-trial brief. However for whatever reason after the submission of the brief these two witnesses were not mentioned again in this specific case.

The following paragraphs will extend the discussion above on the discursivity of pre-trial briefs by comparing the statement of witnesses summarised in pre-trial briefs and what witnesses testified to in court. This will help further illustrate the scope and limitations of what memories the witness subject can talk about at the ICTR. Here it is worth noting a difficulty of working with the ICTR online archival material. Some documents are not yet digitised, or/and are not currently available for legal reasons (see Chapter 7). This is the situation for transcripts and audio-visual recordings of witness

testimonies given in court in the Nizeyimana and Rukundo cases. The online archive does include some audio-visual recordings of witness testimonies in the Nizeyimana case, however these need to be requested and to date a request I have filed is still waiting to be fulfilled. In absence of transcripts of witness testimonies in the Nizeyimana case, the discussion will now engage with the Gregoire Ndahimana case (*ICTR-2001-68-PT*), and witness YAU.

The Ndahimana pre-trial brief stated that witness YAU testimonial evidence relates to the crime of genocide part of the indictment. The pre-trial brief's summary of YAU statement states,

The witness and her family fled to Nyange parish in order to escape violence that followed the assassination of the President. She will testify that upon arrival at the parish she saw the Accused and other members of the JCE holding a meeting; that members of the JCE transported Tutsis to the church; that while she was at the church members of the JCE disarmed the Tutsi refugees; that members of the JCE such as Kayishema and Kanyarukiga refused to give the refugees food or allow them to obtain it themselves; and that a major attack occurred against the refugees on 15 April 1994, which was led by the Accused and members of the JCE. (Prosecutor's Pre-Trial Brief 2010, 6-7).

Testifying in court, YAU is asked questions that directly related to their witness summary in the pre-trial brief regarding a specific location and who was there:

Q. Now, just in terms of approximation, can you tell the Court what is the distance -- or how long would it take you to walk from the parish secretariat to the church, for example?

A. The distance between the secretariat and the church would be similar to the distance between this camera, the camera behind the Judges, and the interpreters' booth. I don't know if it is a booth or there are cupboards.

Q. Madam Witness, just so that the record is absolutely clear, can you point out again the distance.

A. The distance similar to the distance between that camera over there and the booth which is on that side. But I don't know whether they are booths or cupboards. I have to say, however, this is an approximation. This is just an estimate because I did not measure the actual distance between the church and the secretariat. [...]

Q. What did they do, or where did they go?

A. Kanyarukiga and Fulgence Kayishema continued looking for Tutsi refugees in the neighboring hills so that they could bring those refugees to the church.

Q. How do you know that Kayishema and Kanyarukiga continued to look for

Tutsis that were brought to the church? How do you know this?

A. I was at the church. So I could see those Tutsi refugees arrive at the church.

Q. Can you tell the Court, please: how did they arrive?

A. They were transported in Kanyarukiga's vehicle. That vehicle went to get them on the hills where they lived

It is the specific detail of who was at this location on these specific dates that frames the questions that the witness, YAU, needs to respond to. On the witness stand, techniques deployed by legal counsels during witness's examination are very different to conversations in everyday life (Ngane 2015, 162-165). Witnesses are in the position of receiving and answering questions posed by legal counsels, and questions are usually prepared in advance (Ngane 2015, 162). The rigid sequences of turn-taking for some witnesses can come as a surprise as they assumed being called to give evidence would be their opportunity to tell in full what they have experienced (Schabas 2006).

The prosecutor continued to direct the flow of questions asked to YAU in keeping with the content of the witness summary in the pre-trial brief. This time the witness responding to the prosecutor's questions on being forcefully deprived access to food.

Q. So, Madam Witness, what did you do for food at Nyange church?

A. We were not eating. And I even recall that on one occasion we even gave money to Fulgeance Kayishema and to Gaspard Kanyarukiga asking them to go and fetch us some food, but, unfortunately, they never brought any food for us.

Q. Madam Witness, were there other -- okay. Let me rephrase. On which day did this occur?

A. On the second day. It was, therefore, not a Tuesday. It was the second day.

Q. And if you recall, how many days in total did you spend at the Nyange church?

A. I spent three days there.

Q. Now, focusing your attention on the second day, the day you said that you asked Kayishema and Kanyarukiga to get you food, did you, in actual fact, receive any food from them?

A. No. They did not bring any food to us. Contrarily, a sister known as Mama Jean tried to bring us some food, but Kayishema and Kanyarukiga poured the food she intended to bring to us on the ground.¹²¹

¹²¹ Ndahimana Trial Transcript 2010, 41-48.

The main point to highlight here is the importance of the pre-trial processes, such as the pre-trial briefs, in filtering what memories witness subjects can talk about in court. As was argued above, the summaries of witness statements included in pre-trial briefs are chosen because of specific detail the prosecutor needs to contribute to their legal narrative. Thus the testimonies given in court are already narrow in scope, primarily because the questions asked to witnesses are directly shaped by the witness summary in the brief. It is proposed here to think about pre-trial briefs as an important part of the discursive conditions that restrictive memories of past violations witnesses can speak about in court.

Witness testimonies are a key component of the legal story for those in the legal scholarship who advocate that law is able to understand the reasons and causes of mass violence (Sikkink 2011; Byron 2008; Keydar 2019; Osiel 2000). However, as discussed above, the discursive conditions of crimes within the ICTR jurisdiction, indictments and prosecutors' pre-trial brief are part of the discursivity of a discourse of witnessing that shape what story of violence law tells. For advocates of international criminal tribunals and courts (ICTR) being able to tell a collective story of genocidal violence, it is the universality of legal and human rights norms that are central (Byron 2008; Klinkner and Smith 2015; Osiel 2012). It is these norms that make it possible for a collective understanding of past mass violence to be publicly known (see Chapter 1). These advocates ascribe primacy to international trials and the testimonial evidence of witnesses they facilitate, which they argue is vital for societies to be able to move from a violent past to a more peaceful future. In short, for advocates, international trials and the collective legal stories they tell are a prerequisite for societies to be able to transition to a peaceful future (Dixon and Tenove 2013; Sikkink 2011). However, importantly, the following paragraphs drawing upon the thesis's conceptual framework, 'grey zone' (Agamben) and plural memories (Ricoeur), argue that legal witnessing is not, as advocates claim, a 'bridge' to move from a violent past to a peaceful future. Building on from this the discussion will foreground that the production of a legal collective story is absent of heterogenous memories.

The 'Grey Zone' of Legal Witnessing

The discursive conditions of a discourse of witnessing restricting who can be a 'witness' and what they can talk about is in direct contrast with the common claim in the legal scholarship that witnesses are central to law being able to understand a violent past in the

present. Specifically, the following discussion using the conceptual tool the ‘grey zone’ challenges the claim that witness testimonies are a key component in allowing societies to move from a violent past to a peaceful future. To briefly recap from Chapter 2, the ‘grey zone’ is the illusion of a break in violent or suppressive action. Here we can think of the universality of legal and human rights norms as the illusion. This break has the appearance of rupturing the status quo and signalling positive change. The status quo is violations of human rights in Rwanda, and law is the positive change. Law perceives itself as the primary response to its own demise (Turner 2016), although this rupturing is the illusion of change, not actual change. This fallacy of change carries with it hope and progression for a better future facilitated by and through legal and human rights norms (Agamben 1999, 26).

In the context of the ICTR it is legal and human rights norms, and the witness testimonies it facilitates, that has the illusion of a linear progression to a brighter horizon. Here the illusion is the claim of advocates that law makes past atrocities understandable in the present and thus makes a society’s transition to a peaceful future possible. It is suggested here that understanding legal witnessing as being located in a ‘grey zone’ allows this claim to be exposed as unhelpful and misguided.

Understanding legal witnessing as a ‘grey zone’ is crucial to challenging the claim in the legal transitional justice scholarship that law is the primary response to mass atrocities, not only in addressing impunity but also in making sense of past violence (Turner 2016). Understanding legal witnessing as being located in a ‘grey zone’ casts light upon the fragmented and very limiting process of who can be a ‘witness’ and what they can talk about at the ICTR. In other words, law is unable to provide a linear progression from a violent past to a more peaceful future. For example, advocates claim that law has transformative benefits that are upheld through the universality of legal and human rights norms (Sikkink 2011). This claim is linear and can be explained thus. The horrors of genocide against the Tutsi were allowed to happen because legal and human rights norms were ignored. The response to this, indeed the only response, is law. The ICTR represents the re-establishing of legal and human rights norms. Law having been re-established through the creation of the ICTR is able to make sense of past atrocities. Having made sense of past rights violations via witness testimonies law has facilitated an essential component of transition, understanding of social and political reasons for the violence occurring (see Chapter 1, section 3).

However, the claim described above is a self-filling prophecy of law. This prophecy is at the crux of the claim that international criminal law, and international criminal institutions such as the ICTR, are the most suitable response for making sense of mass violence in the present. To be clear, this criticism is specifically of claims that international criminal law and institutions are a necessary prerequisite for ‘successful’ societal transitions (Sikkink 2011). It is not a direct criticism of ‘semi-legal’ approaches to aiding societal recovery, such as the gacaca courts (see discussion below) (Clark 2010; Doughty 2015; Thorne and Viebach 2019). This circular prophecy of law is the failure of law, law being restored, and law facilitating progress via the testimonies of witnesses. It is by identifying the discursive conditions discussed above, and which will be further unpacked in Chapter 6, as highly restrictive in terms of what knowledge of past violence the ICTR constructs that understanding legal witnessing in a ‘grey zone’ is insightful. Importantly, law through the universality of legal norms has the illusion of breaking the status quo of violations of human rights and provides positive change to a brighter future. This is the essence of the ‘grey zone’ of legal witnessing: an illusion of change, not actual change. Crucially, in the context of this chapter understanding the way violence is remembered at the ICTR, it is the ‘grey zone’ that helps foreground the story of violence the tribunal tells is singular.

It is understanding legal witnessing as being located in a ‘grey zone’ that foregrounds the contradiction in the claim that the ICTR can understand the complexities of mass violence. In short, the ‘grey zone’ of legal witnessing challenges the claim that law, through the testimonies of witnesses, facilitates positive progress. Particularly it exposes law’s incapability to produce a collective memory of the individual and diverse experiences of violence.

The plurality of memory

Extending the argument above on the ‘grey zone’, the following discussion argues that the construction of legal memories at the ICTR lacks plural memories (Ricoeur 2004). Specifically, engaging with Ricoeur’s conceptual insights on the plurality of memory, it is argued that the discursive conditions of the ICTR are commonly unable to engage with plural memories. These memories are an essential component for communities sharing stories about the past. To briefly recap from Chapter 2, firstly, the thesis intentionally does not use the term collective memory. This term can suggest, both conceptually and in popular discourse, that a pinnacle of a shared understanding of the past can be reached,

which this thesis disputes. Secondly, the construction of memories entails both individuals and communities, which is crucial for plural understandings of the past (Ricoeur 2004). Ricoeur refers to the sharing of plural memories of the past as being close with others. It is the sharing of memories with individuals who may not approve of an individual's actions, but do not reject the individual's experience. A shared understanding of a violent past is centred on stories individuals tell each other about their experiences of past events. Crucially it is the plural stories and heterogeneous experiences of individuals communally shared that are essential to the production of memory (Ricoeur 2004).

In the context of the claim that the ICTR can produce a collective memory of past violence, Ricoeur's concept of the plurality of memory allows the thesis to critique this claim (Klinkner and Smith 2015; Osiel 2000). The ICTR produces a narrow and singular memory for the specific purpose of reaching a legal judgment. The discursive conditions that constitute what witnesses can talk about do not include individuals sharing heterogeneous memories of shared past events with their community. As previously discussed, the crimes in the ICTR mandate discursively restrict what story of past violence needs to be told. In other words, plural memories of the dynamics of genocidal violence are absent from the legal story. Witness memories that are included in indictments and pre-trial briefs also lack plurality, instead they need to fit within the singular legal categories of ICTR crimes.

Importantly, what is also absent from the narrow legal memory the ICTR produces is the remembering 'with others' that is a key part of memory (Ricoeur 2004). The ICTR does not facilitate a platform for individuals to externalise their memories of shared past experiences with each other. In fact, it is not the purpose of international criminal tribunals and courts to be a platform for communities exchanging personal experiences of a violent past with each other. On a related point, even the singular and narrow memory the ICTR produces is out of reach for most Rwandans, in consideration of the geographical distance of the court from Rwanda. For most Rwandans the ICTR being located hundreds of miles away in Arusha, Tanzania, has meant court proceedings where witness memories are externalised is something they have not experienced (Palmer 2015).¹²² . Moreover, the ICTR archive, like the court, is not located in Rwanda but

¹²² The ICTR did have an outreach program intended to inform Rwandans about the courts work and updates of trials however it has been criticised as an 'add-on', or after thought, to the ICTR and was significantly underfunded and struggled to engage with Rwandans in a meaningful way (Peskins 2008;

Tanzania (see Chapter 7). This legal distancing from the context of the violence goes beyond just geography. It also represents the view of advocates that international criminal and human rights law should be distant from the events it is judging so as not to be ‘contaminated’ by what is seen and heard on the ground (Clark 2018). Despite the ICTR’s rhetoric that their outreach programmes have helped make the workings of the court known to Rwandans, the reality for most Rwandans is that the ICTR remains in all senses distant (Clark 2018; Schulz 2017). This distancing of the ICTR adds to the evidence that the tribunal lacks the core component of memory, individuals telling plural experiences to their community. In short, even the narrow and singular legal memory the ICTR produced lacks communal remembering, which is essential for the sharing of heterogenous experience of past violence (see Chapter 7).

To further illustrate the ICTR’s shortage of plural memories, the following discussion will briefly use the example of the Rwandan gacaca courts, which in contrast with the tribunal did facilitate plural memories (Clark 2010; Doughty 2015; Palmer 2015; Thorne and Viebach 2019). The gacaca courts (2002-2012) were used before and during colonialism as a community-based conflict resolution mechanism and were adapted and modernised to try crimes including Genocide and Crimes Against Humanity (Clark 2010). Central to gacaca was its restorative element that included participation of the whole community (Clark 2010). Legal and human rights norms are central to the claim that the ICTR can produce a collective memory of violence. Interestingly, as gacaca did not adhere to these norms, human rights groups concluded that gacaca was a failure (Thorne and Viebach 2019).¹²³ Importantly, it is precisely the localised understanding of justice at gacaca that allowed for communities to share diverse individual stories of violence (Doughty 2015; Thorne and Viebach 2019). The decision by the Rwandan government to use this traditional justice mechanism is what facilitated community dialogue about diverse experiences of genocidal violence (Clark 2010, 320). A key part

Schulz 2017). Schulz has argued that the ICTR outreach program did aid a more in-depth understanding by some Rwandans of the ICTR, but this increase in understanding did not ‘translate into more favourable perceptions towards the ICTR or the Tribunal’s contribution to reconciliation’. Schulz points towards the difficulties of the ICTR’s outreach program has contributed to lessons learnt for outreach programs at other international criminal tribunals and courts (Schulz 2017, 359).

¹²³ Viebach and I (2019) have argued that reports produced by rights groups (Human Rights Watch and Amnesty International) have concluded gacaca as a failure because it did not adhere to western standards of legal and human rights reports. Crucially, these human rights reports tell a story that leaves little room for different interpretations or meanings attached to gacaca and therefore it is not able to understand the positive impact gacaca has for many Rwandans. Instead these reports produce a very limited understanding of gacaca which is rooted in the radical exclusion of context, subjectivity, sociality and material belonging (Thorne and Viebach 2019).

of gacaca's mandate was community reconciliation through victims, witnesses, perpetrators and members of the community being able to ask questions about the past. In part, it is precisely because gacaca did not adhere to legal and human rights norms, that are so entrenched at the ICTR, which allowed for the communal sharing of individual plural experiences of genocidal violence (Doughty 2015). In other words, the example of gacaca illustrates that the absence of plural memories at the ICTR is explicitly related to its discursive conditions and legal and human rights norms. In contrast, gacaca for many Rwandans, not all, allowed the sharing in communities of individual experiences of genocidal violence through localised understandings of justice.

In summary, Ricoeur's insights on the plurality of memory have been used to argue that the ICTR lacks plural memories of violence. This conceptual lens challenges the claim that the ICTR is able to produce a legal collective memory of mass violence.

Manipulated Memory: Disguising the Absence of Plurality

It is suggested here, that in the context of the ICTR legal and human rights norms and the legal authority upon which knowledge of genocidal violence is constituted acts to disguise, or camouflage, the absence of plural memories of experiences of violence. As Ricoeur reminds us, 'manipulated memory' is the institutionalised construction of knowledge about the past in which certain facts and experiences are included/excluded through a process of dominant norms and power relations between institutional actors (Ricoeur 2004, 82). To be sure, 'manipulated memory' is not being used here to suggest that the ICTR intentionally created false stories about the past. Rather, it is a conceptual tool used to argue that the perceived 'neutrality' of legal and human rights norms and the legal authority of the ICTR acts to camouflage the discursive practices in which a singular knowledge of the past is constituted. 'Manipulated memories' entail institutions (ICTR) bringing together dominant norms that regulate what is perceived to be accepted social behaviour and relations. Here, we can think of law and human rights as a dominant norm. It is institutional use of a dominant norm that regulates the production of collective knowledge of the past. The regulation of the past by dominant norms is a powerful representation of the past 'as it was' (Ricoeur 2004, 80). In the context of the ICTR the tightly controlled discursive conditions that are founded upon legal norms regulate the construction of knowledge, as discussed early in this chapter. Importantly, it is the 'neutrality' of legal and human rights norms that gives legitimacy to the legal stories the ICTR tells. Here, legitimacy of legal and human rights norms understood as 'neutral' is

founded upon the assumption that these norms are able to disconnect from and transcend the ‘real’ social and political world (McEvoy 2007, 421; Turner 2013, 201). The dominant norms and legal authority deflect the absence of plurality in the legal story. It is suggested here that we need to think of the singular legal story the ICTR produces in terms of ‘manipulated memory’. Understood in this way the legal memory the ICTR produces can be deconstructed showing how the discursive conditions, discussed above, significantly restrict what knowledge of the past the subject of ‘witness’ can talk about.

Conclusion

This chapter has focused on how discursive conditions shape the way violence is remembered at the ICTR. It was argued that the variety of experiences of genocidal violence in Rwanda was incompatible with claims by legal and human rights advocates that criminal tribunals can account for the reasons and experiences of violence relating to the genocide against the Tutsi. The chapter began by outlining the multifaceted nature of experiences of genocidal violence, engaging with the research of Fujii (2009). This outlining was used to explore how the crime of genocide as stated in the statute discursively shapes and restricts how law constructs memories of violence. Developing the discussion, examples from the primary data – witness summaries, indictments, pre-trial briefs – were used to illustrate how the discursive conditions restrict what memories of witnesses are included. The discussion then drew upon the thesis’s conceptual tool of the ‘grey zone’ in challenging the claim in the legal scholarship that witness testimony is a core component to allow society to transition from violent past to a more peaceful future. Extending this discussion the conceptual tools of ‘plurality of memory’ and ‘manipulated memory’ were used to argue that remembering at the ICTR is absent of sharing experiences of the past with others which is a core component of memory. In making this argument the illustrative example of memory at the gacaca courts was used. This chapter, exploring how the discursive conditions shape the way violence is remembered at the ICTR, concludes that understanding these discursive restrictions matters because it shows that the singular story the ICTR tells about genocidal violence is unable to account for different experiences and complexities of the events of 1994.

Chapter 6 – Critiquing Law and Collective Memory

This chapter extends the discussion from Chapters 4 and 5, particularly focusing on the discursivity of motions and motion decisions and their relation to the materialization of the act of testimony within trials at the ICTR. From this it will be suggested that witnessing produces counter-memories, challenging the dominant memory constructed by the ousted regime, that become institutional normative memories of past violations, which comprises of the diverse fragments of the past converging around the subject position of the witness. Building on from this discussion, the second section offers a conceptual insight for understanding legal witnessing during transition. Specifically, using the thesis's original conceptual framework and analysis of the data, it provides a critique of Mark Osiel's conceptualisation of law and collective memory. The chapter begins by discussing the various ways in which legal actors – legal counsels, registrar, judges, investigators – engage with memory, assembling diverse fragments of the past to be able to perform legal proceedings at the ICTR. Accordingly, these fragments of memory are assembled to perform a specific legal function of contributing to legal determination. However, through the discursive formation of discourse and the language it constitutes, the diverse fragments of the past are naturalised within the subject of witnesses. Therefore, the assemblage of fragments of memory has no inherent unity with the root political and social causes of violations as liberal institutional perspectives within transitional justice perceive them to have (Osiel 2000, 2019). In other words, the narrative legal counsel constructs is not to tell a story of the reasons and causes that led to the violations occurring. Nor are these memories pre-existing objects that are existentially related to the subject who remembers. Nonetheless, as the previous three chapters have shown, legal witnessing is a tightly controlled discursive field entailing a privation of plurality. Thus, what is proposed here is to acknowledge during transition a detachment of witnesses from an inherent pre-existing interiority, allowing to make visible and disentangle the relation between law's need for closure and to bear witness to human action whose reach is beyond that of law. As such, in showing the necessity for understanding the witness in a lacuna between law and truth is positioning the witness in the lacuna of 'judgment', absent of interiority but importantly distinct from ethical and legal categories (Agamben 1999).

Legal Actors as Memory Producers

As foregrounded in Chapters 4 and 5, indictments and pre-trial briefs are part of the discursive restrictions of what memories witness can talk about at the ICTR. The following discussion expands upon this, particularly focussing on motions and motion decisions as another important layer of the discursive conditions of witnessing at the ICTR. Specifically, the following discussion focuses on three examples of how legal actors play a crucial role in the production of legal memory during the process of motions: in the ‘interest of justice’, disclosure, and rape and sexual violence. The section argues that a discourse analysis of motions and motion decisions relating to these three examples highlights the crucial role the ICTR’s legal actors - Prosecutors, Defence, and Judges, have in the construction of the narrow and singular legal story.

Testifying in the ‘Interest of Justice’

The ICTR RPE state provisions for preliminary motions (Rule 72), and motions (Rule 73) after the initial appearance of the accused.¹²⁴ Motions are an application made to a trial chamber by prosecution and defence counsels requesting the chamber to make a decision on a given issue, such as the admissibility or inadmissibility of witness evidence. Motions of these kind were common in the documents analysed for this thesis (see Appendix 2 for a full list of data). Viewed through a discursive lens motion and motion decisions are a key discursive battleground where contestation over, or the definition of, who can occupy the subject position of witness and what memories they can talk about takes place. Particularly, the discursive statements of in the ‘interests of justice’ and ‘judicial economy’ were commonly used by legal counsels and judges negotiating which witnesses will give their testimony in court. The terms ‘interest of justice’ and ‘judicial economy’ are not defined in the RPE. At ICTR it seems that ‘interest of justice’ or

¹²⁴ Rule 72 on Preliminary Motions states

- (A) Preliminary motions, being motions which:
 - (i) challenge jurisdiction;
 - (ii) allege defects in the form of the indictment;
 - (iii) seek the severance of counts joined in one indictment under Rule 49 or seek separate trials under Rule 82 (B); or
 - (iv) raise objections based on the refusal of a request for assignment of counsel made under Rule 45 C

Rule 73 states

- (A) Subject to Rule 72, either party may move before a Trial Chamber for appropriate ruling or relief after the initial appearance of the accused. The Trial Chamber, or a Judge designated by the Chamber from among its members, may rule on such motions based solely on the briefs of the parties, unless it is decided to hear the motion in open Court.

‘judicial economy’ were not technical legal regulations or measurements of some kind, as is the case at the ICC.¹²⁵ Rather they were used to bolster a given line of argument made by legal counsels in motions, or as part of judges’ justification in motion decisions. As Foucault reminds us, statements are a core part of the discursive field and certain statements that become repeatable ‘allows or prevents the realization of a desire, serves or resists various interests, participates in challenge and struggle, and becomes a theme of appropriation or rivalry’ (Foucault 1972, 126). The statement in the ‘interest of justice’ acts to discursively restrict who can be a witness subject, as can be seen in the chamber’s motion decision in the Nizeyimana case on the Prosecutor’s request to vary the witness list:

Rule 73bis (E) permits the Prosecutor to ‘move the Trial Chamber for leave to reinstate the list of witnesses or to vary his decision as to which witnesses are to be called’ after the commencement of trial, if the Prosecutor believes it to be in the interests of justice. Trial Chambers have allowed either party to vary its witness list upon a showing of good cause and where the requested variance is in the interests of justice. Relevant factors include the materiality and probative value of the testimony in relation to existing witnesses and allegations in the Indictment; the complexity of the case; prejudice to the opposing party; justifications for the late addition of witnesses; and delays in the proceedings. The Chamber recalls that the rebuttal evidence is strictly limited in scope, namely ‘in response to the alibi defence for the dates of the morning of 21 April 1994 to the late afternoon of 22 April 1994 and from 26 April 1994 to on or about 17 May 1994’. In other words, the rebuttal evidence is to focus solely on the presence or absence of the Accused from Butare on the specific dates alleged. Moreover, the Chamber does not find that the Prosecution has provided sufficient justification for the late addition of Witness D to the rebuttal witness list, when TBE Defence witnesses had already mentioned his name during the proceedings. The Chamber therefore exercises its discretion to deny the Prosecution motion (Ildephonse Nizeyimana 2011, 2-3).

It is the discursivity of the statement ‘interest of justice’ and its repeatability as dominant statement that restricts what memories of past violations the witness subject can talk about. Particularly, it is the prosecution and defence deploying the term ‘interest of justice’, as stated in the RPE (Rule 73bis (E)), who are part of the process of constructing a legal memory. That being, the prosecutor chooses fragments of witness memories that contribute to the narrow legal narratives they need to tell in order to

The ICC statute Article 53 (1C) and 2 (C) states, ‘Taking into account the gravity of the crime and the interests of victims, there are nonetheless substantial reasons to believe that an investigation would not serve the interests of justice’. For discussion on differing interpretations of the ‘interests of justice’ at the ICC see De Souza Dias (2017).

demonstrate ‘beyond reasonable doubt’ the guilt of the accused. Legal counsels are not concerned with witnesses externalising their memories of traumatic experiences (Eltringham 2019, 135). Eltringham critiques the claims, such as Combs’s (2010), that culture was the main impediment to the way witnesses’ stories were elicited at the ICTR. Eltringham argues that impediments to witnessing at the ICTR were cultural factors as well as ‘legal culture’ that played an important role. For example, legal counsel focused on just a tiny part of a witnesses’ experience that the counsel needed in order to tell their legal narrative. Sometimes this tiny piece of information that was so vital to the lawyer seemed an unimportant part of the story for the witness. As one ICTR prosecution lawyer told Eltringham,

[w]e only need ten or fifteen minutes out of their whole lifetime. We’re only interested in a tiny little part. We’re not interested in the before or the after. They can’t understand why this miniscule incident is so important ... They want to talk about other things. Therefore, they’re frustrated, they’re not fulfilled because they haven’t told their story (Eltringham 2019, 135).

Counsels selected specific objects of knowledge from witnesses that contributed to the legal outcome they are pursuing. For example, in the above quote the Prosecutor brought a motion for the inclusion of a particular witness due to the witness’s memory being related to very particular and small but important detail relevant to the Prosecutor’s legal narrative. Other memories related to these events that are possibly much more relevant to the witness are however of no relevance to the Prosecutor’s legal narrative and as such are not included. Cruvellier (2010) has noted how ICTR legal counsel ‘invented’ creative uses for the term ‘interest of justice’. Cruvellier points out that:

[i]n principle, this expression is imposing by virtue of its solemnity. In practice, lawyers use it to get out of a bind without having to justify themselves. When they invoke the interest of justice, it generally means they have run out of arguments (Cruvellier 2010, 110).

It is suggested here that in addition to getting lawyers ‘out of a bind’ the term ‘interest of justice’ has as much more significant role. When viewed through a discursive lens the term goes beyond the technical ‘gymnastics’ of legal argumentation and instead becomes central to the construction of objects of knowledge of the past.

The ‘interest of justice’ and ‘judicial economy’ is evident again in the Rukundo case where the defence motions to vary its witness list.¹²⁶

With respect to the Defence’s request to vary its witness list, the Chamber recalls that, in accordance with Rule 73ter (E), it has the discretion [to] grant leave to the Defence to vary its witness list if it considers it to be in the interests of justice. Trial Chambers in other cases before this Tribunal have taken the following factors into account in determining variations to the witness list: justifications for the late variation of witness list; the materiality and probative value of the testimony in relation to existing witnesses and allegations in the indictment; the complexity of the case; the potential prejudice to the opposing party; and delays in the proceedings ... Finally, the Chamber also accepts the Defence’s submission to withdraw Witnesses MCD, GSD, CNE, SLC, SJB, BCC, NYE, RUB and TMF from the witness list as being in the interests of justice and for reasons of judicial economy (Rukundo 2007, 4-5).

The above two quotes, as examples of legal actors shaping the construction of memory, can be understood in the context of the thesis’s conceptual tool of manipulated memory at the ICTR. Powerful actors within institutions are key to the way in which particular individuals and their experiences are used or discarded depending on the objectives and motivation of those actors that have the power to construct memory (Ricoeur 2004, 80-85). Legal actors, such as lawyers, as powerful individuals in the process of memory production relates to the legal demand for trials of mass atrocities to make public what was previously personal private memories (Felman 2002; Ricoeur 2004, 220). As Felman reminds us, law is incapable of telling stories of mass violence but that is exactly what law must do (Felman 2002). Law making public what were previously private individual memories is the process whereby powerful actors, such as legal counsels and judges, justify certain outcomes that shape and influence what memories become part of the publicly told legal story. Manipulated memory, as an important part of how the ICTR’s legal actors shape the construction of memory, will be further discussed in Section 2’s critique of Mark Osiel’s conceptual frame of collective memory. Furthermore, the claim that memory is constructed by legal actors in the narrow single narrative relates directly to the discursive condition of a discourse of witnessing. As stated in Chapter 2, Ricoeur’s

¹²⁶ Rule 73bis (E) states that ‘After commencement of Trial, the Prosecutor, if he considers it to be in the interests of justice, may move the Trial Chamber for leave to reinstate the list of witnesses or to vary his decision as to which witnesses are to be called’. Likewise for the defence Rule 73ter (E) ‘After commencement of the Defence case, the Defence, if it considers it to be in the interests of justice, may move the Trial Chamber for leave to reinstate the list of witnesses or to vary its decision as to which witnesses are to be called.’ (Rules of Procedure and Evidence 2007, 94-96).

concept of manipulated memory is interpreted by the thesis using discursive conditions rather than ideology (see Chapter 2). Understood in this way, it casts light upon how memory can become rigid and fixed within the discursive conditions of the ICTR.

The discursive practices of Disclosure

A common focus of motions were disclosure issues and legal counsel accusing their counterpart of not sharing or sometimes hiding witness evidence that would help their case.¹²⁷ What is suggested here is that if we look at disclosure issues through a discursive lens it is a further example of how ICTR legal actors are an important part of the legal construction of memory. Specifically, before testimonial evidence is given on the witness stand legal counsels shape in important ways what legal memory is produced at the ICTR. The ICTR RPE Rule 68 (A) states '[t]he Prosecutor shall, as soon as practicable, disclose to the Defence any material, which in the actual knowledge of the Prosecutor may suggest the innocence or mitigate the guilt of the accused or affect the credibility of Prosecution evidence' (Rule 68 2007).

Legal scholars and lawyers have been critical of the process of disclosure at the ad hoc tribunals and the ICC. As the ICTR defence lawyer for Jerome Bicomumpack (joinder case) Larochelle argues in interview with McKay and Friedman (2008), prosecutors wilfully accepted fabricated testimonial evidence from witnesses GFA and GTA in the Bicomumpaka case:

What is even more worrying, is tools, legal tools such as corroboration. Well, if you take that against the accused, it becomes very dangerous because, a-ha, corroboration, we won't put one, will get two, so and the guy actually states, that they explained to be more credible, will take two of you, dealing with the same event, putting you in the same place at that exact moment... that witness who gave like 8, 9 statements and at some point, boom, Bicomumpaka appears on his statement on the seventh statement. Then one day after, a completely foreign individual, boom, Bicomumpaka appears in the statement. Same investigator you can see it from the signatures.

Larochelle goes on to say the false testimonies exposed in the Bicomumpaka case had been accepted as admissible evidence in four previous cases:

¹²⁷ De Los Reyes (2005) argues that the common difficulty at the ICTR for defence counsels to obtain witness evidence through disclosure Rule 66 eroded the fair trial rights of the accused. De Los Reyes suggested a useful way forward to resolve this issue could be the use instead of Rule 68. Also see Pozen 2005. In the context of the ICC Swoboda (2008) highlights the shortcomings of disclosure rules in the Lubanga case.

the two I have been talking about, we've just had the luck to be the fourth person against whom they are testifying against. The first one, he was found guilty, on the basis amongst the other evidence of these people, we were just lucky enough to have a long trial which made it so that had the benefit of all the other previous statements, and, to show to a certain extent that you know the contradictions there in and all that (McKay and Friedman 2008).

Producing a Legal Memory of Rape and Sexual Violence

The judgment in the Akeyusu case, including for the first time a guilty verdict of rape as a weapon to commit genocide, is commonly hailed by scholars and legal advocates as a landmark moment for international criminal justice and an important legacy of the ICTR (Obote-Odora 2005, 136-137). As Obote-Odora states the 'ICTR took the first step in breaking down the international legal community's ambivalence toward rape and sexual violence as crimes under international law' (Obote-Odora 2005, 137). In interview with Utter and Horowitz, former ICTR Judge Erik Mose advocates one of the legacies of the ICTR was the tribunal's particular focus on crimes of rape and sexual violence:

Those who say that this tribunal has not sufficiently taken into account rape in this activity are simply wrong. There have been very many such cases and when this tribunal closes in a year or two, it will be seen how many of our cases that actually at the end of the day included this horrible aspect of the Rwandan genocide (Horowitz and Utter 2008).

Indeed, this judgment in the Akayesu case provided important legal precedent that such crimes are accountable to international law. However, the point being made here is not a criticism of legal credibility of the Akayesu or other ICTR verdicts on rape or sexual violence. Rather, it is to foreground beyond the language of legacy and contribution that there is an important question to ask about whose voices, or memories, are heard, and importantly not heard, when telling legal stories of mass sexual violence and rape. Estimations of the numbers of individual victims of rape and sexual violence do vary. However, during the genocide against the Tutsi approximately 100,000 to 250,000 people were raped or experienced sexual violence, the majority of which were women and girls (United Nations Outreach Programme 2014). Most of these victims were not called to testify at the ICTR. This shows the importance of analysing the process before testimony is given in court to help understanding how legal counsel and judges shape, edit and restrict the production of memories of sexual violence and rape.

The difficulty in prosecuting rape at the ICTR is evident in the case of Musema, who was found guilty of rape which was overturned on appeal. The original verdict of being guilty of rape was largely founded on the evidence of five witnesses (Musema Appeal Judgement 2001). In custody waiting for his appeal decision Musema, via the information of a fellow prisoner, became aware of a witness whose account of events supported that of Musema (Cruvellier 2010, 100). Following a defence motion for the release of exculpatory evidence in the Prosecutor's possession, three witness statements came to the attention of Musema's defence team, which contradicted testimonies of key prosecution witnesses (Musema Appeal Judgment 2001, 68-73). The Appeal Judgment stated:

[h]aving considered the additional evidence admitted into the record on appeal, the Appeals Chamber finds that had the testimonies of Witnesses N, CB and EB been presented before a reasonable tribunal of fact, it would have reached the conclusion that there was a reasonable doubt as to the guilt of Musema in respect of Count 7 of the Amended Indictment. Consequently, the Trial Chamber's factual and legal findings in relation to the rape of Nyiramasugi are incorrect and occasioned a miscarriage of justice (Musema Appeal Judgment 2001, 73).

Redwood (2018) has argued that in the rape case of Akayesu the tribunal did allow witnesses testifying in court to develop a detailed account of the sexual violence committed against them. Witnesses were able to shape the process of testimony in court, in this particular case (Redwood 2018). Redwood does acknowledge that after the Akayesu case the tribunal did not allow witnesses in rape cases the same space to narrate their experiences (Redwood 2018). While Redwood does provide insightful analysis on these few witness testimonies given in court, it does not fully account for the discursive restrictions of the voices not heard of individuals who experienced rape or sexual violence.

The 'interests of justice', discussed above, as part of the discursive conditions in how legal counsels construct memory, was also part of the discursive conditions in cases relating to rape and sexual violence. This can be seen in the case of Pauline Nyiramauhuko, the only woman indicted by the ICTR and which included the charge of rape. For example, the prosecution motion for the withdrawal of 30 witnesses as it was in the interest of justice:

Counsel for Nyiramasuhuko acknowledges that the proposed deletion of 30 witnesses serves the interest of justice but argues that the deletion should not be conditioned on the addition of three new witnesses. To add the proposed

Witnesses FA and FCC is unnecessary insofar as many other witnesses have testified or will testify about the same alleged events that both witnesses would address. Concerning the deletion of witnesses from the Prosecution's initial list, it is the Chamber's opinion that the proposed deletion of 30 witnesses could significantly accelerate the proceedings and enhance judicial economy. Furthermore the Chamber notes that the Defence does not object to the deletion of witnesses sought by the Prosecution (Nyiramasuhuko Prosecution motion decision).

Framed in the context of discursive restriction, the 'interests of justice' suggests that Redwood's account of the Akayesu trial as a site that allowed witnesses to tell their stories and externalise their experiences of horrific events needs to be taken in the context of the wider process of memory production at the ICTR. To be sure, this is not to reduce the importance of the testimonies of these few witnesses in the Akayesu case, or any potential benefit witnesses may have got from telling their stories on the witness stand. Rather, when we consider the broader context of rape and sexual violence during the genocide against the Tutsi and the large quantity of victims of the crime of rape, the very limited stories of rape that are included in the way legal actors construct memory at the ICTR is foregrounded (De Brouwer 2015). In the Akayesu case prosecutors called a total of 28 witnesses to testify in court, with the defence calling 13 witnesses including the accused (Akayesu Judgment 1998). In other words, all witness memories that are told on the witness stand are part of the restrictive process of memory production involving legal actors. These memories are the ones legal counsel deem relevant to reaching a legal verdict of guilty or not guilty. Considered this way there is a need to draw some distance, or more caution, between rape cases at the ICTR being positioned as 'landmark' for international criminal justice, and that these cases have made public the individuals' experiences of these horrific crimes. In short, the memory legal actors produced that allowed the important legal verdict of guilty to be reached, sometimes comes at the risk of totalising the stories of a few witnesses given on the witness stand as representing a totality of experiences of rape during the genocide.

De Brouwer (2015) has argued that in contrast to claims by some at the ICTR that victims of rape and sexual violence did not want to talk about their experiences, in fact many did want to. De Brouwer points towards human rights researchers during the early years of the ICTR who conducted hundreds of interviews in Rwanda with victims of rape and sexual violence. Part of the reason so many individuals were willing to testify to these researchers was the sensitive and delicate approach they took to interviewing (De

Brouwer 2015, 652). According to Brouwer, ‘many victims of sexual violence have been willing to testify before the court’ and, in fact, ‘victims in Rwanda have been more willing to testify than has often been depicted despite the stigma attached’ (De Brouwer 2015, 654). The general willingness of many victims to talk about their experiences is in contrast to ICTR claims of difficulties to get these victims to testify. De Brouwer argues this was partially due to the lack of integrity and professionalism in how ICTR investigators engaged with victims of sexualised violence (De Brouwer 2015, 654). One such ICTR staff member who did claim that it was very difficult for investigators to find victims of rape and/or sexual violence willing to talk about what had happened to them was ICTR Registrar Adama Dieng. In interview with Friedman and Horowitz, Dieng states, ‘one of the difficulties, is, even until today, people who have been victims of rape they tend to not speak out. Sometimes it’s very difficult to get the victim of a rape, even in our national jurisdiction, to come out and say that she has been raped’ (Friedman and Horowitz 2008).

These contrasts in views about whether victims were willing to speak about their experiences, in one sense, can be read as reflecting that who the witness is talking to and for what purpose their story is being used for contributes to whether individuals are willing to talk. According to De Brouwer, sexual violence being explicitly tied in with the ICTR mandate prosecuting only senior figures involved in the genocide, has resulted in knowledge of rape and sexual violence during the genocide against the Tutsi being limited to victims whose experience can be used as evidence to prosecute a relatively small amount of individuals who perpetrated sexualised violence (De Brouwer 2015, 656-660). Furthermore, as mentioned above the lack of professionalism by legal counsel investigation teams may have impacted on the lack of witnesses willing to talk that goes beyond the claim of difficult subject matter made by ICTR Registrar Dieng. ICTR Legal Officer Suzanne Chenault highlights that the lack of a professional approach to investigating rape, particularly in the first years of the tribunal, resulted in a significant amount of potential witness evidence being lost. In interview with Nathan and Horowitz, Chenault states:

I think [there is a] need to understand the vulnerability of the survivors and what that would mean I believe if you’re going to prosecute this crime in the hope then that you’re going to deter its continued commission of the crime, you’re going to need much greater sensitivity and that would mean that the investigators not be these hulking policemen who don’t speak either English or French, as even a second language. Because if you’re going to get a testimony, you need to talk to the victim and usually you need to have somebody who can speak in the language

of the victim. What we had initially as I understand we had people who were brought in as investigators and very often they weren't hired necessarily by the UN. They might have been a gift from one of the nations that wanted to help and so there was no way of monitoring, if you will, or giving a program to or giving information to those who went out and investigated. And I'm not saying a great deal of harm was done but I would say a great deal of evidence that could have been preserved was not because of the way the investigations were conducted (Nathan and Horowitz 2008).

The role of legal actors in the construction of legal memories of rape and sexual violence at the ICTR entails a further process of 'filtering'. In analysing the discursive conditions of motions and motion decision, what is not there or what is absent is as important as what is there (Foucault 1972). What is absent from motions are witness memories relating to male victims of rape and sexual violence. Specifically, the memory legal actors produce that relates to individuals' experience of rape and sexual violence are female victims' experiences. Male victims of rape and sexual violence are not relevant to the ICTR legal memory (Buss 2009; De Brouwer 2015). Brown (2014) has foregrounded that during the genocide against the Tutsi, women were not only victims of rape they were also perpetrators of it on male victims (Brown 2014, 459).¹²⁸ According to Brown, one of her interviewees, Charles, who was gang raped by a group of women said that there were many other male victims of rape during the genocide against the Tutsis. However, one of the main difficulties is trying to find victims willing to talk about their experiences (Brown 2014). Brown argues that the lack of voices of male victims relates directly to 'notions of masculinity that dominate Rwanda's gender paradigm and perpetuate the belief that rape is something that is experienced exclusively by women' (Brown 2014, 459-460).

The ICTR was the first international criminal institution to define rape as a weapon to commit genocide. The ICTR jurisprudence of rape stemmed from the Akayesu case, specifically the prosecutor seeking leave to amend the indictment following extensive detail of rape given in six witness statements (Akayesu Judgment 1998). Following the Akayesu case the ICTR's prosecuting rape produced what Buss refers to as a 'script' of who could be a victim of rape and who could be a perpetrator of rape (Buss 2009, 155). These categories, 'scripts', significantly shaped what memories of sexualised

¹²⁸ For a discussion on the need for transitional justice mechanisms to develop policies and processes for male victims of sexualised and gender based violence during atrocities see Schulz (2015). Also see Schulz (2018) 'The "ethical loneliness" of male sexual violence survivors in Northern Uganda: gendered reflections on silencing'.

violence legal counsel needed to construct. As Buss states, the crime of rape at the ICTR created a 'script' of male Hutu as perpetrators and Tutsi women as victims (Buss 2009, 155-156).¹²⁹ This 'script' resulted in the ICTR focusing on shared patterns and experiences which came at the cost of variance and differences (Buss 2009, 155-156). The ICTR's narrow depiction of rape meant that male victims were almost entirely invisible at the ICTR. This invisibility impacted, or limited, 'what [could] be known about sexual violence and its role in the genocide' (Buss 2009, 160; De Brouwer 2015, 645). In the context of the current discussion, male victims of rape and their almost entire absence from the ICTR is a further example of how memories legal actors produce relating to rape is very narrow. Specifically, the ICTR's legal categorisation of rape and who counts as rape victims and perpetrators meant that memories of male rape victims were not relevant to legal counsel's story. This is a further example of how legal actors, prosecutor and defence counsels, play an important role in what memories are included in the legal memory the ICTR produces.

In summary, legal actors, play an important role in how memories of rape and sexual violence are constructed at the ICTR. Building on this, next, the chapter puts forward a critique of liberal legality in relation notions of collective memory.

Liberal Legality and Collective Memory: A Critique

This section uses the arguments from the analysis in Chapters 4-6 and the conceptual framework to critique and challenge conceptual claims made by Osiel (2000) that criminal trials addressing mass atrocities can and should produce a collective memory. Osiel's book, *Mass Atrocity, Collective Memory and the Law* is one of the few works that explicitly and in extensive detail focuses on the legal construction of memory in atrocity trials, and thus is seen as a leading voice in these discussions. This section focuses on critiquing two conceptual points made by Osiel: his conceptual framing of collective memory, and the liberal legality position he advances in claiming the individual and societal benefits of a legal collective memory (see Chapter 2, Section 2). It is argued that a conceptual critique of Osiel, supported by the discourse analysis of the data, foregrounds that the far reaching and idealised role of law advanced by Osiel is ultimately

¹²⁹ De Brouwer (2015) has argued that ICTR investigators were ill-prepared to deal with male victims of sexualised violence. 'Investigators' lack of knowledge or discomfort with the issue is a major obstacle for the effective prosecution of these crimes, probably even more so than for cases involving female victims of sexual violence' (De Brouwer 2015, 658).

unconvincing. The essence of what a trial is there to do is to reach a legal determination and it is arguments such as Osiel's that claim law can contribute to 'reconciliation' and 'peace'. The section concludes by suggesting there is a need for more humility and restraint by those making such demands of international criminal law and institutions.

To be clear, the following critique of Osiel is specifically of the arguments he makes on collective memory and liberal legality in atrocity trials and does not engage with or critique Osiel's extensive body of work. Indeed, it is this thesis's view that Osiel has provided significant insights on a number of issues relating to international criminal law and armed conflict.¹³⁰ Thus, the following critique is framed within his discussion on collective memory during atrocity trials.

A critique of advocacy for a legal collective memory of atrocities

For Osiel, the public demand for knowing what happened during mass violence can be aided by trials and particularly the stories of past wrongs they tell. Following Osiel, these trials:

influence our underlying notions of what memory is about, what it is for... that the cumulative effect of such trials, from Nuremberg and Buenos Aires to the current proceedings in the Hague [ICTY], is that 'the process of how people are made to vanish has become a distinctive feature of postwar conceptions of what memory is [...] Criminal trials must be conducted with this pedagogical purpose in mind (Osiel 2000, 2-3).

Osiel's framing of collective memory in atrocity trials is shaped by his legal critique of traditional liberal thought and his advocacy for liberal legalism. According to Osiel, convincing traditional liberal critiques made within ordinary criminal law when applied to international crimes become overstated and lose relevance (Osiel 2009; Robinson 2013). For example, the sphere of individual culpability which may well be relevant for isolated crimes is misguided when considering mass atrocities which often entail complex group dynamics (Osiel 2009).¹³¹ Osiel argues that traditional liberal theory being embedded within individualistic notions of moral choice and agency, becomes overwhelmed by the context of international criminal law, such as collective criminality

¹³⁰ For examples of Osiel's extensive writings see, *Atrocity, Military Discipline, and the Law of War* (1999); *The End of Reciprocity: Terror, Torture, and the Law of War* (2009); *The Right to Do Wrong: Morality and the Limits of Law* (2019).

¹³¹ Also see Drumbl (2005, 2011).

(Osiel 2009). In the context of atrocity trials, and as an alternative to traditional liberal thought, Osiel suggests that liberal legality supports his argument that law can produce a collective memory of mass atrocities. For Osiel, it is the ‘ground rules’ of liberal legality, such as due process, culpability and fair trial, that facilitate discussions between perpetrators and victims about past wrongs, which Osiel refers to as ‘civil dissensus’ (Osiel 2000, 44; Bloxham and Pendas 2010, 636). According to Osiel, ‘civil dissensus’ creates an equal space for competing parties to share their side of the ‘story’ without one side been given preference over the other (Osiel 2000, 39-41).¹³² Through liberal legality societies affected by a traumatic past ‘can greatly benefit from collective representation of that past, created and cultivated by a process of prosecution and judgment’ (Osiel 2000, 39). It is the level playing field that liberal legality provides that Osiel argues stimulates a distinct punctuation with the past by providing a given society a collective understanding of the atrocities and guiding moral principles for the future (Osiel 2000, 2-3; Ranck 2000, 204). As Osiel states,

[Atrocity trials] present moments of transformative opportunity in the lives of individuals and societies, a potential not lost upon the litigants themselves. Prosecutors and judges in these cases thus rightly aim to shape collective memory of horrible events in ways that can be both successful as public spectacle and consistent with liberal legality (Osiel 2000, 2).

According to Osiel, collective memory consists of the stories a society tells about:

momentous events in its history, the events that most profoundly affect the lives of its members and most arouse their passions for long periods... When a society’s members interpret such an event in common fashion, they drive common lessons from it for the future (Osiel 2000, 19).

Osiel points out that such trials provide important learning experiences about contested moments of a society’s past and thus defends the claim of the transformative benefits of legal collective memory (Osiel 2000, 65-66). This defence is founded on the ability of legal collective memory and the lessons it can teach a society based upon the ‘liberal nature of the stories being told’ (Osiel 2000, 66). This justification is based on collective memory’s capacity to make for telling a better story about where the society should be heading (Osiel 2000, 65-66). In telling ‘better stories’ the collective memory produced

¹³² Alvarez (2008) engages with Osiel’s ‘civil dissensus’ in arguing that legal debates force parties to inhabit the same legal space which can facilitate an understanding of opposing views.

through law is a ‘congenial public opportunity for collective mourning of the victims of administrative massacre. It provides a ritual that is helpful for family members and a sympathetic public in coming to terms with melancholia in even the most traumatic cases’ (Osiel 2000, 67). Important for Osiel is the rules of evidence, procedural and ‘trial ethics’ that facilitate trial actors to publicly narrate past horrors (Osiel 2000, 40-42). As Osiel states, through ‘such “rules of engagement” each party comes to learn, at the very least what its opponent actually thinks and most deeply cares about. Through this process dangerous misconceptions about “the other” are overcome’ (Osiel 2000, 42). It is the linear procedural rules and regulations of trials, ‘civil dissensus’, that allows for a conversation to happen that would not otherwise occur (Osiel 2000, 46). Without these rules and regulations those conflicted actors ‘would refuse to sit down together, or when they did, would quickly descend to vitriolic name-calling, theological incantation or outright violence’ (Osiel 2000, 46-47). In short, Osiel argues that it is law and only law that is able to facilitate conflicted actors the opportunity to engage in meaningful dialogue about the past.

Plural vs Collective memory

Osiel claims that collective memories allow for different stories and perspectives to be told and is transformative by allowing for a shared understanding of a society’s past which thus can positively shape its future. However, as has been stated from the beginning of this thesis the term collective memory is problematic. Rather, memory is understood here as plural and as a process of construction, rather than a ‘thing’ recovered as suggested by Osiel’s framing of collective memory. Memory understood as a plural process then stands in contrast with Osiel’s claim that collective memory produced through law allows for the production of a broad understanding of the past. For Osiel collective memories consist of detailed stories of different experiences to be heard. However, the institutional production of memory, such as in the ICTR, is understood here as manipulated memory. That is to say, a process of memory construction that allows for the admission of certain ‘facts’ while simultaneously omitting others (Ricoeur 2004, 80). Here, a particular focus on critiquing Osiel’s framing of collective memory is the extensive emphasis he puts on law being able to facilitate conversations about different experiences and understandings of the past. It is the storytelling ability facilitated through law and its contribution to a collective memory that manipulated memory illustrates as misguided. As proposed in Chapter 2, discursive conditions and institutional actors significantly restrict not only who

can tell their stories but what stories they can tell in the context of the trial. Furthermore, as argued in Chapter 5, legal memory at the ICTR is absent of sharing plural experiences of the past with others, which is a core component in this thesis's understanding of memory (Ricoeur 2004).

This thesis's conceptual understanding of memory being framed by a poststructuralist lens is an understanding of memory that Osiel argues against. According to Osiel, poststructuralist understandings of memory are too preoccupied with understanding and allowing for the micro-narratives to be given equal 'airtime' (Osiel 2000, 52). For Osiel this 'relativist obsession' fails to understand the need to draw together micro-narratives in order to facilitate a collective agreement on past events (Osiel 2000, 52). However, it is not the case that a poststructuralist framing of memory resists collective consensus of shared experiences. What it does resist is the ability of international criminal law to produce such a consensus of shared experiences. For example, as was proposed in Chapter 5, semi legal institutions such as gacaca have the potential for the plural sharing of memories with others. In other words, it is not as Osiel claims that a poststructuralist framing of memory is incapable or uninterested in shared experiences of the past. Instead, a poststructuralist framing of memory resists the idea of a legal collective memory because the tightly controlled discursive conditions within 'atrocity trials' is unable to facilitate this sharing of stories that is claimed by Osiel.

Another component of Osiel's advocacy for a collective memory of atrocities is that the narratives told in court are ones that would not otherwise be heard and facilitate the experiences of victims being heard by the society affected (Osiel 2000, 22). However when we draw upon the discursive analysis from Chapters 4-6 showing the discursive restrictions that 'filter' what memories witnesses can talk about, this casts doubt on Osiel's claim. For example, as argued in Chapter 5 the ICTR statute, particularly the legal codification of the crime of genocide, is part of the discursive condition that restricts what memories of experiences of genocidal violence can be heard. Specifically, the crime of genocide requires a temporally bound set of actors, agents and events. It is this temporality of the legal codification of genocide that witness memories must fit within. Witness memories that do not fit within the temporality of the crime of genocide are not commonly included as part of the legal collective story the ICTR tells. Moreover, as argued in the first section of this chapter, defence, prosecutors and judges are an important part of the legal production of memory at the ICTR. For example, while the ICTR did create legal precedent through its judgment on the 'rape cases', there is a need to resist

the urge to advocate that law can facilitate diverse stories of horrendous violence to be heard. The witnesses who testified about sexual violence and rape were only a fragment of the total number of victims of sexual violence and rape during the genocide against the Tutsi. Contrary to Osiel's claim that atrocity trials facilitate victim experiences of violence to be heard, the discursive conditions, such as the legal codification of the crime of genocide, significantly restrict what experiences of violence the ICTR needs to tell. The experience of violence the tribunal requires are ones that fit within the narrow legal narrative counsel tell in order to reach legal determination of not guilty or guilty.

Osiel's liberal framing of collective memory argues witnesses/victims are an important part of the conversations that atrocity trials facilitate. In Osiel's liberal frame witnesses are self-evident beings. The emphasis for Osiel is not on questioning what witnesses are, but rather what witnesses are is assumed as obvious and focus instead is on how institutional processes can aid witnesses telling stories of their experience (Osiel 2000, 40). Osiel identifies the legal rules and regulations, 'civil dissensus' as important processes that facilitate conversation about different actors' experiences of the past (Osiel 2000, 42). However, two points here need to be critiqued in challenging Osiel's liberal legality understanding of law and collective memory: what witnesses are is obvious, and legal rules and regulations facilitated the telling of stories. A central argument advanced by this thesis is that legal witnesses are not self-evident. Instead subjectivity needs to be placed centre stage and in doing so allows us to understand how discursive conditions and practices shape, reshape, edit, distort, restrict the discursive construction of identity of the witness. Taking Osiel's assertion that what witnesses are is obvious and placing it in the context of the ICTR is helpful in critiquing Osiel's advocacy for legal collective memory. There were tens of thousands of people who witnessed the horrors of 1994. However out of all those individuals only a fraction were able to become a witness at the ICTR. As Agamben reminds us, subjectivity entails potentiality and impotentiality, the idea not to assume the identity of a group, such as witnesses, encompasses all individuals (Agamben 1997). In short, potentiality highlights the need to not collectivise groups as all-encompassing.

Legal rules of procedure and regulation, Osiel argues, are very important in helping the law to facilitate conversation about contested pasts. However, the discursive analysis here and in the previous two chapters has shown that the ICTR's RPEs and regulations, are not as advocated by Osiel ways of inducing dialogue. Rather they significantly restrict who can be a witness and what witnesses can talk about. For

example, as evidenced in Chapter 4 and 5 the ‘foundational documents’ such as statute detailing the specific crimes within the ICTR’s jurisdiction discursively restricts what knowledge of the past legal counsels require to contribute to their legal narrative. Furthermore, as shown in Chapter 5, pre-trial briefs and the summaries of witness statements are often only a very small and specific part of witnesses’ experience. Moreover, it is also the summary of witness statements detailed in the brief that directly orientate the questions prosecutors ask those witnesses in court. In other words, viewed through a discursive lens, and as evidenced in the last three chapters, rather than facilitating diverse conversations about the past, regulations and processes before witnesses testifying in court significantly restrict what memories of the past are told.

A Conceptual Alternative

This concluding discussion will offer an alternative to Osiel’s collective memory, and scholars who, like Osiel, advocate law’s ability to tell a collective understanding of the past (Douglas 2001; Keydar 2015, 2019), drawing upon the thesis’s conceptual framework. This conceptual alternative is aimed to inform empirical understandings of legal witnessing in international criminal tribunals and courts. As Sharp (2019) insightfully argues, there is a need for a more integrated approach in transitional justice between conceptual critiques and the ‘real world’ (Sharp 2019, 17). For Sharp, conceptual critiques are very useful for drawing attention to blind spots and contours. However, there is a danger that if these critiques only focus on identifying blind spots without considering how these critiques can actually have a benefit in the ‘real world’ their insights may not be fully accomplished (Sharp 2019, 18). As Sharp states, ‘[p]erhaps the most radical thing of all at this stage would therefore be to figure out how to better translate critical theory ideals into actual practice without being stripped of substance in the process’ (Sharp 2019, 21). Therefore the following discussion offering a conceptual alternative, and Chapter 7 exploring the potential for archival material to aid memory in Rwanda, is informed by Sharp’s call for conceptual critique and the ‘real world’ to be brought closer together.

Firstly, the thesis’s conceptual understanding of memory as something constructed and entailing community and ‘with others’ (Ricoeur 2004) is discussed. This conceptual understanding is proposed here as a way for scholars researching legal collective memory to think about law’s relationship with memory that could facilitate more restraint in the prescriptions they offer. Osiel argues that atrocity trials provide a congenial space for opposing parties to tell their side of the story (Osiel 2000). However,

what is proposed here instead of thinking of these legal spaces as a suitable site for individuals to externalise their memories, is to think about them as sites of restriction and absence (Ricoeur 2004). What is restricted is what memories can be talked about, and what is absent is remembering with other people and sharing experiences of the past (Ricoeur 2004). Memory entails sharing memories with other people. In order to understand past shared experiences requires memories of individuals and groups to be worked through and negotiated. This conceptual understanding of memory (Ricoeur 2004) can inform important questions scholars advocating, or investigating, legal collective memory should ask when thinking about spaces of legal memory construction, and what these constructions can, and importantly cannot tell us about the past. For example these questions could include, who is speaking, what are they speaking about, for what purpose, where are they speaking, and who is asking the questions? Also, where is the society affecting within a given process of legal memory construction? The ‘where’ question is crucial because if individuals are remembering in absence of the community, then, as argued in Chapter 5, there is an important part of the process of memory that is missing.

Advocates of legal collective memory, such as Keydar (2015, 2019), argue that it is the vast quantities of witness testimonies in trials, such as the Bemba trial at the ICC, that are ‘an integral, and substantively beneficial, component of the law’s response to atrocity crime’ (Keydar 2019, 554). For Keydar international criminal tribunals (ICTR, ICTY and ICC) facilitating ‘mass testimony is an integral part of the law’s response to the mass scale of atrocity crimes and their ungraspable nature’. In other words, for Keydar the ‘ungraspable nature’ of atrocities becomes graspable precisely because ‘large quantity of witnesses serves crucial functions in addressing such grave human rights violation’ (Keydar 2019 556). The core contribution of large quantities of witnesses ‘extends beyond the limits of proving the crimes of the accused to narratively reconstruct the experience of atrocity[/ies]’ (Keydar 2019, 566-567). However, what is suggested here is, instead of assuming that quantity equates with substance as advocates like Keydar seem to do, it would be more fruitful to think through the questions suggested above. For example, rather than taking the purported quantity of witnesses participating in the legal process as an indicator that international criminal tribunals can produce a comprehensive understanding of atrocities, to consider, or ask, to what extent witnesses are in conversation with each other during the legal processes. In other words, are these individuals, and importantly their community, sharing memories with ‘each other’

(Ricoeur 2004)? If scholars, such as Keydar, were to consider to what extent individuals (witnesses) were engaging with people from their community during the legal construction of memory it is likely that they might be more cautious in advocating quantity as a means to achieve a legal collective understanding of past horrors. Advocates should move away from using indicators of quantity to inform perceptions of whether a collective legal understanding of the past has been achieved: that more witnesses means more memory. Instead, they should ask are witnesses at international criminal courts negotiating shared past experiences with other people? The answer to this question, as argued thus far in this thesis and particularly in Chapter 5, is no, and therefore if scholars asked this question then potentially this would aid a more cautious approach to thinking about laws (in)ability to mediate social change.

Scholars, such as Osiel (2000), Keydar (2019), Funk (2010), Groome (2011), Klinkner and Smith (2015) argue that witnesses are a key part of the collective story told at atrocity trials. These scholars commonly take as their starting point that what witnesses are is self-evident and obvious (Osiel 2000; Keydar 2019, Klinkner and Smith 2015). From this assumed starting point, they investigate the ways witnesses could contribute to collective memory, such as through ‘civil dissensus’ and vast quantities of testimonies given in court. Instead, it is suggested here that a more nuanced starting point is to think about who is speaking, and importantly who is not speaking, and for what purpose? Specifically, the concept of subjectivity (Agamben 1997; Foucault 1972) when applied to legal witnesses highlights that the majority of individuals who experienced the horrors of mass rights violations will not be a witness at international criminal tribunals, such as the ICTR. This does require advocates of legal collective memory to understand the identity of witnesses as something produced by legal institutions and its actors through discursive conditions. The witness who gets to speak is speaking in proxy for the true witness, things they have observed up close but not experienced personally (Agamben 1997). This does not reduce or dismiss any suffering they have experienced, rather it is to think about the witnesses who testify in court as only a small percentage of the individuals who experienced mass human rights violations. If advocates take as their starting point this idea that prior to testifying in court individuals are not witnesses, it opens up a number of things to consider that were previously obscured to them. Furthermore, the creation of the court or tribunal, including the crimes within the court’s jurisdiction, has already begun the process of reducing which individuals are relevant to the legal processes. The processes in which investigators gather witness evidence and

lack of local knowledge also results in reducing which individuals will testify. As discussed in Chapter 4, ICTR resistance to local expertise and knowledge during investigations is an issue that has continued at the ICC (Clark 2018). This discussion is therefore relevant to current and future research investigating the construction of legal collective memory at the ICC. For example, Keydar argues that the Bemba case at the ICC illustrates the potential of courts to produce a collective understanding of the past through the court engaging with large quantities of witness-victims (Keydar 2019). However, if scholars like Keydar were to instead take as their starting point those witnesses testifying in court, such as in the Bemba case, are the visible tip of a restrictive discursive process, this would expose to these scholars that below this visible tip is a significant process of ‘filtering’ out many individuals and their memories.

The conceptual offering of the ‘grey zone’ is possibly a particular challenge for scholars advocating tribunals’ ability to aid individuals’ and societies’ understanding of the past because it pushes against some of their core values. In particular these values are justice as equated with judicial justice, and international criminal law as the most suitable responsible to mass atrocities. Nonetheless, there is a need for more restraint and humility by those advocating the ability of law to make sense of past atrocities, and the ‘grey zone’ provides a useful frame to help that endeavour. The ‘grey zone’ of legal witnessing is helpful because it challenges or casts light upon the assumption that witness testimonies facilitated through law act as a ‘bridge’ between a traumatic past and a path to a more peaceful future (Agamben 1997). Instead testimony is purely a judicial mechanism and has no particular transformative benefits, and is not an essential link, or ‘bridge’, to aid societies’ recovery from a horrific past. This is not to say that witnesses testifying in court never get any benefits from testifying. However, what is being argued is that it should not be claimed by scholars and advocates that testimony will do any more than serve as a judicial mechanism. If individual witnesses do experience a sense of catharsis then this is indeed a positive thing, however this should not be a stated claim of what testimony is likely to do. Its purpose should be seen as purely a contribution towards the function of tribunals: to reach a legal determination of guilty or not guilty.

Related to the discussion above that witness testimonies is purely part of a judicial process and not a mode for social change, is the lacuna between law-justice. Agamben states that it is not the case that law and witness testimonies it facilitates means justice has been achieved (Agamben 1999). Or put slightly more crudely, witnesses testifying in court is not a box to be ‘ticked’ indicating justice has been reached. Instead understanding

legal witnesses in the lacuna of law and justice is a way to resist law's need for progress and singularity. Testimonial evidence witnesses give in court serves an important function of contributing to a legal determination being reached. However, testimony's contribution should not be understood beyond its judicial contribution, as was argued in Chapter 4 discussing the right to truth. The witness located in the lacuna between law and justice then means that testimony is not about contributing towards understanding of the past, and in reaching that understanding would be an important part of a society's progress to a more peaceful future. Instead, the act of witnesses testifying in court becomes distinct from any notions of justice. The act of testimony distinct from justice is important because it resists transitional justice's legalistic impulse to assume that international criminal law is transformative.

The conceptual insights, drawn from the thesis's original framework, offered here can be a way for those researching the role of memory construction at international criminal courts to think about the individuals who speak on the witness stand as the minority of those who survived mass rights violations. The memories that are spoken on the witness stand are for the specific purpose of legal judgement. Suggesting these conceptual insights may be a challenging, but necessary, reorientation that will help those advocating and researching the ability of courts and tribunals to produce a collective understanding of the past to understand some of the limitations of law. If scholars used the conceptual insights and questions suggested here then there would be potential benefits for those they are seeking to help, namely the affected society. One benefit would be that it could aid courts managing the expectations of victims and affected societies. As discussed in Chapter 4, the claims made by legally orientated scholars, and courts such as the ICTR and ICC, about the restorative contributions of the legal processes, including victims having the chance to share their stories of atrocities, inevitably results in victims feeling let down by the court (Moffett 2017). If scholars, and courts, were to engage with the conceptual insights and questions offered here, the advice and guidance given to victims and the wider affected society would reflect the restrictive nature of law and legal processes. Moreover, if scholars were to resist the impulse of equating law with justice this would also positively engage with the plurality of meanings of justice understood by those who are trying to make sense of and coming to terms with a traumatic past (Turner 2016). In societies affected by mass rights violations there are numerous understandings of justice, including judicial, semi legal or hybrid such as gacaca, and non-legal processes including community therapy, and ritual and faith healing processes (Allan and

Macdonald 2015). This is reflected in the statement of one gacaca judge remarking on justice in Rwanda,

In Arusha the big fish are there. The victims travel there, but in gacaca, everyone is already here: survivors, perpetrators, judges, they are all here in the community. That is the difference [...]. Those in Arusha haven't asked for forgiveness, yet they have committed many crimes here. They should face us, the Rwandan family, but they avoid us by being there. (Clark and Palmer 2012, 12)

The importance for scholars and courts to engage with local articulations of justice are also mirrored in the words of one Rwandan genocide survivor,

This man is in Arusha and I am only hearing that he is being tried but it is very far away and it does not help. Can you testify against someone we do not see? To speak would reduce our suffering and I hope that he will be punished but no one has come to speak to us about what he did. How can they try someone if they do not hear our stories? If he came here, maybe he could ask for forgiveness, and perhaps we could have forgiven him. Over there, it does not follow the way of justice that we expect. (Clark and Palmer 2012, 12)

Therefore if legally orientated scholars and courts themselves engaged with the idea international criminal law, and witness testimonies, do not automatically equate with justice this will allow for more robust and context specific understandings of justice. Conceptual insights and questions proposed here would also free up space for legal scholars to think outside the legalistic sphere of a 'self-contained system with its own logic' for how to respond to mass right violations (Zunino 2018, 109). Specifically, if they were to engage with the discursive conditions and restrictions of legal processes and the very narrow and singular narrative of the past it tells, this would give them opportunity to consider what alternative processes their advocacy and research could explore that might have a more positive impact on the individuals and communities are trying to help. To ask legal scholars to re-orientate their restorative justice research away from international criminal law, is a big ask, but vitally necessary.

Conclusion

This chapter argued that an analysis of motion and motion decisions showed they are an important discursive space that further evidences the important role legal actors play in the construction of legal memory. The latter part of the chapter, drawing upon the analysis from Chapters 4-6 and the original conceptual framework, provided a critique of Osiel's conceptual understanding of law and collective memory and in doing so offered an alternative. The chapter began by discussing the crucial role discursive statements of 'interests of justice' and 'judicial economy' have in discursively restricting who can be a

witness subject and what memories they can talk about. Developing on from this discussion it was suggested that the disclosure process was also discursively important. From this, the role of legal actors in editing, shaping and restricting what memories of rape and sexual violence witnesses were required to talk about was outlined. In particular in contrast to the claims by many at the ICTR and some scholars that an important legacy of the tribunal was convicting the crime of rape, it is concluded that prosecuting this crime also acted as a restrictive process of what memories were heard and importantly not heard, such as memories of male victims of rape and sexual violence. Foregrounding the singularity of legal determination this chapter has aimed to unshackle the fallacy of a transcendent synthesis at international tribunals (ICTR). That being, the conflation of legal determination and the capacity of law to contribute to making sense of the past in deeply divided societies: the law's (in)ability to facilitate social change (Turner 2016). In illustrating the discursivity of witnessing at international tribunals, the thesis shows how the legal production of memory should not be assumed by the legal transitional justice scholarship as having the capacity of aiding transitioning societies of coming to terms with a traumatic past.

Chapter 7 – Fragments of Legal Memories

This final chapter explores a potential way legal witnesses could contribute to the plurality of memory in post-conflict societies, which is not rigid and fixed within the tightly controlled discursive conditions of legal proceedings. Specifically, in relation to the thesis's research question, 'How do legal witnesses of human rights violations contribute to memory production in transitional post-conflict societies?', the discussion explores the potential for fragments of witness memories contained in the ICTR archive to contribute to the post-genocide memory ecology in Rwanda. These fragments include witness statements and testimonies, along with other material including forensic reports, investigators' dossiers, videos of investigation sites, diaries, letters and photographs from pre-genocide, genocide and post-genocide periods. To be clear, the argument made in Chapters 4-6 should not be understood as nihilistic; such an argument would reduce the entire ICTR legal process of memory construction to a black hole of nothing more than problematic and unhelpful stories. Rather, it has been necessary for the primary focus of this thesis to conceptualise and show that what it is legal witnesses are and the way in which they remember is formed within a tightly controlled discursive field. Having made this argument allows for the final chapter to conceptually explore what else the legal process of memory construction does: what else happens or is produced through the discursive practices at the ICTR. Therefore the discussion in this chapter extends the argument made in Chapters 4-6, by suggesting that the tightly controlled discursive process at the ICTR produces fragments of plural memories. The chapter begins by conceptualising the ICTR archives as a site where fragments of memories of legal witnesses exist; it does this by engaging with Emmanuel Levinas's conceptual understanding of 'relationality' (the Other) and Ricoeur's understanding of the plurality of memory (Levinas 2001; Ricoeur 2004). The use of the term memory ecology (Hoskins 2016) instead of collective memory is deliberate (see Chapter 1, Section 5). Memory ecology, or post-conflict memory ecology, is understood here to mean the perpetual interactions between and across the numerous levels and layers of memory. Collective memory, both conceptually and in popular discourse, suggests a pinnacle of shared understanding of past events can be reached. In short, it is by conceptualising the ICTR archives, using 'relationality' and 'plurality', that the potential for legal archive material as a site of plural meanings of past atrocities can be explored.

Using the conceptual frame discussed above, the concluding part of the chapter considers the empirical potential, and challenges, of proposing that legal witnesses can potentially contribute to the Rwandan memory ecology in the form of the ICTR archive material. The vast collection of material relates to the testimony of legal witnesses, along with images and audio material, which were gathered as part of the prosecutors' and defence counsel's investigations. Some of this was used during trials, but not all. The unused materials were not deemed relevant to the narrow legal narrative lawyers need to tell in contributing to reaching a legal determination of guilty or not guilty. However, this does not necessarily mean these materials are unreliable or not potentially meaningful and important to Rwandan communities and individuals. It is the fragmented and non-linear space of legal archives that can contribute to the plurality of meaning in how societies make sense of mass violations of human rights.

In summary, this chapter proposes that legal witnesses can potentially contribute to the post-conflict memory ecology during periods of transition, although crucially, this requires a conceptual reorientation in how we think about legal memory. Here, suggesting that legal witnesses can contribute to memory is not a retreat on this thesis's core line of argument which challenges the claim that tribunals can produce a collective memory of mass rights violations. Rather, this chapter suggests that if we re-orientate our understanding of legal memory away from court proceedings and instead zoom-in on the legal archive, and the material it houses, this can potentially be a way that legal witnesses can contribute to the post-conflict memory ecology in Rwanda. This chapter offers an alternative way of thinking about transitioning societies' relationships with legal memory. The chapter is one way not to be limited by law's need for singularity and progress, and therefore puts front and centre the plural and multidirectional nature of remembering atrocities.

Legal Archives: Plurality, Self and 'Others'

The following discussion conceptually explores how ICTR archival material consists of relational fragments of memories and how these fragments could contribute towards Rwandan's sharing experiences of the past. In order to do this the chapter engages with and interprets Emmanuel Levinas' concept of relationality (the 'Other'). Levinas's understanding of relationality has as its essence the irreducible relation between oneself and other people, which Levinas refers to as the 'Other' (Levinas 2001, 33-40; Frost 2014, 223). For Levinas, the self, or I, awareness of objects leads to the awareness of the 'Other'.

It is this awareness of the 'Other' that is relational (Levinas 2001, 104-118). The 'Other' exists before the self, in fact it is the Other that constitutes the self. Importantly, as Frost argues, the Other constituting the self 'does not drive the I into any particular outcome. Nor does the relation to the Other have any meaning apart from constituting the I, the Self' (Frost 2014, 227). In short, Levinas's concept of relationality is interpreted here as a way to think about archival material exists as individual fragments but in relation to other fragments, though importantly the relation is not pre-determined or presupposing the memory into a group or identity.

This chapter interprets Levinas's understanding of 'relationality' as a conceptual tool to suggest that fragments of memories have relations to each other, and, Rwandans' relational existence to the past is a helpful way to be able to move beyond the trauma of 1994. Specifically, relationality is being used in two interconnecting ways: fragments of experiences in the archive are connected but not determined into a dominant narrative, and Rwandans have relational existence to plural experiences of the past. Firstly, central to the relationality of experiences of the past is the relation to the Other. This relation is the interaction with Others, or the 'face-to-face' encounter, 'the face speaks to me and thereby invites me to a relation' (Levinas 2001, 198). For Levinas, this encounter with the Other emphasises that it is not 'possible to conceptualise the world without reaching out to the Other' (Levinas 2001, 201). Specifically, this face-to-face encounter involves not only being with Others but speaking to the Other and accepting the Other (Frost 2015). It is through an interaction with the Other that understanding and acceptance of the Other happens, although importantly without the I being reduced to the Other (Levinas 2001). Crucially the I exists in relation to the Other but is not encapsulated within it. This is particularly important when we think about how remembering the past entails not only individuals sharing their experiences with their communities but also accepting experiences of Other people, even if they do not approve the action carried out by the Other. In short, Levinas' relationality is interpreted here as the irreducible relationship of individuals to Others, to experience the world of Other people and with Other people.

Secondly, understanding fragments of memories contained within the diverse archival material as relational is a way of resisting a dominant singular legal narrative. As Levinas states, being in relation to Others does not mean that relationality acts to define that belonging, rather relationality is what constitutes existence (Levinas 2001). In the context of the archival material, the fragments of experiences, such as testimonies of witnesses, photographs and letters, exist in relation to each other but importantly do not

tell a collective singular narrative of the past. Each fragment of memory tells a story, related to stories of other fragments, but crucially without being reduced to a homogenous understanding of the past. In short, relationality is being used here as a way to show that the ICTR archive contains fragments of legal memories but that crucially these fragments are not constructed into the narrow collective memory the ICTR produces. These fragments of memories exist as legal memories as they were produced by the discursive practices at the ICTR. However they are not encapsulated within the tightly controlled discursive conditions of the ICTR. In summary, relationality is suggested here as a useful way to think about transitioning societies' relationships with legal memory that highlights the existence of fragments of the past telling multiple stories. Legal memory in the form of fragments of experiences in the archive material, including witness testimonies, exist as relational fragments. Each fragment of memory exists in relation to other fragments but, unlike the narrow legal memory the ICTR produces, these fragments have not been defined within a dominant narrative of the past.

Plural Fragments of Memory

The following paragraphs will extend the above discussion by outlining Ricoeur's understanding of plural memory and how this, along with relationality, is a useful conceptual tool to suggest that witness statements in the archive, along with other material, can contribute to the post-genocide memory ecology in Rwanda. According to Ricoeur, memory entails both individuals and groups and therefore entails multiple stories of past experiences (Ricoeur 2004, 54). Importantly, individual memories communally shared with others does not mean that a comprehensive or complete memory of the past can be produced. Rather for Ricoeur, and this thesis, memory is a process (see Chapter 1 and 2). To help illustrate Ricoeur's philosophical insights on plural memories and how they are a useful way to think about fragments of memories of mass rights violations, the discussion will also engage with memory studies scholar Michel Rothberg's concept of multidirectional memory. Rothberg uses his concept of multidirectional memories to explore how memories of the Holocaust interact with each other and historically connected events such as colonialism and slavery (Rothberg 2009). The thesis interprets Rothberg's concept as a tool to illustrate how memories relating to Rwanda's past interact and shape other memories.

As has been stated from the beginning of this thesis, memory is understood here as something produced in the present and not a thing from the past that is recovered.

Memory construction, and the knowledge and identities it produces, only occurs in the present. It is a process of construction and production and not one of recovery, which as discussed in previous chapters is a common perspective within the legal transitional justice scholarship (Combs 2012; Groom 2011; Keydar 2019; Klinkner and Smith 2015; Osiel 2000). Here, the resistance to the terms of recovery or freeing of memory is used as a frame to avoid an overly simplistic or idealistic characterisation of memory. Specifically, memory understood as something recovered or freed misses, or is conceptually unable to account for, the dynamics of memory and the crucial role institutions and actors have in the construction of memory.

According to Ricoeur, memory is not a singular thing in which the more we remember the more knowledge and understanding about the world is accumulated. Rather, memory is a plural and dispersed process that takes place in the present (Ricoeur 2004, 29). Specifically, memory entails individuals and groups across and between spaces and times. Memory production consists of dominant memories, such as those produced by the ICTR. However, importantly, a dominant memory is never autonomous and always exists in relation to other sites of memory. In short, within spaces of memory production there is always dominant memory where knowledge and identity are constructed, as Chapters 4-6 have argued in the context of witnesses' memories at the ICTR. Crucially, however, dominant memory of the past is part of a process which can shift and change across time and space. These spaces can include legal and political institutions, news media, literature, film, documentary and social media (Rothberg 2009). It is because of the plural and fluid nature of memory that this chapter proposes witness statements and other materials in the ICTR archive are a productive way to think about transitioning societies' relationship with legal memory.

A key part of Ricoeur's understanding of the plurality of memory is the absence of memory. In the context of remembering past phenomena and events, the absence of memories is often seen as a deficiency or limitation of remembering (Olick 1999). As Ricoeur states, '[m]emory appears to be caught from the outset in the nets of a transcendent authority, where the problems of credibility are held to be already resolved' (Ricoeur 2004, 386). However, Ricoeur insists absence is not a weakness of memory. Rather, absence is a fundamental part of memory (Ricoeur 2004, 266). It is absences in the construction of memory that foregrounds the plural and multi-layered sphere during acts of remembering. As Ricoeur argues, memory is not something that can be fulfilled by trying to complete gaps in the narrative (Ricoeur 2004, 265). To try to alleviate the

memory of absences is an impossible task because what is not there or what is not heard is a crucial part of all memory and the stories told (Ricoeur 2004, 237). In short, memory is always partial and rather than trying to ‘complete’ or fulfil memory, remembering the past will always entail things said and heard and crucially also silences and gaps. In this sense, ‘loss [or absence] can reveal itself to be inherent in the work of remembering’ (Ricoeur 2004, 391). What is particularly helpful for this chapter in Ricoeur’s understanding of absence is that it provides a conceptual lens to think about the plurality of post-genocide memory ecology in Rwanda. Particularly, thinking of memory as absence, plural, it can be suggested as a way to think of the fragments of memory within the statements and testimonies of witnesses along with other material such as photographs, videos, letters, and diaries and how these fragments can contribute to multiple spaces of memory in Rwanda.

To help illustrate how Ricoeur’s conceptual understanding of the plurality of memory is a useful way to think about memories of mass rights violations within the ICTR archive, Rothberg’s concept of multidirectional memory is drawn upon. In the context of traumatic memories Rothberg argues that we need to think about how past trauma is transmitted across diverse places and times (Rothberg 2008, 29).¹³³ Memories of traumatic events are communicated publicly and interact with other memories of the same event, as well as historically different but related events (Rothberg 2008, 272).¹³⁴ That is to say, memories relating to a given historical event are not contained in an impenetrable bubble separated from other historical events. Rather, memories of different historical phenomena interact and shape each other. In the Rwandan context we can think of memories relating to the genocide against the Tutsi interacting with and shaping memories of distinct but related events, such as memories of colonialism. The key point Rothberg makes is the way in which memories of shared events interact with each other across spaces, such as political and legal institutions, education, news media, literature, film, social media and are transmitted between generations. One example of spaces where memories of 1994 manifest is in photography and film. Cieplak (2017) has investigated how these two forms of art represent memories of the genocide against the Tutsi. He shows how memories of the horrors of 1994 depicted in imagery and film provide diverse narrative representations of the genocide and how some of these representations

¹³³ See Jay Winter ‘War and Remembrance’ (1999).

¹³⁴ Rothberg argues that memories of the Holocaust interact and shape memories of colonialism and slavery (2009).

demonstrate the limitations of imagery when confronted with the scale and complexity of mass atrocities (Cieplak 2017, 2018).¹³⁵ These multiple spaces of memory transmission entail memories of those who experienced the genocide against the Tutsi as well as individuals who have no personal memories of the horrors of 1994, such as those born during or after the genocide. The intergeneration transmission of memory and the potential for archive material, including witness statements and testimonies, to aid this process will be unpacked in the discussion below (Rothberg 2008, 176-177).

As Rothberg states, understanding traumatic memory as diverse plural interactions ‘draws attention to the dynamic transfers which took place between diverse places and times during the act of remembrance’ (Rothberg 2008, 29). The way in which individuals and communities attempt to come to terms with a traumatic past ‘always happens in comparative contexts and via the circulation of memories linked to what are only apparently separate histories’ (Rothberg 2008, 272).¹³⁶ In other words, understanding memory as plural, multidirectional, helps to move beyond understanding memory of mass atrocities as a ‘zero-sum game’, whereby when a term such as the genocide against the Tutsi is used it defines a paradigm for what that term means and importantly what legitimate memories fit within it. Thinking of memory as plural helps to disaggregate understandings of past phenomenon of mass atrocities as ‘one thing’ (Rothberg 2009, 4). The plurality of memory helps to cast light on the different interactions of memories. Importantly, where there are tensions between memories this does not in fact restrict memories. Rather, tensions can produce more memory because they can foreground things that have been marginalised or under represented areas of debate (Rothberg 2009, 11). To help show how fragments of memories in the ICTR archive could contribute to the plural memory ecology in Rwanda, an illustrated example using witness statements and photographs will now be used.

¹³⁵ For further examples see Gilbert (2018); Hitchcock (2017)

¹³⁶ Rothberg’s framing of memory as a dynamic and multidirectional process relates to Landsberg’s idea of prosthetic memory, a memory space between the individual and collective. In this sense Landsberg’s thinking on memory also shares some similarities with Ricoeur’s. For Landsberg, prosthetic memories are neither exclusively individual nor completely collective but appear at the intersection of individual and collective experiences. ‘They are privately felt public memories that develop after an encounter with a mass cultural representation of the past, when new images and ideas come into contact with a person’s own archive of experience’ (Landsberg 2004, 19). Also see Hirst and Stone (2015).

Intergenerational Transmission of Legal Memories: Words and Images

There is a generation of Rwandans born during or after the genocide against the Tutsi who thus have no personal memories of the events of 1994. This generation relies on the memories and stories of other people, such as family members and history told through the school curriculum (Benda 2019, 192). It is suggested here that archival material, such as witness statements and photographs, could be a productive way to stimulate intergenerational transmission of memories that engages with the diverse memory ecology in Rwanda. The intergenerational transmission of memories of past trauma is a two-way process (Pells 2018). Individuals who experienced the events of 1994 draw upon their personal memories as well as memories of other people's experiences of the genocide against the Tutsi. Individuals who were born during/after the genocide bring to the transmission fragments of stories they have heard through encounters with other people. It is this two-way process during the intergeneration transmission of memories where witness statements/testimonies and photographs could have a useful role.

For example, witness statements, summaries of witness statements and transcripts of witness testimonies could potentially be a useful starting point for conversations between parents and their children. Particularly so considering that some parents find it very difficult to discuss their personal experience of the genocide against the Tutsi as it can bring back very traumatic experiences (Pells 2018). Witness statements and transcripts of testimonies could potentially facilitate conversations as parents would not need to draw directly on their experience. In short, the words and memories in the statements and transcripts of testimonies could allow parents to share with their children memories of past trauma. Their children could also read the statements and testimonies before having a conversation with their parents as this would allow them time to consider how these memories of witnesses relate to other memories in the Rwandan memory ecology. Here, it is important to note that suggesting witness statements and testimonies could contribute to intergenerational transmissions of memories, the memories in the witness statements are not part of the singular and narrow collective memory the ICTR produces through court proceedings. Rather, they are part of the fragments of legal memories. The potential for witness statements and testimonies to contribute to the transmission of memories between generations includes children of genocide survivors as well as children of those who perpetrated the genocide (Benda 2019, 194-195). Children of genocide perpetrators can often live with both internal and social stigma because of the past actions of their parent(s) (Benda 2019; Pells 2018). Witness

statements could facilitate important conversations between perpetrators and their children, which could potentially allow them to better understand the circumstances and decisions around their parents' participation and help them to move beyond the stigma.

Photographs from the ICTR archive can potentially provide a further way for intergenerational transmission of memories to engage with the Rwandan memory ecology. The ICTR archives contain hundreds of photographs including family photos, photos taken by journalists during the genocide against the Tutsi and photographs taken by ICTR investigators. Many of the photographs are of places that the post-genocide generation would likely know and may also be part of their everyday reality: shops, football stadiums and churches. For example, photographs taken after the genocide by ICTR investigators of places where genocidal violence occurred, such as high streets and football stadiums, could be a way of facilitating a dialogue between generations.¹³⁷ Particularly, some of these images will be part of the post-genocide generation's everyday lived reality, physical spaces that they know and interact with on a regular basis. Having familiarity with the places in these photographs means it is likely that individuals born after the genocide will have a collection of stories, or fragments of memories, associated with these places. These images could be used as a starting point to facilitate a conversation between those who experienced the horrors of 1994 and those with no personal memories. Particularly, as both individuals will have stories of these places it would allow for multiple meanings to be discussed. Photographs are not a site where meaning is given, rather spaces where meanings are sought and negotiated (Fairly and Orton 2019). In the Rwandan context, photographs from the ICTR archive offer an opportunity for meanings of Rwanda's past to be sought and negotiated between generations. Photographs can stimulate dialogue about human experiences because imagery is explicitly orientated towards embracing complexity and the plurality of lived experiences (Azoulay 2012). Photographs carry with them the potential for perspectives to be explored, reinforced, challenged and altered, and is the beginning of a conversation (Fairly and Orton 2019, 299). Photographs as a tool for dialogue are 'enmeshed in webs of power, resistance and agency through which we assert and explore a sense of self and relation to others' (Fairey and Orton 2019, 299). Dialogue through photographs is a process of being with, and, being open to others, experiencing the world of and with other people (Fairly and Orton 2019, 301). ICTR archival photographs as a dialogue to engage

¹³⁷ For an example of the importance of photographs in how some Rwandans come to terms with and manage their past trauma see Cieplank's documentary 'The Faces We Lost' (2017).

with other people and their experiences speak directly to Levinas's idea of the Other and Ricoeur's Plurality of memory.

Proposing here that archival material, such as witness statements and photographs, could aid intergenerational transmission of memory is positioned as working alongside existing endeavours in Rwanda that aim to foster a dialogue about Rwanda's past and future. For example, the Aegis Trust has produced a 'Youth' programme, including workshops and educational literature, which aims to teach the post genocide generation about the horrors of 1994, and lessons of compassion and tolerance. Incorporating difference is a purported part of the programme where children of genocide perpetrators and survivors and victims are encouraged into a dialogue. This dialogue is intended to allow this generation to understand different perspectives of the genocide and to help to reduce stigma for individuals whose family members participated in the genocide against the Tutsi. While programmes such as the Aegis Trust 'Youth' initiative aim to foster a dialogue about Rwanda's past, the metanarrative the programme tells is a story that aligns with the Rwandan government's depiction of the country's history. Since coming to power in the aftermath of the genocide, the Rwandan Patriotic Front (RPF) have produced a narrative of the history depicting Rwanda's traumatic past. Simplistically put, this narrative tells a story of how the RPF brought an end to years of repression and ethnic hatred (Gahima 2013). Since bringing an end to the genocide against the Tutsi the RPF have created an inclusive society void of ethnic division where individuals are defined by their identity as Rwandans, and not by ethnic groups. Through a long process of justice, forgiveness and healing, Rwandan society has been able to grow and prosper (Gahima 2013). This narrative is tightly controlled by the government and the RPF is very sensitive to any attempts to deviate from the story it tells. It is the view of this thesis that the RPF narrative of the genocide against the Tutsi and a single Rwandan identity has helped to reduce violence in the country and has allowed for a degree of stability (Chemouni 2017; Chemouni and Mugiraneza 2019; Clark 2014; Doughty 2015).¹³⁸

¹³⁸ Chemouni has argued that much of the scholarship on the Rwandan government's decentralisation process has been overly critical in defining it as a destabilising and a negative process. Chemouni, states that actually decentralisation has allowed for popular participation which has had a stabilising effect. Notwithstanding this, to ensure long-term stability there is a need for the government to introduce 'bottom-up' and localised processes of decision making (Chemouni 2017). Also see Chemouni and Mugiraneza (2019).

However, the RPF narrative does not allow for the many different ‘threads’ of Rwandans’ past to be widely discussed and debated publicly.¹³⁹ For example these ‘threads’ include: some Hutus took no part in the violence and perceived themselves as survivors. However the term survivor is often prioritised for Tutsi, this can have implications in regards financial support ‘survivors’ may be entitled to (Burnet 2012, 158)¹⁴⁰; the complex reasons why some people participated in the genocide was for some individuals nothing to do with ethnic hatred but settling long-term personal grievances (Fujii 2009); those born of rape and/or orphaned during the genocide who live with social stigma and without emotional and financial support.¹⁴¹ A further ‘thread’ of Rwanda’s past is the role the RPF played in crimes committed during and in the aftermath of the genocide against the Tutsi. It is commonly accepted within the scholarship that the RPF did commit acts of criminal violence during and in the aftermath of the genocide, however, scholars are divided on the extent and scale RPF violence was planned and carried out.¹⁴² No members associated with the RPF were indicted at the ICTR, even though such alleged crimes did fall within its mandate.¹⁴³ The RPF have acknowledged that a ‘few’ individuals, ‘some bad fruit’, committed criminal acts of violence during the genocide against the Tutsi (Jones 2009). These individuals have been prosecuted at ‘closed doors’ Rwandan military courts (Ndahinda 2016, 167). According to former ICTR prosecutor Jallow, the Rwandan government had shown him details of up to 24 senior military officers who had been prosecuted by the Rwandan military courts in

¹³⁹ There is a claim made by some Western scholars, De Lamb (2005) Combs (2010), that Rwandans have a culture of secrecy and silence and don’t talk, or don’t want to talk about the country’s past. While an element of Rwandan reservedness may exist, however, claiming there is a widespread culture where Rwandans do not share and debate political and social issues is an overreach (Clark 2010, 213-214; Clark 2014; Sundberg 2014).

¹⁴⁰ The Rwandan government led Genocide Survivors Assistance Fund (FARG) provides the most ‘needy’ survivors with financial supports and school scholarships. To be eligible for this financial aid individuals must be officially recognised by FARG administration which requires two supporting signatories from local survivor organisations. Burnet has argued that while in principle Tutsi and Hutu survivors should have equal access to support that in reality the scheme unevenly favours Tutsi survivors (Burnet 2012, 155-156)

¹⁴¹ Denov and Kahn suggest that young Rwandans born of rape during the genocide against the Tutsi entail a complex notion of victimhood. They argue that individuals born of rape are victims, but currently in Rwanda they are not understood as such and this has resulted in exclusion and embedded social stigma (Denov and Kahn 2019).

¹⁴² For examples of debates on RPF Violence during and in the aftermath of the genocide against the Tutsi see Longman 2017; Jones 2009; Clark 2010; Burnet 2009; Doughty 2015.

¹⁴³ ICTR Defence Lawyer Charles Taku has stated that one of the shortcomings of the tribunal was not to prosecute crimes committed by the RPF. In interview with Friedman and Slye, Taku states:

in spite of the fact Prosecutor himself has said so many times that, “We’re investigating the RPF, they will be indicted.” The fact that the Prosecutor is unable to do this, presumably due to other influences, and he can hide behind prosecutorial independence, I think it’s an abuse of the notion of independence (Friedman and Slye 2008).

relation to allegations against the RPF (Jallow 2009).¹⁴⁴ One implication of this in terms of Rwandan memory ecology is that individuals who have traumatic memories of RPF violence or who lost loved ones at the hands of the RPF do not have a space to externalise their memories within the dominant RPF narrative of Rwanda's past. The main point to highlight here is that while initiatives such as the Aegis Trust 'Youth' Programme do facilitate an important dialogue about memories of Rwanda's traumatic past for individuals who have no personal memories of 1994, however this dialogue is unable to engage with many of the 'threads' of Rwanda's past. It is suggested here that fragments of memories within archival material, such as witness statements and photographs, could facilitate a dialogue for plural meanings and experiences of Rwanda's past to be discussed. Crucially, fragments of memories in the form of archival material are not telling a collective singular story, but instead allowing for plural memories and experiences of others to be worked through and negotiated.

Here suggesting the potential of archival material to aid the post genocide memory ecology aims to embrace the relational experience of other people (Levinas 2001). In short, acknowledging the plurality of memory and working through experiences of the past with others. The dominant RPF narrative is indeed a significant part of the memory ecology in Rwanda. To be sure, it is not the purpose of fragments of memories in the ICTR archival material to dismiss or make redundant the dominant RPF narrative. This narrative is for a number of Rwandans an account of the past that they genuinely subscribe to beyond any state coercion (Sundberg 2014). Rather, the Rwandan memory ecology is more complex and dispersed than just the dominant RPF narrative and ICTR archival material has the potential to facilitate a dialogue about the different 'threads' of Rwanda's past.

This section has proposed that if we reframe legal memory in terms of ICTR archival material this could potentially be a productive way legal witnesses could contribute to the post-genocide memory ecology in Rwanda. Specifically, a conceptual lens using relationality (Levinas) and plural memory (Ricoeur) has been suggested as a useful way to think about fragments of memories contained in the archive material, and how this could contribute to the memory ecology in Rwanda. Fragments of memories in the archive could contribute to plural meanings relating to the events of 1994 as well as distinct but related events in Rwanda's past (Ricoeur 2004). Using illustrated examples

¹⁴⁴ See Jallows statement to the UN Security council (2009) - <https://undocs.org/en/S/PV.6134>

of witness statements and photographs from the ICTR archive it was suggested that these materials could aid the intergeneration transmission of memories. Materials housed in the ICTR archive, such as photographs, contain plural meanings and could facilitate dialogues about Rwandans' shared past experiences. Conceptualising the ICTR archive as relational and plural acknowledges and is orientated towards the many 'threads' of Rwanda's past. Archival material, fragments of memory, is suggested that can aid the plurality of the post genocide memory ecology in Rwanda.

Having offered a conceptualisation of the ICTR legal archive and suggested how archival material can potentially contribute to the post genocide memory ecology in Rwanda, it is now necessary to explore the empirical potential and challenges of working with the ICTR archive.

Legal Memory: The Empirical Potential and Challenges of the ICTR Archive

This concluding section will explore how the ICTR archival material could potentially contribute to the post genocide memory ecology in Rwanda using the lens of relationality and plural memories. The ICTR archive consists of the publicly accessible online archive and the archive facility in Arusha, Tanzania. The archive contains material relating to all of the 93 cases at the ICTR. Firstly, having a diverse amount of material which is publicly accessible presents a very rich source of information (Ketelaar 2012; Wilson 2011). This rich material includes witness testimony, photographs before, during, and after the genocide against the Tutsi, videos, maps, sketches and drawings, letters and extracts of diaries of accused. In principle, anyone with access to the internet can search for and obtain material from the online archive. Having an online publicly accessible platform means that the fragments of memories, as discussed above, are available without having to gain permission.

There are of course caveats to 'publicly accessible material', which are worth expanding upon here. The physical archive being located not in Rwanda but in Tanzania means the reality for most Rwandans is that the physical archive while in name is publicly accessible it is not accessible to them in practice. The physical archive contains more material than the online archive because the digitisation process is ongoing. Furthermore, the decision by the ICTR, now International Residual Mechanism for Criminal Tribunals (IRMCT), to permanently locate the physical archive outside of Rwanda reflects long-term tensions between the ICTR and the Rwandan government, particularly around the question of ownership of the archive (Redwood 2017). It is a fact that the material

contained in the ICTR archive belongs to the United Nations (Campbell 2013). However, while the ICTR may have legal ownership of the archive material, these materials are the experiences of Rwandans. In one sense this raises a question around ownership of memories or ownership of fragments of experiences. Particularly, if the ICTR physical archive contains fragments of experiences of individual memories, as suggested in Section 1, then to what extent can or should it be owned? If we understand fragments as being owned it is likely that this would have implications for these fragments of memory to contribute to the plurality of memory in the Rwandan memory ecology. One argument, which is that of the IRMCT, for the ownership of fragments of experiences is that it is a necessity to ensure the long-term safety and preservation of the archive material (ICTR 2015). Primarily, the concern of the ICTR is that if the archive material was given to the Rwandan government, they may restrict access to it and possibly destroy material they deem to be sensitive.¹⁴⁵ From the ICTR's perspective it could be suggested that ownership of fragments of memories is justifiable on the grounds that they would otherwise be at risk. One thing here, if ICTR ownership of fragments of memory is necessary in order to ensure the safeguarding of the material, then ownership justified as means to protect memory comes at the cost of restricting the relationality of fragments of memory and their potential to aid the Rwandan memory ecology. It is the view of this thesis that the archival material should be as accessible as possible, and decisions around the necessity for ownership should include Rwandans in that discussion, which currently is not happening. There is then a need to think about what alternative options of ownership of fragments of memory are possible that would facilitate Rwandans having maximum accessibility to these legal memories.

One alternative option is that the entire archive to be moved to Rwanda under the ownership of the Rwandan government. However, considering that the United Nations have built a new archive facility (2017) in Arusha, Tanzania it is currently very unlikely this will happen. As part of the research for this doctoral thesis I had planned to visit the archive facility in Arusha, however, during the planning of this visit I was informed by an ICTR (IRMCT) archivist that in fact the archive was empty and had been so since the facility 'opened'. This was in Autumn 2017 and at that stage I was told that it would be

¹⁴⁵ Former ICTR (and ICTY) Chief Prosecutor Carla Del Ponte previously opened an investigation into alleged crimes committed by RPF although the ICTR never issued any indictments against individuals associated with the RPF. Even though no indictments were issued it is possible the material obtained during the initial investigation, likely to be classified, could be contained within the physical archive (Jones 2009).

at least another 10 months if not more until the archive material would be transferred from its temporary storage unit to the archive. I was told the reason for this delay was that during the building of the facility the specific environment requirements for an archive storage space had not been followed and as such it was not safe for the material to be moved there. While it is necessary for materials to be stored in an appropriate environment, there was no public communication about the facility being empty. Indeed, the limited information available on the IRMCT website stated that the facility was open and welcoming visitors.

The potential for the archival material, or at least some of the material, to be located in Rwanda may be possible in the future, which has been made more likely with recent thawing in relations between the residual mechanism and the Rwandan government. This could take the form of copies of all the material being made and given to the Rwandan state to create a ‘near’ original physical archive. In one sense, this would alleviate some of the ICTR’s concern around ensuring the safeguarding of material as they would still have the originals. It also allows for, in principle at least, the greater accessibility for Rwandans as materials would be physically in Rwanda. Although, there are questions that arise from Rwandan state ownership of the archive that draws the question of whether this option would actually make fragments of memory more accessible for Rwandans. For example, decisions would need to be made regarding whether all of the material in the physical archive in Arusha, including restricted and classified material, would be copied. Additionally, the practicalities of copying the archive material in terms of staff hours and cost may make the ICTR less keen to engage with this possibility. Relatedly, it can be suggested here that some concerns the ICTR may have around staff hours and costs could have been alleviated if there was earlier long-term planning. Specifically, the records and management section allocated significant resources to the digitising of audio-visual material of court proceedings. While the accessibility of these archival materials is important, based on discussions with a former ICTR archivist, this project almost entirely consumed the ICTR’s resources. In short, the sections decision to focus significant amounts of staff hours and costs on the audio-visual project potentially came at the detriment of copying and digitisation of other material that may have been more relevant to Rwandans. Furthermore, the idea of the Rwandan government having ownership of fragments of memories, archival material, is not unproblematic. Considering that the Rwandan government has produced a dominant memory of the horrors of 1994 it is very likely that it will not only use archival material

to contribute to that memory, but also restrict or suppress material that may challenge or may not fit within the narrative of the past they want to tell (Williams 2018). In other words, while ownership of fragments of memory by the Rwandan government would mean Rwandans are geographically closer to archival material there is potential concern that in practice Rwandans would have quite limited access. Another possible option for ownership of fragments of memory could be a consortium of archival organisations that have custody of the material. Such a consortium could manage the archive within Rwanda and work with the Rwandan authorities and other agencies. However, a consortium of external organisations and actors would entail significant long-term planning and financial investment and thus might not be suitable for the Rwandan context.

In summary, fragments of institutionally (ICTR) produced memories are perpetually entangled in claims of ownership, and trying to envision fragments of legal memories without some kind of ownership at the least is highly problematic. If it is the case that ownership of legal fragments of memory is unavoidable it is necessary, then, to consider whether the digital archive has more possibility of relationality than the physical archive.

The ICTR online archive consists of a newly (2018) reconfigured detailed search interface that allows users to search from numerous documents in a single ICTR case or across multiple cases. Based upon more than three years of personal experience with engaging with the online ICTR archive, this newest reconfiguration of the online search platform is a significant improvement regarding being more user-friendly and accessible.¹⁴⁶ However, in the context of the online (digital) archive being a space of fragments of memories there are specific challenges in regard to the potential for this archival material to contribute to the Rwandan memory ecology (Ketelaar 2016). Firstly, as access to the online archive requires good internet connection this could raise accessibility issues for people in Rwanda. Notwithstanding the improvements to technology infrastructure in Rwanda, reliable internet connection is not guaranteed (ITU News 2018).¹⁴⁷ Considering that many of the digitised archive materials are large files,

¹⁴⁶ For a discussion on how new technologies presents opportunities and challenges for archives and archivists see Ketelaar 2016.

¹⁴⁷ In their 2018 report FreedomontheNet stated that:

Access to information and communication technologies (ICTs) in Rwanda has improved notably in recent years. Nonetheless, poverty continues to be the primary impediment to ICT uptake, especially the internet, with the majority of the population engaged in subsistence agriculture. Internet access is concentrated primarily in Kigali and remains beyond the reach of many citizens (FreedomontheNet 2018).

the possibility to download this material may be highly problematic. That said, the new platform does include a document preview option to allow you to view the material without the need to download.

One of the challenges for the online archive material to contribute to the memory ecology in Rwanda is the particularity of the ICTR archive catalogue. The ICTR archive, unlike many archives, uses the online search platform as an alternative to a traditional reference catalogue. A traditional archive catalogue is a document that lists all material in a given archive, including material that is restricted (Foote 1990). In short, an itinerary of both physical and digital material in the archive. This is important as a fully transparent record of all the material not only allows users to know what material the archive contains but is also crucial to the credibility of the archive. One implication of this is the near impossibility to know to what extent the online 'catalogue' represents all of the material in the archive. For example, based on experience of using the online archive, there was material listed on the old search platform, which is no longer listed on the new search platform. In short, there is material, unrestricted, that exists in the ICTR archive that is not listed in the 'catalogue'. Despite numerous requests I have made to the IRMCT for them to explain their decision to remove unrestricted documents from the catalogue or the opportunity to speak to somebody, these requests have remained unanswered. Partial and fragmented nature of the catalogue matters in relation to ownership of fragments in memory and how they could contribute to the memory ecology in Rwanda. Particularly, there is material, unrestricted material, which could be relevant to Rwandans that in essence nobody knows exists. This suggests that there is a need for more transparency and openness from the IRMCT. Part of the explanation for the reluctance of the archive to be more open currently relates to the archive being an afterthought, or add-on, to the tribunal. For example, a few years ago ICTR introduced a facility for the online archive whereby users could request documents which were unrestricted but would not be able to download the documents instantly. Based upon informal conversations I had with former ICTR archivists, the whole process of implementing the document request service was rushed and ill thought through. The archivist team thought it would be a useful feature for users to be able to request documents, however, they had not anticipated the huge volumes of requests and the practicalities in terms of resources and staff to respond to these requests. From the beginning of the feature being introduced they were unable to respond and properly maintain the service. Based on my own experience of using the request service this seems to be true. I have requested hundreds of documents, many of

which the wait is more than 18 months. Additionally when documents are requested users are told that they will be informed when documents are available. However this has not been my experience and many of the requests I have made went unfilled and it was not until to my own search for the documents a year later I discovered the documents were then available. Relatedly, the archive inherited problems from the judicial process at the ICTR, poor record management that further impedes accessing documents to be requested. During the first few years of the ICTR, the record management practices were very questionable (Nathan and McKay 2008). Many documents submitted via the registry were incorrectly labelled as restricted, confidential or non-restricted (Nathan and McKay 2008).¹⁴⁸ The archive has responded to this mislabelling of documents by creating the process of legal review. This process entails all documents that are unclear whether they are restricted or classified to be firstly reviewed by legal staff before they can be released to users. This is one of the reasons for the very long processing time for documents which have been requested. In other words, there are some issues of the archive's own making, such as a complex and confusing catalogue system and ill thought through functions such as the document request service, and other issues that the archive has inherited from the legal process such as poor document management. All of these practical issues have implications for the relationality of legal archive material and their potential to contribute the post genocide memory ecology in Rwandan.

Notwithstanding the practical challenges discussed above, of using the archival material, it is argued here that their potential to contribute towards plural discussion of Rwanda's past is significant. That said, it is necessary to acknowledge that proposing the usefulness of plural memory in Rwanda is not unproblematic. For example, genocide denial and revisionism are a continuing issue in Rwanda, and other post-genocide societies (Attallah 2019; Becirevic 2010; Eramian 2009; Lemarchand 2011). It is possible that those denying the Rwandan Genocide against the Tutsi could use the fragments of memories in the archival material to advance their own distorted narrative. Denial and revisionism of the genocide against the Tutsi by those involved in the genocide or its

¹⁴⁸ In interview with McKay and Nathan, former Chief of Information and Evidence Ayodeji Fadugba discusses the poor practices of securing and managing ICTR documents in the early years of the tribunal. In the early days:

there was no vault and documents came from the field, they were registered, there was one of the rooms in the Hotel Amahoro, ... So what you would do really, you know, there was a bathtub in there that was cleaned and so that you could put packages there for documents you know, because it was the only secure place you could find. So I would say if you have to do this again, think about how you're going to store your information (McKay and Nathan 2008).

supporters continues to be a significant challenge even 25 years after the events, denial is the final stage of genocide (Melvern 2020, 2). However, proposing here the benefits of archival material is not to suggest that all uses of memories, such as those denying genocide, should be allowed. As Rothberg argues, the multidirectional nature of memory inevitably means that some memories will be misused by some individuals: the plurality of memory is not always something positive (Rothberg 2009). This thesis's poststructuralist frame of memory construction does not argue that all memory should be permitted or plural memory is unproblematic. In short, suggesting the benefits of plural memories requires vigilance to the intentional distortion of the past. One significant advantage of this thesis's poststructuralist frame of memory is that it embraces the complexities and pluralities of human experiences. All experiences are plural, in that how people who were at the same event and saw the same thing can experience it in multiple ways from the more micro everyday events to the massive life changing events, such as genocide. However, there is also a difference between plural experiences of the same event and intentional distortions and manipulated uses of plural experiences, which are very far detached from the genuine experiences. When memory is misused it should be challenged with factual counter point (Rothberg 2009; Attallah 2019). There is always going to be a tension between plural experiences and intentional manipulation of the past. Research, such as this thesis, which investigates issues and themes of dealing with the past needs to be constantly aware of the intentional distortion of the past, and this is something that has to be navigated. Although this should not restrict the potential of plural discussion of the past. The plurality of memory can be very useful in aiding dialogue about multiple perspectives of the past, and in doing so it is also vulnerable to abhorrent appropriations of the past (Rothberg 2009). In short, the fragments of memories in the archival material have great potential to be a very useful way to explore the complexities and nuances of Rwanda's past, and aid conversations about its present and future. At the same time not all uses of the plurality of memory are justified and in such cases should be challenged.

This section has discussed the empirical potential and challenges of working with the ICTR archive to contribute to the memory ecology in Rwanda. The question around ownership of the archive was explored and whether the online archive was more suitable to contribute to the plurality of memory in Rwanda. Despite a number of empirical challenges, it was suggested that the relational fragments of memory in the archive has significant potential to contribute the memory ecology in Rwanda.

Conclusion

This chapter has extended the arguments made in chapters 4-6 by exploring a potential way legal witnesses could contribute to the post genocide memory ecology in Rwanda. Specifically, it was proposed that if we re-orientate our understanding of legal memory away from legal proceedings and instead focus on the fragments of memories within the ICTR archive material, this could offer transitioning societies an alternative way to engage with legal memory, that embraces the plural and multidirectional nature of remembering atrocities. This exploration began by conceptualising the relationality of fragments of memory in the archive and how Rwandans have relational existence to experience of the parts. The conceptual frame engaged with Levinas's concept of 'relationality' and Paul Ricoeur's insights the plurality of memory. This conceptual lens was then used to explore how fragments of memories within the archive could contribute towards the intergenerational transmission of memory. The discussion offered two illustrated examples, witness statements/transcripts and photographs, as a way to facilitate a plural dialogue between those who had experienced the genocide against the Tutsi and those who have no personal memories of the events of 1994. It was argued that conceptualising the fragments of memory within the legal archive material and using the illustrative examples indicated the potential for ICTR archives to contribute to the memory ecology in Rwanda. The latter part of the chapter considered the empirical potential and challenges of the ICTR archive. Ownership of the physical archive in Arusha was discussed, particularly in regards access issues and the impact of this on the relationality of experiences within the material. The online archive was discussed as a possible alternative that may better aid the sharing of relational experiences of the past. Although the online archive consists of a number of its own challenges, including transparency issues and poor document management practices the archive has inherited from the legal processes. Notwithstanding the challenges and ongoing issues with both the physical and online archive, it was proposed the archive material has significant potential to facilitate discussions about Rwanda's traumatic past and also aid conversations about its present and future.

Conclusion

This conclusion chapter will outline the findings of this thesis including the contributions of theory, methodology, use of data and recommendations that have come from this PhD project. Notwithstanding the contributions discussed in this chapter, there are limitations to this PhD research. The following paragraphs will therefore discuss the implications of the findings, the parameters of the project, and give suggestions for future directions of research.

This conceptually led thesis aimed to answer the question: ‘How do legal witnesses of mass human rights violations contribute to memory production in transitioning post conflict societies?’ To answer this question the research proposed an original conceptual framework, (Agamben and Ricoeur) as a lens to explore how the ICTR constructed the witness subject and memories. This theoretical lens was used alongside analysis of empirical data, legal documents from the ICTR online archive and interview transcripts of ICTR staff from the UoW online archive using a Foucauldian framework for discourse analysis.

As stated from the start of this thesis, the findings outlined here are not a normative prescription of how processes of legal witnessing should be in order to improve the way international criminal courts and tribunals contribute to understandings of past atrocities. Nor are the conceptually framed arguments meant to offer a standardised framework that provides a ‘better’ approach to understanding legal witnesses and memory at international criminal tribunals and courts. Rather, these conceptually framed findings do offer one alternative understanding of the ways in which the ICTR constructs witness identities and memory. In doing so, the findings contribute to extending the legal scholarship’s understanding of legal witnessing at international criminal tribunal and courts.

To enable the project’s research question to be answered - ‘How do witnesses of human rights violations contribute to memory production in transitional post-conflict societies?’ - the project asked the following subsidiary research questions:

- (i) How is the subject position of ‘witness’ discursively created? (The way social power relations produce identities and specific historically located meaning).

- (ii) In cases of mass human rights violations, how does the construction of memory at the ICTR frame the manner in which violence is remembered?
- (iii) Does positioning memory within the discursive construction of witness mean memory becomes fixed and rigid?

The thesis advances answers to these questions specifically in the context of the ICTR, which are discussed below.

Key Findings and Significance of Findings

Conceptualising the ways witnesses remember mass atrocities

Constructing an original conceptual framework using the concepts of ‘witness’ (Agamben) and ‘memory’ (Ricoeur) and applying it to the context of the ICTR results in important findings. Specifically, this conceptual framework made visible several important aspects of international criminal tribunals (ICTR) relating to the ways witnesses remember, which have been missed by traditional legal frameworks researching legal witnessing. Firstly, the witness who speaks in court is speaking on behalf, or in proxy, for the true witness. This shows that the knowledge of the past witnesses speak about is always partial. Related to this, what witnesses are is not self-evident, and a term like witness does not encapsulate the entire group. A particular value of this finding is that it redirects focus away from assuming what witnesses are is self-evident and instead focuses on how individuals become a witness. Secondly, witness memories are something constructed through a process of inclusion and exclusion by institutions, such as the ICTR and its actors. Furthermore, memory production is a dispersed process entailing numerous layers and levels, and entails people sharing past experiences with each other.

These findings are important for extending our understanding of legal memory because they show the need to think about memory as a process of construction and perpetually containing gaps and silence. These findings show the importance that conceptual insights can have in extending our understanding of transitional justice processes. Particularly, conceptually led research into legal phenomenon, such as this thesis, offers an alternative to the inward facing and self-preserving logic of legal responses to transitional justice.

The Discursive Creation of the Witness Subject

A major finding is that the processes before witnesses testify in court play a very important role in restricting who can be a witness and what memories they can talk about at the ICTR. The evidence presented in this thesis has shown that ICTR ‘foundational documents’, indictments, pre-trial briefs, motions and motion decisions are a crucial part of the discursive creation of the witness subject. Using Foucault’s idea of discursive statements, Chapter 4 showed that the ICTR statute, United Nations resolution 955, and RPE are more than legislative documents bringing the tribunal into existence: they discursively restrict who can be a witness subject. As argued in the first section of Chapter 4, two important statements in the ICTR statute that ‘filter’ who can occupy the subject position of witness are crimes within ICTR jurisdiction and the tribunal mandated to prosecute only those most responsible. The analysis of the data also showed that complexities of investigations including lack of professional investigators, the approach to investigations, and lack of local knowledge and expertise were further discursive conditions restricting who could be a witness subject. For example, many of the archived interview transcripts with investigators and prosecutors show discursively the important role of gathering only relevant witness evidence has in the filtering process of who can and who cannot be a witness. Related to this, evidence was presented of the role of prosecutors following a narrative of collective guilt in restricting which witnesses were included in indictments. Through analysis of numerous indictment and interview transcripts it was shown that procedural irregularities, such as indictments lacking evidence including witness evidence, acted as a restriction on who could potentially bear witness in court.

The findings also showed that ‘witness’ and ‘victim’ are two separate identity constructions entailing nuanced distinctions and therefore should be understood as such. Secondly, the discursive restrictions of the legal processes suggest that the claim agency made by advocates of the right to truth was misguided as many victims will likely feel let down. An analysis of motion and motion decisions, particularly in Chapter 6, shows that these legal processes are important sites in further ‘filtering’ out who could be a witness, as well as what memory they could speak about.

Memories of violence and discursivity

The memories of violence the ICTR needs in order to reach legal determination offer a narrow and very partial story of the genocidal violence in Rwanda. In particular, it was shown that the crimes within the ICTR jurisdiction such as the legal codification of the crime of genocide was an important part of discursively restricting what memory of

violence the ICTR needed to hear. This argument was developed throughout Chapter 5 and the first section of Chapter 6. This argument was informed by the work of Fujii (2009) showing the complexities and ‘fluidity’ of genocidal violence in Rwanda. From this starting point, evidence from indictment and pre-trial briefs, as well as the ‘foundational documents’ such as the crime of genocide stated in the statute, were used. Through the discourse analysis it was shown that summary of witness statements were included in indictments and pre-trial briefs because they related explicitly to legally proving the crime of genocide. Memories relating to the wider complexities and fluidity of genocidal violence were not commonly included as evidence. Furthermore, summaries of witness statements in pre-trial briefs were compared to what witnesses testified to in court. This comparison was made in order to show that memories witnesses could talk about in court were directly shaped by the summary of their statements in the brief.

Discursive statements, such as in the ‘interests of justice’, was another discursive layer that restricted what memories of violence the ICTR needed. For example, as argued in Chapter 6, legal counsels frequently used the ‘interests of justice’ to shape and edit what memories of violence would be admissible in court. Moreover, the legal narrative prosecutors needed in order to prove the crime of rape had been committed was also a discursively restrictive process of what memories of violence could be heard at the ICTR. This is not to minimise the importance of the Akayesu verdict on rape, nor that in this particular trial a few witnesses were afforded the opportunity to narrate their story (Redwood 2018). However, the crime of rape acted to also restrict what memories of rape could be heard. The vast majority of rape victims during the genocide, approximately 100,000-250,000, did not testify at the ICTR. Moreover it is likely that some individuals did not want to speak at the ICTR because of the lack of professional conduct in the manner in which investigators engaged with them. Also, memories of male victims of rape and sexual violence was something silenced at the ICTR. In other words, the thesis applied the original conceptual lens to ICTR and analysis of the archival material, which shows that memories of violence required by the legal process are very narrow, and therefore are not able to account for the complexities of individuals’ experiences of mass human rights violation. Even though the Akayesu case allowed a few individuals to testify about their experience of rape and the testimonies contributed to the successful prosecution of this crime. The memories of violence relating to rape at the ICTR was small percentage of those who experienced this crime.

The thesis has argued that the processes of memory construction before witnesses testified in court are an important part of the restrictions on who can be a witness and what memories they can speak about. Positioning the process of legal memory construction at the ICTR within the discursive field has shown that witness memories do become rigid precisely because of the singular and narrow legal narrative law requires in order to reach a legal determination. Within the discursive space of the ICTR witness memories are not something to be negotiated and worked through, rather very specific and tiny parts of memories were used as objects of knowledge as part of legal counsels' narrative. Using the evidence from the analysis shows that memory becomes rigid and fixed within the discursive field. This leads to a critique and challenge to Osiel's claim that atrocities trials can facilitate collective memory. This critique was important considering that Osiel's understanding of collective memory is an influential frame for understanding how law can construct collective understandings of the past.

The thesis also acknowledged that the tightly controlled discursive conditions of a discourse of witnessing have an additional function relating to memory. Specifically, through the discursive practices at the ICTR the tribunal also produces plural fragments of memory in the form of archived material. The idea that the ICTR archive consists of fragments of memory that are not rigid and fixed was explored in Chapter 7. The focus of Chapter 7 was to extend the arguments and insights offered in the previous three chapters, by exploring the potential of fragments of memory in the archive to contribute to the memory ecology in Rwanda. The aim of this exploration was to argue that if we re-orientate our focus away from legal proceedings and instead zoom in on the material within the ICTR archive, then this could potentially be a way that transitional societies could positively benefit from legal memory. In particular this focus on the ICTR archive was interested in conceptualising the relationality of fragments of memory within the different material and Rwandans' relational experiences of the past. One concept of relationality (the Other) that was relevant for the purposes of Chapter 7 was that of Levinas. His concept, along with Ricoeur's thinking on plurality of memory, was used as a way to conceptualise the material in the ICTR archive, and how these materials could potentially contribute plural conversations about Rwanda's past, present and future. The illustrated example of intergenerational transmission of memory and the potential role of plural fragments within the ICTR archive was outlined. In particular, the important role witness statements, summary statements, and transcripts of testimonies along with photographs could have in aiding dialogue between those who experienced genocide and

those born during/after genocide with no personal memories of the events of 1994 was set out. Consideration was also given to the empirical potential and challenges of engaging with the ICTR archive.

Identifying the important role before witnesses testify in court has in restricting who can be a witness and what memories they can talk about, contributes to filling a gap in the legal scholarship on legal witnessing. In particular, the existing small amount of critical research on legal witnessing has focused on the processes of what witnesses testify to in court (Dembour and Haslam 2004; Viebach 2017). The existing research shows that what witnesses can talk about on the witness stand is highly restricted. One important insight the thesis's research adds to these discussions is the overall process of witness memory at international criminal tribunals is even more restrictive when extending our critical lens to include legal processes before witnesses testify in court. The significance of these findings also impacts the perceived importance for international criminal courts and tribunals to be a site where horrific past wrongs can be made sense of, and in doing so places victim-witnesses at the centre of legal approaches of transitional justice. As the findings highlight, the process of legal memory is highly restrictive.

Contributions of the study

Contribution to Knowledge

Conceptual

As stated at the start of the thesis, since the emergence of a discourse of transitional justice scholarship the 'field' has remained under theorised. This limited theorisation is particularly evident for the entwined relationship of transitional justice and memory within international criminal institutions. This thesis directly engaged with this lack of theory by creating an original conceptual framework. One of the innovative contributions of the thesis's approach to theorising the way legal witnesses remember was to look outside of the dominant traditional legal framework. Seeking alternative conceptual insights and showing their relevance to researching legal phenomena, as this thesis has done, is an evidenced example of the necessity for the transitional justice legal scholarship to not only more directly engage with theory, but also break the cycle of thinking that law and legal frameworks have the answer to all transitional justice problematics. Moreover, the thesis taking a 'tool-box' approach draws extra attention to the importance of a given research problematic. Starting with the problematic and then identifying the most suitable conceptual components aids research to not be limited by a particular field or discipline.

There are a number of things that the toolkit approach to theory can show, as discussed above, which are missed by traditional legal frameworks.

Methodological

The methodological approach of the thesis whilst it is not entirely novel within transitional justice research; its innovation comes from applying it to processes of legal memory construction at the ICTR. This innovation has two components. Firstly, the thesis's conceptual framework and data being framed by a poststructuralist lens, whilst having limitations as discussed below, enabled this research to deconstruct the way legal witnesses remember. Secondly, conducting a Foucauldian framework for discourse analysis of archived ICTR legal documents and UoW archived interview transcripts showed the relevance of text analysis in understanding legal institutions and their actors as part of the identity and knowledge producing process. These two innovative components of the thesis's methodology contribute to existing methods for analysing international criminal institutions.

Empirical Contribution

The empirical contribution of this thesis to the scholarship on transitional justice comes from its novel engagements with legal archive documents and the legal archive itself. This contribution takes two forms. Firstly, the insights offered by the thesis go beyond the findings offered by traditional analysis of legal texts. Specifically, they demonstrate how legal material casts light upon the way legal processes construct identity and memory. Secondly, insights on what a legal archive is and can be used for extends current thinking within transitional justice. In particular, material within the ICTR archive contains fragments of many different experiences of Rwanda's past. Understanding legal archives as consisting of fragments of memory has significant potential for contributing to post conflict recovery. The role of legal archive material to contribute towards two of the primary aims of transitional justice, namely reconciliation and peace, has received minimal attention from transitional justice researchers. This potential is discussed below when outlining the future direction of research.

Limitations of the study

There are a number of things this thesis does not do. There are some limitations within what the thesis has achieved. Most of these limitations relate to epistemology, parameters of the research and data collected.

Methodological

Whilst taking a Foucauldian poststructuralist methodology is very useful for deconstructing labels and assumptions, it does have epistemological limitations. Discourses are culturally constructed representations of reality rather than a true objective account of reality. From a poststructuralist position it is not possible to conduct research in order to attain a true understand of an existing reality. That said, international courts are themselves cultural constructions of reality, and therefore a poststructuralist investigation can cast new light on how they operate. Taking the ICTR as its case study the thesis is not unable to provide explicit insight about other courts and tribunals. Also, the legal actors at other courts such as the ICC would be different and how they engaged with witnesses and regulations are not necessarily exactly the same as at the ICTR. Furthermore, the two ICTR cases used for the empirical analysis cannot be used to claim that findings are representative of all the cases at the ICTR. However, the ICTR does offer insights that are transferable to other international criminal courts and tribunals. The original conceptual framework offered by the thesis can be applied to other legal institutions, alongside a Foucauldian discourse analysis. Moreover, the similarity of RPEs at the ICTY and ICC provides a useful opportunity to investigate whether the procedural irregularities which shape who can be a witness are evident at these courts.

Gaps in the Data

The ICTR archive, as with all archives, contains gaps. There are gaps in the data, particularly with the ICTR archival material. This is partly due to the fact the thesis collected data only from the online archive and not also from the physical archive in Arusha. As mentioned in Chapter 7 I had planned to collect material from the archive in Arusha but practical issues with the archive meant it was not possible within the timeframe available for this PhD project. The gaps are also partly down to the fact that the online archive is still currently in a process digitising documents, and some documents are either restricted or are going through the process of legal review. The interview transcripts also contain gaps in the sense that they were not my interviews. I did not decide the questions that were ask, nor was I able to ask the interviewees to elaborate or clarify any of their responses. However, the UoW project was created with the purpose of

providing a wide range of topics, and therefore the questions were not directed at eliciting responses to a specific research problematic. Moreover, as the interviews were conducted while the ICTR was in operation this meant that a wide range of staff were interviewed. It is the case that transcripts from staff who worked in range of ICTR departments/organs has certainly enhanced the arguments made in the thesis. In a related point, it would not have been possible for this research project to conduct such a wide-ranging set of interviews due to the practical constraints such as cost, time and dispersed geographical location of all the interviewees.

Possible Future Research Directions

Building on from the thesis's contributions, discussed above, there are fruitful avenues for future research. Going forward, the thesis's original conceptual framework alongside a Foucauldian discourse analysis could be applied to other international criminal institutions, such as the ICTY and ICC, to see if similar patterns of discursive restrictions are evident. Considering that the ICTY used nearly identical RPEs, and that the ICTR's statute and RPE is similar to the ICC, it is likely that similar discursive restrictions of legal witnessing would be evident. This thesis's offerings have contemporary relevance considering that the ICC and legal advocates have a strong victim centric mentality in regards to the perceived purpose of the court and international criminal justice more generally. This can be seen in the current stance of the ICC prosecutor. Therefore, the conceptual framework and a Foucauldian framework for a discourse analysis using the context of the ICC cases could be used in order to argue for more restraint on what the court seeks to achieve, and also crucially in managing expectations in order for societies not to feel let down and disillusioned with the court.

A potentially fruitful direction for future research is a continued exploration of legal archives at the ICTR and ICTY, particularly the prosecution archive. In addition to the ICTR archive discussed in Chapter 7, the OTP has its own archive that is autonomous from the ICTR publicly accessible archive. This archive's potential alongside the continued digitisation of the main ICTR archive could shine further light on discursive practices. However, the OTP's archive is not publicly accessible and from the experience of this research they seem reluctant to engage with access requests. For the purposes of this thesis I sent numerous emails to the ICTR OTP asking for more information about their access policy for the archive. However to date I have received no response to my questions. Notwithstanding this frustration, the future potential of the

ICTR and ICTY OTP archives is significant. This significance is not only in potentially furthering our understanding of the discursive practices relating to legal witnessing, but also the role they could have as plural fragments of memory in aiding dialogue in transitional countries, both in Rwanda, and states that were formerly part of Yugoslavia and ICC investigation countries. The role of legal archive material to aid memory ecology in a given society has significant potential far beyond the narrow and singular story told through the court proceedings. Legal archives as a site to contribute to transitional justice aims of reconciliation and peace has real potential. This potential could be further realised by exploring a more integrated approach to archives that contain material relating to the same atrocity. In the Rwandan context, there are numerous archives, in addition to the ICTR, that contain material relating to events before the genocide, the genocide, and post genocide. Drawing these archives closer and making this material accessible could further the role archive material could have in contributing to plural conversation about the past, as well as aiding dialogue about as societies present and future.

This thesis makes a substantial and significant contribution to the transitional justice legal scholarship by extending current understandings of the scope and limitations of the legal construction of memory at the ICTR. The thesis's original conceptual framework offers new understanding on how the ICTR, and its actors', constructs witness memories. This conceptual contribution moves beyond existing understandings of legal witnessing in tribunals and courts which have been largely saturated by traditional legal frameworks. Specifically, by applying the original conceptual framework to the ICTR this thesis has made visible a number of important aspects of international criminal tribunals (ICTR) relating to the way's witnesses remember. Apply the thesis' conceptual lens to processes relating to the selection of witnesses redirects our gaze away from assuming what witnesses are is self-evident, and instead focuses on how individuals become a witness and what witnesses can talk about at the ICTR, which entails a process of construction and exclusion. This thesis also adds important value to the small amount of existing critical research on legal witnessing by focusing its critical lens explicitly on the pre-trial stage. Specifically, a central contribution of the thesis to these critical discussions is it shows that the overall process of witness memory at international criminal tribunals is even more restrictive when extending our critical lens to include legal processes before witnesses testify in court.

Furthermore, the thesis makes methodological and empirical contributions, including how archival data using textual analysis can cast new light on how international legal institutions contribute to shaping understandings of past atrocities, and how archival material has the potential to aid the post-genocide memory ecology in Rwanda.

The strong legalistic orientation within the transitional justice scholarship has led to many scholars arguing that international criminal institutions have an important role to play in aiding social change following mass atrocities. However, the contributions of this thesis disrupt the perceived importance and ability of international criminal courts and tribunals to be able to produce a collective understanding of the past. This thesis has shown that the process of legal memory is highly restrictive.

Bibliography

- Adami, T.A., 2003. The management of international criminal justice records: The case of Rwandan tribunal. *African Journal of Library, Archives and Information Science* 13, 1–10.
- Adami, T.A., Hunt, M., 2005a. Genocidal Archives: The African Context—Genocide in Rwanda. *Journal of the Society of Archivists* 26, 105–121.
- Agamben, G., 2011. *Nudities*. Stanford University Press.
- Agamben, G., 2008. *State of Exception*. University of Chicago Press.
- Agamben, G., 2002. What is a paradigm? Lecture at European Graduate School.
- Agamben, G., 2000. *Means Without End: Notes on Politics*. U of Minnesota Press.
- Agamben, G., 1999. *Remnants of Auschwitz: The Witness and the Archive*. Zone Books.
- Agamben, G., 1993a. *Infancy and History: The Destruction of Experience*. Verso.
- Agamben, G., 1993b. *The Coming Community*. U of Minnesota Press.
- Aguilera, E.R., 2013. Truth and victims' rights: Towards a legal epistemology of international criminal justice. *Mexican Law Review* 6, 119–160.
- Akhavan, P., 2012. *Reducing Genocide to Law: Definition, Meaning, and the Ultimate Crime*. Cambridge University Press.
- Aldana-Pindell, R., 2002. In Vindication of Justiciable Victims' Rights to Truth and Justice for State-Sponsored Crimes. *Vand. J. Transnat'l L.* 35, 1399.
- Ambos, K., 2009. "Witness Proofing" Before The ICC: Neither Legally Admissible Nor Necessary, in: *The Emerging Practice of the International Criminal Court*. Brill Nijhoff, pp. 599–614.
- Anderson, K., 2017. *Perpetrating Genocide: A Criminological Account*. Routledge.
- Arendt, H., 2006. *Eichmann in jerusalem*. Penguin.
- Arnould, V., 2016. Transitional Justice in Peacebuilding: Dynamics of Contestation in the DRC. *Journal of Intervention and Statebuilding* 10, 321–338.
- Arthur, P., 2009. How transitions reshaped human rights: A conceptual history of transitional justice. *Hum. Rts. Q.* 31, 321.
- Assmann, A., Conrad, S., 2010. *Memory in a global age*. Springer.
- Azoulay, A.A., 2012. *Civil Imagination: a political ontology of photography*. Verso Books.
- Bachman, J.S., 2019. *Cultural Genocide: Law, Politics, and Global Manifestations*. Routledge, Taylor & Francis Group.

- Baker, C., Obradovic-Wochnik, J., 2016. Mapping the nexus of transitional justice and peacebuilding. *Journal of Intervention and Statebuilding* 10, 281–301.
- Barahona de Brito, A., 2010. Transitional justice and memory: Exploring perspectives. *South European Society and Politics* 15, 359–376.
- Baumgartner, E., Hamber, B., Jones, B., Kelly, G., Oliveira, I., 2016. Documentation, Human Rights and Transitional Justice. *Journal of Human Rights Practice* 8, 1–5. <https://doi.org/10.1093/jhuman/huw002>
- Bell, C., 2009. Transitional justice, interdisciplinarity and the state of the ‘field’ or ‘non-field.’ *International Journal of Transitional Justice* 3, 5–27.
- Bell, D., 2006. *Memory, trauma and world politics: Reflections on the relationship between past and present*. Springer.
- Benda, R., 2018. Time to hear the other side: Transitional temporalities and transgenerational narratives in post-genocide Rwanda, in: *Time and Temporality in Transitional and Post-Conflict Societies*. Routledge, pp. 122–142.
- Benda, R.M., 2019. Promising Generations: From Intergenerational Guilt to Ndi Umunyarwanda. *Rwanda Since 1994: Stories of Change* 10, 189.
- Benveniste, É., 1971. *Problems in general linguistics*. University of Miami Press.
- Bernasconi, R., Critchley, S., 2002. *The Cambridge Companion to Levinas*.
- Bernstein, J.M., 2004. Bare life, bearing witness: Auschwitz and the pornography of horror. *parallax* 10, 2–16.
- Betts, A., 2005. Should approaches to post-conflict justice and reconciliation be determined globally, nationally or locally? *The European Journal of Development Research* 17, 735–752.
- Bickford, L., 2000. Human rights archives and research on historical memory: Argentina, Chile, and Uruguay. *Latin American Research Review* 160–182.
- Booth, J., 2018. *Communities of Memory: On Witness, Identity, and Justice*. Cornell University Press.
- Brewer, J.D., 2010. *Peace Processes: A Sociological Approach*. Polity.
- Brouwer, A.-M. de, Smeulers, A., 2016. *The Elgar Companion to the International Criminal Tribunal for Rwanda*. Edward Elgar Publishing.
- Brown, S.E., 2014. Female Perpetrators of the Rwandan Genocide. *International Feminist Journal of Politics* 16, 448–469. <https://doi.org/10.1080/14616742.2013.788806>
- Buckley-Zistel, S., Zolkos, M., 2012. Introduction: Gender in transitional justice, in: *Gender in Transitional Justice*. Springer, pp. 1–33.

- Burchell, G., Gordon, C., Miller, P., 1991. *The Foucault Effect: Studies in Governmentality*. University of Chicago Press.
- Buss, D.E., 2009. Rethinking 'Rape as a Weapon of War.' *Fem Leg Stud* 17, 145–163.
- Calarco, M., 2007. *Giorgio Agamben: Sovereignty and Life*. Stanford University Press.
- Caruth, C., 2016. *Unclaimed Experience: Trauma, Narrative, and History*. JHU Press.
- Caswell, M., 2014. *Archiving the unspeakable: silence, memory, and the photographic record in Cambodia*. University of Wisconsin Pres.
- Chandler, D., 2003. *Semiotics: The Basics*. Routledge.
- Chemouni, B., 2016. Taking stock of Rwanda's decentralisation: changing local governance in a post-conflict environment. *Third World Thematics: A TWQ Journal* 1, 763–778.
- Chemouni, B., Mugiraneza, A., n.d. Ideology and interests in the Rwandan patriotic front: Singing the struggle in pre-genocide Rwanda. *Afr Aff (Lond)*.
- Chomsky, N., Foucault, M., 2006. *The Chomsky - Foucault Debate: On Human Nature*. The New Press.
- Christie, N., 1986. The Ideal Victim, in: Fattah, E.A. (Ed.), *From Crime Policy to Victim Policy: Reorienting the Justice System*. Palgrave Macmillan UK, London, pp. 17–30.
- Clark, J.N., 2019. Finding a Voice: Silence and its Significance for Transitional Justice. *Social & Legal Studies* 0964663919856685.
- Clark, J.N., 2018. De-centring trauma: conflict-related sexual violence and the importance of resilience discourse. *The International Journal of Human Rights* 22, 801–821.
- Clark, P., 2018. *Distant Justice: The Impact of the International Criminal Court on African Politics*. Cambridge University Press.
- Clark, P., 2014. Bringing the peasants back in, again: state power and local agency in Rwanda's gacaca courts. *Journal of Eastern African Studies* 8, 193–213.
- Clark, P., 2010. *The Gacaca Courts, Post-Genocide Justice and Reconciliation in Rwanda: Justice without Lawyers*. Cambridge University Press.
- Clark, P., Kaufman, Z.D., 2009. *After Genocide: Transitional Justice, Post-conflict Reconstruction and Reconciliation in Rwanda and Beyond*. Columbia University Press.
- Clark, P., Palmer, N., 2012a. Challenging transitional justice. *Critical Perspectives in Transitional Justice* (Brussels: Intersentia Publishing 2012) 16–12.
- Clark, P., Palmer, N., 2012b. *Testifying to Genocide: Victim and Witness Protection in Rwanda*. London: Redress Trust.
- Clarke, K.M., 2009. *Fictions of Justice: The International Criminal Court and the Challenge of Legal Pluralism in Sub-Saharan Africa*. Cambridge University Press.

- Combs, N.A., 2010. *Fact-Finding without Facts: The Uncertain Evidentiary Foundations of International Criminal Convictions*. Cambridge University Press.
- Coward, M., 2009. *Urbicide: The Politics of Urban Destruction*. Routledge.
- Cruvellier, T., 2010. *Court of Remorse: Inside the International Criminal Tribunal for Rwanda*. Univ of Wisconsin Press.
- Culler, J.D., Culler, P. of E.J., 1986. *Ferdinand de Saussure*. Cornell University Press.
- Curtis, D., Dzinesa, G.A., 2012. *Peacebuilding, Power, and Politics in Africa*. Ohio University Press.
- De Brito, A.B., Enríquez, C.G., Aguilar, P., 2001. *The politics of memory and democratization: transitional justice in democratizing societies*. OUP Oxford.
- De Brouwer, A.-M., 2015. The importance of understanding sexual violence in conflict for investigation and prosecution purposes. *Cornell Int'l LJ* 48, 639.
- De Brouwer, A.-M., 2005. *Supranational Criminal Prosecution of Sexual Violence: The ICC and the Practice of the ICTY and the ICTR*. Intersentia nv.
- de Brouwer, A.-M., Ruvebana, E., 2013. The legacy of the Gacaca courts in Rwanda: Survivors' views. *International Criminal Law Review* 13, 937–976.
- de Brouwer, A.-M., Smeulers, A., 2016. *The Elgar companion to the international criminal tribunal for Rwanda*. Edward Elgar Publishing.
- De Lame, D., 2005. *A hill among a thousand: Transformations and ruptures in rural Rwanda*. Univ of Wisconsin Press.
- de los Reyes, C., 2005. Revisiting Disclosure Obligations at the ICTR and its Implications for the Rights of the Accused. *Chinese Journal of International Law* 4, 583–597.
- De Saussure, F., 2011. *Course in general linguistics*. Columbia University Press.
- De Vos, C., Kendall, S., Stahn, C., 2015. *Contested justice: the politics and practice of International Criminal Court interventions*. Cambridge University Press.
- Dembour, M.-B., Haslam, E., 2004. Silencing hearings? Victim-witnesses at war crimes trials. *European Journal of International Law* 15, 151–177.
- Denov, M., Kahn, S., 2019. 'They Should See Us as a Symbol of Reconciliation': Youth Born of Genocidal Rape in Rwanda and the Implications for Transitional Justice. *Journal of Human Rights Practice* 11, 151–170.
- Dessingué, A., Winter, J.M., 2015. *Beyond Memory: Silence and the Aesthetics of Remembrance*. Routledge.
- Dickinson, R., Katselli, E., Murray, C., Pedersen, O.W., 2012. *Examining critical perspectives on human rights*. Cambridge University Press.

- Dijk, T.A. van, 1985. *Handbook of Discourse Analysis: Dimensions of discourse*. Academic Press.
- Dixon, P., Tenove, C., 2013. International criminal justice as a transnational field: Rules, authority and victims. *International Journal of Transitional Justice* 7, 393–412.
- Doughty, K.C., 2016. *Remediation in Rwanda: Grassroots Legal Forums*. University of Pennsylvania Press.
- Dreyfus, H.L., Rabinow, P., Rabinow, P., 2014. *Michel Foucault : Beyond Structuralism and Hermeneutics*. Routledge.
- Drumbl, M., 2010. *Collective Responsibility and Post-Conflict Justice* (SSRN Scholarly Paper). Social Science Research Network, Rochester, NY.
- Drumbl, M.A., 2005. *Pluralizing international criminal justice*.
- Durantaye, L. de la, 2009. *Giorgio Agamben: A Critical Introduction*. Stanford University Press.
- Dworkin, R., 1986. *Law's empire*. Harvard University Press.
- Ehrenfreund, N., 2007. *How Nuremberg Changed Medical Ethics*.
- Elster, J., 2004. *Closing the books: Transitional justice in historical perspective*. Cambridge University Press.
- Eltringham, N., 2019. *Genocide Never Sleeps*. Cambridge University Press.
- Eltringham, N., 2004. *Accounting for horror: post-genocide debates in Rwanda*. Pluto Press.
- Evans, M., 2019. *Transitional and Transformative Justice: Critical and International Perspectives*. Routledge.
- Evans, M., 2018. A future without forgiveness: beyond reconciliation in transitional justice. *Int Polit* 55, 678–692.
- Fairclough, N., 2001. *Language and Power*. Pearson Education.
- Fairey, T., Orton, L., 2019. *Photography as Dialogue*.
- Felman, S., Felman, T.E.D.P. of F. and C.L.S., 2002. *The Juridical Unconscious: Trials and Traumas in the Twentieth Century*. Harvard University Press.
- Ferrara, A., 2014. *Assessing the Long-term Impact of Truth Commissions: The Chilean truth and reconciliation commission in historical perspective*. Routledge.
- Ferretter, L., 2007. *Louis Althusser*. Routledge.
- Fletcher, L.E., Weinstein, H.M., Rowen, J., 2009. Context, timing and the dynamics of transitional justice: A historical perspective. *Hum. Rts. Q.* 31, 163.
- Foote, K., 1990. To Remember and Forget: Archives, Memory, and Culture. *The American Archivist* 53, 378–392.

- Foucault, M., 2001. *Madness and Civilization: A History of Insanity in the Age of Reason*. Psychology Press.
- Foucault, M., 1991. *The Foucault Effect: Studies in Governmentality*. University of Chicago Press.
- Foucault, M., 1979. *Discipline and Punish: The Birth of the Prison*. Vintage Books.
- Foucault, M., 1972a. *The Archaeology of Knowledge ; And, the Discourse on Language*. Pantheon Books..
- Foucault, M., 1971. Orders of discourse. *Social Science Information* 10, 7–30.
- Frost, T., 2019. The Dispositif between Foucault and Agamben. *Law, Culture & the Humanities* 15, 151–171.
- Frost, T., 2014. Thinking relationality in Agamben and Levinas. *Griffith Law Review* 23, 210–231.
- Frost, T., 2013. *Giorgio Agamben: Legal, Political and Philosophical Perspectives*. Routledge.
- Frost, T., 2010. Agamben's Sovereign Legalization of Foucault. *Oxf J Leg Stud* 30, 545–577.
- Fujii, L.A., 2011. *Killing Neighbors: Webs of Violence in Rwanda*. Cornell University Press.
- Funk, T.M., 2015. *Victims' Rights and Advocacy at the International Criminal Court*. Oxford University Press.
- Gahima, G., 2013. *Transitional Justice in Rwanda: Accountability for Atrocity*. Routledge.
- Garbett, C., 2017. The International Criminal Court and restorative justice: victims, participation and the processes of justice. *Restorative Justice* 5, 198–220.
- Garde-Hansen, J., Hoskins, A., Reading, A., 2009. *Save As... Digital Memories*. Springer.
- Gee, J.P., 2004. *An introduction to discourse analysis: Theory and method*. Routledge.
- Golder, B., 2013. *Re-reading Foucault: on law, power and rights*. Routledge.
- Golder, B., Fitzpatrick, P., 2009. *Foucault's law*. Routledge-Cavendish.
- Gonzalez-Salzberg, D., Hodson, L., 2019. *Research Methods for International Human Rights Law: Beyond the traditional paradigm*. Routledge.
- Graham, L.J., 2011. The product of text and 'other' statements: Discourse analysis and the critical use of Foucault. *Educational Philosophy and Theory* 43, 663–674.
- Graham, L.J., 2005. *Discourse analysis and the critical use of Foucault*.
- Grayson, H., Hitchcott, N. (Eds.), 2019. *Rwanda Since 1994: Stories of Change*. Oxford University Press.
- Groome, D., 2011. The Right to Truth in the Fight against Impunity. *Berkeley J. Int'l L.* 29, 175.

- Hamber, B., Kelly, G., 2016. Practice, Power and Inertia: Personal Narrative, Archives and Dealing with the Past in Northern Ireland. *Journal of Human Rights Practice* 8, 25–44.
- Hamber, B., Wilson, R.A., 2002. Symbolic closure through memory, reparation and revenge in post-conflict societies. *Journal of Human Rights* 1, 35–53.
- Hand, S., 2001. *The Levinas Reader*.
- Hayner, P.B., 2010. *Unspeakable Truths 2e: Transitional Justice and the Challenge of Truth Commissions*. Routledge.
- Hearty, K., 2018. ‘Victims of’ human rights abuses in transitional justice: hierarchies, perpetrators and the struggle for peace. *The International Journal of Human Rights* 22, 888–909.
- Heller, K.J., 2011. *The Nuremberg Military Tribunals and the Origins of International Criminal Law*. OUP Oxford.
- Heller, K.J., 1996. Power, Subjectification and Resistance in Foucault. *SubStance* 25, 78–110.
- Henry, N., 2012. *War and rape: Law, memory and justice*. Routledge.
- Hoskins, A., 2016. Memory ecologies. *Memory Studies* 9, 348–357.
- Hoskins, A., 2009. The Mediatisation of Memory, in: Garde-Hansen, J., Hoskins, A., Reading, A. (Eds.), *Save As ... Digital Memories*. Palgrave Macmillan UK, London, pp. 27–43.
- Howarth, D., Stavrakakis, Y., 2000. Introducing discourse theory and political analysis.
- Howarth, D.J., Howarth, D.R., Norval, A.J., Stavrakakis, Y., 2000. *Discourse theory and political analysis: Identities, hegemonies and social change*. Manchester University Press.
- Huyssen, A., 2011. International human rights and the politics of memory: Limits and challenges. *Criticism* 53, 607–624.
- Ignatieff, M., 2003. *Human rights as politics and idolatry*. Princeton University Press.
- International Criminal Tribunal for Rwanda, (2010). *Statute: Article 17 Investigation and Preparation of Indictment*. Arusha: United Nations, pp.57-59.
- International Criminal Tribunal for Rwanda, (2010). *Statute: Article 17 Commencement and Conduct of Trial Proceedings*. Arusha: United Nations, p.59.
- International Criminal Tribunal for Rwanda, (2007). *Statute: Article 31 Rules of Procedure and Evidence*. Arusha: United Nations, p.55.
- International Criminal Tribunal for Rwanda, (2013). *Rules of Evidence: Rule 65 bis Status Conference*. Arusha: United Nations, p.63.
- International Criminal Tribunal for Rwanda, (2013). *Rules of Evidence: Section 3: Production of Evidence Rule 66-68*. Arusha: United Nations, pp.65-67.

- ICTR, Defence Witness list: Prosecutor v. Jerome Bicomumpaka. (2009). UNMICT, ICTR-2003-86-T. Arusha.
- ICTR, (2009). *REGISTRAR'S SUBMISSIONS ON THE LANGUAGE PROFICIENCY OF THE*. UNMICT, Arusha.
- ICTR, (2003). *Witness statement*. UNMICT, ICTR-04-81-T. Arusha.
- ICTR, (2009). *:JOSEPH NZORERA' S FIRST REVISED: THE PROSECUTOR*. UNMICT, ICTR-98-44-T. Arusha.
- ICTR, (2009). *Motion: Transfer of detained witness*. UNMICT, ICTR-04-81-T. Arusha.
- ICTR, (2009). *The Prosecutors Pre-trial brief*. UNMICT, ICTR-2005-82-I. Arusha.
- ICTR, (2008). *The prosecution v. Jerome Bicomumpaka: DEFENCE MOTION DECISION*. UNMICT, ICTR-98-44-T. Arusha.
- ICTR, I. (1996). *Indictment: Prosecutor v. Jerome Bicomumpaka*. UNMICT, CASE NO: ICTR-99-3-1. Arusha.
- International Law Commission, U. (2005). *Statute of the International Law Commission*. The Hague: United Nations.
- Isaacs, T., Vernon, R., 2011. *Accountability for Collective Wrongdoing*. Cambridge University Press.
- ITU, 2018. In Rwanda, Broadband Internet connects rural communities to a bright future [WWW Document]. ITU News. URL <https://news.itu.int/broadband-internet-connects-rural-communities-rwanda/> (accessed 10.1.19).
- Jackson, R.H., 1949. Report of Robert H. Jackson, United States Representative to the International Conference on Military Trials. Washington, DC: US GPO.
- Jaspers, K., 2009. *The question of German guilt*. Fordham Univ Press.
- Jones, B., Oliveira, I., 2016. Truth Commission Archives as 'New Democratic Spaces.' *Journal of Human Rights Practice* 8, 6–24. <https://doi.org/10.1093/jhuman/huv016>
- Jones, N., 2009. *The courts of genocide: politics and the rule of law in Rwanda and Arusha*. Routledge-Cavendish.
- Jordash, W., 2009. The practice of 'Witness Proofing' in international criminal tribunals: why the international criminal court should prohibit the practice. *Leiden Journal of International Law* 22, 501–523.
- Kagoyire, M., Richters, A., 2018. "We are the memory representation of our parents": intergenerational legacies of genocide among descendants of rape survivors in Rwanda. *Torture: quarterly journal on rehabilitation of torture victims and prevention of torture* 28, 30–45.

- Karbo, D.T., Mutisi, M., n.d. *Psychological Aspects of Post-Conflict Reconstruction: Transforming* 41.
- Keen, D., 2006. *Endless war?: hidden functions of the "war on terror"*. Pluto Press London.
- Kelsey, D., 2015. Media, myth and terrorism: a discourse-mythological analysis of the 'blitz spirit' in British newspaper responses to the July 7th Bombings. Springer.
- Kendall, S., 2018. Restorative Justice at the International Criminal Court. *REDI* 70, 217.
- Kendall, S., 2015. Beyond the restorative turn: the limits of legal humanitarianism.
- Kendall, S., Nouwen, S.M., 2016. Speaking of legacy: toward an ethos of modesty at the International Criminal Tribunal for Rwanda. *American Journal of International Law* 110, 212–232.
- Kennedy, D., 2002. International human rights movement: part of the problem? *Harv. Hum. Rts. J.* 15, 101.
- Ketelaar, E., 2016. Archiving technologies. *Comma* 2016, 25–34.
- Ketelaar, E., 2017. Archival turns and returns: Studies of the archive. *Research in the Archival Multiverse* 228–268.
- Ketelaar, E., 2008. Archives as spaces of memory. *Journal of the Society of Archivists* 29, 9–27.
- Keydar, R., 2019. Mass Atrocity, Mass Testimony, and the Quantitative Turn in International Law. *Law & Society Review* 53, 554–587. <https://doi.org/10.1111/lasr.12399>
- Killean, R., 2018. *Victims, Atrocity and International Criminal Justice: Lessons from Cambodia*. Routledge.
- Klinkner, M., Davis, H., 2019. *The Right to The Truth in International Law: Victims' Rights in Human Rights and International Criminal Law*. Routledge.
- Klinkner, M., Smith, E., 2015. The Right to Truth, Appropriate Forum and the International Criminal Court, in: Szablewska, N., Bachmann, S.-D. (Eds.), *Current Issues in Transitional Justice: Towards a More Holistic Approach*, Springer Series in Transitional Justice. Springer International Publishing, Cham, pp. 3–29.
- Koomen, J., 2013. "Without These Women, the Tribunal Cannot Do Anything": The Politics of Witness Testimony on Sexual Violence at the International Criminal Tribunal for Rwanda. *Signs: Journal of Women in Culture and Society* 38, 253–277.
- Kritz, N.J., 1995. *Transitional justice: how emerging democracies reckon with former regimes*. US Institute of Peace Press.
- Laclau, E., 2005. *On Populist Reason*. Verso.

- Lambourne, W., 2009. Transitional justice and peacebuilding after mass violence. *International journal of transitional justice* 3, 28–48.
- Landsberg, A., 2004. *Prosthetic Memory: The Transformation of American Remembrance in the Age of Mass Culture*. Columbia University Press.
- Lange, B., 2011. Foucauldian-inspired discourse analysis: A contribution to critical environmental law scholarship?, in: *Law and Ecology*. Routledge, pp. 51–76.
- Lawther, C., 2018. *Truth, Denial and Transition : Northern Ireland and the Contested Past*. Routledge.
- Lawther, C., 2013. Denial, Silence and the Politics of the Past: Unpicking the Opposition to Truth Recovery in Northern Ireland. *Int J Transit Justice* 7, 157–177.
- Lawther, C., Jacobs, D., Moffett, L., 2017. *Research Handbook on Transitional Justice*. Edward Elgar Publishing.
- Leebaw, B.A., 2008. The irreconcilable goals of transitional justice. *Hum. Rts. Q.* 30, 95.
- Leichter, D.J., 2012. Collective Identity and Collective Memory in the Philosophy of Paul Ricoeur. *Études Ricoeuriennes / Ricoeur Studies* 3, 114–131.
- Lessa, F., 2013. *Memory and Transitional Justice in Argentina and Uruguay: Against Impunity*. Springer.
- Levi, P., 2017. *The drowned and the saved*. Simon and Schuster.
- Levinas, E., 2013. *Otherwise Than Being or Beyond Essence*. Springer Science & Business Media.
- Levy, D., Sznajder, N., 2010. *Human rights and memory*. Penn State Press.
- Lundy, P., McGovern, M., 2008. Whose justice? Rethinking transitional justice from the bottom up. *Journal of Law and Society* 35, 265–292.
- Madlingozi, T., 2010. On transitional justice entrepreneurs and the production of victims. *Journal of Human Rights Practice* 2, 208–228.
- Mamdani, M., 2001. *When Victims Become Killers: Colonialism, Nativism, and the*.
- Mariager, R., Molin, K., 2014. Cold War and human rights, in: *Human Rights in Europe during the Cold War*. Routledge, pp. 13–24.
- Marian, D., 2018. *Revisiting the “Ideal Victim”: Developments in Critical Victimology*. Policy Press.
- McAuliffe, P., 2013. *Transitional Justice and Rule of Law Reconstruction: A Contentious Relationship*. Routledge.
- McEvoy, K., 2007. Beyond Legalism: Towards a Thicker Understanding of Transitional Justice. *Journal of Law and Society* 34, 411–440.

McEvoy, K., McConnachie, K., 2012. Victimology in transitional justice: Victimhood, innocence and hierarchy. *European Journal of Criminology* 9, 527–538.

Mechanism Archives and Records Section ICTR-96-4-0729. ICTR. ICTR-96-4. " Assignment of Defence Counsel pursuant to article 19C of the Directive on assignment of Defence Counsel in the matter of Jean-Paul Akayesu ", 8 September 2006.

Mechanism Archives and Records Section. ICTR-00-55C-0474. ICTR. ICTR-00-55C 'Prosecution Response To Defence Motion For Exclusion Of The Testimony Of Rebuttal Witnesses', 12th September 2011

Mechanism Archives and Records Section. ICTR-00-55C-0564. ICTR. ICTR-00-55C 'Prosecutors Response To App-Ential Motion For Fresh Evidence And Corollary Relief (Rule 115,5and 107 Of Rpe', 6th Novermber 2013

Mechanism Archives and Records Section. ICTR-00-55C-0473. ICTR. ICTR-00-55C – 'Prosecution Response To Urgent Defence Motion For Leave To Call Rejoinder Evidence', 12th September 2011

Mechanism Archives and Records Section. ICTR-00-55C-0474. ICTR. ICTR-00-55C – 'Prosecution Response To Defence Motion For Exclusion Of The Testimony Of Rebuttal Witnesses', 12TH September 2011.

Mechanism Archives and Records Section. ICTR-00-55C-0058. ICTR. ICTR-00-55C 'Defence Response To Prosecutor- The Statute, Rules 54, 69, 73 And 75 Of The Rules Of Procedure And Evidence', 21st July 2010

Mechanism Archives and Records Section. ICTR-00-55C-0080. ICTR. ICTR-00-55C 'Prosecutors Reply To Defence The Statements Of Six Deceased Witnesses Pursuant To Rule 89(C) And 92bis' 23rd August 2010

Mechanism Archives and Records Section. ICTR-00-55C-0150. ICTR. ICTR-00-55C. 'Prosecutors Response To Nizeyimana Defence Motion For Disclosure Of Prior Statements', 9th November 2010

Mechanism Archives and Records Section. ICTR-00-55C-017. ITR. ICTR-00-55C. 'Reply To Prosecutors Response To Urgent Pre-Trial Motion For Disclosure Under Rule 66(A) (Ii) Of The R.P.E', 14th December 2010

Mechanism Archives and Records Section. ICTR-00-55-0125. ICTR. ICTR-00-55. 'Supplementary Submission To The Motion To Vary The Witness List', 14th September 2010

Mechanism Archives and Records Section. ICTR-00-55C-05361. ICTR. ICTR-00-55C. 'Judgement And Sentence', 22nd June 2012

Mechanism Archives and Records Section. ICTR-00-55C-0016. ICTR. ICTR-00-55C. 'Corrections To Amended Indictment Dated 01 March 2010', 12th March 2010

Mechanism Archives and Records Section. ICTR-00-55C-0099. ICTR. ICTR-00-55C-0099. 'Second Amended Indictment Second Amended Indictment', 29th September 2010

Mechanism Archives and Records Section. ICTR-00-55-0076. ICTR. ICTR-00-55C. 'Annotated Second Amended Indictment', 14th September 2010

Mechanism Archives and Records Section. ICTR-01-70- 0574. ICTR. ICTR-01-70. 'The Prosecutors Pre-Trial Brief Pursuant To Article 73 Bis (B)(I) Of The Rules Of Procedure And Evidence', 16th October 2006

Mechanism Archives and Records Section. ICTR-01-70-558. ICTR. ICTR-01-70. 'Amended Indictment', 6th October 2006

Mechanism Archives and Records Section. ICTR-01-70-610. ICTR. ICTR.-01-70. 'THE PROSECUTORS PRE-TRIAL BRIEF PURSUANT TO ARTICLE 73 bis (B)(i) OF THE RULES OF PROCEDURE AND EVIDENCE', 16th October 2006

Mechanism Archives and Records Section. ICTR-00-55C-0006. ICTR. ICTR-00-55C. 'Further Reply To Rejoinder -Defence Response To Prosecutors Request For Leave To File An Amended Indictment', 2nd February 2010

Mechanism Archives and Records Section. ICTR-00-55C-0136. ICTR. ICTR-00-55C. 'Prosecution Response To Defence Motion For Disclosure Of Exculpatory Evidence', 2nd November 2010

Mechanism Archives and Records Section. ICTR-00-55C-01721. ICTR. ICTR-00-55C. 'Prosecutors Interlocutory Admit Into Evidence The Statement Of General Marcel Gatsinzi', 6th October 2010

Mechanism Archives and Records Section. ICTR-00-55C-0236. ICTR. ICTR-00-55C. 'Prosecution Response To Urge-For Disclosure Of Prior Statements (Rule 54, 66(A)(Ii), 70 And 73 Of The R.P.E)', 26th January 2011

Mechanism Archives and Records Section. ICTR-00-55C-0496. ICTR. ICTR-00-55C. 'Prosecutors Closing Brief - Public and Redacted' 9th November 2011

Mechanism Archives and Records Section. ICTR-00-55C. ICTR. 'Prosecutors Pre-Trial Brief', 29th September 2010

Mégret, F., 2018a. International Criminal Justice as a Peace Project. *European Journal of International Law* 29, 835–858.

Mégret, F., 2018b. The Strange Case of the Victim Who Did Not Want Justice. *International Journal of Transitional Justice* 12, 444–463.

- Megret, F., 2004. In Whose Name? The ICC and the Search for Constituency. Whose Name.
- Mégret, F., 2002. The politics of international criminal justice. *European Journal of International Law* 13, 1261–1284.
- Meiches, B., 2019. *The Politics of Annihilation: A Genealogy of Genocide*. University of Minnesota Press.
- Melvorn, L., 2020. *Intent to Deceive: Denying the Genocide of the Tutsi*. Verso Books.
- Mettraux, G., 2008. *Perspectives on the Nuremberg Trial*. OUP Oxford.
- Minow, M., 1998. Between vengeance and forgiveness: South Africa's truth and reconciliation commission. *Negotiation Journal* 14, 319–355.
- Moffett, L., 2014. *Justice for Victims before the International Criminal Court*. Routledge.
- Moon, C., 2006. Narrating Political Reconciliation: Truth and Reconciliation in South Africa. *Social & Legal Studies* 15, 257–275.
- Motha, S., Rijswijk, H. van, 2016. *Law, Memory, Violence: Uncovering the Counter-Archive*. Routledge.
- Moyn, S., 2018. *Not Enough: Human Rights in an Unequal World*. Harvard University Press.
- Moyn, S., 2005. *Origins of the Other: Emmanuel Levinas Between Revelation and Ethics*. Cornell University Press.
- Murphy, C., 2018. International Criminal Trials and the Circumstances of Justice. *Criminal Law and Philosophy* 12, 575–585.
- Murphy, C., 2017. *The Conceptual Foundations of Transitional Justice*. Cambridge University Press.
- Murray, A., 2011. *Agamben Dictionary*. Edinburgh University Press.
- Murray, A., 2010. *Giorgio Agamben*. Routledge.
- Mutua, M., 2013. *Human rights: A political and cultural critique*. University of Pennsylvania Press.
- Mutua, M., 2001. Savages, victims, and saviors: The metaphor of human rights. *Harv. Int'l LJ* 42, 201.
- Nagy, R., 2008. Transitional justice as global project: Critical reflections. *Third World Quarterly* 29, 275–289.
- Neergaard, H., Ulhøi, J.P., 2007. *Handbook of Qualitative Research Methods in Entrepreneurship*. Edward Elgar Publishing.
- Neier, A., 2013. *The international human rights movement: a history*. Princeton University Press.

- Norris, A., 2005. *Politics, Metaphysics, and Death: Essays on Giorgio Agamben's Homo Sacer*. Duke University Press.
- Nouwen, S.M., Werner, W.G., 2010. Doing justice to the political: The international criminal court in Uganda and Sudan. *European Journal of International Law* 21, 941–965.
- Olick, J., Perrin, A., 2003. *States Of Memory: Continuities, Conflicts, And Transformations In National Retrospection*. Books by Alumni.
- Olick, J.K., 2013. *The politics of regret: On collective memory and historical responsibility*. Routledge.
- Olick, J.K., Robbins, J., 1998. Social memory studies: From “collective memory” to the historical sociology of mnemonic practices. *Annual Review of sociology* 24, 105–140.
- Olick, J.K., Vinitzky-Seroussi, V., Levy, D., 2011. *The Collective Memory Reader*. Oxford University Press.
- Olsen, T., Payne, L., Reiter, A., 2010. *Transitional justice in balance. Comparing Processes, Weighing Efficacy*. Washington, DC: US Institute of Peace.
- Osiel, M., 2009a. *The End of Reciprocity: Terror, Torture, and the Law of War*. Cambridge University Press.
- Osiel, M., 2009b. *Making Sense of Mass Atrocity*. Cambridge University Press.
- Osiel, M., 2005. The Banality of Good: Aligning Incentives against Mass Atrocity. *Colum. L. Rev.* 105, 1751.
- Osiel, M.J., 2017. *Obedying Orders: Atrocity, Military Discipline and the Law of War*. Routledge.
- Osiel, M.J., 2008. In defense of liberal show trials—Nuremberg and beyond.
- Osiel, M.J., 1999. Making Public Memory, Publicly. *Human Rights in Political Transitions: Gettysburg to Bosnia* 217–261.
- Osiel, M.J., 1995. Ever Again: Legal Remembrance of Administrative Massacre. *University of Pennsylvania Law Review* 144, 463–704.
- Palmer, N., 2015. *Courts in Conflict: Interpreting the Layers of Justice in Post-Genocide Rwanda*. Oxford University Press.
- Palmer, N., 2012. Transfer or Transformation?: A Review of the Rule 11 bis Decisions of the International Criminal Tribunal for Rwanda. *African Journal of International and Comparative Law* 20, 1–21.
- Palmer, N., Jones, B., Viebach, J., 2015. *Introduction: Ways of Knowing Atrocity: A Methodological Enquiry into the Formulation, Implementation, and Assessment of*

- Transitional Justice. *Canadian Journal of Law & Society / La Revue Canadienne Droit et Société* 30, 173–182.
- Palmer, N., Kroner, F., 2019. Anthropology, Transitional Justice and Criminal Law. *International Journal of Transitional Justice*.
- Parsley, C., 2010. The Mask and Agamben: The transitional juridical technics of legal relation. *Law Text Culture* 14, vii.
- Peskin, V., 2008. *International Justice in Rwanda and the Balkans: Virtual Trials and the Struggle for State Cooperation*. Cambridge University Press.
- Peskin, V., 2005. Beyond Victor's Justice? The Challenge of Prosecuting the Winners at the International Criminal Tribunals for the Former Yugoslavia and Rwanda. *Journal of Human Rights* 4, 213–231.
- Peterson, T.H., 2008. *Temporary courts, permanent records*. Woodrow Wilson Center Press, Washington.
- Posner, E.A., Vermeule, A., 2004. Transitional justice as ordinary justice. *Harvard Law Review* 117, 761–825.
- Powderly, J., 2010. The trials of Eichmann, Barbie and Finta, in: *Routledge Handbook of International Criminal Law*. Routledge, pp. 47–64.
- Pozen, J., 2005. Justice Obscured: The Non-Disclosure of Witnesses' Identities in ICTR Trials. *NYUJ Int'l. L. & Pol.* 38, 281.
- Redwood, H., 2017. *Archives of Knowledge: Power, Ownership and Contestation at the ICTR's Archive*.
- Redwood, H.A., 2018. *Accounting for Violence: The Production, Power and Ownership of the International Criminal Tribunal for Rwanda's Archive*.
- 1Resende, E., Budryte, D., 2013. *Memory and trauma in international relations: Theories, cases and debates*. Routledge.
- Ricoeur, P., 2004. *Memory, History, Forgetting*. University of Chicago Press.
- Rieder, P., 2010. After Genocide: Transitional Justice, Post-Conflict Reconstruction and Reconciliation in Rwanda and Beyond, Phil Clark and Zachary D. Kaufman, eds., Hurst & Company, London, 2008, pp. 432. *Canadian Journal of Political Science/Revue canadienne de science politique* 43, 1034–1036.
- Rieff, D., 2016. *In Praise of Forgetting: Historical Memory and Its Ironies*. Yale University Press.
- Rohan, C., Zyberi, G., 2017. *Defense Perspectives on International Criminal Justice*. Cambridge University Press.

- Roht-Arriaza, N., Mariezcurrena, J., 2006. *Transitional justice in the twenty-first century: beyond truth versus justice*. Cambridge University Press.
- Rost, T.F., 2013. Agamben and the possibilities of tradition [WWW Document]. Giorgio Agamben.
- ROTHBERG, M., 2010. Introduction: Between Memory and Memory: From Lieux de mémoire to Noeuds de mémoire. *Yale French Studies* 3–12.
- Rothberg, M., 2009. *Multidirectional Memory: Remembering the Holocaust in the Age of Decolonization*. Stanford University Press.
- Rowen, J., 2017. *Searching for Truth in the Transitional Justice Movement*. Cambridge University Press.
- Rush, P.D., Simić, O., 2013. *The Arts of Transitional Justice: Culture, Activism, and Memory after Atrocity*. Springer Science & Business Media.
- Sander, B., 2018. The Method Is the Message: Law, Narrative Authority and Historical Contestation in International Criminal Courts. *Melb. J. Int'l L.* 299–334.
- Sarkin, J., 2015. Ensuring Justice, Reparations and Truth through A Truth Commission and Other Processes in Uganda. *Verfassung und Recht in Übersee/LAW AND POLITICS IN AFRICA| ASIA| LATIN AMERICA* 390–401.
- Sarkin-Hughes, J., 2004. Carrots and sticks: The TRC and the South African amnesty process. *Intersentia nv*.
- Saul, M., Sweeney, J.A., 2015. *International Law and Post-Conflict Reconstruction Policy*. Routledge.
- Schabas, W.A., 2006. *The UN International Criminal Tribunals: The Former Yugoslavia, Rwanda and Sierra Leone*. Cambridge University Press.
- Schabas, W.A., Schabas, W., 2009. *Genocide in International Law: The Crime of Crimes*. Cambridge University Press.
- Schulz, P., 2015. Transitional Justice for Male Victims of Conflict-Related Sexual and Gender-Based Violence? *International Journal on Rule of Law, Transitional Justice and Human Rights* 6, 39–50.
- Shaw, R., Waldorf, L., Hazan, P., 2010. *Localizing transitional justice: Interventions and priorities after mass violence*. Stanford University Press.
- Sheridan, A., 2003. *Michel Foucault: The Will to Truth*. Routledge.
- Shortt, L., 2012. Re-Imagining East Germany in the Berlin Republic: Jana Hensel, GDR Memory and the Transitional Generation, in: *Memory and Political Change*. Springer, pp. 115–129.

- Sikkink, K., 2011. *The Justice Cascade: How Human Rights Prosecutions Are Changing World Politics* (The Norton Series in World Politics). W. W. Norton & Company.
- Sokhi-Bulley, B., 2019. 4 A postmodern approach to Elisabeth Danov Jobcenter Leipzig. *Research Methods for International Human Rights Law: Beyond the traditional paradigm*.
- Sokhi-Bulley, B., 2013. Alternative methodologies: learning critique as a skill. *Law and Method* 3, 6–23.
- Stover, E., Megally, H., Mufti, H., 2005. Bremer's " Gordian knot": Transitional justice and the US occupation of Iraq. *Human Rights Quarterly* 830–857.
- Sundberg, M., 2014. Ethnographic Challenges Encountered in Rwanda's Social Topography. *The Researcher as Navigator. Anthropologie & développement* 71–86.
- Sweeney, J.A., 2018. The Elusive Right To Truth In Transitional Human Rights Jurisprudence. *International & Comparative Law Quarterly* 67, 353–387.
- Szablewska, N., Bachmann, S.-D., 2014. *Current Issues in Transitional Justice: Towards a More Holistic Approach*. Springer.
- Taylor, T., 1955. Nuremberg Trials, The. *Colum. L. Rev.* 55, 488.
- Teitel, R.G., 2015. *Globalizing Transitional Justice: Contemporary Essays*. Oxford University Press.
- Thorne, B., Viebach, J., n.d. Human Rights Reporting on the Rwandan Gacaca Courts: A Story of Stagnation and Failure, in: Hitchcott and Grayson (Ed.), *Rwanda Since 1994: Stories of Change*.
- Titscher, S., Meyer, M., Wodak, R., Vetter, E., 2000. *Methods of text and discourse analysis: In search of meaning*. Sage.
- Turner, C., 2016. *Violence, Law and the Impossibility of Transitional Justice*. Routledge.
- Turner, C., 2013. Deconstructing Transitional Justice. *Law Critique* 24, 193–209.
- Uglow, S., 1997. *Textbook on evidence*.
- Van Dyke, R.M., Alcock, S.E., 2008. *Archaeologies of memory*. John Wiley & Sons.
- Verdoolaege, A., 2008. *Reconciliation discourse: The case of the Truth and Reconciliation Commission*. John Benjamins Publishing.
- VFRT Suzanne Chenault, Legal Officer and Juris-Linguist. Interview Date: 4 November 2008
Location: Arusha, Tanzania Interviewers: Lisa P. Nathan Donald J Horowitz -
http://www.tribunalvoices.org/voices/transcripts/transcript_CHENAULT_Suzanne_full.pdf

VFRT Adama Dieng Registrar. Date: 28 October 2008, 5 November 2008 Location: Arusha, Tanzania Interviewers: Batya Friedman Donald J Horowitz - http://www.tribunalvoices.org/voices/transcripts/transcript_DIENG_Adama_full.pdf

VFRT Ayodeji Fadugba. Chief of Information and Evidence. Date: 23 October 2008 Location: Arusha, Tanzania Interviewers: Lisa P. Nathan John McKay - http://www.tribunalvoices.org/voices/transcripts/transcript_FADUGBA_%20Ayodeji_full.pdf

VFRT Jean-Pele Fomete Program Director. Interview Date: 24 October 2008 Location: Arusha, Tanzania Interviewers: Batya Friedman John McKay Robert Utter - http://www.tribunalvoices.org/voices/transcripts/transcript_FOMETE_Jean-Pele_full.pdf

VFRT M-L. Lambert, Associate Legal Officer. Interview Date: 23 October 2008 Location: Arusha, Tanzania Interviewers: Donald J Horowitz John McKay - http://www.tribunalvoices.org/voices/transcripts/transcript_LAMBERT_ML_full.pdf

VFRT Optatus Nchimbi, Information Network Assistant. Interview Date: 21 October 2008 Location: Arusha, Tanzania Interviewers: Lisa P. Nathan John McKay - http://www.tribunalvoices.org/voices/transcripts/transcript_NCHIMBI_Optatus_full.pdf

VFRT Everard O'Donnell, Deputy Registrar. Interview Date: 15 October 2008 Location: Arusha, Tanzania Interviewer: Donald J Horowitz - http://www.tribunalvoices.org/voices/transcripts/transcript_ODONNELL_Everard_full.pdf

VFRT Alex Obote Odora, Chief of Appeals. Interview Date: 22 October 2008 Location: Arusha, Tanzania Interviewers: Lisa P. Nathan John McKay - http://www.tribunalvoices.org/voices/transcripts/transcript_ODORA_Alex_Obote_full.pdf

VFRT : Philippe Larochelle, Defense Counsel. Interview Date: 23 October 2008 Location: Arusha, Tanzania Interviewers: Lisa P. Nathan John McKay - http://www.tribunalvoices.org/voices/transcripts/transcript_LAROCHELLE_Philippe_full.pdf

VFRT Claver Sindayigaya, Defense Counsel Interview. Date: 28 October 2008 Location: Arusha, Tanzania Interviewers: Robert Utter Ronald Slye - http://www.tribunalvoices.org/voices/transcripts/transcript_SINDAYIGAYA_Claver_full.pdf

- VFRT Avi Singh, Legal Assistant. Interview Date: 24 October 2008 Location: Arusha, Tanzania Interviewers: Batya Friedman John McKay - http://www.tribunalvoices.org/voices/transcripts/transcript_SINGH_Avi_full.pdf
- VFRT Charles Taku, Defense Counsel. Interview Date: 3 November 2008 Location: Arusha, Tanzania Interviewers: Batya Friedman Ronald Slye - http://www.tribunalvoices.org/voices/transcripts/transcript_TAKU_Charles_full.pdf
- VFRT Alfred Kwende, Acting Chief of Investigations. Interview Date: 28 October 2008 Location: Kigali, Rwanda Interviewer: Lisa P. Nathan - http://www.tribunalvoices.org/voices/transcripts/transcript_KWENDE_%20Alfred_full.pdf
- VFRT Roger Pionana, Investigator. Interview Date: 15 October 2008 Location: Butare, Rwanda Interviewers: John McKay Batya Friedman - http://www.tribunalvoices.org/voices/transcripts/transcript_PIONANA_Roger_full.pdf
- VFRT David Wagala, Acting Chief of Investigations .Interview Date: 16 October 2008 Location: Butare, Rwanda Interviewers: Batya Friedman John McKay - http://www.tribunalvoices.org/voices/transcripts/transcript_WAGALA_David_full.pdf
- VFRT Dennis Byron, President and Judge. Interview Date: 28 October 2008, 5 November 2008 Location: Arusha, Tanzania Interviewer: Robert Utter - http://www.tribunalvoices.org/voices/transcripts/transcript_BYRON_Dennis_full.pdf
- Viebach, J., 2019. Of other times: Temporality, memory and trauma in post-genocide Rwanda. *International Review of Victimology* 0269758019833281.
- Viebach, J., 2017. The Evidence of What Cannot Be Heard: Reading Trauma into and Testimony against the Witness Stand at the International Criminal Tribunal for Rwanda [WWW Document]. *International Journal for Crime, Justice and Social Democracy*.
- Waldorf, L., 2009. Goats & Graves: Reparations in Rwanda's Community Courts, in: *Reparations for Victims of Genocide, War Crimes and Crimes against Humanity*. Brill Nijhoff, pp. 515–539.
- Waldorf, L., 2006. Rwanda's failing experiment in restorative justice. *Handbook of restorative justice: A global perspective* 422–434.
- Ward, I., 1995. *Law and Literature: Possibilities and Perspectives*. Cambridge University Press.

- Wheeler, C.H., 2016. No longer just a victim: the impact of victim participation on trial proceedings at the International Criminal Court. *International Criminal Law Review* 16, 525–546.
- Whyte, J., 2013. *Catastrophe and Redemption: The Political Thought of Giorgio Agamben*. SUNY Press.
- Wilson, R.A., 2011. *Writing History in International Criminal Trials*. Cambridge University Press.
- Wilt, H. van der, Vervliet, J., Sluiter, G., Cate, J.H. ten, 2012. *The Genocide Convention: The Legacy of 60 Years*. Martinus Nijhoff Publishers.
- Winter, J., 2013. Human Rights and European Remembrance, in: Blacker, U., Etkind, A., Fedor, J. (Eds.), *Memory and Theory in Eastern Europe*, Palgrave Studies in Cultural and Intellectual History. Palgrave Macmillan US, New York, pp. 43–58. https://doi.org/10.1057/9781137322067_3
- Winter, J., 2006. Notes on the Memory Boom, in: Bell, D. (Ed.), *Memory, Trauma and World Politics: Reflections on the Relationship Between Past and Present*. Palgrave Macmillan UK, London, pp. 54–73. https://doi.org/10.1057/9780230627482_3
- Winter, J., Sivan, E., 2000. *War and Remembrance in the Twentieth Century*. Cambridge University Press.
- Winter, J.M., 2006. *Remembering War: The Great War Between Memory and History in the Twentieth Century*. Yale University Press.
- Zacklin, R., 2004. The failings of ad hoc international tribunals. *J. Int'l Crim. Just.* 2, 541.
- Zahar, A., Sluiter, G., 2008. *International criminal law: a critical introduction*. Oxford University Press.
- Zartaloudis, T., 2017. *Agamben and Law*. Routledge.
- Zartaloudis, T., 2010. *Giorgio Agamben: Power, Law and the Uses of Criticism*. Routledge.
- Zunino, M., 2018. *Justice Framed*. Cambridge University Press.

Appendix 1

Case studies from the ICTR

Indelphonse Nizeyimana (ICTR-00-55C)

Nizeyimana was a captain and second in command of operations at the École des Sous-Officiers (ESO) (school for non-commissioned officers), which was located in Buture. Nizeyimana was known to be a member of then president Habyarimana inner circle of advisors referred to as Akazu ('the little house'). Nizeyimana was arrested in Uganda in October 2009 with assistance from US authorities. His charges included genocide, crimes against humanity, rape and murder (Nizeyimana Indictment 2000). This include attacks in the Cyahinda parish resulting in the death of thousands of many Tutsi refugees, the targeted killing of former Queen of Rwanda Fosalie Gicanda (Judgment 2012). During the trial, which was one of the shortest at the ICTR lasting 54 days, 77 witnesses were called to testify. In June 2012 the trial Chamber III sentenced Nizeyimana to life in Prison, which was reduced to 35 on appeal (Judgment 2012).

Emmanuel Rukundo (ICTR-01-70)

Before and during the genocide against the Tutsi Rukundo served as a catholic priest in a parish north of Kabgayi. At the request of the ICTR, in 2001 Rukundo was deported from Switzerland, where he had been living since 1999, to Arusha (Rukundo Judgment 2009, 3-7). He was charged with genocide, crimes against humanity, deprivation to life, infringement of physical integrity (Rukundo Indictment 2006). The trial duration was one year and three, months, form November 2006 until February 2008). In total 50 witnesses were called to testify, 18 by the Prosecutor and 32 for the Defence (For full trial details see Annex A in Rukundo judgment) (Rukundo Judgment 2009, 2). A pivotal question during the trial was did Rukundo's action during 1994 including the killing of Madame Rudhunga, inflicting serious bodily harm on four other Tutsi including two of Rudhunga's children and abduction and killing Tutsi refugees from the St Leon seminary constitute genocide? (Rukundo Judgment 2009). In a majority verdict on February the following year Rukundo was found guilty of crimes including, genocide, extermination as a crime against humanity and murder, and sentenced him to 25 years in prison which was reduced to 23 year on appeal (Rukundo Appeal Judgment 2010).

Appendix 2

Iddephonse Nizeyimana (ICTR-00-55C)

Submissions from Parties

ICTR-00-55C-0004
ICTR-00-55C-0005
ICTR-00-55C-0006
ICTR-00-55C-0007
ICTR-00-55C-0018
ICTR-00-55C-0023
ICTR-00-55C-0024
ICTR-00-55C-0028
ICTR-00-55C-0031
ICTR-00-55C-0034
ICTR-00-55C-0035/1
ICTR-00-55C-0045
ICTR-00-55C-0046
ICTR-00-55C-0048
ICTR-00-55C-0056
ICTR-00-55C-0052
ICTR-00-55C-0053
ICTR-00-55C-0057
ICTR-00-55C-0058
ICTR-00-55C-0068
ICTR-00-55C-0272
ICTR-00-55C-0063
ICTR-00-55C-0067
ICTR-00-55C-0065
ICTR-00-55C-0073
ICTR-00-55C-0072
ICTR-00-55C-0075
ICTR-00-55C-0077/1
ICTR-00-55C-0078
ICTR-00-55C-0081
ICTR-00-55C-0079
ICTR-00-55C-0080
ICTR-00-55C-0082
ICTR-00-55C-0084
ICTR-00-55C-0085
ICTR-00-55C-0087
ICTR-00-55C-0088
ICTR-00-55C-0092
ICTR-00-55-0063

ICTR-00-55-0125
ICTR-00-55-0104
ICTR-00-55-0123
ICTR-00-55C-0094
ICTR-00-55C-0104
ICTR-00-55C-0095
ICTR-00-55C-0103/1
ICTR-00-55C-0108
ICTR-00-55C-0120
ICTR-00-55C-0121
ICTR-00-55C-0486
ICTR-00-55C-0568
ICTR-00-55C-0569
ICTR-00-55C-0096
ICTR-00-55C-0133
ICTR-00-55C-0136
ICTR-00-55C-0135
ICTR-00-55C-0139
ICTR-00-55C-0146
ICTR-00-55C-0147
ICTR-00-55C-0150
ICTR-00-55C-0171
ICTR-00-55C-0172/1
ICTR-00-55C-0178
ICTR-00-55C-0128
ICTR-00-55C-0196
ICTR-00-55C-0207
ICTR-00-55C-0236
ICTR-00-55C-0245
ICTR-00-55C-0246
ICTR-00-55C-0248
ICTR-00-55C-0253
ICTR-00-55C-0261
ICTR-00-55C-0262
ICTR-00-55C-0284
ICTR-00-55C-0421
ICTR-00-55C-0422
ICTR-00-55C-0444
ICTR-00-55C-0461
ICTR-00-55C-0474
ICTR-00-55C-0473
ICTR-00-55C-0475
ICTR-00-55C-0476)
ICTR-00-55C-0496
ICTR-00-55C-0506
ICTR-00-55C-0545/1

ICTR-00-55C-0554
ICTR-00-55C-0555
ICTR-00-55C-0558
ICTR-00-55C-0559
ICTR-00-55C-0561/1
ICTR-00-55C-0564
ICTR-00-55C-0565

Submission from non-parties

ICTR-00-55C-0071
ICTR-00-55C-0312/1
ICTR-00-55C-0312/2

Indictments

ICTR-00-55C-0011/1
ICTR-00-55C-0016
ICTR-00-55C-0051/1
ICTR-00-55-0076
ICTR-00-55C-0099
ICTR-00-55C-0102
ICTR-00-55C-0124
ICTR-00-55C-0185

Decision

ICTR-00-55C-0010
ICTR-00-55C-0014/1
ICTR-00-55C-0025
ICTR-00-55C-0032
ICTR-00-55C-0039
ICTR-00-55C-0040
ICTR-00-55C-0036
ICTR-00-55C-0047
ICTR-00-55C-0049/1
ICTR-00-55C-0062
ICTR-00-55C-0091/1
ICTR-00-55-0074
ICTR-00-55C-0105
ICTR-00-55C-0101
ICTR-00-55C-0109
ICTR-00-55C-0116
ICTR-00-55C-0118
ICTR-00-55C-0119

ICTR-00-55C-0142
ICTR-00-55C-0140
ICTR-00-55C-0143
ICTR-00-55C-0159
ICTR-00-55C-0161
ICTR-00-55C-0164
ICTR-00-55C-0167
ICTR-00-55C-0168
ICTR-00-55C-0183
ICTR-00-55C-0201
ICTR-00-55C-0202
ICTR-00-55C-0181
ICTR-00-55C-0198/1
ICTR-00-55C-0225
ICTR-00-55C-0217
ICTR-00-55C-0218
ICTR-00-55C-0219/1
ICTR-00-55C-0220
ICTR-00-55C-0221
ICTR-00-55C-0212
ICTR-00-55C-0215
ICTR-00-55C-0235
ICTR-00-55C-0241
ICTR-00-55C-0258/1
ICTR-00-55C-0267/1
ICTR-00-55C-0271
ICTR-00-55C-0275
ICTR-00-55C-0296
ICTR-00-55C-0288
ICTR-00-55C-0294
ICTR-00-55C-0307
ICTR-00-55C-0317
ICTR-00-55C-0322
ICTR-00-55C-0323
ICTR-00-55C-0324
ICTR-00-55C-0340
ICTR-00-55C-0341
ICTR-00-55C-0343
ICTR-00-55C-0344
ICTR-00-55C-0345
ICTR-00-55C-0350
ICTR-00-55C-0352
ICTR-00-55C-0367
ICTR-00-55C-0368
ICTR-00-55C-0385
ICTR-00-55C-0393

ICTR-00-55C-0410
ICTR-00-55C-0415
ICTR-00-55C-0418
ICTR-00-55C-0419
ICTR-00-55C-0425
ICTR-00-55C-0426
ICTR-00-55C-0428
ICTR-00-55C-0431
ICTR-00-55C-0432
ICTR-00-55C-0445/1
ICTR-00-55C-0448
ICTR-00-55C-0449
ICTR-00-55C-0447
ICTR-00-55C-0450
ICTR-00-55C-0464/1
ICTR-00-55C-0466/1
ICTR-00-55C-0477
ICTR-00-55C-0478
ICTR-00-55C-0484
ICTR-00-55C-0500
ICTR-00-55C-0512
ICTR-00-55C-0523
ICTR-00-55C-0525

Motions

ICTR-00-55C-0203
ICTR-00-55C-0003
ICTR-00-55C-0009
ICTR-00-55C-0013
ICTR-00-55C-0015
ICTR-00-55C-0017
ICTR-00-55C-0019
ICTR-00-55C-0020
ICTR-00-55C-0021
ICTR-00-55C-0022
ICTR-00-55C-0030
ICTR-00-55C-0033
ICTR-00-55C-0041
ICTR-00-55C-0042
ICTR-00-55C-0043
ICTR-00-55C-0044
ICTR-00-55C-0054
ICTR-00-55C-0055
ICTR-00-55C-0273
ICTR-00-55C-0059

ICTR-00-55C-0060
ICTR-00-55C-0061
ICTR-00-55C-0064
ICTR-00-55C-0066
ICTR-00-55C-0070
ICTR-00-55C-0074
ICTR-00-55C-0083
ICTR-00-55C-0090
ICTR-00-55C-0093
ICTR-00-55-0052
ICTR-00-55C-0098
ICTR-00-55C-0100
ICTR-00-55C-0107
ICTR-00-55C-0122
ICTR-00-55C-0127
ICTR-00-55C-0131
ICTR-00-55C-0132
ICTR-00-55C-0134
ICTR-00-55C-0137
ICTR-00-55C-0141
ICTR-00-55C-0144
ICTR-00-55C-0163
ICTR-00-55C-0165
ICTR-00-55C-0170
ICTR-00-55C-0177
ICTR-00-55C-0182
ICTR-00-55C-0129
ICTR-00-55C-0189
ICTR-00-55C-0193
ICTR-00-55C-0190
ICTR-00-55C-0195
ICTR-00-55C-0205
ICTR-00-55C-0208
ICTR-00-55C-0209
ICTR-00-55C-0230
ICTR-00-55C-0229
ICTR-00-55C-0239
ICTR-00-55C-0256
ICTR-00-55C-0264
ICTR-00-55C-0266
ICTR-00-55C-0268
ICTR-00-55C-0269
ICTR-00-55C-0276/1
ICTR-00-55C-0277
ICTR-00-55C-0278
ICTR-00-55C-0281

ICTR-00-55C-0282
ICTR-00-55C-0280
ICTR-00-55C-0283
ICTR-00-55C-0285
ICTR-00-55C-0286
ICTR-00-55C-0291
ICTR-00-55C-0301
ICTR-00-55C-0303
ICTR-00-55C-0304
ICTR-00-55C-0309
ICTR-00-55C-0311
ICTR-00-55C-0313
ICTR-00-55C-0316
ICTR-00-55C-0318
ICTR-00-55C-0326
ICTR-00-55C-0330
ICTR-00-55C-0333
ICTR-00-55C-0334
ICTR-00-55C-0335
ICTR-00-55C-0337
ICTR-00-55C-0338
ICTR-00-55C-0339
ICTR-00-55C-0356
ICTR-00-55C-0359
ICTR-00-55C-0361
ICTR-00-55C-0363
ICTR-00-55C-0365/1
ICTR-00-55C-0310
ICTR-00-55C-0371/1
ICTR-00-55C-0372
ICTR-00-55C-0377/1
ICTR-00-55C-0379/1
ICTR-00-55C-0380
ICTR-00-55C-0384
ICTR-00-55C-0386
ICTR-00-55C-0390
ICTR-00-55C-0394
ICTR-00-55C-0396
ICTR-00-55C-0398
ICTR-00-55C-0402
ICTR-00-55C-0403
ICTR-00-55C-0405
ICTR-00-55C-0407
ICTR-00-55C-0408
ICTR-00-55C-0411
ICTR-00-55C-0412

ICTR-00-55C-0413
ICTR-00-55C-0417
ICTR-00-55C-0424
ICTR-00-55C-0427/2
ICTR-00-55C-0436/1
ICTR-00-55C-0439
ICTR-00-55C-0437
ICTR-00-55C-0440
ICTR-00-55C-0441
ICTR-00-55C-0443
ICTR-00-55C-0446
ICTR-00-55C-0451
ICTR-00-55C-0454/1
ICTR-00-55C-0457
ICTR-00-55C-0468/1
ICTR-00-55C-0469/1
ICTR-00-55C-0470
ICTR-00-55C-0471
ICTR-00-55C-0482
ICTR-00-55C-0499
ICTR-00-55C-0502
ICTR-00-55C-0503
ICTR-00-55C-0508
ICTR-00-55C-0535
ICTR-00-55C-0541
ICTR-00-55C-0544
ICTR-00-55C-0526
ICTR-00-55C-0557

Judgment

ICTR-00-55C-0536/1
ICTR-00-55C-0587/1

Emmanuel Rukundo

Submission from Parties

ICTR-01-70-0084
ICTR-01-70-0119/2
ICTR-01-70-0120/2
ICTR-01-70-0095/2
ICTR-01-70-0424
ICTR-01-70-0392/1
ICTR-01-70-0033/1
ICTR-01-70-0037
ICTR-01-70-0060

ICTR-01-70-0061
ICTR-01-70-0069
ICTR-01-70-0077
ICTR-01-70-0087
ICTR-01-70-0090/2
ICTR-01-70-0097
ICTR-01-70-0098/2
ICTR-01-70-0114
ICTR-01-70-0121/1
ICTR-01-70-0129
ICTR-01-70-0423
ICTR-01-70-0130
ICTR-01-70-0136/1

Submissions from non-parties

ICTR-01-70-0039
ICTR-01-70-0139
ICTR-01-70-0319

Indictments

ICTR-01-70-0004
ICTR-01-70-0001
ICTR-01-70-0009

Decisions

ICTR-01-70-0002
ICTR-01-70-0044
ICTR-01-70-0048
ICTR-01-70-0080
ICTR-01-70-0082
ICTR-01-70-0110
ICTR-01-70-0118/1
ICTR-01-70-0124
ICTR-01-70-0229
ICTR-01-70-0142/1
ICTR-01-70-0389
ICTR-01-70-0132/2
ICTR-01-70-0396
ICTR-01-70-0406
ICTR-01-70-0408
ICTR-01-70-0409
ICTR-01-70-0412
ICTR-01-70-0420
ICTR-01-70-0421

Orders

ICTR-01-70-0007
ICTR-01-70-0015
ICTR-01-70-0059
ICTR-01-70-0067
ICTR-01-70-0105
ICTR-01-70-0106
ICTR-01-70-0113
ICTR-01-70-0122
ICTR-01-70-0127
ICTR-01-70-0134
ICTR-01-70-0391
ICTR-01-70-0401
ICTR-01-70-0405
ICTR-01-70-0416
ICTR-01-70-0104

Voices from the Rwandan Tribunal Interview Transcripts

- VFRT Roland Adjovi, Senior Legal Advisor Interview Date: 13 October 2008
Location: Arusha, Tanzania Interviewers: Donald J Horowitz Lisa P. Nathan
http://www.tribunalvoices.org/voices/transcripts/transcript_ADJOVI_Roland_full.pdf
- VFRT Suzanne Chenault, Legal Officer and Juris-Linguist. Interview Date: 4 November 2008 Location: Arusha, Tanzania Interviewers: Lisa P. Nathan Donald J Horowitz -
http://www.tribunalvoices.org/voices/transcripts/transcript_CHENAULT_Suzanne_full.pdf
- VFRT Adama Dieng Registrar. Date: 28 October 2008, 5 November 2008
Location: Arusha, Tanzania Interviewers: Batya Friedman Donald J Horowitz -
http://www.tribunalvoices.org/voices/transcripts/transcript_DIENG_Adama_full.pdf
- VFRT Ayodeji Fadugba. Chief of Information and Evidence. Date: 23 October 2008 Location: Arusha, Tanzania Interviewers: Lisa P. Nathan John McKay -
http://www.tribunalvoices.org/voices/transcripts/transcript_FADUGBA_Ayodeji_full.pdf
- VFRT Jean-Pele Fomete Program Director. Interview Date: 24 October 2008
Location: Arusha, Tanzania Interviewers: Batya Friedman John McKay Robert Utter -

http://www.tribunalvoices.org/voices/transcripts/transcript_FOMETE_Jean-Pele_full.pdf

- VFRT M-L. Lambert, Associate Legal Officer. Interview Date: 23 October 2008
Location: Arusha, Tanzania Interviewers: Donald J Horowitz John McKay -
http://www.tribunalvoices.org/voices/transcripts/transcript_LAMBERT_ML_full.pdf
- VFRT Optatus Nchimbi, Information Network Assistant. Interview Date: 21 October 2008 Location: Arusha, Tanzania Interviewers: Lisa P. Nathan John McKay -
http://www.tribunalvoices.org/voices/transcripts/transcript_NCHIMBI_Optatus_full.pdf
- VFRT Everard O'Donnell, Deputy Registrar. Interview Date: 15 October 2008
Location: Arusha, Tanzania Interviewer: Donald J Horowitz -
http://www.tribunalvoices.org/voices/transcripts/transcript_ODONNELL_Everard_full.pdf
- VFRT Alex Obote Odora, Chief of Appeals. Interview Date: 22 October 2008
Location: Arusha, Tanzania Interviewers: Lisa P. Nathan John McKay -
http://www.tribunalvoices.org/voices/transcripts/transcript_ODORA_Alex_Obote_full.pdf
- VFRT : Philippe Larochelle, Defense Counsel. Interview Date: 23 October 2008
Location: Arusha, Tanzania Interviewers: Lisa P. Nathan John McKay -
http://www.tribunalvoices.org/voices/transcripts/transcript_LAROCHELLE_Philippe_full.pdf
- VFRT Claver Sindayigaya, Defense Counsel Interview. Date: 28 October 2008
Location: Arusha, Tanzania Interviewers: Robert Utter Ronald Slye -
http://www.tribunalvoices.org/voices/transcripts/transcript_SINDAYIGAYA_Claver_full.pdf
- VFRT Avi Singh, Legal Assistant. Interview Date: 24 October 2008 Location: Arusha, Tanzania Interviewers: Batya Friedman John McKay -
http://www.tribunalvoices.org/voices/transcripts/transcript_SINGH_Avi_full.pdf
- VFRT Charles Taku, Defense Counsel. Interview Date: 3 November 2008
Location: Arusha, Tanzania Interviewers: Batya Friedman Ronald Slye -

[http://www.tribunalvoices.org/voices/transcripts/transcript TAKU Charles full.pdf](http://www.tribunalvoices.org/voices/transcripts/transcript_TAKU_Charles_full.pdf)

- VFRT Alfred Kwende, Acting Chief of Investigations. Interview Date: 28 October 2008 Location: Kigali, Rwanda Interviewer: Lisa P. Nathan -
[http://www.tribunalvoices.org/voices/transcripts/transcript KWENDE %20Alfred_full.pdf](http://www.tribunalvoices.org/voices/transcripts/transcript_KWENDE_%20Alfred_full.pdf)
- VFRT Roger Pionana, Investigator. Interview Date: 15 October 2008 Location: Butare, Rwanda Interviewers: John McKay Batya Friedman -
[http://www.tribunalvoices.org/voices/transcripts/transcript PIONANA Roger_full.pdf](http://www.tribunalvoices.org/voices/transcripts/transcript_PIONANA_Roger_full.pdf)
- VFRT David Wagala, Acting Chief of Investigations .Interview Date: 16 October 2008 Location: Butare, Rwanda Interviewers: Batya Friedman John McKay -
[http://www.tribunalvoices.org/voices/transcripts/transcript WAGALA David_full.pdf](http://www.tribunalvoices.org/voices/transcripts/transcript_WAGALA_David_full.pdf)
- VFRT Dennis Byron, President and Judge. Interview Date: 28 October 2008, 5 November 2008 Location: Arusha, Tanzania Interviewer: Robert Utter -
[http://www.tribunalvoices.org/voices/transcripts/transcript BYRON Dennis_full.pdf](http://www.tribunalvoices.org/voices/transcripts/transcript_BYRON_Dennis_full.pdf)
- VFRT Erik Møse, Judge. Interview Date: 22 October 2008 Location: Arusha, Tanzania Interviewers: Robert Utter Donald J Horowitz -
[http://www.tribunalvoices.org/voices/transcripts/transcript MOSE Erik_full.pdf](http://www.tribunalvoices.org/voices/transcripts/transcript_MOSE_Erik_full.pdf)
- VFRT Charles Adeogun-Phillips, Prosecutor. Interview Date: 6 November 2008 Location: Arusha, Tanzania Interviewers: Lisa P. Nathan Robert Utter -
[http://www.tribunalvoices.org/voices/transcripts/transcript PHILLIPS Charles_full.pdf](http://www.tribunalvoices.org/voices/transcripts/transcript_PHILLIPS_Charles_full.pdf)
- VFRT Hassan Jallow, Chief Prosecutor. Interview Date: 5 November 2008, 6 November 2008 Location: Arusha, Tanzania Interviewers: Lisa P. Nathan Donald J Horowitz Batya Friedman -
[http://www.tribunalvoices.org/voices/transcripts/transcript JALLOW Hassan_full.pdf](http://www.tribunalvoices.org/voices/transcripts/transcript_JALLOW_Hassan_full.pdf)
- VFRT William Egbe, Senior Trial Attorney. Interview Date: 30 October 2008 Location: Arusha, Tanzania Interviewers: Robert Utter Donald J Horowitz Batya

Friedman –

http://www.tribunalvoices.org/voices/transcripts/transcript_EGBE_William_full.pdf

- VFRT Emile Short, Judge. Interview Date: 21 October 2008 Location: Arusha, Tanzania Interviewer: Robert Utter Donald J Horowitz -
http://www.tribunalvoices.org/voices/transcripts/transcript_SHORT_Emile_full.pdf
- VFRT Innocent Kamanzi, Information. Interview Date: 16 October 2008 Location: Kigali, Rwanda Interviewers: Batya Friedman -
http://www.tribunalvoices.org/voices/transcripts/transcript_KAMANZI_Innocent_full.pdf