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"We are not a Truth Commission": fragmented narratives and the historical record at the International Criminal Tribunal for Rwanda

NIGEL ELTRINGHAM

Legal practitioners at the International Criminal Tribunal for Rwanda (ICTR) are exercised by the question of whether their endeavour should seek to intentionally create an "historical record." Their views are framed by a supposed distinction between Truth Commissions and Trials and by the assumption that the practice and method of law and historiography are distinct. Such distinctions are, however, unsustainable given that both trials and Truth Commissions require coercive, enticed remembering and that both the lawyer and historian vicariously re-enact the past in the search for meaning. Similarly, the methodology of the oral historian is not distinct from that employed in a trial. And yet, the apparent celebration of orality at the ICTR is matched by a desire to instantaneously convert mutable speech into immutable text. While the ultimate mutable text, the judgement, declares a legal finality, it intentionally directs the reader to the process of fact discovery preserved in a globally accessible, digital database. While there remains a tension between the digital archive and its physical shadow, an historical record awaits consumption. The question, however, remains who will the consumers be and to what purpose will this record be put?

Presiding Judge: [Our] real objection has to be the number, 174 exhibits that we have to read. Now, the witness has admitted [he made a mistake] so what's the purpose for the document? [. . .]

Defence Counsel: [. . .] we are trying to make a historical record of exactly what happened in Rwanda during this time, and we think we are entitled to rely on authentic documents as well as oral testimony. [. . .] I don't see the harm to anybody if the document is in evidence. This is the way we've been proceeding in the trial throughout, to document what happened in Rwanda through official records, as well as oral testimony.

Prosecution Counsel: [. . .] I'm not opposed to allowing official documents on the record, but [if] we are adopting the approach that all official documents should come in because they help us to reconstruct the history, then that approach has to be even-handed [. . .]

Presiding Judge: Gentlemen, please. We are trying to cut out this type of argument. We are running a trial now. We are not a truth commission. That's the point. There is nothing to contradict this witness anymore because when shown the document he admitted that he had

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> made an error [. . .] So there is no reason for entering it at this point [. . .] And I think that it is time for us to draw a distinction between the truth commission and a trial where we are trying to focus on the issues that are really important [. . .]
>
> **Defence Counsel:** I think it is a mistake not to admit documentary evidence when it is relevant in a trial. Those of us researching the Nuremberg trials [. . .] would look at that type of material. [. . .] And for historical purposes, it is not necessarily a truth commission but it is not a very good way of dealing with a trial of historical significance to let documents be referred to then not be available as part of the record.

Observing this exchange from the Public Gallery (Courtroom III) of the International Criminal Tribunal for Rwanda (ICTR)[1] my gaze rests upon the 15 defence ring binders filled with statements and exhibits and upon the three-tiered, 4 foot high cage-trolley that sits to the side of the witness box holding the Registry's 60 ring binders of statements, exhibits, motions and decisions; I visualize the search page of the Tribunal's on-line "Public Judicial Records Database,"[2] the portal to thousands of hours of transcribed oral testimony and countless digitized exhibits (Party Manifestos; transcriptions of radio broadcasts; United Nations cables; minutes from Rwandan government meetings, etc.); I recall hours sat listening to the minute-by-minute accounts of Rwandan survivors; Rwandan "detained-witnesses;" UNAMIR[3] officers and NGO personnel. And I ponder *why* such a strict distinction is made between a Trial and a Truth Commission.

The discussion below makes no claims regarding the generic value of trials (or Truth Commissions) to heal a "psychologized nation;"[4] promote national reconciliation;[5] or deter future atrocities. Neither is the focus on the "victim-witnesses" at the centre of the trials, whether they experience "catharsis" or "re-traumatization."[6] While the Tribunal's aspirational statement (the Preamble to the November 1994 Statute)[7] makes no claim that it will "heal" victim/survivors (it makes no reference to victim/survivors *at all*), 80% of the 1,800 witnesses who have appeared before the Tribunal to date are protected and cannot be interviewed.[8] Any claim to speak on their behalf would be speculative and disingenuous. Rather, the concern here is the ICTR as a historio-preservation technology.[9] In reviewing reflective assessment by legal practitioners regarding the place an "historical record" should, or should not, occupy in the operation of the Tribunal, one detects a strong belief that enacting law and writing history are discrete endeavours. But can this distinction be maintained both *within* the trial process and in terms of the archival residue?

A theatre of history?

Attitudes to an "historical record" cannot be "read off" transcripts. Returning to the opening epigraph, over a beer the Judge re-iterated the position taken in the courtroom:

> Both the Prosecution and the Defence want documents entered to "preserve the historical record," but the question is what documents are central to the trial? People compare us

> with Truth Commissions. But a "historical record" is not a purpose of the Tribunal, even if it is an inevitable result. We evaluate the credibility of evidence and relate it to the nature of the crimes alleged, although an historical record is an inevitable result.[10]

Over a leisurely lunch, however, the Defence Counsel took a position at variance with the civic tone adopted in the courtroom:

> [Are you trying to get everything on to the record for the future?] No, I am not an archivist. I only submit documents that help me.[11]

In his office, the Prosecution Counsel gave an astute assessment of the Defence Counsel's behaviour:

> [Name of Defence Counsel] is not really concerned with the "historical record," but dumping all the evidence that he can so that he can use it to his advantage. Those documents don't go to the point. He's trying to overwhelm the record so that he can wiggle through substantively.[12]

The four-minute exchange—and the backstage views of its three interlocutors—demonstrate a recurrent characteristic of views on the "historical record" among legal practitioners at the ICTR: that an "historical record" is not be an *intentional* end. Another Judge expressed this view emphatically:

> We are not a truth commission. It's a different kind of body to the South African Commission, Sierra Leone etc. These are there to establish an historical record, to fill in gaps. But, these Tribunals do not have that objective as a primary purpose. We allow counsel to go in to the historical record, but our primary objective is to determine the guilt or innocence of the individual.[13]

Another Judge conceded this position, although only slightly:

> Sierra Leone has both [a Special Court and a Truth Commission], but we don't, not at an international level. Therefore, the Tribunal performs more functions than a normal court. It will establish an historical record and the individual guilt or innocence of an individual—the general and the specific.[14]

By suggesting that an "historical record" is an "inevitable result," not a "primary purpose" (implying it is a secondary consequence); and a "general" rather than a "specific" (immediate) outcome, Judges concede that an "historical record" is an unavoidable *by-product*, but deny its centrality to the primary task of determining individual guilt. Judges replicate a constant position in criminal trials for mass atrocity, as found in the Eichmann Judgement (1961):

> Without a doubt, the testimony given at this trial by survivors of the Holocaust . . . will provide valuable material for research workers and historians, but as far as this Court is concerned, they are to be regarded as by-products of the trial.[15]

As with the alleged acts they consider, judges are concerned with *intent*: trials create an historical record but it is *unintentional*.

Such a position is also found among some Prosecutors, the acceptance that an "historical record" is an *inevitable* by-product:

> This is history. The Tribunal itself is history. Yes, punish the most responsible, but also an accurate historical record, the why and how. The Tribunal serves both purposes. It punishes, but it also has a wider historical importance, part of Rwandan history. You're going to have a version of history anyway, so better to have an accurate legal version rather than a watered down version. That's why Nuremberg was such an important historical event. It established the Holocaust. If there had not been Nuremberg, it would just be "things people said" with no proof.[16]

But, when it comes to "historical record" as *intentional* purpose, views among Prosecutors vary:

> As regards history, even at the level of the OTP [Office of the Prosecutor] there are different views. Some people believe that prosecution is intended to create an historical record. Others say that the prosecution should only be concerned with the particular case at hand, with the guilt of that particular person. For me, I'm concerned with proving the case, not establishing history.[17]

> There's a divergence among prosecutors. Some want an 'historical record'. I believe it's a court, this was my view when I arrived and I'm still in that camp. But I recognise that part of the legacy is to have some account, but it's more of an incidental result than the primary purpose. The other camp get off track of trying someone, to prove something, and the trial mushrooms rather than focusing on the guilt or innocence of the accused.[18]

As acknowledged, "There's a divergence among prosecutors;" there are different "camps." But, as regards the camp who "want an 'historical record,'" positions become entangled in *frontstage* adversarial animosity. Yes to "historical record," but no if it is advantageous to an opponent. Again, the Prosecution Counsel from the exchange with which we started:

> These trials are an opportunity to document as well as judge. This was a reason to establish the Tribunal, to document the conflict. Therefore, due process should be number one—to convict—and two, document what happened. What we have here is a theatre of history, the accused is incidental. The conflict: the what, why, the circumstances, that must come through the trial process as a means of healing society. But, the documentary record is not a disciplined record. I want a full historical record, but it can be exploited by an interested party. The record is flooded with all of these documents.[19]

So, we have a defence counsel who, in court, publicly declares he is preserving an "historical record," but privately acknowledges that this is not his intention, and a prosecution counsel who welcomes the creation of a historical record, but chastises "interested parties" who would exploit this principle (note, it is the *relevance* not the *veracity* of the defence document to which the prosecution counsel objected). The concern, it appears, is with *consistency* in intentional preservation:

> [Do you agree with Counsel who wish to preserve "historically significant" documents in the record?] If tangential documents of "historical importance" are introduced in a trial you lose focus and clarity. Secondly, only *some* advocates in the prosecution and defence do it [i.e. introduce documents they consider of "historical importance"]. When parties are partisan—as the name implies—they do it in a partisan way that suites their case, but exclude

> other documents. If you want the truth, you look at all the documents! There are different formats like a Truth Commission, but this is *not* a good format.[20]

Consistency and partisan advantage cloud the evaluation of motive and intent in preserving history. But, when extracted from partisan concerns, preservation is inevitable, irrespective of intent:

> I see concentric circles. The outer circle: while acting as a court, it's also preserving evidence, cutting a path through a thicket. So, if the circle of law establishes truth, then it preserves history. As they say 'If it quacks and flaps like a duck . . .'. So, the core is legal, but at the periphery there are other things. History is not the primary role, but it does it. No matter how you cut and dice it, the question of history is contentious and the primary responsibility of the Tribunal is justice, but there are other secondary things including a factual, historical record.[21]

As he says "If it quacks and flaps like a duck . . .," an "historical record" is an inevitable residue. What is key, however, is that the debate is framed within a supposed distinction between Truth Commission versus Criminal Trial and, by extension, the practice of law versus the practice of the historian. In terms of method and practice, however, can these distinctions be maintained?

Enticing narrative

> In a certain sense, it is true that lawyers are liars. In the same sense, poets, historians and map-makers are also liars. For it is the function of lawyers, poets, historians and map-makers not to reproduce reality but to illuminate some aspect of reality.[22]

To observe that lawyers, judges, Truth Commissioners and historians share an aspiration to "produce a coherent narrative . . . that explains and interprets as well as records,"[23] tells us little if one concedes that narrative/accounting is intrinsic to all social interaction and selfhood[24] wherein narratives are accounts of past (non-)fulfilment or a future aspiration to fulfil normative expectations.[25] But, trials *are narrative*: initial statements; an indictment; the antiphonal exchanges of examination-in-chief and cross-examination;[26] "Daily Case Minutes;" confidential post-testimony witness summaries; closing briefs; the judgment.

A trial is not only a realm of narrative, but its very existence depends on strategic revelation of narrative's innermost, illusory mechanism. As Jean-Paul Sartre[27] observed, however strong the sensation of teleological propulsion, when conveying a narrative "You appear to start at the beginning. . . . And in fact you have begun at the end." In other words, the "'conclusion' of the story is the pole of attraction of the whole process."[28] Habitually, the conclusion that calls a narrative into existence must remain hidden, because "[t]here is no story unless our attention is held in suspense by a thousand contingencies."[29] At a micro-level, this illusion is maintained in the trial. The lawyer conducting an examination-in-chief holds the witness's statement in her hand and poses questions designed to elicit its contents in an oral form. The witness may not hold a copy of that statement,[30] but she spoke/wrote/re-read/signed it. The charade

of pristine revelation must be performed.[31] At a macro-level, however, one conclusion (and thus, one *proposed* story) is explicitly advanced and brings the trial into existence:

> The Prosecutor of the [ICTR], pursuant to the authority stipulated in Article 17 of the Statute of the [ICTR] charges:
>
> **[NAME OF ACCUSED]**
>
> With GENOCIDE; CONSPIRACY TO COMMIT GENOCIDE; and CRIMES AGAINST HUMANITY for MURDER and EXTERMINATION; offences stipulated in Articles 2 and 3 of the Statute of the Tribunal, as set forth below.

The Prosecution reveals the conclusion of a story it wishes to tell; it is a story that a judge who confirmed the indictment believes the Prosecution *may be able to tell*.[32] The trial will take on the appearance of a revelatory journey, but, in reality, the Prosecution's story and its moments "are caught by the end of the story which attracts them and each of them in turn attracts the preceding moment."[33] As a consequence, the Prosecutor, *like the historian*, is forever under the sway of retrospective hindsight, knowing the conclusion of the story they will tell as revelation. Both the historian and lawyer "imagine the past and remember the future,"[34] a future that has already passed.

The lawyer, judge, Truth Commissioner and historian are all artisans of memory, imposing "temporal causal sequencing [that] makes sense of action."[35] But, it is trials that are singled out as coercive:

> the legal process does not permit witnesses to tell their own coherent narrative; it chops their stories into digestible parts, selects a handful of parts, and sorts and refines them to create a new narrative—the legal narrative.[36]

This implies that other fora *allow* "witnesses to tell their own coherent narrative." As Michael Jackson[37] notes, however, stories:

> are *nowhere* articulated as personal revelations, but authored and authorised dialogically and collaboratively in the course of sharing one's recollections with others. . . . That is why one may no more recover the "original" story than step into the same river twice. The fault is not with memory *per se*, but an effect of the transformations all experience undergoes as it is replayed, recited, reworked and reconstrued in the play of intersubjective life.

All *enticed* remembering is coercive. Making memory legible always relies on the framing grammar of the solicitor. Human Rights reporting, for example, deploys pre-ordained modes of soliciting, corroborating and packaging stories.[38] Truth Commissions have, however, been portrayed as processes of untrammelled witness narration,[39] unrestricted by the fractured narratives of question/answer[40] and free of the methodological individualism[41] and myopic spatial/temporal gaze of the criminal trial. Such a distinction was actively propagated by Commissioners at the South African Truth and Reconciliation Commission (SATRC). For example, at a hearing in Durban (Vryheid) on April 16, 1997, a Commissioner informed a testifier, "Now, please be free. This is not a court of

law, it's just a place where you want to come and ventilate your truth."[42] Such a distinction is, however, unsustainable. First, as Lars Buur[43] demonstrates, experience/memory was coercively framed in the process of statement-taking/assessment. The "controlled vocabulary" by which witness statements were collected and entered into the SATRC's "Information Management System" (IMS) meant that:

> when the TRC went out and "collected" information from people who suffered violations, it did not collect people's stories or narratives as they were told. Stories about violations became coded right from the outset and underwent changes so that they fitted the vocabulary or language of the IMS [which] retrospectively re-framed and re-ordered past experiences.[44]

In this manner, a "new interpretive grid for giving the past meaning was ... imposed."[45] Second, as Annelies Verdoolaege[46] demonstrates, a discursive framework was imposed on witnesses at the oral hearings of the Human Rights Violation Committee[47] of the SATRC where testifiers were "prompted to direct their language toward certain pre-established conceptual frameworks." This framing was enabled by the Commissioner's possession of the testifier's statement allowing Commissioners to quote the statement to elicit information they deemed relevant, a process analogous to examination-in-chief at the ICTR.[48] Given this coercive nature of all enticed remembering, why should trials be singled out as constraining "the manner in which witnesses are able to tell their stories?"[49] While legal facts are indeed "made not born,"[50] Clifford Geertz reminds us that (re)presenting experience in a form on which habitual conventions can act is a feature of *all cultural activity* and that like "any other trade, science, cult, or art, law ... propounds the world in which its descriptions make sense."

While witness-examination in a trial clearly *imposes* form on memory, it is with the witness's dialogical collaboration. Questions asked in examination-in-chief are a product of earlier encounters (the investigator takes a statement; the lawyer "preps" the witness prior to testimony).[51] Live testimony is a duologue that draws upon an earlier, *hidden* duologue. Although witness memory does undergo a process of *directed* redescription, it is a continuation of an on-going process by which non-verbalized memory continually "sifts again what perception had already sifted."[52] Testimony, therefore, is an incremental process of redescription telling the same story each time with additional detail.[53]

Statement-taking at the ICTR is, however, an obscured site of dialogical redescription:

> **Defence Counsel:** What you have signed there [...] It's a statement by ——— signed by you, and also by the interpreter, who says that he has read the statement to you, that is everything you told the investigators. [...] Do you accept that procedure took place? [...]
>
> **Prosecution Counsel [a few moments later]:** Prosecution accepts her signatures appear. But it's not right to go so far as to say the Prosecution formally accept that all the proper procedures were adopted. We don't know.

As regards "witness preparation," for many Common and Civil Law practitioners, it is an alien practice, as a Civil Law judge noted:

> We don't prepare witnesses at home. In fact, you're not supposed to prepare them, to put their testimony into the right format. In [home country], it's just terrible to prepare a witness. It raises the question of how much have they been prepared.[54]

The line between "preparation" and "coaching" is elusive:

> In prepping a witness you go through the evidence. You ask "How would you answer this?" You then say. "Maybe you're saying too much." But, coaching a witness would be "you say this."[55]

> There are degrees of coaching. For example, you can say, "If you are asked this question what will you say?" As long as you don't tell them what to say.[56]

Ultimately, at the ICTR, witness preparation is beyond scrutiny:

> [What is the difference between "preparing" and "coaching?"] At the end of the day it may be a bit of both. There's no way you can draw a line because the distinction is so fine. As an attorney, you are sworn to integrity, you've taken an oath not to coach a witness. But you cannot say that when a lawyer is alone with his or her witness a bit of that flows in. It's up to the individual. The preparation is just meant to confirm the statement. The statement itself is not the testimony, it just provides the information to the other party.[57]

But, the process of incremental redescription finds a specific expression at the ICTR in the phenomenon of the "Will-Say," an addendum to a witness statement:

> Witness preparation may lead to new things coming out, added information. That's when you use a "Will Say". This is to avoid prejudicial surprises because it's not considered fair to spring surprises. So, if in the process of preparing a witness new facts emerge, they're put in a "Will-Say" to prevent "prejudicial surprise", so that the defence is not taken by surprise.[58]

The "Will-say" is an expression of Michal Jackson's observation that "[t]o reconstitute events in a story is no longer to live those events in passivity, but to actively rework them, both in dialogue with others and in one's own imagination."[59] Ultimately, the lawyer wants the witness to deliver a convincing recollection that will stand up to cross-examination. Lawyers are aware that a convincing recall drawing on memory is more likely if they do not impose a narrative on the witness:

> When you prepare the witness you need to be able to take them step-by-step which will allow their memory to be pushed in the direction you want, always knowing that the other side can ask leading questions.[60]

It is to "step-by-step" recollection that we now turn.

Re-enactment

> In the playhouse, as in the courtroom, an event already completed is re-enacted in a sequence which allows its meaning to be searched out.[61]

Having established that, in terms of enticed remembering, truth commissions and criminal trials are not as distinct as is often claimed, let us turn to a process that unites truth commissions and trials with the historian's methodology. Within

the first 30 minutes of watching my first trial in 2005, I witnessed the following exchange regarding the keys to a hospital ward at Kanombe military hospital, Kigali:

> **Prosecution Counsel:** So are you testifying that when you left the building to do whatever little chores you had to do, you went—opened the door or the gate; you went through the gate; you turned around; and you locked the gate as you were leaving, keeping the disabled soldiers locked up inside the ward?
> **Witness:** That is correct. I locked up before leaving.
> **Prosecution Counsel:** And what if there was a fire? You were hoping to kill them?
> **Defence Counsel**: Objection. This question is humiliating.
> **Prosecution Counsel:** I'll withdraw the last . . .
> **Presiding Judge:** Wasn't it risky, Mr Witness, in case they needed to get out fast, the patients?

Calling upon "normative plausibility"[62] (or "common sense") is pervasive in the trials I have observed at the ICTR.[63] This is not surprising, for "narrative typifications of behaviour"[64] or what could be described as a "folk psychology" of normal descriptions/expectations of behaviour[65] is a key aspect of all criminal trials.[66] What is important is that the lawyer/judge *and the historian* all deploy "jurisprudential wisdom . . . a sense of how normal people . . . are expected to behave."[67]

Alfred Schutz[68] suggests that we anticipate our future conduct by way of fantasizing, not about the process of fulfilling a given project, but with the fantasized act having been accomplished and then retracing our steps to determine what action we *should* take:

> I have to place myself in my phantasy [*sic*] at a future time, when this action *will* already *have been* accomplished. Only then may I reconstruct in phantasy the single steps which *will have* brought forth this future act.[69]

Such a process is emulated in criminal trials. For example, a defence counsel is cross-examining a prosecution witness. On the lectern before the defence counsel is an A4 landscape, ring binder containing pages on which are printed two columns. In the left-hand column, extracts from the witness's statement and the transcript of the Examination-in-Chief. Corresponding, hand-written questions are in the right-hand column:

> **Defence Counsel:** In your statement you say, [. . .] "I saw that he killed on the spot, five adult women patients with his axe. After seeing this I was scared and went out with my aunt pretending to go to the toilet." Is that right? That you left pretending to go to the toilet?
> **Prosecution Witness:** That is correct.
> **Defence Counsel:** And in your evidence you told us that you picked up your aunt, and am I right in having heard you say that you put her over your shoulder? Is that right? Your 30-year-old aunt, you put her over your shoulder?
> **Prosecution Witness:** Actually, I did not carry her on my shoulder. She leaned on to my shoulder and I helped her carry her drip.
> **Defence Counsel:** I had it interpreted as over your shoulder but you say she's just leaning on your shoulder. Of course, you've been macheted and injured in both your left leg and your left arm, your aunt is very seriously injured indeed. Is she still on a blood transfusion or not?

> **Prosecution Witness:** I was injured—wounded on my left leg and my left arm, which means that when we left, she still had her drip but I held the drip and we exited.
> **Defence Counsel:** When you say you held the drip, did you hold the bottle or did you hold the stand that the drip was on? What do you mean by that?
> **Prosecution Witness:** I took the drip bottle.
> **Defence Counsel:** And did you say, "Excuse me, we're just going to the toilet?"
> **Prosecution Witness:** Yes, that's what I said.

The witness's statement is an account of steps taken which were earlier re-enacted in examination-in-chief, during which the prosecution counsel advised the witness: "Please proceed stage by stage, so that we can follow." No *evaluative* fantasy was required in examination-in-chief because the plausibility of the account was not in question. The cross-examining lawyer, however, relives for her/himself *as fantasy* steps to achieve a *future* state of affairs.[70] One can replace the "you" with "I" and "your" with "my" in each of the defence counsel's questions. But, the defence counsel also relies on her/his own previously encountered experience (direct or indirect) to choose steps. Like an individual using past experience to envisage efficacious steps, the counsel uses past experience to question the plausibility of the witness's steps. The defence counsel asks himself *subjunctive* questions: "I want to get out of here. I could carry my aunt, but can I, given that I'm wounded and she's on a drip?"[71] In plotting vicarious steps and finding them inadvisable or impossible, the defence counsel determines that these are not steps that will achieve a desired state of affairs; they are not steps the counsel should take; they are not, therefore, *steps that the witness could have taken*.[72] The defence counsel's imitation of steps *taken*, by means of steps *envisaged*, has nothing to do with the witness's own planning *as it happened* and in such re-enactment, passive response will inevitably be portrayed as reflexive, purposive action.[73] But it is this shared practice of re-imagining proposed steps that enables an evaluative reconstruction of steps taken.

The "historical imagination" operates in the same way, for, as R. G. Collingwood[74] observes "What makes [the historian] a qualified judge [is] that he does not look at his subject from a detached point of view, but re-lives it in himself." As a consequence, the past activities studied by the historian:

> are not spectacles to be watched, but experiences to be lived through in his own mind; they are objective, or known to him, only because they are also subjective, or activities of his own.[75]

Cross-examination replicates this "historical thinking" in that "every step in the argument depends on asking a question . . . in the right order"[76] not of someone else, but of oneself. Indeed, Collingwood[77] suggests that the key distinction between the historian and the criminal court is *not method*, but simply that "the historian is under no obligation to make up his mind within any stated time." While the historian normally communes with sources in private, in a trial the lawyer does it publicly and dialogically because the "The *source* is alive."[78]

If, as David Lowenthal,[79] suggests, "[h]istory is persuasive because it is organised by and filtered through individual minds, not in spite of the fact,"

then so is legal testimony. The historian, lawyer and judge are themselves evaluative devices. Further, each is aware that her account will, in turn, be judged on its re-enactable plausibility: the historian by her readership; the lawyer in her final brief; the judge in her judgment. Each is engaged in their own fantasizing and step choice to attain a future state of affairs that has already occurred in the past: to be able to say with confidence "this end required those events and that chain of action"[80] *because I have re-traced them.*

In most European languages, the term "history" is ambiguous, meaning "both 'what happened' and 'that which is said to have happened.'"[81] This ambiguity perpetuates a sensation that both realms exist simultaneously.[82] And yet, "there are not two worlds—the world of past happenings and the world of our present knowledge of those past events—there is only one world, and it is the world of present experience"[83] for "[t]he event is not what happens. The event is that which can be narrated."[84] In the same way, it is "not what happened, but what happens [in the courtroom], that law sees."[85] And this re-enactment is co-production, an imitation of the past is co-produced through the collaborative dialogue of lawyer and witness, both are actors in this re-enactment, both are narrators of the action in which they participate.[86]

The ICTR as oral history project?

> We are not historians. The historical record is created through the participation of each individual who participates before us. That's the historical record.[87]

As Alessandro Portelli[88] reminds us, oral sources contribute to historical knowledge precisely *because* they convey subjective "opinion, value judgements, belief, even error." As a consequence:

> there are no "false" oral sources. Once we have checked their factual credibility with all the established criteria of historical philological criticism that apply to every document [i.e. as if the oral testimony were a document], the diversity of oral history consists in the fact that "untrue" statements are still psychologically "true" and that these previous "errors" sometimes reveal more than factually accurate accounts.[89]

But, Portelli maintains that "subjective information, factual information, and intermediate forms be kept distinct and recognized each for its appropriate cognitive status."[90] Unless these distinctions are maintained, "psychological truth" would resist detection. Oral history embraces detectable error,[91] but it does not abhor the "factual credibility" sought by the judge.

Although Jan Vansina's[92] methodology is concerned with "oral traditions" (events *not* witnessed by a narrator), his observations regarding "free text," oral narratives are relevant here. Vansina[93] distinguishes two forms of interview question: "those which do and those which do not indicate the kind of reply expected." Answers to a question such as "[w]hat can you tell me about the past?" should be "regarded as testimonies that spring from the narrator alone." In contrast, "whenever a question can be answered by yes or no, the testimony must be regarded as

springing from both the questioner and the person questioned." At first sight, this corresponds to the prohibition of "leading questions" in examination-in-chief and their permissibility in cross-examination:

> In Examination-in-Chief, leading questions are to be avoided. You can lead for obvious things, identity etc. but, if it can be answered 'yes or no', it's a leading question.[94]

> Nigel, what should the answer be to every question in a Cross-Examination? The answer to every question in Cross-Examination should be "Yes."[95]

But, Vansina's distinction does not apply straightforwardly because the non-leading questions asked in examination-in-chief are based on a statement gleaned in a previous encounter between questioner/respondent and are determined by "information already in the possession of the questioner."[96] Further, the statement was likely to have been elicited through a combination of leading and non-leading questions. Despite this, however, it is only oral recollection *in the courtroom* that is "evidence."[97] In this manner, Vansina's prohibition of suggestion in the oral historian's method is preserved in examination-in-chief. In addition, Vansina[98] concedes that even where questions are non-leading (cannot be answered "yes" or "no"), oral testimony that is in reply to a series of questions should still be considered as "the work of two informants, the questioner and the person questioned. The testimony consists . . . not only of the replies, but also of the questions." It is the same for evidence adduced in examination-in-chief and cross-examination. For the lawyer, *as for the oral historian*, oral sources are always the "result of a relationship, a common project in which both the informant and the researcher are involved together."[99]

A further parallel between oral history and the court concerns "final publication." As Vansina[100] notes, it is impracticable for the historian to publish all the different accounts of the same event that she collects. Rather, once competing versions have been evaluated,[101] "[o]ne version must be chosen for publication, and variants must be indicated in notes which [will] cite the variant versions *verbatim*."[102] An ICTR judgement follows this principle *in reverse* providing competing versions (under the title of "Factual Findings") and then making a determination, the "version chosen for publication." *But, an ICTR judgement goes further*. While the historian will publish a final montage of oral narratives, she is unlikely to publish all verbatim interview transcripts, thereby masking the dialogical co-production of questions/answers.[103] But, for ICTR trials, the final historical montage (the judgement) expressly directs the reader to this dialogue by means of a footnote:

> He also testified that since he did not attend the meetings, he was not in a position to state precisely when the decision to destroy the church had been taken.[56]
>
> [56]Transcript, 25 January 2005, p 18 (open session).

This represents a transparent rendering of oral history methodology.[104] We know which questions were asked; we know whether questions were leading; we know the full answer; we can (following Vansina) read all the variant narratives of the

same event and, in cross-examination, we can read (following Collingwood) the historian's (normally hidden) evaluative re-enactment. It is difficult to envisage a process that would follow oral history methodology more closely.

Speech and text

The centrality of oral testimony at the ICTR appears to place it in the "Eichmann" camp of live witnesses[105] rather than the "Nuremberg" camp's reliance on documents.[106] Whether this is by choice or necessity is a subject of debate:

> Without the witness, there's no trial. There are few documentary papers on the Rwandan genocide, so the majority of the work depends on witnesses.[107]

> We don't have the documentary trail of Nuremberg, so we rely on verbal testimony.[108]

> In 2002 the prosecutor handed me a wad of statements saying what my client did. 'Where's the rest?', I asked. The Prosecutor said 'People didn't write things down'. Not true, we find many, many documents, ten thousand documents.[109]

> This case is not document heavy. Documents that actually relate to the defendant, from a five-year trial, you could read those documents in a weekend.[110]

Whatever the case, one could argue that the ICTR's insistence on oral testimony is a rejection of the "'holiness' of the written word."[111] And yet, the hierarchy of text over speech is *instantaneously* re-asserted. From the outset, and as one would expect in a criminal court, two "Court Reporters" (stenographers) produced trial transcripts in French and English which are available, after correction, in a hard-copy and electronic form. In 2004, "LiveNote", a transcript management software, was introduced allowing all in the courtroom (*except the witness*) to monitor the transcript instantaneously in "real-time" on laptops. Sitting in the Public Gallery one sees, through the blue-tinted, bullet-proof glass, LiveNote on a laptop. Time is marked at the start of each line (hourminute:second).[112] A yellow line runs along the bottom, within which pulsing words appear as they are spoken. When a line is complete, the line of words moves up the screen and the yellow line moves down and continues to be filled with words. This allows immediate revision of the transcript. Speaking at 11:05 a.m., a Judge says: "[t]here is one issue in the transcript on 1100:00 and 1100:36 [. . .] The 'yet' in both cases shouldn't be there."

But, LiveNote also allows lawyers to *instantaneously* (re)convert text back to speech:

> **Defence Counsel:** Mr. President, I would like to quote exactly what the witness [just] stated. [The lawyer peers at her laptop]. The witness said: "They told me that I should be cautious since they had heard that I was an accomplice. And that they knew exactly what to expect regarding the members of that political party."

With LiveNote in operation, the transcript is not a *post facto* record, but an active, influential participant in the trial. If a witness is speaking too quickly, the presiding judge, monitoring LiveNote, moves his hand, (palm down) up and down slowly: text influences speech influences text.

In the presence of stenography, Paul Connerton's[113] abstract distinction between "an *incorporating* practice" (messages sent through speech/movement in the presence of someone we address) and "an *inscribing* practice" (print, photographs etc. that hold information "long after the human organism has stopped informing") always collapses. With LiveNote, however, the distinction collapses beyond the stenographer to all who scrutinize their laptops.

Allesandro Portelli[114] cautions the oral historian that the embodied behaviour of a testifier and the tone, rhythm, pauses and velocity of their narrative are important conveyors of meaning. Legal practitioners at the ICTR concur that non-verbal responses are equally part of the dialogue that co-produces narrative:

> I don't have LiveNote on my laptop. It's distracting. I want to see the witness's demeanour, the body language.[115]

> I didn't want to be distracted, I focus on what the witness says. LiveNote takes something away from watching the demeanour of the witness. I watch to see how he has answered, is he sure or unsure? I'll be nice when he's sure, but more aggressive when he's unsure. Sometimes you can tell from the voice, but you also need to watch them.[116]

The transcript is only a spectral trace of courtroom performance.[117] For example, *reading* the earlier exchange used to illustrate "vicarious re-enactment," one may detect, on the part of the defence counsel, incredulity bordering on sarcasm. But if one was there, one knows that the questions were posed politely; the defence counsel's voice even and gentle; his facial expression one of enrapture; eye-contact with the witness maintained; leaning over the lectern towards the witness in an attempt to engage; to bridge the proscribed well of the courtroom (between the witness box and the judges) that lawyers must not enter.[118] But, the transcript omits all of this, including "the sometimes devastating silences."[119] For example, a video is played without audio;[120] the images (relayed to monitors in the courtroom and Public Gallery) are distressing, showing children with machete wounds. The images are watched in silence, tears stream down the face of the European witness. LiveNote's yellow line (on the laptop on the desk in the courtroom) is blank, the constant pulse of words halted. The Transcript simply reads: "(Video played)." Just as lawyers are concerned that LiveNote impedes assessment of demeanour, anyone reading a transcript should take great care in imputing the absence or presence of emotion.

Despite concerns regarding demeanour, "LiveNote" is a pervasive presence in the courtroom. It is appreciated because it combines the two valued principles of "hearing" an animate, responsive witness whilst simultaneously enabling the "seeing" of a stable, but *also manipulable*, document.[121] While stenography always transforms unstable speech to stable text, LiveNote enables a near co-presence of these two states. Given that *stabilizing* texts infect all stages of the trial (indictment; documentary exhibits; transcripts; the judgement) LiveNote instantly mediates speech so that it becomes a text among these texts.

The ICTR, like the SATRC, begins with "visible, tangible human bodies as material evidence of the acts of history"[122] and engages in dialogical

re-enactment. But sitting in the public gallery and listening to the presiding judge *read* a "Summary of the Judgement" is how it ends—as a series of jarring pseudonyms:

> The Defence called three witnesses … These are witnesses, FE13, FE27 and CF23. Witnesses FE27 and CF23 cannot be considered as credible on this point in view of the inconsistencies between their testimonies and their prior statements. […] The Chamber finds that Prosecution Witness CDL and Defence Witnesses FE55, BZ1 and PA1, gave consistent testimony … even if their testimonies differ slightly as to the date of the arrival of these persons.

But, is this apex or antapex; the index of a legal process *and* the contents page for an historical record? On one hand, a judgement formally discards the revelatory journey of the trial, while intentionally making that journey visible *through footnotes*. While this is a movement of transcripts and exhibits towards a judgement, the reverse movement from judgement to transcripts and exhibits is inescapable. Should the judgement be read as a "road-map"[123] for those who would re-enter the process of fact revelation? For those who help to write them, ICTR judgements are considered as a cipher through which the record *should* be read:

> [Are the judgement or the archive the "historical record"?] A future researcher cannot just read an exhibit because they would be unable to assess credibility. The burden of proof is so high that only by looking at the judgement can one ascertain whether it is trustworthy or not. Future researchers should always read the judgements before they use any document.[124]

And yet, law's judgement is only matched by its inbuilt tolerance of revision through judicial review[125] (if new *facts* are discovered) and appeal[126] on the basis of issues of law. Both hold the potential to re-configure how the "historical record" *should* be read in the future. And yet, whether researchers will submit to the judges' evaluation remains to be seen, but the process of fact determination is embedded in a judgement's footnotes and is accessible to all through the online "Public Judicial Database." So, what is the nature of the landscape through which this road map could guide?

Paper warriors

> The explosion of fact can be seen on all sides. There are the discovery procedures that produce paper warriors dispatching documents to each other in wheelbarrows.[127]

> In my trial, there are over 400 days of transcripts, the motions and submissions are 30,000 pages; there are 1,500 exhibits … maybe twelve hundred. Someone may exhibit the "UN Blue Book,"[128] that's around 740 pages long alone. This means there are 600,000 to 700,000 pages of material. How do you manage all of that?[129]

Paper is an obsession at the ICTR. Office walls are covered with ring binders and box-folders inscribed with the names of trials. Illustrating the length of witness testimony a judge gestures towards two piles of photocopies (2 feet and 1.5 feet high) on his desk "Look at all my documents!" The physical, rather than evidential, weight of paper is of particular concern to itinerant defence counsel:

> When I first came here I had 35 kilos of documents, they wouldn't let me on the plane. I had to get down to 25 kilos and put the rest in a box that cost around $100 to transport.[130]

> We have tons of records. Every time I go back to my chambers in the US I take cartons of documents. We have every piece of paper.[131]

> The amount of paper! They're trying to break new grounds in terms of waste. There's trucks of paper everyday.[132]

Similarly, photocopying facilities are a constant subject of complaint in conversation and in the courtroom:

> At the ICTY there's a "bull pen" which all the defence teams can use. Right outside is a Xerox machine. It's an incredible machine and there are boxes and boxes of paper. Here there are two broken down, worn-out Xerox machines and we are expected to buy our own paper.[133]

> **Defence Counsel:** Mr. President, we are so many Defence teams, and we have only one photocopy machine. Now, the sorting mechanism of the photocopy machine is just down. When you have more than ten pages, it becomes a whole lot of a problem.

In most corridors of the ICTR there are locally constructed, red-painted, wheeled boxes (about 4 feet long by 3 feet high) labelled "For Shredding." At night the flames of the incinerator light up the North East side of the Arusha International Conference Centre (two wings of which are occupied by the Tribunal).

Documents are not, however, simply referred to in the courtroom, they are a physical presence intertwined with bodily performance (the inscribed object becoming a prosthesis for bodily communication, again breaking down the distinction between *incorporating* and *inscribing* practices). For example, a defence counsel holds up an exhibit, the typed side towards the judges; the presiding judge holds up her copy of the same document, typed side towards the defence counsel and waives it up and down. They exchange nods. A presiding judge rejects a document and throws it to one side with a loud smack. A witness cannot find an extract in a document; the defence counsel holds the document up; printed side towards the witness, circling the page numbers with his pen. A prosecution counsel reading a document turns to the interpretation booths (immediately behind him) holds up a document, points at the paragraph he will read—the translators nod and the lawyer gives a "thumbs-up." An exasperated prosecution counsel holds up a full A4 binder and waves it around: "I have an entire binder of disclosures just dealing with this witness."

But this tacticity of the physical document is in a restive relationship with the digitized document. Despite "trucks of paper:" "When this place closes they'll be able to put everything in a shoe box as discs, they won't need warehouses full of documents."[134] How is this possible? Any document filed by the prosecution, defence or "chambers" (judges and their assistant legal officers) is submitted as a hardcopy *and* electronically as a PDF and Word document: "They walk down to this office and file the hardcopy. They then follow with an electronic version of the document."[135] The Word document is used in translation software by the translation section. The hardcopy (or a printed version of the PDF) is then stamped with a

"Certification Stamp;" signed by the head of the "Court Management Section" and stamped by a date machine. The case number and page numbers (the "regular proceeding page number," e.g. 6851–6847) are then *written* on the document and stamped with a "Wet Seal" of the Tribunal's emblem (judicial decisions are stamped with an embossed "Dry Seal" of the emblem). The newly annotated document is then *re-scanned* into a PDF; emailed to the parties, a copy uploaded to TRIM (the electronic database) and the annotated hardcopy placed in the physical archive. This all takes place in a long-room containing around six desks, each with a PC and a multiple-feed scanner. The process is rapid: "Six or ten pages, a motion or decision, takes thirty minutes from being deposited to being emailed back as a PDF."[136] On one hand, this is an effective process:

> There's over 30,000 pages in my case. The Case File is a monster. When we hand things in they burn it on to a CD. There are three discs: a transcript disk; an exhibit disk; and a case file disc (the case papers, motions, decisions, indictments etc.). The Registry just burn it, although you have to take your own discs! Everything is just one click away. The judges know this. They say "I'm surprised that Mr [lawyer's names] hasn't found it already!" So while the Registry official has to flick through a file, I have it all on my hard drive. Just one click and I have it.[137]

But the convoluted processing of documents also expresses a tension between the perceived authenticity of the tactile object and the efficacy of digitization. This mirrors the tension (described above) between the authenticity of the oral and the stability of the transcript. Whatever the case, preservation is not in doubt. If anything it is over-engineered.

Through the on-line "Public Judicial Records Database" a "future researcher" will be able to access redacted (sensitive material removed) transcripts, exhibits, motions and decisions. Although one can search within documents (Optical Character Recognition (OCR) software is used in the process of scanning), there is no facility to search *across* documents. Even now practitioners are frustrated by the absence of search capacity in EDS (Electronic Disclosure System, containing non-confidential prosecution evidence available to the defence) and "Zy," the Prosecution's confidential database:

> Zy is very rudimentary for research. If I search for a name, the name of a suspect or a place the output is not exhaustive. For example, I found a letter signed by [name of defendant]. I found this by chance. This should not happen in a database in a criminal proceedings. It's like a container, but there are no directories, no clarification etc.[138]

> Zy is a maze, a Kafkaesque novel.[139]

> The Prosecution have this lovely "electronic disclosure" consisting of thousands of PDF files all in a completely random order. Therefore, when you're trying to work out meaning, you have to open each PDF in turn and do a search. There's no data retrieval mechanism attached, just PDFs.[140]

> I've spent the morning looking for all Rule 89C decisions in ICTY and ICTR transcripts. The ICTY is easier because Westlaw allows you to search the ICTY transcripts. No such facility exists for the ICTR, so I have to look at each transcript in turn and do a search.[141]

TRIM (the electronic database) only contains documents that have been entered as evidence and does not, therefore, constitute the entire history "preservation" activity of the Tribunal. As of 2005, all of the Prosecution's physical documents (statements etc.) had not yet been catalogued and/or scanned into Zy and while it was recognized that it is "the biggest evidentiary database on Rwanda and should be accessible"[142] there are no plans to make it publicly accessible. Defence teams also possess archives of material not submitted as evidence. At least two defence teams are planning public access on independent websites:

> On the web there'll be thousands of documents from the trial. These will include documents that duplicate what has been submitted, but also the documents used in preparation. For example, witness statements and interviews with witnesses that did not go into evidence.[143]

There is a further archive: thousands of hours of audio–visual recording currently stored in refrigerated containers. In Courtrooms I, II and III, ceiling-mounted cameras record proceedings on to VHS tape *and* Sony 148 DV Cam tapes (there is no visual recording in Courtroom IV). Three DV Cam tapes hold one day in the courtroom. In addition, all proceedings are recorded using "For the Record" software: "It's only audio, but it compresses eight hours on to one CD. There are three language tracks, but you need special software."[144] All trials are also recorded on to C90 audio-cassette, the preferred format of court reporters. The sheer volume of this material is apparent when visiting the archive: cardboard boxes full of labelled VHS tapes cover the floor, DV Cam tapes and audiotapes (bound together in threes with elastic bands) are piled on the floor, desks and filing cabinets—a week's worth. While audiotapes of trials prior to 2001 (when FTR was introduced), have now been digitized on to DVD, they are not publicly available,[145] while the cost of redacting video tapes is estimated at $1million and has only just begun.

The physical archive is stored in a number of adapted shipping containers (painted white with pitched corrugated-iron roofs) forming eight to twelve rooms. According to those who work in the archive, half of the rooms are tidy and half are a mess, the latter containing at least three mounds of paper: "There's no floor plan and a file may have something written on it and crossed out with something different inside."[146] Matching the condition of the physical archive, it is the digitized archive that is emphasized: "[Can I see the Physical Archive?] Probably, but TRIM is the important thing."[147] And yet, the celebration of *tactile* documents in the courtroom is maintained regarding the future of the physical archive. The Rwandan government insists that the physical archive be transferred to Rwanda.[148] In October 2007, an expert committee was established to study "how best to ensure future accessibility of the archives [of the ICTR *and* ICTY] and will review different locations that may be appropriate for housing the materials."[149] A Tribunal press release described the physical archive as "a unique and invaluable resource" which will "facilitate ongoing and future prosecutions [and] serve as a historic record."[150] Although the digitized, public archive is globally accessible the *tactile* physical archive (ultimately a *residue* of digitization) retains its allure.

Conclusion

> We don't have any idea of how many people access TRIM online. All I know is that if it's down we'll get two or three emails, which is a surprise. Also people email in to say that they can't find a transcript. That's how we discover missing transcripts![151]

Irrespective of their opinion on the intentionality of a historical record, the actors quoted at the start assumed that "researchers" would be interested in the archive. But, who are these imagined consumers? Those who may consume the Tribunal's historical record are myriad:

> theories of history ... grossly underestimate the size, the relevance, and the complexity of the overlapping sites where history is produced, notably outside of academia ... We cannot exclude in advance any of the actors who participate in the production of history or any of the sites where that production may occur. Next to professional historians we discover artisans of different kinds, unpaid or unrecognised field labourers who augment, deflect or reorganise the work of the professionals as politicians, students, fiction writers, filmmakers and participating members of the public.[152]

As Michel-Rolph Trouillot,[153] observes, "[l]ong before average citizens read [historians] they access history through celebrations, sites and museum visits, movies." Film is especially pertinent in this context in the form of *Hotel Rwanda* (2004); *Sometimes in April* (2005); *Shooting Dogs* (2005).[154] Following cinematic convention, these films focus on the "exceptional individual" who fights authority and anonymous forces.[155] The same form is taken by a number of books about the genocide,[156] reflecting the "insatiable" appetite in the West for stories "of individualist triumph over adversity."[157] Will new accounts drawing on the ICTR's "historical record" reform or replace these prominent conceptions of the genocide already in circulation? If so, we must recognize that consumers will "subject the narrative to different and unpredictable readings [and put it] to different and unpredictable uses."[158]

As a Judge told me, "[t]he Tribunal has not created information, but through the process of investigation it has organised material."[159] As we have seen, judgements purposively direct readers to that material. The judgement is not presented in splendid isolation, its formation hidden. Rather consumers are invited to engage with that material as they wish, free from the constraints placed on judges. The judgement is indeed monophonic, but the historical record is contrapuntal.[160] Under such circumstances, many of the critiques of law's finality as being inimical to history become irrelevant.[161] Rather, one comes to recognize, as did Karl Jaspers writing to Hannah Arendt regarding the Eichmann Trial, that "[t]he hearing of witnesses to history and collecting the documents on such a scale and with such thoroughness would not be possible for any researcher."[162]

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Notes and References

1 Situated in Arusha, Tanzania.
2 http://trim.unictr.org/
3 United Nations Assistance Mission for Rwanda.
4 See Brandon Hamber and Richard A. Wilson, "Symbolic closure through memory, reparation and revenge in post-conflict societies," *Journal of Human Rights* Vol 1, No 1, 2002, pp 35–53.
5 For a discussion of this aspect see Eric Stover, *The Witnesses: War Crimes and the Promise of Justice in the Hague* (Philadelphia: University of Pennsylvania Press, 2005), pp 110–125.
6 For a review, see Brandon Hamber, "Does the truth heal? A psychological perspective on the political strategies for dealing with the llegacy of political violence," in: Nigel Biggar, ed., *Burying the Past: Making Peace and Doing Justice after Civil Conflict* (Washington, DC: Georgetown University Press, 2003), pp 155–174. A report by the International Federation for Human Rights International (*Victims in the Balance Challenges Ahead for the International Criminal Tribunal for Rwanda* (Paris: International Federation for Human Rights, 2002)) while instructive, does not claim to be a comprehensive account of "victim-witness" experience (drawing on only seven interviews with Rwandan Prosecution witnesses). Regarding the International Tribunal for the former Yugoslavia (ICTY), Eric Stover observes that the response of witnesses to testifying is idiosyncratic and evolving, Eric Stover, *The Witnesses*, pp 87–90, 131. Ultimately, however, we lack sufficient empirical research to make claims regarding the cathartic *or* re-traumatizing affects of giving testimony at International Tribunals, see Karen Brounéus, "Truth telling as talking cure? Insecurity and retraumatization in the Rwandan Gacaca courts," *Security Dialogue* Vol 39, No 1, 2008, pp 58, 61.
7 United Nations Security Council Resolution 955 (1994).
8 Figures provided by the ICTR Witnesses and Victims Support Section, 2007. Protection measures are found in Rules 69 and 75 of the Tribunal's Rules of Procedure and Evidence (RPEs): "Rule 75(B)i (a) Expunging names and identifying information from the Tribunal's public records; (b) Non-disclosure to the public of any records identifying the victim."
9 The question of historians as expert witnesses at the ICTR will be the subject of a later discussion.
10 Interview with Judge, 2006. All interviews took place in Arusha.
11 Interview with Defence Counsel, 2006.
12 Interview with Prosecution Counsel, 2006.
13 Interview with Judge #2, 2007. The judge concurs with Hannah Arendt, that "even the noblest of ulterior purposes [including the making of an historical record] can only detract from the law's main business: to weigh the charges brought against the accused, to render judgement, and to mete out due punishment," Hannah Arendt, *Eichmann in Jerusalem: A Report on the Banality of Evil* (Harmondsworth: Penguin, 1994 [1963]), p 253.
14 Interview with Judge #3 2007.
15 Eichmann Judgement, 1961, para 2. See also Charles S. Maier, "Doing history, doing justice: the narrative of the historian and the truth commission," in: Robert Rotberg and Dennis Thompson, eds., *Truth V. Justice: The Morality of Truth Commission* (Princeton, NJ: Princeton University Press, 2000), pp 261–278 Mark Osiel, *Mass Atrocity: Collective Memory, and the Law* (London: Transaction, 1997), pp 79–141.
16 Interview with Prosecution Counsel #5, 2007. See Airey Neave, *Nuremberg: A Personal Record of the Trial of the Major Nazi War Criminals* (London: Hodder and Stoughton, 1978), pp 356, 358; Lawrence Douglas, *The Memory of Judgment: Making Law and History in the Trials of the Holocaust* (New Haven, CT, London: Yale University Press, 2001), p 2.
17 Interview with Prosecution Counsel #3, 2005.
18 Interview with Prosecution Counsel #4, 2007.
19 Interview with Prosecution Counsel, 2006.
20 Interview with Defence Counsel #2, 2007.
21 Interview with Prosecution Counsel #2, 2007.
22 Felix S. Cohen, "Field theory and judicial logic," *The Yale Law Journal* Vol 59, 1950, p 242 quoted in Milner Ball, "The play's the thing: an unscientific reflection on courts under the rubric of theater," *Stanford Law Review* Vol 28, 1975, p 93.
23 Maier, "Doing history," p 271.

24 See Barbara Czarniawska-Joerges, *Narrating the Organization: Dramas of Institutional Identity* (London: University of Chicago Press, 1997), pp 11–17; Jerome S. Bruner, *Acts of Meaning* (London: Harvard University Press, 1990), pp 67ff.
25 Hayden V. White, *The Content of the Form: Narrative Discourse and Historical Representation* (Baltimore, MD: Johns Hopkins University Press, 1987), p 13.
26 Peter Brooks, "The law as narrative and record," in: Peter Brooks and Paul Gewirtz, eds., *Law's Stories: Narrative and Rhetoric in the Law* (New Haven, CT: Yale University Press, 1996), pp 7–8.
27 Jean-Paul Sartre, *Nausea* (Harmondsworth: Penguin, 1984[1965]), p 62; See Brooks, "Law as narrative," p 19.
28 Paul Ricoeur, "The narrative function," in: Paul Ricoeur and John Thompson, eds., *Hermeneutics and the Human Sciences: Essays on Language, Action and Interpretation* (Cambridge: Cambridge University Press, 1981), p 277.
29 Ibid.
30 With the judges' permission, a witness can be shown a copy of her/his statement to "refresh" memory. The document is then removed from the witness.
31 Not all statements are rehearsed orally. Rule 90A: "Witnesses shall, in principle, be heard directly by the Chambers unless a Chamber has ordered that the witness be heard by means of a deposition as provided for in Rule 71." In addition, Rule 92 *bis* (adopted at the Plenary Session of the Judges July 2002) allows statements to be entered as evidence without oral testimony where the evidence: "goes to proof of a matter other than the acts and conduct of the accused as charged in the indictment."
32 See Alex Obote-Odora, "Drafting of indictments for the International Criminal Tribunal for Rwanda," *Criminal Law Forum* Vol 12, No 3, 2001, pp 335–358.
33 Sartre, *Nausea*, p 62.
34 Lewis Namier, *Conflicts: Studies in Contemporary History* (London: Macmillan, 1942), p 70 quoted in David Lowenthal, *The Past is a Foreign Country* (Cambridge: Cambridge University Press, 1985), p 234.
35 Maier, "Doing history," p 271.
36 Julie Mertus, "The politics of memory and international trials for wartime rape," in: Paul Gready, ed., *Political Transition: Politics and Cultures* (London: Pluto Press, 2003), p 230. In contrast, the 87 ICTY prosecution, "victim witnesses" interviewed by Eric Stover indicated satisfaction that they had fulfilled the "compelling need to tell their story" as a moral obligation to family and community, see Stover, "The witnesses," pp 76–77, 87–90, 126, 134. As Stover reports "only a handful of witnesses suggested to me that their courtroom experience was overly traumatic," ibid, p 130; and that "77 per cent … said that on balance testifying before the ICTY was a positive experience," ibid, p 134.
37 Michael Jackson, *The Politics of Storytelling: Violence, Transgression, and Intersubjectivity* (Copenhagen: Museum Tusculanum Press, 2002), p 22.
38 Kay Schaffer and Sidonie Smith, *Human Rights and Narrated Lives: The Ethics of Recognition* (Basingstoke: Palgrave Macmillan, 2004), p 27, 36–37, 45; Richard A. Wilson, "Representing human rights violations: social contexts and subjectivities," in: Richard Wilson, ed., *Human Rights, Culture and Context: Anthropological Perspectives* (London: Pluto Press, 1997), pp 134–160.
39 For example, "Victims … spoke unimpeded and uninterrupted," Catherine M. Cole, "Performance, transitional justice, and the law: South Africa's Truth and Reconciliation Commission," *Theatre Journal* Vol 59, No 2, 2007, p 173.
40 Paul Gewirtz, "Narrative and rhetoric in the law," in: Peter Brooks and Paul Gewirtz, eds., *Law's Stories: Narrative and Rhetoric in the Law* (New Haven: Yale University Press, 1996), pp 2–13.
41 Arendt, *Eichmann*, p 5.
42 Quoted in Annelies Verdoolaege, "Managing reconciliation at the Human Rights Violations Hearings of the South African TRC," *The Journal of Human Rights* Vol 5, No 1, 2006, p 67. See http://www.doj.gov.za/trc/hrvtrans/vryheid/vryheid1.htm.
43 Lars Buur, "In the name of the victims: the politics of compensation in the work of the South African Truth and Reconciliation Commission," in: Gready, *Political Transition*, pp 72ff.
44 Lars Buur, "Making findings for the future: representational order and redemption in the work of the TRC," *South African Journal of Philosophy* Vol 20, No 1, 2001, pp 45–46. Determinative vocabularies did not eradicate dilemmas for statement-takers, see Lars Buur, "Monumental history: visibility and invisibility in the work of the South African Truth and Reconciliation Commission," in: Deborah Posel and Graeme Simpson, eds., *Commissioning the Past: Understanding South Africa's Truth and Reconciliation Commission* (Johannesburg: Witwatersrand University Press, 2003), pp 70–71, 150–154; Richard Wilson, *The Politics of Truth and Reconciliation in South Africa: Legitimizing the Post-Apartheid State* (Cambridge: Cambridge University Press, 2001), p 43.
45 Buur, "Monumental history," p 80.

46 Verdoolaege, "Managing reconciliation," p 61. See also Annelies Verdoolaege, "The Human Rights Violations Hearings of the South African TRC: a bridge between individual narratives of suffering and a contextualizing master-story of reconciliation," Department of African Languages and Cultures at Ghent University, Belgium, August 2002, available at: http://cas1.elis.ugent.be/avrug/trc/02_08.htm.
47 The hearings of the SATRC Amnesty Committee are not held as an example of an *alternative* to criminal trials as they were perpetrator-centred nature and juridical in form, see Cole, "Performance," p 175.
48 See Verdoolaege, "Human Rights Violations Hearings," pp 11–14, 22–23, 26–27. For forced elicitation of suffering, reconciliatory comments and ignoring sentiments of hate/revenge see ibid. pp 14–19 and Verdoolaege, "Managing reconciliation," pp 70–72. For criteria for choosing who would give oral testimony, see Belinda Bozzoli, "Public ritual and private transition: the Truth Commission in Alexandra Township, South Africa 1996," *African Studies* Vol 57, No 2, 1998, pp 172–173, 192.
49 Marie Dembour and Emily Haslam, "Silencing hearings? Victim witnesses at war crimes trial," *European Journal of International Law* Vol 15, No 1, 2004, p 164.
50 Clifford Geertz, *Local Knowledge* (New York: Basic Books, 1983), p 173.
51 The same "text trajectory" occurred at the SATRC, see Verdoolaege, "Human Rights Violations Hearings," p 13.
52 Lowenthal, *Past is a Foreign Country*, p 204.
53 See Wilson, *Politics of Truth*, p 43
54 Interview with Judge #5, 2007.
55 Interview with Chambers Officer #1, 2007.
56 Interview with Prosecution Counsel #4, 2007.
57 Interview with Prosecution Counsel #6, 2007.
58 Ibid.
59 Jackson, *Politics of Storytelling*, p 15.
60 Interview with Defence Counsel #4, 2007.
61 Ball, "The play's the thing," p 91. This reflects Paul Ricoeur's discussion of fictive *mimesis* not as "imitation" or "reproductive imagination, but . . . *productive imagination* [which] refers to reality not in order to copy it, but in order to prescribe a new reading," Ricoeur "Narrative function," pp 292–293.
62 Maier, "Doing history," pp 270–71.
63 For "common sense" at the Eichmann Trial, see Haim Gouri, *Facing the Glass Booth: The Jerusalem Trial of Adolf Eichmann* (London: Eurospan, 2004), p 126.
64 Bernard Jackson, "Narrative theories and legal discourse," in: Christopher Nash, ed., *Narrative in Culture: The Uses of Storytelling in the Sciences, Philosophy, and Literature* (London: Routledge, 1990), p 30.
65 Jerome S. Bruner, *Acts of Meaning* (London: Harvard University Press, 1990), p 35.
66 It reflects the "double intertransposability of the past between the *descriptive* and the *normative*," Buur, "Making findings," p 54.
67 Maier, "Doing history," pp 270–271.
68 Alfred Schutz, "Common-sense and scientific interpretation of human action," in: *Collected Papers V.1: The Problem of Social Reality* (The Hague: Nijhoff, 1962), p 20.
69 Ibid.
70 See also Ball, "The play's the thing," pp 103–104.
71 "Subjunctive" stories are "tried on for psychological size, accepted if they fit," Bruner, "*Acts of Meaning*," p 54.
72 The judge "plays the performance over; the case is reproduced in the mind," Ball, "The play's the thing," p 103.
73 R. G. Collingwood and W. J. Van Der Dussen, *The Idea of History* (Oxford: Clarendon, 1993 1946), pp 302–303, 306–309.
74 Ibid, p 327.
75 Ibid, p 218. Collingwood suggests that the historian does not investigate "mere events . . . but actions, and an action is the unity of the outside [bodies and their movements] and the inside [thought] of an event . . . his main task is to think himself into this action, to discern the thought of its agent." Ibid, p 213.
76 Ibid, pp 273–274.
77 Ibid, p 268.
78 Michel-Rolph Trouillot, *Silencing the Past: Power and the Production of History* (Boston, MA: Beacon, 1995), p 29.
79 Lowenthal, "*Past is a Foreign Country*," p 218.
80 Ricoeur, "Narrative function," p 277.
81 Trouillot, *Silencing the Past*, p 2; see Ricoeur, "Narrative function," p 288.

82 For example, regarding the Eichmann Trial, "Beyond this trial—with its books and ideas, its hundreds of thousands of words, its living protagonists, its enormous scope … there stretches a field where people are standing alongside a pit, and other people are shooting them at close range with machine guns. … Let us leave here in order to take hold of what is real, to meet actual people and see what was done to them," Gouri, *Facing the Glass Booth*, p 296.
83 Michael Oakeshott, *Experience and Its Modes* (Cambridge: Cambridge University Press, 1933), p 108 quoted in Michael Jackson, "Storytelling events, violence, and the appearance of the past," *Anthropological Quarterly* Vol 78, No 2, 2005, p 355.
84 Allen Feldman, *Formations of Violence: The Narrative of the Body and Political Terror in Northern Ireland* (Chicago: University of Chicago Press, 1991), p 14.
85 Geertz, *Local Knowledge*, p 173.
86 In oral history "Informants are historians, after a fashion; and the historian is, somehow, a part of the source," Allesandro Portelli, "The peculiarities of oral history," *History Workshop* Vol 12, No 1, 1981, p 105.
87 Interview with Judge #5, 2007.
88 Alessandro Portelli, "Oral testimony, the law and the making of history: the 'April 7' murder trial," *History Workshop Journal* Vol 20, No 1, 1985, p 18. See also Dori Laub, "An event without a witness: truth, testimony and survival," in: Shoshana Felman and Dori Laub, eds., *Testimony: Crises of Witnessing in Literature, Psychoanalysis, and History* (London: Routledge, 1992), pp 59–63; Lowenthal, *Past is a Foreign Country*, pp 200–201; Portelli, "Peculiarities of oral history," p 100.
89 Portelli, "Peculiarities of oral history," p 100.
90 Portelli, "Oral testimony," p 18. For the same observation regarding the SATRC, see Jacobus A. du Pisani and Kwang-Su Kim, "Establishing the truth about the apartheid past: historians and the South African Truth and Reconciliation Commission," *African Studies Quarterly* Vol 8, No 1, 2004, p 88.
91 "The discrepancy between fact and memory ultimately enhances the value of oral sources as historical documents," Alessandro Portelli, *The Death of Luigi Trastulli, and Other Stories: Form and Meaning in Oral History* (Albany, NY: State University of New York Press, 1991), p 26.
92 Also a principle historian and ethnographer of Rwanda, see Jan Vansina, *Antecedents to Modern Rwanda: The Nyiginya Kingdom* (Oxford: James Currey, 2004).
93 Jan Vansina, *Oral Tradition: A Study in Historical Methodology* (New Brunswick: Transaction Publishers, 2006[1961]), pp 29–30.
94 Interview with Defence Counsel #4, 2007.
95 Interview with Prosecution Counsel #7, 2007.
96 Vansina, *Oral Traditions*, pp 29–30.
97 Note, the information in the document only becomes evidence if a witness adopts it. As a judge commented "[t]he document is not evidence of its truth unless somebody can say that the contents are true."
98 Vansina, *Oral Tradition*, p 29.
99 Portelli, "Peculiarities of oral history," p 103. See also Vansina, *Oral Tradition*, p 29.
100 Ibid, p 27.
101 Ibid, pp 114–140.
102 Ibid, p 27.
103 Portelli, "Peculiarities of oral history," p 105.
104 Portelli, "Oral testimony," p 17.
105 See Leora Bilsky, "Between justice and politics: the competition of storytellers in the Eichmann trial," in: Steven E. Aschheim, ed., *Hannah Arendt in Jerusalem* (Berkley: University of California Press, 2001), p 247. The image of the Eichmann trial as one dominated by oral testimony is, perhaps, exaggerated. Watching the Eichmann trial, Haim Gouri commented "[t]his is a trial of documents. The documents have a strange incomprehensible power. Every one of them speaks with ten thousand voices," Gouri, *Facing the Glass Booth*, p 53.
106 See Telford Taylor, *The Anatomy of the Nuremberg Trials: A Personal Memoir* (London: Bloomsbury, 1993), pp 136, 148, 172–177.
107 Interview with Registry Official #5, 2007.
108 Interview with Prosecution Counsel #10, 2006.
109 Interview with Defence Counsel #1, 2006.
110 Interview with Defence Counsel #2, 2007.
111 Portelli, "Peculiarities of oral history," p 101.
112 The time marks do not appear in the final transcript, but are replaced by 37 line marks.
113 Paul Connerton, *How Societies Remember* (Cambridge: Cambridge University Press, 1990), pp 72–73.
114 Portelli, "Peculiarities of oral history," p 98.
115 Interview with Defence Counsel #1, 2006.

116 Interview with Prosecution Counsel #5, 2007.
117 Portelli, "Peculiarities of oral history," p 97. See also Portelli, "Oral testimony," pp 13–14 and Anne Graffam Walker, "The verbatim record: the myth and reality," in: Sue Fisher and Alexandra Dundas Todd, eds., *Discourse and Institutional Authority: Medicine, Education, and Law* (Norwood, NJ: Ablex, 1986).
118 See Antoine Garapon, *Bien Juger: Essai Sur Le Rituel Judiciare* (Paris: Éditions Odile Jacob, 2001), p 38.
119 James Clifford, *The Predicament of Culture: Twentieth Century Ethnography, Literature and Art* (Cambridge, MA: Harvard University Press, 1988), p 290.
120 When questioned by the presiding judge, the defence lawyer explains that this is how the footage—without sound—was submitted by the Prosecution. *Silent* footage of horror was also present in the Eichmann trial, see Gouri, *Facing the Glass Booth*, p 133.
121 Portelli, "Peculiarities of oral history," p 105. See Bilsky, "Between justice and politics," p 247.
122 Pisani and Kim, "Establishing the truth," p 85.
123 The final report of the SATRC was described as a "a road map to those who wish to travel into our past," *Final Report of the SATRC*, Volume 1, (Cape Town: Juta & Co, 1998) Chapter 1, paras. 4–5. See Charles Villa-Vicencio and Wilhelm Verwoerd, "Constructing a report: writing up the 'truth,'" in: Robert Rotberg and Dennis Thompson, eds., *Truth V. Justice: The Morality of Truth Commission* (Princeton, NJ: Princeton University Press, 2000), p 289.
124 Interview with Chambers Officer #3, 2007.
125 Rule 120 of the RPEs.
126 Rule 107ff of the RPEs.
127 Geertz, *Local Knowledge*, p 171.
128 United Nations, *The United Nations and Rwanda, 1993–1996* (New York: United Nations, 1996).
129 Interview with Defence Counsel #10, 2006.
130 Interview with Defence Counsel #5, 2006.
131 Interview with Defence Counsel #3, 2005.
132 Interview with Defence Counsel #8, 2007.
133 Interview with Defence Counsel #9, 2007.
134 Ibid.
135 Interview with Registry Official #6, 2007.
136 Ibid.
137 Interview with Defence Counsel #9, 2007.
138 Interview with Prosecution Counsel #9, 2007.
139 Interview with Prosecution Counsel #7, 2006.
140 Interview with Defence Counsel #11, 2007.
141 Interview with Chambers Officer #1, 2007.
142 Interview with Prosecution Counsel #8, 2007.
143 Interview with Defence Counsel, 2007.
144 Interview with Registry Official #7, 2007.
145 For a discussion of the value of audio–visual for research on the SATRC see Cole, "Performance," p 179.
146 Interview with Chambers Official #2, 2007.
147 Interview with Registry Official #4, 2007.
148 See UN 5594th Meeting of the Security Council, Friday, December 15, 2006; UN 5697th Meeting of the Security Council Monday, June 18, 2007; Hirondelle News Agency, "ICTR/Rwanda—Kigali Wants to Be the Depositary of the ICTR Archives," Arusha, Tanzania, March 8, 2007.
149 ICTR, "Tribunals Launch Archiving Study," *ICTR Press Release* Arusha, Tanzania October 9, 2007.
150 Hirondelle News Agency, "ICTR/Rwanda—African Court Urged to Take Custody of ICTR Archives," Arusha, Tanzania, April 3, 2008. The different locations under consideration are Rwanda, Nairobi, Addis Abbaba and The Hague. There is a possibility that the archives will remain in Arusha under the care of the newly established African Court for Human Rights.
151 Interview with Registry Official #4, 2007.
152 Trouillot, *Silencing the Past*, pp 19, 25–26.
153 Ibid, p 20.
154 See Nigel Eltringham, "Besieged history?: an evaluation of shooting dogs," *Environment and Planning D: Society and Space* Vol 26, No 4, 2008, pp 740–746.
155 Robert Toplin, *History by Hollywood: The Use and Abuse of the American Past* (Urbana: University of Illinois Press, 1996), pp 12–13.
156 See Immaculée Ilibagiza and Steve Erwin, *Left to Tell: Discovering God Amidst the Rwandan Holocaust* (Carlsbad, CA: Hay House, 2006).

157 Schaffer and Smith, *Human Rights*, p 24. These testimonies are, of course, also coercively framed by elicitor/editor around "standardized structures and thematics of presentation," ibid, p 47.
158 Schaffer and Smith, *Human Rights*, p 32.
159 Interview with Judge #1, 2005.
160 Schaffer and Smith, *Human Rights*, p 275.
161 For an overview of these arguments, see Richard A. Wilson, "Judging history: the historical record of the International Criminal Tribunal for the Former Yugoslavia," *Human Rights Quarterly* Vol 27, No 3, 2005, pp 912–916.
162 Hannah Arendt, Karl Jaspers, Lotte Kohler and Hans Saner, *Hannah Arendt and Karl Jaspers: Correspondence, 1926–1969* (New York: Harcourt Brace Jovanovich, 1992), p 411.

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