The Archival Politics of International Courts

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Acknowledgements

This book has been a long time in the making. The ideas that underpin this began to emerge 10 years ago during a third year module I took at the University of Bristol, 'History, Law and Memory', under the inspirational tuition of Tim Cole. This started a fascination with the accounts of violence that courts produce, and how these help, or often hinder, communities transition from war to peace. Much has changed, however, on route to finalising this book, and the influence of peers, mentors, colleagues, family and friends has defined the course that this research has taken.

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List of Abbreviations

APA	Arusha Peace Accord
CDR	Coalition pour la Défense de la République
ESC	United Nations Economics and Social Council
FAR	Rwandan Armed Forces
ICC	International Criminal Court
ICTR	International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for the Former Yugoslavia
IHL	International Humanitarian Law
JCE	Joint Criminal Enterprise
MDR	Mouvement Démocratique Républicain
MICT	International Residual Mechanism for Criminal Tribunals
MRND	Mouvement Républicain National pour la Démocratie et le Développmenent
OIOS	United Nations Office of Internal Oversight Services
OTP	Office of the Prosecutor
RPE	Rules of Procedure and Evidence
RPF	Rwanda Patriotic Front
RTLM	Radio Télévision Libre des Mille Collines
SCLC	Special Court of Sierra Leone

UN	United Nations
UNAMIR	United Nations Assistance Mission for Rwanda
UNGA	United Nations General Assembly
UNSC	United Nations Security Council
UNSG	United Nations Secretary General

Chapter 1: *The Politics of Archival Knowledge in International Courts*

> *We should admit that power produces knowledge (and not simply by encouraging it because it serves power, or by applying it because it is useful); that power and knowledge directly imply one another; that there is no power relation without the correlative constitution of a field of knowledge, nor any knowledge that does not presuppose and constitute at the same time power relations.*[1]

Introduction

International criminal trials produce an overwhelming volume of information. The International Criminal Tribunal for Rwanda's (ICTR) judicial archive, based in Arusha, Tanzania, alone contains thousands of linear metres of documents.[2] Sitting at the heart of the ICTR's archive is the testimony of the witnesses, who formed the main evidence base at the ICTR. This totals approximately 26,000 hours of testimony, produced by 3,200 witnesses across 6,000 trial days.[3] In addition, thousands of exhibits have been entered into the archive, along with the countless motions, decisions and other records of the tribunal's day to day activities. The archive is not, then, only a considerable record of the violence that engulfed Rwanda in 1994, when in just 100 days nearly one million people – the majority of whom were Tutsi - were killed. It is also a record of the tribunal as an institution created by the United Nations Security Council (UNSC) on 8 November 1994 to bring peace and security to the Great Lakes region, and the international community more widely.[4] UNSC delegates at the tribunal's conception further suggested that the ICTR was an expression of the 'conscience of mankind' – a trope that continued to reappear throughout the tribunal's

[1] Michel Foucault, *Discipline and Punish: The Birth of the Prison* (New York: Vintage, 1977), 27.
[2] Tom Adami, 'Judicial Record Management/Archiving', *ICTR Legacy Symposium – 20 Years of Challenging Impunity*, 06/11/2014.
[3] United Nations Security Council (hereafter UNSC), S/PV.6678, *6678th Meeting,* 07/12/2011, 8; and UNSC, S/2015/884, *Letter Dated 17 November 2015 From the President of The International Criminal Tribunal for Rwanda Addressed to The President of The Security Council: Report on The Completion of The Mandate of The International Criminal Tribunal for Rwanda as at 15 November 2015*, 17/11/2015, 5.
[4] UNSC, S/RES/955, 08/11/1994. See Richard Goldstone, 'Justice as a Tool for Peace–Making: Truth Commissions and International Criminal Tribunals', *Journal of International Law and Politics* 28 (1995): 485-504.

existence.[5] As such, the archive is also a record of, or perhaps monument to, that conscience, contributing towards the constitution of an 'international community'.[6]

However, archives are not neutral repositories of information where the past is preserved *as it was*.[7] They are, as the quote from Michel Foucault above suggests, sites intertwined with power. This much is already suggested in the logic that underpinned the creation of the tribunal, where it was thought that constructing *an* account of the violence in Rwanda could play a political role and bring peace to Rwanda and help to (re)constitute the international community. Taking the archive as the focus of analysis, this book, as such, determines: what account of violence was constructed within the archive as a result of the prosecutions at the ICTR? What systems of power account for this? And what understanding of the international community and how it should be governed was constituted as a result? This is, then, a question of the interrelationship between law, knowledge and governance in international courts and archives.

As the following demonstrates, the archive is a site where these themes of law, knowledge and governance coalesce to give an archive, and its corresponding community, a particular form. Having made this case, by drawing on the work of post-colonial scholars, anthropologists and archival scientists, the chapter then examines how the relationship between law, knowledge and governance has been assessed by disciplines more typically associated with the work of international courts, such as international law, history and transitional justice. The chapter then returns to the concept of the archive, as I outline the methodological approach which underpins my reading of the ICTR's archive and its constitution of the international community, the focus of the remainder of the book.[8]

Archival Politics: Law, Knowledge and Governance

The link between law, knowledge and governance was anchored within the idea of the archive from its very conception.[9] The word 'archive' first emerged in ancient Greece in relation to the work of the *archons* (the magistrates) and the archon's house, which was known as the *arkeion* (the archive). The archive was the place where the community's records were kept, separated and secured from the rest of society. The magistrate's authority rested with their ability to protect and interpret the records and as such, create law.[10] This placed at a very early point a clear link between archives, law, knowledge and

[5] UNSC, S/PV.3453, *3453rd Meeting*, 08/11/1994, 3–15; United Nations General Assembly (hereafter, UNGA), A/51/PV.78, *51st Session, 78th Plenary Meeting,* 10/12/1996, 18.
[6] S/PV.6678, 8.
[7] Carolyn Steedman, 'Something She Called a Fever: Michelet, Derrida, and Dust', *The American History Review* 106:4 (2001): 1170-2.
[8] This analytical framework is discussed in greater depth in Henry Redwood, 'Archiving (In)Justice: Building Archives and Imagining Community', *Millennium: Online First* (October 2020).
[9] Joan Schwartz and Terry Cook, 'Archives, Records, and Power: The Making of Modern Memory', *Archival Science* 2:1 (2002): 9-11.
[10] Jacques Derrida, 'Archive Fever: A Freudian Impression', *Diacritics* 25:2 (1995): 9-10.

governance as the archive, as Jacques Derrida notes, functioned as a site of commencement, as an ontology and history were created as real; and commandment, as the law was created and then declared so.[11]

Turning to the institutional history of archives demonstrates this link further as, especially from the nineteenth century onwards, archives played a crucial role in the governing of populations and producing identities and norms of the individual, collective and nation.[12] One of the problems for the modern European state throughout this time was how to control an ever-growing population in an increasingly connected yet secular society – where a sovereign's divinity no longer meant automatic loyalty to the state. Nationalism played an important role in this respect, and archives in turn helped to construct a shared identity through the collection and consignation of objects that produced a sense of the nation's past - its identity. [13] Nineteenth century historians, such as Jules Michelet in France, played a vital role here as they used these records to write nationalist histories, constructing a shared (monolithic) past.[14]

The archival drive is very much predicated on this attempt at a totalizing (and exclusionary), pure and truthful depiction of the past.[15] The synergy, then, between the archive and nationalism – as a technique of governance – goes beyond its practical utility in managing populations. Rather, the archival drive (the process of producing, ordering, fixing, excluding records for the archive, and reifying the existence of particular subjects and objects) mirrors the very logics of nationalism. Underneath the clamours of this 'total history' lies a need to catagorise, to name, and therefore also to exclude and to render unknowable. At its extreme, these logics – an obsessiveness for categorising, ordering and excluding - also unpin acts of violence such as genocide. It is for this reason that Derrida sees that there is a sort of sickness within the heart of the archive.[16]

The relationship between law, knowledge and governance within the archive continued during, and was crucial to, colonial expansion, as archives helped produce the colonial state as a particular reality,[17] and render indigenous populations as knowable and governable

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[11] Irving Velody, 'The Archive and the Human Sciences: Notes Towards a Theory of the Archive', *History of the Human Sciences* 11:4 (1998): 1-2.

[12] Steedman, 'Something She Called a Fever', 1159-63.

[13] Richard Brown and Beth Davis-Brown, 'The Making of Memory: The Politics of the Archive, Libraries and Museums in the Construction of National Consciousness', *History of Human Sciences* 11:4 (1998): 18-20; Derrida, 'Archive Fever', 10; Pierre Nora, 'Between Memory and History: Les Lieux de Mémoire', *Representations* 26 (1989), 12-4.

[14] Steedman, 'Something She Called a Fever', 1171-2; Carolyn Steedman, 'After the Archive', *Comparative Critical Studies* 8:2-3 (2011): 333-7.

[15] Steedman, 'Something She Called a Fever', 1162-3.

[16] Derrida, 'Archive Fever'.

[17] Ann Stoler, *Along the Archival Grain: Epistemic Anxiety and Colonial Common Sense* (Princeton: Princeton University Press, 2010), 28-9.

subjects.[18] Benedict Anderson has shown how through meticulous recording keeping, colonisers invented sub-sections of colonial societies with specific 'objectively' identifiable identities. Within these records it was apparent that whereas the coloniser's sentimentalities and lived experiences shaped these identity categories, the local populations' lived experiences and ways of knowing were ignored. For example, whereas the Philippine's census records fixated on class (e.g. noblemen), which the Spanish conquistadors mobilised wherever they landed, in the Indonesian archipelago the Dutch coloniser's Asian trading networks led to more regionally specific, yet highly racialized, categories, such as 'Chinees'.[19] With time, funneling different subjects through different institutions based on these imagined identities, and giving them different opportunities and standings, 'gave real social life to the state's earlier fantasies'.[20] As such, Ann Stoler argues that these archives reveal:

> the force of writing and the feel of documents, about lettered governance and written traces of colonial lives. It is about the commitment to paper, and the political and personal work that such inscriptions perform. Not least about the colonial archive as sites of the expectant and conjured – about dreams of comforting futures and foreboding future failures.[21]

The archive is a space of imagination and creation.[22] As Stoler suggests, however, the archive's rules are not fixed, but represent the archivist's anxiety as they attempt to bring order to the archive and community, and archive (and produce) new objects.[23] Yet, as the reference to failure suggests, the archivists command over the archive's objects is never complete; there is always an *excess* of meaning within the archives as records pushes back against the archival drive to rationalise, organise, catagorise and exclude. This also means, moreover, that the archive can never capture the complete vision of a community it desires. Indeed, as Michel-Rolph Trouillot has argued, archives are always filled with silences produced by the limits of the archivist's epistemology and imagination.[24]

Rwanda offers a good, if not extreme, example of the potential consequence of this form of archiving, and evidences Derrida's link between genocide and the archive. In Rwanda, prior to colonisation Hutus, Tutsis and Twas (the three main groups in Rwanda) reflected relative socio-economic standing, and so remained fluid identity categories. However, the German

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[18] *Ibid*., 97-8; Thomas Osborne, 'The Ordinariness of the Archives', *History of Human Sciences* 12:2 (1999): 51-64; Jeanette Bastian, 'Reading Colonial Records Through an Archival Lens: The Provenance of Place, Space and Creation', *Archival Science* 6 (2007): 267–84.
[19] Bennedict Anderson, *Imagined Communities: Reflections on the Origin and Spread of Nationalism* (London: Verso, 2006), 168-70.
[20] *Ibid*., 169.
[21] Stoler, *Along the Archival Grain*, 1 and 97.
[22] See also Michel-Rolph Trouillot, *Power and the Production of History* (Boston: Beacon Press, 1995), 72-3.
[23] *Ibid*., 2-3, 32-3, and 41-3.
[24] Trouillot, *Power*, 72-82; Derrida, 'Archive Fever', 51-3; Anjali Arondekar, 'Without a Trace: Sexuality and the Colonial Archive', *Journal of the History of Sexuality* 14:1-2 (2005): 27.

and then Belgian colonisers viewed the Hutu, Tutsis and Twas as racially distinct groups.[25] Drawing on the Hamitic myth, the colonisers determined that the Tutsis – the minority socio-economic group that wielded considerable power – originated from Ethiopia and were, as such, racially closer to white Europeans than Rwanda's 'natives', the Hutus (the majority group) and Twas (the smallest group).[26] Mirroring Anderson's findings, these artificial demarcations became lived realities through the production of records, such as ID cards, and determining which pathways through life would be available for the different groups. This became particularly important in the second republic under President Juvénal Habyarimana when a quota system was implemented under the guise of ensuring a fair representation of the three groups in all sections of society. In reality, however, the system helped to systematically discriminate against Tutsis, establishing them as second-class (or perhaps even non-)citizens.

The arbitrary determination that these catagories constituted distinct races became key during the genocide. For example, the genocidal discourse urged perpetrators to send the Tutsis back to Ethiopia via the Nyabarongo river (a code that Tutsis should be killed and thrown in the water), and victims were killed at roadblocks for 'looking like a Tutsis'. As was stated at the 1936 Congress of German Archivists:

> There is no practice of racial politics without the mobilisation of source documents informing us on the origin and development of race and people… There is no racial politics without archives, without archivists.[27]

The production of records, as such, can carry severe, and sometimes violent, consequences within the communities that they help to constitute.

Archives need not *necessarily* align, however, with 'hegemonic power' – and so reproduce restricted notions of community and nation. Post-colonial International Relations (IR) scholars have, for example, demonstrated that whilst the ability to rescue the subaltern's voice from colonial archives might be in question (discussed more below) it is possible to find 'anti-colonial' archives, which challenge colonialism's (and the archival drive's) orderings of society.[28] Importantly, however, doing so requires reconceptualizing the archive away from the bounded material site of state and colonial administrative centers, and towards a more amorphous, dynamic notion of the archive.[29] Whilst these anti-colonial archives are

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[25] Nigel Eltringham, '"Invaders who have Stolen the Country": The Hamitic Hypothesis, Race and the Rwandan Genocide,' *Social Identities* 12:4 (2006): 425-46.
[26] Alison Des Forges, *Leave None to Tell the Story: Genocide in Rwanda* (New York: Human Rights Watch, 1999), 34-5.
[27] Velody, 'Archive', 5.
[28] Shiera el-Malik and Isaac Kamola (eds) *Politics of African Anticolonial Archive* (London: Rowman & Littlefield International, 2017).
[29] Shiera el-Malik and Isaac Kamola, 'Introduction: Politics of African Anticolonial Archive', in *Politics of African Anticolonial Archive*, in eds. Shiera el-Malik and Isaac Kamola (London: Rowman & Littlefield International, 2017), 3-4. See also: Michelle Caswell, 'Defining Human Rights Archives: Introduction to the Special Double Issue on Archives and Human Rights', *Archival Science* 14 (2014): 207–13; Verne Harris, 'Antonyms of Our Remembering', *Archival Science*

important for understanding how communities - including the international community – might be reimagined, it is equally important to understand how what might be termed hegemonic archives constitute and govern the international community in particular ways and with particular effects. I argue that, as important liberal international institutions that seek to regulate norms and actions within the international community, the archives of international courts represent exactly this type of 'hegemonic archive', and it is for this reason that the book takes these archives as its central concern.

This section has shown that there has been a clear and consistent link between archives, law, knowledge and governance as archives help constitute, and govern, community. As the work of post-colonial scholars, in particular, show, archives were key to the development of states and nationalist ideologies in both Europe and the colonies. Archives are, then, an important, yet I would argue underutilized, site that can help us to understand how communities are imagined and constituted as reality.

Whilst scholarship on international courts has to date, for the most part, overlooked the role archives as empirical sites of interest in and of themselves, the composite themes of knowledge production and governance have received some attention. The following, briefly discusses this work before outlining the methodological approach that underpins the rest of the book.

Knowledge Making in International Courts

The relationship between international courts and the production of knowledge has been examined by both historians and political scientists. Whilst for historians, a fascination with the accounts produced by war crimes courts was prompted by the prosecutions of those responsible for the Holocaust in the aftermath of World War II (the 'Holocaust trials'), for political scientists it was the creation of truth commissions and *ad hoc* international courts in the 1990s, and the emergence of a sub-discipline of transitional justice, which led to an engagement with these issues.[30]

Despite the relative (and surprising) lack of cross-referencing between these bodies of work, uniting these enquiries is a sense that courts struggle to produce historically accurate, or 'truthful', accounts of past violence. There is something about the legal nature of courts that seems to place them squarely at odds with truth-telling and the correlative benefits this has for a transitioning society.[31] Donald Bloxham, for instance, demonstrates that at the

14:3-4 (2014): 215-29; Stewart Motha and Honni van Rijswijk (eds), *Law, Memory and Violence: Uncovering the Counter Archive* (London: Routledge, 2016).

[30] Pierre Hazan, *Judging War, Judging History: Behind Truth and Reconciliation* (Stanford: Standord University Press, 2010), 12.

[31] Arguably, the one of the first scholars to point to the incongruity of the relationship between law and history was Hannah Arendt. Arendt, for instance, addresses laws inability to deal with the banality of Adolf Eichmann during his trial in Jerusalem (1961), as the bureaucratic and essentially modern nature of the Holocaust 'explode[d] the limits of

Nuremberg trial (1945-6), the London Charter (the court's statute) meant that crimes against humanity (the charge arguably best suited to capturing the Holocaust) had to be linked to a charge relating to crimes of aggression, meaning that the Holocaust became subsumed in a narrative of aggressive war, rather than treated as a distinct atrocity.[32] Similarly, the drive to secure a verdict, rather than provide a comprehensive account, meant that the prosecution presented a stunted historical narrative that conflated similar acts of violence together. For instance, all Nazi camps were treated as being identical, and other aspects of the planning and execution of the Holocaust were ignored when deemed superfluous to the court's legal purpose (such as 'Operation Reinhardt'—a key moment in the evolution of the Holocaust).[33] For the French historian, Henry Rousso, the incommensurability of law and history was so stark that he refused to participate as an expert witness in the 1994 trial of Maurice Papon (a Vichy bureaucrat) in Paris, believing that the trial would not only produce an inadequate history, but that it would *damage* the decades of rigorous historical work that had tried to understand Vichy France.[34]

In a similar vein, transitional justice scholars argue that courts' legal priorities and drive for a verdict mean that they cannot perform the truth-seeking function that remains central to transitional justice discourse and practice. This is particularly because of how courts treat witnesses, as the perpetrator–centric nature of their procedures and the pursuit of a legal verdict mean that witnesses, often the victims of the crimes, are prevented from telling *their* story in full.[35] Especially in the wake of the claimed successes of the South African Truth and Reconciliation Commission, trials were seen as more likely to 'silence' victims than offer them a space for cathartic truth-telling.[36] Nicola Henry and Katherine Franke argue that in

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law'. Nancy Wood, 'Memory on Trial in Contemporary France: The Case of Maurice Papon,' *History and Memory* 11:1 (1999): 41; Hannah Arendt, *Eichmann in Jerusalem: A Report on the Banality of Evil* (London: Penguin Books, 2006).

[32] Donald Bloxham, *Genocide on Trial: War Crimes Trials and the Formation of Holocaust History and Memory* (Oxford: Oxford University PRess, 2001); Laurence Douglas, *The Memory of Judgement: Making Law and History in the Trials of the Holocaust* (New Haven: Yale University Press, 2001), 48-9.

[33] Bloxham, *Genocide on Trial*, 101, 114-5, 123 and 127. For similar argument regarding the Frankfurt Auschwitz trials (1963-5), see: Devin Pendas, *The Frankfurt Auschwitz Trial, 1963-1965: Genocide, History and the Limits of the Law* (Cambridge: Cambridge University Press, 2006); Rebecca Wittmann, *Beyond Justice: The Auschwitz Trial* (Cambridge: Harvard University Press, 2005); Ian Buruma, *Wages of Guilt* (London: Atlantic, 2009), 153.

[34] Henry Rousso, *The Haunting Past: History, Memory and Justice in Contemporary France* (Pennsylvania: University of Pennsylvania Press, 2002), 73.

[35] Jonathan Tepperman, 'Truth and Consequences', *Foreign Affairs* 81:2 (2002): 130; Audrey Chapman and Patrick Ball, 'The Truth of Truth Commissions: Comparative Lessons from Haiti, South Africa, and Guatemala,' *Human Rights Quaterly* 23:1 (2001): 3.

[36] Marie–Bénédicte Dembour and Emily Haslam, 'Silencing Hearings? Victim–Witnesses at War Crime Trials,' *European Journal of International Law* 15:1 (2004), 163–5; Kieran McEvoy and Kirsten McConnachie, 'Victims and Transitional Justice: Voice, Agency and Blame,' *Social and Legal Studies* 22:4 (2013): 492-5; Nicola Henry, 'The Impossibility of Bearing Witness: Wartime Rape and the Promise of Justice,' *Violence against Women* 16:10 (2010): 1107-10; Rosalind Dixon, 'Rape as a Crime in International Humanitarian Law: Where to from Here?,' *European Journal of International Law* 13:3 (2002): 705; Claire Garbett, 'The Truth and the Trial: Victim Participation, Restorative Justice, and the International Criminal Court,' *Comtemporary Justice Review* 16:2 (2013): 194-5; Martha Minow, 'The Hope for Healing: What Can Truth Commissions Do?,' in *Truth V. Justice: The Morality of Truth Commissions*, ed. Robert Rotberg and Dennis Thompson (Princeton: Princeton University Press, 2000), 236-8; Martha Minow, 'Making History or Making Peace: When Prosecutions Should Give Way to Truth Commissions and Peace Negotiations,' *Journal of Human Rights* 7:2 (2008): 177. There is now, more generally, a criticism about the idea that

re-silencing the victims the power-relations at the core of the original act of violence are reproduced, which potentially re-traumatises the witness.[37] As such, courts are often seen as sites *devoid* of truth, producing what might be considered a 'knowledge deficit'.[38]

As the first section demonstrated, paying attention to what is *excluded* from (legal) archives is important when understanding the archive's politics. However, much is concealed by focusing on what is absent from courts' accounts of violence. First, this elides the generative and constituting nature of these records – even in spite of these absences. As Lawrence Douglas argues, despite producing a somewhat problematic and limited account of the Holocaust, the Holocaust trials captured the public's imagination *exactly because* they were trials, and the spectacle and dramatic nature of these events enabled the creation of a shared historical consciousness concerning the Holocaust.[39] At *Nuremberg*, the screening of the Nazi Concentration Camp film 'imprinted on the western consciousness the images which came to characterise the Final Solution' and the figure of six million dead became an accepted truth.[40] The trial of Adolf Eichmann in Jerusalem (1961) embedded the Holocaust as a pivotal moment in Israel's, and arguably the world's, collective history.[41] As Mark Osiel argues, trials help to generate a collective memory for a community;[42] and this memory fundamentally shapes what it means to be part of that community, and what type of future it will realise.

Second, and related, the criticisms of courts as spaces devoid of historical truth artificially draws a line around what 'history' is. There is vested interest in attempting to neatly demarcate particular fields of enquiry and expertise – as is true of all disciplinary boundary making – which needs to be questioned.[43] Yet, the boundaries between law and history are

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speaking out is *necessarily* cathartic. Erin Daly, 'Truth Scepticism: An Inquiry into the Value of Truth in Times of Transition', *International Journal of Transitional Justice* 2:1 (2008): 30-32.

[37] Henry, 'The Impossibility of Bearing Witness', 1100-1 and 1109; Katherine Franke, 'Gendered Subjects of Transitional Justice', *Journal of Gender and Law* 15:3 (2006): 818-20. This closely mirrors Walter Benjamin's concern that history so often subsumes and co-opts victim's voice, neutralising their disruptive potential. In the face of the co–option of the victim's voice by both *history and language*, Benjamin argues that sometimes the only real response to trauma is silence. Shoshana Felman, *The Juridical Unconscious: Trials and Traumas in the Twentieth Century* (London: Harvard University Press, 2002), 34-37.

[38] This argument should not be confused with the one put forwards by Nancy Combs. Combs would likely be supportive of the idea of a 'knowledge deficit' but, for Comb's this is because witnesses frequently lied whilst testifying. This argument is questionable in a number of respects (not least Comb's attribution of 'culture' as being a primary factor behind witnesses' wilful perjury). However, I am not interested here in determining whether the accounts produced were 'correct', but rather in determining why it is that they exist as they do. Nancy Combs, *Fact–Finding without Facts: The Uncertain Evidentiary Foundations of International Criminal Law* (Cambridge: Cambridge University Press, 2010), 4-10.

[39] Douglas, *Memory of Judgement*, 66 and 71; Michael Marrus, 'The Holocaust at Nurember,' *Yad Vashem Studies* 26 (1998): 1-32.

[40] Douglas, *Memory of Judgement*, 62 and 70.

[41] *Ibid.,* 103 and 156-57; Shoshana Felman, 'Theatres of Justice: Arendt in Jerusalem, the Eichmann Trial, and the Redefinition of Legal Meaning in the Wake of the Holocaust,' *Theoretical Inquiries in Law* 1:2 (2000): 465-508.

[42] Mark Osiel, *Mass Atrocity, Collective Memory, and the Law* (New Jersey: Transaction Publishers, 2000), 1-6.

[43] Christine Bell, 'Transitional Justice, Interdisciplinarity and the State of the 'Field' or 'Non-Field'', *International Journal of Transitional Justice* 3 (2009), 5–27. A keen advocate of this line between history and law is Richard Evans, also author of *In Defence of History* (2000).

blurred. Advocates of international courts continue to claim that one of these courts' functions is the determination of an accurate record of 'what happened'.[44] Richard Wilson has shown that the use of historical and social science expert knowledge in international trials means that far from being in opposition to law, history has become *legally relevant* in international trials.[45] Nigel Eltringham suggests that international courts' archives should be considered as 'oral history archives'; both law and history entice testimony from witnesses, shape these around particular interests, and adopt a particular understanding of how it is that the agents of history act.[46] Similarly Charles Maier argues that both judges and historians turn the complex social world into a comprehensible story with a false sense of cohesion, finality and impartiality.[47] As the opening quote suggests, knowledge is *always already* imbued with power, which renders the search of an Archimedean point a fruitless activity. Acknowledging this shifts the question from whether or not courts produce 'good' or 'bad' histories to consider what history, why and to what effect? This question leads to the core focus of this book, which interrogates the archives of international courts to understanding which accounts of violence courts produce, why and how this results in particular imaginings of the international community.

International Criminal Justice as Governance

The role of international courts in the governance of international affairs has long garnered scholarly interest. The first (at least partially) international courts at Nuremberg and Tokyo in the aftermath of World War II were, in this respect, embroiled in claims of 'victor's justice', as the powerful victors of the war punished the vanquished, and ignored their own – not inconsequential – crimes. At the Tokyo trial, Judge Pal forced home this point in his dissenting opinion, which argued that the Allies' execution of selective justice rendered the whole process illegitimate.

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[44] Barrie Sander problematises this idea by considering the pluralist nature of courts accounts, and also shows how this notion of the socio-political value of the court is contested by those adhering to a more strictly adjudicative view of the function of trials. Barrie Sander, 'Unveiling the Historical Function of International Criminal Courts: Between Adjudicative and Sociopolitical Justice', *International Journal of Transitional Justice* 12:2 (2018): 334-55; Barrie Sander, 'History on Trial: Historical Narrative Pluralism within and beyond International Criminal Courts', *International & Comparative Law Quarterly* 67:3 (2018): 547-76.

[45] Richard Wilson, *Writing History in International Criminal Trials* (Cambridge: Cambridge University Press, 2011), 12-20, 69-86, 112-3 and 121-8; Ruti Teitel, *Transitional Justice* (Oxford: Oxford University Press, 2000), 69-75; Gerry Simpson, *War and Crime: War Crimes Trials and the Reinvention of International Law* (Cambridge: Polity Press, 2007), 79-80; Nigel Eltringham, 'Illuminating the Broader Context: Anthropological and Historical Knowledge at the International Criminal Tribunal for Rwanda,' *Journal of the Royal Anthropological Institut* 19:2 (2013): 342.

[46] Nigel Eltringham, '"We Are Not a Truth Commission": Fragmented Narratives and the Historical Record at the International Criminal Tribunal for Rwanda,' *Journal of Genocide Research* 11:1 (2009): 55-65. See also Austin Sarat and Thomas Kearns, 'Writing History and Registering Memory in Legal Decisions and Legal Practices: An Introduction,' in *History, Memory, and the Law*, ed. Austin Sarat and Thomas R Kearns (Michigan: University of Michigan Press, 1999), 1-24.

[47] Charles Maier, '"Doing History, Doing Justice": The Narrative of the Historian and of the Truth Commission', in *Truth V. Justice: The Morality of Truth Commissions*, ed. Robert Rotberg and Dennis Thompson (Princeton: Princeton University Press), 270-1.

The new era of international justice that emerged at the end of the Cold War promised to address many of these concerns. With both the establishment of both the ICTR and ICTY, and then the International Criminal Court (ICC), international justice could claim to be, unlike Nuremberg or Tokyo, truly international in terms of personnel, jurisdiction and state support. The universal reach of international criminal justice is such that the ICC's jurisdiction covers even those states that refuse to recognise the court's legitimacy.

Yet, despite this claim to universalism, these courts have also failed to carve out an 'independent' sphere of action, and remained embroiled in the power-dynamics of international politics. This is, as Kenneth Rodman shows, in part because international courts remain at the whims of nation states due to their dependence on national governments for enforcement, staff assistance and finance.[48] This is not to say that politics necessarily *obstructs* these courts' work.[49] Rachel Kerr, for instance, has shown that international politics is *essential* to what these courts do: at the ICTY, politics brought the court to life – through UNSC RES 827, under Chapter VII of the UN Charter; gave it is power to function – through state diplomacy; and its ultimate goal of achieving peace was very much political.[50] As such, these courts function as important sites through which international politics is practiced, and the international community regulated.

This has not stopped, however, these courts from being accused of delivering uneven, and even a form of 'victor's', justice. Two points are particularly important in this respect when thinking about courts as practices of governance: the 'distanced' nature of these courts and the selective application of the law.

Distanced Justice

The accusations that international courts, along with other transitional justice mechanisms, represent a distanced form of justice centre on both the physical distance between these courts and communities where the crimes occurred, and the epistemological distance between law's ways of knowing and how those affected by the violence understand these crimes.[51] Tim Kelsall found, in relation to the Special Court for Sierra Leone, that even the hybrid nature of that court (which supposedly integrated a 'local' element into the

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[48] Kenneth Rodman, 'Justice as a Dialogue between Law and Politics', *Journal of International Criminal Justice* 12:3 (2014): 437-69

[49] Rachel Kerr, *The International Criminal Tribunal for the Former Yugoslavia: An Exercise in Law, Politics, and Diplomacy* (Oxford: Oxford University Press, 2004), 212. See also Michael Humphrey, 'International Intervention, Justice and National Reconciliation: The Role of the ICTY and ICTR in Bosnia and Rwanda', *Journal of Human Rights* 2:4 (2003): 495-505.

[50] Kerr, *ICTY*, 2; Rodman, 'Justice as a Dialogue,' 437-69; James Gow, 'The ICTY, War Crimes Enforcement and Dayton: The Ghost in the Machine,' *Ethnopolitics* 5:1 (2006): 49-65.

[51] Phil Clark, *Distant Justice: The Impact of the International Criminal Court on African Politics* (Cambridge: Cambridge University Press), 34-46 and 309-12; Gready, 'Reconceptualising Transitional Justice', 11–3; Peter Uvin and Charles Mironko, 'Western and Local Approaches to Justice in Rwanda', *Global Governance* 9 (2003), 220; and Drumbl, 'Punishment, Postgenocide', 1314–26. Miriam Aukerman, 'Extraordinary Evil, Ordinary Crime: A Framework for Understanding Transitional Justice,' *Harvard Human Rights Journal* 15 (2002): 47.

procedure) could not overcome the gap between the practice of international law and local Sierra Leonean culture.[52] This was particularly the case when it came to the court's less than adequate understanding of forced marriages, child soldiers, and magic.[53] Joseph Fink has argued that the deontological nature of international criminal law means that it is inevitably incapable of understanding the specificity and cultural contexts within which violence occurs, as it generalises and abstracts episodes of violence.[54] As such, law here is seen as enforcing a particular understanding of the social world – according to the Fink, to the point of deontological abstraction – which inhibits its ability to truly *know* the crimes it processes.

Whilst over-emphasising the passivity of the communities that are subjected to international law,[55] and returning, somewhat unhelpfully, to the 'truth vs justice debate' of the 1990s (as international law is treated simply as being *incapable* of understanding violence), this at least points to the fact that law is not, and cannot, be interpreted simply as the application of rules, but is a reflection, and enforcement, of a particular perspective. It is worth quoting Catherine MacKinnon at length in this respect:

> In reality begins principle. The loftiest abstractions, however, strenuously empty of social specificity on the surface are born of social life: amid the intercourse of particular groups, in the presumptive ease of the deciding classes, through the trauma of specific atrocities, at the expense of the silent and excluded, as a victory (usually compromised often pyrrhic) for the powerless. Law does not grow by syllogistic compulsion; it is pushed by the social logic of domination and challenge to domination, forged in the interaction of change and resistance to change. It is not only in the common law that life of the law is experience, not logic. Behind all

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[52] As Eltringham rightly critiques, this is not to essentialise culture as the obstacle here – as discussed more in Chapter 6.

[53] Tim Kelsall, *Culture under Cross-Examination: International Justice and the Special Court for Sierra Leone* (Cambridge: Cambridge University Press, 2010), 8-16. See Alison Des Forges and Timothy Longman, 'Legal Response to Genocide in Rwanda,' in *My Neighbour, My Enemy*, ed. Harvey Weinstein and Eric Stover (Cambridge: Cambrideg University Press, 2004), 56.

[54] Joseph Fink, 'Deontological Retributivism and the Legal Practice of International Jurisprudence: The Case of the International Criminal Tribunal for Rwanda', *Journal of African Law* 49:2 (2005): 115-23. Payam Akhavan has similarly noted his concern with what happens when the legal idiom attempts to generalise between different types of traumatic experience. Payam Akahavan, *Reducing Genocide to Law: Definition, Meaning, and the Ultimate Crime* (Cambridge: Cambridge University Press, 2012), 1-78 and 141-4.

[55] Clarke, *Distant Justice*, 18; Kamari Clarke, Abel S. Knottnerus, and Eefje De Volder (eds.), *Africa and the ICC: Perceptions of Justice* (Cambridge: Cambridge University Press, 2016). Roger Mac Ginty, 'Hybrid Peace: The Interaction between Top-Down and Bottom-up Peace.,' *Security Dialogue* 41:4 (2010): 391-412. Moreover, as post–colonial scholarship has shown, as a result of colonial encounters, actors from the Global South and the Global North co–constituted each other, fundamentally altering each other's existence, and that these encounters had a significant impact on the nature of international system and international law. This, then, further complicates the notion of 'distant justice' or the ability to neatly disentangle different 'stakeholders' in international criminal justice. Antony Anghie, *Imperialism, Sovereignty and the Making of International Law* (Cambridge: Cambridge University Press, 2005), 1–12 and 250–3; Diane Otto, 'Subalternity and International Law: the Problem of Global Community and the Incommensurability of Difference', *Social and Legal Studies* 5:3 (1996), 339–54; Makau Mutua, 'Savages, Victims, and Saviors: the Metaphor of Human Rights', *Harvard International Law* Journal 42:1 (2001), 212–4; Sundhya Pahuja, 'The Postcoloniality of International Law', *Harvard International Law Journal* 46:2 (2005), 460–8; and Frédéric Mégret, 'From 'Savages' to 'Unlawful Combatants': a Postcolonial Look at International Humanitarian Law's Other', in *International Law and its Others*, ed. Ann Orford (Cambridge: Cambridge University Press, 2006), 265–318.

> law is someone's story; someone whose blood, if you read closely, leaks thought he lines. Text does not beget text; life does. The question – a question of politics and history and therefore law – is whose experience grounds what law.[56]

Law doesn't neatly reflect the social world, then, but plays a role in actively shaping it from a *particular perspective*.[57] These ideas are echoed in Michael Shapiro's analysis of war crimes, as he argues that scholars need to move beyond seeing justice as a static concept and to focus on 'when, where, how, from whose perspective(s), and under whose control it is activated as an issue and implemented through justice related apparatuses'.[58]

Critical legal studies offers further evidence of the politically charged nature of law, and adds greater insight, and nuance, to thinking about how criminal law's epistemology reproduces particular societal dynamics and power-relations. For instance, numerous studies have now shown how gender and race influence how a trial unfolds, and as such, reinforce particular racial and gendered assumptions about society. John O'Barr and William Conley's examination of the treatment of sexual violence testimony in municipal courts shows that the presence of patriarchal discourses means that this type of testimony is less likely to be believed.[59] Martha Minow similarly shows how race effects legal determinations in the US, and in particular that the race of a defendant and their alleged victim plays a significant role in determining the severity of sentence.[60] These non-legal discourses, then, help create the conditions where legal decisions of guilt can be rendered. Law is shaped through a particular world view and how law is practiced has consequences for (re)creating this world view. As Chris Reus-Smit argues, law is both constituting and constitutive of politics.[61]

Rather than simply treating international criminal justice as being necessarily incapable of understanding a particular act of violence, this work from critical legal studies shows there is a need to more closely understand how international law's epistemology functions and with

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[56] Catherine MacKinnon, 'Crimes of War, Crimes of Peace', *UCLA Women's Law Journal* 4 (1993): 59.

[57] This mirrors James White argument that courts *translate* the social world into law, and as with all translations this contains both exuberance (as meaning is added) and deficiency (as meaning is lost). James White, *Justice as Translation: An Essay in Cultural and Legal Criticism* (Chicago: Chicago University Press, 1992), 2239-69; Clark Cunningham, 'The Lawyer as Translator, Representation as Text: Towards an Ethnography of Legal Discourse,' *Cornell Law Review* 77:6 (1992): 1298-387.

[58] Michael Shapiro, *War Crimes, Atrocity and Justice* (Cambridge: Polity Press, 2015), 11-2.

[59] A 'double bind' is placed over a rape victim's testimony that sees the chances of it being accepted by the courtroom diminish. This is the case, O'Barr and Conley argue, because the victim either adopts a powerful speech style and is deemed unreliable for either failing to play out their gender 'properly' or because it indicates that the witness is 'too together' to have experienced a traumatic experience like rape, or they adopt powerless speech style, conform to the gendered stereotype, and are seen as irrational and unreliable; John Conley and William O'Barr, *Just Words: Law, Language, and Power*, 2nd ed. (Chicago: University of Chicago Press, 2005), 32-39. William O'Barr *et al.*, 'Speech Style and Impression Formation in a Court Setting: the Effects of 'Powerful' and 'Powerless' Speech', *Journal of Experimental Social Psychology* 14:3 (1978), 266–79.

[60] Martha Minow, *Making All the Difference: Inclusion, Exclusion, and American Law* (London: Cornell University Press, 1990), 66-7; Martha Minow 'Foreword: Justice Engendered,' *Harvard Law Review* 101:10 (1987): 14; Kimberley Crenshaw, 'Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color,' *Stanford Law Review* 43:6 (1991): 1241–99.

[61] Chris Reus-Smit, 'The Politics of International Law,' in *The Politics of International Law*, ed. Chris Reus-Smit (Cambridge: Cambridge University Press, 2004), 14.

what consequences. Doing so brings to the fore, once more, the question of how law reproduces *particular* accounts of violence and community.

Justice and Community

The second relevant critique of international courts relates to Rosemary Nagy's suggestion that to understand the politics of transitional justice as discourse and practice, scholars need to ask who, when and what these interventions focus on.[62] For international courts, the answer here is relatively explicit: these courts have almost entirely focused on communities in the global south and, in particular, those from the African continent.[63] The sole exception to date is the prosecution of a Belgian national, George Ruggiu, who was tried at the ICTR for his role as radio host on the notorious RTLM radio station. As such, even in this instance, the gaze of the international justice remained on the global south.

The imbalance of these courts', and in particular the ICC's, focus, in part led to the African Union's threat of mass withdrawal in 2017. Whilst the threat was never fully realised – with only Burundi withdrawing, followed in 2018 by the Philippines – this has done little to dampen critics' claims that the ICC's near exclusive focus on the global south renders it a site of neo-colonial governance. The two defences that could be made against this allegation are, first, that the majority of international criminal cases are initiated by actors from the global south, and, second, that investigations are ongoing into a number of western states' actions, including the UK in relation to the Iraq. With the latter, along with the incredibly slow pace of these proceedings against western powers, the fact remains that with three of the five permanent members of the UNSC yet to ratify the Rome Statute, some of the most powerful actors in global politics remain immune from the court's justice as non-signatories are only able to be referred through the UNSC.[64]

The role of African state leaders in initiating proceedings offers a stronger challenge to these neo-Colonial claims.[65] Yet, it is also the case that colonial power has always relied on the colonised to execute much of its work.[66] Overall, the design and practice of international criminal justice today appears to mirror the power-dynamics embedded in international law at its conception; directed at securing the role and legitimacy of 'civilised' states to intervene in, and discipline, uncivilised, barbaric and backward states in need of

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[62] Rosemary Nagy, 'Transitional Justice as Global Project: Critical Reflections,' *Third World Quarterly* 29:2 (2008): 275-89.

[63] The exceptions here would be the International Criminal Tribunal for the Former Yugoslavia, the Extraordinary Chambers in the Courts of Cambodia, Special Panels of the Dili District Court, and the Special Tribunal for Lebanon.

[64] Jessica Whyte, 'Always on Top'? The 'Responsibility to Protect' and the Persistence of Colonialism', in *The Postcolonial World*, Jyotsna Singh and David Kim (eds) (London: Routledge, 2016): 316-7.

[65] Clark, *Distant Justice*, 18.

[66] Dianne, Otto, 'Subalternity and International Law: the Problems of Global Community and the Incommensurability of Difference', *Social & Legal Studies*, *5*:3(1996); 337–64; Gayatri Spivak, 'Can the Subaltern Speak?', in *Colonial Discourse and Post-Colonial Theory: A Reader*, eds. Patrick Williams and Laura Chrisman (New York: Colombia University Press, 1994), 90-110.

'saving'.[67] Whilst the success of modern day 'civilising missions', in the form of humanitarian interventions and international prosecutions, is more than questionable,[68] what is of equal importance here is that these interventions instil a particular set of power-relations within the international domain which presents the global south as failing victim, and the global north as benevolent saviours, ensuring that inequality is reproduced in the international domain.[69] Moreover, whilst who initiates these proceedings is one thing, who controls them once they are underway, and in whose interests they serve is a different matter. When thinking about courts as sites of governance, it is, therefore, important to think about how power is exercised *within* these courts, what role the post-colonial subject – so often the focus of international courts – play in this process, and how particular accounts of violence and community are produced as a result. Such is the focus of the analysis offered in this book.

Moreover, whilst these interventions are often made on behalf of the 'international community' this should not disguise the ambiguity and transience of this community. Following Vivienne Jabri, the international community should be considered 'a distinct juridical-political space' where the constitution of, and relations between, different subjects are defined and regulated by an ever-changing, and unevenly applied, set of rules and norms. This means the international community is not ontologically stable, but is constantly reformulated as it encounters new problems and subjects.[70] As Michael Dillion and Julian Reid have suggested, interventions on behalf of the international community become important for articulating a sense of, and making real, the 'international community';[71] contributing to 'the normative construction of the international' itself.[72]

In this respect, throughout the ICTR's history, beyond helping Rwanda, the tribunal's advocates also stressed what these trials would do for the 'international community' – whether as expression of its conscience, a means to solidify the rules and norms of the community, or to achieve 'international peace and security'. The court, then, offers a chance to examine what particular idea of the international community emerged through the ICTR's operations and, by interrogating the inner operations of the court and the ways in

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[67] Vivienne Jabri, 'Peacebuilding, the Local and the International: a Colonial or a Postcolonial Rationality?', *Peacebuilding* 1:1 (2013): 6-7 and 14; Kamari Clarke, 'Affective Justice: The Racialized Imaginaries of International Justice', *PoLAR* 42:2 (2019): 244-57.

[68] Phil Clark has clearly shown in relation to the ICC how despite the court's failure to acknowledge its own embeddedness in the contexts in which it functions has led to disastrous effects for those communities subjected to its jurisdiction. Clark, *Distant Justice*, 18-9.

[69] Whyte, 'Always on Top'; Mahmood Mamdani, 'Responsibility to Protect or Right to Punish?', *Journal of Intervention and Statebuilding* 4:1 (2010): 53-67; Clarke, 'Affective Justice; Muppidi Himadeep,. 'Colonial and Postcolonial Global Governance', in *Power in Global Governance,* eds. Michael Barnett, and Raymond Duvall (Cambridge and New York: Cambridge University Press, 2005): 273-93.

[70] Jabri, 'Peacebuilding', 3-4; Colin Koopman, 'Foucault's Historiographical Expansion: Adding Genealogy to Archaeology', *Journal of the Philosophy of History* 2:3(2008): 359.

[71] Michael Dillon and Julian Reid, 'Global Governance, Liberal Peace, and Complex Emergency', *Alternatives* 25:1 (2000): 117-43.

[72] Jabri, 'Peacebuilding', 6-7 and 14. See also Clarke, 'Affective Justice', 244-57.

which the archive is produced, *who* controls this process, and, returning to the above, *whose* perspective is enforced and *whose* vision of justice realised.

As this chapter has argued, turning to the archive, as a site where these strands of law, knowledge and governance coalesce, offers the opportunity to get the heart of these questions of why a particular account of violence was produced and how this led to certain conceptions of community. The archive is, however, not only the empirical site through which imaginings of community can be excavated. The archive is also, as the following section argues, a methodological approach that be used to examine how archives' produce and restrict knowledge in particular ways and so produce particular imaginings of community.

Archives as Methodology

In the 1980s and 90s, the question of how to analyse colonial archives was an important point of debate in post-colonial studies. Some scholars argued that there was a need to read archives *against the grain* to recover the subalterns' voice in the face of the archives exclusionary logics.[73] However, Gayatri Spivak questioned the validity of this approach, arguing that the archival force was such that attempting to find agency in those lives recorded in the archive was futile.[74] Stoler, supporting this approach, consequently argued that colonial archives (and arguably any archive) should be read *along the grain*; analysed from an ethnographic perspective to examine how 'credible' knowledge is produced and the effects that this has within particular societies.[75] This resonates with Foucault's description of the archive as part of his archaeological methodology,[76] which Colin Gordon describes as:

> (…) the study of forms of knowledge and rationality at the level of their *material manifestation* as bodies of discourse composed of finite sets of oral or written utterances. The aim is to render these discourses accessible to description and analysis as constituting a specific order of historical reality (...) (Emphasis added).[77]

In order to understand the politics of the archive, then, it is important to ascertain what rules underpin the production of knowledge - Foucault calls these the rules of formation.[78] Foucault's archaeological methodology offers a way to determine these rules, by analysing

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[73] See also Bastian, 'Colonial Records', 273. For a similar account of the ability, and need, to reclaim 'lost voices', see Arlette Farge, *The Allure of the Archive*, trans. Thomas Scott-Railton (London: Yale University Press, 2013).
[74] Gayatri Spivak, 'The Rani of Sirmur: An Essay in Reading the Archives,' *History and Theory* 24:3 (1985): 271; Dianne Otto, 'Subalternity and International Law: the Problems of Global Community and the Incommensurability of Difference', *Social & Legal Studies* 5:3 (1996): 354-5.
[75] Ann Stoler, 'Colonial Archives and the Arts of Governance,' *Archival Science* 2:1 (2002), 87-109.
[76] Michel Foucault, *The Archaeology of Knowledge and the Discourse on Language*, trans. Alan Sheridan (New York: Pantheon Books, 1972).
[77] Colin Gordon, 'Afterword', in *Power/ Knowledge: Selected Interviews and Other Writings 1972–1977*, ed. Colin Gordon (New York: Pantheon Books, 1980), 243-44.
[78] Foucault, *Archaeology of Knowledge*, 127; Gilles Deleuze, *Foucault*, trans. Seán Hand (London: University of Minnesota Press, 1988), 3-8.

the regularity with which statements and records are made for (and excluded from) the archive, and how they relate to each other; structuring, ordering, restricting and *enabling* discourse.[79]

Statements - grouped into four categories, or levels of analysis: objects, enunciative modalities, concepts and strategies - are not understood as regularly conceived of, as explicable through grammatical units such as sentences. Rather they are utterances that are intelligible only as components of the larger whole; a discourse, or *archive*.[80] The way in which Foucault describes these different types of statement offers an insight into how Foucault conceives of the archive, and how the regularity *and specificity* of particular statements can be exposed.

Objects are not found external to discourse but take on a particular appearance as a result of the way that a discourse refracts light, as Gilles Deleuze puts it, in a particular manner to make these visible.[81] In rendering these objects visible *in a particular way*, the discourse itself is rejuvenated. This co-constituting nature is the case for each of these categories of statement, each of which are made possible by, and make possible, a particular discourse.[82] In relation to the ICTR's archive, this might, then, consider how 'victims' and 'perpetrators' are produced as objects of enquiry. Enunciative modalities are the possible subject positions that can be taken up by different actors and the rules that determine how these actors participate in the construction of the discourse. This further highlights the need to look at actors' positions within particular institutions and the position of the institutions themselves within wider society, and hence draws attention to the relationship between the discursive and non-discursive.[83] When analysising international criminal justice this might, for instance, look at the interactions between prosecutors and witnesses in the production of the archive. This also draws attention to question of voice, and resonates with the post-colonial concern with *who* has the right to speak and produce records for the archive. Moreover, following Jens Meierhenrich and Eltringham, this pushes back against any notion that these tribunals are homogenous and disembodied spaces. Rather, as will be made clear throughout the book, international courts are brought to life by different subjects who bring with them their own vision of justice and community.[84]

What is important when understanding the concepts that underpin the archive is the manner in which these relate to each other, which orders the discourse and provides a grid

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[79] Foucault, *Archaeology of Knowledge*, 45.
[80] Ibid., 27, 32–8 and 79–99.
[81] Ibid., 40-9; Gilles Deleuze, 'What Is Dispositif,' in *Michel Foucault: Philosopher*, ed. Timothy Armstong (Hempstead: Harvester Wheatsheaf, 1992), 160.
[82] Lene Hansen, *Security as Practice: Discourse Analysis and the Bosnian War* (London: Routledge, 2013), 9.
[83] Foucault, *Archaeology of Knowledge* 50-5 and 106.
[84] Nigel Eltringham, *Genocide Never Sleeps: Living Law at the International Criminal Tribunal for Rwanda* (Cambridge: Cambridge University Press, 2019): 6-8; Jens Meierhenrich, 'The Practice of International Law: A Theoretical Analysis, *Law and Contemporary Problems* 76:3-4 (2013): 1-83.

of intelligibility.[85] For example, in international criminal justice, the concept of genocide exists only in relation to other crimes, such as crimes against humanity.[86] For each of these categories, the interrelation *within* and *between* categories is crucial when articulating the rules of formation.[87] Finally, strategies are the overriding principles that direct the discourse and help settle conflicts, or hold conflicting possibilities in productive relation to each other.[88] For international courts, one of the most importance strategies underlying its function is to deliver 'justice'. What this, as with all of these catagories, means in practice however is a product of the archive's rules of formation, and so something that needs determining through careful analysis of the archive's records.

The archaeological approach also encourages analysis to move beyond a focus on the discursive. As the quote from Gordon suggests, there is a materiality to the archive. First, the archive is a site where the materiality of a discourse manifests; the archive produces material artefacts and records in a particular way due to the rules that determine the contours of legitimate knowledge. As Stoler argues, archives should be seen 'as monuments of states as well as sites of state ethnography.'[89] As such, reading the materiality of the archive can provide a way to understand the discourse(s) that underpin it. Second, the archive also materially effects the social world. Whether this is how particular people should be classified or what constitutes the 'reality' of a nation's past, the archive produces particular conditions and logics that resonate beyond the archive, producing particular lived experiences. But, as the first section of this chapter argued, the archive's attempts to tame are always bound to, at least partially, fail. What this means is that there is the possibility that certain material fragments are located within the archive which sit in tension with the archive's rules, and offer a disruptive potential. This also, and following Arlette Farage, means that Spivak's claims that the force of the archive is such that it *erases* the subaltern's voice completely should be treated with caution.[90]

The analysis conducted throughout this book draws on this analytical and methodological approach to explore how knowledge is produced within the ICTR's archive and how this links to the production of certain ideas of community. Following the approach set out above, it asks: What account of violence was produced within the archive? What rules and power-relations underpin the archive? And how do these records constitute, as such, a particular imagining of community?

Adopting this approach to the analysis of the ICTR's archive offers a step change in how international law is analysed. Empirically, few scholars that have considered the archives of

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[85] Foucault, *Archaeology of Knowledge*, 56 and 56-63.
[86] Claire Moon, 'Narrating Political Reconciliation: Truth and Reconciliation in South Africa,' *Social Legal Studies* 15:2 (2006): 261-6.
[87] Foucault, *Archaeology of Knowledge* 45.
[88] Ibid., 64-70 and 72.
[89] Stoler, *Along the Archival Grain*, 90.
[90] Farage, *Allure of the Archive*.

international courts as important research sites in and of themselves, and even those that have, on the whole, tend to skirt over the explicit question of the politics of archival knowledge. As such, they treat the archive in more traditional terms as a repository of a neutral account of the past, which is seen as able to contribute towards peace and reconciliation.[91] The exception here is the work of Kirsten Campbell, who's analysis of on the ICTY's archive comes closest to exploring this link between law, knowledge and governance. Campbell highlights several frameworks surrounding the ICTY that shaped the archive, including the tribunal's mandate to determine a legal judgement; its role in representing the international community's norms; and its contribution to the Western Balkans' transition to peace. As such, Campbell shows how the archive's records, and hence the memory of the violence, is *constructed* rather than found and is therefore politically charged.[92]

This book builds on Campbell's analysis in a number of ways. First, whereas Campbell begins analysis with the structures surrounding the ICTY, suggesting, in turn, that these inevitably produced particular types of records, the book begins its analysis with the records themselves, and meticulously traces how the how records were produced and in the process reproduced particular world views, and draws inspiration from the post-colonial concern with *who* has the right to construct the archive.[93] This also looks to emphasis the ways that the archival process is contested. As such, the book is both concerned with how the archive contributes to what Jef Huysmans and Joao Pontes Nogueira refer to as 'boundary making', but also how certain practices in the production of the archive might *fracture* or disrupt those boundaries.[94] Second, whilst Campbell points to the archive as a site of norm projection, by ascertaining the archive's rules the book offers an understanding of what exactly these norms are and how these relate to particular notions of community. This analysis is also, then, important for IR scholars interested in how the international community is demarcated and constituted as a particular reality, and specifically this association between legal archives and the international community is a new and important contribution of this book.[95] Finally, the granular approach to determining how the archives records are produced leads to a deeper exploration of the very contents of the archive, and determines which material traces of the tribunal's existence and the genocide have been

[91] Adami, 'Judicial Record Management/Archiving; Tom Adami and Martha Hunt, 'Genocidal Archives: The African Context', *Journal of the Society of Archivists* 26: 1 (2005): 177; and Tom Adami, "Who Will Be Left to Tell the Tale?' Recordkeeping and International Criminal Jurisprudence', *Archival Science* 7 (2007): 213-21; Eric Ketlaar, 'Truths, Memories and Histories in the Archives of the International Criminal Tribunal for the Former Yugoslavia', *Genocide Convention: The Legacy of 60 Years*, eds. Hugo Van der Wilt *et al* (Leiden: Brill, 2012), 220-1.
[92] Kirsten Campbell, 'The Laws of Memory: The ICTY, Archive, and Transitional Justice,' *Social and Legal Studies* 22:2 (2013): 251-3..
[93] Stoler, *Along the Archival Grain*, 1.
[94] Jef Huysmans and Joala Pontes Nogueira, 'Ten Years of IPS: Fracturing IR', *International Political Sociology* 10:4 (2016): 303-4.
[95] *Ibid*..

deemed worthy of protection and preservation for future use, and what this tells us about the politics of the archive.

When taken together, moreover, these developments offer a theoretical advance in the analysis of international courts by bringing some of the ideas and concepts from critical legal scholarship and IR into the study of international courts. These perspectives, although growing in prominence, still remain marginalised in the study of international criminal law.[96] This is, then, about moving beyond analysis the black letter of the law, and instead understanding how law is brought to life and with what consequence.[97] In doing so the book demonstrates that international courts should be seen as performative sites where law, knowledge and imaginings of community are produced in highly contested and dynamic ways.

Analysing the ICTR Archive

Whilst the book considers the ICTR's archive as a whole, the source base of this research focused in more narrowly on three trials. This was to get an in-depth understanding of the processes and conditions through which records were produced for the archive. This, for instance, allowed for a close analysis of the way that the records of witnesses' testimony were constructed – which remain, arguably, the most important record within the archive. The three trials selected were spread over the lifespan of the tribunal: Jean–Paul Akayesu (1998); Emanuel Bagambiki, Samuel Imanishimwe and André Ntagerura, otherwise known as *Cyangugu* (2004); and Jean–Baptiste Gatete (2011).[98] Throughout the book, the analysis is more concerned with the rules that allow particular statements to be made within the archive, rather than a detailed account of each trial. As such, an overview of these trials can be found at the end of Chapter 2.

These trials were chosen for several reasons. From a methodological perspective, these were selected because they dealt with: prosecutions spread over the tribunal's history; relatively similar subject matter (making it possible to identify the (dis)similarities with which these subjects were treated); and instances of prosecutorial success (*Akayesu* and *Gatete*) and failure (*Cyangugu*). Whilst not representative of all ICTR trials, these offer a way to systematically analyse how records were constructed for the archive, and how differing contexts (e.g. the temporality of the trial) effected this process.

The analysis drew on three main types of sources. The first, and main, set was each trials' case files, which contain: pre–trial statements (only rarely available), indictments, trial transcripts (of both the trial and appeals hearings), trial exhibits, correspondence, motions, decisions, and judgements (of both the trial and appeals hearings). These amounted to a

[96] Eltringham, *Genocide Never Sleeps*; Meierhenrich, 'The Practice of International Law'; Clarke, *Affective Justice*
[97] Eltringham, *Genocide Never Sleeps*, 6-8.
[98] These dates represent the year of the trial judgements.

considerable volume of source material; *Cyangugu* alone contains in the region of 100,000 pages of records. Each of these case files was examined to determine the rules and regularities with which the different actors in the courtroom constructed accounts of violence. In addition to this, I drew on documents from other ICTR trials (particularly judgements) to supplement my analysis where required.

Here, I acknowledge Eltringham's observation about how much is lost from the courtroom process by only looking at trial transcripts, which do not capture the embodied and deeply social nature of the trial process. This is, certainly, a limitation of this study. However, in many respects, the book is, like Eltringham, concerned with moving beyond a 'black letter' approach to the study of the law, and to understand the conditions and rules, often un-spoken, which animate law and bring it to life in particular ways and with particular effects. Whilst perhaps the affective register is lost for the most part in these transcripts, it is nonetheless possible to meticulously trace and build up an image of the rules that underpin which records can be made for the archive, and which cannot. Indeed, because my source base is largely written documentation I have been able to analyse a much larger volume of data than would have been possible with a purely ethnographic approach. However, to compensate for some of this loss, I have both observed ICTR trials in person and conducted a series of interviews with tribunal personnel, discussed below. [99]

Second, to see how the political landscape that surrounded the court affected the archive, I also drew on administrative documents held largely in the UN's online archive,[100] including: external reports (such as by the UN's Fifth Committee), internal reports (particularly ICTR biannual reports to the UNSC and UN General Assembly [UNGA]), strategy documents (such as those by the Office for Internal Oversight Services), and UNGA and UNSC discussions of the ICTR. I attempted to place these UN discussions within broader context of UN activity throughout this period, and so additionally analysed policy briefings and reports that were produced by the UNSC and Secretary General (UNSG) on similar topics (such as peacebuilding and transitional justice).

Finally, as mentioned, I conducted 22 semi–structured interviews with actors from each of the tribunal's organs (prosecution, chambers and registry) and the defence to elucidate how the trials' participants approached the trials at the tribunal and how changes both inside and outside the tribunal affected this. These included a number of senior officials, including two former Presidents of the tribunal, and a Prosecutor; Registrar; head of Appeals; and head of the archives section. This allowed for a potential dissonance to come to the fore as individual actors had the chance to express their motivations and experiences of the tribunal

[99] Eltringham, *Genocide Never Sleep*s, 4 and 8.
[100] UN, 'Documents: Online Archive', found: http://www.un.org/en/documents/index.html, last accessed: 30 August, 2019.

in a manner that might challenge how I understood these processes to have unfolded.[101] These interviews were supplemented by other publicly accessible interviews with tribunal employers, such as the 'Voice from the Rwanda Tribunal' project.[102]

In conducting the analysis, I made used of the qualitative analysis software, NVIVO.[103] This offers a number of tools to identify and record various patterns found in these sources. In particular, it allows the user to create 'nodes' which facilitate the manual 'coding' of files against different themes. At the outset, then, I identified a number of themes linked with Foucault's four catagories of statements – objects, enunciative modalities, concepts and strategies – which became the nodes which then structured my reading of the files. For example, whilst the following is indicative, rather than exhaustive, for objects, I created nodes for 'victims', 'perpetrators' etc; for enunciative modalities, for 'prosecution', 'witnesses' etc.; for concepts, 'genocide', 'crimes against humanity' etc; and for strategies, the initial node was, more broadly, 'strategic function', used to record when and where the function of the court was discussed. Whilst the initial nodes were those more or less obviously associated with the practice of international criminal justice, as analysis continued, more nodes and sub-nodes were added to offer a finer grained analysis For instance, under the perpetrator node I created sub-nodes about the different narrative tropes that were created about the defendants. Once such example, discussed in Chapter Three, was the defendants 'did what they could'. Having 'coded' the documents according to these nodes, it was then possible to return to the file extracts associated with the nodes to further analyse the patterns of how these different objects, enunciative modalities, concepts and strategies, emerged and changed over time. Piecing together the results from this in–depth qualitative research produced the analysis that follows.

Chapter Two, 'The ICTR and It's Archive', sets out the archive's strategies at the tribunal's outset, by tracing the UN's involvement in Rwanda from the build-up to the genocide to the creation of the tribunal and the archive. In particular, it looks at why, having been willing to stand by during the genocide, an international court came to be seen as a potential solution to the violence in Rwanda within the UN, and what this reveals about the politics and purpose of the archive. This argues that the introduction of the legal terminology of 'genocide' during the violence marked a key turning point in the UN's intervention, as the violence then became something that targeted the international community as a whole. The chapter also offers a brief overview of the ICTR and the archive, and here shows that, at the start of the tribunal, a very broad set of strategies underpinned the archive orientated around the principles of truth, justice and reconciliation. This emphasised the tribunal's role in determining individual responsibility, establishing the truth, providing a space for victims

[101] Nigel Eltringham, '"When We Walk out, What Was It All About?': Views on New Beginnings from within the International Criminal Tribunal for Rwanda,' *Development and Change* 45:3 (2014): 545.
[102] Batya Friedman *et al*, 'Voices from the Rwandan Tribunal', found: http://tribunalvoices.org/voices/ (last accessed 22/08/2020).
[103] See http://www.qsrinternational.com/nvivo/what-is-nvivo (last accessed 20/12/2017).

to testify and reconcile with their pasts, and contribute to the development of international criminal law. This broad function had significant consequences for how knowledge was produced for the archive, and the rules that were to underpin it at the outset.

Chapter Three, 'The Force of Law', focuses on the archive's concepts and objects. This first examines how the tribunal's legal rules shaped the archive, setting out how the court's statute and ever-evolving jurisprudence created the framework through which the archive's records were produced. Beginning to get to the political nature of this imagining, the chapter also demonstrates how certain interpretations of the law ended up preventing records from being produced – such as about the international nature of the genocide from entering the archive – and cemented the use of trials as a key governance tool within the international community. The second part zeros in on arguably the two most important objects for the archive: victims and perpetrators. Exploring how these were constituted in particular ways points to how this produced distinctive visions of community, and also how this resulted in a number of conflicts between the archives strategies.

Chapters Four and Five explores how various subject positions (or what Foucault describes as enunciative modalities) influenced how knowledge was produced within the archive, from which perspective records were constructed, and, ultimately, what was to be archived. In Chapter Four, 'Contesting the Archive', I focus on the witnesses, who played a far more significant role in constructing the archive than scholars normally credit. Whilst this shows how legal actors constrained what witnesses could record within the archive, it also demonstrates how witnesses were able to contest these parameters both in terms of which crimes would be recorded, but also how the law was to account for violence. This contestation also destabilised many of the objects and subjects that the legal discourse tried to produce, such as what constituted a victim or perpetrator.

Chapter Five, 'Reconstituting Justice', looks at how other actors involved in the production of knowledge at the ICTR tried to influence the way in which the archive was constructed. It begins by returning to the themes set out at the end of Chapter Two, and explores how the legal actors of the court, in the tribunal's formative years, pursued an expansive approach to the trials in search of truth, justice and reconciliation. This shows how this influenced what was recorded within the archive, and that initially the archive was underpinned by a broader understanding of justice, which can be seen as a weak form of restorative justice. However, this approach to prosecutions changed over time as the tribunal began to focus simply on getting as many verdicts as possible, as quickly as possible. As such, the conception of justice underpinning the archive became far more restricted and more closely resembled a more traditional form of retributive justice. This, then, shows the fragmenting of the tribunal's initial purpose. This chapter identifies three main factors behind this shift: the solidification of the legal rules that underpinned the trials; the relationship between the tribunal and other UN organs – and particularly the Security Council's decision

in early 2000s that the tribunal had to close down as quickly as possible; and the ICTR's acquiescence to the RPF's demands that the tribunal halt investigations into RPF crimes during the genocide.

Chapter Six, 'Imagining a Community', brings together, and buildings on, the findings made throughout the book about the nature of the international community imagined within the archive. This shows that whilst the tribunal functioned as a site of liberal international governance, that underneath this liberal vision sat a distinctly illiberal understanding of community. In particular this shows that the archive divided the international community into the international, as a site of peace and order, and the local, as a site of barbarity; protected a space wherein violence was a legitimate aspect of international relations; and projected a patriarchal and colonial vision of community as the voice of the subaltern was denied.

Chapter Seven, 'The MICT and the Archive', turns to the Residual Mechanism for the International Criminal Tribunals (MICT), the institution that took over the remaining functions of the ICTR after it closed down. This looks at the extent to which the logics that underpinned the ICTR's archive were replicated at the MICT, specifically through a reading of the materiality of the archive, which sits at the heart of the new MICT complex in Arusha. In doing so, this demonstrates that whilst the rhetoric that surrounded the MICT revived the broad idea of justice that underpinned the ICTR at is inception, the reality was that an even narrower vision of justice came to underpin the archive. This also draws on Pierre Nora's understanding of *Lieux de Memoire* to examine the dynamic between remembering and forgetting that is at the heart of the archive.[104]

The conclusion, 'The ICTR's Archive', brings these findings together and considers what this tells us about the role of the archive in international criminal justice and international politics. This reveals a complex picture whereby the principles and strategies that underpinned knowledge production at the tribunal shifted considerably as the tribunal progressed, from a form of restorative justice to a more strictly retributive model. This also meant a shift from more far-reaching records of violence produced under the witnesses' influence to a more legalistic record of violence. Over time, the archive, then, less closely reflected the needs and priorities of those affected by the genocide and arguably also produced a more conservative, and concerning, vision of the international community. The chapter also examines the extent to which these dynamics are an inevitable part of the international criminal justice project, in part by examining ICC trial practice. This argues that whilst there is little to suggest international criminal justice must necessarily act with such a reductionist view of its mandate that, regrettably, the rules underpinning the ICTR/MICT archive continue to frame how justice is imagined and practiced at the ICC.

[104] Pierre Nora, 'Between Memory and History: *Les Lieux de Mémoire*,' *Representations* 2 (1989): 7-24.