"BUT YOU MUST NOT PRONOUNCE THE NAMES": TESTIFYING IN SECRET AT A WAR CRIMES TRIAL

TIMOTHY WILLIAM WATERS*

ABSTRACT

What is the experience of testifying in secret in a war crimes trial? This Article closely examines a single day of testimony to observe the ways in which secrecy is enacted and negotiated, and what its effects are on the perceptions and behavior of actors in the courtroom.

Like domestic courts, international courts base their legitimacy on commitments to a fair process, which they balance with the need to protect individuals and information. But international courts often have an additional goal—to render authoritative judgments that promote reconciliation—which makes the balance between publicity and secrecy especially fraught.

The tensions between publicity and secrecy are particularly acute during court sessions. Public testimony is at the heart of intuitions about public justice, an expectation that is radically challenged when a witness' identity and words are hidden. This happens a lot: secrecy permeates the work of war crimes courts—and makes their work possible. Secrecy shapes the quotidian process of trial: layers of abstraction and uncertainty accrete and interruptions are frequent as lawyers debate which questions to ask in private. Whole exchanges get redacted, producing indecipherable records. The experience can be bewildering and alienating. The result challenges the idea that international courts produce transparent narratives likely to contribute to reconciliation. Yet, without these protections, there would be no narratives at all. These tensions are irreducible: secrecy forms the fabric of trial, shaping how it is experienced and received.

The architecture of secrecy—the many processes by which witnesses and documents arrive at the moment of trial—is largely invisible, and the effects of secrecy on international courts' contribution to reconciliation are hard to measure. But we can see traces of that architecture, and indications of its effect on the narratives that reconciliation depends upon, in the record trial creates. This Article shows how the procedures of secrecy play out, what incentives they create, and how individuals react, on a typical day, in a typical trial. It is the

* Richard S. Melvin Professor, Indiana University Maurer School of Law. tiwaters@indiana.edu. https://orcid.org/0000-0003-0205-6457. Thanks to participants at the Translucent Justice conference, Max Planck Institute for Procedural Law (Luxembourg), and Christiana Ochoa, Jayanth Krishnan, and Luis Fuentes-Rohwer for comments and critiques, and Gianluca Pantaleo for research assistance.

21st of February, 2011; Germain Katanga is on trial in The Hague; and an unnamed witness is about to enter the courtroom.

I. INTRODUCTION

> "Secrecy has this disadvantage: we lose the sense of proportion; we cannot tell whether our secret is important or not."[1]

What is the experience of testifying in secret in a war crimes trial? Like domestic courts, international criminal courts base their legitimacy on a commitment to a fair process, through which they aim to produce authoritative judgments. Publicity—the public, transparent rendering of justice[2]—is important for ensuring international justice is

1. EDWARD M. FORSTER, A ROOM WITH A VIEW 98 (Dover Publications 1995) (1908).

2. *See, e.g.*, *Procedural Justice*, YALE L. SCH. JUST. COLLABORATORY https://law.yale.edu/justice-collaboratory/procedural-justice (July 1, 2024) (identifying the four components of procedural justice as voice, respect, neutrality, and trustworthiness).

fair and perceived as fair.[3] Commitments to publicity are structured into the statutes and operations of all the international tribunals.[4]

Unlike domestic courts, however, international courts often have an additional purpose: to use their fair process and authoritative judgments to promote reconciliation in war-torn, divided societies.[5] International courts aim to produce narratives that transform societies.

Yet one of the critical devices international courts deploy, precisely to ensure that trials can be effective, is secrecy. Domestic courts use secrecy as well, and increasingly so,[6] but there is good reason to believe international courts use it more, and more comprehensively.[7] Secrecy—in the form of classified documents, closed and *ex parte* sessions,

3. *See, e.g.*, Tom R. Tyler & Jonathan Jackson, *Popular Legitimacy and the Exercise of Legal Authority: Motivating Compliance, Cooperation and Engagement*, 20 PSYCH., PUB. POL'Y, & L. 78, 82 (2014). *But see* IDA KOIVISTO, THE TRANSPARENCY PARADOX 201 (2022) (critically examining the dominance of transparency norms in law and transparency's relationship to legitimacy and arguing that "self-evidently good concepts such as transparency tend to be turned into tools of power and control"); *see also* REPS. COMM. FOR FREEDOM OF THE PRESS, SECRET JUSTICE: GRAND JURIES 2 (Fall 2004) (referring to some courts' attempts to limit the flow of information and noting that, "[s]uch steps, purportedly taken to ensure fairness, may actually harm the integrity of a trial because court secrecy and limits on information are contrary to the fundamental constitutional guarantee of a public trial").

4. *See, e.g.*, INT'L CRIM. CT (ICC), REPORTING ON THE ICC: A PRACTICAL GUIDE FOR MEDIA 12 (2015) (noting that "[t]ransparency and accountability are cornerstones of the ICC"). Prosecutor v. Katanga, ICC-01/04-01/07-T-231-Red2-ENG, Transcript of Trial Hearing, 8 ll. 17-25 (Feb. 21, 2011) [hereinafter *Katanga Transcript*] (discussing the importance of holding testimony in open court); RULES OF PROC. & EVIDENCE BEFORE THE KOSOVO SPECIALIST CHAMBERS r. 120(1) (Kos. Specialist Chambers Apr. 30, 2020), https://www.scp-ks.org/sites/default/files/public/content/documents/ksc-bd-03-rev3-rulesofprocedureandevidence.pdf [hereinafter KSC Rules] ("All proceedings before a Panel, other than deliberations, shall be held in public, unless otherwise decided by the Panel after hearing the Parties"); *id.* at r. 120(2) (requiring that reasons for holding closed or private sessions be given in public); *id.* at r. 120(3) (listing the reasons a session can be closed to the public); RULES OF PROCEDURE AND EVIDENCE, r. 78 (Int'l Crim. Trib. for Former Yugoslavia July 8, 2015), https://www.icty.org/x/file/Legal%20Library/Rules_procedure_evidence/IT032Rev50_en.pdf ("All proceedings before a Trial Chamber, other than deliberations of the Chamber, shall be held in public, unless otherwise provided"); *id.* at r. 98 *ter(a)* (providing for public judgment). Other tribunals, including the ICC, have very similar provisions – and all of them, of course, also have extensive rules on disclosure and confidentiality that limit publicity.

5. See discussion *infra* Section II.A, especially *infra* note 22.

6. David Lusty, *Anonymous Accusers: An Historical & Comparative Analysis of Secret Witnesses in Criminal Trials*, 24 SYDNEY L. REV. 361, 362 (2002) ("in light of growing concerns over witness intimidation and national security, courts and legislatures throughout the world have recently been called on to curtail the right of confrontation by withholding the true identities of prosecution witnesses from the accused, permitting them to testify anonymously and prohibiting cross-examination that could reveal their true identities" and calling this "highly controversial").

7. *See, e.g.*, Sabine Swoboda, *Confidentiality for the Protection of National Security Interests*, 81 REVUE INTERNATIONALE DE DROIT PÉNAL [R.I.D.P.] 209, 209-10 (2010) (Fr.); Interview with lawyer at the

protected witnesses, and redacted testimony[8]—permeates the work of war crimes courts, deployed both strategically and in automatic, bureaucratic ways.

Secrecy makes the work of these courts possible because without it, states would not cooperate, witnesses would not testify, and the courts would be isolated and uninformed. Although secrecy is essential to these courts' efficient operation, it is also in tension with norms of publicity and can undercut these institutions' broader policy goals because secret, intransparent narratives are seen as less trustworthy and less authoritative.[9]

Most secrecy produced at these tribunals is in their documentary record, much like in most domestic trials, an iceberg of documents beneath the testimony and arguments that surface in open court. The tensions between publicity and secrecy are present in documents, too, but nowhere are they more apparent than during court sessions, and especially testimony.

The power of direct testimony, with its confrontation between accused and accuser, is at the heart of theories and intuitions about public justice.[10] Those expectations are radically challenged when a witness' or accuser's identity and words are hidden from the public, or even from parties to the case. Yet such protections are essential for witnesses—who, just like our witness whom we will soon meet, have often experienced shocking trauma and might face violent repercussions—to feel safe enough to risk testifying.

These tensions are evident in the day-to-day experience of trial, in which the imperatives of secrecy shape the process: layers of abstraction and uncertainty accrete, one atop another. Interruptions are frequent: hearings are delayed by the transitions between open and closed sessions while lawyers debate which questions to ask in public or in private. Individual words and whole pages get redacted, and notes are appended to transcripts to make sure information that has slipped into the open record gets removed later, producing often indecipherable

ICC (anonymous, author file AB-3) ICC, in The Hague (June 2023); Zoom Interview with former ICL court official (anonymous, author file RK-6) (Feb. 2024).

8. Secrecy and its corollary, publicity, are discussed in Part II.A, *infra*.

9. *See, e.g.*, CONFERENCE OF STATE COURT ADMINISTRATORS, COURTING PUBLIC TRUST AND CONFIDENCE: EFFECTIVE COMMUNICATION IN THE DIGITAL AGE 14 (2023), https://cosca.ncsc.org/__data/assets/pdf_file/0020/86015/COSCA-Policy-Paper-Courting-Public-Trust.pdf.

10. Lusty, *supra* note 6, at 361 ("A central and defining feature of the adversarial system of criminal trial is the right of an accused to confront his or her accusers."); *id.* at 362 (citing JOHN H. WIGMORE, A TREATISE ON THE ANGLO-AMERICAN SYSTEM OF EVIDENCE IN TRIALS AT COMMON LAW §1367 (3rd ed., 1940) (describing the procedure as "the greatest legal engine ever invented for the discovery of truth")).

texts. Whether watched live, viewed in a subsequent broadcast, or read in a transcript, the experience can be bewildering and alienating—it is confusing and frustrating even to the participants.

The result seriously challenges the idea that courts are transparent, or that the narratives they produce can be scrutinized by the broader public. Yet, without these protections, there would be no narrative at all. These tensions are irreducible, and the effects they have on the daily operations of these courts compose the true fabric of trial practice.

As a matter of method, this Article draws on a close reading of court documents to see what the physical record tells us about how processes of secrecy are used and experienced. This Article first describes the theoretical and practical framework in which secrecy operates in a war crimes trial. It then applies that framework to a particular instance of testimony—the transcript for a single witness—to show how it shapes the procedures governing confidentiality and the incentives they create play out, and how individuals act and react in the moment to the requirements and opportunities created by secrecy in a typical trial. The day is the 21st of February, 2011; the place is the International Criminal Court (ICC) in The Hague; Germain Katanga is on trial; and an unnamed witness is about to enter the courtroom.

II. The Theoretical and Practical Framework of Secrecy in War Crimes Trials

A. *Secrecy and Publicity*

But before she does, we must clarify some terms and concepts. "Secrecy" refers to all processes that allow any actor (working in or with a court) to withhold information from others or otherwise limit the public dissemination of information arising from a trial or the workings of the court.[11] We can contrast secrecy with publicity, which, as we have

11. *Cf.* Gary T. Marx, *Censorship and Secrecy, Social and Legal Perspectives*, *in* International Encyclopedia of the Social and Behavorial Sciences 1581, 1581 (Neil J. Smelser & Paul B. Baltes eds., 2001) (discussing secrecy in the context of censorship: "Secrecy involves norms about the control of information, whether limiting access to it, destroying it, or prohibiting or shaping its' [*sic*] creation. Secrecy is a general and fundamental social process known to all societies. . . . Secrecy norms are embedded in role relationships and involve obligations and rights to withhold information, whether reciprocal or singular."). Courts do not necessarily use the word "secrecy" to describe their own process, instead referring to "confidentiality" or "protection measures" or "redaction"; I consider all of these forms of secrecy under this definition. This Article is focused on processes that restrict publicity in courtroom hearings, but those processes also relate to documents and internal deliberations.

seen, is an important organizing principle for international criminal law (ICL) courts and is closely linked to their goals of transformation and reconciliation through narrative.[12]

Because of the formal, rhetorical importance of publicity to the work of these courts, it is helpful to think about secrecy in terms of any process that restricts the public dissemination of information. Some secret processes operate entirely internally, among court personnel, in ways that may not appear to implicate norms of publicity, but even these limit what information reaches the broader public.[13] Secrecy is often the result of institutional design, and exhibits a kind of automatic, technical quality—such as the redaction forms used to manage documents—but it can also be highly discretionary. Either way, secrecy is a strategic choice. In fact, we might call secrecy strategic or designed intransparency.[14]

Secrecy is not a rationale in and of itself; it is a technique in service of some other rationale. All secrecy techniques support one or more of three principal rationales: 1) to protect individuals participating in or affected by trials; 2) to protect states and other outside actors; or 3) to protect the trial process and the court as an institution. Information is protected because some individual's or institution's interests might be jeopardized by its release. Secrecy rules aim to mitigate these risks.

Thus, secrecy is not simply an outcome, but a process, enacted over time by individuals performing roles. These processes are often bureaucratized and routinized. Rationales for maintaining the secrecy of information entering the trial system are often incorporated directly into the statutes and rules of these courts, including national security exceptions, witness protection procedures, and classification standards.[15]

---

12. See discussion in text at *infra* note 22.

13. Internal work product is often treated as presumptively excludable from public release or even disclosure to opposing parties, but it must be processed according to court norms about publicity and secrecy. At the Kosovo Specialist Chambers, for example, a Framework Decision on Disclosure of Evidence and Related Matters identifies categories of material presumptively not subject to disclosure, one of which includes internal work product, and the standard redaction forms include a box to check for internal work product. *See* Prosecutor v. Mustafa, Case No. KSC-BC-2020-05, Framework Decision on the Disclosure of Evidence and Related Matters, Kosovo Special Chambers, ¶ 86(c) (Oct. 9, 2020), https://repository.scp-ks.org/details.php?doc_id=091ec6e980362c50&doc_type=stl_filing&lang=eng [hereinafter *Mustafa Framework Decision*]. This is typical of other courts—indeed, the KSC's practice draws upon that of the ICTY and ICC.

14. On confidentiality, see generally André Klip, *Confidentiality Restrictions*, 10 J. INT'L CRIMINAL JUST. 645 (2012).

15. *See, e.g.*, Rome Statute of the International Criminal Court art. 72, 17 July 1998, 2187 U.N.T.S. 90 [hereinafter Rome Statute] (describing an elaborate, multi-stage process for determining if and under what conditions information a state deems sensitive to its national security shall be disclosed at trial); Strafprozessordnung [StPO] [Code of Criminal Procedure], Apr. 7, 1987,

Courts and individual chambers issue practice directives or guidelines, particular to each court but often quite similar.[16] There is considerable discretion, ultimately vested in the judge, but often exercised in preliminary but decisive ways by the parties and registry officials, as well as by outside actors, such as states, international organizations, and of course witnesses.[17]

The result is trials that appear to use secrecy on a much larger scale than domestic courts. Techniques of secrecy—redaction of testimony, protection of witnesses, hearings *in camera*,[18] restricted access to

---

BUNDESGESETZBLATT, TEIL I [BGBL I] at 1074, as amended, § 68 (Ger.); U.S. DEP'T OF JUST., CRIMINAL RESOURCE MANUAL §2054 (2019), https://www.justice.gov/archives/jm/criminal-resource-manual-2054-synopsis-classified-information-procedures-act-cipa.

16. For example, in the *Mustafa Framework Decision*, the KSC refers approximately 22 times to seven different ICC cases, frequently describing those provisions as similar; it also refers once each to cases from the Special Tribunal for Lebanon and the International Criminal Tribunal for Rwanda. *See Mustafa Framework Decision*, *supra* note 13. The *Thaçi chamber* adopted a nearly identical framework. *See also* Pros. v. Thaçi et al., Case No. KSC-BC-2020-06, Framework Decision on Disclosure of Evidence and Related Matters, Kosovo Special Chambers, (Nov. 23 2020), https://repository.scp-ks.org/details.php?doc_id=091ec6e980396b9d&doc_type=stl_filing&lang=eng.

17. Judges generally make final decisions, but parties often have a role in deciding what classification to give material. For example, chambers typically determine the general framework for disclosure – a decision with implications for both publicity and secrecy *intra partes* – but then the prosecution makes its own decisions about which documents to disclose pursuant to that framework, and the defense can challenge those decisions. *See, e.g.*, Rome Statute, *supra* note 15, at art. 67(2) ("the Prosecutor shall, as soon as practicable, disclose to the defence evidence in the Prosecutor's possession or control which he or she believes shows or tends to show the innocence of the accused, or to mitigate the guilt of the accused, or which may affect the credibility of prosecution evidence. In case of doubt as to the application of this paragraph, the Court shall decide"). *See also Mustafa Framework Decision*, *supra* note 13, at ¶¶ 32-33 (noting, that "[d]isclosure of evidence. . .is a process that takes place between the SPO [Special Prosecutor's Office] and the Defence" and providing that the parties "shall determine the appropriate level of classification of each item. . .in accordance with. . .the Rules."); *id.* at ¶¶ 58-61 (discussing special rules for protected materials, noting that "[i]n light of the SPO's submissions [regarding these materials, the Pre-Trial Judge does not need to make any further determination"); *id.* ¶¶ 85-87 (discussing "standard redactions" which may made "by the disclosing party without prior judicial authorisation"). Prosecutors exercise broad discretion that can extend to complex questions of strategy with broad implications beyond the courtroom, over which the judges have little control. *See* Timothy W. Waters, *Unexploded Bomb: Voice, Silence and Consequence at the Hague Tribunals – A Legal and Rhetorical Critique*, 35 N.Y.U. J. INT'L L. & POL. 1015, 1020 (2003) (discussing the ICTY Prosecution's discretion both in deciding not to investigate NATO and in publishing its decision and reasoning, which usually remain non-public).

18. Closed sessions in criminal trials are rare in the common law context, but traditionally in the civil law much more of the process can be held in closed sessions. Lusty, *supra* note 6, at 415 ("Witness anonymity is inherently more compatible with inquisitorial than adversarial proceedings"); *id.* at 382 (noting that "[c]ourts throughout the United States have been extremely reluctant to conceal any identifying information of crucial prosecution witnesses"); *id.*

documents, and closed archives—are frequent devices in international criminal trials. As in domestic courts, secrecy is more extensive in investigative and pre-trial phases, and more restricted at trial.[19] Final judgments are almost always fully public—though this is changing[20]—but even public judgments contain references to evidence, testimony, and other documents that are secret. Beneath even highly public judgments are layers of secrecy. And sometimes the act of hiding is itself hidden.

Often for good cause: There are compelling reasons for high levels of secrecy in war crimes trials because without secrecy, many individuals might refuse to testify (or be killed if they did) and states might not cooperate (for fear that their own personnel and state secrets would be jeopardized).[21] Secrecy is a necessary precondition of an effective trial.

But secrecy is in tension with publicity, and this may be particularly problematic for international courts because they often aspire to facilitate reconciliation through their judgments, in ways that are more explicit and ambitious than domestic courts.

---

at 382-411 (surveying practice in several common law jurisdictions). ICL, with its mixed procedural model, uses closed sessions frequently. In addition, the relatively limited resources available to international courts for witness relocation has encouraged greater reliance on anonymizing tactics in the courtroom. Zoom Interview with former ICL court official (anonymous, author file RK-6) (Feb. 2024).

19. Interview with legal officer (anonymous, author file GX-4), ICC, in The Hague (June 2023). *See also* Kimberly A. Leaman & Andrew T. Winkler, *In the Name of Secrecy: Revisiting Grand Jury Secrecy as Applied to Witnesses*, 58 AM. CRIM. L. REV. 49, 50, 59-62 (2021) (referring to the "general cloak of secrecy long considered integral to grand jury proceedings[,]" discussing the English origins and rationale of grand juries "free of procedural constraints or evidentiary rules[,]" and contrasting grand jury processes with "protections afforded to witnesses by modern civil discovery rules[,]" but also noting modern restrictions on grand jury secrecy in the Federal Rules of Criminal Procedure).

20. This shift is occurring in *international* courts; in some domestic war crimes trials, such as in Serbia, final judgments have always contained redactions.

21. *See, e.g.*, *Kenya: ICC Defendant Found Dead*, HUM. RTS. WATCH (Nov. 2, 2022), https://www.hrw.org/news/2022/11/02/kenya-icc-defendant-found-dead (discussing the complex events surrounding the death of a defendant in a contempt trial, itself involving accusations of witness tampering and the death of a defense witness). It is difficult to specify the real risk witnesses might face for testifying, but these courts' procedures seem to assume that the risk is real and affects witnesses' willingness to testify. Pros. v. Thaçi et al., Case No. KSC-BC-2020-06, Transcript, Kosovo Special Chambers, 5213 ll. 10-15 (June 20, 2023), https://repository.scp-ks.org/LW/Published/Transcript/KSC-BC-2020-06/Trial%20Hearing%20-%2020%20June%202023%20-%20Public%20Redacted.pdf [hereinafter *Thaçi Trans.*] (discussing the "fear" related to presenting witnesses); Rome Statute, *supra* note 15, art. 68(5) (referring to protective pre-trial measures "[w]here the disclosure of evidence or information pursuant to this Statute may lead to the grave endangerment of the security of a witness or his or her family").

The theory[22] according to which trials can contribute to reconciliation depends on the public integrity of their process: it is not only judgment but public evidence of that judgment's authority and integrity that is supposed to contribute to reconciliation. So, although domestic courts also use secrecy, reliance on secrecy poses different, more intense challenges for international courts. International courts may be producing a publicly incomplete account of the crimes and the wars over which they sit in judgment, and as a result, their ability to act as agents of transformation is limited—by the very secrecy that makes trials possible. Secrecy creates a double bind: without it, there can be no trial, but with it, perhaps, the trial cannot do what it is supposed to.

B. *The Experience of Trial*

These tensions—which implicate broader effects and agendas beyond the courtroom—are not necessarily obvious in the day-to-day of trial. But that is the focus of this Article: what is the *quotidian experience* of secrecy in the trial process—how it is experienced by those in the courtroom, and those for whom the trial as a process is of interest? What effect does that daily process of producing and performing secrecy have on the meaning and utility of the trial? And what insights might we glean about the effects of secrecy on ICL's grander ambitions from secrecy's operation in the day-to-day?

There is extensive literature about the experience of actors in international criminal trials. But much of this work focuses on how witnesses experience testifying or what impact testifying appears to have on their own perception of the trial or sense of well-being—only some of which touches upon questions of secrecy.[23] Similarly, there is considerable literature about the degree to which testimony is probative, but it, too, is

22. Elsewhere I have referred to this as the "authoritative narrative theory" of ICL. I am critical of this theory, but it is a dominant assumption and justification in the field, and I develop my argument in this Article in light of that. *See* Timothy W. Waters, *A Kind of Judgment: Searching for Judicial Narratives after Death*, 42 GEO. WASH. INT'L L. REV. 279, 285-94 (2010).

23. *See, e.g.*, Kimi King & James Meernik, *The Burden of Bearing Witness: The Impact of Testifying at War Crimes Tribunals*, 63 J. CONFLICT RES. 348 (2019) (examining the experience of testifying for witnesses at the ICTY); KIMI KING ET AL., ECHOES OF TESTIMONY: A PILOT STUDY INTO THE LONG-TERM IMPACT OF BEARING WITNESS BEFORE THE ICTY, 28, 63 (2016), https://www.icty.org/x/file/About/Registry/Witnesses/Echoes-Full-Report_EN.pdf; STEPHEN CODY ET AL, BEARING WITNESS AT THE INTERNATIONAL CRIMINAL COURT: AN INTERVIEW SURVEY OF 109 WITNESSES (2014) (including interviews with witnesses from *Katanga,* but only sporadic discussion of confidentiality provisions or their effects); ERIC STOVER, THE WITNESSES: WAR CRIMES AND THE PROMISE OF JUSTICE IN THE HAGUE (2005) (examining witnesses at the ICTY, and addressing the problems of protecting witnesses' identities).

not particularly focused on the effects of secrecy.[24] Courts themselves, unsurprisingly, focus their own analysis less on the experience of witnesses than on doctrinal considerations, especially on how to balance the protection of victims and witnesses against the interests of the accused in a fair trial.[25]

There is likewise much less work on the experiences of other actors in the international courtroom—the trained professionals leading, conducting, and facilitating proceedings.[26] Individuals' subjective reports are valuable but may not be fully reliable or complete. In interviews I have conducted with judges and other officials at several of the major war crimes tribunals, my interlocutors have generally maintained that the practical mechanics of closed sessions—broadcast delay,

---

24. *See, e.g.*, Gabrielėė Chlevickaitė et al., *Judicial Witness Assessments at the ICTY, ICTR and ICC: Is There 'Standard Practice' in International Criminal Justice?*, 18 J. INT'L CRIM. JUST. 185, 190 (2020) (aiming "to critically evaluate the state of the art of witness assessments at international criminal courts and tribunals" but not focusing on confidentiality procedures or protective measures); NANCY A. COMBS, FACT-FINDING WITHOUT FACTS: THE UNCERTAIN EVIDENTIARY FOUNDATIONS OF INTERNATIONAL CRIMINAL CONVICTIONS (2010).

25. *See, e.g.*, Pros. v. Tadić, Case No. IT-94-1-T, Decision on the Prosecutor's Motion Requesting Protective Measures for Victims and Witnesses, (Int'l Crim. Trib. for the Former Yugoslavia, Aug. 10, 1995), ¶¶ 31-42 and 53-75, https://www.icty.org/x/cases/tadic/tdec/en/100895pm.htm (outlining, in a seminal ruling, a series of protective measures for testimony – both limits on publicity and *ex parte* restrictions – in relation to the court's obligations to provide a fair trial to the accused).

26. Important examples include ELLEN ELIAS-BURSAĆ, TRANSLATING EVIDENCE AND INTERPRETING TESTIMONY AT A WAR CRIMES TRIBUNAL: WORKING IN A TUG-OF-WAR (2015); Mikkel Christensen, *The Professional Market of International Criminal Justice: Divisions of Labour and Patterns of Elite Production*, 19 J. INT'L CRIM. JUST. 783 (2021); NIGEL ELTRINGHAM, GENOCIDE NEVER SLEEPS: LIVING LAW AT THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA (2019); Kjersti Lohne, *Towards a Sociology of International Criminal Justice*, *in* POWER IN INTERNATIONAL CRIMINAL JUSTICE 47 (Morten Bergsmo et al., eds., 2020); Alex Batesmith, *International Prosecutors as Cause Lawyers*, 19 J. INT'L CRIM. JUST. 803 (2021).

There is a much larger literature on how domestic trials are produced, and by whom, much of it springing from Marc Galanter's seminal article discussing the positionality and incentives of actors in trial, including the distinction between repeat players and one-shot participants. *See e.g.* Marc Galanter, *Why the "Haves" Come out Ahead: Speculations on the Limits of Legal Change*, 9 L. & SOC'Y REV. 95 (1974); Shauhin A. Talesh, *Foreword* to MARC GALANTER, WHY THE HAVES COME OUT AHEAD: THE CLASSIC ESSAY AND NEW OBSERVATIONS, at iii (2014). This will be true in our case, in which the the witness will be entering a courtroom in which the other players have long experience and agendas that extend far beyond her own testimony; for the judges and prosecutors in particular, these agendas can extend to the general framework of rules and practices governing the whole court, not just this one case. *Cf.* Galanter at 100 (1974) (discussing the incentives repeat players have to "play for rules as well as immediate gains"). *See also* Cynthia Alkon, *Galanter's Analysis of the "Limits of Legal Change" as Applied to Criminal Cases and Reform*, *in* DISCUSSIONS IN DISPUTE RESOLUTION: THE FOUNDATIONAL ARTICLES 312 (Art Hinshaw ed., 2021) (discussing, at Part III, the role of prosecutors and defense attorneys as repeat players).

curtains, distortions of voice and image, pauses as the court moves between open and closed sessions—do not cause them much trouble or disrupt their work.[27] Even officials who are troubled by the *amount* of secrecy in these courts tend not to see the *daily process* of secrecy as problematic.[28]

And this is probably true. Many of those mechanics are less visible and intrusive to the participants than they are to outsiders. Broadcast delay of proceedings—usually for thirty minutes—does not delay their deliberations and only affects their work to the degree that courtroom participants have to pay attention to potential breaches of secrecy that can be resolved during the delay.[29] When a session is closed and the curtains are drawn, the participants can still see, and distortions do not usually affect what *they* see and hear. In fact, the only process that directly affects their work is the delays as hearings move between open and closed sessions, which requires a pause in the proceedings. Indeed, when courts meet in fully closed sessions, the work of officials is almost certainly *less* disrupted.

But this subjective sense must be qualified. Although participants' self-reported *perception* is that the disruption is minimal, we have external evidence that the disruption is considerable: the records of the proceedings themselves, to which we will turn in Part III. A close reading of the physical record shows that operating the procedures of secrecy takes up a lot of time and mental energy.

---

27. This includes current or former court officials at the International Criminal Court (ICC), International Criminal Tribunal for the Former Yugoslavia (ICTY), International Criminal Tribunal for Rwanda (ICTR), International Residual Mechanism for Criminal Tribunals (IRMCT, the successor to the two ICTs), Kosovo Specialist Chambers (KSC), Special Tribunal for Lebanon (STL), and the Extraordinary Chambers in the Courts of Cambodia (ECCC), as well as a small number of journalists and NGO workers involved with some of those courts.

28. *See Thaçi Trans*, *supra* note 21, at 5210 l. 51 (extensively discussing secrecy standards for witnesses, including, for example, at 5214 ll. 10-25, an exchange in which defense counsel complains about the extensive secrecy for witnesses, but acknowledges that he has just conducted his own examination in secret and that there were few issues which did not relate personally to the witness and thus raise protection issues). In this same discussion, defense attorneys certainly saw *some* measures as problematic to implement day to day. *See, e.g.*, *id.* at 5215 ll. 9-11, that the use of secret codes makes the process "difficult for the clients to follow, and certainly for those who have hear it in the public domain, they find it impossible to follow").

29. Court officials are able to deal with potential breaches on the fly, arranging for redaction orders through the exchange of emails, in ways that are not even visible to observers in the gallery, let alone to anyone looking at broadcasts or transcripts later. Interview with Jonas Nilsson, Registry Official (speaking in personal capacity, author file FG-9), KSC, in The Hague (June 27, 2023); Interview with legal officer (anonymous, author file GX-4), ICC, in The Hague (June 2023); Interview with Judge Joanna Korner, ICC, in The Hague (June 28, 2023).

Moreover, even a process that is not disruptive *to the participants* has significant effects on the flow of information *out of the court*—indeed, the very ways in which it is *not* disruptive can affect the court's ability to deliberate publicly and produce public judgments. Even officials who were quite attentive to the policies and practices designed to ensure the secrecy of trials seemed unaware of how secrecy appeared to outsiders or appeared not to understand just how intransparent their trials were. They were focused on maintaining secrecy but less attentive to what its effects might be on the public. Perhaps they simply cared less about those effects, but in fact, there is plenty of evidence—both in the trial to which we are about to turn, and more generally—that courtroom professionals actually do care about ensuring publicity as well as the protection and efficiency that secrecy affords.[30] I suspect instead that their inattention comes from an insider's incentives and point of view. Smooth, efficient processes of secrecy operate by extending the realm of secrecy and making it invisible and unobtrusive to those operating inside of it—blinding them, as it were, to how blind their process makes everyone else.

III. One Day in the *Katanga* Trial: Secrecy in Practice

Let us see how the processes governing secrecy and the incentives they create play out on a typical day during a typical trial (assuming there is any such thing).[31] Our chosen case is the trial of Germain Katanga at the ICC, and the testimony of a woman known to us only as V19-P-0002.

---

30. On professional self-identity in international courts—and especially the self-image of prosecutors as cause lawyers—see Batesmith, *supra* note 26.

31. I have chosen this particular day because of what it contains and does not contain. *Katanga* was a significant trial that reached completion and resulted in conviction. It involved atrocities—which sometimes mean more secrecy—but basically all international trials do. It did *not* include a particularly high level of concern with witness intimidation or other ancillary concerns that might have increased the levels of secrecy—it plausibly is, in other words, a typical trial.

I chose this particular witness because, as the first witness in this phase of the trial, her testimony is preceded by some discussion of mechanics, useful in getting a sense of what the parties understand they are doing. But the day does not contain an unusually large number of redactions—one can easily find much more heavily redacted texts. Finally, as I note below, this a victim-witness, not a witness for the prosecution or defense, and therefore arguably not particularly "important" to the trial.

And of course, I chose it in part because, although there is considerable use of secrecy, the day is in fact mostly public. For a truly secret day of testimony, with the entire proceeding conducted *inter partes*, I simply have no access at all. There are significant limits to this or any method without access to the secret parts of the transcript: Seeing those would allow a much fuller, less speculative analysis. But they are not available, unless and until later made public—and even then, of course,

Germain Katanga was a commander in Ituri in the Democratic Republic of the Congo.[32] In 2007, he was charged by the ICC with crimes against humanity and war crimes for a 2003 massacre in Bogoro, in eastern Congo.[33] Katanga was taken into custody in 2007, and the trial began in 2009, with closing statements in 2012.[34] Katanga was convicted in 2014 and sentenced to twelve years; both the defense and prosecution appealed but withdrew their appeals shortly thereafter.[35]

But now, in February 2011, much of that remains in the future; we are in the middle of the trial. On this day, the Court will hear from V19-P-0002, the first victim-witness—not a witness for the prosecution or the defense but a victim testifying on her own behalf, through the auspices of the victims' representative, who is a separate participant in the proceedings.[36]

This means, among other things, that this witness' testimony is probably not the most important part of the trial. For all the rhetorical deference to the centrality of victims in the modern international trial process, there is good reason to believe that they remain marginal to the decision-making process and the strategic considerations of the main parties and the Trial Chamber.[37] Indeed, the defense only bothers to cross-examine this witness because she expressly says that she had heard people say the two defendants, Katanga and Ngudjolo Choi, were the people responsible for the attack;[38] absent this one fact, the

---

we face the problem that only certain types of secret materials are ever made public, so we cannot know how typical they are. This—what is here, and the evidence of what is not—is what we have.

32. Katanga was charged and tried together with Mathieu Ngudjolo Chui, but the cases were severed in November 2012, and Ngudjolo was acquitted that December. *See Katanga Case*, ICC, https://www.icc-cpi.int/drc/katanga (last visited 23 Aug. 2024).

33. *Id.*

34. *Id.*

35. *Id.*

36. *See* Rome Statute, *supra* note 15, art. 68(3) (providing for the views and concerns of victims to be presented "by the legal representatives of the victims"); *see* ICC, REPRESENTING VICTIMS BEFORE THE INTERNATIONAL CRIMINAL COURT: A MANUAL FOR LEGAL REPRESENTATIVES 7 (5th rev. ed. 2019), https://www.icc-cpi.int/sites/default/files/2021.03.01-ENG-5th-Rev-Rev.pdf ("The Rome Statute expressly provides for the right of victims to participate in proceedings before the ICC. . . . Since the very first proceedings, the Court has developed a number of principles pertaining to victims' participation that may be reasonably deemed today to be part of its constant jurisprudence").

37. *See e.g.* ICC, *supra* note 36, at 7 ("The legal instruments of the Court, however, are not explicit in detailing the modalities of victims' participation"); Alessandra Cuppini, *A Restorative Response to Victims in Proceedings before the International Criminal Court: Reality or Chimaera?*, 21 INT'L CRIM. L. REV. 313, 318 (2021).

38. *Katanga Transcript*, *supra* note 4, at 57 ll. 23-25, 58 ll. 1-5.

defense attorney would not have bothered to question her. So, this phase is relatively low stakes.[39] Let's begin.

A. *Instructions—and Hopes*

Presiding Judge Bruno Cotte opens the day's session with some housekeeping: a suggestion that the parties give advance notice of filings. This is in everyone's interest, he says, as it will allow the parties to begin preparing their responses and keep the trial on schedule. He then qualifies his suggestion to take account of secrecy concerns:

> 18 . . . Also, it goes without saying that this suggestion does not
> 19 deal with *ex parte* filings, and it will be possible to provide
> 20 confidential filings in closed session very briefly, and it would be a
> 21 good idea to try to combine all these various matters so that we don't
> 22 have to go in and out of closed session constantly.[40]

Giving advance notice of filings is a common interest, Judge Cotte suggests, but of course, anyone familiar with a trial knows that this is not strictly true. Parties have divergent interests and sometimes time their filings to give opponents less time to prepare. And so the exemption of *ex parte* filings from this system of advance notice, though unavoidable (because many *ex parte* filings involve issues on which the opposing party should not be notified at all), simply creates a further incentive for parties to push material into *ex parte* filings if they plausibly can.

Still, even *ex parte* filings are supposed to be combined and presented in groups to avoid going into closed session too often.[41] This suggests just how disruptive closed sessions can be, both wasting the time of excluded parties, who have to mill about waiting, and creating abstraction and confusion in the record and transcript. But unsurprisingly, it turns out to be impractical to combine filings on disparate issues, and as we shall see, the judge's plea is largely ignored.

B. *Protective Measures and Transparency*

Immediately after making this request, Judge Cotte describes the protections victims receive, measures the Chamber had apparently

---

39. I am unsure whether focusing on such a moment reveals more, or less, than something "more important" might.

40. *Katanga Transcript, supra* note 4, at 3 ll. 18-22.

41. *See id.*

announced earlier in a confidential ruling after consulting the Victims and Witnesses Unit (VWU), which the repeat players in the room are presumably already generally familiar with.[42] He mentions several techniques—closed sessions, voice and image distortion, pseudonyms—and together, they represent a typical[43] balance between protection and publicity, and a concern with efficient flow of the trial process:

> 12 So the victim shall enter—the witness shall enter the
> 13 courtroom and shall leave the courtroom in closed session. Furthermore,
> 14 a pseudonym will be used. The witness's voice will be distorted, and the
> 15 image will also be distorted on the computer screens. We will go into
> 16 private session when questions are asked that may identify this witness.[44]

But Cotte is also concerned with the disruption and confusion generated by closed or private[45] sessions, including the effect—evident to anyone who has ever tried to follow one of these trials from the gallery or after the fact—on the clarity of the proceedings and the transcripts:

> 17 Now, all the same, the Chamber does wish to remind everyone that
> 18 we must endeavour to reduce the number of times that we go in and out of
> 19 closed session or private session, because we must ensure that the
> 20 hearing is held in public as much as possible, and we would suggest that
> 21 these identifying questions be combined so that we are not constantly
> 22 going in and out of closed session or private session, because, among
> 23 other things, it makes the transcript difficult to understand when we
> 24 read it afterwards, and it's also very difficult for the people watching
> 25 from the gallery.[46]

---

42. *Id.* at 8 ll. 10-11 (referring to a confidential ruling number 2663, dated 27 January 2011).

43. *See* Cody, *supra* note 23, at 5, 23 (noting that "the vast majority of witnesses who testified in the *Lubanga* and *Katanga* trials used some form of protective measure (pseudonyms and facial and/or voice distortion)").

44. *Katanga Transcript, supra* note 4, at 8 ll. 12-16.

45. In "closed" sessions all audio and visual contact with the court is cut; in "private" sessions audio is cut, but visual contact is not. *See, e.g.*, KSC Rules, *supra* note 4, at r. 120. One might compare "private session" to a sidebar, "closed session" to a proceeding in which the courtroom is cleared of all spectators or a hearing held in judges' chambers. It is not clear the parties use these terms rigorously; sometimes they refer to "closed session" when they appear to mean both kinds. *See Katanga Transcript, supra* note 4, at 3 ll. 18-22.

46. *Katanga Transcript, supra* note 4, at 8 ll. 17-25.

Finally, Cotte adverts to another technique for keeping information confidential while avoiding closed session, namely the use of code names for individuals mentioned during testimony:

> 1 Now, we also would suggest using figures for the—for certain
> 2 names, and I believe in the case of the Katanga team, they used this
> 3 technique by providing us with a key, so to speak, with the list of names
> 4 and numbers, and I believe we did receive something similar today, and
> 5 the only hitch I can see is that if the various parties have different
> 6 lists, we'll have to make sure that we use the same numbers as much as
> 7 possible.[47]

There is an ad hoc quality to this—the different lists, the fact that all of this is based on a confidential ruling the Chamber made *because* little of it had been worked out in advance. And, at the same time, there is a general atmosphere of shared mission, the need to coordinate among themselves for the bare purpose of making sure that they are talking about the same thing. That shared mission is both real—a consequence of process and values—and a strategic fiction.

C. *The Witness Enters—"Expunged"*

So let us follow the victim witness as she enters the Court and goes through the process—follow her, that is, as best we can, because V19-P-0002, as our witness is called, will enter the courtroom with the curtain drawn.

> 13 [Presiding Judge Cotte is speaking] Court Officer, we'll go into closed session so that the witness
> 14 can enter the room.
> 15 (Closed session at 2.22 p.m.)
> 16 (Expunged)
> 17 (Expunged)
> 18 (Expunged)
> 19 (Expunged)
> 20 (Expunged)
> 21 (Expunged)
> 22 (Expunged)
> 23 (Expunged)

47. *Id.* at 9 ll. 1-7.

24 (Expunged)
25 (Open session at 2.24 p.m.)
/[48]
1 COURT OFFICER: (Interpretation) We are in open session,
2 your Honour.
3 PRESIDING JUDGE COTTE: (Interpretation) Thank you,
4 Court Officer.
5 Good afternoon, ma'am.
6 THE WITNESS: (Interpretation) Good afternoon. Good afternoon.[49]

And here, for the first time, unless she said something in those two minutes, this woman from eastern Congo, entering a sleek courtroom in a distant land, speaks.

D. *A Near Miss—Identification*

There is one more preliminary, and in the course of explaining why public testimony is important to the trial process, the judge nearly forgets himself, asking the witness to say her name in open court:

10 PRESIDING JUDGE COTTE: (Interpretation) Very well. The Court
11 welcomes you, ma'am. We are pleased to have you here with us today to
12 help us with our work, because coming to give testimony before this Court
13 is—means providing—you are providing assistance to the Court so
14 that we can establish the truth.
15 Please now give us your name, and please speak loud and clear. I
16 beg your pardon. We'll first go into private session, and then we will
17 go back into open session so that you can give your solemn undertaking.
18 Please wait one moment.
19 (Private session at 2.26 p.m.)
20 (Expunged)
21 (Expunged)
22 (Expunged)
. . .
21 (Expunged)
22 (Open session at 2.28 p.m.)
23 COURT OFFICER: (Interpretation) We are in open session,

48. This forward slash denotes a page break; it does not appear in the transcript.
49. *Katanga Transcript*, *supra* note 4, at 9 ll. 13-25, 10 ll. 1-6.

24 your Honour.[50]

E. *Protective Measures—Codes and Purposes*

The witness is sworn in during open session—without, of course, her name being repeated—and a few other preliminaries, including problems with a microphone, occur before the victims' representative, Fidel Nsita Luvengika, begins asking questions. But before he does, another reminder of the protective measures:

4 . . . I did want to draw your attention to the
5 protective measures that apply to you. Later, we will be handing to you
6 a list of names, and we will ask you to use that list when you answer
7 questions. We would like you to refer to that list if your answer
8 concerns names that appear on that list. You will find numbers alongside
9 those names. Please use those numbers rather than mentioning their names
10 in open session of this court. It is for your protection. It is also
11 for the protection of those close to you.[51]

And then immediately a request to go into another private session:

13 we can put to you personal mat
14 questions which may identify you. And when we do so, we will explain
15 once again how to use this list of names so in this hearing we will be
16 able to remain in open session as much as possible?
17 PRESIDING JUDGE COTTE: (Interpretation) Court Officer, we will
18 go into private session, please.
19 For the benefit of the public, the questions that are going to be
20 asked of the witness would clearly identify this witness, who is not to
21 be publicly identified. That is why we are moving into private session.
22 (Private session at 2.40 p.m.)
23 (Expunged)
. . ./. . .
19 (Expunged)

20 (Open session at 2.56 p.m.)

21 COURT OFFICER: (Interpretation) We are in public session, in

50. *Id.* at 10 l. 10-11 l. 24.
51. *Id.* at 16 l. 4-11.

22 open session.

23 PRESIDING JUDGE COTTE: (Interpretation) Mr. Luvengika, please

24 continue.[52]

A good thing Cotte explained the purpose to the gallery, because for sixteen minutes, they stare into silence. For over five pages, the transcript is the word "(Expunged)," relieved only by the standard notice, usually at line 12, that the entire page is expunged owing to a private session. Thirty-four minutes since the witness entered the court, and the court has been in closed or private session three times, for a total of twenty minutes. Even most of the time in open session has been spent on discussing and performing the mechanics of secrecy. All of this is necessary, probably, but all of this is time. The ratios will improve—more time in open session—but the pattern will continue, and one gets the sense that Judge Cotte's initial pleas to keep the court in open session were directed as much at himself as the parties, and to no greater effect.

F. *Testimony—Identity and Indications*

The purpose of closed session is, ostensibly, to protect the witness and 'those close to her,' and so any "identifying information" must be conveyed in secret. This includes names and residence, but also narratives that would make the witness' identity clear.

But not everything in closed session is completely secret; some of it bleeds out indirectly. In fact, the representative's very first question upon returning to open session appears to refer to something the witness has just said:

1 Q. Witness, earlier you said that you were living in Bogoro in 2003.
2 Do you know the Bogoro Institute?
3 A. Yes.[53]

Of course, this witness, like all witnesses, has been interviewed, so it is possible the representative is referring to some earlier statement, but if so usually that itself would be indicated.[54] So the likeliest answer is that

52. *Id.* at 16 l. 13-23, 22 l. 19-24. The terms "private" and "closed," are often used interchangeably, although in some courts there is a small difference in meaning.

53. *Id.* at 23 ll. 1-3.

54. We find out later, for example, that the witness has previously filled out an application, been interviewed, and made a statement. *See Id.* at 70 l. 24-73 l. 15.

in the preceding sixteen minutes, V19-P-0002 mentioned Bogoro, though we cannot see it directly. In any case, the name of this place as her residence does not appear earlier in the open transcript. As her residence, that is: it appears for other reasons, because the village of Bogoro is not just an anonymous place anymore. It is the site of the massacre in 2003 at the heart of the charges against Katanga, the charnel field for hundreds of corpses, including, inevitably, members of this witness' own family.

But just saying "Bogoro" gives away nothing too explicit—it turns out she lives thirty minutes away from the Institute, so this hardly identifies her home with specificity—and after all, it is always possible to redact serious slips from the open transcript, so, at the risk of circularity, the fact that we are still seeing this suggests it is not a problem.

G. *Testimony—Clarifying the Rules*

The witness herself is attentive to the protective norms—although apparently a first-timer at the ICC,[55] she is an active participant in shaping and policing norms that both limit what she says and protect her—and when asked a question about her family, she seeks clarification about what she can say:

8 Q. Who are the members of your family who lived with you in Bogoro?
9 A. Do you want me to give you the names of the members of my family
10 such as my parents?
11 Q. No, Witness. You can simply say, "My parents." That will be
12 enough for now. "My children," will also be enough for the time being.
13 A. All right.
14 Q. Could you please answer the question, Witness, or would you like
15 me to repeat it?
16 A. Could you please ask the question again.
17 Q. In 2003, which members of your family were living in Bogoro?
18 A. In 2003, I lived with my husband, my children, and my parents.[56]

55. What Galanter calls a "one-shotter[,]" someone who does not have significant prior experience in court, whereas the other major actors—the judges, the lawyers representing prosecution, victims, and (to some degree) defense—and indeed much of the courtroom personnel, are repeat players. *See* Galanter, *supra* note 26, at 97. The defendants are one-shotters as well.

56. *Katanga Transcript*, *supra* note 4, at 23 ll. 8-18.

Riveting stuff, but this is how trials normally go: a slow, dull slog to get to the point, which, when it finally comes, can be something terrible, though even then often blurred, buried beneath accreting layers and forms of law. In the meantime, the question must be repeated.

H. *The Critical Moment—Codes and Curtains*

The thing, when it comes, is a message, rumors: "we were told this": the witness says, "You . . . must be very careful, because our brothers are preparing for war."[57]

19 Q. Madam Witness, do you have any knowledge of the people who
20 said—when you say "we were told," who were these people who told you?
21 But you must not pronounce the names in open session . . . .
24 Q. So these colleagues who gave you messages, if the person or
25 persons figure on the name (* as interpreted) I gave you, you simply have
/
1 to quote the number. So who gave you this information?
2 A. The first person to inform us was the person number 2 on the
3 list.[58]

"Person number 2 on the list," someone who worked with V19-P-0002's parents, had come to warn them about the coming storm.

But who are these people? These confidential measures are in place for the protection of the witness and other people, as the court has explained. But there is a cost. The layers of abstraction and uncertainty accrete, one atop another. The witness, a person unknown to us, tells what she has heard from her unidentified parents about what another person, unnamed, has told them, about still more unnamed people who are preparing to do violence. It is confusing even to the participants: the victims' representative confuses the names on his own code list, starting to refer to "'number 3," then correcting himself to "'number 2."[59] Twice.[60]

57. *Id.* at 25 ll. 17-18.

58. *Id.* at 25 l. 19-26 l. 3. The interpolation at page 25, line 25 suggests what was actually said or meant was "list" rather than "name" because the representative is presumably referring to the list of codenames previously given to the witness.

59. *Id.* at 26 ll. 17-19.

60. *Id.* at 28 ll. 12-13.

Their identities matter, of course—not only in the sense that these people need protection, but because who they are is part of the story the Court must sort out. People are not numbers: They have identities and relationships to other people, and those relationships are at the heart of this and every story humans try to tell. Those stories are what the Court must extract from beneath the numbers and turn into a story they—and we—can understand.

At this point, there is confusion about whether the witness has heard something herself or from others, and in the course of clarifying, it also becomes clear to us that the people preparing for war—the "brothers" of number 2—are from a different tribe, the Lendu.

And now the pace quickens: V19-P-0002's doubts about how serious things are, her family's concern, a nearby military base, the crack of gunshots, sudden flight like startled birds:

18 Q. And at that point, where did you go? What place did you go to at
19 that particular time?
20 A. As I was running—you see, each person had headed off in his or
21 her own direction. My husband and the other children were running
22 quickly. (Expunged)
23 (Expunged)
24 (Expunged)
25 (Expunged), but
/
1 I wasn't able to stay there. I ran to find a hiding place.
2 MR. LUVENGIKA: (Interpretation) Your Honour, with your leave, I
3 would like to ask if we could briefly go into private session, because we
4 will be ask for some explanations regarding this particular set of
5 circumstances which we just heard about.
6 PRESIDING JUDGE COTTE: (Interpretation) Court Officer, if we
7 could briefly go into private session.
8 Mr. Luvengika, I think you realise that we have slightly more
9 than 12 minutes left.
10 (Private session at 3.46 p.m.)
11 (Expunged)
. . .
1 (Expunged)
2 (Open session at 3.53 p.m.)

3 COURT OFFICER: (Interpretation) We are in open session,
4 your Honour.[61]

I. *Anticlimax*

One might think we have just missed something gripping—when interrupted, the witness was running for her life, seeking a desperate refuge—but upon reemerging, the judge's reaction is not quite in keeping with the catharsis of a high drama:

7 Mr. Luvengika, we have spent quite a bit of time so far with this
8 witness, and we have become acquainted with her—acquainted with her,
9 and you, yourself, have been dealing with her, so to speak, for the first
10 time during the examination, and the Chamber certainly sees the approach
11 you were taking. We wish to remind you that this is a difficult
12 exercise, and insofar as is possible, it would be suitable if you could
13 avoid any questions that are excessively repetitive in relation to what
14 we've already heard from the previous witness.
15 Now, we are aware that it is important for you to bring out
16 certain details and to base your questioning on the witness's reality,
17 but please remember what I am saying so that we can make progress with
18 the necessary haste. So I think we all have to take—or make an
19 assessment of that.[62]

Whatever was just said in closed session may have described a moment of terror, but it was also, apparently, excessively detailed and redundant, and the judge is concerned about the pace of trial. These are trade-offs—not unique to secret processes, but neither do they go away just because the transcript is hidden. After all, one of the purposes of closed sessions is to facilitate trial, but clearly, the judge is worried they are slowing down the trial and affecting its public value. And it is nearly time for a break.

61. *Id.* at 35 l. 18-39 l. 4. In the middle of this, at page 38, line 20, "(Closed session at 3:53 p.m.)" is indicated. Before that, at page 36, line 7, "private session" was in place; apparently, the court has switched from one secret form to another just before returning to open session.

62. *Id.* at 39 ll. 7-19. The judge's reference to "the previous witness" is presumably to one of the prosecution's witnesses, as this is the first witness to testify specifically as a victim representative.

J. *Too Public*—Post Hoc *Redactions*

When trial reopens that afternoon, after another brief closed session as the witness reenters, Judge Cotte reminds the victim representative, "[w]e are in open session for the time being. As far as possible, everything must be done to stay in open session while we can."[63]

Apparently, everyone takes the judge's plea a little too seriously, because within about a minute, an exchange begins that will be expunged after the fact:

> 6 Q. While you were running, did you hear them drawing closer to you?
> 7 A. While I was running, I was not alone. There was a group of us.
> 8 (Expunged)
> . . . .[64]

What follows is over two empty pages with the note "redaction order[.]"[65] Evidently, no one asked for a private session even as the questioning

---

63. *Id.* at 40 ll. 19-21.

64. *Id.* at 41 ll. 6-8.

65. It is not clear when the redaction was ordered. The transcript records moves from public to private sessions and back, and when lines are reclassified. Later this same day, in fact, we find the judge ordering a different section reclassified from private to public, and the transcript itself records this twice, both at where the initial exchange occurs and in the "Reclassification Report" at the end of the day's transcript. *See id.* at 77 ll. 11-14. Here, we have an indication that there was a redaction order. Such redactions can happene in one of two ways. First, they can be done on the fly during the trial, without any public discussion in the record. In interviews, several officials at the ICC confirmed the basic mechanics of the process: When any party or official notices something in open court that violates one of the secrecy provisions, they can notify the registry officials or clerks—I heard different descriptions—who can communicate with the judges, who in turn confirm in passing that a redaction is to be made; all this is done via emails or electronic messaging, which themselves constitute a valid order from the court. There is no need to pause the proceedings or even discuss it in open court. Indeed, as one interlocutor pointed out, it can be risky to mention a breach in open court, because that draws attention to it.

But these sorts of redactions on the fly are imprecise. They may not necessarily say "redact the word X or name Y" but instead identify a time range—a certain few seconds of the recording—to be redacted. Everything on the relevant lines will be removed. In part this is because it is difficult to specify, and doubly so when there are two or more languages being used. The result is that redactions can remove more than the target. (It also means that when redactions *are* more precise, they are more likely to be the result of a *post hoc* redaction made following a review of the transcript by one of the parties, rather than a redaction made on the fly.)

In this case, the textual evidence might be consistent with an on-the-fly redaction, except for that mention of a redaction order, which rather suggests it was done after the session was over. And in fact, the very end of the transcript includes an "Information Report" noting that pursuant to an email order of September 29, 2011, further redactions have been made. *Id.* at 77 ll. 15-17. (A similar notation appears in red at the top of every page of the transcript, whose header also

veered into protected territory and stayed there for several minutes. In their determination to obey the judge and stay in open court, the parties let the witness and attorney say something—redundant or terrifying or both—that must not be heard.

The episode likely did not register with any of the parties—inside the process, they are just following the events, the sort of thing that might make someone later say, "no, secrecy doesn't really interrupt our work." As, indeed, it did not, though later someone made the decision that it should have.

This is one of the longer instances, but at several points, testimony in open session is subsequently redacted after the day's session has ended; sometimes just a few words, sometimes, as here, much longer exchanges. Small but (presumably) significant parts of the day's testimony, given in open court, end up sealed.

Much less often, the traffic goes the other way, and something secret becomes public: at the end of the day, a brief exchange about assigning an evidence number to the list of code names originally takes place in a closed session, but the transcript shows the judge asking the court officer to reclassify it as public, because that exchange "should be stated in public session."[66] Occasionally, something takes place in secret and the actors themselves realize it should be public; the judge has the power to make it so, which is the only reason we know.

K. *Indecipherability*

When the transcript resumes, the judge is apparently now speaking and, evidently, has had enough of this line of questioning, whatever it is. Andreas O'Shea, defense attorney for Katanga, seeks a clarification, itself expunged, though the judge assures O'Shea that his understanding of whatever the issue is, is correct:

1 MR. O'SHEA [Katanga's attorney]: Sorry, Mr. President. I may be wrong about this,
2 but my understanding (Expunged)
3 (Expunged)
4 (Expunged)
5 (Expunged)

indicates that this is a second, edited version.) This is months later, and which changes it refers to is not specified, but it is possible, even likely, that it includes this exchange. If so, for six months something secret was in the public transcript, but I have not found it.

66. *Id.* at 75 ll. 1-2. Not the code names and their identifying names, of course—rather, the discussion about the evidence number for the code names.

6 PRESIDING JUDGE COTTE: (Interpretation) Yes. Thank you very
7 much, Mr. O'Shea. That is exactly the situation.[67]

Then the victim representative briefly addresses the witness, but his comments—and apparently her answer—are also redacted. And with that, the victim representative asks for another private session, which lasts for three minutes. So much for the judge's desire to stay in open court.

If you are confused about what I have just described, you are in the correct position to understand what we are examining, if not what was said in court. In fact, it is nearly impossible to know what was being discussed in court in these minutes, even in the open session, which is so fragmented and referential to hidden conversations.

IV. The Architecture of Secrecy: Testifying in Secret, in Open Court

V19-P-0002 is a protected witness, testifying anonymously. Significant parts of her testimony are expunged, although her testimony is neither particularly consequential nor part of the case-in-chief.

But we learn quite a few pieces of identifying information in open session. V19-P-0002 is a woman who lived in Bogoro, a place you can find on Google (1.4084˚N 30.2800˚E),[68] with her parents, in a straw hut.[69] She had eight children, one a baby, though she was only living with four at the time (the others she had sent to live with a relative "in the locality mentioned before the letter B on the list").[70] She had a small business—a restaurant.[71] She also had a farm plot—seven cows, twenty-five goats—and fields with manioc, potatoes, tomatoes, and onions.[72] She employed a shepherd, who himself must be protected,[73]

---

67. *Id.* at 44 ll. 1-7.

68. Location at 1°24'30.2"N 30°16'48.0"E, Google Maps, https://maps.app.goo.gl/kydLkzfZB6xDnbNp8 (last visited Aug. 23, 2024).

69. *Katanga Transcript*, *supra* note 4, at 52 ll. 20-22, 54 ll. 9-15 (also cataloging her household possessions).

70. *Id.* at 30 l. 25-31 l. 6, 33 ll. 24-25.

71. *Id.* at 52 ll. 15-18.

72. *Id.* at 52 ll. 19-20, 55 l. 22-56 l. 1.

73. About that shepherd: Even when the court is determined to remain in public session, the process of secrecy slows things down. The victim representative asks the judge for permission for the witness to write down the name of the shepherd who tended her animals, so that a closed session can be avoided; the response is then put on an overhead projector "only for the courtroom's eyes" – a process that takes almost an entire page of the transcript, to solicit a single name. *Id.* at 53 ll. 18-19, 53 l. 5-54 l. 4. And, owing to the odd procedure, another few moments are required at the end of the day for the prosecution to ensure that the shepherd's name actually makes it into the (confidential) record. *Id.* at 76 ll. 4-15. It is only because the court tried to keep the process as public as possible that it ended up taking so long; the moments when individual

and her animals were kept at Ngida on the day of the attack.[74] She speaks Swahili and (apparently) Kigegere.[75] She was in Bogoro on the Monday morning when the attack began.[76] One of her children died in the attack.[77] She lived afterward for a while in Uganda.[78]

It is not a lot. Perhaps an extremely determined person with contacts in the area could work out who she is, but it would be very difficult. Harder still to find out the identity of person number 2, who is a more direct link to the violence. In many respects, this means the protective system worked.

One person knows all of this quite well, of course—V19-P-0002. At the start of her testimony, V19-P-0002 was admonished not to speak about her testimony outside of court—not only the confidential parts, but her testimony in general and the fact of it.[79] This is sensible: because her identity is secret, merely acknowledging her participation would defeat the protection measures. Indeed, even though only specific parts of her testimony are in closed session, the effective operation of the whole protective system depends on the witness keeping her entire involvement secret.

From this we can extrapolate and imagine an entire architecture of secrecy, reaching back to eastern Congo and Uganda, through hidden channels to The Hague: an archipelago of decisions and acts designed to keep her absence from home plausible, her movements hidden, and her presence in the court anonymous. It requires coordination between the prosecution, the registry, and the chamber—and eventually the defense. It may require the cooperation of local, regional, or state officials—or sometimes, it may require keeping secrets from those officials. The process can take months—years—and can last long beyond the moment a particular witness, like this one, steps into a courtroom.

We cannot describe the operation of that architecture in relation to this particular witness, but we know a complex system of secrecy must exist.[80] And what is essential to grasp is that it is a system—with many

names have simply been redacted *post hoc*, or uttered in closed sessions, do not impinge on the court's time at all.

74. *Id.* at 53 ll. 2-4.

75. *Id.* at 13 ll. 7-16, 47 ll. 8-16.

76. *Id.* at 32 ll. 9-20.

77. *See id.* at 48 ll. 8-18.

78. *Id.* at 50 l. 9-51 l. 10.

79. *Id.* at 13 ll. 17-18.

80. I do not examine them here for considerations of space and focus, but I address them in my larger book project on how secrecy is created and used in war crimes courts, and with what effect. This Article will form part of that book.

moving, contesting, cooperating, contradicting parts, with actors inhabiting different roles and pursuing different agendas, with procedures devised across time for many, often quite different situations—that produces, maintains, and relies upon secrecy. It is this system that is necessary for trials to happen at all—and this system that creates the comprehensive secrecy that envelopes these trials from before their beginning to beyond their completion, and that may affect their ability to do the thing that, we are told, these courts are purposed to do: tell stories that reconcile.

All this has been done not only to ensure the protection of a person, but of the trial record's secrecy. Even non-anonymous trial participants—and perhaps most particularly, witnesses who are not professional and repeat players—might well have a hard time recalling what they said in open session and what they said in closed.

After all, when the curtain closes, they are on the other side. They do not disappear or do anything different, apart from pausing while the veil descends. For them, the flow of question, answer, and discussion, is largely unimpeded. A person whose voice and image are hidden and distorted does not necessarily perceive this happening; it feels normal. A judge reviewing the record later, in his chambers, as he writes the judgment, does not see a blank page. Everything is visible.

But it is secret, and the voluntary or compelled cooperation of witnesses, court officers, and other participants in maintaining the confidentiality of proceedings is also a technique of secrecy. The sense of normalcy—the one my interviewees consistently reported—is a feature, too.

V. Conclusion

The day's session ends at 6:30 p.m., but V19-P-0002 will be back the next morning, brought into the courtroom in closed session, and welcomed in open, with more testimony and more interruptions. But on this first afternoon, across nearly four hours of hearings, the court has gone into closed or private session eight separate times,[81] for a total of thirty-three minutes and 313 lines; and at ten other occasions lines have been expunged—an additional 105 lines.[82] That is over a fifth of the transcript.

---

81. Four listed as "closed" and four as "private." At least once, a private and closed session follow immediately upon each other without any open session between; and once part of a closed session is reclassified as open by a redaction order given during the hearing.

82. *See Katanga Transcript, supra* note 4, at 9 ll. 13-24, 10 l. 20-11 l. 21, 16 l. 23-22 l. 19, 35 ll. 22-25, 36 l. 11-39 l. 1, 40 ll. 1-8, 41 l. 9-43 l. 21, 44 ll. 2-5, 44 ll. 12-16, 44 l. 25-46 l. 10, 46 ll. 21-23, 48 l. 18, 48 ll. 22-23, 54 l. 24-55 l. 18, 74 ll. 3-13.

Length of hearing:	3 hours, 52 minutes
Transcript length:	900 lines
No. private sessions:	8
Length private sessions:	33 minutes (approx. 1/7)
No. other expungements:	10
Additional expungements:	105 lines
Total:	418/1900 (approx. 1/5)

And that is not all. Considerable time in open session—I estimate at least an additional forty minutes—has been taken up with the mechanics of closed sessions, and even many substantive exchanges in open session are conducted in code. Meanwhile, during the entire session, some types of information have been suppressed as a matter of course.

All this raises questions, beyond the scope of what this exercise in close reading can answer, but which a close reading shows very much need answers. What does this process do to the legitimacy and authority of a court—and to the reception of its work? If courts indeed rely on transparent processes for their authority, what effect do such quotidian exercises of secrecy have on that authority? What are the effects on the project of narrative through reconciliation, when the narrative cannot be read?

I hope to answer these questions in a book I am writing. But here, looking at a single day, we can observe the effects of secrecy in small ways. Because even an open, public session is suffused with secrecy, and the result is delay, confusion, indecipherability—and a trial. A typical day, it seems.