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History In International Criminal Trials: The 'Crime-Driven Lens' And Its Blind Spots

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Abstract

While the question of whether international criminal courts and tribunals (ICTs) ought to write historical narratives of armed conflicts is an old one, it has gained renewed relevance in the context of the recent turn to history in International Criminal Law and the minimal attention paid to historical context in the first judgment of the International Criminal Court. The 'proper' place of history-writing in international criminal adjudication remains controversial, and even though some judges have preferred to de-emphasize it, the fact remains that ICTs are epistemic engines, systematically and inevitably producing knowledge about the conflicts that come before them. This article develops a framework for analysing the historical knowledge generated by ICTs, namely, the 'crime-driven lens'. It argues that this lens is characterized by two important constraints, one qualitative relating to interpretation and the other quantitative relating to scope, both of which may give rise to blind spots. In the final analysis, while the important contributions of ICTs to deepening understanding of the histories of armed conflicts should not be underestimated, the constraints of the 'crime-driven lens' and its blind spots have to be taken into account when assessing their historical legacies.

1. Introduction

At least since the trials of Nazi war criminals in Nuremberg, commentators have asked whether criminal courts ought to write historical narratives of an armed conflict.[1] While the question is not new, therefore, it has gained renewed relevance in the context of the recent turn to history in international criminal law (ICL), the growing attention to the historical legacies of the ad

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[1] R.A. Wilson, *Writing History in International Criminal Trials* (Cambridge University Press, 2011), at viii–ix.

hoc Tribunals since their closure, and the minimal attention paid to historical context in the first judgment of the International Criminal Court (ICC).[2]

The debate over the extent to which mass atrocity trials should have a history-writing function was brought to the fore during the 1961 *Eichmann* trial in Israel, when Hannah Arendt famously drew attention to the question in her book, *Eichmann in Jerusalem: A Report on the Banality of Evil*.[3] Since Arendt articulated her doctrine of strict legality, in response to what she perceived as the excesses of the prosecutor's expansive historical approach, the scholarly debate on the subject has been largely polarized between *restrictive* and *expansive* approaches to history-writing in such trials. On the one hand, Arendt's restrictive doctrine, which has been characterized as a 'justice-and-nothing-else' doctrine, dominated early discussions of the subject and continues to resurface repeatedly.[4] On the other hand, however, a growing number of scholars have identified the distinction between legal and extralegal aims as unnecessary and limiting.[5] Scholars in this camp have characterized strict legality as 'crabbed and needlessly restrictive,'[6] and have argued that mass atrocity trials should actively seek to shape collective memory and maximize their pedagogic impact.[7]

The question over the proper approach to history-writing in international criminal adjudication continues to be a source of controversy today. Given that the primary function of international criminal courts and tribunals (ICTs) remains the determination of the guilt or innocence of the defendant, some judges (and other legal practitioners) have taken the view that a concern with history-writing could only, as Arendt had argued, detract from that function.

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[2] Judgment pursuant to Article 74 of the Statute, *Lubanga Dyilo* (ICC-01/04-01/06), Trial Chamber, 14 March 2012, § 41–49. Just nine of the 593 pages of the *Lubanga* trial judgment are devoted to describing the historical context in which the crimes were committed.
[3] H. Arendt, *Eichmann in Jerusalem: A Report on the Banality of Evil* (Penguin Publishing Group, 1992).
[4] F. Gaynor, 'Uneasy Partners — Evidence, Truth and History in International Trials', 10 *Journal of International Criminal Justice* (*JICJ*) (2012) 1257, at 1257.
[5] N. Tromp, *Prosecuting Slobodan Milošević: The Unfinished Trial* (Routledge, 2016), at 18.
[6] L. Douglas, 'The Didactic Trial: Filtering History and Memory into the Courtroom', 14 *European Review* (2006) 513, at 514.
[7] M.J. Osiel, *Mass Atrocity, Collective Memory, and the Law* (Transaction Publishers, 1999), at 3.

They have, as a consequence, sought to de-emphasize their history-writing role. However, even if the history-writing role is backgrounded, the fact remains that ICTs are *epistemic engines*: that is, they are institutions that systematically and inevitably produce knowledge or find truths about the conflicts that come before them.[8] The question over the proper approach to history-writing, therefore, cannot be escaped. In this context, there is often a tension between the diverging priorities that ICTs seek to address: 'to tell the whole truth and to create a historical record, while adhering to jurisdictional and evidentiary rules which restrict that process.'[9] While previous works of scholarship in this area have identified various jurisdictional concepts and procedural rules which affect and constrain the production of historical narratives in international criminal trials,[10] this article develops a particular framework through which ICTs interpret past events and generate truth: the 'crime-driven lens'.[11]

ICL's focus on proscribing certain categories of criminal conduct and ascribing criminal liability significantly constrains the questions that judges and other actors involved in international criminal proceedings are able to ask and tends to limit broader narratives about a given armed conflict.[12] This narrow focus on criminal conduct and criminal liability may be characterized as 'crime-driven.' Adopting the 'crime-driven lens' means that other dimensions of a conflict, unrelated to criminal liability, but which would be of unquestionable historical

[8] J.v.H. Holtermann, '"One of the Challenges That Can Plausibly Be Raised Against Them"? On the Role of Truth in Debates about the Legitimacy of International Criminal Tribunals', in N. Hayashi and C.M. Bailliet (eds), *The Legitimacy of International Criminal Tribunals* (Cambridge University Press, 2017), at 207.
[9] Gaynor, *supra* note 4, at 1258.
[10] See, *inter alia*, Wilson, *supra* note 1; Gaynor, *supra* note 4.
[11] In this respect, the article adopts a cognitive framing approach to look into the frames used by international judges: see B. Pirker and J. Smolka, 'The Future of International Law Is Cognitive—International Law, Cognitive Sociology and Cognitive Pragmatics', 20 *German Law Journal* (2019) 430, at 436. The 'crime-driven lens' is just one framework through which international judges perceive historical events. In international criminal adjudication, this framework is usually complemented by others, including a focus on individual agency (the individual-centred lens) and a faith in law as a force for good (the law-affirming lens). Through the juxtaposition of these lenses, and the constraints on history-writing that they entail, international judges are usually only able to produce "trial" truths that are distinctly-legal. For a more extensive discussion of this issue, see: Aldo Zammit Borda, *The Historical Narratives of International Criminal Tribunals and Their Blind Spots: Building a Responsible History Framework* (Springer/TMC Asser, forthcoming).
[12] A. Cassese, *Cassese's International Criminal Law* (Oxford University Press, 2013), at 3; R. Cryer and others, *An Introduction to International Criminal Law and Procedure* (Cambridge University Press, 2007), at 18.

importance – such as legitimate combat not involving crimes, peace negotiations, and efforts to ensure humanitarian relief – are often irrelevant to both the prosecution and the defence.[13] As a result, these dimensions of a conflict, while historically significant, may never so much as get mentioned in trial narratives because they are essentially irrelevant for the purposes of determining criminal liability.[14]

This article explores the features of the 'crime-driven lens' and its implications for the production of historical narratives by ICTs. As such, this study is related to a line of recent work concerned with *legal epistemology*, pursued by scholars who are attempting to establish this field as a new sub-discipline in the philosophy of law at the crossroads between the law of evidence and philosophical epistemology.[15] The adoption of such lens is characterized by two important constraints, one qualitative relating to interpretation and the other quantitative relating to scope, both of which may give rise to blind spots. In this context, Hirsch observes that international tribunals produce very distinct kinds of historical narratives, which have to be *interpreted* and *selected* by those courts and tribunals.[16] This article will examine how ICTs interpret historical events from a specific legal prism, which may be quite different from interpretations of the same events in other disciplines. While the 'crime-driven lens' is useful in focusing attention on the implications of different interpretations, an important limitation of the framework is that it is not able to account for why judges, in particular cases, may prefer particular interpretations. It will then analyse the implications of external and internal exclusions for the historical narratives that ICTs may write. Again, while the merit of the 'crime-driven lens' is to draw attention to the implications of these exclusions for the historical

[13] Gaynor, *supra* note 4, at 1264. The point here is to highlight the limits of the crime-driven lens and the scope of past events considered to be 'relevant' from the perspective of this lens. It is not to suggest that the focus of ICTs should be broadened to such matters as humanitarian relief.
[14] W. Schabas, *Unimaginable Atrocities: Justice, Politics, and Rights at the War Crimes Tribunals* (Oxford University Press, 2012), at 160.
[15] Holtermann, *supra* note 8, at 212.
[16] M. Hirsch, *Invitation to the Sociology of International Law* (Oxford University Press, 2016), at 53.

narratives, an important limitation is that the framework is unable to explain the motivations behind such exclusions.

2. Outlining the 'crime-driven lens'

A. Constraints Relating to Interpretation

Law generally, and criminal law in particular, contains a number of distinct legal constructs, some of which diverge markedly from the 'ordinary' understandings of similar terms, and which compel judges to view past events from specific lenses. Moreover, at trial, judges are called on to interpret these constructs, and their judicial interpretations may further influence how historical evidence is approached in the case at hand and, therefore, how past events are ultimately represented in their narratives. Wilson observes that '[l]aw's unique conventions, special categories, and exceptional rules impel courts to perceive historical events through a counterintuitive prism, which leads to all manner of unintended consequences and absurd outcomes.'[17] And Damaška notes that whereas other intellectual pursuits thrive on plural, often ambiguous meanings, law usually insists on a single, fixed (and potentially artificial) perspective.[18] Law is not unusual in this regard, as other disciplines and epistemic communities have their own peculiar conventions and concepts. However, what is different about law is that it is intended for external consumption far beyond the legal community, where such legal constructs and conventions, assessed against non-legal standards, may seem absurd.

As will be discussed in this section, legal constructs often promote distinctly-legal interpretations (or, in some cases, distortions) of past events either because of the specific framing of particular concepts on the statute books, which may differ markedly from the 'ordinary' meanings of such concepts, or because of the specific judicial interpretations at trial.

[17] Wilson, *supra* note 1, at 8.
[18] M. Damaška, 'Truth in Adjudication', 49 *Hastings Law Journal* (1998), at 293.

The 'crime-driven lens' is useful in that it draws attention to this phenomenon and its implications for the ensuing historical narratives and their blind spots.

Many of the legal concepts and modes of criminal liability contained in the Charter of the International Military Tribunal (IMT) at Nuremberg have come under considerable scrutiny. This is particularly so with respect to the concept of 'conspiracy', which Bloxham refers to as the 'tyranny of a construct,'[19] as well as the then innovative concept of 'crimes against humanity,' which was developed, *inter alia*, following pressure to expand the definition of existing legal concepts in the light of revelations about the systematic massacres in eastern Europe.[20]

Article 6(c) of the IMT Charter provided that crimes against humanity, which included murder, extermination, and enslavement, were crimes coming within the jurisdiction of the Tribunal so long as they were committed 'in execution of or in connection with any crime within the jurisdiction of the Tribunal.'[21] This technical language essentially meant that crimes against humanity were not autonomous and could *only* fall within the jurisdiction of the court if committed in connection with crimes against the peace and/or war crimes. The drafters of the Charter may have decided to link war crimes with crimes against humanity to counterweigh the controversial status of crimes against humanity as an innovative international crime at the time.[22] However, the requirement for this linkage had the perverse effect of compelling the prosecution and the judges to focus on crimes committed after 1939 and, consequently, of cutting short their assessment of the vast crimes occurring before the war began, such as the

[19] D. Bloxham, *Genocide on Trial: War Crimes Trials and the Formation of Holocaust History and Memory* (Oxford University Press, 2003), at 69. See also G. Simpson, 'Linear Law: The History of International Criminal Law', in C. Schwöbel (ed), *Critical Approaches to International Criminal Law* (Routledge, 2015), at 168.
[20] Bloxham (n 20) at 18.
[21] Charter of the International Military Tribunal - Annex to the Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis ("London Agreement").
[22] The Allies also sought to avoid precedents that could apply to them: J. Fuchs and F. Lattanzi, 'International Military Tribunals', in F. Lachenmann and R. Wolfrum (eds), *The Law of Armed Conflict and the Use of Force: The Max Planck Encyclopedia of Public International Law* (Oxford University Press, 2017), at 550.

extermination of German nationals in German concentration camps before 1939.[23] On this point, the Nuremberg Tribunal famously concluded that pre-war atrocities did not fall within its jurisdictional competence:

> [t]he policy of persecution, repression and murder of civilians in Germany before the war of 1939 […] was most ruthlessly carried out. The persecution of Jews during the same period is established beyond all doubt. To constitute crimes against humanity, the acts relied on before the outbreak of war must have been in execution of, or in connection with, any crime within the jurisdiction of the Tribunal. The Tribunal is of the opinion that revolting and horrible as many of these crimes were, it has not been satisfactorily proved that they were done in execution of, or connection with, any such crime. The Tribunal therefore cannot make a general declaration that the acts before 1939 were Crimes Against Humanity within the meaning of the Charter.[24]

Douglas argues that by holding that only those crimes against humanity committed in connection with criminal war of aggression or war crimes were justiciable, the Tribunal radically restricted the reach of 6(c). Suddenly atrocities committed by the Nazi government against its own civilians – precisely those offenses targeted by the Charter's seemingly ambitious notion of crimes against humanity – could be brought into the IMT's jurisdiction only if they had been committed in connection with the planning or waging of a war of aggression or other war crimes.[25] From the perspective of historical representation, therefore,

[23] *Ibid.*
[24] Judgment, *Trial of the Major War Criminals Before the International Military Tribunal,* Nuremberg, 14 November 1945–1 October 1946*,* vol 22 § 498.
[25] L. Douglas, *The Memory of Judgment: Making Law and History in the Trials of the Holocaust* (Yale University Press, 2005), at 48–9; Bloxham, *supra* note 19, at 62.

the link requirement of the Charter, as interpreted and applied by the Nuremberg judges, gave rise to significant blind spots in the historical narratives emerging from that Tribunal.

Importantly, the restrictive interpretation of the link requirement favoured by the Nuremberg judges was only one of a number of possible interpretations supported by the language of Article 6 of the Charter. It was not, however, the only possible interpretation. Indeed, Article 6(c) of the Charter expressly included crimes against humanity committed '*before* or during the war.' However, the judges at Nuremberg chose to de-emphasize this element and to place greater emphasis on the link requirement, hence adopting a more restrictive interpretation of crimes against humanity. This approach resulted in a narrower application of crimes against humanity which, as noted above, resulted in the omission of acts that occurred before 1939.[26] This indicates that, while legal constructs contained in the frameworks of particular ICTs do exert limitations on the possible interpretations of historical facts, such constructs *per se* remain adaptable and potentially open to competing interpretations. While the 'crime-driven lens' is useful in focusing attention on the implications of different interpretations for the ensuing historical narratives, this framework is not able to explain why judges, in particular cases, may prefer particular interpretations. Such preferences would have to be explained by reference to other theories (such as theories of judicial decision-making).

While some legal constructs resemble more closely the 'ordinary' or scientific understandings of a particular concept, others diverge significantly from those understandings. The reasons for such divergences may vary: in the case of constructs developed in the international arena, for instance, these may have been subjected to several rounds of negotiations and political compromises, resulting in distinctly-legal constructs. It is usually the constructs that diverge most significantly from the ordinary or scientific understandings of a

[26] See Fuchs and Lattanzi, *supra* note 22, at 550.

concept that have most potential to distort historical interpretations. Social scientists have described these as having the effect of 'torturing,'[27] 'deforming,'[28] or 'distorting'[29] history. This was the case with respect to the limiting language around crimes against humanity in the IMT Charter and, as will be discussed below, the distinctive definition of the crime of genocide.

The definition of the crime of genocide, as enshrined in Article 2 of the Genocide Convention of 1948, departs significantly from 'genocide' as it exists in the public imagination.[30] Milanović observes that 'there is a marked difference between the ordinary, lay meaning of the word "genocide", or even the concept of genocide in anthropology or other social sciences, and the *legal* concept of genocide.'[31] One major area of divergence relates to the omission of political and other groups from the list of protected groups in the crime of genocide.[32] By excluding political and other groups, the definition, which was the result of several political compromises,[33] could give rise to the situation whereby, for instance, the killing of 8,372 men and boys in Srebrenica may be legally categorized as (ethnic) genocide,[34] while the massacre of over a million in Cambodia may not, because such massacres concerned social, economic or political groups not covered by the definition.[35] This in turn could give rise to significant blind spots in the narratives produced by ICTs, in that, mass atrocities potentially involving millions of people may *legally* not be considered genocide at all (though they could

[27] Douglas, *supra* note 25, at 76.
[28] Simpson, *supra* note 19, at 168.
[29] Wilson, *supra* note 1, at 9.
[30] United Nations Human Rights Council and Independent International Commission of Inquiry on the Syrian Arab Republic, '"They Came to Destroy": ISIS Crimes Against the Yazidis', (2016) A/HRC/32/CRP.2, para 13.
[31] M. Milanović, 'State Responsibility for Genocide', 17 *European Journal of International Law* (2006) 553, at 556.
[32] B.V. Schaack, 'The Crime of Political Genocide: Repairing the Genocide Convention's Blind Spot', 106 *The Yale Law Journal* (1997) 35, at 2259; S.R. Ratner and J.S. Abrams, *Accountability for Human Rights Atrocities in International Law: Beyond the Nuremberg Legacy* (Oxford University Press, 2001), at 44.
[33] See W.A. Schabas, *Genocide in International Law: The Crimes of Crimes* (Cambridge University Press, 2000), at 51.
[34] Judgment, *Krstić* (IT-98-33-T), Trial Chamber, 02 August 2001, § 594.
[35] W.A. Schabas, 'Problems of International Codification - Were the Atrocities in Cambodia and Kosovo Genocide Symposium: Universal Jurisdiction: Myths, Realities, and Prospects: Panel Two: Problems of International Codification', 35 *New England Law Review* (2000) 287, at 292. Determining the precise number killed is difficult for Cambodia: see R.J. Rummel, *Statistics of Democide: Genocide and Mass Murder Since 1900* (LIT Verlag Münster, 1998), at 4.

be categorised as crimes against humanity / war crimes). These limitations of the legal construct of genocide have led some social scientists to discard it altogether and to ask: 'to what extent is it legitimate to adopt an international legal norm resulting from a political compromise between states as a basis for historical, sociological or anthropological inquiry?'[36]

It is important to emphasize, at this stage, that legal constructs, even if seemingly artificial to 'outsiders,' perform an important function in the process of legal adjudication. Schauer argues that such legal constructs have to be seen in the context of law as a rule-based and an exclusionary system.[37] Law itself, more than morality, or history, or even everyday common-sense reasoning, is an exclusionary system. By treating certain legal constructs as authoritative (and thus obligatory) even when, to an external audience, they may seem to generate suboptimal outcomes, the legal system does its work by taking off the table factors and reasons that an ideal and unconstrained decision-maker would treat as relevant. Thus, a central feature of law is its rule-based commitment to instructing its decision-makers that not everything they believe material to making 'the best all-things-considered decision is something they can take into consideration when making a *legal* decision.'[38] And it is this rules-based commitment that, in part, enables the narratives of ICTs to be regarded as authoritative. Moreover, Damaška argues that the narrow framing of legal constructs has the advantage of focusing inquiries 'on narrow aspects of reality in regard to which the potential for controversy is greatly reduced.'[39]

Legal constructs, therefore, have an important role to play in a rule-based and exclusionary system such as law, and their use is valuable in constraining decision-makers and safeguarding the legitimacy of the adjudicative process. However, given that judges (and other

[36] J. Sémelin, *Purify and Destroy: The Political Uses of Massacre and Genocide* (C Hurst & Co Publishers Ltd, 2014), at 321. This has however given rise to a plurality of definitions of genocide in the social sciences: see *ibid*.
[37] F. Schauer, 'In Defense of Rule-Based Evidence Law–and Epistemology Too1', 5 *Episteme* (2008) 295, at 300.
[38] *Ibid.*, at 301.
[39] Damaška, *supra* note 18, at 293.

legal practitioners) are obliged to interpret historical facts through such constructs and, in particular, to make determinations as to what historical evidence is relevant or not, such constructs have the potential to have a distortive effect on the interpretation of past events, particularly when they diverge significantly from the 'ordinary' or scientific understandings of a term.

While the discussion so far has tended to highlight the rigidities of law's crime-based lens, it is important to note that law is also able to innovate and develop new legal categories to reflect novel or changing realities and, potentially, to bridge blind spots. After all, the concepts of crimes against humanity and genocide were innovations adopted in response to the atrocities of WWII. Bilsky argues that ICL has been able to develop innovative legal categories to accommodate novel situations: thus for example, 'the trials had to develop innovative interpretations of new legal concepts such as "collaboration," "crimes against humanity," "universal jurisdiction," "manifestly illegal order," and so on.'[40] And ICL continues to evolve and to develop new legal constructs, such as in the areas of sexual and reproductive violence. Indeed, as Jarvis and Nabti observe, when the ICTY prosecution began to focus more on conflict-related sexual violence crimes, there was very little concerning sexual violence in ICL.[41] Early cases establishing today's well-worn precedents – such as recognition of sexual violence as torture and enslavement – initially required a leap of faith by the prosecution.[42] Today, however, legal constructs concerning such violence have become firmly embedded in modern ICL.

[40] L. Bilsky, *Transformative Justice: Israeli Identity on Trial* (University of Michigan Press, 2004), at 12.
[41] M. Jarvis and N. Nabti, 'Policies and Institutional Strategies for Successful Sexual Violence Prosecutions', in S. Brammertz and M. Jarvis (eds), *Prosecuting Conflict-Related Sexual Violence* (Oxford University Press, 2016), at 73.
[42] M. Jarvis, 'Overview: The Challenge of Accountability for Conflict-Related Sexual Violence Crimes', in S. Brammertz and M. Jarvis (eds), *Prosecuting Conflict-Related Sexual Violence* (Oxford University Press, 2016), at 9.

At trial, judges could further seek to recalibrate the scope of such legal constructs, by broadening or narrowing them through judicial interpretation, which in turn would have implications for the historical narratives and their blind spots. Judges of ICTs have shown a willingness, in certain cases, to use interpretive methodologies to adapt particular legal concepts to the novel situations before them.[43] Indeed, Shklar argues that law is more creative than its practitioners like to admit.[44] A case in point is the ICTR's application of the definition of genocide to the situation in Rwanda. In *Akayesu*, the Trial Chamber was faced with the predicament of applying the legal concept of genocide and, in particular its protected groups definition, to the Tutsis, who did not exist as a separate ethnic group, as all Rwandans spoke the same language and shared the same cultural and religious traditions.[45] The Chamber framed its predicament as follows:

> the Chamber considered whether the groups protected by the Genocide Convention, echoed in Article 2 of the Statute, should be limited to only the four groups expressly mentioned and whether they should not also include any group which is stable and permanent like the said four groups. In other words, the question that arises is whether it would be impossible to punish the physical destruction of a group as such under the Genocide Convention, if the said group, although stable and membership is by birth, does not meet the definition of any one of the four groups expressly protected by the Genocide Convention.[46]

[43] B. Sander, 'The Method Is the Message: Law, Narrative Authority and Historical Contestation in International Criminal Courts', 19 *Melbourne Journal of International Law* (2018) 299, at 4.
[44] J.N. Shklar, *Legalism: Law, Morals, and Political Trials* (Harvard University Press, 1986), at 151–70. See also R. Vernon, 'What Is Crime against Humanity?', 10 *Journal of Political Philosophy* (2002) 231, at 232.
[45] Wilson, *supra* note 1, at 175.
[46] Judgment, *Akayesu* (ICTR-96-4-T), Trial Chamber, 2 September 1998 § 516.

Had the judges of the ICTR Trial Chamber adopted a strict legal interpretation, they would have had to answer the question in the affirmative – it was not possible to punish the physical destruction of a group if that group did not meet the definition of protected groups under the definition of genocide. Had they stopped there, they would therefore have had to conclude that genocide had not occurred in Rwanda, giving rise to significant lacunae in the Tribunal's historical narratives on the Rwandan violence. However, they kept alive the idea that the Tutsi were a protected group by taking an innovative turn, arguing that:

> although the Tutsi did not qualify straightforwardly as an ethnic or racial group under the terms of the Genocide Convention, permanent membership in the group was conferred both by the Rwandan state (in the form of ID cards and birth certificates) and Rwandan society (through conventions of patrilineal descent).[47]

This broader interpretation of the legal grid concerning genocide, which Alvarez describes as 'postmodern,'[48] went on to influence other legal assessments of mass violence.

It could be argued that, by interpreting this legal construct broadly to find that Tutsis constituted a protected group, the judges in *Akayesu* exerted a 'corrective' interpretation on the legal construct, bringing it more in line with the 'ordinary' understanding of genocide as it exists in the public imagination.[49] This broad interpretation, in turn, had significant implications for determinations of relevance or irrelevance of historical evidence admitted at trial and, ultimately, for the historical narratives on genocide that ensued from the ICTR.

[47] Wilson, *supra* note 1, at 176.
[48] J. Alvarez, 'Crimes of States/Crimes of Hate: Lessons from Rwanda', 24 *Yale Journal of International Law* (1999), at 421.
[49] Of course, whether or not particular interpretations are viewed as exerting a 'distortive' or 'corrective' effect on historical facts will depend on one's standpoint. For a critique of the broad interpretation in *Akayesu*, see: W.A. Schabas, 'Darfur and the "Odious Scourge": The Commission of Inquiry's Findings on Genocide', 18 *Leiden Journal of International Law* (2005) 871, at 878.

Scholars have illustrated how, in other cases, international judges have shown willingness to broaden the scope of legal constructs, through the process of legal interpretation, to address the novel situations before them.[50] In this context, the 'crime-driven lens' has the merit of drawing attention to the implications of such differing interpretations for the ensuing historical narratives. As stated, however, this framework is unable to account for the differences in interpretations and approaches that different benches and/or individual judges may decide to adopt.

Finally, it would be important not to overstate the flexibility of law's 'crime-driven lens' both in terms of its ability to develop new legal constructs and in terms of its ability to accommodate competing interpretations. In the context of ICL, fair trial principles such as those of legality and *nullum crimen sine lege*, impose significant constraints on how far such innovations or adaptations may go. There is a point where the formal categories of the law may not be able to stretch sufficiently to accommodate the chaotic realities of armed conflict. At that juncture, the formality of the law could have a significantly distorting effect on the historical narratives written by judges.[51] For instance, in the 1963 trial of the Auschwitz guards in Frankfurt, because the gravest offense for which the defendants could be tried was murder as defined under national criminal law, the prosecution often had to 'torture history' to show that the behaviour of the defendants, who were involved in the administration and operation of the Auschwitz concentration camp, satisfied the elements of murder under national law.[52]

B. Constraints Relating to Scope

In addition to the constraints on interpretation, the 'crime-driven lens' is also further constrained in its scope, potentially giving rise to blind spots in the historical narratives that

[50] Sander, *supra* note 43, at 4.
[51] Bilsky, *supra* note 40, at 71.
[52] Douglas, *supra* note 25, at 189.

ICTs may write. Within a given armed conflict, trials are only able to select and focus on the criminal acts that took place within the ICTs' temporal, territorial, personal and subject-matter jurisdiction. And even within those specific jurisdictional limits, trials usually only ever cover a small subset of the criminal activity falling within their jurisdiction depending, *inter alia*, on the charges selected by the prosecutor and presented in the indictments.[53] The constraints as to scope may be characterized in terms of external exclusions, referring to 'the idea that only certain conflicts will be subjected to international criminal law' and internal exclusions, referring to the selectivity involved with respect to 'who within those conflicts is the subject of prosecution.'[54] For various reasons, the prosecutor might choose to select and emphasize a specific category of criminal activity and de-emphasize other conduct, with consequences for the ensuing historical narratives.[55] The merit of the 'crime-driven lens' is to draw attention to the implications of such external and internal exclusions for the historical narratives written by ICTs. This framework, however, is not able to explain the motivations for such exclusions.

Resource constraints and selectivity are part of the daily reality of ICTs and, even though these limitations could give rise to critiques of partial justice,[56] the fact is that ICTs were never meant, nor have the capacity, to prosecute large numbers of perpetrators.[57] Investigators and prosecutors working on conflict-related atrocities are generally confronted with an overwhelming volume of criminality to address, combined with considerable resource constraints and the ever-intensifying need to reduce the size and length of investigations and

[53] Gaynor, *supra* note 4, at 1266.
[54] C. Nielsen, 'From Nuremberg to The Hague: The Civilizing Mission of International Criminal Law', 14 *Auckland University Law Review* (2008) 81, at 91–5.
[55] Gaynor, *supra* note 4, at 1265.
[56] M.A. Drumbl, *Atrocity, Punishment, and International Law* (Cambridge University Press, 2003), at 153.
[57] In spite of these limitations, writing in relation to the ICTY, Milanović considers that the tribunal still made a positive net contribution, even if an imperfect one, as it was "exceptionally unlikely that any of the high-ranking political and military leaders that have been tried by the ICTY would ever have been (successfully) prosecuted before domestic courts": see M. Milanovic, 'The Impact of the ICTY on the Former Yugoslavia: An Anticipatory Postmortem', 110 *American Journal of International Law* (2016) 233, at 233. Moreover, some have argued that by putting even a few prominent individuals on trial, courts may do for society at large 'what psychoanalysis does for individuals': Osiel, *supra* note 7, at 173. Finally, Douglas points out that the individuals selected for prosecution, even if only a few, should not be regarded as "scapegoats": see Douglas, *supra* note 25, at 518.

prosecutions.[58] As a result, Jarvis notes that 'tough choices constantly have to be made about where priorities should lie and prosecutorial discretion takes on unique dimensions.'[59] An element of chance may also come into play with respect to whether or not aspects of the criminal activity would be uncovered in time to be included in the charges. For instance, in relation to Nuremberg, Bloxham notes that '[t]he hand of fortune was clearly at work in deciding that the records of the German Foreign Office would be found in Marburg Castle, or that the correspondence of Alfred Rosenberg would be discovered behind a false wall, in time for their incorporation in the IMT trial.'[60] These constraints mean, therefore, that ICTs may only ever get to focus on a limited subset of crimes that occur in situations of mass atrocity, and this, in turn, may give rise to significant blind spots in the historical narratives they write.

The stark truth is, unfortunately, that many victims may never have their day in court or indeed be ever accounted for in the history books. Writing in relation to the African continent, Kapuscinski poignantly observes that '[m]any wars in Africa are waged without witnesses, secretively, in unreachable places, in silence, without the world's knowledge, or even the slightest attention.'[61] In his expert testimony in *Lubanga*, Garretón, further noted that '[w]hat is so painful in Africa is the magnitude of the figures involved. So many people died. There are no names, no identification of the victims, and yet the figures are always debatable.'[62] Comparable observations may be made about victims of conflicts, particularly those of 'new wars,'[63] in other parts of the world.[64] These sobering views should serve to contain any vaunted

[58] To undertake such investigations, for instance, the Office of the Prosecution at the ICTY had a Leadership Research Team and a Military Analyst Team, consisting mostly of non-legal experts and researchers who provided information and expertise on historical, political, and military topics for prosecution trial teams, that were made up mostly of police investigators and lawyers: see Tromp, *supra* note 5, at ix.
[59] M. Jarvis and K. Vigneswaran, 'Challenges to Successful Outcomes in Sexual Violence Cases' in S. Brammertz and M. Jarvis (eds), *Prosecuting Conflict-Related Sexual Violence* (Oxford University Press, 2016), at 33.
[60] Bloxham, *supra* note 19, at 58.
[61] R. Kapuscinski, *The Shadow of the Sun: My African Life* (Klara Glowczewska tr, Penguin, 2002), at 172.
[62] Transcript, *Prosecutor v Thomas Lubanga Dyilo* (ICC-01/04-01/06-T-193-ENG ET WT 17-06-2009 1/96 SZ T (ICC)), 17 June 2009, at 27 (§ 11–4).
[63] J. Freedman, *Gender, Violence and Politics in the Democratic Republic of Congo* (Routledge, 2015), at 39.
[64] For instance, in its investigation of the long-running conflict between the Government of Sri Lanka and the Liberation Tigers of Tamil Eelam (LTTE), the UN Panel of Experts on Accountability in Sri Lanka found credible

ambitions about the scope of historical narratives of armed conflicts that ICTs, or indeed other writers of history, may be able to write.

The conduct that is charged before ICTs will require the introduction of a 'point of view' with respect to locating the beginning and end of the relevant historical contexts. There are no consensual criteria for locating the beginning and end of such historical contexts. In historiography, as Shklar notes, there is no general rule which can determine 'the cut-off point for the historian's search for causes […].'[65] Indeed, historians readily concede that these temporal resting points 'do not flow from the events but are in fact strategic ruptures chosen for specific purposes.'[66] The choice of such ruptures – of where to begin the narrative and where to end it – is of immense strategic importance as it could determine who will play the villain, who the victim.[67] While in law, the bounds of temporal jurisdiction define the span of time over which a given court or tribunal has jurisdiction, competing views on the objectives of criminal trials may induce varying starting and ending points with respect to the historical contexts and evidence deemed relevant. Shklar argues that those who wish to emphasize rehabilitation will wish to go far back into the root causes of conflict. Conversely, those who are interested:

allegations, which if proven, indicate that 'a wide range of serious violations of international humanitarian law and international human rights law was committed both by the Government of Sri Lanka and the LTTE, some of which would amount to war crimes and crimes against humanity. […] Specifically, the Panel found credible allegations associated with the final stages of the war. Between September 2008 and 19 May 2009, the Sri Lanka Army advanced its military campaign into the Vanni using large-scale and widespread shelling, causing large numbers of civilian deaths': see 'Report of the Secretary-General's Panel of Experts on Accountability in Sri Lanka' (2011), at ii <http://www.un.org/News/dh/infocus/Sri_Lanka/POE_Report_Full.pdf> accessed 7 March 2019; J. Reynolds and S. Xavier, '"The Dark Corners of the World" TWAIL and International Criminal Justice', 14 *JICJ* (2016) 959, at 960.

[65] Shklar, *supra* note 44, at 197.

[66] K. Cmiel, 'After Objectivity: What Comes Next in History?', 2 *American literary History* (1990) 170, at 172.

[67] Osiel argues that the victims and villains in the narrative told by the International Military Tribunal for the Far East would have appeared different had the story ended somewhat later than the prosecution preferred, "not with Allied victory at Okinawa, but with the nuclear destruction of Hiroshima and Nagasaki, at a time when all but the final details of Japanese surrender had been resolved": see Osiel, *supra* note 7, at 133.

> in simply ridding society of dangerous deviants as quickly and efficiently as possible will be apt to stop very early. For them the 'but for,' *sine qua non* test will be all that needs to be proved. Those lawyers whose eyes are fixed on deterrence and on maintaining the principle of legality in criminal cases will want, in addition, proof of *mens rea,* amplified by a variety of conditional considerations which ensure that the agent causing the prohibited result did so in a truly voluntary, direct, and premeditated way. In all these cases the purpose of causal inquiry, the fixing of responsibility, and subsequent punishment will determine the scope and remoteness of the causes considered.[68]

There is no consensus, therefore, amongst lawyers about the proximity or remoteness of the causes that they must examine in order to address criminal responsibility. When in early 2006, Geoffrey Nice consulted his prosecution team on the prosecution's closing arguments in the *Milošević* trial, he recommended beginning with the Field of Blackbirds in Kosovo in 1389 and tracing the connections through the following six hundred years until the crimes of Slobodan Milošević. Wilson notes that some applauded this approach, while others were uncomfortable with the historical context extending so far back.[69] While in some cases, judges of ICTs have been willing to hear historical evidence dating from outside the indictment period, for background and historical context,[70] when handling vast quantities of evidence in other cases, they have declined to admit such evidence, citing its marginal relevance to the crimes charged.[71]

[68] Shklar, *supra* note 44, at 197.
[69] Cited in Wilson, *supra* note 1, at 108. See also T. Hunt, 'Whose Truth? Objective Truth and a Challenge for History', in W. Schabas and S. Darcy (eds), *Truth Commissions And Courts: The Tension Between Criminal Justice and the Search for Truth* (Springer Netherlands, 2004), at 195.
[70] R. Cryer, *Prosecuting International Crimes: Selectivity and the International Criminal Law Regime* (Cambridge University Press, 2011), at 210.
[71] Gaynor, *supra* note 4, at 1266.

In addition to locating the beginning and end of the relevant historical contexts, prosecutorial discretion will further limit the scope of the 'crime-driven lens' through the way the charges are framed by the prosecution.[72] The primary objective of prosecutors is not to write history, even though they might well have a strong belief in the historical importance of their case.[73] The primary objective of the prosecutor is 'to select the charges, incidents and modes of liability which most accurately reflect the facts arising from the material collected, and to select from that material only those items which will most concisely and compellingly prove those facts.'[74] Indeed, prosecutors who try to use the indictment as a tool for history-writing may encounter active resistance from the bench. In some cases, international judges have invited prosecutors to reduce the number of counts charged in the indictment and have actively dissuaded them from seeking to perform history-writing functions. In *Stanisić et al.*, for instance, the ICTY pre-trial judge requested that the content of indictment be limited in order to shorten the length of proceedings:

> a final argument, the Prosecution submits that reducing the scope of the Indictment would risk the creation of an inaccurate historical record. It argues that '[t]he loss of the *Slobodan Milosevic* Judgement left an inevitable void in terms of the historical record of the scope of the atrocities committed by Milosevic and his co-perpetrators' and that 'the Tribunal is now faced with the opportunity ... to create a permanent historical record of these atrocities and to bring justice to the victims of these heinous crimes.' In this regard, it also submits that a further reduction of the Indictment 'would result in a historically and factually inaccurate record, and a loss of possibly the last opportunity the Tribunal

[72] *Ibid*., 1264.
[73] For instance, Jarvis observes that, in developing legal approaches to prosecute sexual crimes, the ICTY prosecution 'clearly understood the historical importance of [its] mandate to prosecute sexual violence crimes': see Jarvis, *supra* note 42, at 9.
[74] Gaynor, *supra* note 4, at 1271.

> has to achieve one of its core goals ... - to bring effective redress to the victims of international humanitarian law violations.' *However, the Tribunal was established to administer justice, and not to create a historical record.* The Trial Chamber will therefore not consider this argument as relevant for a decision to be taken pursuant to Rule 73 *bis(D).*[75]

The assertion by the judge that the Tribunal was established to administer justice, and not to create a historical record, reflects the fact that there appears to be no consensus regarding 'the precise extent either of the 'truth' or of the 'historical record' that international trials are expected to produce.'[76] While in *Stanisić et al.*, the pre-trial judge de-emphasized the history-writing function of the ICTY, in other cases, such as *Sikirica et al.*, the judges of the ICTY Tribunal affirmed that the truth-finding function was one of the 'fundamental objectives of the International Tribunal.'[77] This lack of consensus on the proper place of history-writing in international criminal adjudication is shared by prosecutors and other legal practitioners. Eltringham notes that '[l]egal practitioners […] are exercised by the question of whether their endeavour should seek to intentionally create an "historical record."'[78] In a series of interviews with prosecution counsel that the author conducted at the ICTR, he found that prosecutors acknowledged the divergence of views on this matter:

[75] Decision Pursuant to Rule 73bis (D), *Stanisić et al* (ICTY IT-03-69-PT), Trial Chamber, 4 February 2008, § 21 (emphasis added). See also *Milutinović*, where the Trial Chamber focused on identifying and eliminating 'those crime sites or incidents that are clearly different from the fundamental nature or theme of the case': Decision on application of Rule 73 bis, *Milutinović et al.* (IT-05-87-T), 11 July 2006, § 10; and *Seselj*, where the Trial Chamber focused on identifying the crime sites or incidents that are 'reasonably representative of the crimes charged': Decision on the application of Rule 73 bis, *Seselj* (IT-03-67-PT), 8 November 2006, § 12.
[76] Gaynor, *supra* note 4, at 1257.
[77] Sentencing Judgment, *Sikirica et al.* (IT-95-8-S 70), 13 November 2001, § 149.
[78] N. Eltringham, '"We Are Not a Truth Commission": Fragmented Narratives and the Historical Record at the International Criminal Tribunal for Rwanda', 11 *Journal of Genocide Research* (2009) 55, at 55.

> [A] As regards history, even at the level of the OTP [Office of the Prosecutor] there are different views. Some people believe that prosecution is intended to create an historical record. Others say that the prosecution should only be concerned with the particular case at hand, with the guilt of that particular person. For me, I'm concerned with proving the case, not establishing history.
>
> [B] There's a divergence among prosecutors. Some want an 'historical record'. I believe it's a court, this was my view when I arrived and I'm still in that camp. But I recognize that part of the legacy is to have some account, but it's more of an incidental result than the primary purpose. The other camp get off track of trying someone, to prove something, and the trial mushrooms rather than focusing on the guilt or innocence of the accused.[79]

The above reflects both the fact that there is no consensus over the proper place of history-writing in international criminal adjudication and the reality that, at best, the truth-seeking function is but one of a number of competing priorities within the prosecutorial strategy. As noted, investigators and prosecutors constantly have to make tough choices about what crimes to prioritize and in what way.[80] Where the history-writing priority ranks in this equation may depend on, *inter alia*, the particular approaches of the prosecutorial team. In this regard, it is possible to discern three broad and overlapping approaches to the ways in which prosecutors may select and frame the charges: (a) focused charges; (b) comprehensive charges; and (c) representative charges. Each of these may have important implications for the ensuing historical narratives.

[79] *Ibid*., at 58.
[80] See D. Rogers, *Law, Politics and the Limits of Prosecuting Mass Atrocity* (Palgrave Macmillan, 2017), at 62.

At one end of the spectrum, the prosecutor may seek to bring narrow, 'focused' charges, as was the case in *Lubanga*, where the indictment focused on the enlistment, conscription and use of child soldiers, but omitted other categories of criminal conduct, such as sexual offenses.[81] While this approach has the merit of tending to promote expeditious trials (though this may not always be the case),[82] by excluding significant categories of conduct, it may come in for significant criticism. For instance, human rights groups extensively criticized the ICC Office of the Prosecutor in *Lubanga* for failing to accurately characterise the scope of the conflict by not including sexual violence charges in the indictment against Lubanga, despite allegations that girls had been kidnapped into Lubanga's militia and were often raped and/or kept as sex slaves. From the perspective of history-writing, therefore, focused charges risk giving rise to significant blind spots with respect to the true scope and extent of criminal conduct. Interestingly, the ICTY prosecution was initially going to go down the path of focused charges with respect to the genocide in Srebrenica in July 1995. In this context, Jarvis notes that:

> [i]nitially, faced with the twin realities of overwhelming crimes and limited resources, the OTP proposed to prosecute the Srebrenica killings to the exclusion of the crimes committed against the women, children and elderly who were expelled.[83]

However, that proposal was ultimately reversed and charges for both exterminations of the military-aged Bosnian Muslim men and deportations of the women, children and elderly people

[81] ASIL Insights, 'The ICC Appeals Chamber Judgment on the Legal Characterization of the Facts in Prosecutor v. Lubanga - Vol. 14, Issue: 1' (8 January 2010) </insights/volume/14/issue/1/icc-appeals-chamber-judgment-legal-characterization-facts-prosecutor-v> accessed 14 March 2020.
[82] Judge Kwon notes that even cases involving accused charged with relatively few crimes committed in a relatively confined geographical area may result in lengthy trials: see O.G. Kwon, 'The Challenge of an International Criminal Trial as Seen from the Bench', 5 *JICJ* (2007) 360, at 362.
[83] Jarvis, *supra* note 42, at 14–5.

were brought.[84] Prosecuting only the killings / exterminations would have meant not just failing to accurately address the crimes directed at the women, children and elderly persons, but it would have also obscured the broader reality of the genocide in Srebrenica. This in turn would have given rise to significant blind spots in the Tribunal's narratives about the genocide. Despite the inherent risks of a focused approach to charging, some judges have actively advocated for this approach, as it promotes more expeditious trials. For instance, Judge Kwon argued that:

> the most effective measure for tackling the problem of lengthy trials would be to limit the number of charges in the indictment themselves. With a more focused indictment, the production and analysis of crime-base and linkage evidence would be a much speedier process than it currently is in the majority of the cases at the Tribunal.[85]

This argument, while placing emphasis on expeditious trials, tends to overlook the implications for the ensuing historical narratives. Indeed, Judge Kwon was critical of the reasons for which the ICTY prosecutor and her staff appeared to be unwilling, in some instances, to voluntarily reduce the number of charges in their indictments at the ICTY. He noted, *inter alia*, that:

> the Prosecutor and many human-rights groups seem to believe that it is one of the Tribunal's main duties to […] compile a complete historical record of the war and determine the truth of what actually happened, both of which would ostensibly require trial to proceed on charges that are as comprehensive as possible.[86]

[84] *Krstić*, *supra* note 34, § 1.
[85] Kwon, *supra* note 82, at 372–3.
[86] *Ibid*., at 373.

Judge Kwon was not persuaded by that view. From his perspective, rather, 'the paramount role of the judges of the Tribunal is to adjudicate, in as fair and expeditious a manner as possible, the guilt or innocence of the accused before them.'[87] This position calls back the tension that exists between the competing priorities that ICTs seek to address. In this case, Judge Kwon sought to resolve that tension by emphasizing the aim of expeditious trials over the aim of truth-seeking and, consequently, by promoting a more focused approach to charging rather than one which promoted broader, more comprehensive charges. While his reasons for doing so may be understandable, particularly in light of pressures from the completion strategy, this approach does come at a cost with respect to the ensuing historical narratives as it is more likely to give rise to blind spots.

At the other end of the spectrum, the prosecutor may seek to bring 'comprehensive' charges, as was the case in *Milošević*, which included 66 counts in the indictments, allegedly committed in Croatia, Bosnia and Herzegovina, and Kosovo, over a period of nine years.[88] This approach, particularly when it involves high-level accused, may include many different forms of responsibility with larger and more sprawling crime bases. This approach tends to appear attractive from the perspective of history-writing, as it aspires towards a broader, inclusive account of the criminal conduct. However, it tends to increase the length and complexity of trials as the parties seek to introduce large quantities of evidence and counter-evidence to challenge the competing historical claims.[89] As Surroi, notes, for instance, 'for Milošević, what was happening was not a trial; it was a panel on history […], in which his role would be defined as the guardian of the Serbian historic truth.'[90] It is submitted that, given the formal and rule-

[87] *Ibid*., at 374.
[88] Tromp, *supra* note 5, at 11.
[89] Kwon, *supra* note 82, at 373.
[90] V. Surroi, 'Conversations with Milošević – Two Meetings, Bloody Hands', in T. Waters (ed), *The Milosevic Trial: An Autopsy* (Oxford University Press, 2014), at 225–6.

bound nature of criminal trials, together with their various competing priorities,[91] criminal trials may be not be best placed to attempt such comprehensive accounts of conflicts.[92] Indeed, Cryer notes that '[c]are must be taken that creating an accurate record of particular offences does not spill over into an attempt to write the whole history of a conflict.'[93] Or, as Wilson puts it, '[t]he writing of a far-reaching history is more adequately achieved elsewhere, and chiefly by historians, social scientists, and others who may, of course, draw on the extensive information and documentation revealed in international trials.'[94]

In some cases, prosecutors concerned with the history-writing function of ICTs have tried to bridge the gap by charging 'representative' crimes. Indeed, such an approach is envisaged by the legal frameworks of some ICTs. As will be discussed, however, it is not without its challenges. For instance, Rule 73 *bis(D)* of the ICTY Rules of Procedure and Evidence provides:

> [a]fter having heard the Prosecutor, the Trial Chamber, in the interest of a fair and expeditious trial, may invite the Prosecutor to reduce the number of counts charged in the indictment and may fix a number of crime sites or incidents comprised in one or more of the charges in respect of which evidence may be presented by the Prosecutor which, having regard to all the relevant circumstances, including the crimes charged in the indictment, their classification and nature, the places where they are alleged to have been committed, their scale and the victims of the crimes, are *reasonably representative* of the crimes charged.[95]

[91] In this context, Damaška recalls that while truth-seeking is an important objective of criminal trials, it quite obviously 'cannot be an overriding consideration in legal proceedings: it is generally recognized that several social needs and values exercise a constraining effect on attempts to achieve fact-finding precision': see Damaška, *supra* note 18, at 301.
[92] Kwon, *supra* note 82, at 373.
[93] R. Cryer, 'Witness Evidence before the International Criminal Tribunals', 2 *Law and Practice of International Courts and Tribunals* (2003) 411, at 418.
[94] Wilson, *supra* note 2, at 17.
[95] Rule 73 *bis(D)* of the ICTY Rules of Procedure (emphasis added).

In *Milutinović*, for instance, the Trial Chamber invoked this rule to promote a more streamlined indictment, by identifying and eliminating 'those crime sites or incidents that are clearly different from the fundamental nature or theme of the case.'[96] The Chamber recommended a removal of three sites, holding that 'the case the Prosecution seeks to establish [....] will be adequately presented even if evidence in relation to [the three removed] sites is not led, and that focusing the trial on the remaining charges will improve the expeditiousness of the proceedings while ensuring that they remain fair.'[97] Similarly, in *Seselj*, the Trial Chamber used this rule to remove five counts and several crime sites from the indictment, finding that the remaining crime sites or incidents were 'reasonably representative of the crimes charged.'[98] In a similar vein, in the 2009 – 2012 Prosecutorial Strategy of the Office of the Prosecutor of the ICC, it was held that:

> [w]hile the Office's mandate does not include production of comprehensive historical records for a given conflict, incidents are selected to provide a sample that is reflective of the gravest incidents and the main types of victimization.[99]

Representative charges are intended to bridge the gap between more focused and more comprehensive charges and, from the perspective of truth-seeking, would appear appealing, in light of the various constraints on ICTs. On the one hand, representative charges aim to include crime sites and incidents that may be considered representative of a broader *genus* of crimes, while keeping the number of charges within manageable limits, and thus avoiding some of the pitfalls of both focused and comprehensive charging. On the other hand, however, the faith in

[96] Decision on application of Rule 73 bis, *Milutinović, et al* (IT-05-87-T), Trial Chamber, 11 July 2006, § 10.
[97] *Ibid*., § 12.
[98] Decision on the application of Rule 73 bis, *Seselj* (IT-03-67-PT), Trial Chamber, 8 November 2006, § 14.
[99] ICC, The Office of The Prosecutor, "Prosecutorial Strategy: 2009-2012" (1 February 2010), § 20.

'representative' crimes, and the consequent reductions in the crime sites or incidents in the indictments, may give rise to an important philosophical question about representation: that is, whether any crimes can be considered sufficiently 'representative' of the broader atrocities that occur in armed conflict.

Bloxham addresses this question in relation to the Nuremberg Tribunal and the Holocaust. He notes that, even at Nuremberg, Justice Jackson and others wanted to avoid focusing on 'individual barbarities and perversions which may have occurred independently of any central plan.'[100] Rather, the trial staff requested of the governments of nine United Nations countries that they furnish 'three examples of war crimes or violations of international law to be used in the prosecution of the leading Nazis.'[101] However, in practice, it was impossible to say what was or was not 'typical', or even if 'types' as such did exist within groupings of diverse Nazi institutions and practices such as the camp system. As a result of this approach to charging representative crimes, the names of two camps – Belzec and Sobibor – were entirely absent from the judgement. These camps, together with Treblinka, had particular significance when considering the historical representation of the Holocaust as a whole. They were an integral part of what came to be known as Aktion Reinhard, a larger scheme of murdering and expropriating the Jews.[102] Bloxham argues that the absence of these camps from the post-war trials, which was in part a function of the faith in 'representative' examples, had far-reaching implications for popular appreciation of the Jewish fate, as well as the historical narratives that emerged from Nuremberg. The approach of charging representative crimes, therefore, also carries some risks for creating blind spots in the narratives of ICTs. It raises the questions of which crimes may be construed as 'representative' and who decides and how? In practice, the

[100] Bloxham, *supra* note 20, at 62.
[101] *Ibid.*
[102] *Ibid*., at 109.

selection of representative crimes, as seen in Nuremberg, may further limit the scope of events about which ICTs write historical narratives.

The 'crime-driven lens' is helpful in drawing attention to the implications of these approaches to charging for the historical narratives of ICTs. The decision of whether to bring 'focused,' 'comprehensive' or 'representative' charges will however be contingent on several factors, only some of which may be related to considerations of history-writing. In the first instance, the decision will be directly related to the availability of evidence. However, here again, the availability of evidence may itself, in turn, be influenced by the attitudes of the investigators and prosecutors to the proper place of history-writing. Some ex-ICC investigators have suggested, for instance, that not enough analysis and resources had been invested ahead of investigative missions to uncover and bring to light a more accurate account of human rights abuses in Uganda, the Democratic Republic of Congo and Sudan. As a result, the most appropriate charges may not always have been brought against suspected perpetrators of atrocities.[103]

Another critical consideration for the prosecutor when selecting and framing the charges will be the very high probative threshold of 'beyond reasonable doubt.' A trial chamber will only convict if it 'is satisfied of the criminal responsibility of the accused beyond reasonable doubt, on the basis of the entirety of the evidence admitted.'[104] This standard is significantly higher than the broader 'frame of probabilities' usually used by historians.[105] Indeed, Evans notes that 'historians may find it difficult to argue that their conclusions put any matter with which they deal "beyond reasonable doubt," as is required in the criminal law

[103] K. Glassborow, 'Institute for War and Peace Reporting, ICC Investigative Strategy Under Fire' (*Institute for War and Peace Reporting*) <https://iwpr.net/global-voices/icc-investigative-strategy-under-fire> accessed 14 March 2020.
[104] Gaynor, *supra* note 4, at 1272.
[105] Wilson, *supra* note 1, at 6.

before a conviction can be reached.'[106] The criminal law standard, of course, has the advantage of establishing 'a historical record at the highest legal standard of certainty.'[107] Indeed, often criminal trials lead to the accrual of a great deal of evidence in order to prove 'the obvious.' This potentially gives rise to greater accuracy of the historical narratives, as each allegation against the accused would need to be established, including that the crime actually occurred and that accused was criminally responsible for it.[108]

However, this entails also considerable potential risks for the ensuing historical narrative in the case of acquittals on account of the high standard not having been met. This is due to the error distribution doctrine that underlies criminal procedure and stacks the results in such a way as 'to ensure that such errors as do occur will be predominantly false acquittals rather than false convictions.'[109] For instance, in September 2011, an ICTY Trial Chamber convicted the Chief of the General Staff of the Yugoslav Army, Momčilo Perišić, to 27 years of imprisonment for aiding and abetting crimes in Sarajevo and Srebrenica committed by Bosnian Serbs, and on the basis of superior responsibility for crimes in Croatia committed by Croatian Serbs.[110] However, on appeal, Perišić was acquitted of all of these charges, by a majority of the ICTY Appeals Chamber, who found that both the aiding and abetting charges, and the superior responsibility charges had *not* been proven beyond reasonable doubt.[111] This acquittal was described by one observer as 'unfortunate' in view of its impact on 'the solidification of official narratives of the warring parties in the former Yugoslavia.'[112] In particular, the acquittal was presented by the Serbian government 'as some kind of general

[106] R.J. Evans, 'History, Memory, and the Law: The Historian as Expert Witness', 41 *History and Theory* (2002) 326, at 330.
[107] R.G. Teitel, *Transitional Justice* (Oxford University Press, 2002), at 73.
[108] Tromp, *supra* note 5, at 22.
[109] L. Laudan, *Truth, Error, and Criminal Law: An Essay in Legal Epistemology* (Cambridge University Press, 2006), at 29.
[110] Trial Judgment, *Perišić* (IT-04-81-T), Trial Chamber, 6 September 2011, § 1840.
[111] Appeals Judgment, *Perišić* (IT-04-81-A), Appeals Judgment, 28 February 2013, § 122.
[112] M. Milanović, 'The Limits of Aiding and Abetting Liability: The ICTY Appeals Chamber Acquits Momcilo Perisic', (*EJIL:Talk!*, 11 May 2013) <https://www.ejiltalk.org/the-limits-of-aiding-and-abetting-liability-the-icty-appeals-chamber-acquits-momcilo-perisic/>.

exoneration of Serbia as a state for its involvement in mass atrocities in Bosnia and Croatia.'[113] It may be argued that a conscientious historian, analysing the same evidence, might well have reached different conclusions with respect to Perišić's responsibility in this matter.[114]

Criminal law espouses the maxim, which may be traced back to Roman law, that 'it is better for a guilty person to go unpunished than for an innocent one to be condemned.'[115] Drawing on his experience in a domestic court, Judge Frankel observes '[w]hile we undoubtedly convict some innocent people, a truth horrifying to confront, we also acquit a far larger number who are guilty, a fact we bear with much more equanimity.'[116] Although Lord Bonomy reminds that a court judgment of acquittal in a criminal case does not necessarily mean that an accused is 'innocent',[117] the truth is that an acquittal of a potentially guilty individual for want of evidence may have far-reaching implications for the ensuing historical narratives of the conflict. Osiel notes that:

> [w]hen political leaders are acquitted in a criminal proceeding, they choose (unsurprisingly) to interpret this legal result as a complete vindication of their story. Their claims to this effect, in tum, are widely disseminated throughout society by the mass media.[118]

A judgment of acquittal by a given court or tribunal may be perceived (erroneously) as equivalent to a judgment of innocence. As stated, this may have significant implications for the

[113] *Ibid*.
[114] Gaynor, *supra* note 4, at 1272.
[115] G. Williams, *The Proof of Guilt: A Study of the English Criminal Trial* (Stevens & Sons Limited, 1955), at 130. For variations of this maxim, see Laudan, *supra* note 109, at 63.
[116] M.E. Frankel, 'The Search for Truth: An Umpireal View', 123 *University of Pennsylvania Law Review* (1975) 1031, at 1037.
[117] Cited in N. Tromp, 'In Search for Truth at Mass Atrocities Trials: Will Judges and Lawyers Have the Last Word?', 12 *The Journal of Comparative Law* (2018) 61, at 73.
[118] Osiel, *supra* note 7, at 105.

legal and historical narratives that ensue.[119] In view of this, when faced with evidence which may not meet the required threshold, a prosecutor may prefer not to charge particular conduct in the first place.[120] After all, in convicting a killer, the law does not need to prove that he committed a thousand murders if it can prove he committed a hundred. As Evans notes, however, this approach may 'fail to satisfy the wider remit of history.'[121] It serves to restrict the number of crimes charged in the indictment and, consequently, to further limit the scope of the historical narratives that ICTs may produce.

There are several other factors that exert constraints on the formulation of the indictment and, as a result, the scope of the 'crime-driven lens' in international criminal trials.[122] In the final analysis, in the context of adversarial proceedings, the ultimate goal of trial lawyers is to win the case at hand and not necessarily to produce accurate and sincere historical narratives.[123] As such, lawyers will generally tend to prefer versions of history that support that outcome, even if they may contain significant historical blind spots. That ultimate goal will inform every aspect of the prosecutorial process, including the formulation of the indictment and the charges brought. In his assessment of that process, Wilson notes that 'what we see are legally motivated strategies from both prosecution and defense that distort the record

[119] Tromp, *supra* note 5, at 10. Indeed, Damaška argues that, in order to avoid such misperceptions, a third type of verdict may be appropriate: '[w]hile convictions are expected to accurately determine the factual predicates of criminal liability, acquittals are not meant to do the same for the factual predicates of innocence. If we wanted to increase the truth-value of acquittals, we would have to adopt a third type of verdict - a type capable of expressing a range of belief-states between the conviction that the accused is guilty and the finding that he is innocent. Acquittals could then be reserved for cases in which factfinders are convinced of the accused's innocence': Damaška, *supra* note 18, at 305.

[120] Alvarez, *supra* note 48, at 429.

[121] Evans, *supra* note 106, at 330.

[122] These include both internal and external factors. With respect to internal factors, for instance, one mechanism which has been extensively scrutinized is the plea bargaining procedure which, while saving precious resources, may produce partial historical narratives: see Schabas, *supra* note 14, at 164; Gaynor, supra note 4, at 1268. With respect to external constraints, several scholars have written about the political constraints which are exerted in subtle and not-so-subtle ways on prosecutors when formulating indictments: see Rogers, *supra* note 80, at 142, 145; and Cryer, *supra* note 70, at 220.

[123] The theme of accurate and sincere history-writing, in the context of the concept of responsible history, is developed further in Aldo Zammit Borda, *The Historical Narratives of International Criminal Tribunals and Their Blind Spots: Building a Responsible History Framework* (Springer/TMC Asser, *forthcoming*).

[…]'[124] or, at least, that may degrade the quality of historical evidence. The fact is that, even for prosecutors who are firmly committed to the history-writing role of ICTs, this commitment will always have to be subordinate to the demands of that ultimate goal.

3. Conclusion

In his assessment of the link between judging international crimes and writing a history of armed conflicts, Wilson reflects that both are complex endeavours and their relationship to one another 'cannot be characterized by either harmonious accord or inherent contradiction.'[125] Arguably this relationship continues to be a source of controversy for judges and other legal practitioners today, and there is no consensus over the proper place of history-writing in the context of international criminal adjudication. While some judges prefer to de-emphasize their history-writing role, the fact remains, however, that ICTs are *epistemic engines*, that is, they are institutions that systematically and inevitably produce knowledge or find truths about the conflicts that come before them.

The framework discussed is helpful in drawing attention to some of the features of international criminal trials and their implications for the kinds of knowledge that ICTs may produce and the historical narratives that they write. The 'crime-driven lens' is characterized by two important constraints relating to *interpretation* and *scope*, both of which may give rise to blind spots in the narratives of ICTs. With respect to interpretation, ICTs perceive and interpret past events through distinct legal constructs, which may be further broadened or narrowed through judicial interpretation at trial. While these constructs perform an important function in legal adjudication, they may appear artificial to outsiders and, at times, may have the effect of 'torturing,' or 'distorting' history. Moreover, although such constructs are

[124] Wilson, *supra* note 1, at 168.
[125] *Ibid*., at 13.

adaptable and, in some cases, judges have shown willingness to construe them in ways that bring them closer to 'ordinary' understandings of the terms, there is a limit to the flexibility of the 'crime-driven lens' imposed by the principles of legality and *nullum crimen sine lege*. While this framework is useful in focusing attention on competing interpretations for the ensuing historical narratives, it is not able to explain why judges, in particular cases, may prefer particular interpretations. Such preferences would have to be explained by reference to other factors (such as theories of judicial decision-making).

Moreover, the 'crime-driven lens' is further constrained by scope to criminal conduct that took place within the ICTs' jurisdiction. Dimensions of a conflict which are not related to criminal conduct and/or fall outside the jurisdiction of a given ICT would not systematically be captured in the historical narratives produced by such courts and tribunals. This would include events of unquestionable historical importance, such as legitimate combat not involving crimes, peace negotiations, and efforts to ensure humanitarian relief. And even with respect to events falling within the jurisdictional limits of a given ICT, trials usually only ever capture a small subset of criminal conduct, depending, *inter alia*, on the charges selected by the prosecutor and presented in the indictments. As discussed, various factors may influence the charges brought as well as the location of the beginning and end of the relevant historical contexts. In some cases, prosecutors concerned with the history-writing function have tried to bridge the gap by charging representative crimes. However, the faith in representative crimes, while intuitively appealing from the perspective of history-writing, may also raise philosophical questions related to the nature of representation and whether crimes can be considered sufficiently representative of the broader atrocities that occur in armed conflict. While the merit of the 'crime-driven lens' is to draw attention to the implications of these approaches for the historical narratives written by ICTs, it is not an appropriate framework for explaining the motivations behind particular charging styles.

As epistemic engines, ICTs have systematically produced important historical accounts of the armed conflicts falling within their purview,[126] and their judgments have included significant debates about the historical dimensions of such conflicts that 'have gone much beyond the specifics of the charges against any particular individuals accused.'[127] While the important contributions of ICTs to enhancing understanding of the histories of conflicts should therefore not be underestimated, the significant constraints of the 'crime-driven lens' through which ICTs perceive and interpret past events, and its potential for blind spots, have to be taken into account when considering the historical legacies of ICTs.

[126] *Ibid*., at 18.
[127] Schabas, *supra* note 14, at 158.