A Partial View of History: ICTY Judgments as 'Judicial Truths'

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10.1. Introduction

The judgments of the International Criminal Tribunal for the former Yugoslavia (ICTY) have been influential and widely cited for their factual findings and large bodies of evidence on the conflict in the former Yugoslavia.[1] While these findings were made in the context of the Tribunal's mandate to determine the criminal responsibility of the accused, there is little doubt

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[1] They have been cited, *inter alia*, by the International Court of Justice, the European Court of Human Rights, the Human Rights Chamber for Bosnia and Herzegovina and the European Parliament. See Application of the Convention on the Prevention and Punishment of the Crime of Genocide (*Bosnia and Herzegovina v Serbia and Montenegro*) (Judgment) [2007] ICJ Rep 191, p. 43, para. 223; *Mehida Mustafić-Mujić et al. v the Netherlands* App no 49037/15 (ECtHR, 30 August 2016), para. 87; Ferida Selimović et al. v the Republika Srpska ("The Srebrenica Cases") (Decision on Admissibility and Merits) Human Rights Chamber for Bosnia and Herzegovina CH/01/8365 (7 March 2003) paras. 15-28; and European Parliament resolution 2015/2747(RSP) of 9 July 2015 on the Srebrenica Commemoration [2017] OJ C265.

that they have also contributed to the historical narrative of the conflict in the region.[2] Writing in relation to international criminal tribunals more generally, one commentator has noted:

> The modern international criminal tribunals, for the former Yugoslavia, Rwanda, and Sierra Leone, were established to address major conflicts in different parts of the world. Each has now generated an enormous volume of case law. The tribunals have held many dozens of major trials. In most of these, there have been important debates about the historical dimensions of the situation being considered.[3]

By providing 'detailed and well-substantiated records of particular incidents and events',[4] the ICTY has provided a body of evidence that is invaluable for historians, and so in that sense, the legacy of this Tribunal and its contribution towards a better understanding of the history of the region will last long after the trials have completed.[5] This, however, raises the question of the role of international criminal trials in writing historical narratives of events surrounding atrocity crimes, a question which 'has been largely overlooked' in the legal literature.[6] With some notable exceptions,[7] the questions of the appropriate role of history in international criminal trials has received little academic attention.[8]

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[2] See, for instance, Sabrina P Ramet, 'Martyr in His Own Mind: The Trial and Tribulations of Slobodan Milošević' (2004) 5 Totalitarian Movements and Political Religions 112, 114.

[3] William Schabas, *Unimaginable Atrocities: Justice, Politics, and Rights at the War Crimes Tribunals* (Oxford University Press 2012) 158.

[4] UN Secretary General, *The Rule of Law and Transitional Justice in Conflict and Post-conflict Societies* (23 August 2004) UN Doc. S/2004/616, paras. 38-39.

[5] Richard Ashby Wilson, *Writing History in International Criminal Trials* (Cambridge: Cambridge University Press 2011) 18. For example, a well-known instance of historians making use of criminal trial records to develop a historical narrative is Arendt's *Eichmann in Jerusalem*, which soberly details the horror of the mass deportations and killings of Europe's Jews, and is based primarily on the trial transcripts, and exhibits admitted in evidence during the trial: see Fergal Gaynor, 'Uneasy Partners – Evidence, Truth and History in International Trials' (2012) 10 *Journal of International Criminal Justice* 1257, 1258.

[6] Felicity Conrad, 'Writing History in International Criminal Trials. By Richard Ashby Wilson.' (2012) 44 NYUJILP 999, 1042.

[7] Notably, Richard J Evans, 'History, Memory, and the Law: The Historian as Expert Witness' (2002) 41 History and Theory 326-345 and Wilson (n 5). This paper builds on the research undertaken by Evans and Wilson and we owe a debt of gratitude to these authors.

[8] Conrad (n 6) 1045. This question is related to the broader Human Rights and transitional justice questions of victims' right to the truth: see Dermot Groome, 'The Right to Truth in the Fight against Impunity' (2011) 29 Berkeley J Intl L 175, 176.

This chapter begins by providing an overview of the three main phases in the ICTY's use of history. It then considers three schools of thought around the question of the role of international criminal trials in writing historical accounts, namely, those who argue that it is not for courts to write history; those who argue that historical discussions are inevitable in criminal trials; and those who argue that, aside from being inevitable, such discussions are desirable. Section 3 then explores the converging and diverging methods and aims of law and history, and Section 4 discusses the impact of the changing rules on admissibility of evidence on history writing. Section 5 goes on to consider two practical examples of how such rules may impact on the historical narrative written by international criminal trials. In these two cases, information deemed not detrimental to the parties' case was admitted at trial. Such information included references to the involvement of third parties in the commission of crimes which were eventually referenced in the judgements. The paper concludes that the relationship between international criminal trials and history writing is a dynamic, contingent and complex one. However, one cautionary tale arises from the analysis, namely, that to expect the ICTY – and international criminal tribunals in general – to write detailed historical narratives of the conflicts they are called to assess is possibly to overburden them.

10.2. Approaches to history at the ICTY

Before discussing the ICTY's approaches to history, it has to be recognised that approaches to history and historiography are contested. As one writer put it, 'there appears to be no consensus regarding what precisely is meant by the "truth" and the "historical record" produced by international criminal tribunals.'[9] Section 3 will outline some of the differences

[9] Gaynor (n 5) 1263.

between the methods and aims of law and history, differences which have led some authors to consider that historical truth 'is different from legal truth.'[10] Moreover, within the discipline of history itself, there are debates around what is meant by writing history and, especially, around the possibility of arriving at some kind of historical truth.[11] There are also important distinctions between history in a scientific sense, whose 'foremost collective purpose is to achieve an understanding of the complex life and changes of past human societies',[12] and memory, which is 'constructed in the present and is influenced by contemporary society and its particular features.'[13] While we do not have the space to directly engage in these debates, we will limit ourselves to noting that there appears to be little consensus over the meaning of 'history', used extensively in the discussion below.

The role of history at the ICTY has fluctuated significantly over the course of the Tribunal's lifespan. Wilson identified three main phases in its use of history: (1) the production of background information, asserting only a weak causality to the charges in the *Tadić* case; (2) the elaboration of monumental history and ambitious claims about causality in the *Milošević* case; and finally (3) a focus on micro-histories of events surrounding particular crimes in the *Brđanin* case.

The *Tadić* judgement started with an extended history of the Balkans.[14] Wilson noted that;

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[10] Bob de Graaf, 'The Difference between Legal Proof and Historical Evidence. The Trial of Slobodan Milosevic and the Case of Srebrenica' (2006) 14 *European Review* 499, 505. See also Sofia Stolk, 'The Record on Which History Will Judge Us Tomorrow': Auto-History in the Opening Statements of International Criminal Trials' (2015) 28 *Leiden Journal of International Law* 993, 995.

[11] For more information, see Martin Stuart-Fox, 'Two Views of the History of Histography and the Nature of History' (2007) 4 *History Australia* 44.1. See also C. Behan McCullagh, 'What Do Historians Argue About?' (2004) 43 *History and Theory* 18, 18-19.

[12] Perez Zagorin, 'Rejoinder to a Postmodernist' (2000) 39 *History and Theory* 201, 209.

[13] Moshe Hirsch, 'The Role of International Tribunals in the Development of Historical Narratives' (2018) 20 *Journal of the History of International Law* 391, 397.

[14] *Tadić Case* (Judgment) ICTY-94-1 (7 May 1997) paras. 53-126 ('*Tadić Judgment*').

> [t]he *Tadić* Trial Judgment wrote the historical run-up to the conflict in Bosnia as the backdrop to a tragic play. Yet nowhere does the language of *Tadić* suggest that historical events brought about the 1991–5 conflict in Bosnia. The judgment's historical narrative does not lead inexorably toward ethnic cleansing and war, as other outcomes were possible.[15]

This historical narrative bore only a weak, if any, causal relationship with the accused's crimes, and its primary purpose was to provide context for the international judges and other parties, who were not directly familiar with the region. However, this historical background was not value-neutral. It functioned as a cognitive framework to understand the ensuing actions which would inevitably favour certain interpretations over others.[16] In *Tadić*, for instance, the background information set out by the Chamber tended to contradict Serb nationalist explanations of the conflict, which accorded 'great significance to incidents that occurred in 1941 or even in 1389.'[17] Wilson noted that, in subsequent cases, lawyers quickly recognised the importance of this background historical context and used it strategically to construct a framework that organized scattered acts, statements, and events, in a narrative that best suited their arguments.[18]

In *Milošević*, the accused was charged, *inter alia*, with war crimes and the crime of genocide. However, there was no direct documentary evidence of an order for genocide, and the prosecution conceded that 'there is little direct evidence to that precise effect, such as a specific order to commit genocide signed by the accused or a confession by him.'[19] The

[15] Wilson (n 5) 74.
[16] Martti Koskenniemi, 'Between Impunity and Show Trials' in Jochen A Frowein and Rüdiger Wolfrum (eds), *Max Planck Yearbook of United Nations Law, vol. 6* (Kluwer 2002) 1, 16–17.
[17] Wilson (n 5) 76.
[18] Ibid., 77.
[19] *Milošević Case* (Decision on Motion for Judgement of Acquittal) ICTY-02-54 (16 June 2004) para. 121.

prosecution, thus, had to prove *dolus specialis* through inferential and circumstantial evidence. It submitted that:

> the Trial Chamber must look at all the facts and circumstances proved in the Prosecution case and that 'if a sufficient number of circumstances can be objectively identified that together demonstrate a coherent series of actions on the part of the Accused, a reasonable tribunal of fact would be entitled to draw the necessary inference that the Accused did intend the destruction of part of the Bosnian Muslim group'.[20]

An important element of the prosecution's thesis, in this regard, was based on historical arguments, namely that special intent to commit genocide was not accidental but the culmination of a century-old ideological program to carve a Greater Serbia.[21] Wilson referred to this case as 'the high-water mark of historical debate at the ICTY. Here, we see the greatest role for a grand, sweeping metanarrative of history that led inexorably to the alleged crimes of the accused.'[22] On his part, the accused denounced what he saw as historical reductionism and attacked various aspects of the historical narrative set out by the prosecution.[23] In this trial, the narrative of Greater Serbia collided head-on with the self-determination stories of the seceding populations.[24] It is considered that the clash of narratives in *Milošević* had undertones of the struggle, in memory politics, over whose memories will be preserved and institutionalised to represent a nation's past, and whose memories will be repressed and forgotten.[25]

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[20] Ibid.
[21] It should be emphasised that historical arguments were not the *only* component of the prosecution's case, which also included important oral and documentary evidences. See Ramet (n 2) 133.
[22] Wilson (n 5) 98.
[23] *Milošević Case* (Public Transcript of Hearing) ICTY-02-54-T (24 July 2003) 24866–9. See also Koskenniemi (n 16) 1.
[24] Ibid., 12.
[25] Monika Palmberger, 'Making and Breaking Boundaries: Memory Discourses and Memory Politics in Bosnia and Herzegovina' in Milan Bufon (ed), *The Western Balkans - A European Challenge* (Založba Annales 2006) 525, 526-528.

After *Milošević*, a third, more indirect and complex relationship developed between history and criminal intent at the ICTY.[26] The judges' growing emphasis on the factual circumstances of the crime militated against broad contextual and interpretative forms of evidence. Wilson noted that, '[c]oinciding as they did with the added imperatives of the ICTY's completion strategy, these jurisprudential developments reduced the incentives for prosecutors to integrate contextual and historical expert witnesses into their cases…'[27] Instead, the prosecution's focus needed to be narrowed to the point that it barely ventured outside the immediate circumstances of the actual crimes. An example of the new model was an expert report from the *Brđanin* trial focusing on the existence of local Bosnian Serb governing structures, rather than their interpretation or origins.[28] This approach could be referred to as microhistory. However, it is debatable whether it is history at all. The *Brđanin* report did not deal with remote events or their longitudinal development; it addressed how the Serbian crisis staffs operated at the time of the crimes - it served, therefore, as a contextualisation of the crimes themselves.[29]

The above overview of the changing role of history in the jurisprudence of the ICTY presents a complex dynamic and demonstrates that the relationship between judging international crimes and writing a history of an armed conflict 'cannot be characterized by either harmonious accord or inherent contradiction.'[30] The ambivalence over the appropriate role of writing history in international criminal trials is reflected in the wider scholarship, a subject which is considered next. Three main schools of thought may be identified here: (a) those who argue that it is not for courts to write history; (b) those who argue that historical

[26] Wilson (n 5) 111.
[27] Ibid., 120.
[28] Ibid., 124.
[29] Timothy W Waters, 'Book Review of Writing History in International Criminal Trials by Richard Ashby Wilson' (2012) 35 *Political and Legal Anthropology Review* 347–350.
[30] Wilson (n 5) 13.

discussions are inevitable in criminal trials; and (c) those who argue that, aside from being inevitable, such discussions are indeed desirable.

10.2.1. It is not for the Court to write history

In *Krstić*, the Trial Chamber acknowledged that its task was to decide on the guilt or innocence of the accused within the boundaries of the indictment, and it had to leave it 'to historians and social psychologist to plumb the depths of this episode of the Balkan conflict and to probe for deep-seated causes.'[31] This view has been echoed by courts in the domestic sphere, too. For instance, the Lausanne District Police Court, in considering the charge of genocide denial with respect to the defendant Perinçek, held 'it is not for the Court to write history.'[32]

Arguments from both law and sociology have been proffered in support of this position. In the legal field, liberal legalism holds that the sole function of a criminal trial is to decide on the criminal responsibility of the accused. For instance, the ICTY was established 'for the *sole* purpose of prosecuting persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia…',[33] and there was no explicit mandate to narrate the history of the armed conflict.[34] Thus, liberal legalism would posit that the Tribunal should not attempt 'to answer the broader questions of why a conflict occurred between certain peoples in a particular place and time, nor should it pass judgment on competing historical interpretations.'[35]

Another argument from the socio-legal field concerns the quality of the history written by courts. In view of a range of factors, including jurisdictional limits, evidentiary thresholds,

[31] *Krstić Case* (Judgment) ICTY-98-33 (2 August 2001) para. 2.
[32] Cited in Perinçek v Switzerland App no 27510/08 (ECtHR, 15 October 2015) para. 22.
[33] UNSC Res 827 (25 May 1993) UN Doc S/RES/827, para 2 (emphasis added).
[34] See below, at Section 4.
[35] Wilson (n 5) 3.

special categories of crimes, as well as other considerations, international criminal tribunals will invariably only ever be able to consider a limited number of crimes from any given conflict.[36] As such, they may only ever hope to produce a partial historical account of a conflict.[37] Moreover, some have emphasised the divergences in the methods and aims of law and history.[38] As a result of these differences, Wilson notes that:

> international tribunals can get the history of a country badly wrong when trying genocide cases as a result of their quest for certainty and fixity in defining ethnic groups. There always exists the possibility, and even the likelihood, that history is being oversimplified and misused in an international trial; that the prosecution's conception of nationalist history is overly deterministic, or that the defense's contextualization of the crimes bolsters a *tu quoque* defense in an effort to mitigate punishment.[39]

In a significant study, focusing on the question of whether it was desirable for non-criminal international tribunals to be employed in constructing collective memories, Hirsch considered three sociological perspectives: structural-functional, symbolic-interactionist and social conflict. He found that from two of these perspectives, it was not desirable for international courts to participate in constructing collective memory. From the perspective of symbolic interactionism, '[i]n light of the extreme socio-cultural diversity in the global community, it is doubtful whether meaningful collective memories can be formed by global

[36] See Koskenniemi (n 16) 10.
[37] Ibid., 11–12. In this context, the author notes: 'One of the few uncontroversial merits of truth commissions *vis-a-vis* criminal justice has been stated to lie in the way the former are able to canvass much more widely and deeply the criminality under scrutiny and thus to offer more opportunities for closure, healing and reconciliation.'
[38] See below, at Section 3.
[39] Wilson (n 5) 17.

tribunals (often detached from the relevant local communities).'[40] Furthermore, from a social conflict perspective, Hirsch noted that '[i]n light of tribunals' susceptibility to the development of historical narratives promoted by powerful actors, the social conflict perspective generally embraces a mistrustful attitude towards the involvement of tribunals in this sphere.'[41] Although Hirsch's comments relate to the role of courts in collective memory, they are to some extent also applicable to the writing of history.

10.2.2. Historical Discussions as Legally Relevant

Speaking in connection with the International Criminal Tribunal for Rwanda, its former President, Navanethem Pillay, held that the need for evidence on Rwandan history and culture in relation to certain trials was inevitable because it was legally relevant.[42] Pillay held that:

> [w]e judges agreed that you can't avoid this question of history of Rwanda, otherwise it's just one ethnic group killing another ethnic group with no reason why. History is necessary for an understanding of why the conflict occurred.[43]

From this view, therefore, the need for historical narratives reflects the nature of international criminal trials and the relative unfamiliarity of international judges with the history and culture of the region in which the alleged crimes were committed.[44] Peskin argued that, given their relative autonomy from nation-states and the special nature of the crimes they adjudicate,

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[40] Hirsch (n 13) 408.
[41] Ibid., 413.
[42] Wilson (n 5) 20.
[43] Ibid., 72.
[44] Koskenniemi notes that the need for historical contextualisation may not arise in domestic trials, even when the crimes were exceptionally shocking, as there would normally be 'little doubt about how to understand the relevant acts in their historical context' (Koskenniemi (n 16) 12).

historical discussions of armed conflicts were a necessary part of such trials.[45] He held that '[w]hether we like it or not, historical discussions are here to stay at international tribunals.'[46] Moreover, from a structural-functional perspective, Hirsch noted that 'the formation and spreading of unifying international memories that are likely to enhance international social integration.'[47]

Historical discussions are particularly pertinent to those categories of crimes, such as genocide and persecution, that require proof of discriminatory intent. For instance, the crime of genocide requires proof of *dolus specialis* on the part of the accused, in that, the accused must have acted with intent to destroy, in whole or in part, a protected group, as such. Thus, particularly in the absence of specific documentation evidencing such intent, the prosecution case may be assisted if the prosecution can connect violent methods with political and historical objectives which were held by the accused.[48] In such cases, recourse to historical discussion is inevitable because it is legally relevant to elaborate the *mens rea* requirements. Similar considerations may apply to other categories of crimes, such as crimes against humanity, which need to be 'widespread and systematic', implying a close examination of both the historical and social settings in which those crimes occurred.[49]

10.2.3. Courts Uniquely Capable of Documenting Complex Wartime Narratives

Some have argued that, in view of the structures, powers and procedures of international tribunals, not least their painstakingly sifting through large bodies of evidence, they are

[45] Victor Peskin, 'Seeing Like a Court: Documenting Histories of Armed Conflict through the Lens of Judging International Crimes' (2013) 35 Human Rights Q 769, 771.
[46] Ibid.
[47] Hirsch (n 13) 406.
[48] Wilson (n 5) 21.
[49] Ibid.

particularly well-suited to engage in reliable historical discussions.[50] Peskin noted that, for many observers, international criminal tribunals were uniquely capable of documenting complex wartime histories rigorously and impartially, and by doing so could help lay the foundations for nation-building and national reconciliation. International criminal tribunals are regarded as the most authoritative truth finders at the top of a hierarchy of officially produced knowledge in which the reports of United Nations commissions and expert groups occupied the next rung down.[51]

In an address to the UN General Assembly in the early years of the ICTY, Antonio Cassese, the Tribunal's first President, held that the institution was creating 'a historical record of what occurred during the conflict thereby preventing historical revisionism.'[52] Subsequently, Cassese made the point that ensuring the history of atrocities was not forgotten was important not only for those who survive: '[f]orgetting means that victims are murdered twice: first, when they are exterminated physically, and thereafter when they are forgotten.'[53]

In her report to the UN Security Council and the General Assembly, the former President of the ICTY, Judge Gabrielle Kirk McDonald placed emphasis on the Tribunal's history writing role. While acknowledging that the ICTY's primary purpose was the prosecution of persons responsible for serious violations of international humanitarian law, she held: '[i]n addition, through its judicial proceedings the Tribunal establishes a historical record which provides the basis for the long-term reconciliation and reconstruction of the region.'[54] McDonald held further that '[i]n creating a historical record, the Tribunal has a significant

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[50] Groome (n 8) 176, 187.
[51] Peskin (n 45) 770.
[52] Address of Antonio Cassese, President of the International Criminal Tribunal for the Former Yugoslavia, to the General Assembly of the United Nations, 4 November 1997 – as quoted by Michael Karnavas ('Gathering Evidence in International Criminal Trials – The View of the Defence Lawyer', in Michael Bohlander, Cameron May (eds), *International Criminal Justice: A Critical Analysis of Institutions and Procedures* (May Publishers 2007) 77).
[53] Antonio Cassese, *International Criminal Law* (OUP 2003) 5.
[54] UN General Assembly 'Fifth Annual Report of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991*'* (7 August 1998) UN Doc A/53/219, para. 202.

contribution to make to the creation of conditions conducive to an objective assessment of the events of this decade…'.[55]

Some have gone so far as to argue that, in cases of conflicts involving mass atrocities, because punishing a few individuals could never come close to measuring up to such crimes, establishing historical narratives of the events should be one of the most important functions of international criminal tribunals, possibly more so than punishing the perpetrators.[56] Such historical accounts were necessary to enable the commencement of the healing process for the victims and for didactic purposes, 'for teaching younger generations of the dangers involved in particular policies.'[57]

As may be seen from the above, therefore, there is considerable disagreement over the appropriate role of writing history in international criminal trials, and recognition that this is a complex and contingent question. This ambivalence may, in part, stem from the diverging methods and aims of law and history, a subject which is explored next.

10.3. The Methods and Aims of Law and History

The aversion of some historians towards courts as writers of historical accounts, built upon a perceived distinction of simplified judgements of the law on one hand and complex contextualization and interpretation of history on the other, is not always well-grounded.[58] This is because the adversarial settings of courts, allowing for rigorous examination of competing

[55] Ibid., para. 286.
[56] Koskenniemi (n 16) 2-3.
[57] Ibid., 4-5.
[58] Frederik Forrai Oerskov, 'The Truth, the Whole Truth and Nothing but The Truth: The Historian, The Court, and The David Irving Trial' (2016) Historiography: Themes in Its History and Approaches to Its Theory 4 <https://www.academia.edu/25720564/The_Truth_the_Whole_Truth_and_Nothing_but_the_Truth_The_Historian_the_Court_and_the_David_Irving_Trial> accessed May 2019.

arguments, as well as detailed scrutiny of extensive evidence, may contribute to creating 'a firm baseline of understanding' of events.[59] It is considered that there is much common ground in the aims and methods of law and history, and the two are not necessarily irreconcilable. The starting point for this discussion, therefore, is that overstressing the points of divergence could serve to forestall a deeper appreciation of how they are effectively combined in international criminal trials.[60]

Moreover, Hirsch observed that, in the marketplace of memory, in writing historical narratives of conflicts, tribunals would be competing against other agents of memory, including diverse state and non-state actors such as political parties, historians, the mass media, and NGOs.[61] With this in mind, the real question should be: in a context were other agents of memory, some of which would be far less reliable than tribunals, would be more than ready to step in, would it be desirable that international tribunals would not be active in this field?

Nevertheless, there are important differences between legal and historical approaches. Law's epistemology is positivist and realist, demanding definite and verifiable evidence. In determining criminal responsibility, courts often endorse one narrative of events above all others. History, on the other hand, is more pluralistic and interpretative, and may integrate the elements of competing accounts. Wilson notes that '[h]istorians often recognize that historical truths are provisional and that their evidence and conclusions are not always verifiable or free of ambiguity.'[62] On the one hand, historians would consider it pretentious to say they were searching for 'the Truth.'[63] On the other, with the exception of some radical postmodernists, most historians would demand some level of accuracy of historical claims. As one historian put it:

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[59] Wilson (n 5) 220. However, some have argued that 'institutional incentives and legal strategies can lead to the pursuit of incomplete and inaccurate histories' (see Peskin (n 45) 778).
[60] Wilson (n 5) 218.
[61] Hirsch (n 13) 394.
[62] Wilson (n 5) 7.
[63] Zagorin (n 12) 209.

> we continue to appraise all knowledge-claims for their degree of truth; and to require good arguments, conformity to logic, sound evidence, objectivity, reasons that can withstand criticism, and, in general, rational support and justification for beliefs and propositions about the world and the human past...[64]

In this context, although early ICTY judgments made grand claims about discovering the Truth as 'a cornerstone of the rule of law and a fundamental step on the way to reconciliation',[65] later judgments presented more qualified claims, noting that 'the "truth" can never be fully established or satisfied.'[66] Therefore, it would appear that there is some level of convergence between law and history in this area.

However, there are also differences, including in relation to rules on the admissibility of evidence[67] and standards of proof, as well as questions of agency and causation. In determining criminal responsibility, criminal courts seek linear connections between actions and focus on the role of individual agency and subjective intentions. History, on the other hand, recognizes multiple layers of causality and intentions, recognising that 'the meaning of historical events often exceeds the intentions or actions of particular individuals and can be grasped only by attention to structural causes.'[68] While lawyers are therefore more likely to reduce the historical context in order to isolate particular events and attribute criminal responsibility, historians generally espouse a more multi-layered outlook, which is based on

[64] Ibid., 207.
[65] *Erdemović Case* (Sentencing Judgment) ICTY-96-22 (5 March 1998) para. 21.
[66] See *M. Nikolić Case* (Sentencing Judgment) ICTY-02-60/1 (2 December 2003) para. 60, referring to *Blagojević et al. Case* (Guidelines on the Standards Governing the Admission of Evidence) ICTY-02-60 (23 April 2003).
[67] Discussed in Section 4.
[68] Koskenniemi (n 16) 13-14.

the view that 'any single human act is embedded in an intricate matrix of causal relations,'[69] and which may also accommodate incoherence and serendipity.[70]

Another significant divergence concerns taxonomy and conventions. Law comprises several special categories and conventions (such as temporal prescription) which require criminal courts to perceive historical events through specific and idiosyncratic lenses, which may be different from the lenses used in history and other social sciences. For instance, with respect to the legal definition of genocide under the 1948 Genocide Convention, which is the prevailing definition in law and has been accepted by the ICTY,[71] one historian wondered '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?'[72]

While international criminal tribunals suffer from some significant limitations regarding the development of historical narratives, they are not necessarily less reliable or effective than other agents of memory. Hirsch observes that in many cases, when compared with other agents of memory (e.g., the mass media, national governmental bodies or historians), international criminal proceedings 'tend to mitigate inequalities and often provide more opportunities to additional parties to present their evidence.'[73]

Moreover, international tribunals often enjoy enhanced legitimacy and attract widespread attention.[74] On balance, therefore, it may indeed be desirable for international criminal tribunals to contribute towards the writing of historical narratives of conflicts.

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[69] Wilson (n 5) 217.
[70] Thijs Pollmann 'Coherence and Ambiguity in History' (2000) 39 History and Theory 167; and William M Reddy, 'The Logic of Action: Indeterminacy, Emotion, and Historical Narrative' (2001) 40 History and Theory 10, 11.
[71] This definition of genocide was reflected verbatim in the Rome Statute of the International Criminal Court.
[72] Jacques Sémelin, *Purify and Destroy: The Political Uses of Massacre and Genocide* (Hurst 2013) 321. Indeed, at 311 *et seq.* the author points to significant divergences over the definition of genocide in the social sciences.
[73] Hirsch (n 13) 417.
[74] See, for instance, Nikolas Rajkovic, 'On 'Bad Law' and 'Good Politics': The Politics of the ICJ Genocide Case and Its Interpretation' (2008) 21 *Leiden Journal of International Law* 885, 893.

However, an important factor which has to be taken into consideration when assessing their narratives is the specific lenses which frame their approach. With respect to the ICTY, one factor by which the Tribunal's approach was influenced was the changing rules of admissibility of evidence, a subject which is considered next.

10.4. The Impact of the Rules on Admissibility of Evidence on History Writing

As noted above, the UN Security Council resolution establishing the ICTY did not explicitly accord the Tribunal a history writing function. Nonetheless, despite the lack of references to such a function in the Statute, it may be argued that through the attribution of primacy over national jurisdictions (Article 9) in relation to the prosecution of the conducts which '*prima facie*' could have been qualified as crimes under Articles 2 to 5, the Tribunal has also been conferred a primary role over the *narrative* of the related events. On the procedural level, the Statute stipulates that – provided that it determined that a *prima facie* case existed – the prosecution has to prepare indictments containing concise statements of the facts and crimes charged (Article 18, para. 4), while the Trial Chambers have a legal duty to ensure that the trial is fair and expeditious (Article 20, para. 1).

Section 2 discussed the three main phases in the ICTY's approach to history writing. Significantly, these phases were broadly reflected in three subsequent amendments to the Rules of Procedure and Evidence ('RoPE' or 'Rules').[75]

[75] International Criminal Tribunal for the former Yugoslavia, Rules of Procedure and Evidence (entered into force 14 March 1994) UN Doc.IT/32.

In fact, considering that the crimes charged rested on a particular personal disposition of the accused towards the victims (specially in relation to persecution), in the first trial held before the Tribunal (*Tadić*) the Prosecution sought the admission of evidence consisting in comprehensive accounts of the Balkans history through the testimony of expert witnesses. Having deemed those accounts as 'relevant evidence' with 'probative value' (in compliance with Rule 89(C) of the Rules), the Trial Chamber dedicated several hearings to the direct and cross-examination of such experts.[76] As a result, *Tadić* Trial Judgement conveyed a long history of the Balkans, summarized in 73 paragraphs under the header 'The context of the conflict' (see Section 2).[77]

This was possible because at the time the *Tadić* trial was held, the rules on the admissibility of evidence were informed by the adversarial model. According to Rule 85(A), for instance, the parties chose the respective expert witnesses, determined the subject of their testimony, provided them with the materials on which they had to testify, and prepared them for direct and cross-examination. Under such a system, the parties were allowed to 'shop for favorable expert testimony,' select one that would be 'compatible with their position and "theory of the case"', and give him/her the materials which more likely would confirm it.[78]

In 1998, some inquisitorial features were introduced to the RoPE, respectively allowing the judges to limit the number of witnesses called by the parties to provide testimony about the same issue (new Rules 73*bis* and 73*ter*), and the parties to get written statements of expert witnesses admitted into evidence without calling the witness to testify in person, if the other party did not request to cross-examine him/her (new Rule 94*bis*).[79]

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[76] In particular Dr. James Gow, Lecturer of the Department of War Studies at King's College (London), called as Prosecution witness, was examined for three and a half days.
[77] See *Tadić Judgement* (n 14).
[78] See Ksenija Turkovic, 'Historians in Search for Truth about Conflicts in the Territory of Former Yugoslavia as Expert Witnesses in front of the ICTY' (2004) 36 Časopis za suvremenu povijest (J of Contemporary History) 41, 51.
[79] International Criminal Tribunal for the former Yugoslavia, Rules of Procedure and Evidence (entered into force 14 March 1994) UN Doc.IT/32/Rev.13 (adopted 9-10 July 1998).

A second amendment, adopted in December 2000, permitted the admission into a case of written statements – including in the form of reports relating to the relevant historical, political or military background, unless the other party sought to prove the evidence unreliable or prejudicial or requested cross-examination, or the judges deemed the cross-examination appropriate (new Rule 92*bis*).[80] In December 2002, by amending Rule 94*bis*, the opposing party was attributed the faculty to challenge the expert's qualifications, or the relevance of (parts of) his/her report.[81]

Finally, a significant shift in the prosecutorial strategy would result from the 'post-*Milošević*' decision to adopt a strict crime-based approach and limit the scope of those reports,[82] which was recommended to the Prosecution by the duty to meet the request to expedite the proceedings, sanctioned by the UN Security Council in the Resolution 1503/2003.

These successive amendments to the RoPE – and particularly the new Rule 92*bis*, with respect to the admission at the trial of written statements relating to historical background, as long as they are not challenged by the parties – could have a direct impact on the quality of historical information admitted at trial.

An analogous criticism may be moved in relation to 'adjudicated facts': the decision to amend Rule 94[83] in order to allow a trial chamber to take judicial notice of facts or documentary

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[80] International Criminal Tribunal for the former Yugoslavia, Rules of Procedure and Evidence (entered into force 14 March 1994) UN Doc.IT/32/Rev.19 (adopted 1 and 13 December 2000).

[81] International Criminal Tribunal for the former Yugoslavia, Rules of Procedure and Evidence (entered into force 14 March 1994) UN Doc.IT/32/Rev.26 (adopted 12 December 2002).

[82] As recalled by one Prosecution expert witness, reports would focus on the circumstances immediately surrounding the alleged crimes, dealing with individual towns or regions where the accused conducted their deeds and seeking to explicate the political culture in which the perpetrator came to wield power (see Robert Donia, 'Encountering the Past: History at the Yugoslav War Crimes Tribunal' (2004) 11 The Journal of the International Institute <http://quod.lib.umich.edu/j/jii/4750978.0011.201/--encountering-the-past-history-at-the-yugoslav-war-crimes?rg n=main;view=fulltext> accessed May 2019).

[83] A Letter (B) was introduced by an amendment adopted in July 1998 (see *supra* note 64), and interpreted as conferring the Trial Chamber a discretionary power to narrow the issues at trial, under the condition, among other things, that those facts were relevant to the case, had been settled by an Appeals Chamber, and didn't go to the accused's act, conduct or mental state (see, *ex plurimis*: *Z. Kupreškić et al. Case* (Decision on the Motions of Drago Josipović, Zoran Kupreškić and Vlatko Kupreškić to admit additional evidence pursuant to Rule 115 and for judicial notice taken pursuant to rule 94(B)) ICTY-95-16 (8 May 2001) para. 6; and *Prlić et al. Case* (Decision on Motion for Judicial Notice of Adjudicated Facts Pursuant to Rule 94(B)) ICTY-04-74 (14 March 2006) para. 12.

evidence 'validated' in a previous judgement certainly promotes judicial economy, but at the same time significantly affects the quality of the historical accounts provided by the tribunal.

In fact, in both circumstances the parties will focus their resources on challenging documents containing historical information of direct relevance to aspects of their case.

Once again, the *Milošević* trial represents a watershed in the tribunal's history. More than any other case, it was exemplary of the impact the inherent tension between history writing and determining the criminal responsibility of the accused may have on a trial. This tension is reflected in the apparently explanatory warning given by the Chief Prosecutor Carla Del Ponte during the Prosecution's opening statement, that 'it is Slobodan Milošević's personal responsibility which the Prosecution intends to demonstrate for the crimes ascribed to him, nothing but that, but all of that.'[84]

Due to the accused's position (as President of Serbia and of the Federal Republic of Yugoslavia) and the implications of the modes by which the Prosecution intended to attach liability to him (the participation to three different joint criminal enterprises (JCE), in relation to the conflicts in Kosovo, Croatia, and Bosnia respectively), and also in light of the decision to join three indictments in one single trial,[85] in order to prove *all of* Milošević's personal criminal responsibility vis-à-vis conducts occurring between 1991 and 1999, the Prosecution was required to present a comprehensive narrative of the disintegration of Yugoslavia – or, as noted by Wilson, a 'monumental history' of the conflict.[86] In fact, Del Ponte's proclamation that the Tribunal 'will write only one chapter, the most bloody one'[87] of such history not only

[84] *Milošević Case* (Public Transcript of Hearing) ICTY-02-54-T (12 February 2002) 11.
[85] As recalled by Carla Del Ponte, the Prosecution's strategy was 'to join the three indictments, relying on a JCE theory whose unifying element was a plan to establish a Greater Serbia' (Carla Del Ponte, 'Difficulties for the participants – Indictment Correct, Trial Impossible', in Timothy W Waters (ed), *The Milošević Trial – an autopsy*' (OUP 2013) 138).
[86] Wilson (n 5) 86.
[87] *Milošević Trial Transcript* (n 84) 10.

collided with the implied duty to historically contextualize Milošević's actions, but also – and most of all – with Milošević's *right* to challenge the Prosecutor's version and to present his own narrative. A corollary to this right was that he would be allowed to challenge the Prosecution's narrative by arguing that the trial had the aim of asserting the collective responsibility of Serbia, and that his role would thus be 'to defend, not merely himself, but the whole nation.'[88] Moreover, Milošević's plan would benefit from the Court's decision to allow him to defend himself.[89] As emphatically put by Veton Surroi, '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]

In the end, according to Carla Del Ponte '[t]he main factor contributing to the trial's length was the Rules of Procedure and Evidence.'[91] In her view, to prevent this from happening, the Court should have not only placed significant restrictions on the time and scope of the Defence case, but also on the subject-matter of proposed witness testimony – a choice that the judges would later make *on the basis* of the lessons learned during the *Milošević* trial.[92] However, the Appeals Chamber held that to introduce such restrictions only on the Defence case would violate the principle of basic proportionality enshrined in Article 21 of the Statute, the only viable option for a Chamber would be to implement an aggressive case management plan with respect to the Prosecution case.[93]

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[88] Timothy W Waters, 'The Trial – IT-02-54, *Prosecutor v Milošević*' in Waters (n 85) 58.
[89] Ibid., 67-69 (arguing that even if this strategy may have negatively affected his chances of being acquitted, he gained a unique opportunity 'of influencing his legacy and politics in Serbia'). In the same spirit, see Carla Del Ponte (Del Ponte (n 85) 146), arguing that Milošević 'did not even bother to mount a proper defense', and instead 'chose to present a political defense, to speak directly to his constituents in Serbia, to exploit each trial day … as an opportunity for political diatribe.'
[90] Veton Surroi, 'Conversations with Milošević – Two Meetings, Bloody Hands', in Waters (n 85) 225-226.
[91] Del Ponte (n 85) 140.
[92] Waters ('Biopsy – The Legacies of Milošević', in Waters (n 85) 489) argued that '[t]he tighter grip shown by judges in more recent trials of prominent accused is in part a practice directly drawn from the lessons of Milošević, in part as a consequence of changed rules … that themselves derive from the experience of that trial', and that 'the pressure to shorten trials … derives principally from the recognition of how long the *Milošević* trial was ….'
[93] See Gideon Boas, *The Milošević trial: Lessons for the Conduct of Complex International Criminal Proceedings* (CUP 2007) 194-195 – referring to the Appeals Chamber's decision in *Orić* (*Orić* case (Interlocutory Decision on Length of Defence Case) ICTY-03-68 (20 July 2005) paras. 5-7). On the other hand, Carla Del Ponte argued that '[a] tribunal's trial chamber should refrain from unilaterally shrinking complex leadership cases' (Carla Del Ponte,

This even-handed approach of the ICTY was necessary in order to prevent what Koskenniemi[94] has described as 'show trials', namely trials which silence the accused and seek to convey unambiguous historical truths to their audience. The price to pay in safeguarding the trial's legitimacy consists in granting that judges will construct facts out of what the parties are able to bring forward (in compliance with the procedural techniques informing the admission of evidence). In other words: in order for the trial to be fair, the accused must be entitled to challenge the Prosecution's version of the truth.

Irrespective of the approach adopted in the rules on the admission of evidence, a critical choice seems to rest with the Prosecution: that is to determine, by broadening or narrowing the scope of an indictment, how much history – and how much *competing* history – would be allowed into the trial.[95]

As a result, it must be acknowledged that especially due to the recognition of equality of arms between the parties, international criminal trials are not primarily concerned with writing a comprehensive historical narrative of conflicts, since the judges are at best in a position to provide a balanced, but nevertheless partial truth – a truth which is very much

Chuck Sudetic, *Madame Prosecutor – Confrontations with Humanity's Worst Criminals and the Culture of Impunity* (Other Press 2009) 376).

[94] Koskenniemi (n 16) 33-35.

[95] However, for the enormous documentary record produced by the Prosecution with regard to Milošević Trial 'can provide historians with access to materials they might never have been able to assemble,' it can be considered as 'a gift to historiography' (Waters (n 88) 73 – in the same spirit, see also Florian Bieber, 'Do Historians Need a Verdict?', in Waters (n 85) 352). Furthermore, since ICTY support in the Balkans was often based on the assumption that once a record was established by the tribunal, it would be difficult for local societies not to acknowledge the truth – that atrocities were committed –, this acknowledgment may also facilitate reconciliation (see Diane F Orentlicher, 'That Someone Guilty Be Punished – The Impact of the ICTY in Bosnia' *International Centre for Transitional Justice* and *Open Society Justice Initiative* (2010) 42-43, 89-100 <https://www.ictj.org/sites/default/files/ICTJ-FormerYugoslavia-Someone-Guilty-2010-English.pdf> accessed May 2019). As highlighted by Carla Del Ponte (Del Ponte Sudetic (n 93) 371-372), the Tribunal's record, 'if historians, writers, and journalists do their jobs effectively, will make it difficult for future demagogues in Croatia, Serbia, Bosnia and Herzegovina, Macedonia, and Kosovo to foment interethnic hysteria,' because '[t]hanks to the tribunal's work, no one group in the lands of the former Yugoslavia … can proclaim itself a victim and nothing else.' In fact, the evidence gathered during the trial may have 'an effect on how future generations understand the region's history and how the conflicts came to pass' ('Weighing the evidence – Lessons from the Slobodan Milosevic trial' (*Human Rights Watch*, December 2006) 1 <https://www.hrw.org/sites/default/files/reports/milosevic1206webwcover.pdf> accessed May 2019.

framed within a tribunal's specific lens and the Parties' narratives, and which will be addressed below as *judicial truth*.[96]

10.5. The Involvement of Third Parties: 'Contextual' Allegations as Quasi-Criminal Responsibility?

The new architecture on the admission of evidence, together with other factors including resource limitations of the parties, could tend to allow for less rigorous scrutiny and acceptance of statements not affecting the accused's position. As discussed below, the information deemed irrelevant or not detrimental to the latter's case, including that related to the involvement of third parties in the commission of crimes, has been admitted at trial – and eventually referred to in the judgements. Moreover, and even more worryingly, two prominent corollaries to the right to a fair trial – the right to defend oneself from accusations and the right to confront witnesses – have only been applied in relation to living persons.

The findings related to an accused standing trial in a separate case are barred from being admitted against him/her under Rule 94, since the only option available to the Prosecution is the joining of investigations or trials (Rules 48 and 82). On the other hand, ICTY basic documents do not afford much protection to the deceased,[97] either in terms of limits to the admissibility of evidence or by granting a standing to a counsel/representative. The only

[96] In this regard, it has also been noted that when the statements of historians who appear as expert witnesses are challenged, the Trial Chamber may decide to resolve the issue 'by adopting appropriately neutral language' (*Tadić Judgement* (n 14) para. 54). In such circumstances, the judges may in fact prefer to 'sort through the contradictory opinions of competing experts' by 'removing the weight of such evidence' or even by 'removing expert evidence from consideration altogether' (see Artur Appazov, *Expert Evidence and International Criminal Justice* (Springer 2016) 7).

[97] According to Rule 54 the Trial Chamber has to terminate proceedings in case of the death of the accused (see: *Hadzić Case* (Order Terminating the Proceedings) ICTY-04-75 (22 July 2016)). *A fortiori*, a person deceased before the initiation of the investigation can't be qualified as suspect (and be granted the suspect's rights).

instrument available is the request to appear as *amicus curiae*, which a Trial Chamber can grant (to a person, an organization, or a State) 'if it considers it desirable for the proper determination of the case' (Rule 74).

Two cases may provide a clearer understanding of the implications of this legal shortcoming. In *Prlić* case, the Trial Chamber dismissed a request for leave to appear as *amicus curiae* filed by the Government of the Republic of Croatia – wishing to clarify issues related to 'the participation of the political and military leaders in the joint criminal enterprise' alleged in the indictment, including the then President Franjo Tuđman – because such submissions 'shall be limited to questions of law', whereas the points raised by Croatia went 'far beyond the scope of the indictment', and the appearance of the State 'would not be in the interests of justice'.[98]

Due to the political impact of the subsequent reference to President Tuđman as a member of the JCE in *Prlić* Trial Judgement,[99] in 2016 the Croatian Government filed a new request for leave to appear as *amicus curiae* at the appeals phase. In dismissing the request, the Appeals Chamber emphasised that 'findings of criminal responsibility made in a case before the Tribunal are binding only on the accused in a specific case', and that the Trial Chamber 'made no explicit findings concerning [the] … participation in the JCE' and thus did not find Tuđman guilty of any crime, since in light of the presumption of innocence the findings 'regarding the mere existence and membership of the JCE do not … constitute findings of criminal responsibility of any persons who were not charged and convicted in the case' and 'on the part of the state of Croatia'.[100]

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[98] *Prlić et al. Case* (Decision on Request by the Government of the Republic of Croatia for Leave to Appear as *Amicus Curiae*) ICTY-04-74 (11 October 2006) paras. 4-5.

[99] See, *inter alia*: 'Hague judges jail Bosnian Croat leaders, condemn Tudjman' *Deutsche Welle* (29 May 2013) <http://www.dw.com/en/hague-judges-jail-bosnian-croat-leaders-condemn-tudjman/a-16846447> accessed May 2019.

[100] *Prlić et al. Case* (Decision on Application by the Republic of Croatia for Leave to Appear as *Amicus Curiae* and to Submit *Amicus Curiae* Brief) ICTY-04-74 (18 July 2016) para. 9.

On the other hand, factual findings made in *Karadžić* Trial Judgement[101] were invoked by the Serbian Government in the days following its issuance as constituting a legal finding on Slobodan Milošević's – and the then Serbian Government's – non-involvement in the genocidal campaign conducted around Srebrenica in 1995.[102] The heated reactions spurred by these statements forced ICTY Prosecutor Serge Brammertz to step in and highlight that '[t]he only person on trial in Karadžić's case was Karadžić', and 'while Milošević did not face final judgement in the courtroom, the facts and evidence [discussed during his own trial] remain'.[103]

The above two examples show that, as a consequence of the new architecture on the admission of evidence, even though historical information introduced at trial may not be directly objectionable to the parties in the case, it is far from neutral and could have an impact on the historical narrative. In these two cases, historical and political discussions took centre stage, and a different organ of the Tribunal had to recall that in accordance with a basic corollary to the principle of legality, the presumption of innocence, such findings have no impact on the criminal liability of persons who were not charged in the specific case.

In conclusion, problematic as it may be, in some cases international criminal tribunals will be required to engage in assessing historical events also in relation to un-indicted or deceased individuals. However, it will rest with the judges and outreach programs to clarify that those findings cannot be equated with the determinations on the criminal responsibility of the third parties involved. Such historical assessments will moreover remain 'as one piece of the puzzle in reconstructing particular events.'[104]

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[101] *Inter alia*, the Trial Chamber found that '[b]y May 1995, it appeared to international representatives that the split between Slobodan Milošević and the Accused was complete' (*Karadžić Case* (Public Redacted Version of Judgement Issued on 24 March 2016) ICTY-95-5/18 (24 March 2016) para. 3296).

[102] Sasa Dragojlo, 'Milosevic's Old Allies Celebrate His "Innocence"' *BIRN* (Belgrade, 16 August 2016) <http://www.balkaninsight.com/en/article/milosevic-s-old-allies-celebrate-his-innocence--08-16-2016> accessed May 2019.

[103] Serge Brammertz, 'Slobodan Milosevic is no hero' *Al Jazeera* (24 August 2016) <http://www.aljazeera.com/indepth/opinion/2016/08/slobodan-milosevic-hero-160823124808287.html> accessed May 2019.

[104] Bieber (n 95) 355.

10.6. Conclusion

Through its case law, and detailed and well-substantiated records of particular incidents and events, the ICTY has provided a body of evidence that is invaluable for historians. Its contribution towards a better understanding of the history of the region will last long after the trials have completed. However, this paper has argued that the evolution of the relationship between criminal adjudication and the writing of historical narratives at the ICTY represents one of the most important lessons for future tribunals.

Absent of a clear demarcation of its mandate in relation to history-writing, the Tribunal's organs found themselves embroiled in deliberations concerning the historical context of the crimes. In fact, early on, the Prosecution intended its mandate to prosecute the gravest crimes committed during the conflict as implying a duty to convey 'grand narratives' of the events (irrespective of the weak causal relationship with the charges).

In the following years, and especially after the proceedings against Slobodan Milošević collapsed, the prosecution adopted a narrower crime-based approach. In the same period, the UN Security Council imposed upon the ICTY the so-called 'completion strategy': in order to meet the request to expedite proceedings, among other things the Tribunal had to substantially amend the rules on the admission of evidence, reducing the role of lengthy historical analyses and historian expert witnesses.

As a result, later judgements generally contain historical information which had been deemed directly linked to the charges. Moreover, the judges adopted a more neutral approach, to the point that they would ignore expert evidence when confronted with contradictory narratives which were challenged by the parties. Having, on the other hand, subjected the historical information not objected by the parties to a lesser level of scrutiny, they have been

forced to clarify that the judgements have no impact on those persons who had not been charged.

As a matter of fact, the ICTY has been an extraordinary recipient of documents and evidence of substantial historical value. As recalled in the Fifth Annual Report on its activities, not only did the Tribunal contribute to developing a historical narrative of the conflict, but it also disseminated information widely, through its outreach programme, within the former Yugoslavia, thus empowering people and enabling them to challenge and change the culture which had led to the conflict.[105]

However, to argue that this Tribunal – and international criminal tribunals in general – are in the position to provide an 'authoritative' and definitive account of historical events connected to the conduct they are called to assess is to overburden them. First of all, because – as demonstrated in this paper – such a conclusion could only be reached by overlooking the essential difference between the methods and parameters respectively informing the quest for historical and judicial truths. And most of all, because no trier of fact is in the position to provide an authoritative account of events, for a criminal tribunal approaches history from its own specific lens, and is bound by procedural norms imposing conditions on the admissibility of evidence.[106] It is ultimately primarily concerned with information related to the criminal responsibility of the accused. As underlined by Florian Bieber, '[e]ven if a Court were understood to produce "definitive histories of conflicts[,]"…the judicial process inherently focuses on determining the guilt of an individual', and thus the historical record it produces 'is inherently a by-product, not its purpose.'[107]

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[105] Fifth Annual Report (n 54) paras. 296-297.

[106] In this regard, Sander underlines that 'rather than the result of neutral acts of deduction, judicial narratives inevitably depend on the choices made by the multiplicity of actors who interact within international criminal proceedings', including 'the ability of the prosecution and defence teams to access evidence, prosecutorial charging policies, the procedural and evidential framework relied upon to admit, scrutinize and evaluate evidence, and the interpretation of substantive legal categories' (Barrie Sander, 'History On Trial: Historical Narrative Pluralism Within And Beyond International Criminal Courts' (2018) 67 *International and Comparative Law Quarterly* 547, 574).

[107] Bieber (n 95) 350.

One of the most significant legacies of the ICTY is, in fact, the acknowledgement that what international criminal tribunals are able to provide is a *judicial* truth, consisting in a version of the events based upon the evidences tendered and deemed admissible and credible in accordance with the rules and the context of the trial.[108] Instead of being treated as authoritative narratives, international criminal tribunals' findings on distant or contextual historical events, as well as those related to third parties should better be characterized as 'a discursive beginning for the examination of particular episodes of mass violence.'[109] Accordingly, as suggested by Hirsch, when international tribunals are bound to establish historical facts in order to grasp the contextual background of the crimes, it seems desirable that tribunals:

> acknowledge that the particular historical narrative presented in their judgment is provisional, and based on the specific legal context and facts available to them (and not rule out the development of alternative historical accounts in different contexts).[110]

In conclusion, since as pointed out by the Trial Chamber, (international) criminal tribunals are not the arbiters of historical facts,[111] recalling an observation made by Hannah Arendt in relation to the *Eichmann* trial in Jerusalem, it is now as then necessary to keep in mind that 'even the noblest of ulterior purposes … can only detract from law's main business: to weigh the charges …, to render judgement, and to mete out punishment'.[112]

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[108] Ibid., 351.
[109] Sander (n 106) 575.
[110] Hirsch (n 13) 411.
[111] *D. Nikolić Case* (Sentencing Judgement) ICTY-94-2 (18 December 2003) para. 122.
[112] See Hannah Arendt, *Eichmann in Jerusalem. A Report on the Banality of Evil* (Viking 1965) 253.