

# THE METHOD IS THE MESSAGE: LAW, NARRATIVE AUTHORITY AND HISTORICAL CONTESTATION IN INTERNATIONAL CRIMINAL COURTS

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*International criminal courts produce extensive historical records concerning the mass atrocity situations that fall within their purview. To date, existing scholarship has tended to examine the historical function of these courts based on two key assumptions: first, that the centre of narrative authority within international criminal courts resides in their judgments; and secondly, that the historical narratives constructed within international criminal judgments are inevitably restricted by the legal categories that shape their form and substance. Taking these twin assumptions as its point of departure, this article seeks to develop a more nuanced understanding of the historical function of international criminal courts, first by revealing how international criminal courts are contested terrains in which narrative authority is dispersed, and secondly by illuminating how the adaptability of legal categories can generate narrative dissensus between international criminal judges both within and across particular cases. In this way, rather than constructing universal historical narratives about mass atrocity situations, this article reveals international criminal courts to be narrative battlegrounds characterised by competing claims of authority and contested understandings of history.*

## CONTENTS

I	Introduction.....	2
II	The Dispersal of Narrative Authority in International Criminal Courts .....	4
III	Interpretive Method and the Adaptability of Legal Categories in International Criminal Courts.....	8
IV	Three Case Studies: Legal and Historical Dissensus in International Criminal Courts.....	16
	A    Crimes against Peace at the IMTFE .....	16
	1    The Majority Judgment .....	17
	2    Justice Röling .....	20
	3    Justice Pal.....	21
	4    Narrative Implications of Legal Dissensus over Crimes against Peace .....	23
	B    Forced Marriage at the SCSL .....	23
	C    Duress at the ICTY .....	28
	1    The Majority Judgment .....	30
	2    The Minority Opinions.....	32
	3    Narrative Implications of Legal Dissensus over Duress .....	34
V	Conclusion: The Method Is the Message.....	35

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## I INTRODUCTION

In recent years, the field of international criminal justice has become increasingly self-reflective. The unflinching enthusiasm that initially characterised its kinetic institutionalisation in the 1990s has been tempered.<sup>1</sup> Whereas critical engagement with international criminal justice was once the exception, clouded by the aspirational faith of its stakeholders,<sup>2</sup> today the field is characterised by a heightened concern to manage expectations and question its founding assumptions.<sup>3</sup> Even in this critical climate, however, it is important to recognise that certain functions of international criminal courts are inescapable in light of their inherent connection to the adjudicative task of determining the culpability of the accused.

One such intrinsic function is what may be termed the *historical function* of international criminal courts — the capacity of such courts to produce historical records concerning both the accused and the broader mass atrocity situation in which they are alleged to have participated.<sup>4</sup> As Fergal Gaynor has observed, '[a]ny trial involving top military or political leaders, where the trial record incorporates thousands of documents and the testimony of hundreds of witnesses, *can hardly avoid* creating a historical record'.<sup>5</sup>

The inescapability of the historical function of international criminal courts is reflected in the close association between adjudicative justice and establishing the truth.<sup>6</sup> At the International Criminal Court ('ICC'), for example, the importance of truth to adjudicative justice is reflected in various legal provisions that require the Prosecutor to 'establish the truth',<sup>7</sup> authorise the Court 'to request the submission of all evidence that it considers necessary for the determination of the truth',<sup>8</sup> and require witnesses to 'speak the truth, the whole

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<sup>1</sup> See generally Barrie Sander, 'International Criminal Justice as Progress: From Faith to Critique' in Morten Bergsmo et al (eds), *Historical Origins of International Criminal Law* (Torkel Opsahl Academic EPublisher, 2015) vol 4, 749.

<sup>2</sup> See also Miriam J Aukerman, 'Extraordinary Evil, Ordinary Crime: A Framework for Understanding Transitional Justice' (2002) 15 *Harvard Human Rights Journal* 39, 43; Mirjan Damaška, 'The International Criminal Court between Aspiration and Achievement' (2009) 14 *UCLA Journal of International Law and Foreign Affairs* 19, 23.

<sup>3</sup> See, eg, Marieke de Hoon, 'The Future of the International Criminal Court: On Critique, Legalism and Strengthening the ICC's Legitimacy' (2017) 17 *International Criminal Law Review* 591; Barrie Sander, 'The Expressive Limits of International Criminal Justice: Victim Trauma and Local Culture in the Iron Cage of the Law' (Paper presented at the European Society of International Law Annual Conference, Oslo, 10–12 September 2015) 1.

<sup>4</sup> See generally Barrie Sander, 'Unveiling the Historical Function of International Criminal Courts: Between Adjudicative and Sociopolitical Justice' (2018) 12 *International Journal of Transitional Justice* 334.

<sup>5</sup> Fergal Gaynor, 'Uneasy Partners — Evidence, Truth and History in International Trials' (2012) 10 *Journal of International Criminal Justice* 1257, 1262 (emphasis added).

<sup>6</sup> See, eg, Carsten Stahn, 'Between "Faith" and "Facts": By What Standards Should We Assess International Criminal Justice?' (2012) 25 *Leiden Journal of International Law* 251, 271: 'The duty to seek the "truth" is inherent in the mandate of judges and sometimes an express prosecutorial duty.'; Albin Eser, 'Procedural Structure and Features of International Criminal Justice: Lessons from the ICTY' in Bert Swart, Alexander Zahar and Göran Sluiter (eds), *The Legacy of the International Criminal Tribunal for the Former Yugoslavia* (Oxford University Press, 2011) 108, 147: 'the truth to the best extent possible is ... essential to rendering justice in the individual case'.

<sup>7</sup> *Rome Statute of the International Criminal Court*, opened for signature 17 July 1998, 2187 UNTS 90 (entered into force 1 July 2002) art 54(1) ('*Rome Statute*').

<sup>8</sup> *Ibid* art 69(3).

truth and nothing but the truth'.<sup>9</sup> The close association between adjudicative justice and truth-seeking is also reflected in a range of well-established legal concepts and maxims. For instance, the early-sixteenth-century meaning of the term 'prosecution' was understood to signify 'to know precisely, to delve in detail into a matter'.<sup>10</sup> Moreover the ancestral maxim, *res judicata pro veritate habetur*, stands for the proposition that what is tried should be considered as the truth.<sup>11</sup>

More recently, the tendency to define international criminal prosecution in opposition to amnesty has served to reinforce the association of prosecution with remembrance and the failure to prosecute with amnesia.<sup>12</sup> In this vein, international criminal courts have also been characterised as 'important tools for ensuring the right to the truth'.<sup>13</sup> References to the right to the truth have even begun to appear in international criminal court proceedings. For instance, Judge Steiner in a single-judge decision of the ICC Pre-Trial Chamber in *Prosecutor v Katanga* expressly recognised that

the victims' core interest in the determination of the facts, the identification of those responsible and the declaration of their responsibility is at the root of the well-established right to the truth for the victims of serious violations of human rights.<sup>14</sup>

Given the inescapability of the historical function of international criminal courts, the pertinent question is not whether such courts *should* write history, but rather what histories *are* constructed by such courts in practice.<sup>15</sup> In tackling this question, existing scholarship has often rested on two key assumptions: first, that the centre of narrative *authority* within international criminal courts resides in their judgments; and secondly, that the historical narratives constructed within international criminal judgments are inevitably *restricted* by the legal categories that shape their form and substance.

Taking these twin assumptions as its point of departure, this article seeks to develop a more nuanced understanding of the historical function of international criminal courts, first by revealing how international criminal courts are contested terrains in which narrative authority is *dispersed*, and secondly by illuminating

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<sup>9</sup> International Criminal Court, *Rules of Procedure and Evidence*, Doc No ICC-ASP/1/3 (adopted 9 September 2002) r 66(1).

<sup>10</sup> Ruti G Teitel, *Transitional Justice* (Oxford University Press, 2000) 49.

<sup>11</sup> Caroline Fournet, *The Crime of Destruction and the Law of Genocide: Their Impact on Collective Memory* (Ashgate, 2007) xxxii.

<sup>12</sup> Teitel, above n 10, 72.

<sup>13</sup> United Nations Commission on Human Rights, *Study on the Right to the Truth: Report of the Office of the United Nations High Commissioner for Human Rights*, UN ESCOR, 62<sup>nd</sup> sess, Agenda Item 17, UN Doc E/CN.4/2006/91 (8 February 2006) 15 [61]. See also Pablo de Greiff, *Report of the Special Rapporteur on the Promotion of Truth, Justice, Reparation and Guarantees of Non-Recurrence*, UN GAOR, 27<sup>th</sup> sess, Agenda Item 3, UN Doc A/HRC/27/56 (27 August 2014) [28].

<sup>14</sup> *Prosecutor v Katanga (Decision on the Set of Procedural Rights Attached to Procedural Status of Victim at the Pre-Trial Stage of the Case)* (International Criminal Court, Pre-Trial Chamber I, Case No ICC-01/04-01/07, 13 May 2008) [32].

<sup>15</sup> See, eg, Gerry Simpson, 'International Criminal Justice and the Past' in Gideon Boas, William A Schabas and Michael P Scharf (eds), *International Criminal Justice: Legitimacy and Coherence* (Edward Elgar, 2012) 123, 128; Nicola Henry, *War and Rape: Law, Memory and Justice* (Routledge, 2011) 26–7; Lawrence Douglas, 'The Didactic Trial: Filtering History and Memory into the Courtroom' (2006) 14 *European Review* 513, 514.

how the *adaptability* of legal categories can generate historical dissensus between international criminal judges. As such, rather than constructing universal historical narratives about mass atrocity situations, this article argues that international criminal courts are narrative battlegrounds characterised by competing claims of authority and contested understandings of history.

The argument unfolds in four parts. The article begins by reviewing the contention that the centre of narrative authority within international criminal courts resides in their judgments, arguing instead that authority is dispersed and contested both within and beyond the courtroom (Part II). The article then turns to critically examine the contention that the historical narratives constructed within international criminal courts must be tailored to fit within the confines of restrictive legal categories. It is argued that while legal categories can perform this limiting function, they are also to a certain extent adaptable through the process of legal interpretation (Part III). Having illuminated these theoretical foundations, the article then elaborates three case studies to illustrate how history has been contested within international criminal courts in practice, varying according to the methodological assumptions that underpin the interpretation of legal categories in particular institutional contexts. Specifically, the article examines crimes against peace at the International Military Tribunal for the Far East ('IMTFE'), forced marriage at the Special Court for Sierra Leone ('SCSL') and duress at the International Criminal Tribunal for the former Yugoslavia ('ICTY') (Part IV). Finally, the article concludes by offering some reflections on the significance of the dispersed and contested nature of narrative authority within international criminal courts, as well as the connection between legal and narrative dissensus amongst international criminal judges (Part V).

## II THE DISPERSAL OF NARRATIVE AUTHORITY IN INTERNATIONAL CRIMINAL COURTS

According to what has been termed the 'model of closure' or 'authoritative narrative theory',<sup>16</sup> the centre of narrative authority within international criminal courts resides in their judgments. On this view, international criminal courts are expected to distil the competing narratives put forward by the antagonists at trial into 'a single, authorized narrative ... often by excluding and silencing divergent viewpoints'.<sup>17</sup> In performing this task, judges are understood to be engaged in a process that is at once destructive and reconstructive. Having afforded the antagonists the opportunity to put forward their preferred narratives and subjected them to scrutiny at trial,<sup>18</sup> judges seek on the one hand to effectively kill off and delegitimise judicially unpersuasive interpretations of the past and on the other to declare their own as authoritative.<sup>19</sup> This dual role is reminiscent of

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<sup>16</sup> Jose E Alvarez, 'Rush to Closure: Lessons of the *Tadić Judgment*' (1998) 96 *Michigan Law Review* 2031, 2036; Timothy William Waters, 'A Kind of Judgment: Searching for Judicial Narratives after Death' (2010) 42 *George Washington International Law Review* 279, 285.

<sup>17</sup> Eric H Reiter, 'Fact, Narrative, and the Judicial Uses of History: *Delgamuukw* and Beyond' 8(1) *Indigenous Law Journal* (2010) 55, 58.

<sup>18</sup> Waters, above n 16, 290.

<sup>19</sup> See Pierre Bourdieu, 'The Force of Law: Toward a Sociology of the Juridical Field' (Richard Terdiman trans) (1987) 38 *Hastings Law Journal* 805, 837–8.

Robert Cover's depiction of judges as both 'people of violence' and 'people of peace':

Judges are people of violence. Because of the violence they command, judges characteristically do not create law, but kill it. Theirs is the jurispatic office. Confronting the luxuriant growth of a hundred legal traditions, they assert that *this one* is law and destroy or try to destroy the rest.

But judges are also people of peace. Among warring sects, each of which wraps itself in the mantle of a law of its own, they assert a regulative function that permits a life of law rather than violence. The range of the violence they could command (but generally do not) measures the range of the peace and law they constitute.<sup>20</sup>

Applied to the present context, as 'people of violence', judges seek to invalidate historical accounts that conflict with their own judicially constructed narratives, while as 'people of peace', judges seek to promote renewed solidarity around the narratives they declare as authoritative in their judgments.<sup>21</sup> In this regard, it is by establishing an authoritative historical account in their judgments that international criminal courts are expected to serve as mechanisms to combat denial and prevent attempts at revisionism.<sup>22</sup>

Although the authoritative narrative theory provides an accurate account of the authority that international criminal courts are *expected* to garner, in practice international criminal courts are complex institutions through which narrative authority is contested and dispersed both within and beyond the courtroom.<sup>23</sup>

*Within* the courtroom, historical narratives are constructed not merely by judges in their judgments, but by a range of actors — including prosecution and defence counsel, victims, and witnesses — throughout the international criminal process. Trials, in particular, perform a significant role in facilitating the presentation of diverse and often conflicting historical narratives. At trial, the prosecution will marshal evidentiary materials with the aim of establishing beyond a reasonable doubt the material facts of the case, namely the factual allegations that support each of the elements of the legal categories of crimes and

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<sup>20</sup> Robert Cover, 'Nomos and Narrative' in Martha Minow, Michael Ryan and Austin Sarat (eds), *Narrative, Violence, and the Law: The Essays of Robert Cover* (University of Michigan Press, 1992) 95, 155 (emphasis in original).

<sup>21</sup> See Martha Minow, 'The Work of Re-Membering: After Genocide and Mass Atrocity' (1999) 23 *Fordham International Law Journal* 429, 430: referring to this process as one of 're-member[ing]', a process of 'reconstitut[ing] a community of humanity against which there can be crimes ... and within which victims and survivors can be reclaimed as worthy members'.

<sup>22</sup> See, eg, Diane F Orentlicher, *Shrinking the Space for Denial: The Impact of the ICTY in Serbia* (20 May 2008) Open Society Justice Initiative, 63, 77 <[https://www.opensocietyfoundations.org/sites/default/files/serbia\\_20080501.pdf](https://www.opensocietyfoundations.org/sites/default/files/serbia_20080501.pdf)> archived at <<https://perma.cc/L4FF-HTQE>>; Michael Ignatieff, 'Articles of Faith' (1996) 25 *Index on Censorship* 110, 117–18.

<sup>23</sup> For a more detailed account of this perspective, see Barrie Sander, 'History on Trial: Historical Narrative Pluralism Within and Beyond International Criminal Courts' (2018) 67 *International & Comparative Law Quarterly* 547. See also Doris Buss, 'Expert Witnesses and International War Crimes Trial: Making Sense of Large-Scale Violence in Rwanda' in Dubravka Zarkov and Marlies Glasius (eds), *Narrative of Justice in and out of the Courtroom: Former Yugoslavia and Beyond* (Springer, 2014) 23, 23; M Hirsch, 'The Role of International Tribunals in the Development of Historical Narratives' (2018) 20 *Journal of the History of International Law* (forthcoming).

modes of participation with which the accused has been charged.<sup>24</sup> In turn, the defence will seek to cast reasonable doubt on the prosecution's evidence by challenging its credibility, advancing their own evidence, and sometimes raising an affirmative defence.<sup>25</sup> Beyond the prosecution and defence, some international criminal courts have also enabled victims to participate in trial proceedings, opening up the possibility for additional rival narratives to emerge as well as creating opportunities for fact and expert witnesses to be subjected to additional layers of scrutiny.<sup>26</sup> In this battleground of narrative contestation, a plurality of historical narratives will be articulated by the antagonists.<sup>27</sup> As Paul Gewirtz has observed:

one side's narrative is constantly being met by the other side's counternarrative (or sidestepping narrative), so that "reality" is always disassembled into multiple, conflicting, and partly overlapping versions, each version presented as true, each fighting to be declared 'what really happened' — with very high stakes riding on that ultimate declaration.<sup>28</sup>

Importantly, although the authority of the narratives put forward by the antagonists at trial will typically be affected — at least to some extent — by the historical account ultimately constructed by an international criminal court in its judgment, it is far from uncommon for judicially rejected historical narratives to resonate with and live on in the public domain as 'discordant notes' or 'counter-memories'.<sup>29</sup>

In addition to narratives constructed by the antagonists at trial, judges themselves may challenge the narratives rendered within international criminal judgments. For instance, a judge may challenge the narrative of the majority

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<sup>24</sup> See Elinor Fry, 'Legal Recharacterization and the Materiality of Facts at the International Criminal Court: Which Changes Are Permissible?' (2016) 29 *Leiden Journal of International Law* 577, 580. International criminal courts have adopted different approaches to the question of how to respond to erroneous legal characterisation of charges. For an overview of the different approaches, see generally Robert Cryer et al, *An Introduction to International Criminal Law and Procedure* (Cambridge University Press, 3<sup>rd</sup> ed, 2014) 459–60; *Prosecutor v Kupreškić (Judgement)* (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber, Case No IT-95–16-T, 14 January 2000) [728]–[748].

<sup>25</sup> See generally United Nations Interregional Crime and Justice Research Institute, Association of Defence Counsel Practicing before the International Criminal Tribunal for the former Yugoslavia and Office for Democratic Institutions and Human Rights, 'Manual on International Criminal Defence: ADC–ICTY Developed Practices Within the framework of the War Crimes Justice Project' (Manual, 2011) 21–49 <[http://media.wix.com/ugd/ce12e8\\_ac2fa55054f847edbe20a40f3c15ea86.pdf](http://media.wix.com/ugd/ce12e8_ac2fa55054f847edbe20a40f3c15ea86.pdf)> archived at <<https://perma.cc/A4T5-5CSC>>.

<sup>26</sup> See also Richard Ashby Wilson, *Writing History in International Criminal Trials* (Cambridge University Press, 2011) 210–12.

<sup>27</sup> See also Stiiina Löytömäki, 'The Law and Collective Memory of Colonialism: France and the Case of "Belated" Transitional Justice' (2013) 7 *International Journal of Transitional Justice* 205, 209: 'trials convey a plurality of narratives and social meanings and should be understood as forums where a variety of social, political and other actors promote their particular narratives in order to advance different causes'.

<sup>28</sup> Paul Gewirtz, 'Narrative and Rhetoric in the Law' in Peter Brooks and Paul Gewirtz (eds), *Law's Stories: Narrative and Rhetoric in the Law* (Yale University Press, 1996) 2, 8.

<sup>29</sup> Gerry Simpson, *Law, War and Crime: War Crimes Trials and the Reinvention of International Law* (Polity Press, 2007) 92; Henry, above n 15, 63.

through a separate or dissenting opinion.<sup>30</sup> The narratives constructed within a trial judgment may be subject to alteration on appeal. And where an international criminal court has been mandated to render a series of judgments concerning a particular conflict situation, later judgments may challenge narratives constructed in earlier cases.<sup>31</sup>

*Beyond* the courtroom, the narratives constructed within international criminal judgements will generally be transmitted to a range of audiences, who will often continue to contest their meaning and relevance long after the original narratives have been rendered. In this regard, it is important to recognise that the *social relay* of narratives constructed within international criminal judgments will often vary depending on a range of factors, many of which are beyond the control of the judges.<sup>32</sup> In particular, it is possible to identify a range of social-psychological and practical obstacles, which inhibit the authority of judicially constructed narratives in practice.<sup>33</sup>

From a *social-psychological* perspective, in the aftermath of episodes of mass violence, members of local communities often possess deeply entrenched internal narratives denying responsibility for any crimes committed by factions to which they have some form of communal attachment.<sup>34</sup> In such circumstances, any historical narratives constructed within an international criminal judgment that seek to challenge or destabilise these self-serving narratives of victimhood are likely to be rejected or ignored by such individuals.<sup>35</sup>

Equally, from a *practical* perspective, it has not been uncommon for judicially constructed narratives either to fail to reach local communities at all,<sup>36</sup> or first be filtered by various carrier groups such as the media or local politicians before reaching particular audiences.<sup>37</sup> These carrier groups may attempt to distort or undermine the narratives constructed within international criminal judgments, further widening the gap between the international courtroom and local audiences.

As these factors indicate, narrative authority with respect to international criminal courts is both dispersed and contested. Although there is an

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<sup>30</sup> See Hemi Mistry, 'The Paradox of Dissent: Judicial Dissent and the Projects of International Criminal Justice' (2015) 13 *Journal of International Criminal Justice* 449; Neha Jain, 'Radical Dissents in International Criminal Trials' (2017) 28 *European Journal of International Law* 1163.

<sup>31</sup> Lawrence Douglas, 'Truth and Justice in Atrocity Trials' in William A Schabas (ed), *The Cambridge Companion to International Criminal Law* (Cambridge University Press, 2016) 34, 37, 46.

<sup>32</sup> The term 'social relay' is taken from: Frédéric Mégret, 'Practices of Stigmatization' (2013) 76(3-4) *Law and Contemporary Problems* 287, 311.

<sup>33</sup> See generally Sander, above n 3, 5-6.

<sup>34</sup> See, eg, Eric Stover, *The Witnesses: War Crimes and the Promise of Justice in The Hague* (University of Pennsylvania Press, 2005) 143; Stuart Ford, 'A Social Psychology Model of the Perceived Legitimacy of International Criminal Courts: Implications for the Success of Transitional Justice Mechanisms' (2012) 45 *Vanderbilt Journal of Transnational Law* 405, 463-4.

<sup>35</sup> See, eg, Ford, above n 34, 405.

<sup>36</sup> Janine N Clark, 'The Impact Question: The ICTY and the Restoration and Maintenance of Peace' in Bert Swart, Alexander Zahar and Göran Sluiter (eds), *The Legacy of the International Criminal Tribunal for the Former Yugoslavia* (Oxford University Press, 2011) 55, 76.

<sup>37</sup> Henry, above n 15, 119-22.

understandable expectation that the narratives constructed within international criminal judgments will be authoritative, this is not inevitable in practice. As James Boyd White has eloquently explained:

a legal judgment ... is not self-validating but requires community acceptance. The text of a judicial judgment ... is in its own terms purely authoritative, but it is always a question what role any such text will have in the community that it seeks to govern. ... It is an open question what weight and authority the parties will in subsequent years treat that document as having and by what standards or means it will be interpreted ... The text does not conclude the difficulties of the real world, but begins a process, a process of its own interpretation. This is the process by which the law is connected to the rest of life.<sup>38</sup>

Against this background, the remainder of this article examines a particular form of narrative contestation within international criminal courts — namely, the narrative dissensus that can arise *between judges* both within the confines of a single case, as well as across judgments in different cases.

### III INTERPRETIVE METHOD AND THE ADAPTABILITY OF LEGAL CATEGORIES IN INTERNATIONAL CRIMINAL COURTS

A common starting point for examining the historical function of international criminal courts has been to recognise that the narratives constructed within their judgments are inevitably incomplete. As Clifford Geertz famously remarked, ‘whatever it is that the law is after it is not the whole story’.<sup>39</sup> In line with this observation, various scholars have begun to illuminate the legal and evidentiary concepts that serve to limit the capacity of international criminal courts to construct historical narratives in practice.<sup>40</sup> Lawrence Douglas, in particular, has likened the construction of history in international criminal contexts to a process of filtration whereby ‘history and memory do not simply *enter* a trial, as if offered an open ticket of admission’, but rather ‘*filter* into the trial through certain legal or juridical categories that shape its form and substance’.<sup>41</sup> According to this perspective, legal categories are akin to narrative grids within which historical narratives must be specifically framed to fit so as to ensure their legal relevance in any particular case. Holocaust historian Michael Marrus, for example, has argued that ‘the shape of the stories told in trials understandably

<sup>38</sup> James Boyd White, ‘Telling Stories in the Law and in Ordinary Life: The *Oresteia* and “Noon Wine”’ in James Boyd White (ed), *Heracles’ Bow: Essays on the Rhetoric and Poetics of the Law* (University of Wisconsin Press, 1985) 168, 185.

<sup>39</sup> Clifford Geertz (ed), *Local Knowledge: Further Essays in Interpretative Anthropology* (Basic Books, 1985) 173.

<sup>40</sup> See, eg, Gerry J Simpson, ‘Didactic and Dissident Histories in War Crimes Trials’ (1997) 60 *Albany Law Review* 801; Wilson, above n 26; Gaynor, above n 5; Marina Aksenova, ‘The Role of International Criminal Tribunals in Shaping the Historical Accounts of Genocide’ in Uladzislau Belavusau and Aleksandra Gliszczyńska-Grabias (eds), *Law and Memory: Towards Legal Governance of History* (Cambridge University Press, 2017) 48.

<sup>41</sup> Douglas, above n 15, 515–16 (emphasis in original). See also Larissa van den Herik, ‘International Criminal Law as a Spotlight and Black Holes as Constituents of Legacy’ (2016) 110 *AJIL Unbound* 209, 210: ‘[ICL] filters realities through the use of precise definitions and categories of responsibility including concomitant rules of interpretation guiding their application, as well as through the use of the highest evidentiary standards and other strict rules of procedure’.



follows the definition of the crimes with which the accused are charged, rather than an impartial assessment of the events themselves'.<sup>42</sup>

That legal categories perform this restrictive function is undeniable. Consider, for example, the judgment of the International Military Tribunal ('IMT') at Nuremberg. Article 6(c) of the *Nuremberg Charter* provided that the acts relied upon to constitute crimes against humanity must have been committed 'in execution of, or in connection with any crime within the jurisdiction of the Tribunal' (the so-called 'war nexus' requirement).<sup>43</sup> At the London Conference where the *Nuremberg Charter* was drafted, the French delegate Professor Andre Gros cautioned that the war nexus requirement would likely constitute 'a difficult burden because, even in the Nazi plan against the Jews, there is no apparent aggression against other nations'.<sup>44</sup> These words of warning proved to be somewhat prophetic.

At trial, the Prosecution's understanding that crimes against humanity required a war nexus led to the factual circumstances of the case being shoehorned to fit the narrative grid of the crime category.<sup>45</sup> For instance, US Prosecutor Robert Jackson argued that anti-Semitism had been promoted by the Nazis as a policy 'to divide and embitter' the populations of other democratic nations and 'to soften their resistance to the Nazi aggression'.<sup>46</sup> According to Jackson, the destruction of the Jewish people as a whole could be characterised as 'a measure of preparation for war' and 'a discipline of conquered peoples'.<sup>47</sup> Moreover, Jackson emphasised that it was only because the Nazi efforts to eliminate the influence of the Jews had aimed 'to clear their obstruction to the precipitation of aggressive war' that such acts took the character of international crimes.<sup>48</sup> As Lawrence Douglas has explained, by framing the atrocities committed by the Nazis in this way, the Prosecution seemed prepared to accept

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<sup>42</sup> Michael R Marrus, 'History and the Holocaust in the Courtroom' in Ronald Smelser (ed), *Lessons and Legacies: The Holocaust and Justice* (Northwestern University Press, 2002) vol 5, 215, 232 (emphasis added). See also Wilson, above n 26, 9 (emphasis added): 'Because courts *follow* law's own exceptional principles rather than those of historical inquiry, they can reduce complex histories to a defective legal template, and thereby distort history'.

<sup>43</sup> There was initially a discrepancy between the English, French and Russian versions of the *Nuremberg Charter*, which raised doubts as to whether all types of crimes against humanity had to be tied to crimes against peace or war crimes, or simply the sub-category of persecution-like crimes against humanity. On the famous *Semicolon Protocol* of 6 October 1945, which has generally been considered to have clarified that *all* crimes against humanity must be linked to crimes against peace or war crimes, see Lawrence Douglas, *The Memory of Judgment: Making Law and History in the Trials of the Holocaust* (Yale University Press, 2001) 53–4; Donald Bloxham, *Genocide on Trial: War Crimes Trials and the Formation of Holocaust History and Memory* (Oxford University Press, 2001) 64 n 27.

<sup>44</sup> International Military Tribunal, 'Minutes of Conference Session of July 24, 1945', reproduced in Robert H Jackson, *Report of Robert H Jackson to the International Conference on Military Trials* (United States of America Department of State International Organisation and Conference Series II, 1949) 360, 360.

<sup>45</sup> See Douglas, above n 43, 75–7.

<sup>46</sup> International Military Tribunal, 'Second Day, Wednesday 21 November 1945', reproduced in International Military Tribunal, *Trial of the Major War Criminals before the International Military Tribunal: Nuremberg 14 November 1945 – 1 October 1946* (1947) vol 2, 95, 118.

<sup>47</sup> *Ibid* 119.

<sup>48</sup> *Ibid* 127.

the Nazis' depiction of the Jews as a potential military enemy, 'a fifth column lurking behind the lines, threatening acts of sabotage'.<sup>49</sup>

Part of the Prosecution's strategy seems to have been aimed at ensuring that crimes against humanity committed prior to the outbreak of war would be recognised by the IMT. However, such efforts ultimately proved unsuccessful. In its final judgment, the Nuremberg IMT confirmed that the war nexus requirement meant that the tribunal was unable to make 'a general declaration that the acts before 1939 were Crimes against Humanity within the meaning of the *Charter*' because 'revolting and horrible as many of these crimes were, it [had] not been satisfactorily proved that they were done in execution of, or in connection with' war crimes or crimes against peace.<sup>50</sup> As such, the narrative frame of the IMT's judgment was narrowed in conformity with the war nexus requirement and the interests and suffering of victims of Nazi atrocities committed prior to the outbreak of war were neglected.<sup>51</sup>

Yet, while the *Nuremberg judgment* offers a clear illustration of how historical narratives can be shoe-horned to fit the restrictive elements of a particular legal category, the case study occludes the extent to which legal categories are themselves to a certain extent adaptable in the face of novel factual circumstances through the process of legal interpretation.<sup>52</sup>

An important starting point in this regard is to recognise that legal categories are often drafted in open-textured and context-independent terms.<sup>53</sup> Although the precise text of a legal category is typically drafted with a particular event in mind — for example, the Holocaust with respect to the crime of genocide — a more general formulation is usually relied upon to ensure a broader range of factual circumstances fall within their scope.<sup>54</sup> As such, when judges adjudicate individual cases, they are required to interpret legal categories with a view to applying them to the specific factual circumstances of the case at hand. In this way, the interpretative enterprise may be understood as a complex interplay

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<sup>49</sup> Douglas, above n 43, 76. See also *United States of America v Göring (Judgment)* (International Military Tribunal, 1 October 1946) ('*Nuremberg IMT Judgment*'), reproduced in International Military Tribunal, *Trial of the Major War Criminals before the International Military Tribunal: Nuremberg, 14 November 1945 – 1 October 1946* (1947) vol 1, 171, 249: 'It was contended for the Prosecution that certain aspects of this anti-Semitic policy were connected with the plans for aggressive war'.

<sup>50</sup> *Nuremberg IMT Judgment* (International Military Tribunal, 1 October 1946) 254.

<sup>51</sup> See also Luke Moffett, 'The Role of Victims in the International Criminal Tribunals of the Second World War' (2012) 12 *International Criminal Law Review* 245, 251: referring to such victims as being 'relegated to secondary importance'. See also William A Schabas, *An Introduction to the International Criminal Court* (Cambridge University Press, 4<sup>th</sup> ed, 2011) 344: referring to such victims as 'betrayed by the *Nuremberg judgment*'.

<sup>52</sup> Lawrence Douglas acknowledges this point without, however, delving too deeply into the matter. See Lawrence Douglas, 'Perpetrator Proceedings and Didactic Trials' in Antony Duff et al (eds), *The Trial on Trial: Judgment and Calling to Account* (Hart Publishing, 2006) vol 2, 191, 196–9.

<sup>53</sup> Marjolein Cupido, 'Facing Facts in International Criminal Law: A Casuistic Model of Judicial Reasoning' (2016) 14 *Journal of International Criminal Justice* 1, 3. This paragraph draws on material articulated in Barrie Sander, 'Justice as Identity: Unveiling the Mechanics of Legitimation in Domestic Atrocity Trials' (2018) 16 *Journal of International Criminal Justice* 203.

<sup>54</sup> Jan Klabbers, 'The Meaning of Rules' (2006) 20 *International Relations* 295, 297–8.

between facts and law,<sup>55</sup> the historical narratives constructed within international criminal courts depending on how the two are ‘fitted to each other’.<sup>56</sup>

In practice, this process of going back and forth between facts and law gives rise to a tension between interpreting legal categories *restrictively* or *dynamically* in response to the novel factual circumstances of new cases.<sup>57</sup> In turn, the existence of this tension begs the question as to what *constrains* the discretion of interpreters in making such determinations in practice. This question — essentially one that seeks to understand the process of legal interpretation — has generated significant debate amongst scholars.

According to one perspective, sometimes referred to as the ‘theory of textual determinacy’,<sup>58</sup> it is the text itself that constrains legal interpretation. On this view, legal categories come attached with pre-existing meanings and the role of the interpreter is limited to the technical exercise of extracting those meanings by deploying the ‘correct’ procedure.<sup>59</sup> The weakness of this theory, however, resides in its inability to explain why, if legal categories contain their own meaning and constrain their own interpretations, interpreters often disagree about the meanings of particular legal categories.<sup>60</sup>

Given the challenges of textual determinacy, it might be tempting to turn to the opposite extreme and posit that interpretation is conducted at the unfettered whim of the interpreter. However, this perspective is equally unpersuasive for the simple reason that it is unable to provide a convincing account for why, if interpretation is unbounded, there is so much agreement amongst interpreters over the meanings of particular legal categories.<sup>61</sup> In other words, such a perspective fails to explain how in any area of law it is always possible to identify ‘areas of relative stability, moments where a mainstream has consolidated or is only marginally threatened by critique’.<sup>62</sup>

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<sup>55</sup> See generally Cupido, above n 53. See also Friedrich V Kratochwil, *Rules, Norms, and Decisions: On the Conditions of Practical and Legal Reasoning in International Relations and Domestic Affairs* (Cambridge University Press, 1989) 240: ‘It is precisely this going back and forth between “facts” and norms in which the “artfulness” of legal reasoning (*ars legis*) consists’.

<sup>56</sup> Kratochwil, above n 55, 241.

<sup>57</sup> Allison Marston Danner, ‘When Courts Make Law: How the International Criminal Tribunals Recast the Laws of War’ (2006) 59 *Vanderbilt Law Review* 1, 5.

<sup>58</sup> Andrea Bianchi, ‘Textual Interpretation and (International) Law Reading: The Myth of (In)Determinacy and the Genealogy of Meaning’ in Pieter H F Bekker, Rudolf Dolzer and Michael Waibel (eds), *Making Transnational Law Work in the Global Economy: Essays in Honour of Detlev Vagts* (Cambridge University Press, 2010) 34, 35: noting how, within international legal discourse, ‘the theory of textual determinacy [is] still the prevailing paradigm’.

<sup>59</sup> See Ingo Venzke, *How Interpretation Makes International Law: On Semantic Change and Normative Twists* (Oxford University Press, 2012) 50–1: noting that international courts and scholarly doctrine have generally adhered to the assumption that ‘the text itself could distinguish permissible from impermissible interpretations’.

<sup>60</sup> Stanley Fish, *Doing What Comes Naturally: Change, Rhetoric, and the Practice of Theory in Literary and Legal Studies* (Duke University Press, 1989) 141: ‘Why, if the text contains its own meaning and constrains its own interpretation, do so many interpreters disagree about that meaning?’.

<sup>61</sup> *Ibid* 141: ‘Why, if meaning is created by the individual reader from the perspective of his own experience and interpretive desires, is there so much that interpreters agree about?’.

<sup>62</sup> Martti Koskenniemi, *From Apology to Utopia: The Structure of International Legal Argument* (Cambridge University Press, 2005) 607.

What is needed, therefore, is a perspective that avoids the twin pitfalls of an unfettered concept of judicial agency and an unyielding determinism that offers no space for judicial discretion.<sup>63</sup> To this end, international legal scholars have increasingly turned towards legal practice to explain the process of interpretation.<sup>64</sup> According to this account, interpretation is understood as an unavoidably creative practice that constitutes the meanings that it purports to find.<sup>65</sup> Since there are no inherent meanings in legal texts or meta-criteria for extracting meanings from such texts, legal categories only have meaning through their usage.<sup>66</sup> From this perspective, interpreters are constrained by their 'context', understood in a broad sense to include not only the set of circumstances external to interpreters, but also their internal context, including their past experiences and presuppositions.<sup>67</sup>

In terms of their *external* context, interpreters are constrained both by past uses of legal categories as well as their anticipation of how particular interpretations may be received by other actors in their interpretive community in the future.<sup>68</sup> For instance, although not formally bound by a system of precedent in their statutes, international criminal courts have regularly relied on their own prior judicial practices for the purpose of determining the meaning of legal categories,<sup>69</sup> as well as the prior jurisprudence of other international criminal

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<sup>63</sup> Several scholars have sought to forge a middle path that seeks to avoid the pitfalls of objectivism and subjectivism. See especially Fish, above n 60, 141; Bourdieu, above n 19, 814.

<sup>64</sup> See, eg, Fuad Zarbiyev, 'Judicial Activism in International Law — A Conceptual Framework for Analysis' (2012) 3 *Journal of International Dispute Settlement* 247; Venzke, above n 59, 54–7, 62–4; Ian Johnstone, *The Power of Deliberation: International Law, Politics and Organizations* (Oxford University Press, 2011) 33–41; Bianchi, above n 58, 51–5.

<sup>65</sup> Jean d'Aspremont, 'The Multidimensional Process of Interpretation: Content-Determination and Law-Ascertainment Distinguished' in Andrea Bianchi, Daniel Peat and Matthew Windsor (eds), *Interpretation in International Law* (Oxford University Press, 2015) 111, 113–5; Venzke, above n 59, 55, 71.

<sup>66</sup> Ingo Venzke, 'The Role of International Courts as Interpreters and Developers of the Law: Working Out the Jurisgenerative Practice of Interpretation' (2011) 34 *Loyola of Los Angeles International and Comparative Law Review* 99, 115–19, citing Ludwig Wittgenstein, *Philosophical Investigations* (G E M Anscombe trans, Basil Blackwell, 1958) [53]; John L Austin, *How to Do Things with Words: The William James Lectures Delivered at Harvard University in 1955* (Oxford University Press, 2<sup>nd</sup> ed, 1976) 4, 139.

<sup>67</sup> Bianchi, 'Textual Interpretation and (International) Law Reading', above n 58, 41.

<sup>68</sup> See generally Venzke, above n 59, 48–9.

<sup>69</sup> On the operation of precedent at the UN ad hoc tribunals, see generally *Aleksovski v Prosecutor (Judgment)* (International Criminal Tribunal for the Former Yugoslavia, Appeals Chamber, Case No IT-95-14/1-A, 24 March 2000) [107]–[111]. See also *Agreement between the United Nations and the Government of Sierra Leone on the Establishment of the Special Court for Sierra Leone*, signed 16 January 2002, 2178 UNTS 137 (entered into force 12 April 2002) annex ('*Statute of the Special Court for Sierra Leone*') art 20(3) ('*SCSL Statute*'). At the ICC, the *Rome Statute* enables, but does not mandate, the Court to refer to 'the principles and rules of law interpreted in its previous decisions': *Rome Statute* art 21(2). In this regard, the Trial Chamber in *Prosecutor v Bemba Gombo* recently confirmed that although it is at the Chamber's discretion, following its prior case law — particularly findings of the Appeals Chamber — is 'desirable in the interests of expeditiousness, procedural economy, and legal certainty': *Prosecutor v Bemba Gombo (Judgment Pursuant to Article 74 of the Statute)* (International Criminal Court, Trial Chamber III, Case No ICC-01/05-01/08-3343, 21 March 2016) [74].

courts.<sup>70</sup> As Armin von Bogdandy and Ingo Venzke have observed, judicial decisions are often able to ‘redistribute argumentative burdens in legal discourse in a way that is hard, if not impossible, to escape’.<sup>71</sup> In other words, judicial decisions have the capacity to serve as ‘focal points’,<sup>72</sup> or ‘content-laden reference points’,<sup>73</sup> which if subsequently endorsed with sufficient frequency can become almost impossible to ignore.<sup>74</sup> At the same time, interpreters also need to consider their audience’s already situated beliefs in order to be persuasive.<sup>75</sup> In order for interpretations to *stick*, interpreters need to convince and ultimately gain the acceptance of other actors within their interpretive community.<sup>76</sup> As such, the external context of an interpreter is both backward-looking and forward-looking.<sup>77</sup> Or as Robert Brandom has succinctly put it, ‘the current judge is held accountable to the tradition she inherits by the judges yet to come’.<sup>78</sup>

Beyond an interpreter’s external context, it is also important to appreciate their *internal* context. To refer to an interpreter’s internal context is to recognise that each and every interpreter is always situated. As Stanley Fish famously put it, ‘we are never not in a situation’ and, therefore, interpretation is never

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<sup>70</sup> See, eg, Shane Darcy, *Judges, Law and War: The Judicial Development of International Humanitarian Law* (Cambridge University Press, 2014) 28: ‘decisions and judgments of the various international criminal courts contain numerous references to each other’s case law’. See also Beth van Schaack, ‘*Crimen Sine Lege*: Judicial Lawmaking at the Intersection of Law and Morals’ (2008) 97 *Georgetown Law Journal* 119, 170: ‘it cannot be gainsaid that these courts rely heavily on each other’s jurisprudence in resolving all manner of questions presented to them’.

<sup>71</sup> Armin von Bogdandy and Ingo Venzke, ‘Beyond Dispute: International Judicial Institutions as Lawmakers’ (2011) 12 *German Law Journal* 979, 991.

<sup>72</sup> Danner, above n 57, 57.

<sup>73</sup> Ingo Venzke, ‘Between Power and Persuasion: On International Institutions’ Authority in Making Law’ (2013) 4 *Transnational Legal Theory* 354, 368.

<sup>74</sup> See also Darcy, above n 70, 317; Martti Koskeniemi, ‘Methodology of International Law’ in Rüdiger Wolfrum et al (eds), *Max Planck Encyclopaedia of Public International Law* (Oxford University Press, 2007) [13]; van Schaak, above n 70, 189.

<sup>75</sup> On the importance of audience to interpretation, see generally Andrea Bianchi, ‘The Game of Interpretation in International Law: The Players, the Cards, and Why the Game is Worth the Candle’ in Andrea Bianchi, Daniel Peat and Matthew Windsor (eds), *Interpretation in International Law* (Oxford University Press, 2015) 34, 36–9; Richard H Weisberg, ‘Three Lessons from Law and Literature’ (1993) 27 *Loyola of Los Angeles Law Review* 285, 289, 291, 300: discussing the notion of ‘considerate communication’.

<sup>76</sup> Venzke, above n 59, 49, 55–8, 71. See also, in the international criminal context, Darcy, above n 70, 37, 49, 61, 65, 81, 317, 320; Robert Cryer, ‘Royalism and the King: Article 21 of the *Rome Statute* and the Politics of Sources’ (2009) 12 *New Criminal Law Review* 390, 392; Sergey Vasiliev, ‘The Making of International Criminal Law’ in Catherine Brölmann and Yannick Radi (eds), *Research Handbook on the Theory and Practice of International Lawmaking* (Edward Elgar, 2016) 354, 367.

<sup>77</sup> Venzke, above n 59, 49: describing the development of the law as ‘interstitial’ since it ‘stands between the past and the future’.

<sup>78</sup> Robert B Brandom, ‘Some Pragmatist Themes in Hegel’s Idealism: Negotiation and Administration in Hegel’s Account of the Structure and Content of Conceptual Norms’ (1999) 7 *European Journal of Philosophy* 164, 181, cited in Venzke, above n 59, 57.

available ‘independently of a set of beliefs’.<sup>79</sup> This means that whenever an interpreter approaches the task of interpretation, they will always carry with them their assumptions and presuppositions gained through professional training and personal experience.<sup>80</sup> Importantly, an interpreter’s internal context should not be thought of as fixed; assumptions and presuppositions can develop over time.<sup>81</sup> In this regard, it is notable that international criminal justice has typically been characterised as a juridical field at the crossroads, situated at the confluence of different bodies of law,<sup>82</sup> informed by a variety of legal traditions<sup>83</sup> and host to social actors from a diversity of professional backgrounds.<sup>84</sup> For instance, Andrew Clapham has observed how the field of international criminal justice tends to be populated by ‘a series of tribes with their own customs, totems, traditions and prophets’, including the ‘*pénalistes*’, the ‘*droits de l’hommes*’ and the ‘*internationalistes*’, each influencing the development of the field

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<sup>79</sup> Stanley Fish, *Is There a Text in This Class? The Authority of Interpretive Communities* (Harvard University Press, 1980) 276, 365. See also Richard Rorty, *Contingency, Irony, and Solidarity* (Cambridge University Press, 1989) 54: dismissing the idea of ‘presuppositionless critical reflection, conducted in no particular language and outside of any particular historical context’. See also Thomas S Kuhn, *The Structure of Scientific Revolutions* (University of Chicago Press, 4<sup>th</sup> ed, 2012) 113: noting that ‘something like a paradigm is prerequisite to perception itself’ and that, therefore, ‘[w]hat a man sees depends both upon what he looks at and also upon what his previous visual-conceptual experience has taught him to see’.

<sup>80</sup> Andrea Bianchi, ‘Reflexive Butterfly Catching: Insights from a Situated Catcher’ in Joost Pauwelyn, Ramses A Wessel and Jan Wouters (eds), *Informal International Lawmaking* (Oxford University Press, 2012) 200, 203.

<sup>81</sup> Fish, above n 60, 146. See also Pierre Bourdieu and Loïc J D Wacquant, ‘The Purpose of Reflexive Sociology’ in Pierre Bourdieu and Loïc J D Wacquant, *An Invitation to Reflexive Sociology* (University of Chicago Press, 1992) 60, 133–4: arguing that the internal dispositions of an interpreter will generally become more and more rigid and less and less responsive to challenge over time and referring, by way of illustration, to the process of aging, whereby ‘the mental and bodily schemata of a person who ages become more and more rigid, less and less responsive to external solicitations’.

<sup>82</sup> See, eg, M Cherif Bassiouni, *Introduction to International Criminal Law* (Martinus Nijhoff Publishers, revised ed, 2013) 1: ‘derives from one or more legal disciplines and their respective branches’. See also Antonio Cassese et al, *Cassese’s International Criminal Law* (Oxford University Press, 3<sup>rd</sup> ed, 2013) 5 (emphasis in original): ‘*derives its origin from and continuously draws upon both international humanitarian law and human rights law, as well as national criminal law*’; Allison Marston Danner and Jenny S Martinez, ‘Guilty Associations: Joint Criminal Enterprise, Command Responsibility, and the Development of International Criminal Law’ (2005) 93 *California Law Review* 75, 80: ‘confluence of several important bodies of law’.

<sup>83</sup> See, eg, Elies van Sliedregt and Sergey Vasiliev, ‘Pluralism: A New Framework for International Criminal Justice’ in Elies van Sliedregt and Sergey Vasiliev (eds), *Pluralism in International Criminal Law* (Oxford University Press, 2014) 3, 30: noting how international criminal law ‘evolved in the process of “reinventing” domestic legal concepts drawn from pre-dominant legal traditions of common law and civil law’.

<sup>84</sup> See, eg, Peter Dixon and Chris Tenove, ‘International Criminal Justice as a Transnational Field: Rules, Authority and Victims’ (2013) 7 *International Journal of Transitional Justice* 393, 397: ‘diversity of individuals and organizations with sometimes very antagonistic positions’. See also Mia Swart, ‘Is there a Text in this Court? The Purposive Method of Interpretation and the ad hoc Tribunals’ (2010) 70 *Heidelberg Journal of International Law* 767, 777: outlining the ‘interpretive community’ of the field of international criminal law.

according to their distinct conceptual frameworks.<sup>85</sup> As a result of this multifaceted hybridity,<sup>86</sup> international criminal courts have often suffered from crises of identity, oscillating between the prioritisation of conflicting normative values when interpreting legal categories in particular cases.<sup>87</sup>

In practice, the internal and external contexts of an interpreter are given expression in the interpreter's 'method', which for present purposes may be understood as 'the way in which a set of relevant normative and interpretive paradigms are used to analyse, explain, and justify legal and social realities'.<sup>88</sup> As Andrea Bianchi has explained, '[t]he interpretive presuppositions that inspire doctrinal analysis ... are rarely revealed, and yet there is always an implicit set of methodological assumptions that directs the normative outcome'.<sup>89</sup> Importantly, where an interpretive community is divided over the method that must be applied for interpreting a particular legal category, the category's meaning will generally be unstable, varying depending on the identity of the interpreter. In such circumstances, if we accept that legal categories are akin to narrative grids within which historical narratives must be specifically framed to fit, then divisions over interpretive method will also invariably lead to the construction of divergent historical narratives.

Against this background, the remainder of this article seeks to illustrate how the divergent methodological assumptions of judges in particular institutional contexts have led to divergent historical narratives concerning both the culpability of the accused and the situations of mass atrocity in which they participated. The aim is to understand how *legal* dissensus emerges within international criminal courts, often generating *historical* dissensus as a consequence.

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<sup>85</sup> Andrew Clapham, 'Concluding Remarks: Three Tribes Engage on the Future of International Criminal Law' (2011) 9 *Journal of International Criminal Justice* 689, 689–91. See also Larissa van den Herik and Carsten Stahn, "'Fragmentation", Diversification and "3D" Legal Pluralism: International Law as the Jack-in-the-Box' in Larissa van den Herik and Carsten Stahn (eds), *The Diversification and Fragmentation of International Criminal Law* (Martinus Nijhoff, 2012) 21, 23–4.

<sup>86</sup> Patricia Pinto Soares, 'Tangling Human Rights and International Criminal Law: The Practice of International Tribunals and the Call for Rationalized Legal Pluralism' (2012) 23 *Criminal Law Forum* 161, 162: referring to international criminal law's 'intrinsic hybridity concerning sources, principles, institutions and actors'.

<sup>87</sup> See generally Darryl Robinson, 'The Identity Crisis of International Criminal Law' (2008) 21 *Leiden Journal of International Law* 925; Leena Grover, 'A Call to Arms: Fundamental Dilemmas Confronting the Interpretation of Crimes in the Rome Statute of the International Criminal Court' (2010) 21 *European Journal of International Law* 543, 550–1. See also van Sliedregt and Vasiliev, above n 83, 32–4: preferring the term 'normative pluralism' to 'identity crisis'.

<sup>88</sup> Andrea Bianchi, 'The International Regulation of the Use of Force: The Politics of Interpretive Method' (2009) 22 *Leiden Journal of International Law* 651, 652. For general reflections on method within the field of international criminal justice, see Michelle Burgis-Kasthala, 'Scholarship as Dialogue? TWAIL and the Politics of Methodology' (2016) 14 *Journal of International Criminal Justice* 921.

<sup>89</sup> Bianchi, 'The International Regulation of the Use of Force', above n 88, 652. On the inextricable connection between method and practice, see David Garland, *Punishment and Modern Society: A Study in Social Theory* (Clarendon Press, 1990) 277–8.

#### IV THREE CASE STUDIES: LEGAL AND HISTORICAL DISSENSUS IN INTERNATIONAL CRIMINAL COURTS

In order to illustrate how divergent methodological assumptions on the part of judges can affect not only the meanings of legal categories, but also the scope and content of the historical narratives constructed by them, this section examines three case studies: first, legal dissensus over the existence of a crime category — crimes against peace at the IMTFE; secondly, legal dissensus over the conceptualisation of a crime category — forced marriage at the SCSL; and finally, legal dissensus over the scope of a culpability category — duress at the ICTY.

##### A *Crimes against Peace at the IMTFE*

The legal category of crimes against peace was included in art 5 of the *Tokyo Charter* primarily to satisfy the interests of the United States, which wanted to utilise the category to punish Japanese aggression.<sup>90</sup> The significance attached to crimes against peace is evident from an early policy paper developed by the US government, which specified that investigations with respect to what would ultimately become the IMTFE ‘should attach importance’ to crimes against peace.<sup>91</sup> This sentiment was later expressly incorporated into the *chapeau* of art 5 of the *Tokyo Charter*, which delimited the powers of the IMTFE to trying and punishing individuals ‘charged with offenses *which include Crimes against Peace*’.<sup>92</sup> As this wording suggests, defendants before the IMTFE were to be charged *at a minimum* with crimes against peace, the additional charges of war crimes and crimes against humanity deemed merely optional.<sup>93</sup> Yet, notwithstanding the importance of the category, the recognition of crimes against peace caused significant division amongst the judges of the IMTFE, with attendant consequences for the historical narratives constructed by them as a result.

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<sup>90</sup> Neil Boister and Robert Cryer, *The Tokyo International Military Tribunal — A Reappraisal* (Oxford University Press, 2008) 119.

<sup>91</sup> ‘Report by the State–War–Navy Coordinating Subcommittee for the Far East’ in US Department of State, *Foreign Relations of the United States: Diplomatic Papers 1945: The British Commonwealth, The Far East* (US Government Printing Office, 1945–53) vol VI, 926, 930. See also Boister and Cryer, *The Tokyo International Military Tribunal — A Reappraisal*, above n 90, 25: noting that ‘the US had initially suggested that the Tribunal should only have jurisdiction over crimes against peace, but the UK insisted that all three categories of crime should be charged’.

<sup>92</sup> *Charter of the International Military Tribunal: Supreme Commander Proclamation 19 January 1946*, annex (‘*Charter of the International Military Tribunal for the Far East*’) art 5, cited in Neil Boister and Robert Cryer, *Documents on the Tokyo International Military Tribunal: Charter, Indictments and Judgments* (Oxford University Press, 2008) 7 (emphasis added) (‘*IMTFE Charter*’).

<sup>93</sup> Fujita Hisakazu, ‘The Tokyo Trial: Humanity’s Justice v Victors’ Justice’ in Yuki Tanaka, Tim McCormack and Gerry Simpson (eds), *Beyond Victor’s Justice? The Tokyo War Crimes Trial Revisited* (Martinus Nijhoff, 2011) 3, 7; Yuki Totani, ‘The Case against the Accused’ in Yuki Tanaka, Tim McCormack and Gerry Simpson (eds), *Beyond Victor’s Justice? The Tokyo War Crimes Trial Revisited* (Martinus Nijhoff, 2011) 147, 147.



## 1 *The Majority Judgment*

In the judgment of the IMTFE, the majority began its examination of the legal basis of the category of crimes against peace by explaining that the *Tokyo Charter* was ‘decisive and binding on the Tribunal’ such that the judges were under a duty and responsibility to apply ‘the law set forth in the *Charter*’.<sup>94</sup> Despite this confident opening, the statements that followed were more ambiguous.

On the one hand, the majority declared that the Allied nations could not have enacted or promulgated laws or vested powers in their tribunals if they were ‘in conflict with recognised international law or rules or principles thereof’.<sup>95</sup> This statement seemed to suggest that it would be necessary for the tribunal to examine the legal basis of crimes against peace under international law.<sup>96</sup> On the other hand, the majority responded to the claims of the Defence that the provisions of the *Charter* constituted ex post facto legislation and were therefore illegal by simply asserting that since the law of the *Charter* was decisive and binding upon it, the tribunal was ‘formally bound to reject’ such allegations.<sup>97</sup> This statement appeared to suggest that the legal basis of crimes against peace need not be examined after all.

Ultimately, the seeming inconsistency between these statements did not need to be resolved because, similar to the Nuremberg IMT that had preceded it, the majority of the IMTFE proceeded to consider the substance of the Defence allegations ‘in view of the great importance of the questions of law involved’.<sup>98</sup> For this purpose, the majority was succinct, confining itself to an expression of ‘unqualified adherence’ to the reasoning that had already been adopted by the Nuremberg IMT.<sup>99</sup> It was on this basis that the majority felt able to conclude that aggressive war was ‘a crime at international law long prior to the date of the Declaration of Potsdam’.<sup>100</sup> The reasoning of the Nuremberg IMT that the IMTFE majority endorsed consisted of two arguments.<sup>101</sup>

First, the Nuremberg IMT had argued that the recognition of crimes against peace in the *Nuremberg Charter* was in conformity with the demands of substantive justice. For this purpose, the IMT had relied on reasoning which

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<sup>94</sup> *United States of America v Araki (Judgment)* (International Military Tribunal for the Far East, 4 November 1948) [48], [435]–[448], [436] (*‘IMTFE Judgment’*), reproduced in Neil Boister and Robert Cryer, *Documents on the Tokyo International Military Tribunal: Charter, Indictments and Judgments* (Oxford University Press, 2008) 79.

<sup>95</sup> *IMTFE Judgment* (International Military Tribunal for the Far East, 4 November 1948) [48], [436].

<sup>96</sup> Kenneth S Gallant, *The Principle of Legality in International and Comparative Criminal Law* (Cambridge University Press, 2009) 143.

<sup>97</sup> *IMTFE Judgment* (International Military Tribunal for the Far East, 4 November 1948) [48], [437].

<sup>98</sup> *Ibid.*

<sup>99</sup> *Ibid* [48], [437]–[448], [439]:

In view of the fact that in all material aspects the *Charters* of this Tribunal and the Nuremberg Tribunal are identical, this Tribunal prefers to express its unqualified adherence to the relevant opinions of the Nuremberg Tribunal rather than by reasoning the matters anew in somewhat different language to open the door to controversy by way of conflicting interpretations of the two statements of opinions.

<sup>100</sup> *Ibid* [48], [440].

<sup>101</sup> *Nuremberg IMT Judgment* (International Military Tribunal, 1 October 1946) 219.

conflated the illegality, immorality and criminality of the acts of aggressive war in which the defendants had participated.<sup>102</sup> The IMT had argued that since the defendants' designs of invasion and aggression were carried out 'in defiance of all international law' (*illegality*), the defendants 'must have known' that their acts were 'wrong' (*immorality*), and consequently 'far from it being unjust to punish [them], it would be unjust if [their] wrong were allowed to go unpunished' (*criminality*).<sup>103</sup> According to this line of reasoning, even if the criminalisation of aggressive war had been retroactive, it was nonetheless justifiable in light of its conformity with the general tenets of substantive justice.

However, the Nuremberg IMT was not content to merely demonstrate that the recognition of crimes against peace by the Allies had been 'demanded by the conscience of the world',<sup>104</sup> and proceeded to argue that the crime category also constituted 'the expression of international law existing both "at the time of [the Charter's] creation" as well as "in 1939"'.<sup>105</sup> For this purpose, the IMT relied on an expansive interpretation of the *Kellogg–Briand Pact* of 1928 to conclude that resort to a war of aggression was not merely illegal, but also criminal under international law.<sup>106</sup> In this regard, the IMT began by arguing that the substantive provisions of the Pact rendered war as an instrument of national policy illegal under international law.<sup>107</sup> Next, the IMT confronted the absence of any express reference to criminal liability in the *Kellogg–Briand Pact*. To overcome this hurdle, the IMT drew attention to the long history of war crimes prosecutions that had been conducted by military tribunals for violations of the rules of the *Hague Convention* of 1907, a treaty that prohibited recourse to certain methods of waging war. The IMT observed that these prosecutions had been carried out despite the fact that the *Hague Convention* 'nowhere designates such practices as criminal'.<sup>108</sup> On this basis, the IMT reasoned that if individuals who violated the *Hague Convention* could be subject to criminal liability despite the lack of express wording to that effect, so too could those who violated the *Kellogg–Briand Pact*. This was particularly justifiable, the IMT asserted, since 'those who wage aggressive war are doing that which is equally illegal, and of much greater moment than a breach of one of the rules of the *Hague Convention*'.<sup>109</sup> Finally, the IMT made reference to a number of unratified

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<sup>102</sup> See William Schabas, *Unimaginable Atrocities: Justice, Politics, and Rights at the War Crimes Tribunals* (Oxford University Press, 2012) 57–8; Robert Cryer, 'The Philosophy of International Criminal Law' in Alexander Orakhelashvili (ed), *Research Handbook on the Theory and History of International Law* (Edward Elgar, 2011) 232, 241.

<sup>103</sup> *Nuremberg IMT Judgment* (International Military Tribunal, 1 October 1946) 219. See also B V A Röling and Antonio Cassese, *The Tokyo Trial and Beyond: Reflections of a Peacemonger* (Polity Press, 1993) 69: in which Justice Röling notes that 'the Germans were aware that their wars were illegal and that this illegality would result in the deaths of millions of people. Their claim that it would be unjust for them to have to account for their misbehaviour was ridiculous'.

<sup>104</sup> *Nuremberg IMT Judgment* (International Military Tribunal, 1 October 1946) 222.

<sup>105</sup> *Ibid* 218–19.

<sup>106</sup> *Ibid* 222.

<sup>107</sup> *Ibid* 220.

<sup>108</sup> *Ibid* 220–1.

<sup>109</sup> *Ibid* 221.

treaties and non-binding declarations, which it argued reinforced its interpretation of the *Kellogg–Briand Pact*.<sup>110</sup>

The reasoning adopted by the Nuremberg IMT to conclude that crimes against peace was an established crime category under international law has been described by scholars as ‘tenuous’,<sup>111</sup> ‘not very solid’<sup>112</sup> and seeming ‘more like rationalisation than proof’.<sup>113</sup> In particular, the absence of state practice in support of individual criminal responsibility for wars of aggression would seem to constitute an insurmountable obstacle to the reasoning of the Nuremberg IMT.<sup>114</sup> In fact, it is almost universally accepted that the IMT was forging new ground both in recognising crimes against peace in its judgment, as well as in the reasoning it adopted for the purpose.<sup>115</sup>

Nonetheless, the legal validation of the category of crimes against peace by both the IMT and the IMTFE had a profound influence on the historical narratives constructed by these tribunals in practice. First, the *recognition* of crimes against peace enabled the judges to examine alleged Nazi and Japanese acts of aggression and to determine whether individual defendants could be held criminally responsible for them. In addition, the *reasoning* adopted by these tribunals, namely their attempts to identify a basis for crimes against peace in international law as it existed at the time of the relevant acts, enabled the tribunals to portray those convicted of the crime as rule-breakers, disruptive deviants who had undermined the established international order by breaching a pre-existing criminal prohibition.<sup>116</sup>

Yet, despite the IMTFE majority’s assertion of unqualified adherence to the reasoning adopted in the *Nuremberg judgment*, several judges delivered individual opinions in which they contested the legal basis for recognising the category of crimes against peace and with it the historical narrative that had been constructed as a result.<sup>117</sup>

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<sup>110</sup> Ibid 221–2.

<sup>111</sup> van Schaack, above n 70, 129.

<sup>112</sup> Judith N Shklar, *Legalism: Law Morals, and Political Trials* (Harvard University Press, 1964) 179.

<sup>113</sup> Cryer, above n 102, 242.

<sup>114</sup> Boister and Cryer, *The Tokyo International Military Tribunal — A Reappraisal*, above n 90, 118, 136: ‘During the war itself division emerged in the UNWCC between Australia, China, New Zealand, Poland, and Yugoslavia which supported the Czech lead that aggression was criminal, and the US, France, UK, Netherlands, and Greece, which maintained it was not’.

<sup>115</sup> See Robert Cryer, *Prosecuting International Crimes: Selectivity and the International Criminal Law Regime* (Cambridge University Press, 2005) 243: ‘In all, it is clear that this charge could be accepted only on the basis of an exceptionally broad view of the sources of international law and was, in reality, created *ex post facto*’. See also Bert V A Röling, ‘The Nuremberg and the Tokyo Trials in Retrospect’ in Guénaël Mettraux (ed), *Perspectives on the Nuremberg Trial* (Oxford University Press, 2008) 455, 460: ‘It is at this moment a practically undisputed thesis that before World War II positive international law did not recognise the crime of aggressive war for which individuals could be punished’.

<sup>116</sup> See Guénaël Mettraux, ‘Trial at Nuremberg’ in William A Schabas and Nadia Bernaz (eds), *Routledge Handbook of International Criminal Law* (Routledge, 2011) 5, 11: noting how in a memorandum dated 10 July 1946, Francis Biddle, the US judge at the Nuremberg IMT, was advised in the following terms: ‘It is essential to state the views of the Tribunal as to just what the international law was. It is not too cynical to point out that whether it was or was not before your honors spoke, from the period when you do so speak it is the law’.

<sup>117</sup> For a useful overview of the various positions, see generally Gallant, above n 96, 142–52; Boister and Cryer, *The Tokyo International Military Tribunal — A Reappraisal*, above n 90, 128–34.

## 2 Justice Röling

In contrast to the majority judgment, Justice Röling began his dissent by emphasising that while the *Tokyo Charter* defined the jurisdictional limits of the tribunal, it was the responsibility of the judges to determine whether the provisions of the *Charter* were in conformity with international law.<sup>118</sup> Interestingly, years later Justice Röling confirmed that this conception of the judicial function had caused tensions with the Dutch government and almost led to his resignation, an incident that illustrates both the external pressures put on judges by states during this period as well as Justice Röling's independence in resisting them.<sup>119</sup> In any event, taking the view that the tribunal had a duty to consider the conformity of its *Charter* with international law, Justice Röling proceeded to examine the legality of the category of crimes against peace.

In Justice Röling's opinion, crimes against peace did not exist under international law prior to the end of 1943.<sup>120</sup> However, this fact was not decisive since the maxim prohibiting retroactive criminal law was merely 'an expression of political wisdom, not necessarily applicable in present international relations', which 'may, if circumstances necessitate it, be disregarded even by powers victorious in a war fought for freedom'.<sup>121</sup>

In the present circumstances, Justice Röling argued, the victorious states possessed a right under international law to neutralise threats to international peace and ensure the prevention of such conduct in the future.<sup>122</sup> Since the Allies could have responded with '[m]ere political action, based on the responsibility of power' in exercising this right, the creation of the novel category of crimes of peace could not be regarded as a violation of international law; indeed, the recognition of crimes against peace afforded the vanquished more guarantees than they would otherwise have received.<sup>123</sup>

To further elucidate this argument, Justice Röling drew a distinction between *ordinary* crimes and *political* crimes, the latter being crimes 'where the decisive element is *the danger* rather than the guilt' of the defendant.<sup>124</sup> For Justice Röling, crimes against peace were akin to political crimes 'where the criminal is considered *an enemy* rather than a villain, and where the punishment emphasizes the *political measure* rather than the judicial retribution'.<sup>125</sup>

Effectively, therefore, Justice Röling claimed that preventative detention was permissible under international law against individuals 'who, because of their aggressive political activities in the past, present a danger to the newly won peace'.<sup>126</sup> This characterisation of crimes against peace transformed the historical narrative that had been constructed by the majority. Rather than

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<sup>118</sup> *IMTFE Judgment* (International Military Tribunal for the Far East, 4 November 1948) [3]–[10] (Justice Röling).

<sup>119</sup> Röling and Cassese, above n 103, 61–2.

<sup>120</sup> *IMTFE Judgment* (International Military Tribunal for the Far East, 4 November 1948) [10]–[44] (Justice Röling).

<sup>121</sup> *Ibid* [45].

<sup>122</sup> *Ibid* [46].

<sup>123</sup> *Ibid* [47].

<sup>124</sup> *Ibid* [48] (emphasis added).

<sup>125</sup> *Ibid* (emphasis added).

<sup>126</sup> Bert V A Röling, 'Crimes against Peace' in A Cassese (ed), *The Current Legal Regulation of the Use of Force* (Martinus Nijhoff Publishers, 1986) 385, 390.

depicting those convicted of crimes against peace as individuals who had acted defiantly *in the past* by breaching a pre-existing criminal prohibition established under international law, Justice Röling preferred to characterise them as individuals who had previously undertaken aggressive political behaviour that posed a threat to the peace *in the future*. In other words, Justice Röling's narrative was oriented more towards the notion of prospective deterrence rather than retrospective retribution. As Justice Röling later argued, in his view the recognition of crimes against peace represented the beginning of 'international law of the atomic era'.<sup>127</sup> While the crime was undeniably recognised "in advance" of actual legal concepts and juridical situations', it was not at all 'in advance of the facts of international relations' and should therefore be characterised as a necessary development 'to prevent universal catastrophe'.<sup>128</sup>

### 3 *Justice Pal*

Of the dissenting opinions at Tokyo, Justice Pal's was by far the longest and most critical. Although Justice Pal's dissent focused on a wide range of issues, a significant portion was devoted to elaborating a further perspective on the legality of the category of crimes against peace.

Similar to Justice Röling, Justice Pal began his dissent by emphasising that it was the responsibility of the tribunal to determine whether or not the crimes listed in the *Tokyo Charter* were crimes already existing under international law at the time of the relevant acts of the defendants; otherwise, Justice Pal argued, the tribunal would be nothing more than 'a mere tool for the manifestation of power', and its proceedings would become 'a sham employment of legal process for the satisfaction of a thirst for revenge'.<sup>129</sup> On this basis, Justice Pal conducted a thorough review of the authorities concerning the legality of crimes against peace, ultimately concluding that 'no category of war became a crime in international life up to the date of the commencement of the world war under our consideration'.<sup>130</sup>

Having reached this conclusion on the law, Justice Pal devoted a significant portion of his dissent to disputing the majority's findings of fact concerning Japanese aggression. In this regard, Justice Pal adopted a strikingly deferential attitude towards the submissions of the Defence, at times coming close to accepting that Japan had fought altruistically to liberate Asia from western domination, waging war merely to stave off perceived threats from the US.<sup>131</sup> In his factual appraisal of the conflict, Justice Pal has generally been characterised as becoming somewhat over-indulgent in Japanese claims of self-defence, which appeared to almost blind him to the more imperial and militaristic dimensions of

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<sup>127</sup> Röling, 'The Nuremberg and the Tokyo Trials in Retrospect', above n 115, 470.

<sup>128</sup> *Ibid.*

<sup>129</sup> *IMTFE Judgment* (International Military Tribunal for the Far East, 4 November 1948) [37] (Justice Pal).

<sup>130</sup> *Ibid* [152].

<sup>131</sup> Elizabeth S Kopelman, 'Ideology and International Law: The Dissent of the Indian Justice at the Tokyo War Crimes Trial' (1991) 23 *New York University Journal of International Law and Politics* 373, 419–21, 427; Robert Cryer, 'Röling in Tokyo: A Dignified Dissenter' (2010) 8 *Journal of International Criminal Justice* 1109, 1122.

Japanese expansionism.<sup>132</sup> In adopting this perspective, some scholars have argued that Justice Pal evoked anti-imperialist and pan-Asiatic sentiments.<sup>133</sup> Of particular importance for present purposes, these sentiments also infused Justice Pal's critical discussion of the majority's legal validation of the category of crimes against peace. Specifically, Justice Pal advanced two counter-narratives that served to challenge the majority's depiction of the Japanese defendants as deviants who had undermined the established international order through their involvement in a war of aggression.

First, Justice Pal argued that, far from being deviant, war remained a legitimate tool of self-help under international law at the time of the Second World War. According to Justice Pal, if acts of aggressive war were considered criminal then 'the entire international community is living that criminal life'.<sup>134</sup> By way of illustration, Justice Pal pointed out that after the signing of the *Kellogg-Briand Pact*, states had not behaved as if war was illegal.<sup>135</sup> In fact, within four years of its conclusion, there were three major instances of recourse to force by signatories of the Pact.<sup>136</sup> With this in mind, Justice Pal argued that the majority's conviction of Japanese defendants for crimes against peace reflected a double standard, merely serving to legitimate the idea that punishment for aggressive war depended not upon law 'but only upon the fact of defeat in war'.<sup>137</sup> As Justice Pal cynically put it, 'when the conduct of nations is taken into account the law will perhaps be found to be *that only a lost war is a crime*'.<sup>138</sup> Moreover, Justice Pal even went so far as to argue that to convict and punish the Japanese defendants for acts that were not criminal under existing international law would itself constitute a war crime since 'prisoners are to be dealt with according to the rules and regulations of international law and not according to what the victor chooses to name as international law'.<sup>139</sup> According to this counter-narrative, therefore, the only deviant behaviour identifiable was that of the Allied victor nations in seeking to try and punish individuals for crimes that lacked an adequate legal basis.

Secondly, Justice Pal critiqued the idea that aggressive war had been criminalised on the basis of an underlying shared humanity amongst the international community. In a particularly biting passage, Justice Pal noted that feelings of shared humanity 'were non-existent *at the time when* the [atomic] bombs were dropped' nor could he perceive such sentiments 'in the justifying words of those who were responsible for their use'.<sup>140</sup> For Justice Pal, it was simply premature to speak of a community of nations organised on the basis of humanity. Rather, the basis of international relations was still 'the competitive

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<sup>132</sup> Kopelman, above n 131, 420. See also Boister and Cryer, *The Tokyo International Military Tribunal — A Reappraisal*, above n 90, 135: noting how Pal took 'no account of the incipient rights of the decolonized peoples [in Asia] not to be recolonized by Japan'.

<sup>133</sup> See, eg, Kopelman, above n 131, 421, 426–8.

<sup>134</sup> *IMTFE Judgment* (International Military Tribunal for the Far East, 4 November 1948) [225] (Justice Pal).

<sup>135</sup> *Ibid* [114].

<sup>136</sup> *Ibid* [128].

<sup>137</sup> *Ibid* [147].

<sup>138</sup> *Ibid* [128] (emphasis in original).

<sup>139</sup> *Ibid* [179].

<sup>140</sup> *Ibid* [138] (emphasis in original).

struggle of states', encompassing 'dominated and enslaved nations' and 'no provision anywhere in the system for any peaceful readjustment without struggle'.<sup>141</sup> With this in mind, Justice Pal saw the criminalisation of aggression as an attempt by the Allied nations to impose a static conception of peace on the international community so as to preserve their territorial domination.<sup>142</sup> In what appears to be a clear reference to the colonial powers, Justice Pal quipped:

A swordsman may genuinely be eager to return the weapon to its scabbard at the earliest possible moment after using it successfully for his gain, if he can keep his spoil without having to use it anymore. But perhaps one thing which you cannot do with weapons like bayonets and swords is that you cannot sit on them.<sup>143</sup>

According to this counter-narrative, therefore, the criminalisation of aggressive war represented an attempt by the Allied victor nations to affirm the status quo and ensure the submission of dominated nations to 'eternal domination'.<sup>144</sup>

#### 4 *Narrative Implications of Legal Dissensus over Crimes against Peace*

Taken together, the majority judgment of the IMTFE and the individual opinions of Justices Röling and Pal demonstrate how the methodological assumptions of the judges — in particular concerning the principle of legality — led to divergent understandings of the category of crimes against peace that affected the historical narratives constructed in relation to it. For the majority, the Japanese defendants convicted of crimes against peace were unruly deviants who had undermined international peace and security with their criminal designs for dominating other states. For Justice Röling, crimes against peace represented a revolution in law that would hold the defendants accountable for their prior political actions in light of the danger they presented to the future security of the international community. According to this view, the defendants were not deviant, but dangerous. For Justice Pal, by contrast, the recognition of crimes against peace was itself a potentially criminal act that sought to stifle anti-imperialist struggle in the name of cementing a static conception of peace. Far from being deviant, the behaviour of the Japanese defendants had conformed to the normal course of international relations recognised at that time. Interestingly, it was Justice Pal's dissent — rather than the majority judgment — that would be deemed most authoritative in Japan, proving to be highly influential in shaping Japanese collective memory concerning their conduct both prior to and during the Second World War.<sup>145</sup>

#### B *Forced Marriage at the SCSL*

Within their extensive jurisprudence, the UN ad hoc tribunals recognised a broad range of sexual and gender-based violence crimes. In general, the recognition of such crimes was achieved by deploying one of three techniques.

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<sup>141</sup> Ibid [223].

<sup>142</sup> Ibid [238]–[241].

<sup>143</sup> Ibid [240].

<sup>144</sup> Ibid [239]. For a critique of Justice Pal's position, see Boister and Cryer, *The Tokyo International Military Tribunal — A Reappraisal*, above n 90, 135: arguing that 'the immorality of colonialism does not undermine the illegality of aggression'.

<sup>145</sup> Mistry, above n 30, 461.

First, various forms of sexual and gender-based violence were recognised as evidence of other prohibited acts. For example, in *Prosecutor v Kunarac*, the Trial Chamber of the ICTY found that forcing three women to strip and dance naked on a table while one of the defendants watched them from a sofa, pointing his weapons at them, was a painful and humiliating experience for the victims such that it fell within the war crime of outrages upon personal dignity.<sup>146</sup>

Secondly, some forms of sexual and gender-based violence were recognised as particularised versions of more general prohibited acts.<sup>147</sup> For instance, in *Prosecutor v Sesay*, the Trial Chamber of the SCSL confirmed that the prohibited act of sexual slavery — expressly recognised in art 2(g) of the *Statute of the SCSL*<sup>148</sup> — ‘is a particularised form of slavery or enslavement’ and also noted that ‘acts which could be classified as sexual slavery have been prosecuted as enslavement in the past’.<sup>149</sup> According to the Chamber, the prohibition of more particularised offences such as sexual slavery is

designed to draw attention to serious crimes that have been historically overlooked and to recognise the particular nature of sexual violence that has been used, often with impunity, as a tactic of war to humiliate, dominate and instil fear in victims, their families and communities during armed conflict.<sup>150</sup>

Finally, various forms of sexual and gender-based violence were recognised within the catch-all residual category of ‘other inhumane acts’.<sup>151</sup> For instance, in *Prosecutor v Akayesu*, the Trial Chamber of the International Criminal Tribunal for Rwanda (ICTR) found that the forced undressing of women and marching them in public and forcing women to perform exercises naked fell within the scope of ‘other inhumane acts’.<sup>152</sup>

By deploying each of these techniques, the ad hoc tribunals were able to recognise and condemn various forms of sexual and gender-based violence,

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<sup>146</sup> *Prosecutor v Kunarac (Judgment)* (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber, Case Nos IT-96-23-T & IT-96-23/1-T, 22 February 2001) [772]–[774].

<sup>147</sup> Sara Wharton, ‘The Evolution of International Criminal Law: Prosecuting “New” Crimes before the Special Court for Sierra Leone’ (2011) 11 *International Criminal Law Review* 217, 235–9.

<sup>148</sup> The *SCSL Statute* expressly recognised a broader range of sexual and gender-based crimes than the statutes of the ICTY and ICTR. See *SCSL Statute* art 2(g): recognising rape, sexual slavery, enforced prostitution, forced pregnancy and any other form of sexual violence. See also *SCSL Statute* art 3(e): recognising humiliating and degrading treatment, rape, enforced prostitution and any form of indecent assault as ‘outrages upon personal dignity’, a serious violation of Common Article 3 to the Geneva Conventions 1949 and Additional Protocol II. In addition, the *SCSL Statute* recognised offences relating to the abuse of girls pursuant to Sierra Leonean law, although these crimes were not prosecuted in practice. See *SCSL Statute* art 5(a).

<sup>149</sup> *Prosecutor v Sesay (Judgment)* (Special Court for Sierra Leone, Trial Chamber I, Case No SCSL-04-15-T, 2 March 2009) [155] (*‘Sesay Trial Chamber Judgment’*).

<sup>150</sup> *Sesay Trial Chamber Judgment* (Special Court for Sierra Leone, Trial Chamber I, Case No SCSL-04-15-T, 2 March 2009) [156].

<sup>151</sup> Wharton, above n 147, 230–3.

<sup>152</sup> *Prosecutor v Akayesu (Judgment)* (International Criminal Tribunal for Rwanda, Trial Chamber I, Case No ICTR-96-4-T, 2 September 1998) [697]. See also *Prosecutor v Brima (Judgment)* (Special Court for Sierra Leone, Appeals Chamber, Case No SCSL-2004-16-A, 22 February 2008) [184] (*‘Brima Appeals Judgment’*): summarising the wide range of criminal acts recognised as ‘other inhumane acts’ in the jurisprudence of the ad hoc tribunals.



broadening the scope of their historical narratives, whilst at the same time claiming conformity with the principle of legality.<sup>153</sup>

Of particular importance for present purposes, the diverse methodologies used to recognise particular forms of sexual and gender-based violence sometimes had implications for the narratives constructed about such violence in their judgments. This may be demonstrated by examining a line of cases at the SCSL that concerned the practice of forced marriage. This practice was conceptualised in no less than three different ways in the jurisprudence of the SCSL,<sup>154</sup> resulting in different harms and experiences being foregrounded within the historical narratives of different judgments.<sup>155</sup>

First, in *Prosecutor v Brima*, a majority of the Trial Chamber dismissed charges of forced marriage on the basis that the evidence put forward by the prosecution was ‘completely subsumed’ by the crime of sexual slavery.<sup>156</sup> According to the majority, ‘there is no lacuna in the law which would necessitate a separate crime of “forced marriage” as an “other inhumane act”’.<sup>157</sup> In this regard, the majority found that none of the victims of sexual slavery had given evidence that ‘the mere fact that a rebel had declared her to be his wife had caused her any particular trauma, whether physical or mental’.<sup>158</sup> Moreover, the majority added that ‘had there been such evidence, it would not by itself have amounted to a crime against humanity, since it would not have been of similar gravity’ to other prohibited acts of crimes against humanity.<sup>159</sup> The subsumption of the evidence of forced marriages within the crime of sexual slavery affected how such ‘marriages’ were characterised and understood. First, the majority’s approach implicitly characterised the evidence of forced marriages as predominantly sexual in nature.<sup>160</sup> Secondly, the majority’s approach characterised the relationship of the perpetrators to their “wives” as one of ‘ownership’.<sup>161</sup>

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<sup>153</sup> See, eg, *Sesay Trial Chamber Judgment* (Special Court for Sierra Leone, Trial Chamber I, Case No SCSL-04-15-T, 2 March 2009) [154]–[155]: recognising that the indictments in that case were ‘the first to specifically indict persons with the crime of sexual slavery’ but that at the same time adding that ‘the Chamber does not suggest that the offence is entirely new’.

<sup>154</sup> For a broader account, elaborating on approaches adopted in Rule 98 *bis* decisions and by the Prosecutor in his trial briefs, see generally Sidney Thompson, ‘Forced Marriage at the Special Court for Sierra Leone: Questions of Jurisdiction, Legality, Specificity, and Consistency’ in Charles Chernor Jalloh (ed), *The Sierra Leone Special Court and its Legacy: The Impact for Africa and International Criminal Law* (Cambridge University Press, 2014) 215, 223–32.

<sup>155</sup> See also Valerie Oosterveld, ‘Evaluating the Special Court for Sierra Leone’s Gender Jurisprudence’ in Charles Chernor Jalloh (ed), *The Sierra Leone Special Court and Its Legacy: The Impact for Africa and International Criminal Law* (Cambridge University Press, 2014) 234, 251–2.

<sup>156</sup> *Prosecutor v Brima (Judgment)* (Special Court for Sierra Leone, Trial Chamber II, Case No SCSL-04-16-T, 20 June 2007) [713] (*‘Brima Trial Judgment’*).

<sup>157</sup> *Ibid.*

<sup>158</sup> *Ibid* [710].

<sup>159</sup> *Ibid.*

<sup>160</sup> See also *Brima Appeals Judgment* (Special Court for Sierra Leone, Appeals Chamber, Case No SCSL-2004-16-A, 22 February 2008) [188].

<sup>161</sup> *Brima Trial Judgment* (Special Court for Sierra Leone, Trial Chamber II, Case No SCSL-04-16-T, 20 June 2007) [711].

On appeal, the Appeals Chamber adopted a different approach, reversing the Trial Chamber's majority judgment on the basis that 'no tribunal could reasonably have found that forced marriage was subsumed in the crime against humanity of sexual slavery'.<sup>162</sup> To reach this conclusion, the Appeals Chamber contended that forced marriage was neither a predominantly sexual crime nor merely the exercise of an ownership interest by the perpetrators over their victims.<sup>163</sup> For the Appeals Chamber, forced marriage entailed the imposition of 'a forced conjugal association upon the victims', pursuant to which women and girls were systematically abducted from their homes and communities by Armed Forces Revolutionary Council ('AFRC') troops and compelled to serve as 'conjugal partners' to AFRC soldiers.<sup>164</sup> This relationship entailed the performance of 'conjugal duties' by the victims, including regular sexual intercourse, forced domestic labour, forced pregnancy and caring for and bringing up children of the 'marriage'. In return, the rebel 'husband' was expected 'to provide food, clothing and protection to his "wife", including protection from rape by other men, acts he did not perform when he used a female for sexual purposes only'.<sup>165</sup> In a further distinction from the crime of sexual slavery, forced marriage implied 'a relationship of exclusivity between the "husband" and "wife", which could lead to disciplinary consequences for breach of this exclusive arrangement'.<sup>166</sup> In terms of the particular harms caused by the crime of forced marriage, the Appeals Chamber pointed to both the social stigmatisation suffered by the 'wives' and children born from such associations, including ostracisation from their communities, as well as the physical injury and psychological trauma related to becoming and living as a 'wife'.<sup>167</sup>

In light of these observations, the Appeals Chamber had little difficulty in concluding that acts of 'forced marriage' were of similar gravity to other enumerated crimes against humanity sufficient to constitute the crime against humanity of '[o]ther [i]nhumane [a]cts'.<sup>168</sup> The final definition of the crime of forced marriage ultimately confirmed by the chamber referred to a situation in which

the perpetrator through his words or conduct, or those of someone for whose actions he is responsible, compels a person by force, threat of force, or coercion to serve as a conjugal partner resulting in severe suffering, or physical, mental or psychological injury to the victim.<sup>169</sup>

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<sup>162</sup> *Brima Appeals Judgment* (Special Court for Sierra Leone, Appeals Chamber, Case No SCSL-2004-16-A, 22 February 2008) [195].

<sup>163</sup> *Ibid* [190]–[195].

<sup>164</sup> *Ibid* [190].

<sup>165</sup> *Ibid*.

<sup>166</sup> *Ibid* [195].

<sup>167</sup> *Ibid* [199–200].

<sup>168</sup> *Ibid* [202]: the Appeals Chamber declined to enter a conviction for forced marriage, concluding that the acts in question were encompassed in the conviction for outrages upon personal dignity, and deeming the recognition that such conduct is criminal and that it constitutes an 'other inhumane act' sufficient to convey 'society's disapproval of the forceful abduction and use of women and girls as forced conjugal partners as part of a widespread or systematic attack against the civilian population'.

<sup>169</sup> *Ibid* [196].

The Appeals Chamber's findings were subsequently applied by the Trial Chamber in *Prosecutor v Sesay*, which convicted all three accused of forced marriage as an 'other inhumane act'.<sup>170</sup> The Trial Chamber referred to forced marriage in terms of 'women and girls being forced into "marriages" and being forced to perform a number of conjugal duties under coercion by their "husbands"'.<sup>171</sup> The Trial Chamber also reiterated the social stigma and physical and psychological harm caused by the practice,<sup>172</sup> as well as confirming that the crime was not subsumed by the crime of sexual slavery because of its distinct elements of 'a forced conjugal association based on exclusivity between the perpetrator and victim'.<sup>173</sup>

A final approach to the practice of forced marriage was adopted by the Trial Chamber in *Prosecutor v Taylor*. Even though Charles Taylor had not been charged with forced marriage as an inhumane act, the Trial Chamber decided to elaborate its thoughts on the issue in light of the extensive evidence of the practice that had been adduced by the Prosecution under charges related to sexual violence.<sup>174</sup> The Trial Chamber explained that it did not consider the nomenclature of 'marriage' to be a useful label to describe the experiences of the victims who had suffered such practices, preferring instead the descriptor 'conjugal slavery'.<sup>175</sup> The Trial Chamber argued that conjugal slavery entailed forced conjugal relations involving the imposition of sexual and non-sexual acts and placed particular emphasis on the power of ownership exercised by the perpetrators over their 'bush wives'.<sup>176</sup> The Chamber concluded that conjugal slavery was not a new crime, preferring instead to examine the sexual violence aspects of the practice under the crime against humanity of sexual slavery, and the forced labour aspects of the practice under the crime against humanity of enslavement.<sup>177</sup>

Rather than the factual circumstances being shoehorned to fit a particular legal category, the SCSL's jurisprudence on forced marriage reveals how legal categories can be adapted in line with judicial predilections in response to the novel circumstances of a particular case. Significantly, the divergent interpretative approaches of the judges at the SCSL led to divergent conceptualisations of forced marriage and different harms being foregrounded in the narratives constructed in their judgments. Whereas the subsumption of forced marriage within the crimes of sexual slavery and enslavement tended to emphasise the constituent criminal components of the practice (in particular, sexual violence and forced labour), it was only the recognition of forced

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<sup>170</sup> *Sesay Trial Chamber Judgment* (Special Court for Sierra Leone, Trial Chamber I, Case No SCSL-04-15-T, 2 March 2009) 678.

<sup>171</sup> *Ibid* [164].

<sup>172</sup> See, eg, *ibid* [1296].

<sup>173</sup> *Ibid* [2307].

<sup>174</sup> *Prosecutor v Taylor (Judgment)* (Special Court for Sierra Leone, Trial Chamber II, Case No SCSL-03-01-T, 18 May 2012) [422] ('*Taylor Trial Judgment*').

<sup>175</sup> *Ibid* [426]–[428].

<sup>176</sup> *Ibid* [427].

<sup>177</sup> See, eg, *ibid* [1095]–[1098]: evidence of sexual violence aspects of conjugal slavery considered within charges of sexual slavery. See also at [1824]–[1830]: evidence of forced labour aspects of conjugal slavery considered within charges of enslavement.

marriage as a separate crime that foregrounded the trauma and stigma suffered by victims as a result of the forced conferral of the status of ‘marriage’.

Interestingly, in the aftermath of these judgments, a number of scholars have expressly relied upon narrative considerations to argue in favour of recognising forced marriage as a distinct crime. According to Valerie Oosterveld, for example, since the act of naming is an important expressive tool, the recognition of forced marriage as a distinct prohibited act within crimes against humanity has the potential to ‘authoritatively transform a previously legally unacknowledged experience’ into an acknowledged wrong, as well as help legitimise experiences of victims and identify such experiences as crimes.<sup>178</sup> Equally, for Michael Scharf, the recognition of forced marriage as a separate crime could help to communicate that the practice is ‘far more than just the sum of its parts’, not only demeaning and distorting the institution of marriage itself, but also causing victims to suffer from being ‘indefinably and inexorably bound, “married” to the men who victimize them’.<sup>179</sup>

It remains to be seen which — if any — of the SCSL’s conceptualisations of forced marriage will resonate with particular audiences beyond the courtroom. With respect to communities within Sierra Leone, however, it is notable that although the SCSL referred in general terms to the stigmatisation suffered by individual victims of forced marriage in their communities, the Court tended to neglect the specifically familial nature of marriage in Sierra Leone and the familial nature of the harm that was suffered as a result of such practices. As Tim Kelsall has argued, the SCSL tended to be preoccupied with the compulsion of the *individual* victim into marriage, whereas ‘[i]t was the fact that the *family* had not given its consent that made this a transgressive act in local eyes, not that the “wife” was a non-consenting partner’.<sup>180</sup> Moreover, whereas the SCSL illuminated the different types of harm suffered by the individual victims, from a local perspective forced marriage was seen as ‘an offence against the family’ and the remedies were generally ‘restorative, not retributive’.<sup>181</sup>

### C *Duress at the ICTY*

The final case study concerns the question of the availability of the defence of duress for crimes involving the killing of innocent persons, an issue that became the central point of contention in the case of *Prosecutor v Erdemović* at the ICTY.

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<sup>178</sup> Oosterveld, above n 155, 250.

<sup>179</sup> Michael P Scharf, ‘Forced Marriage as a Separate Crime against Humanity’ in Charles Chernor Jalloh (ed), *The Sierra Leone Special Court and its Legacy: The Impact for Africa and International Criminal Law* (Cambridge University Press, 2014) 193, 193.

<sup>180</sup> Tim Kelsall, *Culture under Cross-Examination: International Justice and the Special Court for Sierra Leone* (Cambridge University Press, 2009) 253 (emphasis added). See also *Sesay Trial Chamber Judgment* (Special Court for Sierra Leone, Trial Chamber I, Case No SCSL-04-15-T, 2 March 2009) [1469] (emphasis added): ‘The Chamber observes, however, that *parental and family consent* to the so-called marriages of these sexually enslaved and abused women was conspicuously absent’.

<sup>181</sup> Kelsall, above n 180, 253.

To provide some background to the case, Dražen Erdemović is an ethnic Croat who lived in the Yugoslav Republic of Bosnia and Herzegovina.<sup>182</sup> After brief periods in the Yugoslav National Army and the police force of the Croatian Defence Council, Erdemović sought work as a locksmith and married a Serbian woman. The young couple tried to leave the Balkans, but visas to Switzerland were difficult to obtain. With his wife pregnant and funds running low, in 1994 Erdemović enlisted in the 10<sup>th</sup> Sabotage Unit of the Bosnian Serb Army of Radovan Karadžić's 'Republika Srpska', a Serb enclave within Bosnia. Rosa Brooks has described Erdemović as 'an accidental and unwilling soldier', someone who had enlisted in order to provide for his family and who had specifically sought to serve in the 10<sup>th</sup> Sabotage Unit because of its relative ethnic diversity and the fact that it was not a combat unit.<sup>183</sup>

However, on 16 July 1995, the unit was ordered to the Branjevo collective farm near Pilica, close to the city of Srebrenica, where five busloads of captive Muslim men and boys were lined up with their backs to the soldiers. Erdemović and his fellow soldiers were told that upon their commander's order, they were to kill the civilians. According to Erdemović's account, he initially protested and stated that he did not want to take part, exclaiming '[a]re you normal? Do you know what you are doing?'<sup>184</sup> However, nobody was interested in his protests and upon refusing to obey the order, he was told: 'If you are sorry for them, stand up, line up with them and we will kill you too'.<sup>185</sup>

Faced with the choice to kill or be killed, Erdemović reluctantly agreed to obey the order, later explaining that he was less fearing for himself and more for what might happen to his wife and child.<sup>186</sup> Even at this stage, however, Erdemović tried to save a man of between 50 and 60 years of age whom he claimed had saved Serbs from Srebrenica on a previous occasion. Despite these efforts, Erdemović's commander informed him that he did not want any surviving witnesses to the incident.<sup>187</sup> The 10<sup>th</sup> Sabotage Unit ended up killing around 1200 civilians that day and, according to Erdemović's own estimate, he killed around seventy persons.<sup>188</sup>

After the war had ended and Erdemović had been demobilised, he confessed his story to a journalist. Shortly after the publication of his story, Erdemović was arrested and transferred to The Hague where he was charged with one count of

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<sup>182</sup> For a useful factual overview of the case, see generally Rosa Ehrenreich Brooks, 'Law in the Heart of Darkness: Atrocity & Duress' (2003) 43 *Virginia Journal of International Law* 861, 863–7. See also *Prosecutor v Erdemović (Sentencing Judgement)* (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber I, Case No IT-96–22-T, 29 November 1996) ('*Erdemović First Trial Sentencing Judgment*'); *Prosecutor v Erdemović (Sentencing Judgement)* (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber II, Case No IT-96–22-Tbis, 5 March 1998) ('*Erdemović Second Trial Sentencing Judgment*').

<sup>183</sup> Brooks, above n 182, 864.

<sup>184</sup> *Erdemović Second Trial Sentencing Judgment* (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber II, Case No IT-96–22-Tbis, 5 March 1998) [14].

<sup>185</sup> *Ibid.*

<sup>186</sup> *Ibid.*

<sup>187</sup> *Erdemović First Trial Sentencing Judgment* (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber I, Case No IT-96–22-T, 29 November 1996) [80].

<sup>188</sup> *Erdemović Second Trial Sentencing Judgment* (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber II, Case No IT-96–22-Tbis, 5 March 1998) [15].

crimes against humanity and, in the alternative, one count of war crimes.<sup>189</sup> Erdemović entered a guilty plea to the first charge and was sentenced by the ICTY Trial Chamber to 10 years imprisonment.<sup>190</sup> On appeal, however, Erdemović's legal counsel argued, inter alia, that his guilty plea had been uninformed and equivocal.<sup>191</sup> Since Erdemović had insisted that he had only acted under coercion, the Appeals Chamber was required to examine whether the defendant's claim of duress rendered his guilty plea equivocal, and in particular whether duress could afford a complete defence to a soldier who had killed innocent persons. As Brooks has observed, at this stage, the story of Erdemović became a story about law, and in particular 'law's struggle to apply reason to terror'.<sup>192</sup> The Appeals Chamber was sharply divided, concluding by a slim 3:2 majority that 'duress does *not* afford a complete defence to a soldier charged with a crime against humanity and/or a war crime involving the killing of innocent human beings'.<sup>193</sup>

### 1 *The Majority Judgment*

The reasoning of the majority is primarily set out in the Joint Separate Opinion of Judge McDonald and Judge Vohrah.<sup>194</sup> The majority began by reviewing the case law of the post-World War Two military tribunals as well as national courts and other military tribunals, concluding that 'no rule may be found in customary international law regarding the availability or the non-availability of duress as a defence to a charge of killing innocent human beings'.<sup>195</sup> Turning next to review the treatment of duress in different legal systems across the world, the majority identified what they saw as an irreconcilable difference in approach between common law systems (against duress constituting a defence to murder) and civil law systems (in favour of duress constituting a defence to murder), concluding that no general principle of law had emerged on the issue.<sup>196</sup>

Interestingly, the conclusion of the majority concerning customary international law was shared by the minority judges, with Judge Cassese, for example, concluding that 'no special customary rule has evolved in international law on whether or not duress can be admitted as a defence in case of crimes

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<sup>189</sup> *Prosecutor v Erdemović (Indictment)* (International Criminal Tribunal for the Former Yugoslavia, Case No IT-96-22, 22 May 1996).

<sup>190</sup> *Erdemović First Trial Sentencing Judgment* (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber I, Case No IT-96-22-T, 29 November 1996).

<sup>191</sup> *Erdemović v Prosecutor (Judgement)* (International Criminal Tribunal for the Former Yugoslavia, Appeals Chamber, Case No IT-96-22-A, 7 October 1997) [11]–[12] ('*Erdemović Appeals Judgment*').

<sup>192</sup> Brooks, above n 182, 866.

<sup>193</sup> *Erdemović Appeals Judgment* (International Criminal Tribunal for the Former Yugoslavia, Appeals Chamber, Case No IT-96-22-A, 7 October 1997) [19] (emphasis added).

<sup>194</sup> *Erdemović Appeals Judgment* (International Criminal Tribunal for the Former Yugoslavia, Appeals Chamber, Case No IT-96-22-A, 7 October 1997) [32] (Judge McDonald and Judge Vohrah), [2]–[12] (Judge Li).

<sup>195</sup> *Erdemović Appeals Judgment* (International Criminal Tribunal for the Former Yugoslavia, Appeals Chamber, Case No IT-96-22-A, 7 October 1997) [55] (Judge McDonald and Judge Vohrah).

<sup>196</sup> *Ibid* [72].

involving the killing of persons'.<sup>197</sup> Where the judges differed, however, was in what consequences should be drawn from the stalemate in the sources of law.

According to the majority, 'the law should not be the product or slave of logic or intellectual hair-splitting, but must serve broader normative purposes in light of its social, political and economic role'.<sup>198</sup> Proceeding from this basis, the majority argued that the mandate given to them by the United Nations Security Council was 'to facilitate the development and effectiveness of international humanitarian law and to promote its aims and application by recognising the normative effect which criminal law should have upon those subject to them'.<sup>199</sup> Reasoning that international humanitarian law should guide the conduct of combatants and commanders and that legal limits must be placed on such conduct, the majority argued that the question ought to be approached in light of the object and purpose of international humanitarian law, which entailed 'the protection of the weak and vulnerable in such a situation where their lives and security are endangered'.<sup>200</sup> In accordance with the spirit of international humanitarian law, the majority concluded that duress was not available as a complete defence to combatants for the killing of innocent persons.<sup>201</sup> In reaching this conclusion, the majority emphasised two further points.

First, they explained that their findings were confined to whether duress affords a complete defence to a *soldier* charged with killing innocent persons. As such, their position was based on their view that 'soldiers or combatants are expected to exercise fortitude and a greater degree of resistance to a threat than civilians, at least when it is their own lives which are being threatened'.<sup>202</sup> From this perspective, the relevant question was what may reasonably be expected from the ordinary soldier in the situation of the defendant, to which the majority replied that 'it is unacceptable to allow a trained fighter, whose job necessarily entails the occupational hazard of dying, to avail himself of a complete defence to a crime in which he killed one or more innocent persons'.<sup>203</sup> Rather, the majority preferred to assert 'an absolute moral postulate which is clear and unmistakable for the implementation of international humanitarian law'.<sup>204</sup> According to this absolute moral principle, an ordinary soldier may reasonably be expected to die rather than kill innocent civilians *in any circumstances*.<sup>205</sup>

Secondly, the majority argued that the law could still recognise the human frailty of a soldier who had killed innocent persons under the threat of death by mitigating his punishment. In determining what the law 'expects' of an

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<sup>197</sup> *Erdemović Appeals Judgment* (International Criminal Tribunal for the Former Yugoslavia, Appeals Chamber, Case No IT-96-22-A, 7 October 1997) [40] (Judge Cassese) (emphasis omitted). Similarly, see at [24] (Judge Stephen).

<sup>198</sup> *Erdemović Appeals Judgment* (International Criminal Tribunal for the Former Yugoslavia, Appeals Chamber, Case No IT-96-22-A, 7 October 1997) [75] (Judge McDonald and Judge Vohrah).

<sup>199</sup> *Ibid.*

<sup>200</sup> *Ibid* [75], [80].

<sup>201</sup> *Ibid* [80].

<sup>202</sup> *Ibid* [84].

<sup>203</sup> *Ibid.*

<sup>204</sup> *Ibid* [83].

<sup>205</sup> For a similar interpretation of this passage, see Illan Rua Wall, 'Duress, International Criminal Law and Literature' (2006) 4 *Journal of International Criminal Justice* 724, 741; Brooks, above n 182, 879.

individual, it would be superficial to look solely at whether or not an individual was convicted; rather, the law employs mitigation of punishment ‘as a far more sophisticated and flexible tool for the purpose of doing justice in an individual case’.<sup>206</sup> Indeed, the majority even argued that in appropriate cases, ‘the offender may receive no punishment at all’.<sup>207</sup>

## 2 *The Minority Opinions*

In response to the majority’s position, Judge Cassese argued that the majority’s reliance on practical policy considerations was ‘extraneous to the task of our Tribunal’, which should ‘refrain from engaging in meta-legal analyses’ and ‘refrain from relying exclusively on notions, policy considerations or the philosophical underpinnings of common-law countries, while disregarding those of civil-law countries or other systems of law’.<sup>208</sup> In Judge Cassese’s view, if there is no special rule governing the availability of duress as a defence for killing innocent persons, the general rule on duress should apply to all categories of crimes.<sup>209</sup> Moreover, even assuming that no clear legal regulation of the matter existed in international law, Judge Cassese argued that the Appeals Chamber should have drawn upon the law applicable in the former Yugoslavia, which provides that duress may amount to a total defence for any crime, including the killing of innocent persons.<sup>210</sup> Such an approach would be supported by the general maxim *in dubio pro reo*, pursuant to which ambiguities in the law should be resolved in favour of the defendant.<sup>211</sup> In reaching this conclusion, Judge Cassese emphasised two further points in response to the majority’s arguments.

First, similar to the majority, Judge Cassese invoked the notion that the law is based on ‘what society can reasonably expect of its members’.<sup>212</sup> Although Judge Cassese did not expressly particularise this reasonableness standard according to the role of a soldier, he impliedly took such a position by arguing that the rank of a soldier should be considered when examining whether the defendant enjoyed any real moral choice.<sup>213</sup> According to this standard of reasonableness, Judge Cassese argued that the absolute moral postulate adopted by the majority was ‘too dogmatic’; the Defence should not be ‘cut off absolutely and *a priori* from invoking the excuse of duress’.<sup>214</sup> According to Judge Cassese, the availability of the defence of duress to all categories of crimes renders the law ‘both realistic and flexible’, empowering Trial Chambers to examine the defendant’s behaviour in light of the circumstances of concrete

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<sup>206</sup> *Erdemović Appeals Judgment* (International Criminal Tribunal for the Former Yugoslavia, Appeals Chamber, Case No IT-96-22-A, 7 October 1997) [85] (Judge McDonald and Judge Vohrah).

<sup>207</sup> *Ibid.*

<sup>208</sup> *Ibid* [11] (Judge Cassese).

<sup>209</sup> *Ibid* [11], [41].

<sup>210</sup> *Ibid* [49].

<sup>211</sup> *Ibid.*

<sup>212</sup> *Ibid* [47].

<sup>213</sup> *Ibid* [45], [51].

<sup>214</sup> *Ibid* [42].



cases rather than by recourse to absolute moral postulates asserted in the abstract.<sup>215</sup>

Although the proportionality requirement of the defence of duress would render its availability rare for crimes involving the killing of innocent persons, Judge Cassese emphasised that where there existed a high probability that the person under duress will not be able to save the lives of the victims whatever he does, the defence may succeed.<sup>216</sup> In such situations, were the defendant to comply with his legal duty not to shoot innocent persons, ‘he would forfeit his life for no benefit to anyone and no effect whatsoever apart from setting a heroic example for mankind (which the law cannot demand him to set): his sacrifice of his own life would be to no avail’.<sup>217</sup> This point also formed the focus of Judge Stephen’s dissenting opinion, who emphasised that the defence of duress should be available ‘where resistance to the demand will not avert the evil but will only add to it, the person under duress also suffering that evil’.<sup>218</sup> According to Judge Stephen, ‘the desire for self-preservation is not merely instinctive but rational, and a law which would require it to be contradicted is not consistent ... with a “rational system of law” that takes “fully into account the standards of honest and reasonable men”’.<sup>219</sup> The majority’s aim of protecting the lives of innocent persons is not to be achieved ‘by the denial of a just defence to one who is in no position to effect by his own will the protection of innocent life’.<sup>220</sup>

Secondly, in response to the majority’s contention that the human frailty of a soldier could be adequately accounted for through mitigation of punishment, Judge Cassese argued that no matter how much mitigation a court allows a defendant, ‘the fundamental fact remains that if it convicts him, it regards his behaviour as criminal, and considers that he should have behaved differently’.<sup>221</sup> Similarly, Judge Stephen argued that precluding duress as a defence for the killing of innocent persons would deny judges the legal flexibility to ensure that in appropriate circumstances defendants are not burdened with ‘all the stigma of conviction as a murderer’.<sup>222</sup> On this basis, Judge Stephen concluded that ‘[t]o admit duress generally as a matter of mitigation but wholly to exclude it as a defence in the case of murder does indeed appear illogical’.<sup>223</sup>

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<sup>215</sup> Ibid [47], [49].

<sup>216</sup> Ibid [42]–[44].

<sup>217</sup> Ibid [44].

<sup>218</sup> Ibid [62] (Judge Stephen). Judge Stephen’s conclusion was based on the view that that the common law denial of duress as a defence to murder is based upon ‘situations in which an accused has had a choice between his own life and the life of another as distinct from cases where an accused has no such choice, it being a case of either death for one or death for both’: at [25]. Since the facts of *Erdemović* concerned the latter type of situation, the basis of the common law denial of duress as a defence to murder was not at issue; consequently, Judge Stephen concluded that ‘[n]o violence is done to the fundamental concepts of the common law by the recognition in international law of duress as a defence in such cases’ and the availability of duress in other circumstances in crimes involving the killing of innocent lives ‘is a matter for another day and another case’: at [64].

<sup>219</sup> Ibid [54].

<sup>220</sup> Ibid [65].

<sup>221</sup> Ibid [48] (Judge Cassese) (emphasis omitted).

<sup>222</sup> Ibid [27] (Judge Stephen).

<sup>223</sup> Ibid [46].

### 3 Narrative Implications of Legal Dissensus over Duress

*Prosecutor v Erdemović* provides a further illustration of how divergent methodological assumptions can lead to dissensus over the meaning of a legal category, with significant implications for the narratives constructed by judges in relation to it.

For the majority, the primary concern in defining the scope of the defence of duress was to secure deterrence through adherence to international humanitarian law and protect prospective victims of international crimes. The narrative implications of this posture were twofold.

First, the majority's assertion that an absolute moral postulate to implement international humanitarian law is in conformity with what society reasonably expects of an ordinary soldier constituted an abstract approach to the question of reasonableness at the expense of examining the particular contexts in which soldiers operate. As Illan Wall has argued, '[b]y bracketing the plight of Erdemović himself and considering duress independently of any facts, we treat it as some legal occurrence rather than a terrible actual event; we clinicalize the incident'.<sup>224</sup> By adopting a victim-focused teleological interpretation of its mandate at the expense of considering the particular circumstances that had confronted the accused, Erdemović effectively became a 'sacrificial lamb' for honouring the pain of the victims of Srebrenica.<sup>225</sup>

Secondly, the majority's conviction of Erdemović characterised his story as 'a narrative about choice'.<sup>226</sup> As Rosa Brooks has argued, the majority's narrative drew attention to Erdemović's failure as a moral agent, whose crime 'was only consummated at Srebrenica, but began much earlier ... [in] his repeated failure to take a real stand, to insist on loyalty to any one group or idea'.<sup>227</sup> This emphasis on Erdemović's agency also rose to the fore in the ICTY Trial Chamber's sentencing judgment, in which the judges emphasised how the defendant had provided testimony of 'incidents when he broke out of this chain of helplessness and took positive action', thereby proving that 'he was capable of taking positive action, once he had weighed up his options' and that '[t]he risks that he took appear to have been calculated and considered'.<sup>228</sup>

By contrast, for the minority, the primary interest in defining the scope of the defence of duress was a concern for ensuring fairness to the accused. Acceptance of the minority's recognition of the availability of the defence of duress for crimes involving the killing of innocent persons would have resulted in two narrative implications.

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<sup>224</sup> Wall, above n 205, 742.

<sup>225</sup> Brooks, above n 182, 885. See also Robinson, above n 87, 946: 'the chamber focused on the need to send a clear message, but overlooked whether the system's principles allowed it to use Dražen Erdemović to send that message'.

<sup>226</sup> Brooks, above n 182, 881 (emphasis added).

<sup>227</sup> Ibid. The majority's conclusion has been criticised by a range of scholars. See, eg, Thomas Weigend, 'Kill or Be Killed: Another Look at *Erdemović*' (2012) 10 *Journal of International Criminal Justice* 1219, 1222; Aaron Fichtelberg, 'Liberal Values in International Criminal Law: A Critique of *Erdemović*' (2008) 6 *Journal of International Criminal Justice* 3, 13. Cf Darryl Robinson, 'A Cosmopolitan Liberal Account of International Criminal Law' (2013) 26 *Leiden Journal of International Law* 127, 150–1.

<sup>228</sup> *Erdemović Second Trial Sentencing Judgment* (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber II, Case No IT-96–22-Tbis, 5 March 1998) [17].

First, the minority's position would have enabled an examination of the difficult contexts confronted by individuals such as Erdemović on a more nuanced case-by-case basis. According to Kai Ambos, for example, the minority's position is preferable since it is based on 'a profoundly human and in this sense honest and realistic concept of criminal law, which takes into account the human weakness of each individual and rejects an abstract call for heroism to be regulated by criminal law'.<sup>229</sup>

Secondly, the minority's position would have opened up the possibility of drawing greater attention to the extent to which Erdemović's story was 'a narrative about *inevitability and determinism*'.<sup>230</sup> Although Erdemović had voluntarily signed up with the Bosnian Serb army and the number of persons he had killed to save his own life was high,<sup>231</sup> the minority's approach would nonetheless have rendered it possible — though not inevitable — for Erdemović's story to have been characterised as one involving 'the very worst sort of moral luck', the story of a man 'caught up in events beyond his control ... [with] no more freedom than a pawn on chessboard ... an ordinary man who one day simply found himself in an untenable situation'.<sup>232</sup>

## V CONCLUSION: THE METHOD IS THE MESSAGE

Since international criminal courts are unavoidably embroiled in the production of historical records concerning the mass atrocity situations that fall within their purview, it is important to reflect on the histories that are constructed by them in practice. To this end, this article has sought to contribute to our understanding of the historical function of international criminal courts in two respects.

First, the article has illuminated how international criminal courts constitute confrontational terrains in which narrative authority is dispersed and contested.

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<sup>229</sup> Kai Ambos, *Treatise on International Criminal Law: Foundations and General Part* (Oxford University Press, 2013) vol 1, 361 (emphasis omitted). Similarly, see Weigend, above n 227, 1236: 'a soldier undertakes to be valiant in the face of an attack by hostile troops and he is trained to deal with such attacks; but his training does not prepare him for resisting unlawful threats by his own superior or by any other member of his army'; Saira Mohamed, 'Deviance, Aspiration, and the Stories We Tell: Reconciling Mass Atrocity and the Criminal Law' (2015) 124 *Yale Law Journal* 1628, 1666–7: 'facing a risk of death at the hands of an enemy differs dramatically from laying down one's life in the face of one's own threatening and criminal commander. Does it make sense to expect the average soldier to accept death in these circumstances? Unless we dramatically redefine our understanding of the average battlefield, it does not'; Harmen van der Wilt, 'Justifications and Excuses in International Criminal Law: An Assessment of the Case-Law of the ICTY' in Bert Swart et al (eds), *The Legacy of the International Criminal Tribunal for the Former Yugoslavia* (Oxford University Press, 2011) 275, 293: 'The soldier may have considered the possibility of being killed in action, but might not have contemplated that he would ever be faced with the choice of committing a war crime at gun point'. But see Luis E Chiesa, 'Duress, Demanding Heroism, and Proportionality' 41 (2008) *Vanderbilt Journal of Transnational Law* 741, 772: 'as a soldier, Erdemović had an obligation to protect innocent noncombatants. In the standard case, a soldier is required to resist threats to his own life and bodily integrity in order to protect innocent people'.

<sup>230</sup> Brooks, above n 182, 881 (emphasis added).

<sup>231</sup> *Erdemović Appeals Judgment* (International Criminal Tribunal for the Former Yugoslavia, Appeals Chamber, Case No IT-96–22-A, 7 October 1997) [50] (Judge Cassese): drawing attention to these factors as requiring further reflection had the matter been remitted to a Trial Chamber.

<sup>232</sup> Brooks, above n 182, 881.

With this in mind, rather than expecting international criminal judgments to provide moments of narrative closure, it is suggested that a more fruitful perspective would be to view international criminal proceedings as a whole as discursive beginnings for victims, local communities and future generations to engage with and debate the past beyond the courtroom.<sup>233</sup> According to this perspective, international criminal proceedings might be likened to public monuments, which, once constructed, '[permit] debates over memory, and potentially conflicting and multiple meanings and perspectives on the underlying events'.<sup>234</sup>

Secondly, the article has revealed an important dimension of how narrative dissensus can emerge between international criminal judges both within and across cases in particular institutional contexts. By drawing attention to the significance of the methodological assumptions underpinning legal interpretation, this article has demonstrated how dissensus over the meaning of legal categories can have significant implications for the historical narratives constructed by judges in particular cases. Whilst acknowledging that legal categories may be characterised as restrictive grids within which narratives must be tailored to fit to ensure their legal relevance, this article has emphasised the importance of recognising that the meanings of legal categories are not always self-evident. In particular, where the methodological assumptions of an interpretive community are in flux, the resulting adaptability of legal categories can generate narrative dissensus amongst international criminal judges. Ultimately, given the significance of methodological assumptions to both normative and narrative outcomes, it may be concluded that the method *is* the message — a message not only about the meaning of legal categories but also about our historical understanding of particular episodes of mass violence.<sup>235</sup>

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<sup>233</sup> See also Mark Osiel, *Mass Atrocity, Collective Memory, and Law* (Transaction Publishers, 1997): putting forward a 'civil dissensus' theory.

<sup>234</sup> Martha Minow, *Between Vengeance and Forgiveness: Facing History after Genocide and Mass Violence* (Beacon Press, 1998) 139. See also Mistry, above n 30, 461 (emphasis in original): noting how 'dissents may stimulate a discourse *outside* the courtroom that may be more conducive to the ends of historical truth seeking than courtroom processes'.

<sup>235</sup> The phrase 'the method is the message' is drawn from: Anne-Marie Slaughter and Stephen R Ratner, 'The Method is the Message' (1998) 93 *American Journal of International Law* 410, 410.