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Table of Contents

'THE WORLD'S COURT OF JUSTICE':A HISTORIOGRAPHY OF WAR CRIMES PROSECUTIONS

Tiphaine Dickson*

Abstract

The International Criminal Tribunal for the former Yugoslavia, and the International Criminal Tribunal for Rwanda, established by the Security Council of the United Nations in 1993 and 1994, respectively, faced the already daunting task of carrying out complex criminal prosecutions, with little jurisprudential guidance, in often extremely unfavorable conditions. Despite the innumerable practical, legal, financial and political challenges these institutions faced, they chose to take on an additional and unnecessary responsibility for which they were woefully ill-equipped: writing history. This article explores the incompatibility between the craft of history and institutions of international criminal law, and argues that court written history degrades both. Moreover, contrary to the tribunals' claims that their writing history in the context of the criminal prosecution of individuals serves to combat denial; they contribute to precisely such historical distortions, in particular in the context of World War II atrocities.

'Presque toute l'histoire n'estdoncqu'une longue suite d'atrocitésinutiles'[Voltaire, *Essai sur l'histoire générale*, 1756][1]

'The History of the world is the world's court of justice.' [Karl Löwith, *Meaning in History*, 1949][2]

'History is a pack of tricks we play on the dead.'[Voltaire][3]

INTRODUCTION

To say that the influence of history on war crimes trials and international criminal law is significant would be an understatement. The discipline of history participates in the establishment of a narrative that international courts (and their political proponents) consider as being *true*; this truth in turn becomes, in the highly charged context of, for example, a genocide trial, the historical account that must be proven as a matter of law. The idea of (writing) history becomes one of the objectives of the court, and some judges, not content to note the historical nature of

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[1]Voltaire, *Essai sur l'histoire générale et sur l'esprit et les moeurs des nations,* (Cramer, 1757), 24.

[2]Cited in Carlo Ginzburg, 'Checking the Evidence: The Judge and the Historian,' in James Chandler, Arnold I. Davidson, and Harry Harootian (eds), *Questions of Evidence: Proof Practice and Persuation Across the Disciplines* (University of Chicago Press, 1994), 291.

[3]Cited in Judith Shklar, 'Learning Without Knowing,' in Stanley Hoffmann (ed) *Political Thought and Political Thinkers* (University of Chicago Press, 1998), 117.

their functions adopt, in addition, the mantle of historians.[4] But contrary to those they emulate, they seek an account not subject to appeal. Historical events and historic legal precedents from the mid-twentieth century lend solemnity and purpose by analogy. After all, the judges who preceded them at Nuremberg, at least in France, have their words enshrined in legislation that prohibits contesting ('contester') the existence of crimes against humanity as defined by the Nuremberg Charter committed by organizations deemed criminal or by individuals found guilty by French or international tribunals.[5] Members of the French Commission on Constitutional Law, the commission being a legislative committee, have argued that this provision of criminal law can be extended to questioning (or 'contesting') the existence of crimes against humanity as held by judges of the *ad hoc* International Criminal Tribunal for the Former Yugoslavia and the International Criminal Tribunal for Rwanda.[6] It should not come as a surprise that a number of reputable historians[7] have publicly objected to this law, and asked for its repeal, among them the tireless opponent of Holocaust denial and son of two parents killed in Auschwitz, Pierre Vidal-Naquet. 'History is not a legal object,' Vidal-Naquet*et al* wrote in an op-ed published in *Libération*. 'In a free state, it is not the province of Parliament or the courts to define historical truth. State policy, even when animated with the best intentions, is not the policy of history.'[8]

And so a historian protests the enactment of a criminal law that protects the history written by judges in international criminal cases—at times with the help of expert historians—from the scrutiny of historians. This essay examines how we got there.

LAW IN HISTORY

Law and history have long been interrelated. Historians have employed law's artifacts—judgments, transcripts, letters exchanged in the margins of trials,[9] accounts of trials—to tell stories about politics, society, institutions, and philosophy. From the numerous conflicting accounts of the trial of Socrates to

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[4]The International Criminal Tribunal for the Former Yugoslavia'swebsite, in its'About Us' section, makesthis plain: 'The Tribunal has contributed to an indisputable historical record, combating denial and helping communities come to terms with their recent history.' <www.icty.org/sections/AbouttheICTY> (accessed 7 April 2015>.

[5] *loi* nº 90-615 du 13 juillet 1990 tendant à réprimer tout acteraciste, antisémiteouxénophobe

[6]Assemblée Nationale, No. 3074, 'Rapport fait au nom de la Commission des loisconstitutionnelles, de la législation et de l'administration générale de la république sur la proposition de loi (n° 3030) de m. Didier Migaud et plusieurs de sescollègues, complétant la Loi n° 2001-70 du29 janvier 2001 relative à la reconnaissance du génocidearméniende 1915,Par M. Christophe Masse,Député,' May 15th, 2006, 15.

[7]See René Rémond, 'L'histoire et la loi' (2006) 6 *Études* 763.

[8] Author's translation. 'L'histoire n'est pas un objet juridique. DansunÉtatlibre, iln'appartientni au Parlementni à l'autoritéjudiciaire de définir la véritéhistorique. La politique de l'État, mêmeanimée des meilleures intentions, n'est pas la politique de l'histoire.' Pierre Vidal-Naquet*et al* 'Liberté pour l'histoire' (*Libération* 13 December 2005) <http://www.liberation.fr/societe/2005/12/13/liberte-pour-l-histoire_541669> (accessed 26 October 2015).

[9]Michael Grossberg, 'How to Tell Law Stories' (1998) 23(2) *Law and Social Inquiry* 459.

historical scholarship on the witchcraft trials of the Inquisition, law's manifestation through sources offers useful evidence for the work of the historian. Legal proceedings leave precious archival records for historians to mine.[10] But this observation is trivial if the purpose for which historians employ archival evidence generated by law is ignored. The *Annales* School[11]—named after the 1929 French journal, *Annalesd'histoireéconomiqueetsociale*—introduced a new approach to social history, borrowing from Durkheim's contribution to the sociological theory of collective unconscious, as well as from the structuralist theories developed in anthropology.[12]It is with these methods and approaches that historians of this school studied social units such as women, the poor, marginal elements of society as well as the ideas creating the boundaries and values of these elements in their historical context.[13]

Inquisition records provided evidentiary foundation for the exploration of themes well beyond the narrow scope of the trials themselves; Emmanuel Le Roy Ladurie reconstituted the complex social relations of a 14th century French town on the basis of Jacques Fournier's Inquisition records of the investigation of 94 people accused of heresy in Montaillou, setting the records against the broader economic, social and political context of the time.[14] Carlo Ginzburg's*The Cheese and the Worms,*[15]as well as *The Night Battles*, examine society, beliefs, and cosmology by exploring the gaps created by misunderstandings and distortions contained in Italian Inquisition records.[16] This work disproved the pessimism of many historians regarding the possibility of reconstructing the lives of average individuals, and even more so, the underprivileged of the distant past, as evidence did not exist in a sufficient amount to document their daily habits and social relations.[17] The law proved critical in permitting this approach to emerge, as Ginzburg puts it, since 'the richest (not to say the only available) evidence for these entries has been provided, either directly or indirectly, by court records from distance places and times: fourteenth- or sixteenth-century France, seventeenth-century Italy or China.'[18]

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[10] Martha Howell and Walter Prevenier, *From Reliable Sources: an Introduction to Historical Methods*, (Cornell University Press, 2001) 34.
[11] ibid 110; Ginzburg (n 2) 293.
[12] Collective consciousness is theorized by Durkheim as a shared set of beliefs and understanding of social norms among given social groups. These group beliefs can usefully be studied over time by historians. Structuralist anthropology provided a theory that could delve into the way human society assigned identities, functions, and roles. Notions such as gender, space, time, life and death are elements of social structure, both founding it as well as being produced by it. Howell and Prevenier (n 10) 110-111.
[13] ibid.
[14] ibid 111.
[15] Carlo Ginzburg, *The Cheese and the Worms: The Cosmos of a Sixteenth-Century Miller* (Johns Hopkins University Press 1992).
[16] Arnold I. Davidson, 'Ginzburg and the Renewal of Historiography' in Chandler Davidson and Harootian (n 2) 320.
[17] Ginzburg (n 2) 300.
[18] ibid and cf Ginzburg, 'The Inquisitor as Anthropologist,' in *Clues, Myths and the Historical Method* (John Hopkins University Press 1989) 158-159.

But more crucially than the issue of availability, as important as it isthe fact is that history and law share some core methodological affinities. History, originally conceived as a practice on the intersection of medicine and rhetoric,[19] reflects not only tools of legal reasoning and argument, but also the evaluation and careful weighing of evidence[20]. History is, however, the self-conscious reconstitution of that evidence into a coherent, honest, yet nonetheless subjective narrative.[21] Peter Brooks writes, regarding histories of law, that: 'How stories are told, listened to, received, interpreted—how they are made operative, enacted—these are issues by no means marginal to the law nor exclusive to theory; rather they are part of law's daily living reality.'[22] What this means with respect to history is that good history is a story well told, conveying an illusion of reality[23] but it is not—and surely cannot be tolerated as—a merely fictional exercise. Evidence matters. But what can be reconstructed is a story—scrupulously respecting the integrity and authenticity of evidence—that borrows from the literary genre, allowing the historian to consider matters that had been considered irrelevant (such as peasants and 'witches') or for which the evidence was scarce.[24]

Thus law and history overlap, but they are not interchangeable. Earlier historiography emphasized persuasion, at the expense of the production of evidence, the latter being reserved to antiquarians.[25] In the eighteenth century, the practice of the historian considering evidence and 'testimony' emerged; and so, too, did the practice of the historian assuming the role of a judge.[26] Ginzburg shows how profoundly the influence of the judicial temper and function affected historiography at this time: first, Hegel's grand pronouncements, in his philosophy of history, of the '*Weltgericht*,''verdict of the world'—which also means 'Last Judgment,'— against which Nietzsche railed furiously in his *Uses and Abuses of History*[27]—then Lord Acton's characterization of history as a legitimate tribunal dispensing universal truth.[28] But this approach oriented historiography to the examination of great events, leaving aside the type of social relations later captured by the *Annales* School—paradoxically, perhaps, thanks to the assistance of sources generated by the legal process. It is thus that social historians chose to understand rather than to judge.[29]

The judicial process and the law, writes Ginzburg, travel along the same road in the initial stages of their respective purposes, both, in particular, paying careful

[19] Ginzburg (n 2) 290-291.
[20]Ibid 290.
[21]Howell and Prevenier (n 10) 20.
[22]Peter Brooks, 'The Law as Narrative and Rhetoric,' in Peter Brooks and Paul Gewirtz (eds) *Law Stories, Narrative and Rhetoric in the Law* (Yale University Press, 1996).
[23]Carlo Ginzburg, *The Judge and the Historian: Marginal Notes on a Late-Twentieth-Century Miscarriage of Justice* (Verso, 2002) 12.
[24]Ginzburg (n 2) 297.
[25] Ginzburg (n 23) 12-13.
[26] Ibid.
[27]Shklar (n 3) 115.
[28] Ginzburg (n 2) 292.
[29] ibid 293.

attention to facts and evidence; but they must necessarily diverge at one point. Both justice and history suffer from conflation of purposes, and indeed, in Ginzburg's apt formulation, 'whoever attempts to reduce the historian to a judge simplifies and impoverishes historiographical consciousness; but whoever attempts to reduce the judge to historian irredeemably pollutes the exercise of justice.[30]'

HISTORY IN LAW

'The remote past,' wrote Judith Shklar, regarding the charge of waging aggressive war in Nuremberg, 'cannot be legally tried, and the remote future cannot be controlled.'[31] In *Legalism*,Shklar sharply distinguished the legal and historical approaches to events on the basis of different methodological commitments to causality.[32] Where historians and jurists could agree, she argued, was on simple matters of causality such as John Wilkes Booth being the cause of Abraham Lincoln's death. But historians, though their discipline provides them with professionally understood and accepted cut-off points in time, nonetheless explore vast swaths of social and economic interrelations over time and space. This, she argues, makes history uniquely ill-suited to examining charges, brought in the judicial sphere, such as that of waging aggressive war, since the prosecution of such an offence (and inevitably its defense) would introduce a discussion of the causes of the war. This exploration can be taken up by the historian, but it embraces far more than what a trial requires and indeed allows.[33] Much of the contemporary scholarship on the role of history in the legal process, however, has not been as skeptical as Shklar's.

In the heady post-cold war yearsShklar's work—*Legalism* and 'The Liberalism of Fear', an essay—were in fact posthumously employed to variously promote the idea that war crimes trials had always been established by liberal democracies,[34] or to restore, urgently, faith in liberalism—paradoxically lost after it had ostensibly triumphed against the ideas of Marx—by highlighting terror and fear abroad, thus creating vocations of heroism for American rebels without a cause.[35] Standard accounts now repeat that the nineteen-nineties were years where atrocities were unleashed while the West stood by[36]; in this narrative, those who did act (usually with the pen, or more frequently the laptop of the foreign correspondent) were fighting the tide of stubborn inaction. The claim seems curious, as not one, but two, *ad hoc* international criminal tribunals were

[30] Ginzburg (n 23) 118.
[31] Judith Shklar, *Legalism* (Harvard University Press, 1964)171.
[32]Causality, here, refers to the historian'sinterest in change, and the examination of phenomena, events, or antecedentsthatmay have played a role in the change. Complexevents have complexantecedents ; thisrequireshistorians to takeaccount of thatcomplexitywhenexploring a causal explantation. Howell and Prevenier (n 10) 128.
[33]Shklar (n 31) 195-197.
[34]See Gary J. Bass, *Stay the Hand of Vengeance: The Politics of War Crimes Tribunals* (Princeton University Press 2000) 20.
[35]Corey Robin, *Fear: The History of a Political Idea* (OUP 2004) 145-147.
[36]Samantha Power, *A Problem From Hell: America and the Age of Genocide* (Perrenial 2003).

established by the Security Council of the United Nations before the end of 1994.[37] This is worthy of mention as the creation of these bodies is a legitimate object of study for history; but the type of history that has been produced to account for it, bears striking resemblance to the biographies of great men—one can think here of Samantha Power's lionization of Raphaël Lemkin and William Proxmire[38]—or to the early historiography advocating Christianity.[39] The contemporary cause is the fight against atrocities and its urgent and graphic nature justify the adoption of a historiographical genre better suited to advocacy than to understanding.[40]

It may be that the role of history in war crimes prosecutions is situated somewhere between judging and understanding. Richard Wilson undertakes the rebuttal of a trio of objections against the use of history in war crimes prosecutions: that it is harmful to due process, that it is inconsistent with the legal approach, and that it generates 'boring' history.[41] Wilson begins from the questionable premise that the 'standard' view is that history ought not play a role in the law governing atrocities, which can hardly be said to reflect the conventional scholarly, social, or even institutional wisdom on this point. Starting with the public position of the International Criminal Tribunal for the Former Yugoslavia, as set out by their outreach program (a responsibility of the Registrar, one of the three organs of the Tribunal), a radical embrace of history, as well as of a sense of historical mission and accomplishment is immediately apparent:

The Tribunal has established beyond a reasonable doubt crucial facts related to crimes committed in the former Yugoslavia. In doing so, the Tribunal's judges have carefully reviewed testimonies of eyewitnesses, survivors and perpetrators, forensic data and often previously unseen documentary and video evidence. The Tribunal's judgements have contributed to creating a historical record, combatting denial and preventing attempts at revisionism and provided the basis for future transitional justice initiatives in the region. As the work of the ICTY progresses, important elements of a historical record of the conflicts in the former Yugoslavia in the 1990s have emerged. The ICTY has established crucial facts about crimes, once subject to dispute, beyond a reasonable doubt.[42]

The pronouncement, by a Security Council body tasked to hold trials against individuals, that certain historical matters are now no longer subject to dispute is perplexing. Wilson, however, expresses the view that international tribunals, and in particular the ICTY, have overcome the main obstacles posed by previous courts, by virtue of their international nature. Part of the problem is that Wilson considers only objections to French proceedings against Paul Touvier, and Hannah Arendt's critique of the Eichmann trial; but obviously international courts are not a single

[37] *Report of the Secretary-General Pursuant to Paragraph 2 of the Security Council Resolution 808 (1993)*, UN Doc S/25704, 3 May 1993; SC Res. 955, 8 November, 1994.
[38] Samantha Power, *A Problem from Hell: America and the Age of Genocide.*
[39] Howell and Prevenier (n 10) 5.
[40] Ibid *6.*
[41] Richard Wilson, 'Judging History: The Historical Record of the International Criminal Tribunal for the Former Yugoslavia,' (2005) 27(3) *Human Rights Quarterly* 908, 908.
[42] <www.icty.org/sid/324#establishing> (accessed 13 April 2015).

nation-state exploiting a criminal trial for the purposes of restoring moral credibility as in the case of France or building a national identity as in the case of Israel[43]. It thus says very little to point to international courts as not tributary of the idiosyncratic goals of particular states if that is to mean that such international status can guarantee fair trial and due process rights, or indeed that history has not been abused or potentially distorted. It hardly makes a difference from the due process standpoint that the Security Council is employing an international tribunal to write history instead of a nation state: the problems inherent in court-written history remain just the same.'A trial at the ICTY' writes Patricia Wald, former judge at the ICTY and quoted by Wilson, 'is usually more akin to documenting an episode or even an era of national or ethnic conflict rather than proving a single discrete incident.'[44] Is Wald not describing a practice beyond that of the prosecution of individuals, more akin to Shklar's concerns regarding the historians' broader views of causality, and can it be blithely assumed that this will have no impact on the due process rights of an individual charged with specific criminal offenses?

In the end, Wilson does not meaningfully address the due process objections that emerge when war crimes prosecutions employ courts to write history; instead, he devotes considerable space to praise the quality of the history written by the ICTY, noting that the court's first judgment, in the case of Prosecutor v. Tadic,[45] restates the history of Yugoslavia (and its constituent parts, before the creation of the Socialist Federal Republic of Yugoslavia) from the fourth century to the armed conflicts justifying the establishment of the tribunal in 1993, as it was presented by the Prosecution's expert, military historian James Gow.[46] Wilson then summarizes the sixty-nine pages that the Tadic judgment devotes to history even before addressing the indictment, and approvingly cites another prosecution expert witness, historian Robert Donia, who in his own published account of his role as a prosecution expert in another case,[47] wrote that '[t]hese chambers have produced

[43]Wilson refers to twowell-known objections to court-writtenhistory: the first is Hannah Arendt'sassessmentthat the Eichmann trial had been instrumentalised by the theIsraeligovernment to write a broad, sweepinghistory of antisemitisminstead of concentrating on the criminalmatter at hand and guaranteeingdueprocess for the accused. Hannah Arendt, *Eichmann in Jerusalem: A Report on the Banality of Evil* (Viking Press 1964) 253. TzvetanTodorov, in turn, deplored that the French trials of Paul Touvier and Klaus Barbie engaged in forays into World War II history and questions of French national identity, rather than applying the law in an equitable way. See TzvetanTodorov 'The Touvier Affair' in *Memory, the Holocaust and French Justice: the Bousquet and Touvier Affairs* Richard Joseph Golsan (ed) (University Press of New England 1996) 120.

[44]Patricia M. Wald, 'To Establish Incredible Events by Credible Evidence: The Use of Affidavit Testimony in Yugoslav War Crimes Tribunal Proceedings' (2001) 42 *Harvard International Law Journal* 535, 536–37 (2001), cited in Wilson (n 41) 923.

[45]Prosecutor v. Tadic; (Case No. IT-94-1-T), Judgment of Trial Chamber, 7 May 1997

[46]Wilson (n 41) 927: 'The history up to World War I is taken entirely from Gow's testimony and significant elements of subsequent history as well, including the role of President Tito in suppressing nationalist tensions, the significance of the 1974 Yugoslav Constitution, and finally the organization and ethnic composition of the Yugoslav People's Army in the 1980s and early 1990s', citing the Tadic Judgment at ¶¶ 56–79, 108–14.

[47]Robert Donia, 'Encountering the Past: History at the Yugoslav War Crimes Tribunal' (2004) 11(2-3) *The Journal of International Institute*<http://quod.lib.umich.edu/j/jii/4750978.0011.201/--encountering-the-past-history-at-the-yugoslav-war-crimes?rgn=main;view=fulltext>

histories that are not only credible and readable, but indispensable to understand the origins and course of the 1990s conflicts in the former Yugoslavia.'

The Tribunal judges, though writing a history spanning centuries on the basis of a single testimony (with the exception of a relatively narrow point about worker self-management offered by anthropologist Robert Hayden, called by the defense), describe as Serb propaganda the fact that periodicals from Belgrade 'featured stories on the remote history of Serbs intended to inspire nationalistic feelings.'[48] The 'remote history' in question refers to the Second World War. That period, as the Tribunal mentions elsewhere in the decision, with the type of understatement that led to the British libel trial in Irving v. Penguin Books[49], was a 'tragic time, marked by harsh repression, great hardship and the brutal treatment of minorities. It was a time of prolonged armed conflict, in part the product of civil war, in part a struggle against foreign invasion and subsequent occupation.'[50] One hoping to read even a superficial account of the fascist political structure of NDH Croatia, or the widespread atrocities committed by the Ustasa—those committed against the Jews comprehensively detailed in Volume II of Raul Hilberg's*TheDestruction of the European Jews*[51]—will be disappointed. Instead, the 'credible history' presented by the ICTY judges states that 'Three distinct Yugoslav forces each fought one another: the Ustasa forces of the strongly nationalist Croatian State, supported by the Axis powers, the Chetniks, who were Serb nationalist and monarchist forces, and the Partisans, a largely communist and Serb group.'[52]

Let us attempt to break down that sentence. First, the ICTY's history qualifies the Ustasa as 'forces of the strongly nationalist Croatian state,' and while this is true in the same way it is true that Nazis were forces of the strongly nationalist German state, the claim is significant for what it fails to state. In Hilberg's words, 'the underlying philosophy of the [Croatian] state was Fascist-Catholic.'[53] The United States Holocaust Memorial Museum is somewhat less reserved than Hilberg in its characterization of the Ustase as 'fanatically nationalist, fascist, separatist, and terrorist.'[54] The 'tragic time, marked by harsh repression, great hardship and the brutal treatment of minorities,' (as the ICTY describes it) is less euphemistically described by Hilberg's account of half the Jewish population of Croatia's internment in one or the other of NDH Croatia's 7 labor or 2 extermination camps.[55] Of the two extermination camps, Jasenovac is the most well-known, and it is primarily there that Jews (along with Serbs, who composed the majority of the victims, as well as Roma and political opponents)

[48]*Prosecutor v. Tadic* (n 45) ¶ 91.
[49]Irving v. Penguin Books Ltd., No. 1996-I-1113, 2000 WL 362478, ¶ 1.3 (Q.B. Apr. 11), *appeal denied* (18 December 2000)
[50]*Prosecutor v. Tadic* (n 45) ¶ 61.
[51]Raul Hilberg, *The Destruction of The European Jews* (3rd ed. vol. II Yale UP 2003) 756-765.
[52] Prosecutor v. Tadic (n 45) ¶ 61.
[53] Raul Hilberg, *The Destruction of the European Jews*, vol. 2, 756.
[54]United States Holocaust Museum, 'Encyclopedia of the Holocaust, Jasenovac' <www.ushmm.org/wlc/en/article.php?ModuleId=10005449>.
[55]Hilberg (n 51) 759-760.

died of typhus, torture, drowning, knifings, and blows to the head with hammers.[56] Walter Laqueur and Judith TydorBaumeldescribe Ustasa killings as 'madness',[57] a sentiment echoed by General Edmund Glaise von Horstenau, the Wehrmacht's Plenipotentiary General in NDH, one of the many Italian and German officials who complained about 'the lawless and chaotic' methods of the Ustase.[58]

The Tadic judgment mentions Jasenovac—memorialized by the USHMM—only three times, and only twice in the portion of the judgment devoted to history. First, it emerges in the context of Serb propaganda, and 'stirring up Serb nationalistic feelings.' The ICTY judges write: 'Among much other suffering, many Serbs, including the accused's mother, had been forcibly deported by the Ustasa to a concentration camp at Jasenovac where many died and all were ill-treated.'[59] The second mention of Jasenovac occurs in a paragraph directly addressing a 'campaign of propaganda' orchestrated by the Serbs, and it is referred to in a quote, attributed only to 'Serb-dominated media,'[60] as a 'symbol.' The final mention of Jasenovac in the 'reliable' history written by the ICTY concerns the accused. 'During the Second World War,' wrote the judges, 'his mother had been confined to the Jasenovac prison camp which was operated by Croats.'The Tadic judgment nearly instructs the reader in greater detail about the Hapsburg occupation than it does about the death camp at Jasenovac. In fact, it is not possible to know what it was, other than a place of ill treatment—a prison or concentration camp—where many died. And thus, judicial history determines what counts as history, but also what history is entitled to leave out of its account.

The historiography of Yugoslavia continues to be contentious, and nothing arguably illustrates this better than Josip Glaurdic's scathing review[61] of the recently published result of Charles Ingrao's'Scholar's Initiative,' an eight-year project involving three hundred scholars from thirty-one countries to attempt to resolve the most enduring controversies in the historical scholarship on Yugoslavia.[62]Glaurdic is unsparing in his criticisms of the volume, and some objections certainly seem legitimate, in particular the instances of plagiarism, if confirmed. However, the importance of Ingrao's initiative in the context of the historiography of war crimes tribunals, and Glaurdic's exasperation over inaccurate points of varying importance, is that attempts to write the one last definitive history of anything—let alone of recent and highly-charged conflictual events—is as incautious as it is unsuccessful. Richard Evans details a remarkably long list of complaints made in the press after the Irving trial at which he appeared as an expert on behalf of Deborah Lipstadt and Penguin Books, many expressing concern

[56] Ibid 760.
[57]Walter Laqueur and Judith TydorBaumel, *The Holocaust Encyclopedia* (Yale University Press 2001) 709.
[58] Richard Breitman, *US Intelligence and the Nazis* (CUP 2005) 204.
[59]Tadic (n 45) ¶83.
[60] Ibid ¶88.
[61]Josip Glaurdic, 'Review Essay: Confronting the Yugoslav Controversies: A Scholar's Initiative' (2010) 24 *East European Politics and Societies* 294.
[62]Charles Ingrao and Thomas A. Emmert (eds) *Confronting the Yugoslav Controversies: A Scholars' Initiative* (Purdue University Press 2012).

with a judicially enforced single narrative about the Holocaust which would result in an atrophy of important questions about the events.[63] Evans takes pains to distinguish these objections—that he would agree with had the trial actually been about imposing a single version of history—with what the Irving trial did address, that is, the standards of historical scholarship.The standards, for Evans, are what distinguish ideologically-driven twisting of sources (and omissions) from legitimate debate about the Holocaust.[64]

In the Irving trial, a libel suit was initiated by David Irving in Great Britain, where libel law places the burden of proof on the defendant. The issuein question was whether Deborah Lipstadt was entitled to characterize Irving as a Holocaust denier. Irving's position was that he was a serious scholar and historian and thus, that his reputation had been harmed by Lipstadt, and her publisher, Penguin Books. The defense proceeded to inundate Judge Charles Gray's court with expertise detailing the ways in which, over the course of his career, Irving had oriented his work towards a denial of the Holocaust, and had not treated his sources and evidence in an objective, fair, or scholarly manner. To arrive at a verdict, Judge Gray formulated the standard of the 'conscientious historian.'[65] The misrepresentations and distortions of historical evidence, found in nineteen separate instances of Irving's work were found to have fallen short of that standard, according to Judge Gray's 350-page judgment.[66]

One is entitled to wonder whether the ICTY's historical treatment of the former Yugoslavia would meet the standard of the 'conscientious historian.' What is certain is that the kind of history that it did generate is incomplete, and would cause some perplexity from the vantage point of scholarship undertaken on the Holocaust, in particular its treatment of NDH Croatia and the atrocities committed during the Nazi satellite's existence. Thus, its own claims to having established a historical record, 'beyond reasonable doubt' to silence deniers is of historical and legal concern. In fact, silencing deniers, when seen as a judicial function, apparently involves silencing episodes of history—in the case the Holocaust—which paradoxically serves as the very model of denial (a moral and in some cases criminal offense) the ICTY has appropriated.

Other difficulties are related to the historian's role in war crimes prosecutions, in particular when historians are personally invested in the events about which they later testify as experts. The case of the International Criminal Tribunal for Rwanda's first judgment, in Prosecutor v. Akayesu, is instructive in this respect. Historian Alison Des Forges testified as an expert, both on the history of Rwanda—which Trial Chamber I saw fit to recite at length, from pre-colonial times to 1994[67]—as well as to interpret broader events, well beyond the scope of Akayesu's indictment, as constituting preparation and execution of genocide. These views had been endorsed by the Human Rights Watch and FIDH sponsored

[63]Richard Evans, *Lying About Hitler* (Basic Books 2002) 251-259.
[64] Ibid 256-266.
[65]Evans (n 63) 227.
[66]Irving v. Penguin Books Ltd. (n 49).
[67]*Prosecutor v. Akayesu*, Judgment, ICTR 96-4-T, ¶ 78.

'International Commission of Inquiry' (ICI), in a 1993 report Des Forges co-authored.

Des Forges was the only historian cited by the ICTR in its thirty-three paragraph history of Rwanda, as well as its eighteen paragraph finding that genocide had occurred as a historical fact in Rwanda in 1994,. Des Forges' testimony provided the court with its basis for findings on issues as diverse as political and territorial organization, Rwandan law, the military, weapons shipments, the economy, religion, as well as a unique—and arguably influential—manner of disqualifying the previous government's claims of attacks or infiltration by the other party signatory to the Arusha Peace Accords of 1993, the Rwandan Patriotic Front, who had invaded Rwanda from Uganda in 1990.[68] The Rwandan President's entourage, the Trial Chamber noted,on the basis of Des Forges' sole historical testimony, had disseminated propaganda and fabrication, characterized, according to the judgment, 'as 'mirror politics', whereby a person accuses others of what he or she does or wants to do.'[69] This constitutes a powerful explanatory claim; one that in the ICTR's first ever judgment certainly set a tone and even suggested how evidence should be weighed and credibility assessed. It is so powerful a disqualifying device that its uncritical inclusion in a court-written history poses a double problem of evidence: that is, the nature of the evidence that supports the claim, and the fact that the device may later be used to assess the credibility of claims regarding historical events.

Des Forges' involvement in the International Commission of Inquiry led to her testimony in other trials regarding Rwandans suspected of involvement in the 1994 events, but the reception she received in some domestic courts was not as uncritical as it appears to have been before the ICTR. The Canadian Federal Court of Appeals, for instance, was sharp in its assessment of her credibility as well as her objectivity as a historian. Testifying against Leon Mugesera, facing immigration charges in Canada, Des Forges (much as she did before the ICTR in Arusha) defended the report of the ICI, as well as her activism. The Canadian court highlighted the following statement. She admitted, at the end of the cross-examination: '*If you wish to argue that we chose our evidence to support our conclusions, you are entirely correct. We chose our evidence to support our conclusions.* There were many facts concerning the historical period which did not appear to us relevant. We did not include them. We chose our evidence after we had weighed all of the facts and reached our conclusions. We made an orderly presentation as you do as a lawyer to support your contention' (a.b. vol. 10, p. 3075 – emphasis added by the Federal Court of Appeals).[70]

The prosecutorial flavor of her expert testimony—which went unnoticed in

[68]Barrie Collins, *Rwanda 1994: The Myth of the Akazu Genocide and Its Consequences* (Palgrave Macmillan, 2014) 56.
[69]*Akayesu* (n 67) ¶ 99.
[70]*Mugesera v. Canada (Minister of Citizenship and Immigration)*, [2004] 1 F.C.R. 3, 232 D.L.R. (4th) 75, 309 N.R. 14, 31 Imm. L.R. (3d) 159, par 99. Reversed by the Canadian Supreme Court: Mugesera *v*. Canada (Minister of Citizenship and Immigration), [2005] 2 S.C.R. 100, 2005 SCC 40. Des Forges' testimony was not considered by the Supreme Court.

the context of a UN trial, where in fact she was afforded tremendous deference and her testimony great weight—was remarked upon in Canada in an unambiguously critical manner:

> Even making the debatable assumption that a member of a commission of inquiry, who is actually its co-chairperson and co-author of the report, can be described as an objective witness concerning the conclusions of that report, Ms. Des Forges testified much more as an activist than as a historian. Her attitude throughout her testimony disclosed a clear bias against Mr. Mugesera and an implacable determination to defend the conclusions arrived at by the ICI and to have Mr. Mugesera's head.[71]

The difference in treatment of Des Forges as a witness by the UN and Canadian bodies emphasizes the striking difference in the acceptable scope of a historian's testimony in domestic as opposed to war crimes courts. This phenomenon was even remarked upon by Robert Donia, who testified for the Prosecution in the Blaskic case in The Hague, as'more an extended lecture on regional history than court testimony as it might take place in an American court, where a judge would neither need nor welcome such an extensive background portrayal'.[72]. AleksandarJokic has referred to this moral and judicial differential as 'the normative divide,' a concept that captures the fact that acts that would be blameworthy in Western democracies or Western courts, appear acceptable if performed abroad, in relation to an ostensible challenge against, or even a narrative about genocide.[73] Beyond the moral question, however, lies the historical one, and it is intertwined with the notion of justice. As Judith Shklar has argued about the legalist disposition of lawyers and legal theorists—that is, that they insist rather dogmatically on a separation between politics and law, when in fact the notion that they can be so neatly distinguished is a conservative self-delusion[74]—so, too, we are challenged to look at the connection between history and the law.

But while it is obviously misguided to insist that history and law never do and never ought to intersect, it is also arguably even more dangerous to suggest that judges can capably do the work of historians and that historians can safely perform the functions of the judge. Again, Carlo Ginzburg's point appears apposite here: 'if one attempts to reduce the historian to a judge, one simplifies and impoverishes historiographical knowledge; but if one attempts to reduce the judge to historian, one contaminates—and irreparably so—the administration of justice.'[75]Shklar's view that legalism is an ideology oughtnot to stand for the proposition that either history or law are well served by their respective instrumentalisation. A court writing history—a single, definitive history, the denial of which is in some instances subject to criminal sanction—is also performing an ideological role.[76] While TzvetanTodorov formulates the classic legalist objection to

[71] Ibid par. 102.
[72]Cited in Wilson (n 41) 928.
[73]AleksandarJokic, 'Genocidalism' (2004) 8(3) *The Journal of Ethics*, 8 (3) 251, 293.
[74]Shklar (n 31)1-11.
[75] Ginzburg (n 2) 118.
[76]EmanuelaFronza, 'The Punishment of Negationism: The Difficult Dialogue between Law and Memory' (2006) 30 *Vermont Law Review* 609, 621-622.

the trial of Klaus Barbie., writing that 'what is especially worth criticizing . . . is not that they wrote bad history, it's that they wrote history at all, instead of being content to apply the law equitably and universally,'[77] the problem is compounded when, even assuming that judges are qualified to reconstruct events for anything wider in scope than what is required for the ends of a discrete criminal prosecution, according to its rules of evidence and procedure, they determine a preferred historical interpretation of that reconstitution.

EmanuelaFronza's critique of the criminalization of negationism emphasizes the ideological nature of the judicial protection of a single version of history. Rational and democratic systems of government treat people like citizens, but when they criminalize who people are or what they want, they treat them as enemies.[78]Fronza isolates the historiographical problem of the court-sanctioned version of history: 'The tribunal will inevitably find itself, in this case, sanctioning one interpretation as official and discrediting the idea that more than one historical school exists. Yet, in truth, a multitude of historical schools exists.[79]'

Criminal law seeks a single, definitive reconstruction of an event, but only as a means to determine whether the state has established the culpability of an individual according to rules of evidence and a standard and burden of proof. The historical approach selected by a tribunal will necessarily be subordinated to the needs of the judicial function.

For example, David Chuter argues, following the analogy of the intentionalist-functionalist debate in Holocaust scholarship,[80] that it would have been impossible, had Hitler been tried, to settle on one approach to the detriment of another, as most proponents of a historical school will generally concede that there are valid objections to it.[81] It may be, however, that in some cases a side in a historical debate is chosen. This will occur when or if one approach presents greater consistency with judicial, usually prosecutorial, objectives. Thus, in the case of Nuremberg, neither historiographical approach lent itself well to a smooth prosecution. It is noteworthy that then, functionalism had barely emerged, as Hilberg's*Destruction of the European Jews* was yet unpublished. [82]For the Nuremberg court,conspiracy, as participation in a common plan to commit crimes against the peace, was the legal device most suitable to apply.[83] Other historical approaches may tend to hew more closely with the judicial objectives of contemporary tribunals, however.

International war crimes tribunals may have difficulty performing their judicial function, moreover, when the historical nature inherent to these prosecutions imposes, if not a dominant interpretation, then at least a sense of a

[77]Todorov (n 43) 114-116 cited in Wilson (n 41) 912.
[78]Fronza (n 76) 622.
[79] Ibid 621.
[80]See, too, Raul Hilberg, *The Politics of Memory: The Journey of a Holocaust Historian* (Ivan R. Dee 1996).
[81]David Chuter, *War Crimes: Confronting Atrocity in the Modern World* (Lynne Reiner, 2003) 152.
[82]Hilberg (n 80) 66.
[83]Chuter (n 81) 152.

widely accepted version of history.[84] David Paccioco argues that the events creating international tribunals impose an interpretation of history on judges that is practically irresistible, and which creates expectations from judges that they will find in the record what they think that they already know.

This creates an irresistible temptation—however well intentioned—to prejudge issues, one that traps both the innocent and the guilty.[85] There is little allowance made for the idea that the received history can be wrong, and thus that innocents can be convicted as a result, and while judges decide on evidence, their assessment of it will inevitably be based on their pre-existing beliefs about the events[86] that led to the creation of the 'law-like political institutions'[87] in which they are called to judge. Paccioco points out that part of the reason for history's influence on these proceedings lies in the very creation of international criminal courts,[88] namely in the attempt to promote reconciliation, in addition to their prosecutorial and punitive functions. In turn, this preoccupation is transformed into a 'search for historical truth'[89] which justifies recourse to what Almiro Rodrigues and Cécile Tournaye call a 'free system of evidence,' one that admits hearsay, and indeed, whatever type of evidence judges consider relevant and which has probative value.[90]

Rodrigues and Tournaye consider that these rules of evidence were deemed necessary in anticipation of the difficulties that the ICTY would encounter in gathering evidence in the service of historical truth.[91] Thus, from its inception, the contemporary UN war crimes tribunal, as a judicial body, both invests itself in the search for historical truth, and—perhaps surprisingly from the vantage point of historians—loosens the rules of evidence to do so.

Reconciliation is seen by proponents of the historical school of international law as establishing a 'memory' that would, as Paccioco writes, 'shame offending parties into distancing themselves from their past.'[92] Participants in the establishment of the United Nations ad hoc courts have explicitly acknowledged this intent. For instance, Michael Scharf, writing an op-ed in the summer of 2004 arguing against Slobodan Milosevic's continued self-representation, stated that the ICTY had been established with three objectives:

In creating the Yugoslavia tribunal statute, the U.N. Security Council set three objectives: first, to educate the Serbian people, who were long misled by Milosevic's

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[84]David Paciocco, 'Defending Rwandans Before the ICTR: A Venture Full of Pitfalls and Lessons for International Criminal Law' in Hélène Dumont and Anne-Marie Boisvert (eds), *La voievers la Courpénaleinternationale: tous les cheminsmênent à Rome* (Thémis 2004).
[85] Ibid 100-101.
[86] Ibid 101.
[87]Shklar (n 31) 156.
[88]Paccioco (n 84) 102.
[89]Almiro Rodriguez and Cécile Tournaye, 'Hearsay Evidence' in May, Tolbert, Hocking, Roberts, Jia, Mundis, and Oosthizen (eds), *Essays on ICTY Procedure and Evidence in Honour of Gabrielle Kirk McDonald* (Kluwer, 2001), 296.
[90] Ibid.
[91] Ibid.
[92] Ibid.

propaganda, about the acts of aggression, war crimes and crimes against humanity committed by his regime; second, to facilitate national reconciliation by pinning prime responsibility on Milosevic and other top leaders and disclosing the ways in which the Milosevic regime had induced ordinary Serbs to commit atrocities; and third, to promote political catharsis while enabling Serbia's newly elected leaders to distance themselves from the repressive policies of the past. May's decision to allow Milosevic to represent himself has seriously undercut these aims.[93]

These clearly appear to be political objectives, and while Shklar would be skeptical of the idea that the judicial function can ever be really separated from politics, it is one thing to admit the influence of politics on law or even to acknowledge its logical necessity, but quite another to establish a body with objectives that appear antithetical to the judicial function. Of concern is the effect that the political nature of this establishment can have on the kind of history it writes, as well as on the history that will be written by others about the events to which these tribunals devote their work.

THE POLITICAL QUALITY OF HISTORY IN INTERNATIONAL WAR CRIMES TRIALS

The media played an essential role in establishing a dominant narrative—described by Diana Johnstone as a 'collective fiction'[94] with respect to Yugoslavia: it was, according to the standard narrative, a 'prison of peoples' in which the Serbs oppressed all other ethnic groups[95]. When the oppressed of Yugoslavia attempted to liberate themselves from the brutal dictatorship of Slobodan Milosevic, he—and the Serbs (a thoroughly evil group of people)—embarked upon a policy of ethnic cleansing, about which the international community did nothing. Milosevic and the Serbs had a policy of systematic rape, concentration camps, and committed genocide in the locality of Srebrenica. US bombing forced Milosevic to participate in peace talks in Dayton, and to make up for the international community's inaction in the face of Nazi-like horror, the UN Security Council established a body just like Nuremberg.[96]

Diana Johnstone argues that almost every material particular supporting this narrative is inaccurate; but that once the equation had been drawn between the Nazi Holocaust and the Yugoslav wars, created by 'reporters under pressure to meet deadlines, editors further simplifying the story for readers assumed to be both ignorant and impatient, paid propagandists and public relations officers.'[97]The political changes that invested a post-cold war single superpower with the ability to declare itself the judge of the moral and legal questions it had itself framed proved

[93]Michael Scharf, ''Making a Spectacle of Himself: Milosevic Wants a Stage, Not the Right to Provide His Own Defense'' *Washington Post* (Washington, 29 August 2004) B2.
[94]Diana Johnstone, *Fools' Crusade: Yugoslavia, NATO, and Western Delusions* (Monthly Review Press 2002) 4.
[95]Ibid.
[96] Ibid 5.
[97]Ibid 4.

irresistible. A virtually unimpeachable truth had been established by repeating a narrative that relied on the Holocaust often enough. The power of the historical analogy triggered action; in the interests of justice, something had to be done.

The effects of the media's contribution to the establishment of the ICTY through its reliance on Holocaust imagery cannot be understated. The most influential scholars, authors, and pundits do not even attempt to conceal it. Samantha Power's influential *A Problem from Hell: America in an Age of Genocide* makes it unambiguous:

> We will never know whether a different war in a different place at a different time would have eventually triggered a different process**.** But one factor behind the creation of the UN war crimes tribunal for the former Yugoslavia was the coincidence of imagery between the Bosnian war and the Holocaust.[98]

The strategy yielded dividends that are still apparent today as even the Obama administration's 2010 National Security Strategy demonstrates the strategic value of US-dominated ad hoc courts, and US involvement—where it can control processes in its interest—in the proceedings of the International Criminal Court.

International Justice**:** From Nuremberg to Yugoslavia to Liberia, the United States has seen that the end of impunity and the promotion of justice are not just moral imperatives; they are stabilizing forces in international affairs. The United States is thus working to strengthen national justice systems and is maintaining our support for ad hoc international tribunals and hybrid courts. Those who intentionally target innocent civilians must be held accountable, and we will continue to support institutions and prosecutions that advance this important interest. Although the United States is not at present a party to the Rome Statute of the International Criminal Court (ICC), and will always protect U.S. personnel, we are engaging with State Parties to the Rome Statute on issues of concern and are supporting the ICC's prosecution of those cases that advance U.S. interests and values, consistent with the requirements of U.S. law.[99]

Thus, what preceded the establishment of these contemporary bodies was the power of history. Today, still, international justice, framed as national security, relies on the Nuremberg precedent, arguably less in its legal form than in its cultural and historical embodiment. It does not follow, however, that the institutions created in the nineteen-nineties write the history of the events they adjudge in the way historians, over the past decades, have refined their

[98]Power (n 38) 483. See, too, Ivan Simonovic, 'The Role Of The ICTY In The Development of International Criminal Adjudication' (1999) 23(2) *Fordham International Law Journal* 440, 442: 'It was the pressure of world public opinion, viewers of the media with global coverage bringing the reality of the horror to millions of homes that were the catalyst for a response from the international community. Given its earlier intervention in Iraq, the U.S. Administration was not eager to get directly involved, and Europe preferred recourse to multilateralism as well. The fact that the end of the Cold War had brought a period of better understanding between the permanent members of the Security Council enabled the United Nations to become actively involved.' Christopher Rudolph 'Constructing an Atrocities Regime: The Politics of War Crimes Tribunals' (2001) 55(3)*International Organization* is much in the same vein.

[99]*National Security Strategy*, President of the United States of America, May 27th, 2010.

understanding of the workings of Nazi Germany and of the Holocaust. Yet that is perhaps precisely the history we imagine when we think of Nuremberg.To conflate the careful scholarship of Raul Hilberg and Christopher Browning, for instance, with the approach of those who established the narratives of this immediate history is to mistake the approach and training of the historians, on the one hand, with the unique constraints and objectives of journalism. 'It is not a criticism of the media,' David Chuter writes'to say that its priorities are different from that of courts and investigators,'[100] and how much more so do they differ from those of historians. The work of historians can pose a problem in its use in courts—amounting to what Chuter characterizes as a 'category error.'This means that little if any of the scholarly production in history seeks to establish an individual's guilt for an offense beyond a reasonable doubt based on judicial standards.[101] Journalism exacerbates the misfit considerably given the time and commercial constraints of the trade.

Journalists have been more prompt to assert guilt—and with greater confidence and speed—than have historians in articles, and on some occasions, books. Many journalists have been called upon to testify before the contemporary war crimes tribunals.[102] Yet demands of space and time inherent in the practice of journalism lead to preferring extravagant claims over more tentative ones, higher estimates of casualties over lower ones.[103]

Raul Hilberg's careful assessment of Jews killed in the Holocaust is inferior to the standard six million—and, as Chuter puts it, 'because of the limitations that the media work under, shorthand comparisons are often used to convey what busy and often inexpert journalists want their busy and poorly informed audiences to understand.'[104]Chuter cites Pulitzer award-winning journalist Roy Gutman[105] as an example of amplification of claims: he had written, in 1992, that *every* woman aged fifteen to twenty-five had been raped in Bosnia-Herzegovina.[106]

Less commonly known is the little remarked upon fact that Roy Gutman was the source for the ICTY Prosecutor's indictment of a certain 'Gruban' for a series of rapes.[107] The indictment was subsequently withdrawn, as Gutman's source—a fellow Yugoslav journalist—had, in response to Gutman's queries about whether his colleague could identify the 'biggest rapist' in the region, named Gruban, a fictional character created by a local novelist.[108] This incident—the actual indictment of a fictional character before a war crimes tribunal established by the United Nations on the basis of a journalist's communication of evidently unreliable hearsay evidence—tends to demonstrate a clear difference in the manner in which journalists and historians treat the concept of a source. As for the judicial

[100]Chuter (n 81) 153.
[101] Ibid.
[102] Ibid.
[103] Ibid.
[104] Ibid.
[105]See Roy Gutman, *Witness to Genocide* (Macmillan, 1993)
[106]Chuter (n 81) 153.
[107]Jokic (n 73) 291.
[108] Ibid.

component of this embarrassing imbroglio, while it is difficult, perhaps impossible, to measure, it is worth inquiring into the potential influence of the journalistic approach—the rush to judgment on such a tenuousbasis—on the carelessness with which this indictment was proffered by the Prosecutor then confirmed by United Nations judges. Journalists played a tremendous role in stoking outrage for reasons detailed above—lack of time to investigate claims, as well as a preference for more colorful narratives—and as a result, they resorted instead to very powerful discursive historical shorthand. 'Moral certainty', however, as Carlo Ginzburg put it, 'does not have value of proof.'[109] Yet, references to the Holocaust were consistent in the reporting on the Yugoslav wars,[110] and more than serving merely as shorthand, these references created—then reinforced—the kind of climate of preconceived belief among judges that Paccioco rightly critiques.

A legalistic mind might find the narrative quality of some historical works on the events that courts are called to adjudicate objectionable—the emotional, and perhaps melodramatic quality of what fills in the gaps where footnotes are absent, can make criminal lawyers uncomfortable. This phenomenon could be called 'narrativism,' and would be defined as a misuse of the narrative device in absence of evidence—and in particular in the presence of contrary evidence—to create an emotional response in the reader. Two examples from Samantha Power's influential *America in an Age of Genocide* may illustrate the problem. Power begins her book, which not the work of a historian, though its largely positive reception and Pulitzer Prize (for General Non-Fiction) make that irrelevant—with the following paragraph:'On March 14, 1921, on a damp day in the Charlottenburg district of Berlin, a twenty-four-year-old Armenian crept up behind a man in a heavy gray overcoat swinging his cane. The Armenian, SoghomonTehlirian, placed a revolver at the back of the man's head and pulled the trigger, shouting, 'This is to avenge the death of my family!' The burly target crumpled. If you had heard the shot and spotted the rage distorting the face of the young offender you might have suspected that you were witnessing a murder to avenge a very different kind of crime. But back then you would not have known to crime the crime in question 'genocide.' The word did not yet exist.'[111]

The legalist reader is perhaps the kind of reader that Carlo Ginzburg might have had in mind when he described as 'naïve' the kind of person that would search in vain for a footnote to support a clearly conjectural claim.[112] Is there not conjecture in the very familiar wording observed above, 'if you had heard the shot,' and does this formulation not eerily resemble Eileen Power's description of the life of Bodo in *Medieval People*? Ginzburg points out the implausibility of Bodo—who was from Île-de-France—singing an Anglo-Saxon incantation.[113] The problem resides, here, in the filling of gaps in evidence with implausible or questionable conjecture. But in Samantha Power's retelling of Tehlirian's murder of Pasha, the

[109]Davidson (n 16) 306.
[110]Chuter (n81) 154.
[111] Power (n 38) 1.
[112]Ginzburg (n 23) 115.
[113] Ibid114.

reader is not invited to understand the young Armenian's statement as conjecture; alternatively, if it is conjecture, it is not only implausible, but contrary to existing evidence regarding the event, in particular transcripts of Tehlirian's trial for murder[114]—in which the accused himself, as well as a witness state that nothing was said before the assassination of Pasha. That 'this is to avenge the death of my family'—now reproduced in other pop-historical accounts, footnoting Power—was the broad interpretation one could reasonably hold of Tehlirian's defense, as well as the outcome of his trial (an acquittal by reason of insanity, as a result of trauma caused by witnessing the slaughter of his family) certainly seems sound, it is another thing altogether to gratuitously place that quote—as if it had been spoken, when evidence tends to show that it was not—at the very beginning of Power's book.

In another instance, Power quotes an account from a story published in the Washington post on July 15th, 1995, which possesses a quality that can be described as 'the anecdote that nobody could have possibly witnessed,' and which again, perhaps, weaves conjecture with evidence: a young woman, a refugee from Srebrenica, hangs herself, but before that moment, she sobs alone. It is perhaps naïve to wonder how one goes about establishing that she was sobbing if she was alone. It is, one can suppose, an assumption that one sobs before suicide. The young woman died with no shoes on. Sometime Thursday night she climbed a high tree near the muddy ditch where she had camped for 36 hours. Knotting a shabby floral shawl together with her belt, she secured it to a branch, ran her head of black hair through the makeshift noose and jumped... She had no relatives with her and sobbed by herself until the moment she scaled the tree.[115]

Power employs the quote from John Pomfret's emotional front page July 15th, 1995, *Washington Post* article, about the young woman's suicide, to set up a scene at a Clinton cabinet meeting, in which Vice-President Gore, she writes, had referred to the photograph accompanying Pomfret's article:Gore told the Clinton cabinet that in the photo that accompanied Pomfret's story, the woman looked around the same age as his daughter. 'My twenty-one-year-old daughter asked about that picture,' Gore said. 'What am I supposed to tell her? Why is this happening and we're not doing anything?' [...] 'My daughter is surprised that the world is allowing this to happen,' Gore said, pausing for effect. 'I am too.' Clinton said the United States would take action and agreed, in Gore's words,that 'acquiescence is not an option.'[116]

The sobbing conjecture could appear puzzling enough to prompt the skeptic to verify Pomfret's article to examine his evidence: had somebody witnessed the woman sobbing alone? A Lexis-Nexis search of the Washington Post's front page on July 15th, 1995, reveals not only Pomfret's story, but another, by Samantha Power, 'special to the Washington Post' (from Sarajevo), with additional reporting by John Pomfret (in Tuzla). There was no sourcing, in the Pomfret piece, to indicate how he knew the woman had sobbed by herself. The prose seems

[114]Available at <http://armenianhouse.org/wegner/docs-en/talaat-1.html>.
[115]Ellipsis in Power (n 38) 413.
[116] Ibid.

uncharacteristically literary, and the article, according to Lexis-Nexis, is accompanied by a Reuters photo of Muslim women crying. What to make of Power's account of Gore's reaction to the photo of a young woman hanging from a tree, a photo that according to her, 'accompanied'Pomfret's article?

A microfilm search of the front page of the July 15th, 1995 issue of the *Washington Post* reveals that John's Pomfret's article appears in a box, beneath the fold, on the right hand side, without illustration. It is continued, on page A-17, and is accompanied by a Reuters photo of Muslim women and children crying. Above the fold that day, under the headline 'Residents Sizzle', the Washington Post published a photo of a young woman pouring water down her neck. No photo of a hanged young woman ran alongside John Pomfret's article, as stated by Power, nor was it run on the following days.

Power's account of the cabinet meeting footnotes Bob Woodward's *The Choice*, at pages 162-163. Woodward writes, regarding Vice-President Gore:

He noted that the front page of the Washington Post over the weekend had described a young woman, just one of the 10,000 refugees from Srebrenica, who had committed suicide by tying a floral shawl and her belt together to hang herself from a tree. A picture of the woman had run all over the world. Gore said she seemed to be the age of his own daughter. 'My twenty-one-year-old asked about the picture.'[117]

Power's claim that this photo appeared accompanying John Pomfret's July 15th, 1995 article is inaccurate. The *Washington Post* does not support it, and neither does Woodward—who, carefully (for obvious reasons) references only the Washington Post's *description* of the suicide, claiming rather that the picture had 'run all over the world,' and that Gore's daughter, perhaps an avid reader of foreign newspapers, had asked about the picture. Does it matter? It matters in that this account—like many others in Power's book—is offered to illustrate a significant moment, an epiphany, in this case, a shift in U.S. foreign policy effected by Gore's response to a photo that was published in the Washington Post, one that prompted his daughter to ask questions that were intolerable.

The photograph was described in a *Guardian* piece by Lorna Martin, published April 17th, 2005, titled 'Truth Behind the Picture That Shocked the World'. The photograph of FeridaOsmanovic was published on front pages across the world soon after the fall of Srebrenica on 11 July, 1995. It prompted a series of questions in the US Senate by those concerned about Bosnia's war. What was her name, where was she from, what humiliations and depravations did she suffer, had she been raped, did she witness loved ones being killed? At a meeting with President Bill Clinton, Vice President Al Gore referred to a front-page story in that day's Washington Post. 'My 21-year-old daughter asked about this picture,' he told the President, showing him the newspaper. 'What am I supposed to tell her? Why is this happening and we're not doing anything? My daughter is surprised the world is allowing this to happen. I am too.''[118]

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[117] Bob Woodward, *The Choice* (Simon and Shuster 1996).

[118] Available at <www.guardian.co.uk/world/2005/apr/17/warcrimes.lornamartin>.

Here, too, the point is that this is a significant photograph, described by Martin, ten years after its publication 'on front pages across the world', as having prompted questions in the Senate. Martin writes that Vice President Gore showed President Clinton 'that day's Washington Post', stating that his 21 year-old daughter asked him about the picture, in precisely the same terms as those crafted by Power. Here, journalism reproduces the errors of a former journalist's account of a conversation it is far from clear ever occurred, about a photograph that did not run in the Washington Post. The account appears in Gore's Senate webpage, the myth now apparently carved into stone.[119]Also strange is Power's contention that Clinton cabinet meeting occurred on July 15th, 1995, when page 161 of Woodward's book (the *following two pages* arefootnoted in support of her account) places that meeting on Monday, July 17th, 1995.[120]

Power's anecdote is one where a poignant photo of a hanged woman accompanies a front-page article in the Washington Post, and the Vice President brings it to the cabinet's attention, the very same day. Does the account lose narrative force if described in a manner consistent with the evidence? The accurate account is that Gore would have referred to a Washington Post article, 'published over the weekend' (it was Saturday, July 15th) that described a hanging, a photo of which was apparently published elsewhere.[121] That photograph both reminded him of his daughter, and caused his daughter to ask him why 'the world' was doing nothing, a question he adopted as his own. The message in each account is the same: this photo changed foreign policy as a result of Gore's emotional response. In Power's account, however, the photo was published in the Washington Post, and Gore responded to it immediately. Both the press (specifically the Washington Post, to which Power herself contributed an article that day), and Gore appear more decisive in Power's inaccurate account. The conclusion seems to be that the media—and in particular, images, have the power to affect politicians and cause them to act despite their hesitations. The obvious problem is of course—and this example shows it well—journalists do not always treat evidence with care.

The difficulty is compounded when a journalist crafts a work imbued with scholarly pretense. Power's erroneous claims, in keeping with the trappings of scholarly methodology, are supported by footnotes, and yet it is those very footnotes that show them to be inaccurate. It is thus not an invitation to conjecture, to be weighed, then accepted or rejected: Power's assertions are offered as facts, supported by footnotes. Power correctly *added the reference to Pomfret's piece*in

[119]'Internationally, Gore was quicker than Clinton to advocate the use of military force in world trouble spots. While the president pondered what to do about the worsening crisis in Bosnia, the vice president pointed to a front page picture in the *Washington Post* of a twenty-one-year-old refugee who had hanged herself in despair. 'My twenty-one-year-old daughter asked about that picture,' said Gore. 'What am I supposed to tell her? Why is this happening and we're not doing anything?' United States Senate, Albert A. Gore, Jr., 45th Vice President (1993-2001) <www.senate.gov/artandhistory/history/common/generic/VP_Albert_Gore.htm>.

[120]Woodward (n 117) 161.

[121] The author while unable to locate any major French or English language publication that published the photo notes that there is a contemporaneous account stating that 'some newspapers' did run it. James Fenton, 'Comment' *The Independent* (London, 17 July 1995) 15.

Woodward's account, and footnoted it accurately. No person having done that could honestly claim that the photograph of a woman hanging accompanied that article, and arguably less someone having herself published an article in the same paper that same day. Power misstates the date of the cabinet meeting, yet it stretches credulity that she would miss Woodward's reference to the date at which the meeting occurred. That date appears *one page before the pages she footnotes.* How does the writing process unfold? One thing is certain; it is not a scholarly process, much less a historical one. It can rather be imagined as a series of anecdotes, all emotional and powerful, fraught with victims and heroes, brought together to send a powerful message.

Narrative license, even on insignificant matters, supports a strange subtext: to Power, accuracy does not matter; the story does, as does the appearance of careful research and accurate reference to evidence. Yet a genre tackling genocide, and the history of its understanding by the United States, as well as the history of the establishment of legal bodies, about which Power also states that they would not have been created without the coincidence of imagery with the Holocaust, requires meticulous attention to evidence. A wealth of footnotes and a gargantuan bibliography do not make up for errors of fact, nor does a better story, or a noble cause. In fact, the enterprise becomes suspect as the reader is left baffled and wondering for what purpose an easily uncovered myth is planted in this narrative; one which would have served the thrust of her work just as well had she reported the facts—about reporting, ironically—with accuracy.

HISTORY IN INTERNATIONAL RELATIONS AND ACADEMIC INTERNATIONAL CRIMINAL LAW

I have attempted thus far to explore the relationship between law and history, as well as the effect of journalism on a certain idea of history. The sub-discipline of international relations,which can study international criminal law from the perspective of political science or the philosophy of international law, also employs history as evidence, data, as well as to provide examples to illustrate social scientific theoretical propositions. Academic international criminal law, too, employs history in a manner of interest to this essay: to account for, or more particularly to advocate for change in the substantive law. Such is the case of academic international criminal law's development of an unusual concept: the 'Grotian Moment.'

Paul Schroeder has addressed the issue of the relation between history and international relations scholarship with great care, seeking first to address commonly held misconceptions regarding the differences between the two fields.[122] First, the notion that history addresses only the particular in great detail, while international relations theory addresses patterns and law-like generalizations; second, and related, is the idea that the difference between the two disciplines is

[122]Paul W. Schroeder, 'History and International Relations Theory: Not Use or Abuse, but Fit or Misfit' 22(1) (1997) *International Security* 64, 65.

that international relations is nomothetic while history is idiographic, a merely descriptive pursuit, which thirdly, seeks understanding in the sense of *Verstehen*—intuitive identification.[123] Schroeder argues that while there is some plausibility to each of these claims, they can nonetheless serve to distort history to the point of caricature, thus granting license to political scientists (or scholars from other disciplines) to misuse and abuse elements of historical work to pursue what is mistakenly considered to be a strictly social scientific endeavor, that is explanation and prediction.[124] This misconception holds that history is a merely descriptive undertaking, and while it is true that narration (and description) play a crucial role in the historical approach, this view fails to grasp that historical works, as Schroeder writes, 'are clearly nomothetic in the sense that they develop hypotheses, assign particular causes for events and developments, and establish general patterns.'[125]

History seeks to account for social change, and its methodology, perhaps 'distressingly vague' by social scientific standards,[126] consists in identifying under-explored or incorrectly interpreted phenomena, and marshalling all available evidence, arriving at a synoptic judgment, that is 'a broad interpretation of a development based on examining it from different angles to determine how it came to be, what it means, and what understanding of it best integrates the available evidence.'[127] Misuse of history—in addition to the most obvious abuses resulting from incorrect factual claims, usually resulting from the reliance on other works in international relations—occurs primarily when historical findings are taken out of context and used as data without an adequate understanding of the key differences between history and political science: history seeks to account for change, it is concerned with acts of purposive human agency, not mere behavior, and historians form judgments about the causes, meaning and significance of social change.[128]

The use of historical materials to classify states according to their democratic or autocratic nature—known in international relations as the democratic peace theory, the proposition that democracies do not go to war against each other—provides an illustration of a misfit between history and the social sciences.[129] Indeed, from the perspective of historians, the cases used as data to test the theory have been removed from all contexts[130]; they lose the complexity and richness of explanation, the continued refinement, debates and questions that continue to interest the discipline of history; historical events, thus employed, are effectively de-historicised. As Schroeder writes:

The concept of what is to be discovered and explained (not change over historic time, but supposedly law like, structural correlations between fixed stylized

[123] Ibid.
[124] Ibid.
[125] Ibid 66.
[126] Ibid 68.
[127] Ibid.
[128] Ibid 71.
[129] Edward Ingram, 'The Wonderland of the Political Scientist' 22(1) (1997) *International Security* 53, 56.
[130] Ibid.

phenomena); of the subject matter (not human conduct, acts of purposive agency, but behavior, phenomena to be stripped of their human, purposive element precisely in order to be manipulable and calculable for scientific purposes); and of the desired explanatory outcome (designed precisely to exclude synoptic judgment and to consist of proofs, preferably statistical-mathematical, of such correlations)—all these are so remote from and alien to what historical scholarship is about and always will be, that between it and this kind of endeavor no genuine conversation, much less fit and collaboration, is possible.[131]

Edward Ingram draws a similar conclusion, adding that historians, when examining the world of the political scientist, are bewildered by its curious position on time, space, and causation, like Alice in Wonderland.[132] Both Ingram and Schroeder argue in favor of something akin to a non-aggression pact between the two disciplines, but it could be argued that historians may have a responsibility greater than that of merely averting their gaze from political science's different perception of the phenomena they study. There are instances in international relations scholarship as well as the related scholarship in academic international criminal law where the use of historical materials goes beyond mere oversimplification or instrumentalisation: it is employed to argue that international law has changed—without legislative intervention and in a virtually instantaneous manner—resulting in real consequences for real people.

In the genre outlined above, the concept of the 'Grotian moment,' first developed by Richard Falk, but most recently expounded by Michael Scharf, is instructive. The Grotian moment refers to Hugo Grotius, widely considered the father of international law. Michael Scharf employs the expression as he marshals elements of history to assert a paradigmatic shift in law as a result of a dramatic historical event.[133] In an article advocating that a controversial mode of criminal participation, joint criminal enterprise—or JCE, also known by some critics as 'just convict everyone'[134]—which in one of its incarnations allows individuals to be held individually criminally responsible for crimes perpetrated by others that were *outside of thescope of the original agreement*, provided they were the foreseeable consequence of activitiesthat were originally agreed upon or contemplated. Hence, the purpose of JCE is to facilitate convictions, as it significantly reduces the prosecutorial burden of proof, and permits the conviction of the morally—and objectively—innocent.[135] I have argued elsewhere[136] that JCE is both a very recent

[131]Schroeder (n 122) 73.
[132]Ingram (n 129) 63.
[133]Michael Scharf, 'Seizing the 'Grotian Moment': Accelerated Formation of Customary International Law in Times of Fundamental Change' 43 (2010) *Cornell International Law Journal* 439, 439.
[134]Shane Darcy, 'Imputed Criminal Liability and the Goals of Criminal Justice' 20 (2007)*Leiden Journal of International Law* 377, 386; M. E. Badar, ''Just Convict Everyone!' – Joint Perpetration: FromTadic to Stakic and Back Again' 6 (2006)*International Criminal Law Review*293, 302; Mark Drumbl, *Atrocity, Punishment, and International Law*, (CUP 2007) 39.
[135]See Hector Olasolo, 'Joint Criminal Enterprise and its Extended Form' 20 (2009) *Criminal Law Forum* 263, 284.

and unique legal concept. JCE is only deployed in cases where there is, in fact, no evidence—or insufficient evidence, from the standpoint of the criminal burden of proof—of genocidal intent. In other words, its purpose can be said to be to convict the innocent.JCE is recent, as the ICTY's Statute does not—and did not at the institution's creation—include this 'prosecutorial tool' as a mode of participation in a criminal offence[137]; indeed, Article 7 of the Statute sets out traditional modes of participation, which require evidence of both a criminal act, either as a direct act, or as an alternate, traditionally known modes of participation, such as aiding and abetting, or a common agreement, plan or design) as well as criminal intent.

Scharf's position, in contrast, is that JCE forms part of customary international law since the Nuremberg trials, and an impressive array of arguments are offered in support of this argument. However, precedents (such as the Eichmann trial) or the debatable inclusion of all Nuremberg principles into international criminal law do not appear to suffice; Scharf wants to make a different argument, and employ his concept of a Grotian moment to strengthen his legal case. This is done by arguing that the particular atrocities committed by the Nazi regime—described in a single paragraph that omits Germany's invasion of the Soviet Union, surely not a detail of history, and which footnotes two pages from a previous book written by Scharf himself as sole historical support—having led to the establishment of the Nuremberg tribunal, constituted a paradigmatic shift in law. Thus, (and this is Scharf's specific goal) JCE should apply to the defendants before the Cambodia tribunal, and constitutes evidence that this mode of participation was included in international criminal law in the nineteen-seventies when the Khmer Rouge regime was in power.

The argument is troubling along legal and historical lines: the legal controversy has, in the case of Cambodia, been resolved by the Appeals Chamber, which has recently ruled that the most controversial form of JCE[138]—and thereby serving a stunning rebuke to the ICTY Appeals Chamber decision in Tadic[139]—was not included in international criminal law in the years 1975 to 1979. In fact, the Extraordinary Chambers in the Court of Cambodia, a hybrid international court,have rejected as unsound the arguments Scharf presents in his article. Errors and unsuccessful legal arguments are the stuff of everyday practice and scholarship, but what is unusual in Scharf's approach is the blend of (poor) history

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[136]Tiphaine Dickson and AleksandarJokic, 'See No Evil, Hear No Evil, Speak No Evil: The Unsightly Milosevic Case' 19(4) (2006) *International Journal for the Semiotics of Law* 19, (4) 355, 356.

[137]JCE wasintroduced in the case of Prosecutor v. Brdjanin, Decision on InterlocatoryAppeal, AppealsChamber, IT-99-36-A, 19 March 2004, at paras 5-10.

[138]Public Decision on the Appeals Against the Co-Investigative Judges Order on Joint Criminal Enterprise (JCE), D97/15/9, 20 May 2010, Extraordinary Chambers in the Court of Cambodia. Kevin Jon Heller is unambiguous in his praise for this decision, claiming that the Tadic appeals decision of the ICTY created JCE III 'literally out of thin air' <http://opiniojuris.org/2010/05/23/the-eccc-issues-a-landmark-decision-on-jce-iii/>.

[139]A decision which also incredibly includes an egregious error, that is a quote from Nuremberg prosecutor Telford Taylor's argument, presented by the ICTY Appeals Chamber as part of the Einsatzgruppen *judgment*. This is the ICTY's final court of appeal, and *Tadic* was the ICTY's first judgment.

and legal argument to create claims that would facilitate the conviction of the innocent. Misuse of history in legal scholarship ought to baffle the historian as much and arguably more than Ingram's Alice in Wonderland feeling when confronted with international relations theory, as work such as that written by Scharf is normative in nature, and in this particular instance militates for the conviction of the innocent based on some sort of historical—as opposed to a legal—idea of sudden paradigmatic shifts in international law, minus states ratifying treaties, or their *opinio juris*. A historian might wonder, as Ingram does about the democratic peace theory, why only the case of Nuremberg? Why no international courts during the cold war? Can the sudden change solely be explained by atrocities that re-emerged only in the nineteen-nineties? If Nuremberg, for the sake of argument, modified customary international law in a 'Grotian moment,' why is aggression—described by the Nuremberg's Trial of the Major War Criminals as 'the supreme international crime'—not presently an actual crime? Historians of legal bodies can also question Scharf's assertions that only the United States wished to try—rather than to execute—the Nazi leadership, whether Nuremberg was an international body rather than the exercise of jurisdiction by the Allies following German terms of surrender, whether conspiracy charges were an exclusively American idea, and whether following Nuremberg, international law could charge and prosecute individuals.

CONCLUSION

In criminal law, what goes beyond the legal and factual findings required to find whether an individual is guilty or not guilty of an offence, before a court of law, is *obiter dictum*[140]. Similarly, international court practice disallows a determination in favor of parties that go beyond the issues of a case; this rule is known as *non ultrapetita*.[141] History written by international court thus falls somewhere between *obiter dicta* and *ultra petita*, but this history is less the responsibility of the judges as it is attributable to the nature of these bodies, described by Judith Shklar as 'law-like political institutions.'Since these courts are the product of international politics,they can fall inside international scholars' examination scope. What should be borne in mind is that international war crimes courts exist at the intersection of politics, law, and history; they are not impervious to the influence of the media. This has an effect on both the history these courts can be expected to write and the fairness of the process.

Historians, political scientists, and legal scholars all have a stake in the manner in which they examine the development of international criminal law: historians ought be wary of the history written by courts, and understand, along

[140] *Black's Law Dictionary* (8th edition, West Group 2004) 1102.

[141] 'It is the duty of the Court not only to reply to the questions as stated in the final submissions of the parties, but also to abstain from deciding points not included in those submissions' *(Asylum, Judgment, I.C.J. Reports 1950*, p. 402), reiterated by the International Court of Justice in Arrest Warrant of 11 April 2000(Democratic Republic of the Congo v. Belgium)**,** Judgment of 14 February 2002, par. 43.

with legal scholars, that the process cannot be divorced from the political aspects of these bodies. Political scientists or philosophers, in turn, should not shy from the study of international criminal law as a political question and the establishment of war crimes tribunals as a result of power and of interests; indeed, they are well suited to address the limitations of international law, but they may have to approach the issues reflexively,[142] rather than attempt empirical theory building and the generation of correlations focusing solely on behavior and ignoring purposive agency. The manner in which historians arrive at synoptic judgments about events, and the care with which evidence is treated should serve as a model for international relations scholarship.

Finally, in examining international criminal courts, international relations scholarship, and conceptually minded thinkers like philosophers, ought to pay attention to the quality of the history generated by these institutions and take great care to verify those narratives with the more careful and deliberate work of historians. International relations and international legal scholars and those who have an interest in evaluating argumentation, however well-intentioned they may be in hoping that a Grotian moment has emerged and that new, unwritten norms now govern individuals, would be well-advised to approach their hopes with caution: so-called Grotian moments today seem to operate to the detriment of individuals charged with grave crimes, and some innocent people may well pay the ultimate price of an unjust conviction.

Miscarriages of justice can occur internationally, and are more likely to do so in the misguided search for historical truth. In *The Judge and the Historian*, Carlo Ginzburg writes that: 'in comparison with the errors of historians, however, the errors of judges have more immediate and more serious consequences. They can lead to the conviction of innocent people.'[143] And now, at least in France, where Inquisitor Jacques Fournier once tried people for their beliefs, it is a crime to contest the *obiter dicta* of 'law-like political bodies,' a matter that ought to—and is—of great concern to historians. It should also be ofconcern to international legal theory and practice.

[142]This has been proposed by Ido Oren, who adopts a Weberian, reflexive, and critical approach to political science in *Our Enemies and US: America's Rivalries and the Making of Political Science* (Cornell University Press, 2003) 183.
[143]Ginzburg (n 2) 119.