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# **WORKING PAPER**

**Tracing Inclusions and Exclusions  
in International Criminal Law's Historical  
Linearity via Law and Literature**

Teodora Schrotter



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**Tracing Inclusions and Exclusions in International  
Criminal Law's Historical Linearity via Law and Literature**

Teodora Schrotter

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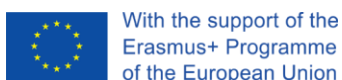
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## **Abstract**

This article analyses the linear historical trajectory of international criminal law. This discipline is traditionally viewed as a linear axis of main historical events: the 1945-1946 Nuremberg Trials, the creation of the two ad-hoc tribunals, the ICTY and the ICTR, in 1993 and 1994, respectively, and the establishment of the ICC in 1998 - with the subsequent work they produced. Focusing solely on this linearity of pivotal events excludes a variety of noteworthy objects of inquiry: underexplored trials, such as the Moscow Show Trials; and how this historical narrative obsessing over an 'anti-impunity goal' ignores, distracts from, or even facilitates colonial and neocolonial oppression' (Nesiah, 2021). Additionally, this linear history overincludes a seating of hegemonic histories and an account of 'victors' faux official history' (Simpson, 2014). The grand, politicised events constituting the linear history also obscure other stories about ICL, primarily those closer to ordinary people. Delving into the latter, this article uses the book *Waiting for Hitler* as a literary artifact to disrupt ICL's mainstream history via personal accounts of people living in 1930s Britain under the threat of German invasion. A methodology of law and literature is therefore deployed for the disrupting exercise. This enables us to understand the discipline of ICL better than by holding tight onto its linear narrative.

## **Keywords**

Histories of international criminal law, exclusions, inclusions, linearity and non-linearity, law and literature, voices of ordinary people

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**1. Introduction**

Rebecca West, a British journalist and writer, was assigned to cover the 1945-1946 Nuremberg Trials. In *A Train of Powder* (1946), her writing about the experience observing the trials, West recalls being asked what the most interesting thing witnessed at Nuremberg was.

*Often people said, ‘You must have seen some very interesting sights when you went to the Nuremberg Trial’. Yes, indeed. There had been a man with one leg and a child of twelve, growing enormous cyclamens in a greenhouse."*

On the ‘cyclamens moment’, Rebecca West, 1955

West’s reply is my point of departure for this article. Her observation is pertinent because she moves away from the grand institutional moment happening at that time in the courtroom at the Nuremberg Palace of Justice, seeking to prosecute senior officials of Nazi Germany. It was the first international criminal trial, marking a move towards punishing individuals (not states) for international crimes. Phrases like ‘atrocious behaviour’, new markers as ‘crimes against humanity’ or ‘juridified war’ were being introduced in the international law vocabulary<sup>1</sup>. A

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\* I express my gratitude for excellent mentors at Cambridge during this program: Dr Midge Gillies, Dr Alexander Carter (informal supervisor) and Ana Leticia Magini, PhD – on literary, interdisciplinary/philosophical and legal angles. This article is also based on a presentation given at

groundbreaking moment for international criminal justice, it seems, for most observers. Yet, Rebecca West focuses on a scenario noticed outside the courtroom, where a man getting around on one leg and a child of twelve, victims of World War II atrocities, were growing enormous flowers - cyclamens.

The Nuremberg Trials gave birth to the field of justice today known as International Criminal Law ('ICL'). These were then followed by the two ad-hoc international tribunals, the International Criminal Tribunal for the former Yugoslavia and the International Criminal Tribunal for Rwanda, in 1993 and in 1994, respectively. These events culminated with the establishment of the first permanent international criminal tribunal. Drawing on the precedents of these previous temporarily established international courts, the International Criminal Court (ICC)<sup>2</sup> has jurisdiction over crimes of war, aggression, crimes against humanity and genocide, and was established in 1998. From a historical angle, the trajectory of ICL can perhaps only be depicted with reference to these key constitutional moments<sup>3</sup>, recounted with chronological linearity<sup>4</sup>. However, the sole focus on institutional landmarks (building up to a linearity of ICL's narrative) obscures other stories with equal relevance for the discipline, the individual accounts that would move it closer to ordinary people. The question this article explores is not what types of histories international criminal tribunals produce when analysing atrocities<sup>5</sup>, but instead, what story is being told about ICL historically (the inclusions) and, crucially, what is left out (the exclusions).

Rebecca West's observation that came to be called the cyclamens moment carries a special symbolic weight in this context because it moves the genesis of modern ICL as an institutionalised project (Simpson, 2014) away from the centre of the narrative. Following her lead, this article seeks to decentre the Nuremberg Trial through a micro-lens, deemed one of the main events within the macro-lens of ICL's historical trajectory. I aim to show the more advantageous narrative purposively unsettling the institutionalised historical chain of events towards a narrative closer to the ordinary people. I draw on Megiddo's (2019) scholarship to consider the role of the individual in shaping – the story told about - ICL. *Ordinary people* refer to human beings not identifying with legal/political/historical figures telling the story of ICL. They thus describe the legal sphere's 'outsiders' or, equivalently, the ordinary public (Tobia, Slokum and Nourse, 2022).

Methodologically, I draw from the book *Waiting for Hitler: Voices from Britain on the Brink of Invasion* (Gillies, 2007) to disrupt ICL's historical linearity via personal diaries of people<sup>6</sup> living

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the ESIL Interest Group on the History of International Law Workshop (Histories of Inclusion / Exclusion in International Law) in August 2022. I warmly thank the convenors and participants for their valuable comments and questions. I am also grateful to the editors of this volume for their patience and insightful suggestions. Not least, I wish to thank Professor Gerry Simpson, who, through his particular style of teaching at the LSE where I was an LLM student and his own writing, initiated me in the law and literature intersection. In some ways, his kind feedback on an early (and different from this article's) draft I wrote on that informs the turn this article took.

<sup>1</sup> See, e.g., U.S. delegate Robert Jackson's opening speech at Nuremberg, <https://www.roberthjackson.org/speech-and-writing/opening-statement-before-the-international-military-tribunal/>.

<sup>2</sup> Hereinafter, 'ICC'.

<sup>3</sup> See, e.g., Olásolo's description of the discipline, 2018.

<sup>4</sup> Simpson, *Linear Law*, 2014.

<sup>5</sup> See Barrie Sander's work for this assessment, 2021.

<sup>6</sup> There have been various attempts to carve in the 'voices of the forgotten': Max Arthur (in association with the Imperial War Museum), *Forgotten Voices of the Great War* (London: Ebury, 2002), *Lest We Forget: Forgotten Voices 1914–1945* (London: Ebury, 2007); Roderick Bailey (in association with the



in 1940s Britain under a threat of German invasion. The book works as a literary artifact<sup>7</sup> by archiving personal stories 'from *that* period about *those* people' (Taha, 2022). Literature is therefore deployed as the channel for the unsettling exercise. I will show how disrupting ICL's linearity works through the book via fragmentary, chaotic (as opposed to linear, chronological) stories about ordinary people encompassed in personal diaries, written sources from contemporary press reports, letters and personal accounts from those times or reminiscent of those. These reveal the viewpoints of ordinary people in a chaotic, social, fragmented history due to the way their experiences develop(ed) in real life.

In the quest for 'peace' and 'justice' when regulating international criminal behaviour, victims' needs or voices are presupposed or implicitly, but not explicitly and directly, regarded<sup>8</sup>. Whenever I refer to victims in this research, I take the concept broadly, to include surviving victims of international crimes, their families, overall communities affected by international atrocities and potential victims<sup>9</sup>. The latter are those that Gillies' book covers, *i.e.*, persons living through the Second World War and preparing for a very probable invasion of Britain, by Germany (ordinary people). This article places more emphasis on their voices, situating their place within the ICL discipline, a focus currently scarce in the specialised literature<sup>10</sup>. By focusing on potential victims' voices instead of those of the international community<sup>11</sup> or on the alleged universal sense of justice expressed by the latter (or, better yet, the victors' or the Great powers), the juridified linear historical account is examined from a fresh perspective. I refer here to the historical story of ICL, different from the history of conflicts that generate trials investigating international crimes. However, sometimes these two types of history overlap and one builds upon the other, as reflected in the article. The historical axis of ICL itself is under scrutiny (outbound perspective), with an inbound look towards personal stories of people in crisis. My research then attempts a deconstruction, through literary avenues, of ICL's historical linear narrative and turns towards a sort of chaotic narrative, finding meaning for ICL in smaller events or moments, like the cyclamens moment. Hence, the contribution of this article is the excavation of an ICL and literature angle, specifically, focusing on the narrative of ICL as a

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Imperial War Museum), *Forgotten Voices of the Secret War* (London: Ebury, 2008); Joshua Levine (in association with the Imperial War Museum), *Forgotten Voices of the Blitz and the Battle for Britain* (London: Ebury, 2006); Lyn Smith (in association with the Imperial War Museum), *Forgotten Voices of the Holocaust* (London: Ebury, 2005); Julian Thompson (in association with the Imperial War Museum), *Forgotten Voices of Burma* (London: Ebury, 2009) (Gillies, *Clamouring to be heard*, 2018, p. 6).

<sup>7</sup> The notion of 'literary artifact' is taken from Taha, *Palestine Parodies*, 2022. A literary artifact is part of cultural archive – a device that has the 'power of memory-making' (Taha, 2022). Therefore, a literary artifact serves as a launchpad in bridging memory, history and law.

<sup>8</sup> See, *e.g.*, Brown, *International Criminal Law: Nature, Origins and a Few Key Issues*, 2011.

<sup>9</sup> Including potential victims in the discussion does not impact the status or rights of actual victims, nor does it pose ethical concerns since the article does not refer to the trial stage or its aftermath. Although Hitler did not invade England, there was a clear and imminent threat of invasion, leading the country to make preparations. Consequently, at this point in time, the distinction between actual victims and potential victims is minimal or non-existent. During a few months in 1940, these communities faced the impending invasion, with mothers expressing a preference for poisoning their children rather than handing them over to the Nazis, and individuals making life-or-death decisions. Therefore, for the purpose of this article, these individuals can broadly be included in the victim vocabulary.

<sup>10</sup> Not completely inexistent, however. See, *e.g.*, related to victims' voices in the international criminal justice machinery, Nouwen, *Justifying justice*, in the Cambridge Companion to International Law, Crawford and Koskeniemi (ed.), Cambridge University Press, 2015, where Nouwen traces the justice journey in ICL through interviews with victims as interviewees.

<sup>11</sup> Tallgren, *The Voice of the International: Who is Speaking?*, 2015.

discipline, different from the existing and sparse, general literary explorations of various topics *within* ICL.

This article, a variation of my finalised work at Cambridge, proceeds as follows. First, I present the traditional linear historical account in ICL and explain its potential appeal. Secondly, I advocate a non-linear understanding by revealing the misgivings of the current historical account (the exclusions and overinclusions). Thirdly, the interplay between law and literature is briefly illustrated. Fourthly, I articulate how the literary artifact chosen aids in imagining a non-linear history of ICL constituted by fragmented accounts of people under a threat of invasion. Finally, the Nuremberg Trial is succinctly presented and two threads considered for a decentring example. Drawing from *Waiting for Hitler*, this research explores the underexamined link between ICL and literature and invites more sustained analysis through a process of unsettling<sup>12</sup>.

## 2. Linearity and non-linearity

### 2.1. The linear perspective

The traditional narrative of ICL's history is depicted in a linear manner, consisting of a chronological sequence of main international criminal tribunals and events in the field. Linearity here refers to the chronological dimension, but also to the continuance, in a straight trajectory, of similarly picked main events (having more or less the same characteristics and a presumably identical impact on the international community). Thus, linearity appears as a useful pedagogical technique showing a discipline's main events in a historical and chronological sequence. Simpson pointed to an additional possible methodological predilection sedimented in the project of international criminal justice explaining this inclination - perhaps an ideological bias for histories that 'reflect well on liberal values of multiculturalism over the regressive tendencies of nation, ethnies or religion' or a political bias, as the proclivity for writing histories that 'accord with the political requirements of the Great Powers' (Simpson, 2014). This enforces the idea of politics as a series of transformative events, reflected in ICL's history.

Punitive legalism, according to which perpetrators of crimes against humanity, war crimes and crimes against peace<sup>13</sup>, must not go unpunished, was considered by some a main concern in the twentieth century ICL<sup>14</sup>. International legal scholarship usually focuses on the potential gains inherent in this move towards criminalisation initiated at Nuremberg in 1945. Accordingly, the fight against impunity cause was to be served by internationally mandated courts expected to uphold justice in the proper exercise of their duties<sup>15</sup>. This puts international criminal tribunals and their work chronologically on the linear map of main events in the field.

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<sup>12</sup> 'Unsettling' and 'disrupting' are used interchangeably in the article.

<sup>13</sup> This is how the U.S. delegate, Robert Jackson, referred to the crimes being investigated in 1945 in his opening speech at Nuremberg: <https://www.roberthjackson.org/speech-and-writing/opening-statement-before-the-international-military-tribunal/>.

<sup>14</sup> As echoed in this ICC keynote address in 2006, *Applying the Principles of Nuremberg in the ICC*, where accountability for serious crimes is mentioned as fundamental principle starting with Nuremberg: [https://www.icc-cpi.int/sites/default/files/NR/rdonlyres/ED2F5177-9F9B-4D66-9386-5C5BF45D052C/146323/PK\\_20060930\\_English.pdf](https://www.icc-cpi.int/sites/default/files/NR/rdonlyres/ED2F5177-9F9B-4D66-9386-5C5BF45D052C/146323/PK_20060930_English.pdf), p. 3.

<sup>15</sup> See, e.g., Murphy, *International Criminal Accountability and the International Criminal Court*, 2004.

This research asks what, if anything, has been lost to the story usually told about ICL and whether literature has a role in filling a potential gap<sup>16</sup> in the ethos of the project of international justice in the face of mass atrocities. It is suggested that focusing solely on the linear chain of grand events obscures or excludes a variety of noteworthy objects of inquiry while over-emphasising others. First, it excludes trials with multi-faceted significance within the history of ICL (e.g., the Tokyo Trial, the Klaus Barbie Trial, the Moscow Show Trials<sup>17</sup>). Second, it neglects how this historical narrative obsessing over an 'anti-impunity telos' (Nesiah, 2021) 'ignores, distracts from, or even facilitates colonial and neocolonial oppression'<sup>18</sup>; here, the 19th century history of the Freetown tribunals, the international courts for the suppression of the slave trade, reveals how a particular history<sup>19</sup> frames and reframes the crisis-space of slavery in a way that 'denies and distracts from the legacies of racial capitalism' (Nesiah, 2021). Third, this linear history overincludes 'hegemonic histories' and an account of victors' false official history (Simpson, 2014). Fourth, the chronological sequence of events and contextualism are erroneously overemphasised in the traditional account. As Wheatley (2021) and Orford (2013) note, 'the workings of modern law are not governed by the narrow strictures of sequential chronology' and legal scholars need alternate methods to reflect 'law's transfer of meaning through time'. Contextualism represents a 'misguided methodological straightjacket that stifles critique by quarantining meaning and power in discrete historical silos' (Wheatley, 2021, quoting Orford, 2013). Finally, the accumulation of grand, politicised events constituting the linear history, far-removed from the people through their pompous dimension, obscures other stories about ICL, primarily those closer to the people impacted by the relevant events in the field.

The historical account presupposes a linearity of pivotal moments seen as main events marking the evolution of the field in time, as shown above. The linear history seems fixed by some historical moments set in stone in the field. My argument is that this maximised, macro lens, whilst perhaps a necessary summary of main events in the discipline (with the flaws of selectivity, overemphasizing some events and excluding relevant events or stories), neglects a micro type of analysis. The latter is focused on a chaotic, fragmentary, social history, where voices of ordinary people are considered part of ICL's historical fabric. This type of history comes to complement the outline of main events in the field and better explain their causes, holistically.

The linear historical account might be thought of as the natural, traditional way of constructing the history of a field dealing with conflicts, its benefits being juridified and historicized accounts of the latter, bringing clarity and objectivity in a historical archive of law. International criminal tribunals are 'epistemic engines', as Borda contends, due to their being institutions 'systematically and inevitably' producing knowledge or finding truths about conflicts coming before them (Borda, 2020). In light of this assertion, some might argue that ICL plays an (albeit backgrounded) role in history writing. What stems from this assumption is that every deemed

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<sup>16</sup> The possibility that literature might also reinforce the current story about ICL is not excluded. The particular literary artifact chosen helps in a deconstruction of ICL's current narrative; other pieces of literature might well do just the opposite.

<sup>17</sup> See Simpson and Heller, *The Hidden Histories of War Crimes*, 2013.

<sup>18</sup> Nesiah, *A Mad and Melancholy Record: The Crisis of International Law Histories*, 2021, pointing to the Nuremberg Trial.

<sup>19</sup> For current purposes, the 19th century history is just an example of how a history, like the ICL linear one, is apt to distract from other worthy objects of inquiry. Its chronological placement has no bearing on the current article.

major (set of) conflict(s) international criminal tribunals deal with in their work is deemed a pivotal moment in ICL's history. This leads to the gradual accumulation of a linear historical account constituted by a series of such events<sup>20</sup>. Therefore, what other historical trajectory of the discipline might emerge if not the one formed by paramount events through which we understand the field itself?

An important premise is that the linear account contains institutional arrangements too grand to reflect ordinary people's lives. Is the narrative of a discipline examining international crimes and atrocity spaces meant to be rigid and reflecting only a chronology of grand historical events? Or ought it take into account the voices of ordinary people living through those experiences ICL comes to regulate?

Here we might recall the soldier war poet, Siegfried Sassoon, being indignant at the Ypres Memorial (the Menin Gate, in Belgium) - a 'pile of peace-complacent stone', that to him was 'too grandiose to commemorate the ordinary enlisted men'<sup>21</sup>. In Sassoon's view, the memorial's grandeur was 'mere pomp, designed to disguise the crime of the state's prosecution for war'<sup>22</sup>. The linear account is too far from ordinary people, their rationale and emotions during the unfolding of atrocities. Their apparent transformation, post-atrocity, in grand institutionalised events removed from the actual atrocity falls short of providing a transparent historical account of the discipline<sup>23</sup>.

According to Clements, in *Complementarity, Catalysts, Compliance* (De Vos, 2020) and *Distant Justice* (Clark, 2018), the authors resort primarily to ICC's 'legalism', a concept they deem as 'distancing the Court from situation countries, with many damaging effects on accountability efforts' (Clements, 2021). For instance, 'the stakes of the ICC's manoeuvres are the risks associated with all attempts at being distant': miscommunication, isolation, speculation, invention and re-presentation when perceived as being too far<sup>24</sup>. Such risks reflect many of the recent concerns about the ICC's work in (and on) Africa and Africans<sup>25</sup>. Some authors are also wary of the ICC sometimes being too close to the atrocity space, which might pose the risks of 'meddling, imposition and claustrophobia' (e.g., Clark, 2018). The ICC is indeed the organ at the heart of ICL and these analyses significantly address the appropriate stance of the institution in addressing accountability. Examining the jurisprudential factor in ICL, its practical advantages or flaws related to either proximity to or remoteness from atrocity spaces might yield comprehensive results for international criminal justice. Notwithstanding, I ask how ICL's historical trajectory is constructed and viewed as a field, heterogenously. Is it

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<sup>20</sup> I am not referring here to the work produced by tribunals when investigating international crimes, but of the historical trajectory of main events traditionally considered important in the field.

<sup>21</sup>A Palmer, <https://medium.com/kent-connections/who-will-remember-the-unheroic-dead-c5490fa6480f>, regarding S Sassoon's *On Passing the New Menin Gate* sonnet, 1927. The fact that 34,984 names of soldiers were excluded from the memorial because of lack of space might have contributed to Sassoon's indignation (see <https://allpoetry.com/On-Passing-The-New-Menin-Gate>).

<sup>22</sup> Idem.

<sup>23</sup> Here see Primo Levi, *If This Is a Man*, 1947, later retitled *Survival in Auschwitz: The Nazi Assault on Humanity in the US*; Arendt, *The Origins of Totalitarianism*, 1951; Arendt, *Correspondence 1926-1969*, 1993.

<sup>24</sup> As Clements mentions, the images of distance and proximity used are inspired from M. Foucault, *Of Other Spaces: Utopias and Heterotopias* (1967); see also Kendall and Nouwen, *Representational Practices at the International Criminal Court: The Gap between Juridified and Abstract Victimhood*, 235' (Clements, 2021).

<sup>25</sup> Gevers, 2020.

close to or far-removed from the people? Is the story about ICL properly incorporating people's experiences and voices in atrocity spaces?

Literature is uniquely well-placed as the channel for unsettling ICL's linearity. It aids us in returning to a lost literary style<sup>26</sup> in the field, symbolically present in the late nineteenth, early twentieth century - for instance, in the genre of war poetry, through the works of soldier-poets like Siegfried Sassoon and Wilfred Owen describing their experiences and emotions on the battlefield<sup>27</sup>. We might ask why even attempt to theoretically reverse that shift? I argue that when dealing with international crimes, there is a need to provide a necessarily humanist, but real account on behalf of ordinary people affected by the crimes. Creative writers have the emotional intelligence and humanist vision to provide this.

Another possible answer might be the shared preoccupation of law and literature, respectively, identified by Craft in 1992, the 'fear of dread', of the unfathomable future. (International) law dealt with the desire for justice and peace by coming up with legal fictions contained in a legal framework generated via imagination (see Koskenniemi, 2021); it regulated behaviour and introduced ways of punishment for international crimes, thus dealing with unknown future behaviour by deterring new situations of mass atrocities. Literature has engaged in a similar exercise when faced with 'the apprehension of a future heavy with the possibility of danger' (Craft, 1992). Whilst 'literature captures and suspends fear, allowing readers to contemplate the perils of arbitrary fate', law is an 'antidote to fate' (Craft, 1992) since it intervenes to offer explanation and remedy after something has occurred. Therefore, although through different means depending on the field, the fear of the unknowable future conjoins the two disciplines and indicates a link worth examining, in order to further problematise ICL's historical chain of events. Fear (of dread) is also a common denominator of law and literature regarding the grappling of ordinary people in *Waiting for Hitler* with the fear of Germany invading Britain. The invasion did not happen in the end. Therefore, we cannot speak of an international crime or conflict - in terms of ICL *per se* - when describing the book. However, the personal stories of people living throughout that period, with the danger of an alleged imminent invasion, mirror the experiences of people before the occurrence of an event under ICL's scrutiny (for instance, those of the Ukrainian people before 24 February 2022, when the danger of Russian invasion *did* materialise).

Going further, one might ask how ICL would benefit from insights into the law and literature intersection and, in particular, why the movement towards unsettling ICL's history would be advantageous to the project of international justice as a whole. My response is manifold. First, literature adds power to the field and is helpful to legal practitioners, generally, allowing them to 'free themselves from the shackles of formalism and rigidity' (Bianchi, 2016). Literature also brings new ethics into legal practice, often perceived as an 'aseptic, detached' professional activity (Bianchi, 2016, mentioning Weisberg, 1989). Third, we should consider literature's quality of acting as an antidote against the portrayal of the social practice of the law merely as scientific method or dry technique (Bianchi, 2016; Koskenniemi, 2007).

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<sup>26</sup> Simpson, *A Sentimental Life of International Law* (2015), p. 7.

<sup>27</sup> The study of emotions in international law, linked to law and literature, has also gained traction in recent times – see, e.g., *Virtue, Emotion and Imagination in Law and Legal Reasoning*, ed. Amaya and Del Mar. Oxford: Hart Publishing, 2020 and White, *Images of Reach, Range, and Recognition: Thinking about emotions in the study of international law* in *Edward Elgar Research Handbook on Law and Emotion*, 2021. Additionally, see History of Emotions Centre, <https://projects.history.qmul.ac.uk/emotions/>.

According to Bianchi, when the application of legal techniques proves insufficient to capture human experience, literature offers a better understanding of social and human reality, which is ultimately the 'context in which law operates' (Bianchi, 2016). The reminder of humaneness in people is useful in our comparative analyses of Gillies' depiction of personal stories and the international community's addressing of issues pertaining to international crimes. This view strengthens the argument that a literature and law junction aids the current study. Bianchi demonstrates that literature has the potential to cultivate a critical conscience as an approach that emphasises particular experiences and individual lives. His assertion that this approach promotes awareness that 'abstract characterizations of the law, with their rationalizing aspirations', ought not be allowed to operate in a human vacuum (Bianchi, 2016), is applicable to the argument in this article.

Disrupting the story about ICL's historical narrative is done via a literary device also due to literature's ability of inscribing (historical, political, sociological) context (Gevers, 2019) to law. The flaws of ICL's narrative trigger this disruption: its exclusions and overinclusions, its selective nature and the fact that the grand trajectory of events obscures the stories of ordinary people in state of crisis that might influence the discipline's story by offering avenues to understand why and how events in ICL occur. This article focuses on the latter flaw. Megiddo's analysis of individuals' contribution in international law, an underexplored theme, is useful here. His 'individualist constructive method', which he describes as 'studying the making, implementation, interpretation, development and breaking of international law as ultimately carried out by individual people' (Megiddo, 2019) draws an analogy with how ICL might be historically formed in the same way.

Moreover, the usefulness of groups of ordinary people's voices is mirrored by Koskenniemi's coined concept of *legal bricolage* (Koskenniemi, 2021). A technique used by lawyers, theologians and political writers between circa 1300 and 1870 involving the use of old legal vocabularies, but in novel ways, bricolage provides answers to legal questions related to international dimensions not encountered before (Koskenniemi, 2021). Koskenniemi manifests a preference for a sort of legal bricolage shown by Bluntschli, placing importance on following 'the legal consciousness of human communities' (Koskenniemi, 2021, on Bluntschli, 1868). He emphasised the advantage that zooming in on the interactions between human groups would emphasise their 'inner lives, attitudes and ideologies' (Koskenniemi, 2021). Similarly, the relations between human groups, the consciousness of human communities during crises within ICL, reflected in ordinary voices, as shown through a literary artifact, form a legal bricolage revealing a different history of the field, understood more aggregately than via linearity.

## **2.2. Towards a non-linear perspective**

There have been attempts to deconstruct the dominant narrative of ICL's history. For instance, some authors examined a vast range of 'less explored time periods, geographical regions and institutional settings' (Bergsmo, Ling, Ping, 2014). They questioned the traditional historical narrative to demonstrate how communities, states and international organisations have pursued the prosecution of or dealing with international crimes. They showed how atrocities have been addressed over time by paying attention to less well-known non-Western cases or personas in ICL. Heller and Simpson engaged in a similar exercise by moving away from ICL's traditional linear history to scrutinise trials that had received scant attention (the Tokyo Trial, the Klaus Barbie Trial, the Moscow Show Trials) (Heller and Simpson, 2013). Underexplored

cases, personas and time periods are worthy techniques when challenging ICL's traditional historical paradigm. Against this backdrop of approaches, I focus on disrupting the field's linearity to emphasise the voices of ordinary people involved in conflicts relevant to ICL in the hope that this will enrich our comprehension of why events in the discipline occur.

The concept of linearity resembles what Koskenniemi describes as 'continuity' in his newest work, *To The Uttermost Parts of the World* (2021). The history covered in his book is one of the legal imagination aimed at capturing actions or policies with consequences beyond the domestic realm roughly during 1300–1870. Relevantly to this article, to him 'continuity cannot be read as a single tradition'. Rather, diverse ways of 'imagining a law to be applied abroad' or regarding foreign people arose at once in different places (Koskenniemi, 2021). Similarly, I argue that by focusing on linearity in ICL by binding together similar events in a straightforward trajectory, we risk discarding a variety of people, backgrounds and experiences. Through the decentring of the first main event in the discipline and the hypostases in the literary artifact under scrutiny<sup>28</sup>, this article shows how a bricolage of peoples' voices and experiences can form an alternative, non-linear history. Wheatley and Orford, when dismissing contextualism and chronological linearity, open the floor to a 'fuller exploration of law in history and in time' (Wheatley, 2021). As Orford reminds us, legal training itself comprised schooling in how to make 'meaning move across time' (Orford, 2013). This approach bodes well with envisioning a chaotic (as opposed to a linear, chronological) history of the field, in an attempt to view history as something indeterminate and perhaps acknowledge that the legal realm cannot offer decisive versions of histories regarding conflicts.

Hence, the following question ensues: Are the potential benefits of the linear historical perspective shown above properly balanced against the costs? Simpson, for instance, suggests that we might want to look into a non-linear ICL due to a desire of not seating hegemonic histories through linear law or to not bypass the 'role of structural or economic forces in creating the conditions for warfare' or to embrace history as indeterminacy and acknowledge 'law's impossibility' of offering definitive accounts of histories relating to conflict (Simpson, 2015). Moreover, related to 'Eurocentrism' in international law, Koskenniemi stresses that to view the development of international law as linear despite it having started as territorial expansion of European values through force is erroneous (Koskenniemi, 2013). The latter offers another justification for considering a non-linear narrative. Analogously, the development of ICL, supposedly initiated by the Nuremberg Trials, started with the expansion of the Allied Powers' values internationally through what *they* deemed the content and prosecution of international crimes.

Amidst these justifications for moving towards a non-linear perspective, my exploration turns to the following: What do we lose when, immersed in a grand institutionalised history, we distance ourselves from the ground, from the smallness of gestures and the persons' involved rationale, needs<sup>29</sup>? This interrogation brings Simpson's idea of 'social history' to the fore, analysis of which is scarce in the international tribunals' 'accounts of the causes of war or conflict' (Simpson, 2015). This echoes how 'over-attention to the behaviour of elites (...) has skewed 'history away from the everyday or the social' (Simpson, 2015). In deconstructing ICL's

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<sup>28</sup> See section 4.2 for hypostases.

<sup>29</sup> There have been attempts to bring the law, generally, closer to the everyday activities of ordinary people, to better understand how law should function within the sociological sphere it operates – see, e.g., Silbey, *The Every Day Work of Studying the Law in Everyday Life*, 2019.

historical linearity, I turn towards a chaotic narrative finding meaning for ICL in smaller moments, like the cyclamens moment.

The cyclamens moment could be described as emphasizing the overall interest of the victim in the international criminal justice machinery (as a defiance gesture towards atrocity or ICL's grand, institutionalised linear account (Simpson, 2014)). However, I do not purport to excavate heroic narratives therein (related to plots in the field - villains versus victims or victims' procedural rights) or the construction of the victim in ICL. I neither analyse the victim's image in the courtroom nor in the field itself, related to a humanitarian vision of the victim and its 'fundraising' (the exploration all of which Schwöbel-Patel, 2016, compellingly engages in). Instead of being outbound looking – analysing the victims from the outside, my perspective is inbound, as I attempt to look *inside* the victims and out into the world, from their point of view. I am interested in ascertaining from within the victims themselves, with the help of a literary piece, how their emotions, feelings, rationale, captured in personal diaries, reveal another history of ICL<sup>30</sup> worth considering - a chaotic, social, fragmented history.

Linking literature and law to echo ordinary people's interests, their social and ordinary experiences generates a non-linear ICL history contrasting the mainstream narrative commonly seen in the field's textbooks. A glance at how ICL's history is traditionally viewed illustrates how the U.S. delegate to the Nuremberg Tribunal, Robert Jackson's voice, for instance, takes prominence regarding ICL's story<sup>31</sup> over voices of regular people actually affected by the international crimes the Nuremberg Tribunal was set up to investigate<sup>32</sup>.

Hence, this article invites towards a better dialogue between ICL academic scholarship and the literature (in the non-specialised sense) produced about individual accounts related to the spaces in which international crimes happen (or are expected to occur, as was Germany's invasion of Britain in 1940). There is a distinction between factual accounts of real victims (for instance, Anne Frank's diary or the writings of Holocaust survivors, such as Primo Levi, Viktor Frankl and Imre Kertész – see Drumbl, 2016) and fictional accounts about real events (perhaps the writings of Holocaust survivor Ka-Tzetnik might be integrated here). The ways in which the two types of literature contribute to ICL in a broader way are certainly different (notwithstanding that both could positively influence the field). *Waiting for Hitler* could be integrated somewhere in the middle ground between the two, seeing its inclusion in the genre of 'creative non-fiction'<sup>33</sup>, but more closely towards non-fiction. It is important to note that this genre is defined as 'the literature of reality'<sup>34</sup>. The narrative, based on true facts, uses techniques from fiction to tell an engaging, but always, true story. The life events in *Waiting for Hitler* were taken from personal diaries of people living throughout that period. Therefore, all the information

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<sup>30</sup> I do not examine here whether ICL *should* pursue the task of making history in the first place. For various assessments on this topic, see, e.g., Borda, 2020; Hirsch, 2003; Osiel, 1999.

<sup>31</sup> This argument is attested by various accounts of the history of ICL where the opening speech at Nuremberg, by Robert H. Jackson (or the closing address, by the same) is used in describing the importance of the Nuremberg Trial, the first main moment in the discipline – see, e.g., Caterinicchio, *Robert H. Jackson and the Nuremberg Trials: Justice and Diplomacy*; also see, e.g., how Geoffrey Robertson QC states the widespread belief of where ICL's origins lie – at the London Conference in 1945, initiated by Robert H. Jackson and Harry S. Truman – in *Historical Origins of International Criminal Law: Volume 1*, 2014, p. vii.

<sup>32</sup> See, however, Sands, *East West Street*, 2017, for family experiences and emotions relevant to ICL that seem to shape this field.

<sup>33</sup> Gillies, *Clamouring to be heard*, 2018.

<sup>34</sup> See, e.g., <https://creativenonfiction.org/people/lee-gutkind/>.



pertaining to individuals' accounts is *real*. However, it could successfully be contended that Gillies' work is a hybrid of the two genres, since it is 'both of the time and reflecting on it'<sup>35</sup>. Additionally, the study is not yet another critique of ICL as a field (the literature here abounds<sup>36</sup>). I am also not interested, for the purposes of this article, in whether or not the ICC, specifically, does enough for the victims where reparations are concerned, by providing the special Trust Fund for victims; indeed, it is the only international institution of this sort equipped with such an innovative reparatory system for the victims. My interest lies in moving the lens away from institutionalised, juridified moments in ICL, and closer to social experiences and emotions of people on the ground, whose interests ICL is supposed to mirror. This research is a springboard into complex ways to historically approach the encounter between literature and ICL, of great paucity in the literature thus far and only beginning to be sketched here.

### **3. The movement of law and literature**

#### **3.1. Overview**

The first category of relevant texts on the law and literature movement sets the foundation for the ICL and literature junction (Peters, 2005; Sullivan, 1998; Smith, 1977; White, 1973; Posner, 1988-2000; Weisberg, 1986 – 2018; Stern, 2014).

Law and literature, as a movement conjoining the two disciplines, is considered to have James Boyd White as its initiator, with *The Legal Imagination*, 1973, a book initially conceived as a handbook for his law students, to improve their courtroom skills.

There have been various reasons for the movement's genesis:

1. the two fields' interconnections, such as using history, the structures of oppression, the frailty of human nature or the influence of the parent-child relation on adult societal patterns (Craft, 1992);
2. the dissimilarities between the two disciplines and thus the benefits that a symbiosis between them might generate: allegedly, the 'objectivity that law tries to cultivate, in antithesis with the fiction in literature' (Sullivan, 1998), the fact that whilst 'literature describes, law prescribes' (Cover, 1986), the violence in law and its authoritative tone - as Radin, 1990, notes, 'authoritative regulations command, not invite', which does not ring true to literature;
3. the gap in each field that the other comes to fill, for instance, the technocracy, dullness, excessive formalism in law would be overcome by the humanism in literature (Peters, 2005) and 4. the two fields' shared preoccupation, *i.e.* the omnipresent 'anxiety about the unknowable future' exerting its force (Craft, 1992).

The intersection of the two disciplines triggered four strands: *the law of literature*, the study of the law relating to works of literature, copyright and patent laws, *law as literature*, an essentially hermeneutic movement subjecting legal texts to interpretive methods developed in literary theory; *legal and literary hermeneutics*, the study of the methods of interpretation of legal and literary texts; and *law in literature*, the study of the representation of law and legal processes in literature (Julius, 1998). Additionally, the power of law to tell a particular story (and the

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<sup>35</sup> I thank one of my (anonymous) markers at Cambridge for pointing this out.

<sup>36</sup> See, *e.g.*, Vasiliev, 2020 or, on critical approaches, Schwöbel (ed.), 2014.

exposition of stories it is silent about) is the focus of the so-called “narrato/lawgy” movement or *legal story-telling* (Naftali and Triger, 2018). I do not focus on a particular strand, fearing of essentialising; rather, I let the literary texts chosen ‘inscribe’ context to ICL (Gevers, 2019, 1) whilst examining a common preoccupation that law and literature share, the ‘ubiquitous anxiety’ (Craft, 1992) regarding the unfathomable future.

Literature and law’s shared preoccupation – the fear of the unknowable future - is mirrored by *Waiting for Hitler*. The anxiety induced by the inconceivable future is reflected in ICL and the scrutinised book: the former, with the attempt to regulate social behaviour via criminal accountability for international crimes; the latter, with excavations of the human conscience of people facing atrocity. The fear of dread is pervasive throughout Gillies’ book, as it reveals, through personal diaries, how people living in 1940s Britain were emotionally coping with the war and preparing, on various personal fronts, for a possible German invasion.

According to Peters (2005), the movement evolved from the early 1970s to the late 1980s due to three main concepts: humanism, hermeneutics and narrative. It suffices for current purposes to acknowledge that a common denominator of law and literature, *i.e.* humanism, is a worthy starting point to explore ICL’s story, because it necessarily emphasises an exclusion from the mainstream linear trajectory: ordinary people’s voices.

### **3.2. Adjacent interconnections of law and literature**

The following category of literature encompasses existing adjacent interconnections between law and literature (international law and literature – Ayres, 2004; criminal law and literature – Coughlin, 2001; Lacey, 2017).

When exploring the realm of ICL and literature, I came across a slightly related project - the examination of criminal law through the lens of literature, as envisaged by Stern (2013), for instance. Stern shows how literature can address questions about substantive criminal law doctrines and the grounds for their application (*e.g.*, Lacey, 2017; Coughlin, 2001). An example is Lacey’s analysis of criminal behaviour of women as portrayed in the twentieth century literature (2017). Also regarding criminal law and literature, showcasing the deployment of literary techniques in law (*law as literature*), Barell illustrates how the aesthetic consequences of the treason trials of the middle 1790s, as set out in his book, *Imagining the King’s Death*, are established by means of a close reading of some of the poetry of Samuel Taylor Coleridge. There are also international law and literature connections; *e.g.*, Ayres’ (2004) work reveals the linkage between children’s tales and international matters.

Moreover, in *Literature and the Law of Nations*, Warren recognises a certain nature of early modern international law by showing how major writers of the English Renaissance—including Shakespeare, Milton, and Hobbes—deployed genres like epic, tragedy, comedy, tragicomedy, and history to support the ‘canonical subjects and objects of modern international law’<sup>37</sup>. Warren illustrates how Renaissance literary genres informed modern categories like public international law, private international law, international legal personality, and human rights. Similarly, this article reflects how a literary genre (creative non-fiction, where Gillies’ book pertains) informs ICL.

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<sup>37</sup> Warren, *Literature and the Law of Nations*, 2015.

### 3.3. The encounter between ICL and literature

This article maps out an encounter between ICL and literature that helps us problematise, unsettle, rethink ICL's historical linearity. The most relevant work on ICL and literature has recently emerged. The 'Literature & International Law at the Edge' group (2018), for instance, brings out interactions between law and literature's two neglected branches, so to speak, namely literature of the South and Third Worldist international law. On that note, Slaughter (2019) used Moore's poem, *The Last Rose of Summer* (1813) to consider the 'imaginative, or intellectual, work that the flower-person does in this legal theory of juridical personality' and to discuss matters of sovereignty. The literature on ICL and literature as an enterprise is extremely scarce<sup>38</sup>, prompting the current research. Some works of Gevers, Simpson, Nesiah and Motha, for instance, touch on ICL and literature themes. However, they do so generally, either speaking about literature and international law and thus implicitly incorporating ICL in the latter or using some literary pieces to analyse topics *within* ICL (but not *the discipline's* narrative *per se*).

## 4. Why Waiting for Hitler? And how?

### 4.1. Description

The main reason for choosing this piece of literature was the identical (historical, legal, sociographic) context it shares with ICL. *Waiting for Hitler*, a study of the Home Front in Britain, is situated in the mid-twentieth century Britain. People were recommended to write personal diaries during the Second World War<sup>39</sup>, while supposedly waiting for Germany to invade Britain, the thoughts laid therein being a paramount source for Gillies' book narrative. These diaries were written by individuals who had time to do so and felt their lives were worth recording. Therefore, the author's sample is quite focused.

According to Gillies, the book, a collision between law and history, pertains to the 'creative non-fiction' genre<sup>40</sup>. The legal dimensions of the book consist of the background surrounding the war period in which the action is based (late summer in 1940s Britain), containing: the obligation of eligible men to enlist to defend the country, the curfew of residents, the rules

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<sup>38</sup> E.g., Simpson, *The Sentimental Life of International Law*, 2021 and 2015 (book and article, respectively); Gevers, *Africa and International Criminal Law*, 2020; Gevers, *International Law, Literature and Worldmaking*, 2019; Gevers, *Africa Blue Books' at Versailles*, 2019; Motha, *Archiving Sovereignty*, 2018; Martinez & Surwillo, "Like the Pirate and the Slave Trader Before Him"- *Precedent and Analogy in Contemporary Law and Literature*, 2017; McLoughlin, *Authoring war: the literary representation of war from the Iliad to Iraq*, 2011; Nesiah, *Placing International Law: White Spaces on a Map*, 2003. Also see the 'Literature and International Law at the Edge' group, discussing International (Criminal) Law and Literature related themes.

There is also a subgenre, so to speak, of ICL and literature, focused on poetry in ICL, which is also a scant one. However, these works address the use of poetry in trials before international criminal tribunals, thus involving a juridical dimension, instead of the historical axis of the field, the focus of this article. See, e.g., Surdukowski, *The Sword and the Shield: The Uses of Poetry at the War Crimes Trial of Radovan Karadžić, the Poet-Warrior*, 2019. I am grateful to the organisers of the *Poetry and International Law* conference at the Max Plank Institute for Comparative Public Law and International Law, 2022, for bringing this (sub)topic to my attention.

<sup>39</sup> See here how Mass Observation played a key role in encouraging diary keeping: <http://www.massobs.org.uk/>.

<sup>40</sup> I am grateful to one of my supervisors, Academic Director, Creative Writing at ICE, Dr Midge Gillies, for so generously discussing her book with me.

regarding the preparation for the invasion (for instance, the adamant recommendation that people remain in their houses instead of trying to leave their cities; non-compliance would have probably resulted in blocking the roads, thus hindering efforts to minimise the effects of Germany's invasion)<sup>41</sup>.

Gillies' work increasingly moves towards popular history, encompassing oral history to access experiences from different parts of society (Gillies, 2018), including ordinary people. She respected the conventions and codes of oral history (Gillies, 2018), by not fragmenting real-life experiences told by individuals. The author emphasises the importance of the subtitle of her book, *Voices from Britain on the Brink of Invasion*. It ensures that the voices, representative of personal stories of real people within the oeuvre, provide authenticity and a somewhat historical accuracy to the writing. Nonetheless, she concedes that the book presents extracts from a variety of real-life experiences encountered when researching personal diaries and interviewing various persons. Therefore, there is room to critique the authenticity of the story "of real people" as well, since they are not fully fledged stories, but selected fragments. These accounts could be paralleled to evidence admitted in courts during the investigation of international crimes, where undoubtedly extracts carved out of personal experiences are also reflected (as opposed to complete life stories). The presumed expertise of the competent people involved addressing the questions (either the defence lawyer, the prosecution or the judge) should steer the flow of information towards objectively establishing the facts of an alleged international crime. However, the traumatic dimension inherent in international crimes, coupled with the courtroom's rigid and formalistic setting might preclude victims' or witnesses' ability to offer an objective and complete account of the facts. In that sense, perhaps the accounts within a literary piece, such as *Waiting for Hitler*, since excluded from a judicial setting, might provide a suitable alternative avenue when problematising stories of people involved in international crimes.

#### **4.2. How does *Waiting for Hitler* help us unsettle ICL's linear historical account?**

By examining personal diaries of people grappling with an imminent invasion, their emotions, thoughts and coping mechanisms, this article places the lens on potential victims in ICL and affected communities (a neglected topic in the ICL literature), with a German invasion looming. I look at *Waiting from Hitler* as if it were a 'literary artifact', its significance lying not only in its substantive value, but also in its objectivity and materiality (Taha, 2022). The book's materiality can be 'reinforced by its power of memory making', being an artifact 'from *that* period about *those* people' (Taha, 2022), *i.e.* from the Second World War, about the people living throughout it and grappling with a thought-of imminent Nazi invasion. This technique resembles the context-inscribing method Gevers deploys.

Through the personal diaries, written sources from contemporary press reports, letters and personal accounts in the book, I observed themes relating to *humour, defiance, superstitions, ordinary involved in history*, as hypostases within the literary artifact speaking to the histories produced in ICL. By laying out the chaotic (in the sense of scattered experiences of various people from different families and social backgrounds in the short timespan covered in Gillies' book, a few months), fragmented histories in the field, another type of ICL history is shaped, a necessary, social one. This discipline is not only represented by the types of histories its specialised tribunals produce when analysing conflicts. Instead, it has got representations in

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<sup>41</sup> See, *e.g.*, Gillies, *Waiting for Hitler*, p. 46.

civil society and academia, among others<sup>42</sup>. *Waiting for Hitler* has been a launchpad into beginning to explore the societal, social representations of ICL through lived experiences of ordinary people that – one way or another - relate to the behaviour ICL regulates and explain some of the neglected causes of ICL conflicts. One cannot speak of main events in the discipline without attempting to understand their roots. And yet, with linearity, it is precisely what is being done.

The hypostases I identified in *Waiting for Hitler* are: first, *humour*, revealed in funny remarks or moments of bitter irony, presumably as a defense mechanism during the war. Gillies mentions the literary technique of having moments of heightened tension in the book 'interspersed with humour'<sup>43</sup>. In chapter 12, humorous remarks are made regarding the rumours surrounding parachutists disguised as nuns or, one of the most virulent rumours, that these disguised nuns betrayed themselves by revealing their hairy forearm<sup>44</sup>. Humour might be connected to *comedy* in international law, mirroring this article's link between literature and ICL. This is reflected in, for instance, Simpson's chapters iii and iv in his new book<sup>45</sup>, where he asks what type of 'funny' international law might be and he contrasts two kinds: ironic and blasphemous (Simpson, 2021). He thus puts international law into conversation with the genre of comedy, conceding that these are not often thought of as having much of an interconnection (Simpson, 2021). He uses 'bathos', for example, as an effect of the application of ICL to war disasters.

A second hypostasis in the book could be *defiance*. Here we might recall an episode of the two young sisters in the book, Jenny and Muriel, who kept diaries for Mass Observation. They manifested an act of defiance towards war and invasion by swimming in the sea that Hitler was expected to use for his invasion. Notwithstanding their age (in their twenties) and background (no Jewish family to be afraid for, for example, and thus possibly deterring them from dangerous behaviour) this gesture reveals an act of defiance. It also mirrors defiance as symbolically shown in ICL scholars' examinations of attitudes towards the discipline. Mégret and Samson characterise defiance as perhaps the 'most famous, and infamous, attitude of defendants before international criminal tribunals' (Mégret and Samson, 2019). The live suicide of Slobodan Praljak in a ICTY courtyard a few moments after his sentence was pronounced in 2017 might be remembered as the 'ultimate act of defiance', they aver. According to them, like Hermann Göring before Praljak, the effect was 'not only to withdraw himself, as dramatically as possible, from the tribunal's jurisdiction', but also to undermine the legitimacy of the tribunal itself (Mégret and Samson, 2019). For the purposes of this research, the attitude of the sisters complements my dismissive view of the historical linearity of ICL. It does so by symbolically marking a chaotic episode in ordinary people's lives that ought to impact how we view the discipline as a whole.

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<sup>42</sup> I was inspired here by the ideas laid out in the superb Tallgren, *The Durkheimian Spell of International Criminal Law?*, 2013.

<sup>43</sup> Gillies, *Clamouring to be heard*, 2018, p. 46.

<sup>44</sup> *Waiting for Hitler*, p. 156, 157.

<sup>45</sup> *The Sentimental Life of International Law*, 2021.

The *ordinary shaping history* could be seen as a third hypostasis. Here ‘the myth of the little ships’<sup>46</sup>, where an ordinary Briton was allowed to play a part in a military operation<sup>47</sup>, is relevant.

*‘Look – this little steamer, like all her brave and battered sisters, is immortal. She’ll go sailing proudly down the years in the epic of Dunkirk. And our great-grandchildren, when they learn how we began this War by snatching glory out of defeat, and then swept on to victory, may also learn how the little holiday steamers made an excursion to hell and came back glorious’*<sup>48</sup>.

The paragraph reflects the idea of moments shaping history in a glorious way. This section invites to a reconsideration of the small moments, like the one above, instead of pompous, institutionalised ones; they trigger a rethinking of where the useful voices in ICL lie. Some ideas postulated by Tolstoy (again, taking cue from literature) in 1999 are relevant here. According to him, the theory of the transference of the collective will of the people to historical persons, whilst useful for jurisprudential purposes, is futile once ‘history begins’, *i.e.* once revolutions or civil wars start. His opinion clearly steers the discussion towards historical agency or authorship for international crimes (individual responsibility versus collective guilt). However, it may also convey the potential impossibility of transferring collective will/collective rationale to a historical figure involved in the institutional arrangements within ICL’s historical narrative(s); more so when events like invasions or other types of crises falling under ICL’s scrutiny occur. The idea that the accumulated experiences, emotions and personal circumstances of various people when in crisis can be taken together, as a unitary perception, and reflected with accuracy by one historical figure (e.g., Robert Jackson at Nuremberg) is one I take issue with. As previously stated, perhaps this approach fits in the macro lens consisting of a necessary summary of a field’s main events, where inevitably experiences (albeit different) must be reduced to a common thread to provide a condensed outline (reiterating the flaws of the current historical institutional account in ICL would prove futile here). However, this neglects the historical micro lens, equally important, which foregrounds precisely those unique characteristics with potential to shape this discipline differently by integrating the social aspect of communities where atrocities happen. This mirrors the (undesired, among proponents of linear histories) task of examining various overlooked causes of conflicts and crimes in ICL, perhaps structural explanations (economical fragility, different rivalries between states, the mistrustful nature of diplomacy, precarious security systems<sup>49</sup> and so forth), instead of keeping to the preordained – juridical - one: ascribing individual responsibility to one leader or to a small elite working towards a dark conspiracy (see the Great War situation). As Simpson mentions, there is an affinity for prioritising ‘linear arrangements of history over those that tend towards ambiguity or fragmentation’<sup>50</sup>.

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<sup>46</sup> *Waiting for Hitler*, p. 90, 91.

<sup>47</sup> J.B. Priestley, a Yorkshire novelist and playwright, placed this image of the little ships and the British girl’s involvement in the military operation in the public’s imagination during the BBC’s *Postscripts*, a series of short talks.

<sup>48</sup> *Waiting for Hitler*, p. 91, from the BBC radio broadcast on 5 June 1940, London, <https://speakola.com/ideas/jb-priestley-the-little-steamer-dunkirk-1940>.

<sup>49</sup> Simpson, *Linear Law*, p. 165.

<sup>50</sup> Simpson, *Linear Law*, p. 170.

With these considerations in mind, I attempted to instead dismember linearity and bring equivocacy to the analysis. Thus, the *humour, defiance, the ordinary shaping history* represent hypostases within the literary artifact speaking to the fragmented historical personal accounts. These chaotic hypostases echo the fragmentary histories produced in and by ICL. They constitute the alternative social fabric and history of the discipline worthy of exploration after decentralising ICL's linearity. This leads to the conclusion that it might be chaotic history, with fragmented accounts of ordinary people and structural explanations, that ought to characterise ICL to begin to properly comprehend why and how the events under this discipline's scrutiny occur. In turn, this holds up a different mirror of the field (than the mainstream one), a more comprehensive and transparent story we might want to start telling.

## **5. Decentring the Nuremberg Trial**

The literary writing chosen, *Waiting for Hitler*, alongside the cyclamens moment, helps disrupt the key narrative in ICL, as follows. The cyclamens moment, *i.e.* the noticing of a man with one leg and the young girl growing enormous cyclamens outside the Nuremberg Palace of Justice when the trial was ongoing (Simpson, 2017, mentioning West, 1984) is an anti-constitutional moment (not considered paramount, almost not uttered) that could be read in two ways, always decentralising the Nuremberg trial, moment considered paramount in ICL's mainstream narrative.

There is a juxtaposition of two moments relevant to the unsettling process attained through literary and legal analyses. First, the literary writing encompasses a pair of sisters, Jenny and Muriel, that, with an apparently carefree attitude, go swimming in the pool and playing tennis during the war in Britain, with an imminent Nazi invasion at the horizon. The second moment is the cyclamens moment, with a girl of twelve and a man with one leg growing enormous cyclamens in a greenhouse near the Nuremberg Palace of Justice. The juxtaposition is beneficial in unsettling the foundational premises of ICL in a non-linear examination.

On the one hand we have an institution focused with trying major war criminals, the so-called 'enemies of mankind' and, on the other, right outside the building, a completely different scenario, with two people planting seeds for flowers. These episodes are trapped in the same time and place. This shift away from the trial at that time triggers two underlying assumptions: one related to victims in ICL and a second envisaging a future in the field.

First, it is illustrative of victimhood in ICL and of how the historical institutionalised account is too far-removed from them: that life goes on after tragedy, that perhaps what victims need is not a lengthy trial to remind them of the atrocity endured, but to continue their daily, mundane activities (like the growing of flowers), giving their life purpose, joy and beauty. This triggers a necessary turn, in ICL, from the insistence, since the twentieth century, on punitive legalism, to a reconsideration of this concept's effects on victims of international crimes and the affected communities, and perhaps a return to a literary style of international law. A question ensues: Are surviving victims being revictimized through trial by being compelled to relive their traumas?

Thus, this study, via unsettling ICL's linear historical trajectory, alongside attempting to shape an alternative story about the discipline by foregrounding victims' or ordinary peoples' voices, also invites to extensive empirical research into 'the impact of international criminal justice on communities affected by the crimes within international tribunals' jurisdictions' (Nouwen, 2014). As Nouwen rightly contends, research into this area has been extremely scarce.

A second interpretation would be the one Simpson remarked. According to him, Rebecca West's cyclamens moment consists in a 'departure point' for analysing how international criminal justice might be defined as a dialogue between 'its technocratic grammars ("legalism") and a style - sometimes literary, sometimes visceral - that gives voice to its founding passions' (Simpson, 2011). He asserts that one relevant story could be 'that life continues outside the court-room' (Simpson, 2011). He also points out a hidden possible significance, that perhaps what matters is how 'the flowers grow after the trial is over' (Simpson, 2011). This goes to the core of a fundamental question pointed towards international war crimes trials, as Simpson notes. He interrogates:

*'Are they integrated properly into the existing or future local criminal justice machinery? What effects are they intended to produce or do they produce on the rebuilt state or the transitional democracy or the traumatised population?'*<sup>51</sup>.

## 6. Conclusion

A worthy encounter between literature and ICL, grossly understudied in the international legal arena and the potential of a literary artifact to unsettle ICL's histories were excavated in this article. I sought to disrupt the historical linearity of the field by bringing it closer to ordinary people, generally excluded from the grand scheme of politicised events. This research therefore attempted to trace some inclusions and exclusions from the histories of ICL and to focus on one category of identified exclusions (the voices of ordinary people) from the mainstream linearity of the discipline. The intersection between critiquing ICL's linearity and using the law and literature realm, with the added voices of ordinary people, provides a more humanist, social and fragmented account of the discipline's story; it thus departs from the linear, hegemonical narrative.

Disrupting ICL's linearity through literary means was attempted because the linear arrangement is based on hegemonical accounts (in this sense it is pompous and institutional) and on an insistence on either offering a juridical dimension to the events by ascribing responsibility to various countries' elites or to a machiavelic leader and/or invoking the conspiracy element to explain the origin of ICL's events. Explicating the narrative of the discipline exclusively this way fails to examine the structural and complex reasons why the events in the field actually occur. The disrupting exercise in this article, whilst not purporting to analyse these causes exhaustively, offers an avenue to better comprehend the conflicts in the field. It proposes literature as the methodology due to, *inter alia*, the necessary humanist (but real) account on behalf of the ordinary people affected by international crimes, inspired by the techniques suggested by Bianchi, Koskenniemi and Megiddo. This research is only a springboard into more analyses and ways to approach the encounter between literature and ICL, the unsettling of a linear historical account and the inclusions and exclusions inherent in ICL as traditionally depicted.

In contexts coming under ICL, legal techniques show an insufficiency to encapsulate human experience<sup>52</sup>, as the flaws of the linear account revealed. Literature is better placed to offer a

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<sup>51</sup> Simpson, SOAS, 2011.

<sup>52</sup> See, again, Bianchi here, 2016.



comprehension of social and human reality, which is the framework in which law functions. The idea of rhetorical reasoning or rhetorical spaces that Martinez and Survillo postulated as being descriptive of both law and literature<sup>53</sup>, encapsulating the playing out of public discourse (albeit with distinct rules and conventions) applies to the sort of ICL narrative I wished to illustrate. With the help of literature, we can showcase a public space encompassing ordinary people's voices shaping the overall narrative of the discipline differently. This will enable us to understand the past and present happenings in the field better (holistically) than if we held tight to ICL's linear, institutional, hegemonic and exclusionary arrangements.

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<sup>53</sup> Martinez and Survillo, 2017, p. 85.



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